

COURT OF APPEALS  
DIVISION II

12 JAN 23 AM 9:15

**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION TWO**

STATE OF WASHINGTON  
BY cm  
DEPUTY

**Case No. 42343-0-II**

---

**PAUL H. ORRIS,**  
Appellant,

v.

**MATTHEW ARNOLD LINGLEY and  
MICHAEL D. LINGLEY and KATHY A.  
LINGLEY as Personal Representatives  
and Notice Agents of THE ESTATE OF  
MATTHEW ARNOLD LINGLEY,**

Respondents.

---

**APPELLANT'S REPLY BRIEF**

---

K. Michael Fandel, WSBA 16281  
Diane M. Meyers, WSBA 40729  
GRAHAM & DUNN PC  
2801 Alaskan Way, Suite 300  
Seattle, WA 98121  
Telephone: (206) 624-8300  
Facsimile: (206) 340-9599

Michael T. Morgan, WSBA 29314  
Kamela J. James, WSBA 29787  
MORGAN JAMES, PLLC  
209 Quince Street NE  
Olympia, WA 98506  
Telephone: (360) 943-0555  
Facsimile: (360) 943-0475

*Attorneys for Appellant  
Paul H. Orris*

ORIGINAL

## TABLE OF CONTENTS

I.	Argument .....	1
	A. The Lower Court Misapplied Judicial Estoppel .....	4
	B. The Estate Misapplies the Summary Judgment Standard.....	5
	C. The Estate Misconstrues the Court’s Summary Judgment Order .....	9
	D. Orris Was Not in the Course and Scope of Employment .....	10
	E. Applying Judicial Estoppel Is Unjust .....	11
	F. The Lower Court Ignored Orris’s Argument That Lingley’s Intoxication Removed Him From the Course of His Employment.....	14
II.	Conclusion .....	17

## TABLE OF AUTHORITIES

### Cases

<i>Aloha Lumber Corp. v. Dep't of Labor &amp; Indus.</i> , 77 Wn.2d 763, 466 P.2d 151 (1970).....	6
<i>Bankhead v. Aztec Constr. Co.</i> , 48 Wn. App. 102, 737 P.2d 1291 (1987).....	14
<i>Doty v. Town of South Prairie</i> , 122 Wn. App. 333, 93 P.3d 956 (2004).....	11
<i>Flavorland Indus., Inc. v. Schumacker</i> , 32 Wn. App. 428, 647 P.2d 1062 (1982).....	16
<i>Miller v. Campbell</i> , 137 Wn.App. 762, 772-773, 155 P.3d 154 (2007).....	11
<i>Olson v. Stern</i> , 65 Wn.2d 871, 400 P.2d 305 (1965).....	14
<i>Seth v. Dept. of Labor &amp; Indus.</i> , 21 Wn.2d 691, 152 P.2d 976 (1944).....	6, 7
<i>Tallerday v. Delong</i> , 68 Wn.App. 351, 842 P.2d 1023 (1993).....	13
<b>Statutes</b>	
RCW 51.08.180 .....	3

## I. Argument

Paul Orris was severely and permanently injured in an automobile accident that occurred while he was returning home from work in 2007. Orris lost his arm, suffered permanent injuries to his leg, and was burned over half of his body. At the time of the accident, Orris was a passenger in a truck driven by Matthew Lingley, which veered off the road. Orris was not working and was merely tagging along with Lingley as a favor to him. Orris was not required to ride with Lingley and was not paid for riding with Lingley.

The lower court acknowledged that the above evidence creates an issue of fact as to whether Orris was working at the time of his injury, yet the court still ruled against Orris on summary judgment. Applying the “logic” of the doctrine of estoppel, it concluded that Orris could not contend that the accident occurred outside the course his employment because Orris had received worker’s compensation benefits.

In this appeal, the Court must decide whether the judicial estoppel doctrine should be stretched to apply to this case. The Estate of Matthew Lingley argued to the lower court that Orris’s signature on a L&I verification form was a prior inconsistent statement that somehow implicated the doctrine of judicial estoppel. It encouraged the trial court to apply the doctrine to Orris’s signature on this form in order to estop

Orris from arguing in this case that he was not in the course of his employment while riding home with Lingley. “The doctrine of judicial estoppel,” the Estate argued, “bars [Orris] from taking a position in this case” inconsistent with “his position before L&I.” (CP 147.) The Estate asked the lower court to disregard factual inferences in Orris’s favor, apply judicial estoppel, and grant its motion for summary judgment. The lower court did just that.

Because the lower court recognized that the traditional elements of judicial estoppel did not fit this case, it created and applied a new legal doctrine—the “logic” of judicial estoppel—to prohibit Orris from contesting his employment status. Applying the “logic” of judicial estoppel allowed the court to resolve its “struggle” with whether Orris’s third party claim against the Estate was somehow inconsistent with his receipt of L&I benefits. (Feb. 14, 2011 Record of Proceedings 1:8; CP 189.)

Judicial estoppel per se clearly does not apply here. Orris never took a position in litigation that contradicts his claim that he was not in the course of employment, and no court accepted or adopted any “position” that Orris was working at the time of the accident. The L&I form in question meets none of these elements, each of which is, of course, fundamental to the application of judicial estoppel.

Because the Estate realizes that judicial estoppel does not apply, it backtracks significantly from the position it took in the lower court—it now disavows judicial estoppel entirely. Inexplicably, the Estate claims that the doctrine played no role in the lower court’s ruling. According to the Estate, the lower court concluded that because Orris received worker’s compensation benefits, he could not also pursue alternative tort remedies.

The Estate’s new theory is based on a distinction without a difference because it bars inquiry into whether Orris was in the course and scope of employment at the time of the accident. Workers’ compensation exclusivity applies only to “workers” engaged in employment, as defined in RCW 51.08.180. Orris offered substantial evidence that he was *not* in the course and scope of employment, and the lower court recognized that Orris’s employment status is a fact question. With the Estate’s encouragement, the court nonetheless avoided this question by preventing (estopping) Orris from arguing the contrary facts. In this appeal, the Estate also ignores fact questions about Orris’s employment status in an effort to shield itself with the immunities afforded by the IIA. The Estate’s current interpretation is indistinguishable from the erroneous judicial estoppel argument made (and adopted) below. It simply (and conveniently) omits the phrase “judicial estoppel.”

The Estate’s claim that this is not a judicial estoppel case not only overlooks its own insistence before the lower court that this *is* a judicial estoppel case, it ignores the trial court’s explanation that judicial estoppel is “consistent with [its] ruling.” The court clearly—though wrongly—applied judicial estoppel. But even if the Estate is somehow correct that the lower court did not apply judicial estoppel per se, this argument, taken to its logical conclusion, means that the lower court ruled on Orris’s employment status as a matter of law. Such a ruling, particularly at the summary judgment stage, would fly in the face of the significant factual evidence that Orris was not in the course of his employment when he was injured. It is also contrary to court’s acknowledgement that Orris’s employment status is a question of fact.

No matter how the Estate frames the ruling, it is wrong and must be reversed. If the lower court applied judicial estoppel, it erred. If the lower court decided Orris’s employment status as a matter of law despite significant factual questions raised by Orris, it erred. In either event, the case must be reversed and remanded for trial.

**A. The Lower Court Misapplied Judicial Estoppel**

The opening brief of Paul Orris explained at length why the judicial estoppel doctrine does not apply in this case. In response, the

Estate did not dispute Orris's argument or the legal authorities Orris cited. As to this issue, therefore, Orris stands on his original briefing.

**B. The Estate Misapplies the Summary Judgment Standard**

The Estate's brief amply demonstrates at least one reason why summary judgment should not have been granted. To make its arguments, the Estate takes all inferences in its favor and describes as "facts" things that are directly contradicted by record evidence. The Estate also raises factual objections that it did not raise in the lower court. There are many instances, but among the most central are:

- The Estate asserts that Orris "affirmatively represented that his injuries were work related." (Respondent's Br. at 2.) To support this assertion, the Estate cites Orris's declaration (CP 36), Orris's discovery responses (CP 25), and the Accident Report form prepared by Orris's father (CP 143.) None of these documents include Orris's "affirmative representation that his injuries were work related." No such "affirmative representation" appears in the record. In fact, in the declaration cited by the Estate for this proposition, Orris stated that at the time of the accident, he was riding with Lingley, without pay or reimbursement, because Lingley's cell phone was dead and the truck Lingley was driving was unreliable. (CP 36.) This is

not an affirmative representation that Orris's injury was work related; it is an affirmative representation that Orris's injury was *not* work related.

- The Estate asserts that Orris's father represented to L&I that Orris was "returning to shop from worksite." (Respondent's Br. at 10.) But even if his father's understanding was determinative of his actual status, Orris's father wrote only that Orris was "on way home;" some unknown person crossed this off and wrote in "returning to shop from worksite." (CP 142.) The Accident Report, as submitted by Orris's father, is not sufficient to establish a work related injury. *E.g., Aloha Lumber Corp. v. Dep't of Labor & Indus.*, 77 Wn.2d 763, 766, 466 P.2d 151 (1970).
- The Estate challenges the quality of the evidence establishing that Orris's father did not write "returning to shop from worksite," but it never objected to or challenged this evidence below. It has waived this argument. RAP 2.5(a); *see also, e.g., Seth v. Dept. of Labor & Indus.*, 21 Wn.2d 691, 693, 152 P.2d 976 (1944) ("We have held in many cases that an objection to the admission of testimony will not be considered by this court on appeal if it is not timely made in the trial court.")

- The Estate also argues that *it* deserves “the only reasonable inference:” that “[Orris’s father] was the one who made the changes on the Application.” (Respondent’s Br. at 10.) But the Estate’s requested inference is contrary to the established summary judgment standard, and it introduced no evidence to support such an inference.
- The Estate asserts that “there is simply no evidence of [Lingley’s] intoxication.” (Respondent’s Br. at 15.) However, this assertion is belied by Toxicology Report, which shows that Lingley was under the influence of marijuana at the time of the accident. (CP 46.)
- The Estate also challenges the introduction of the Toxicology Report for the first time on appeal. It has waived this objection. RAP 2.5(a); *see also, e.g., Seth*, 21 Wn.2d at 693.
- The Estate argues that the L&I verification form is “inconsistent” with Orris’s argument that he was not in the course of employment. (Respondent’s Br. at 2-3, 12.)  
  
However, in the light most favorable to Orris, the verification form was simply intended to confirm the period of time during which Orris performed no work of any kind, not as Orris’s

“position” on his employment status at the time of the accident that had occurred more two years before he signed it.

The Estate commits a more fundamental error in its argument. The Estate asserts that the lower court concluded, as a matter of law, that Orris’s receipt of worker’s compensation benefits resolves the factual question whether he was in the course of his employment. (Respondent’s Br. at 4.) The lower court acknowledged, as it must, that a jury could find that Orris was not in the course of employment and that a jury “could find one hundred percent, or 90 some percent of his reason for riding was just as a friend, helping a friend out because that friend might get stranded, and not because he was trying to help out the company in any way, because he wasn’t getting paid mileage or time or anything like that.” (Feb. 14, 2011 RP 1:13-19.) A conclusion that Orris was in the course of employment based solely on Orris’s L&I claim, as suggested by the Estate, ignores the factual evidence that Orris was not in the course of his employment at the time of the accident. Such a ruling, if true, would violate the fundamental rule on summary judgment that Orris, as the non-movant, is entitled to all factual inferences in his favor.

### **C. The Estate Misconstrues the Court's Summary Judgment Order**

The Estate tries to remove the doctrine of judicial estoppel from this case, claiming that the doctrine played no role in the lower court's ruling. This is not only contrary to the court's order, but contrary to the proceedings and arguments below:

- At oral argument on the Estate's motion for summary judgment, the lower court asked the parties to brief the legal effect, if any, of Orris's receipt of L&I benefits. (Feb. 14, 2011 RP 2:14-3:15.) It explained that it was "struggling" with whether the receipt of L&I benefits was somehow "inconsistent" with Orris's third party claim against the Estate. (*Id.*)
- In its supplemental brief on this issue, the Estate urged the trial court to apply judicial estoppel to prevent Orris from "maintain[ing] a position in direct contradiction to his prior position" and from contesting his employment status. (CP 146-53.) The "position" cited by the Estate was Orris's signature on the L&I verification form. (CP 147-49.)
- The lower court granted the Estate's motion for summary judgment without elaboration. (CP 168.)

- Orris requested that the court clarify whether the summary judgment order was based upon the doctrine of judicial estoppel. (CP 172-80.)
- The court explained that the “logic of the doctrine seems to be consistent with [its] ruling.” (CP 189.) Because the lower court concluded that Orris could not contest his employment status, it then barred him from pursuing alternative tort remedies. (CP 189-90.)

The Estate’s disavowal of the judicial estoppel doctrine ignores these facts. The lower court clearly applied judicial estoppel to address its concern about inconsistent positions. Its application of judicial estoppel is wrong for the reasons thoroughly outlined in Orris’s Opening Brief and not contested by the Estate.

#### **D. Orris Was Not in the Course and Scope of Employment**

As argued in appellant’s opening brief, Paul Orris was not in the course of his employment at the time of the accident. He rode to the jobsite in a personal vehicle, was not required to ride in the Caliber truck, was not required to return to Caliber’s office after working at the job site, was not reimbursed by Caliber for time or mileage for traveling to or from the job site, and was only riding with Lingley at his request because of

Lingley's dead cell phone and Lingley's fear that the truck might break down. (CP 28-31, 35-36.)

The Estate argues at length about the exclusive remedies of the IIA. Were he in the course of his employment, Orris would not dispute that his alternative tort remedies would be limited to those remedies permitted under the IIA. The trial court and the Estate erred by ignoring a threshold principle: Orris must be *in* the course of employment for the exclusive IIA remedies to apply. In fact, the cases that the Estate cites reflect this basic principal, including *Doty v. Town of South Prairie*, 122 Wn. App. 333, 93 P.3d 956 (2004), cited on page 3 of Respondent's brief. In *Doty*, the appellate court held that the exclusive remedy of the IIA did *not* apply to a volunteer firefighter who was injured performing her firefighting duties. *Id.* at 341 (holding that because the firefighter was not an employee, the trial court erred in ruling that the Act precluded her action against her employer). This threshold question was erroneously decided as a matter of law by the trial court, and the Estate perpetuates this error in its briefing.

#### **E. Applying Judicial Estoppel Is Unjust**

The equities do not favor the application of judicial estoppel, or any variant thereof, here. *Miller v. Campbell*, 137 Wn.App. 762, 772-773, 155 P.3d 154 (2007) (observing that "[a]dditional considerations may

inform the doctrine's application in specific factual contexts" and holding that "a substantial additional consideration bearing on the equities" barred its application in that case).

The lower court apparently dismissed Orris's case because he signed an L&I verification form. It viewed this as inconsistent with the third party claim against the Estate. But, even if inconsistent, the effect of Orris's signature on the L&I form should be no different than any other inconsistent statement.<sup>1</sup> Courts do not summarily dismiss claimants for making inconsistent statements. If, in fact, an inconsistent statement was made, well established evidentiary rules should apply, not the draconian sanction of dismissal.

Furthermore, the effect of dismissing Orris's case makes an unknown L&I employee the final arbiter of Orris's employment status, but only if that employee determined Orris was working. For example, had L&I rejected Orris's claim because he was not working at the time of the accident, the Estate would still be free to challenge that finding, and almost certainly would have, in order to gain the benefit of IIA immunity and exclusivity. Similarly, if Orris had foregone the benefits offered by L&I, the Estate would have been entitled to bring the very same summary

---

<sup>1</sup> As explained above and Orris's Opening Brief at 23-25, no "position" taken by Orris on the verification forms is "inconsistent" with the litigation against the Estate. The forms confirmed the period of time during which Orris performed no work of any kind.

judgment motion it did bring, and the court would have ruled on it without making Orris's decision a determinative factor. Regardless of whether the initial decision is right or wrong, the harsh consequence of dismissal would apply in only one of three very real potential scenarios, and place an injured person whose employment status is uncertain in an unfair and untenable position. There is no equity in such an inconsistent approach.

The lower court discussed "fairness" at the summary judgment hearing. (Feb. 14, 2011 RP 2:8.) Unfortunately, in the lower court's view, "fairness" apparently requires that the victim of a catastrophic accident (Orris) bear all the risk of incurring significant costs of the accident, and "fairness" leaves L&I with the tab for these significant costs. The lower court's "fairness" calculation favors only the tortfeasor.

This is contrary to Washington law, as the cases the Estate cites recognize. In *Tallerday v. Delong*, 68 Wn.App. 351, 842 P.2d 1023 (1993), cited at page 6 of the Estate's brief, injured parties collected L&I benefits *and* were able to pursue their tort claims for attorney malpractice for the difference between their actual damages and the L&I benefits received. *Id.* at 354-55. L&I had a right to reimbursement from any recovery because, as the court explained, "Washington has a policy of protecting state funds..." *Id.* at 359.

Similarly, in *Bankhead v. Aztec Constr. Co*, 48 Wn. App. 102, 737 P.2d 1291 (1987), cited at page 5 of the Estate’s brief, the court considered whether L&I should receive a proportionate share of the recovery from a tortfeasor. As the court explained, the IIA was

enacted with the intent of shifting the cost of worker claims from industrial insurance funds to responsible third parties, while at the same time allowing injured workers to obtain a more complete recompense for their damages.

*Id.* at 108.

The lower court’s order satisfies none of the interests. The injured party (Orris) did not receive a complete recompense for his injuries. L&I has paid these costs out of state industrial insurance funds without reimbursement. If Orris was not working at the time of the accident, as appellant contends, then the L&I has expended state fund unnecessarily, while the responsible third party pays nothing.

**F. The Lower Court Ignored Orris’s Argument That Lingley’s Intoxication Removed Him From the Course of His Employment.**

To survive summary judgment, Orris needed to establish a genuine issue of fact about whether either he or Lingley were in the course of employment. If either of the two (or both) were not in the course of employment, the exclusive remedy of the IIA would not apply. *E.g. Olson v. Stern*, 65 Wn.2d 871, 400 P.2d 305 (1965) (“If both employees have a

common employer but the negligent employee is not acting in the course of his employment at the time the injury occurs, he is not immune from suit.”).

In fact, Orris did argue that Lingley’s intoxication took him out of the course of his employment. (CP 32-33.) Lingley operated the truck under the influence of marijuana. As a result, he veered off the road, drove three hundred feet across a field without slowing, and hit a large tree. The Washington State Patrol cited Lingley’s driving under the influence of marijuana as a significant cause of the accident. The lower court never commented on or decided this separate basis on which to deny the Estate’s motion for summary judgment.

The Estate’s sole response to this argument is that the Toxicology Report relied on by Orris to establish this issue of genuine issue of material fact should never have been introduced into evidence. Because the Estate makes this argument for the first time on appeal, it waived its objection to the introduction of this evidence. RAP 2.5(a); *see also, e.g., Seth*, 21 Wn.2d at 693 (refusing to consider on appeal an argument that evidence should not have been admitted before the trial court).

Moreover, the Estate mistakenly relies on a line of overservice cases to support its claim that a Toxicology Report cannot establish a question of fact about Lingley’s intoxication. (Respondent’s Br. at 15)

(citing *Faust v. Albertson*, 167 Wn. 531, 541, 222 P.3d 1208 (2009)). These cases turn whether an individual “appears” intoxicated and therefore should not have been served more alcohol. Unremarkably, these cases require that evidence offered to prove whether an individual “appears” intoxicated to those around him reflect *actual* appearance rather than any assumptions about appearance that might be drawn based on after-the-fact blood alcohol content. As the court explained in *Faust*, this prevents jurors from making the inferential leap that “driver’s BAC was X so he must have appeared drunk.” *Faust*, 167 Wn. These cases say nothing about the reliability of BAC or actual intoxication for the purposes of establishing that a driver’s intoxication caused an accident.

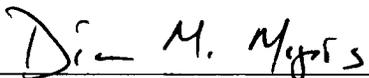
Orris argued below that Lingley’s intoxication was a deviation from his employer’s interest such that Lingley was not in the course of his employment at the time of the accident. The Estate relies on *Flavorland Indus., Inc. v. Schumacker*, 32 Wn. App. 428, 647 P.2d 1062 (1982), to support its assertion that an employee’s intoxication cannot, as a matter of law, establish deviation from the employer’s interest. (Respondent’s Br. at 14.) But in *Flavorland* the factual issues went to the jury: “[w]hether Mr. Schumacker departed from the course of his employment to the extent necessary to constitute an abandonment of that employment was a factual determination for the jury.” *Id.* at 434. And, unlike this case, the

employer *paid* for Mr. Schumacker's intoxication—it not only paid for the drinks Mr. Schumaker consumed, but it expected that he would consume as part of its effort to develop and cultivate its own business interests. *Id.* at 433. *Flavorland* provides no basis upon which to have decided the effect of Lingley's intoxication as a matter of law.

## II. Conclusion

The lower court erred when it applied the “logic” of judicial estoppel to prevent Orris from contesting his employment status. It also erred in ignoring the factual evidence that Orris was not in the course of his employment when it granted summary judgment to the Estate. Orris should be permitted to argue to a jury that he was riding with Lingley as a favor to a friend, not as part of his employment or for the benefit of his employer. For the reasons argued in Orris's Opening Brief and above, summary judgment in favor of the Estate should be reversed and the case remanded for trial.

DATED this 17th day of January, 2012.

  
K. Michael Fandel, WSBA 16281  
Diane M. Meyers, WSBA 40729  
GRAHAM & DUNN PC  
2801 Alaskan Way, Suite 300  
Seattle, WA 98121  
T: (206) 624-8300  
F: (206) 340-9599

