

NO. 36972-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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CATHERINE BAYLOR, Individually,

Appellant,

vs.

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

Respondents.

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BRIEF OF RESPONDENTS

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## **I. INTRODUCTION**

In this case, an employee, a passenger in a vehicle driven by her co-worker and owned by their mutual employer, was injured when the co-worker negligently collided with another vehicle during the workday. The injured employee sought and obtained workers compensation benefits for the injuries she claimed to have suffered in the accident. Then, while the employee was still receiving such benefits, she brought a civil action against her co-worker and her employer.

The trial court properly dismissed the civil action on summary judgment. The employee's exclusive remedy for injuries resulting from the negligence of a co-worker is the receipt of workers compensation benefits. Acceptance of those benefits gives rise to a statutory immunity in favor of the employer and the co-worker. Further, the employee is judicially estopped from taking inconsistent positions in order to obtain both workers compensation benefits and tort damages against immune entities. This Court should affirm.

## **II. ASSIGNMENTS OF ERROR**

The Respondents acknowledge the Appellant's assignment of error and the issues pertaining to that assignment of error. For the reasons stated

below, it is the Respondents' position that the trial court correctly dismissed the Appellant's claims on summary judgment.

### **III. COUNTER-STATEMENT OF THE CASE**

The Respondents in this appeal are Absolutely Clean Cleaning Service, LLC ("Absolutely Clean") and Leslie (Bean) Hohbein. The Appellant is Catherine Baylor. Baylor sued Absolutely Clean and Hohbein for injuries she allegedly sustained in a motor vehicle accident while a passenger in a vehicle driven by Hohbein and owned by Absolutely Clean, a housekeeping service. (CP 47:10-15; 48:15-21) At the time of the accident, Baylor and Hohbein were both employed by Absolutely Clean. (CP 55:17-19) Hohbein was a "team leader" for Absolutely Clean and Baylor was part of Hohbein's team on the day of the accident. (CP 58:16-22)

The accident occurred on February 18, 2005. On that day, Baylor and Hohbein started work at approximately 9:00 a.m. (CP 58:8-12) They cleaned a house in the Canterwood neighborhood in Gig Harbor and finished sometime between 11:30 a.m. and noon. (CP 58:13-25) After finishing that job, Hohbein and Baylor drove to McDonald's for lunch. (CP 59:1-2; 268:24-25) They bought their lunch and began eating it in the car in the McDonald's parking lot. (CP 59:20-24) Hohbein then received a telephone

call from the owner of Absolutely Clean, who asked Hohbein to return to the office to pick up a third co-worker (JoAnn May), who was to help them clean the next house after lunch. (CP 60:2-8)

When Hohbein and Baylor picked up May, they were still eating. (CP 262:1-20) May commented that she would like to get some lunch at McDonald's before the three of them went to the next house to clean. (CP 60:17-25) Hohbein drove back to McDonald's at May's request. (*Id.*) According to Baylor, the accident occurred while the women were on their way back to McDonald's. (CP 63:4-12) Hohbein recalls that she was driving them to the next house when the accident occurred. (CP 272:1-20) Regardless, there is no dispute that the women would have worked at the next house after lunch if the accident had not occurred. (CP 61:5)

As a result of the accident, Baylor applied for workers compensation benefits in May 2005. (CP 64:14-25) Baylor indicated on her application for workers compensation benefits that she was involved in a car accident in her employer's vehicle while she was on her way to her next job. (CP 64:14-65:7) At no time did Baylor ever indicate to anyone at Washington's Department of Labor and Industries that she was not on the job when the accident occurred. (CP 66:24-67:2) As Baylor explained in her own words,

. . . I was at work. I was at Absolutely Clean. That's work. Even if I'm at lunch, I'm at work. . . . I was entitled to receive [workers compensation benefits] because I was at work at the time of the accident.

(CP 70:6-8; 72:9-11) Thereafter, Absolutely Clean received a copy of a Notice of Decision from the Department of Labor and Industries addressed to Baylor, which stated:

This claim for the industrial injury that occurred on 02/18/2005 while working for ABSOLUTELY CLEAN CLEANING SERV is allowed. The worker is entitled to receive medical treatment and other benefits as appropriate under the industrial insurance laws.

(CP 91)

For approximately 18 months, Baylor received medical benefits, time loss benefits, and even vocational counseling as a result of her industrial injury. (CP 97-156(medical billings and time loss compensation); 157-169(vocational counseling))

On May 25, 2006, Baylor signed a Third Party Election Form, indicating that Melba Bumphrey, the owner and operator of Absolutely Clean was the third party responsible for the accident, even though the form indicated that an employer or co-employee were excluded. (CP 282) On July

21, 2006, Baylor filed a complaint for injuries allegedly resulting from the accident in Pierce County Superior Court. (CP 1-4) Baylor named Hohbein (initially identified as Leslie Young) and Absolutely Clean as defendants. (CP 1) Baylor's complaint went through various iterations and amendments, and her third amended complaint (her final one) was filed on March 19, 2007. (CP 46-49)

At the time Baylor filed her complaint, she was still receiving workers compensation benefits as a result of the injuries she claimed to have suffered in the accident. (CP 125-131) Yet in her complaint, Baylor alleged that she was "on an unpaid break, [was] off of the clock, and [was] not on [her] way to any new jobs/work." (CP 48, para. 3.6) Baylor further alleged that neither she nor Hohbein were "in the course or scope of their employment at the time of the collision." (*Id.*)

Baylor later admitted in her deposition, consistent with her request for workers compensation benefits, that she was in the course and scope of her employment at the time of the accident. (CP 278:5-15 "... I was working for Absolutely Clean when it [the accident] happened.") Baylor attempted to reconcile the inconsistency between her receipt of workers compensation benefits and the allegations in her complaint by making a distinction between

a generalized sense of being “at work” and physically performing her job duties:

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?

....

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 mean that I wasn’t cleaning a house. That’s what on the job means.

(CP 278:9-13, 19-22)

Absolutely Clean and Hohbein filed a motion for summary judgment, which was heard by the trial court on November 8, 2007. (RP 3:1-12) They argued that Baylor’s claims should be dismissed because (1) Baylor’s acceptance of L&I benefits constituted her exclusive remedy for injuries allegedly resulting from the accident and (2) because Baylor was judicially estopped from maintaining her action. (CP 201:9-14) After considering the argument of counsel, the trial court ruled:

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, [RCW] 52.12, 52.32, 51.24. It’s an exclusive remedy.

(RP 23:12-16) The trial court did not reach Absolutely Clean and Hohbein's judicial estoppel argument. (RP 23:17-18)

An order granting Absolutely Clean and Hohbein's motion was entered on November 8, 2007. (CP 307-08) The following day, the Department of Labor and Industries filed a "Notice of Statutory Interest in Recovery." (CP 309) Baylor timely filed a Notice of Appeal of the order granting summary judgment.<sup>1</sup>

#### IV. ARGUMENT

##### A. Standard of Review

Baylor appeals from an order dismissing her complaint on summary judgment and, thus, this Court's review of that order is *de novo*. *Smith v. State*, 59 Wn. App. 808, 810, 802 P.2d 133 (1990), *rev. denied*, 116 Wn.2d 1012 (1991).

The purpose of summary judgment is to avoid an unnecessary trial when there is no genuine issue of material fact. *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1997). Summary judgment is required where the non-moving party fails to raise any genuine issue of material fact upon which the outcome of the litigation depends. *Capitol Hill Methodist Church of*

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<sup>1</sup>Baylor did not include her Notice of Appeal in the record on appeal.

*Seattle v. City of Seattle*, 52 Wn.2d 359, 363-64, 324 P.2d 1113 (1958).

**B. Washington's Industrial Insurance Act**

Washington's Industrial Insurance Act (IIA) provides benefits for injuries that occur in the course of employment. **RCW 51.12.010**. The IIA is "the exclusive remedy for workers injured during the course and scope of their employment." *Washington Ins. Guar. Ass'n v. Dep't of Labor & Indus.*, 122 Wn.2d 527, 530, 859 P.2d 592 (1993).

[The IIA] was the result of a compromise between employers and workers. In exchange for limited liability the employer would pay on some claims for which there had been no common law liability. The worker gave up common law remedies and would receive less, in most cases, than he would have received had he won in court in a civil action, and in exchange would be sure of receiving that lesser amount without having to fight for it.

*Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 469, 745 P.2d 1295 (1987).

Under this statutory scheme, an employer is immune from civil lawsuits by an employee for non-intentional workplace injuries. *Hildahl v. Bringolf*, 101 Wn. App. 634, 642, 5 P.3d 38 (2000), rev. denied, 142 Wn.2d 1020 (2001).

As an exception to the exclusive, statutory remedy, **RCW**

51.24.030(1) allows an injured worker to file suit against a third party tortfeasor, so long as that third party is “not in [the] worker’s same employ[.]” This statute “plainly contemplates actionable negligence from the wrong of another, not a fellow servant of the same employer[.]” *Marsland v. Bullitt Co.*, 71 Wn.2d 343, 346, 428 P.2d 586 (1967). Thus, a worker allegedly injured by a co-worker’s negligence is limited to the remedies provided by the IIA. *Brown v. Labor Ready N.W., Inc.*, 113 Wn. App. 643, 647, 54 P.3d 166 (2002), rev. denied, 149 Wn.2d 1011 (2003). “In other words, co-workers are equally immune from liability for job-related injuries they cause in the scope of their employment.” *Silliman v. Argus Servs., Inc.*, 105 Wn. App. 232, 236, 19 P.3d 428, rev. denied, 144 Wn.2d 1005 (2001).

C. **Baylor’s Request for and Acceptance of IIA Benefits Constitutes Her Exclusive Remedy Against Absolutely Clean and Hohbein for Injuries Allegedly Resulting from the Industrial Accident. Baylor May Not Maintain a Third Party Action Against Absolutely Clean and Hohbein Because, at the Time of the Accident, Baylor and Hohbein Were Co-Workers and Hohbein Was Acting in the Course and Scope of Her Employment.**

When Baylor sought and accepted IIA benefits for injuries allegedly resulting from the accident, she made an irrevocable election of remedies. In exchange for Baylor being entitled to “speedy and sure relief” without the need to prove fault, Absolutely Clean and Hohbein are immunized from

common law responsibility. *Flanigan v. Dep't of Labor & Indus.*, 123 Wn.2d 418, 422-23, 869 P.2d 14 (1994). The trial court correctly dismissed Baylor's complaint on summary judgment.

Baylor's sole contention in this appeal is that summary judgment was not appropriate because there were issues of fact whether Hohbein was in the course of her employment at the time of the accident. *Opening Brief at 8.* She is incorrect.

As noted above, a worker injured by a co-worker's negligence is limited to the remedies provided by the IIA. *Brown, supra*, 113 Wn. App. at 647. An injured worker may not sue her co-worker for negligence; she may only sue a third party "not in the same employ." *Id.* (quoting RCW 51.24.030(1)). The dispositive question is, thus, whether Hohbein was Baylor's co-worker at the time of the accident. *Id.*

The undisputed facts establish as a matter of law that Hohbein and Baylor were co-workers at the time of the accident. Hohbein and Baylor were both employed by Absolutely Clean. Hohbein was Baylor's "team leader," and they had worked together in the morning before the accident occurred. When the accident occurred, Hohbein was driving a vehicle owned by Absolutely Clean. Just prior to the accident, she and Baylor had picked up

another co-worker, and the three of them would have continued working together for the afternoon if the accident had not occurred. Because Hohbein was Baylor's co-worker at the time of the accident, Hohbein is entitled to IIA immunity and dismissal of Baylor's claims.

Baylor relies on *Evans v. Thompson*, 124 Wn.2d 435, 879 P.2d 938 (1994), for the proposition that she may bring a third party action against Hohbein if Hohbein was not acting in the course of her employment at the time of the accident. *Opening Brief at 7*. This is too broad a reading of *Evans*. In *Evans*, two employees of Santana Trucking & Excavating were killed after being exposed to an accumulation of methane gas in a manhole on the company's property. The plaintiffs' estates brought suit against the individual shareholders of the company, alleging that the shareholders were individually liable as third parties based on their separate legal status as landowners. *Id.* at 437. The shareholders argued they were immune under the IIA. *Id.* On appeal, the Supreme Court remanded the case to the trial court, finding issues of fact as to the legal status of the shareholders:

These defendants, *as a legal entity entirely separate from the corporation*, own the real property upon which the deceased workers met their deaths, allegedly from conditions of that real estate. Decedents are alleged to be invitees. As such, they may be owed well-

established duties from defendant husband and from defendant wife, *as landowners*.

Under our holdings, the plaintiffs do not necessarily recover. Rather, we hold that there are genuine issues of material fact as to whether defendants, particularly defendant wife, were in fact coemployees of the decedents. There are issues of law as to what defendants' duties are as landowners and factual issues as to whether those duties were breached.

*Id.* at 438 (*emphasis added*).

The *Evans* decision is distinguishable from this case in three very significant respects. First, there is no indication that, as is the case here, the plaintiffs in *Evans* had accepted any workers compensation benefits before suing the individual defendants under the theory that the injured workers were not in the course of their employment at the time of the accident. Second, unlike Hohbein and Baylor, the injured workers and the individual defendants in the *Evans* case were not performing the exact same function when the industrial injury occurred. And third, Baylor has not produced any evidence to suggest that Hohbein, like the defendants in *Evans*, possesses a second persona so totally distinct and separate from her status as a co-employee that an issue of fact could be raised as to whether she was in the course of her employment at the time of the accident.

In contrast to Evans, Baylor sued Hohbein in her status as a co-worker. Baylor alleged in her complaint that she and Hohbein were employees of Absolutely Clean. Baylor also alleged that Hohbein was driving a company-owned vehicle at the time of the accident. Even though she may have been eating her lunch, Hohbein was in the process of driving herself and her co-workers — including Baylor — to the next house they were to clean. Clearly, Hohbein was engaged in furtherance of Absolutely Clean’s interests such that her activities at the time of the accident were “inseparably intermingled and interwoven with, and a part of, [her] general employment[.]” Bice v. Anderson, 52 Wn.2d 259, 262, 324 P.2d 1067 (1958). As such, she was in the course of her employment with Absolutely Clean. Id.

Baylor makes much of the fact that Hohbein was eating her lunch at the time of the accident and that the witnesses’ recollections differ on whether Hohbein was driving to the next house or back to McDonald’s when the accident occurred. *Opening Brief at 10.*<sup>2</sup> This argument ignores the

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<sup>2</sup>Baylor also contends that Absolutely Clean’s and Hohbein’s counsel conceded there was conflicting testimony whether Hohbein was in the course of her employment at the time of the accident. *Opening Brief at 5, 10*. Baylor is absolutely incorrect. As a review of the relevant portion of the transcript reveals, counsel simply acknowledged that witness recollections differed on whether Hohbein was driving back to

crucial point that neither of these facts are material facts for purposes of summary judgment. The question of whether Hohbein is entitled to statutory immunity does not depend on whether she was eating at the time of the accident or whether she was driving a co-worker to get lunch or driving her co-workers to their next job. An employee is in the course of her employment if she is engaged at the time in furtherance of her employer's interest. **RCW 51.08.013(1)**; *Lunz v. Dep't of Labor & Indus.*, 50 Wn.2d 273, 278, 310 P.2d 880 (1957). Further, "[i]t is not necessary that at the time an injury is sustained by a worker he or she is doing the work on which his or her compensation is based or that the event is within the time limits on which industrial insurance or medical aid premiums or assessments are paid."

**RCW 51.08.013(1)**. Finally, and perhaps most pertinent to this case,

Where an employer supplies a car 'for the mutual benefit of himself and the workman to facilitate the progress of the work, the employment begins when the workman enters the vehicle and ends when he leaves it on the termination of his labor.'

*Puget Sound Energy v. Adamo*, 113 Wn. App. 166, 169, 52 P.3d 560 (2002)

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McDonald's or whether she was driving to the next house when the accident occurred. (RP 9:9-18; 21:12-19) Counsel also argued to the trial court (as the Respondents do in this appeal) that any such dispute is not a material fact for purposes of summary judgment. (RP 21:15-17)

(quoting *Aloha Lumber Corp. v. Dep't of Labor & Indus.*, 77 Wn.2d 763, 770, 466 P.2d 151 (1970)).

The facts that Hohbein was eating her lunch at the time of the accident and that no employees were paid for their lunch breaks are not a material fact because they are not dispositive of the issue of whether Hohbein was in the course of her employment. Likewise, whether Hohbein was driving back to McDonald's or to the next house is not a material fact because it is undisputed that she was driving her co-workers in a company-owned vehicle in the middle of their workday and that they would have continued working if the accident had not occurred. Contrary to Baylor's suggestion, the "going and coming" rule has no application in this case, because neither Hohbein nor Baylor were commuting to or from work. See *Belnap v. Boeing*, 64 Wn. App. 212, 221, 823 P.2d 528 (1992) ("The 'going and coming' rule . . . denies industrial insurance coverage to workers who are injured while commuting to and from work.").

This Court should also consider the inherent flaw in the logic of Baylor's contention that Hohbein was not in the course and scope of her employment at the time of the accident. Baylor ignores the fact that she and Hohbein were doing the exact same thing when the accident occurred —

eating lunch in a company car in between housekeeping jobs. If Baylor was in the course of her employment (which she initially asserted she was, in order to obtain IIA benefits), then why wouldn't Hohbein be as well? If Hohbein were injured in the accident, there can be no reasonable dispute that she would have been as equally entitled to receive IIA benefits as Baylor was. Hohbein is entitled to statutory immunity and a summary judgment dismissal of Baylor's claims against her was appropriate.

Summary judgment dismissal of Baylor's claims against Absolutely Clean was also appropriate. Baylor has failed to set forth any facts establishing that her employer, Absolutely Clean, qualifies as a third party tortfeasor under **RCW 51.24.030(1)**. An employer becomes subject to such liability "if — and only if — he possesses a second persona so completely independent from and unrelated to his status as employer that by established standards the law recognizes it as a separate legal person." *Folsom v. Burger King*, 135 Wn.2d 658, 668, 958 P.2d 301 (1998) (quoting 2A ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 72.81 (1984)). In order to maintain a third party action against Absolutely Clean, Baylor must also establish that its "second function generates obligations distinct from those related to the employment activity." *Id.* Because Baylor lacks any facts

establishing that Absolutely Clean possessed any type of “second function” independent from its status as Baylor’s employer or that any such function generated any non-employment obligations, her claims against Absolutely Clean were properly dismissed on summary judgment.

Washington’s standard for whether a worker is within the course of employment is a broad and lenient standard. See *Ball Foster Glass Container Co. v. Giovanelli*, \_\_\_ Wn.2d \_\_\_, ¶ 10, \_\_\_ P.3d \_\_\_ (2008). “If the employment occasions the worker’s use of the street, the risks of the street become part of the risks of employment.” *Id.* at ¶ 42. Thus, an employee is “in the course of employment” if injury occurs “out of a risk that is sufficiently incidental to the conditions and circumstances of the particular employment.” *Id.* at ¶ 12. Here, Baylor was injured due to Hohbein’s negligence while she was a passenger in a vehicle driven by Hohbein and owned by Absolutely Clean. As Baylor has admitted she was in the course of her employment when the accident occurred. Likewise, so was Hohbein. Both Hohbein and Absolutely Clean are entitled to immunity and Baylor’s claims against them were properly dismissed on summary judgment.

**D. Baylor Is Judicially Estopped from Bringing a Third Party Action Against Absolutely Clean and Hohbein Based on Her Request for and Receipt of IIA Benefits.**

Absolutely Clean also argued at the trial court that Baylor was judicially estopped from maintaining this action against her employer and co-worker based on her request for and acceptance of IIA benefits, which was inconsistent with the allegation in her complaint that she was not in the course and scope of her employment at the time of the accident. (CP 203-04) The trial court did not reach Absolutely Clean's judicial estoppel argument. (RP 23:17-18) However, "[a]n appellate court can sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it." *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

Even if this Court finds an issue of fact regarding Hohbein's and Baylor's status at the time of the accident, this Court may nonetheless affirm the order of summary judgment on the grounds that Ms. Baylor is judicially estopped from maintaining this action. "Judicial estoppel precludes a party from gaining an advantage by taking one position and then seeking a second advantage by taking an incompatible position in a subsequent action." *Johnson v. Si-Cor, Inc.*, 107 Wn. App. 902, 906, 28 P.3d 832 (2001). There

are six non-exclusive factors a trial court should consider in applying the doctrine: (1) whether the inconsistent position first asserted was successfully maintained; (2) whether a judgment was rendered; (3) whether the two positions are clearly inconsistent; (4) whether the parties and questions are the same; (5) whether the party claiming estoppel was misled or changed his position; and (6) whether it would be unjust to one party to allow the other to change. *DeAtley v. Barnett*, 127 Wn. App. 478, 483, 112 P.2d 540 (2005), rev. denied, 156 Wn.2d 1021, cert. denied, 127 S. Ct. 123, 166 L. Ed. 2d 35 (2006).

The court's focus should be on the inconsistent position. *Id.* at 484. Judicial estoppel applies only if a litigant's prior inconsistent position benefitted him or her. *Johnson*, 107 Wn. App. at 909. The doctrine may be applied even if the two proceedings involved different parties, if there is no reliance and no resulting damage, and if no final judgment is entered in the first proceeding. *Id.* at 908. As this Court recently held, judicial estoppel is appropriate when a party takes contrary positions in different proceedings; when judicial acceptance of an inconsistent position in a later proceeding may be misleading; and when a party derives an unfair advantage. *Skinner v. Holgate*, 141 Wn. App. 840, 849, 850, 852, 173 P.3d 300 (2007).

In this case, application of these core factors precludes Baylor from pursuing her claims against Absolutely Clean and Hohbein. First, Baylor took a contrary position by seeking and accepting IIA benefits (the receipt of which are necessarily predicated on a finding that the injury occurred in the course of employment) and later suing Absolutely Clean and Hohbein. Baylor's allegation in her complaint that she was not in the course of her employment at the time of the accident is inconsistent with her IIA claim.

Second, acceptance of Baylor's inconsistent position — *i.e.*, allowing her to maintain this action on the premise that neither she nor her co-worker were in the course and scope of their employment following her request for and acceptance of IIA benefits — is misleading. Baylor's application for and receipt of IIA benefits (and Absolutely Clean's payment of an increased IIA premium as a result of the accident and Baylor's claim) would, under normal circumstances, preclude this type of litigation.

Third, Baylor would derive an unfair advantage from her machinations. The "compromise" between employers and employees established through the IIA statutory scheme reflects an understanding that an employee likely receives less in IIA benefits than in a tort action in exchange for the fast and sure relief under the IIA. *Dennis, supra, 109 Wn.2d*

at 469. If Baylor's claim is allowed to go forward, she would be put in a better position by receiving both IIA benefits and tort damages, and would only have to reimburse the Department of Labor and Industries a percentage of the amounts it paid. **RCW 51.24.060(1)(b) and (c)**. Further, Baylor would be entitled to recover a proportionate share of her attorney fees from the Department, an expense that she would otherwise be fully responsible for in civil litigation. **RCW 51.24.060(1)(c)(i)**.

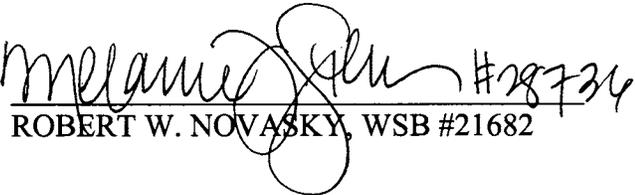
The fact that **RCW 51.24.030(2)** and **51.24.060(2)** allow the Department of Labor and Industries a lien on any third party recovery is of no consequence. If Baylor's position is accepted, and an employee is entitled to bring third party actions against an immune employer and co-employee simply because of the lien, then the statutory immunity becomes meaningless. Baylor's attempted use of **RCW 51.24.030** against Absolutely Clean and Hohbein is not what the Legislature intended by authorizing third party claims. Baylor's prior acceptance of IIA benefits, which are conditioned upon her being injured in the course of her employment, means she is judicially estopped from maintaining this action against Absolutely Clean and Hohbein upon the allegation that she was on an unpaid lunch break at the time of the accident. Baylor's complaint should be dismissed.

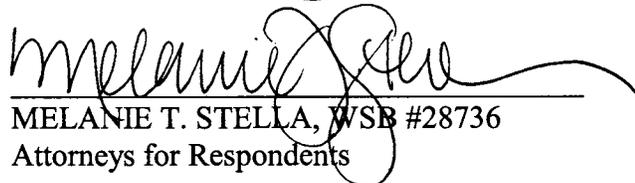
**V. CONCLUSION**

Absolutely Clean and Hohbein respectfully request that this Court affirm the trial court's order of summary judgment dismissing Baylor's claims against them.

Submitted this 21st day of March, 2008.

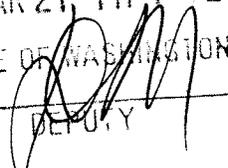
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STATE OF WASHINGTON  
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**NO. 36972-9-II**

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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CATHERINE BAYLOR, Individually,

Appellant,

vs.

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

Respondents.

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**AFFIDAVIT OF MAILING  
BRIEF OF RESPONDENTS**

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