

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.

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
BY _____
DEPT. _____


REPLY BRIEF OF APPELLANT CATHERINE BAYLOR

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COMES NOW Appellant Catherine Baylor, by and through her undersigned attorney, and submits for the Court's consideration this Reply Brief.

I. THE TRIAL COURT ERRED BECAUSE THERE WERE GENUINE ISSUES OF MATERIAL FACT PRESENT REGARDING WHETHER HOHBEIN WAS WITHIN THE SCOPE OF HER EMPLOYMENT.

The Respondents point out that there was a conflict between the testimony of Baylor and Hohbein as to whether they were on their way to McDonald's or a job site at the time of the collision which injured Baylor. Respondents' Brief at 3 and 13. This only underscores the trial court's error in granting summary judgment, because whether Hohbein was on lunch break is a significant factor in the determination of whether she was within the scope of her employment at the time of the collision. *Bergsma v. Dept. of Labor & Industries*, 33 Wn. App. 609, 616, 656 P.2d 1109 (1983) (when the time of work does not include the lunch hour, the "coming and going" rule applies to lunch-time injuries; an employee injured while eating lunch in a vehicle off-premises is generally not within the scope of employment). If there was any factual dispute over Hohbein's status, summary judgment should **not** have been granted. Likewise, if the credibility of Baylor or Hohbein was in question, summary judgment should **not** have been granted.

Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.

Herron v. KING Broadcasting Co., 112 Wn.2d 762, 769, 776 P.2d 98 (1989).

The Respondents cite to several cases that stand for the proposition that the IIA allows an injured worker to sue a third party not “in the same employ.” See *Marsland v. Bullitt Co.*, 71 Wn.2d 343, 346, 428 P.2d 586 (1967); *Silliman v. Argus Services, Inc.*, 105 Wn. App. 232, 236, 19 P.3d 428 (2001), *rev. denied* 144 Wn.2d 1005, 29 P.3d 717 (2001); *Brown v. Labor Ready Northwest, Inc.*, 113 Wn. App. 643, 646-47, 54 P.3d 166 (2002). But these cases do nothing to answer the question of whether there were issues of material fact regarding Hohbein’s employment status that should not have been decided on summary judgment.

The Respondents also cite to cases that are factually distinguishable. In *Ball-Foster Glass Container v. Giovanelli*, ___ Wn.2d ___, 177 P.3d 692 (2008), the injured employee normally lived in Pennsylvania, but was on temporary job assignment in Seattle. *Id.* at 694.

In deciding whether the employee was injured within the scope of employment, the Washington Supreme Court applied the “commercial coverage rule,” which generally provides that a traveling employee is considered to be in the scope of employment continuously during his entire trip, except during distinct departures on personal errands. *Id.* at 696. The rule is usually applied to employees such as traveling salespeople and long-haul truck drivers. *Id.* at 698. Such employees are typically required, as a condition of employment, to “travel to a distant jobsite, away from home, and find overnight lodging.” *Id.*

No similar facts are present in Baylor’s case. There is no evidence that ACCS required its employees to travel to distant jobsites, away from home, and find overnight lodging. There is no evidence that Hohbein lived at a distant location from where she worked, that she was a long way from home at the time of the collision, or that she was staying at overnight lodging the night before the collision. Hohbein was not a traveling employee for purposes of the “commercial coverage rule,” so the holding in *Ball-Foster* is not precedential here.

Likewise, in *Bice v. Anderson*, 52 Wn.2d 259, 324 P.2d 1067 (1958),¹ the employee was self-employed and had chosen to pay

¹ This case was decided prior to the 1977 passage of RCW 51.24.040, the election of remedies statute.

premiums to the Department for all activities involved in his business as a junk dealer. *Id.* at 263. The Washington Supreme Court found that because the employee was self-employed and had chosen to cover all of his activities, his third-party action for personal injuries was barred. *Id.*

Here, Hohbein was not self-employed and the undisputed testimony before the trial court was that ACCS employees were not paid for their lunch breaks. CP 265 (May Deposition at 17:8-23); CP 281 (Baylor Deposition at 86:5-7). With the passage of RCW 51.24.040, it is clear that employees like Baylor can now receive IIA benefits and elect to sue negligent third parties for damages. *Bice* is not on point and the court's holding there provides no guidance.

The Respondents make much ado about the fact that ACCS owned the car that Hohbein was driving at the time of the collision, citing to *Puget Sound Energy, Inc. v. Adamo*, 113 Wn. App. 166, 52 P.3d 560 (2002). In that case, the injured employee was assigned a company truck and required to take it home so that he could respond to emergencies on an on-call basis. *Id.* at 168. He was injured in the company parking lot on his way to where the truck was parked. *Id.*

In the present case, however, there is no evidence that Hohbein was required as part of her employment to take ACCS's car to lunch or drive the car when she was off duty. ACCS's ownership of the car or

provision of the car to Hohbein alone do not determine Hohbein's employment status.

The test adopted by this court for determining whether an employee is, at a given time, in the course of his employment, is whether the employee was, at the time, **engaged in the performance of the duties required of him by his contract of employment, or by specific direction of his employer**; or, as sometimes stated, whether he was engaged at the time in the furtherance of the employer's interest. . . . **The fact that the activity was tolerated by the employer does not mean that it was done in furtherance of the company's interest.**

Lunz v. Dept. of Labor and Industries, 50 Wn.2d 273, 278, 310 P.2d 880 (1957) (emphasis added).

Although Hohbein was driving a company car, she was driving to McDonald's on her lunch break, for which ACCS did not compensate her. ACCS did not direct her to go to McDonald's, and she was not performing any house-cleaning duties while she was in the car on her way to McDonald's. The fact that ACCS allowed Hohbein to drive to McDonald's in a company car does not mean that Hohbein was acting in the furtherance of the company's interest at the time of the collision.

Hohbein was more like the employee in *Mutti v. Boeing Aircraft Co.*, 25 Wn.2d 871, 172 P.2d 249 (1946), who was injured on his employer's premises during his lunch break.

It is our opinion that, in going down to get this bond during the lunch period, when he was absolutely free to go where

he pleased, and not under the control of his employer, he was proceeding upon a venture of his own, which was in no way connected with the duties required of him by his contract of employment, but which was solely for his own benefit and of no benefit to his employer. Appellant was not being paid for the half-hour lunch period, nor were any premiums or assessments being paid by the employer to the department of labor and industries for this half-hour. At the time he was injured, he was going away from his place of work [on a different floor in the same building].

Under the facts of this case, we are of the opinion that the trial court erred in holding as a matter of law that the appellant was in the course of his employment at the time he was injured, and in granting respondent's motion.

Id. at 882-83. Because Hohbein was free to go where she pleased, not under the control of ACCS, and was proceeding on a venture of her own which was not connected with her duties and for which she was not being paid, Hohbein was not acting within the scope of her employment at the time of the subject collision.

At the very least, the trial court should have viewed the facts in a light most favorable to Baylor and recognized that a genuine factual dispute over Hohbein's employment status was present. Because the trial court granted summary judgment in spite of this factual dispute, the trial court erred and must be reversed.

II. THE TRIAL COURT ERRED BECAUSE BAYLOR'S ELECTION OF REMEDIES WAS AUTHORIZED BY STATUTE.

The Respondents' unsupported assertion that Baylor's election of

remedies was “irrevocable” is simply wrong. *See* Respondents’ Brief at 9.

RCW 51.24.040 provides:

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.

(Emphasis added.) If a worker elects to pursue a third-party claim and simultaneously accepts workers’ compensation, the only consequence is that the worker must reimburse the Department from any third-party recovery. 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). Any reading of RCW 51.24.040 and .060 that precludes a worker from both receiving benefits **and** suing a negligent third party would **render the statutes meaningless**. *See Davis v. Dept. of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous), *quoting Stone v. Chelan County Sheriff’s Dept.*, 110 Wn.2d 806, 810, 756 P.2d 736 (1988). This Court has already considered at least one case in which an injured worker first collected IIA benefits then filed suit against a third party, and **no error was found**. *See Hildahl v. Bringolf*, 101 Wn. App.

634, 640-51, 5 P.3d 38 (2000), *rev. denied* 142 Wn.2d 1020, 16 P.3d 1263 (2001).

By following RCW 51.24.040 and .060, Baylor is not deriving an “unfair advantage.” *See* Respondents’ Brief at 20-21. Under RCW 51.24.060, she is required to reimburse the Department for its payments, less a pro rata share of attorney’s fees and costs. This statutory right of reimbursement is consistent with the common law right of reimbursement that a first-party insurer would have in a third-party personal injury action. *See Mahler v. Szucs*, 135 Wn.2d 398, 428, 957 P.2d 632 (1998). Even if Baylor may obtain a greater amount from her third-party action than she would under the IIA (in part because she can claim damages other than her medical expenses), the Washington Supreme Court has already held that “between an injured plaintiff and a defendant-wrongdoer, the plaintiff is the appropriate one to receive the windfall.” *Cox v. Spangler*, 141 Wn.2d 431, 439-40, 5 P.3d 1265 (2000).

Because Baylor had the statutory right to recover benefits **and** make a third-party claim pursuant to RCW 54.24.040 and .060, the trial court erred in finding that Baylor’s L&I claim was her “exclusive remedy.” The trial court’s grant of summary judgment must be reversed.

III. THERE IS NO LEGAL OR FACTUAL BASIS FOR APPLICATION OF THE DOCTRINE OF JUDICIAL ESTOPPEL IN THIS CASE.

The Respondents argue in the alternative that Baylor's action was correctly dismissed under the doctrine of judicial estoppel because she took "incompatible positions" by both accepting L&I benefits and filing a third-party action for damages. The Respondents are incorrect both because the plain language of the Industrial Insurance Act specifically permits election of remedies, and the policies supporting application of the doctrine are not present in this case.

A. BAYLOR WAS ENTITLED BY STATUTE TO FULL BENEFITS REGARDLESS OF HER ELECTION TO SUE A THIRD PARTY.

As discussed in Section II above, Baylor was authorized under RCW 54.24.040 to both accept IIA benefits and sue the negligent third party who caused her injuries. Because Washington law permits Baylor to do both, she should not be penalized through dismissal of her third-party action. There are no grounds for application of judicial estoppel where, as here, a party's actions are specifically authorized by statute.

B. THE POLICIES SUPPORTING APPLICATION OF THE DOCTRINE OF JUDICIAL ESTOPPEL ARE NOT PRESENT.

The doctrine of judicial estoppel serves three purposes:

(1) to preserve respect for judicial proceedings; (2) to bar as evidence statements by a party that would be contrary to sworn testimony the party gave in prior judicial proceedings; and (3) to avoid inconsistency, duplicity, and waste of time.

Skinner v. Holgate, 141 Wn. App. 840, 847, 173 P.3d 300 (2007). The doctrine may not apply in situations where the party can reasonably explain the differing positions. *Id.* at 848.

Here, allowing Baylor to follow RCW 54.24.040 and .060 would not diminish the parties' respect for judicial proceedings. The trial court would not be shown "disrespect" if Baylor were permitted to follow Washington statutes that specifically apply to her case. Second, there has been no "sworn testimony" in "prior judicial proceedings" that conflicts with Baylor's testimony in the present action. Thus, there have been no "incompatible positions" as the Respondents have argued, and the trial court was not misled. Finally, allowing Baylor's third-party claim to go to trial will not create any inconsistency, duplicity, or waste of time, as no one other than Baylor has the right to pursue Hohbein for personal injuries arising out of the subject action, and no such action has been previously filed.

Baylor can also reasonably explain any inconsistency that may be present in her statements. At her deposition, Baylor was asked about her work status at the time of the collision:

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 278-79 (Baylor Deposition at 58:5 – 59:5) (emphasis added). If the Respondents wish to impugn Baylor's testimony regarding her work status, then they must accept that there were **credibility issues present which the trial court should not have resolved on summary judgment.** Otherwise, Baylor has given a reasonable factual explanation for her filing both an L&I claim and a third-party action, and judicial estoppel does not

apply.

The Respondents in fact can point to **no** IIA cases in which the doctrine of judicial estoppel has been used to bar a subsequent personal injury action. The cases cited in the Respondents' brief merely deal with the effect of an intervening **bankruptcy** on a pending civil action in state court. *See, e.g., Johnson v. Si-Cor Inc.*, 107 Wn. App. 902, 28 P.3d 832 (2001) (judicial estoppel applied when personal injury plaintiff failed to amend his bankruptcy schedules to include personal injury claim); *DeAtley v. Barnett*, 127 Wn. App. 478, 112 P.3d 540 (2005), *rev. denied* 156 Wn.2d 1021, 132 P.3d 735 (2006), *cert. denied* 127 S. Ct. 123, 166 L.Ed.2d 35 (2006) (judicial estoppel applied in civil action when contractor failed to list right of first refusal as an asset on bankruptcy schedule); *Skinner v. Holgate*, 141 Wn. App. 840, 173 P.3d 300 (2007) (judicial estoppel applied in civil action against partner when plaintiff failed to disclose claim against partner in bankruptcy). There is no bankruptcy in this case.

Furthermore, the required elements of judicial estoppel cited by the Respondents are not satisfied. *See* Respondents' Brief at 19; *DeAtley*, 127 Wn. App. at 483. First, Baylor gave no inconsistent testimony in a prior judicial proceeding, so there was no "inconsistent position" that was "successfully maintained." Second, no judgment was rendered regarding

Baylor's L&I claim. Third, there were no inconsistent positions, as Baylor's testimony quoted above demonstrates. Fourth, the issues in Baylor's L&I proceeding (whether she satisfied statutory and regulatory requirements for benefits) and the issues in this case (the common law elements of negligence) are completely different. Neither the trial court nor the Respondents have been misled, and Baylor has not changed her position, as explained above. Neither the trial court nor the Respondents would suffer injustice or prejudice if Baylor is permitted to proceed with her third-party action, as contemplated by RCW 54.21.040 and .060. There is no legal or factual basis that would support application of judicial estoppel against Baylor. The trial court's grant of summary judgment cannot be upheld on this basis.

IV. CONCLUSION

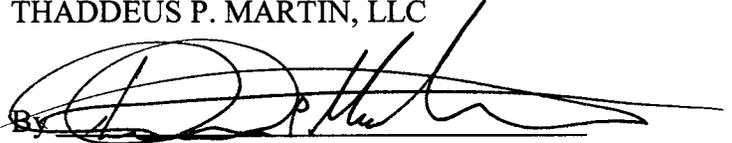
The trial court grant of summary judgment was error because it took the factual and credibility issues regarding Hohbein's employment status away from the jury. The trial court's decision cannot be upheld by application of the doctrine of judicial estoppel. Catherine Baylor respectfully requests that the Court reverse the trial court's November 8, 2007, order and remand her case for trial.

//

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Dated this 17th day of April, 2008.

Respectfully submitted,
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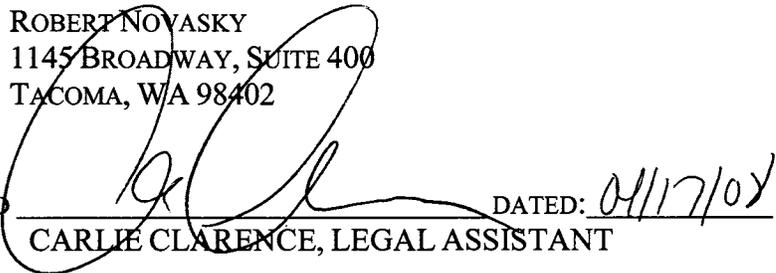
CERTIFICATE OF SERVICE

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 17 DAY OF APRIL, 2008.

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