

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

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STATE OF WASHINGTON
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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.

BRIEF OF APPELLANT

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I. Introduction

This case involves a single narrow question: should the doctrine of judicial estoppel be stretched beyond its well-established parameters to apply to a signature on an administrative form that was never used in a judicial proceeding nor ever relied on or accepted by a court?

Although the lower court acknowledged that this case could not satisfy the traditional elements of judicial estoppel, it inexplicably expanded the doctrine, applying its “logic” to Paul Orris’s signature on a Labor and Industries’ “worker verification form.” Based on Orris’s signature on this pre-printed form, the court prohibited Orris from contesting his employment status when he was severely and permanently injured while riding home from work. The lower court applied what it described as judicial estoppel’s “logic” because the doctrine clearly would not apply: Orris never once 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” on the form. Each of these are, of course, fundamental elements of judicial estoppel. Even L&I did not rely on this form—it began giving Orris worker’s compensation benefits fifteen months *before* Orris signed it. Nor did the Estate of Matthew Lingley, which was not a party to Orris’s L&I file.

Because the court barred Orris from contesting his employment status at the time of the accident, Orris's argument that he was not in the course of employment was not considered—even though the lower court agreed that it would otherwise be a question of fact for the jury—and his claim against the Estate was dismissed.

The lower court erred in expanding judicial estoppel and applying a new doctrine—the “logic” of judicial estoppel—to this case, which meets neither the legal elements of judicial estoppel, nor the equitable considerations that are usually applied. This Court should reverse the lower court's order granting summary judgment and remand for trial.

II. Assignments of Error

1. The trial court erred in granting Defendants' (“Lingley”) Motion for Summary Judgment on Orris's Complaint when it held that Orris was estopped from arguing that he was not in the course of his employment when the accident occurred.
2. The trial court erred in failing to consider whether Lingley's intoxication at the time of the accident removed Lingley from the course of his employment and removed Lingley's negligence from the exclusive remedial

provisions of Washington's Industrial Insurance Act ("IIA").

III. Issues Presented for Review

1. Orris was severely and permanently injured while returning home from an out of town job when a truck driven by Lingley, in which Orris was a passenger, veered off the road. Orris was not working at the time of the accident and was merely tagging along with Lingley as a favor. He was not required to ride with Lingley, was not paid for riding with Lingley, and was not reimbursed by his employer for mileage. Did the trial court err in holding that, despite its conclusion that this evidence created an issue of fact, Orris could not contend that the accident occurred outside the course his employment because he signed L&I worker verification form after receiving worker's compensation benefits? (Assignment of Error 1.)
2. Lingley, Orris's co-worker, was under the influence of marijuana at the time of the accident. Did the trial court err in determining that Orris's exclusive remedy is the IIA when there was a question of fact regarding whether Lingley's intoxication deviated from his job activities such

that he was not within the course of his employment at the time of the accident? (Assignment of Error 2.)

IV. Statement of the Case

A. The 2007 Accident

On August 17, 2007, Paul Orris was a 24-year-old apprentice working for Caliber Concrete Construction and living in Puyallup (CP 43, 143.) Orris had been working as a laborer since dropping out of high school in the eleventh grade. (CP 145.) Orris's job frequently required him to travel to out-of-town job sites, although he was never paid for the time spent traveling to or returning from a job. (CP 35-36.)

On the morning of Friday, August 17, 2007, Orris rode from Puyallup to a job site at Aberdeen High School with his co-worker, Matt Dolan, in Dolan's personal car. (CP 35, 40.) They arrived at the site sometime before 9:30 a.m., where they joined a few other Caliber employees. (CP 40.) Matt Lingley, another of Orris's co-workers, had driven a Caliber flatbed truck to the Aberdeen site because his carpool partner stood him up. (CP 40.) The Caliber crew finished work for the day around 12:45 p.m. (CP 40.) After work, they all stopped for lunch. (CP 40.)

After lunch, at Lingley's request, Orris agreed to ride home with Lingley in the Caliber truck instead of returning with Dolan. (CP 36.)

Lingley did not want to drive alone because his cell phone was dead, and the company truck was old, had mechanical issues, and had stalled in the past while Lingley was driving it. (CP 36.) Lingley planned to drop the truck off at Caliber's office in Edgewood. (CP 36.) Because Orris did not want Lingley to be stranded without a cell phone, he rode home with Lingley. (CP 36.)

On the way home, Lingley, who had been awake since 4:00 a.m. and worked fourteen hours the day before, complained to Orris that he was tired. (CP 36, 40.) The two stopped for energy drinks at a convenience store. (CP 36.)

Shortly after making this stop, the flatbed truck, driven by Lingley, veered off State Route 8. (CP 41.) It travelled three hundred feet across a grassy field without slowing, hit a large fir tree, and immediately caught fire. (CP 41.)

Three witnesses and two members of the Washington State Patrol were able to extract Orris from the passenger seat of the burning truck. (CP 41.) They were unable to extinguish the truck. (CP 41.)

Lingley was killed in the accident. (CP 40.) A toxicology screen ordered by the Grays Harbor Coroner's Office as part of its autopsy of Lingley found cannabinoids (marijuana) in his urine. (CP 46.) The Washington State Patrol concluded that the accident was caused by a

combination of “DUI, carbon monoxide, and fatigue,” which led to Lingley’s failure to control the vehicle. (CP 41.)

Orris was airlifted to Harborview, where he was treated for third degree burns over fifty percent of his body and a fractured pelvis. (CP 40.) The doctors ultimately amputated Orris’s left arm. (CP 40.) Orris remained in a coma for several months after the accident. (CP 142.)

B. Orris’s L&I File

On September 23, 2007, while Orris was in a coma, his father completed the Department of Labor and Industries’ *Report of Industrial Injury or Occupational Disease* (the “Accident Report”). (CP 142-43.) Orris’s father indicated that Orris was “on way home” when the accident occurred. (CP 143.) An unknown person crossed out “on way home” and inserted “returning to shop from worksite.”¹ (CP 142.) The Accident Report was received by L&I on September 25, 2007. (CP 163.)

Without a hearing or other proceeding or any input from Orris apart from the Accident Report, L&I allowed Orris’s claim for medical treatment and other benefits on October 17, 2008, and its decision became final on December 28, 2008. (CP 162.) Although there is no explanation for the eleven month-delay between the date of the accident and L&I’s

¹ As filled out by Orris’s father, the form was not sufficient to establish a work-related injury. Neither Paul Orris nor his father made the change. (CP 142.)

notice of decision, L&I did confer with Orris's employer and secured its agreement that it would pay Orris wage while he was out of work.² (CP 167-68.) From the date of the incident until June 2, 2009, Caliber paid Orris's wages. (CP 167-68.) After Caliber stopped paying, L&I paid Orris time loss benefits, beginning on June 29, 2009. (CP 163.)

It was not until fifteen months *after* L&I had allowed Orris's claim, on January 15, 2010, that Orris signed L&I's Worker Verification Form. The verification form instructs the worker to "[c]omplete the form so we can consider paying time loss benefits." (CP 165.) The document, which is almost entirely preprinted, states that "[d]ue to my workplace injury/illness, I didn't work and I wasn't able to work from [date] to [date]." (CP 165.) It explains that the inability to work includes "any type of work—paid or unpaid—such as volunteer work, self-employment, COPES or CHORES Services." (CP 165.) The form advises that the signature is under penalty of perjury, warns against "false statements about my activities or physical condition," and requires any update if, among other changes not relevant here, the worker "perform[s] any work (paid or unpaid), [or] if my doctor releases me for work...." (CP 165.)

² Caliber, of course, had every incentive to ensure that L&I classified Orris's injury as work related, which allowed it to assert employer immunity under the IIA as a complete defense when it was sued by Orris for his injuries. (CP 48-73.)

The form contains no express representation or statement regarding the individual's employment status at the time of injury. (CP 165.)

Having performed no work of any kind since his accident, Orris inserted "8/07 to now" in the blanks and signed the verification form. (CP 165.) Orris signed a second, modified version of the same form on April 23, 2010 that changed the dates he had been unable to work from "8/07 to now" to "10/09 to now." (CP 166.)

Through May 7, 2010, L&I paid \$1,124,090.93 for Orris's medical expenses, and paid Orris \$35,573.41 in time loss benefits. (CP 163-64.)

C. Procedural History

Orris and the Estate initially sued Caliber for their injuries, alleging that the condition of the Caliber truck caused their injuries. (CP 26.) They were jointly represented in that case, which ended when Orris's then attorney, without notice to Orris, voluntarily dismissed the claims without prejudice. (CP 30, 144-45.) When Orris subsequently discovered the dismissal, he retained new, separate counsel, and brought this tort action against Lingley's Estate to recover for his general, medical, and special damages, lost wages, and lost earning capacity caused by Lingley's negligence. (CP 1-4, 144-45.)

The Estate brought a motion for summary judgment alleging that it is immune under Washington's Industrial Insurance Act from Orris's suit

because Lingley and Orris worked for Caliber. (CP 13-20.) The Estate claimed that Lingley and Orris were acting in the course of their employment on the drive to Caliber's Edgewood office because Lingley needed to return Caliber's truck and the truck carried a load of forms for Caliber. (CP 13-20.) As evidence that Orris was acting in the course of his employment, the Estate cited Orris's admission that he received worker's compensation benefits from L&I. (CP 19, 23-37.)

Because Orris 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 because of Lingley's dead cell phone and Lingley's fear that the truck might break down, Orris argued that he was not in the course of his employment at the time of the accident. (CP28-31, 35-36.)

Orris argued, as a separate basis on which to deny the motion for summary judgment, that Lingley was not in the course of his employment because he was under the influence of marijuana at the time of the accident. (CP 32-33.)

D. Fact Issues on Orris's Employment Status

The lower court agreed that whether Orris was acting in the course of employment was an issue of fact. (Feb. 14, 2011 Record of

Proceedings, 1:8.) The court observed that Orris “was free to leave the work place once he finished the day. He was not the one that brought the truck down; he came down by a different means of transportation.” (*Id.* at 1:8-11.) Based on these facts, the court concluded that a jury “could find that one hundred percent, or 90 some percent of his reason for riding was just as a friend, helping out a friend 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.” (*Id.* at 1:13-19.)

Instead of denying the Estate’s motion for summary judgment on the basis that a genuine issue of fact existed on whether Orris was in the course of employment, the court asked the parties to brief the legal effect, if any, of Orris’s receipt of L&I benefits. (*Id.* at 2-3.) The court 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.*) Although the supplemental briefing was intended to help the court reach a decision on the Estate’s motion for summary judgment, and issues on which the Estate bore the burden of proof, the court required that Orris submit the first brief, to which the Estate could respond. (*Id.* at 3.)

E. Supplemental Briefing

In its response to Orris’s supplemental brief, the Estate argued for the first time that “judicial estoppel” barred Orris’s claim against Lingley. (CP 147.) To support this argument, the Estate misstated the chronology of Orris’s L&I claim, incorrectly asserting that L&I gave Orris time loss benefits “only after” Orris submitted the verification form and only allowed Orris’s claim because of this form. (CP 148.) In fact, as the chronology below makes clear, the claim was allowed on October 17, 2008, and payment of time loss benefits started on June 29, 2009, well before Orris submitted his worker verification form in January 2010. (CP 162-64.)

Date	Event	Record
Aug. 17, 2007	Accident	CP 40-41
Sept. 25, 2007	Accident Report	CP 163
Oct. 17, 2008	L&I allows Orris’s claim.	CP 162
June 29, 2009	L&I begins paying time loss benefits.	CP 163
Jan. 15, 2010	Orris signs “Worker Verification Form”	CP 165
Apr. 23, 2010	Orris signs “Worker Verification Form”	CP 166

The only document considered by L&I before the claim was allowed and time loss benefits began was the Accident Report, which was completed not by Orris but by Orris’s father while Orris was in a coma, which indicated that Orris was “on way home,” and which some unknown person had revised after Orris’s father completed it. (CP 143.) After

supplemental briefing, the court granted the Estate's motion for summary judgment without comment. (CP 168-71.)

Orris moved for reconsideration or, in the alternative, for clarification of the court's order granting summary judgment, requesting that the lower court clarify whether it applied judicial estoppel to dismiss Orris's claim. (CP 172-80.) The court issued a letter decision explaining that while "the doctrine of judicial estoppel may not apply," the "logic of the doctrine seems to be consistent" with its ruling. (CP 189-90.) The court then cited portions of the IIA that make the IIA the exclusive remedy for certain employee injuries, and case law confirming the general proposition that an injured worker loses the right to pursue alternative tort remedies against an employer or co-employee. (CP 189-90.) The court denied Orris's motion to reconsider. (CP 189-90, 192-93.)

The court never ruled on Orris's argument that Lingley was not in the course of his employment because Lingley was under the influence of marijuana at the time of the accident.

Orris filed his timely Notice of Appeal on July 1, 2011. (CP 194-202.)

V. Summary of Argument

The trial court's careless expansion of judicial estoppel doctrine to bar Orris's claim against Lingley's Estate is legally erroneous. It is also inequitable. The decision, therefore, should be reversed.

Judicial estoppel is an equitable doctrine that prevents a party in a judicial or quasi-judicial proceeding from asserting or adopting a position in litigation that is clearly inconsistent with a position taken in prior judicial or quasi-judicial proceeding. It applies in only very limited circumstances. Judicial estoppel requires, first and foremost, that a contradictory position be taken in a prior judicial, quasi-judicial, or administrative proceeding, and that the position be accepted by the *court*.

The Estate argued that Orris's signature on a pre-printed administrative form that was never used in any judicial or quasi-judicial proceeding is a "position" inconsistent with Orris's claim against the Estate. But through the long history of judicial estoppel in Washington, not one case has applied judicial estoppel in the way suggested by the Estate—to a position taken outside the judicial system. This makes sense. After all, the doctrine protects the integrity of *courts* by reducing the risk that different courts will come to opposite conclusions on the same facts and issues. If no court has been presented with or adopted the contradictory "position," no risk of inconsistency exists. Moreover,

because judicial estoppel is “strong medicine,” it is applied sparingly by courts and generally only when equity demands the prevention of the deliberate or intentional manipulation of the judicial system.

Ignoring the legal test, the history of judicial estoppel in Washington, and any analysis of the equities, the lower court extended the “logic” of judicial estoppel into a completely new area, concluding that Orris was prohibited from denying that he was in the course of employment on his ride home with Lingley. The “contradictory” position taken by Orris—the L&I verification form—was not made in prior litigation or even in an administrative proceeding. It was not signed by Orris until January 2010—two and a half years after Orris’s father submitted the Accident Report explaining that Orris was “on way home” when the accident occurred, fifteen months after L&I allowed his claim, and more than six months after L&I began paying Orris time loss benefits. Orris’s signature on this administrative form meets neither the legal nor the equitable tests for the application of judicial estoppel.

Because the court erroneously applied its new “logic of judicial estoppel” test to prohibit Orris from litigating the question of whether he was acting in the course of his employment at the time he was injured, the court erroneously determined that Orris’s sole and exclusive remedy in this case was under the IIA and dismissed his claim against the Estate.

The court compounded its error by ignoring Orris's separate argument that by driving the company truck under the influence of marijuana, Lingley acted outside the course of his employment. However, if a jury were to conclude that Lingley's intoxication took him outside the course of his employment at the time of the accident, Orris's employment status would not matter because Lingley would be considered a "third party." Thus, Lingley and Orris would not be in the "same employ" for purposes of the IIA.

Because the lower court erred in applying the "logic" of judicial estoppel in the absence of any prior judicial proceeding and failed to address Orris's alternative argument that Lingley's negligence removed his actions from the exclusive remedies of the IIA, its decision granting summary judgment should be reversed and the case remanded for trial.

VI. Argument

A. Standard of Review

Although a lower court's application of the doctrine of judicial estoppel is generally reviewed for an abuse of discretion, *e.g.*, *Miller v. Campbell*, 164 Wn.2d 529, 536, 192 P.3d 352 (2008), in this case, the lower court formulated and applied a completely new legal test, based on the "logic" of judicial estoppel. Its decision to do so should be reviewed *de novo*. *E.g.*, *Isla Verde Intern. Holdings, Ltd. v. City of Camas*, 147

Wn.App. 454, 196 P.3d 719 (2008). Under either standard of review, however, the lower court's decision in this case should be reversed.

B. Judicial Estoppel Applies Only to Positions Taken in a Prior Litigation, Not to Out-of-Court Signatures on Administrative Forms.

The lower court conceded that the “doctrine of judicial estoppel may not apply to this particular situation.” Recognizing this, it nonetheless proceeded to apply the “logic” of judicial estoppel to conclude that Orris could not deny that he was in the course of employment at the time of the accident. But a key aspect of that logic is that the doctrine is applied in only limited circumstances. The lower court's extension of the doctrine beyond its traditionally limited bounds was an abuse of the court's discretion. In fact, neither the doctrine, nor its logic, apply in this case.

1. Orris took no prior litigation position.

In its most basic form, judicial estoppel prevents a party from asserting a position in one legal proceeding that directly contradicts a position taken by the same party in an earlier legal proceeding. In Washington, courts have applied various tests to determine whether the doctrine of judicial estoppel should apply, including the “three core factor” test described by the United States Supreme Court in *New Hampshire*

v. Maine, 532 U.S. 742, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001), and the six factor test set forth by the Washington Supreme Court in *Markley v. Markley*, 31 Wn.2d 605, 198 P.2d 486 (1948). Under both tests, the threshold question is whether the positions are taken in legal proceedings.

In *New Hampshire*, the United States Supreme Court explained that judicial estoppel operates when a “party assumes a certain position in a *legal proceeding*, and succeeds in maintaining that position,” and later “assume[s] a contrary position.” 532 U.S. at 749 (emphasis added). The doctrine “generally prevents a party from prevailing in one phase of a case on an argument then relying on a contradictory argument to prevail in another phase.” *Id.* In this way, the doctrine protects the “integrity of the *judicial process*” and prevents the “improper use of the *judicial machinery*.” *Id.* at 750 (emphasis added).

In *Markley*, the Washington Supreme Court described judicial estoppel as “[t]he rule that a party will not be allowed to maintain inconsistent positions is applied in respect of positions in *judicial proceedings*.” *Markley*, 31 Wn.2d at 614 (citing 19 AM.JUR. *Estoppel* § 72) (emphasis added). It elaborated that the doctrine “may be regarded not strictly as a question of estoppel, but as a matter in the nature of a positive rule of procedure based on manifest justice and, to a greater or

less degree, on considerations of orderliness, regularity, and expedition *in litigation.*” *Id.* (emphasis added).

That judicial estoppel applies only to contradictory positions taken in *judicial proceedings*—not to written statements made out of court—is an established element in Washington’s judicial estoppel jurisprudence. No Washington case has applied judicial estoppel to positions taken out of court. To the contrary, the only Washington court to expressly consider whether judicial estoppel applies to written statements made out of court—even those made under penalty of perjury—determined that it does not.

In *Armantrout v. Carlson*, the court of appeals refused to apply judicial estoppel to bar a litigation position that was at odds with claims made for social security, tax, and insurance benefits. 141 Wn.App. 716, 724, 170 P.3d 1218 (2007) (*Armantrout I*), *rev’d on other grounds*, 166 Wn.2d 931, 214 P.3d 914 (2009).³ In the Armantrouts’ tax filings and Social Security and insurance forms, they had claimed their deceased daughter as a dependent. *Id.* In litigation arising out of the daughter’s

³ In *Armantrout I*, the appellate court concluded that the value of personal services provided by the decedent to her parents could not be considered “financial support.” 141 Wn.App. at 731. This holding was reversed by the Supreme Court, which held that the jury could consider the value of any services that have monetary value when assessing a claimant’s dependency. *Armantrout v. Carlson*, 166 Wn.2d 931, 941, 214 P.3d 914 (2009). The Supreme Court did not disturb the appellate court’s judicial estoppel holding.

untimely death, however, the Armantrouts reversed course and claimed that they depended on her, an essential component of a parent's claim under Washington's wrongful death statute. *Id.* The defendants attempted unsuccessfully to argue that the Armantrouts were judicially estopped from claiming that they depended on their deceased daughter for financial support. *Id.* The appellate court rejected this argument because "there was neither a prior judgment nor any prior litigation from which the Armantrouts benefited from claiming Kristen as a dependent." *Id.* at 725. Furthermore, the court noted that the defendant "was never a party to any prior proceeding involving the Armantrouts" and therefore could not have been induced into changing its position in reliance on the Armantrout's prior position. *Id.*

In this case, the lower court ignored the threshold element of judicial estoppel—that it applies only to positions taken in prior *judicial proceedings*—when it concluded that Orris's signature on L&I's Worker Verification Form estopped him from arguing that he was not in the course of his employment. Orris's signature was neither obtained during the course of litigation, nor was it used in the course of prior litigation or judicial proceeding. There was not even an administrative proceeding associated with Orris's L&I file, and L&I never questioned whether Orris was in the course of employment when he was injured. Instead, L&I

simply assumed that his accident occurred while he was working, and the L&I administrator handling his file allowed his claim. It did so solely on the Accident Report filled out by Orris's father while Orris was in a coma, not on the basis of anything Orris submitted or signed two years later.

Moreover, the Accident Report as filled out by Orris's father did not state that Orris was in the course of his employment. His father wrote only that Orris was "on way home," which, as a general rule, is *not* in the course of employment. *E.g., Aloha Lumber Corp. v. Dep't of Labor & Indus.*, 77 Wn.2d 763, 766, 466 P.2d 151 (1970). But even if they were inconsistent positions, neither the Accident Report on which L&I based its provision of benefits, nor the verification form signed by Orris, are prior positions taken in judicial proceedings to which the doctrine of judicial estoppel applies.

2. Orris's receipt of benefits meets none of the factors that warrant application of judicial estoppel.

As the lower court effectively conceded, the legal elements of judicial estoppel did not warrant its application to the facts of this case. Although the lower court neither cited a case nor an applicable legal test, the two separate but similar judicial estoppel tests applied at various times

in Washington each confirm that judicial estoppel does not, as a legal matter, apply here.

In *New Hampshire*, the United States Supreme Court adopted a three factor test to determine whether a particular situation warranted the application of judicial estoppel. First, a “party’s later position must be ‘clearly inconsistent’ with its earlier position.” 532 U.S. at 750. Second, the party must succeed in “persuading a court to accept that party’s earlier position.” *Id.* When this happens, judicial acceptance of the inconsistent position in the later proceeding “create[s] the perception that either the first or the second court was misled.” *Id.* (internal quotation and citation omitted). Third, the party asserting the inconsistent position must “derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.” *Id.* at 751.

The *New Hampshire* “three factor” test has been cited and applied by all of the appellate courts of this state. *E.g., Ingram v. Thompson*, 141 Wn.App. 287, 169 P.3d 832 (2007) (Division 1 rejected application of judicial estoppel under three factor test); *Deveny v. Hadaller*, 139 Wn.App. 605, 161 P.3d 1059 (2007) (Division 2 rejected application of judicial estoppel under three factor test); *Haslett v. Planck*, 140 Wn.App. 660, 166 P.3d 866 (2007) (Division 3 rejected application of judicial estoppel under three factor test); *Miller v. Campbell*, 164 Wn.2d 529, 192

P.3d 352 (2008) (Washington Supreme Court rejected application of judicial estoppel under three factor test).

Prior to the adoption in Washington of the three factor test, a slightly different test had been adopted by the Washington Supreme Court in *Markley v. Markley*. That test examined six factors to determine whether judicial estoppel should apply:

- (1) The inconsistent position first asserted must have been successfully maintained;
- (2) a judgment must have been rendered;
- (3) the positions must be clearly inconsistent;
- (4) the parties and questions must be the same;
- (5) the party claiming estoppel must have been misled and have changed his position; and
- (6) it must appear unjust to one party to permit the other to change.

Markley, 31 Wn.2d at 614-15.

Although every appellate court in Washington has applied *New Hampshire's* “three core factors” test, as recently as 2007, the Washington Supreme Court cited the six factor test that it adopted in *Markley*. *Id.* at 539. In *Skinner v. Holgate*, 141 Wn.App. 840, 849, 173 P.3d 300 (2007), this court explained that the three core factors are not an “exhaustive formula.” Other Washington courts in the post-*New Hampshire* era continue to apply the six *Markley* factors. See *Armantrout*, 141 Wn.App. 716, 170 P.3d 1318 (Division 1); *DeAtley v. Barnett*, 127 Wn. App. 478, 112 P.3d 540 (2005) (Division 3).

Even if *New Hampshire* has replaced *Markley*, the application is not significantly different. *E.g.*, *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 543, 160 P.3d 13 (2007) (Sanders, J., dissenting) (observing that “*Markley*’s six factors essentially overlap with the three core factors”). As Justice Sanders observed in his *Arkison* dissent, the only “somewhat supplemental” factors are the first, second, and fourth *Markley* factors, which are “more a matter of procedure than substantive analysis.” *Id.* Regardless, both tests apply judicial estoppel, if at all, only to positions adopted in *judicial proceedings*. *See supra*, Sec. VI.B.1. And neither test warrants its application in this case.

The lower court cited neither test and ignored both when it concluded that Orris’s signature on L&I’s Worker Verification Form estopped him from arguing that he was not in the course of his employment. Orris’s signature on this form does not meet *New Hampshire*’s test. It was neither obtained during the course of, nor asserted in the course of, prior litigation and therefore cannot be clearly inconsistent with a later asserted litigation position (Factor 1). In the light most favorable to Orris, he signed the verification form to identify the dates on which he was not able to work, inserting “8/07” and “now” in the first and “10/09” and “now” in the second, and to confirm that he had performed no work—paid or unpaid—during that time. (CP 165-66.)

L&I had already allowed his claim and had been paying time loss benefits for more than six months. The form, which includes no express representation about employment status at the time of the injury, was simply not intended or submitted as Orris's "position" on this issue, nor is it "diametrically opposed" to his argument in this case that he was not in the course of employment when he was injured. *See Seattle-First Nat'l Bank v. Marshall*, 31 Wn.App. 339, 641 P.2d 1194 (1982) (rejecting application of judicial estoppel even where party asserted two different values for a partnership because the two values were not "diametrically opposed").

This interpretation of the verification form as a means of providing dates on which Orris was unable to perform work (rather than a statement about his status at the time of injury) is buttressed by the absence of any reference to his injury, the explanation that "unable to work" means "*any* type of work—paid or unpaid" and includes volunteer work and self-employment, the express warning against making a false representation regarding "*activities or physical condition*," the reminder that L&I should be notified in the event that the individual "perform[s] any work (paid or unpaid) or receives medical clearance to return to work, and the fact that Orris had to fill out a second form in order to make a date change. (CP 165-66.) (emphasis added) One can easily conclude that these forms

were simply a means of verifying the period of time during which Orris was unable to work and a confirmation that unable to work meant performing no work whatsoever, not as Orris's "position" on his employment status at the time of the accident.

Because it was never asserted in a judicial proceeding, it was not accepted or relied on by a court, and there is, therefore, no risk of two courts coming to different conclusions as a result (Factor 2).

Moreover—and contrary to the misstatements of facts argued by the Estate below (CP 146-53)—Orris did not receive a benefit as a result of his submission of the verification form (Factor 3). Orris signed the form *after* L&I paid Orris's worker's compensation benefits, including time loss benefits, and *after* L&I allowed his claim.⁴ The verification form could not have been the basis on which the L&I administrator reached its earlier conclusion that Orris suffered a workplace injury. And the only document on which Orris (or someone on his behalf) took any position prior to L&I's determination was the Accident Report, completed

⁴ L&I allowed Orris's claim on October 17, 2008, more than a year before he signed the verification form. L&I began paying time loss benefits on June 29, 2009, more than six months before Orris signed the verification form.

by Orris's father while Orris was in a coma, on which his father wrote that Orris was "on way home."⁵

Were this Court also to apply the additional *Markley* factors, none warrant the application of judicial estoppel. There was no prior judgment (Factor 2), Lingley was not a party to Orris's workers compensation file (Factor 4), and Lingley was neither misled nor changed his position on the basis of Orris's receipt of worker's compensation benefits (Factor 5).

Finally and fundamentally, the equities do not favor the application of judicial estoppel 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). Not only is it *not* unjust to permit Orris to argue that he was not in the course of his employment, it is unjust not to permit him to do so.

Although the lower court did not clearly identify the prior "position" taken by Orris to which it applied its reasoning, none of the

⁵ In addition, L&I had telephonic and written correspondence with Orris's employer, which, as described above, had every incentive to help L&I reach the conclusion that Orris was in the course of employment, a fact that Caliber pointed to when it moved for summary judgment in the case Orris filed against it. (CP 69-73.)

possibilities—Accident Report, verification form, or the mere fact that Orris received benefits—warrants its application.⁶

As the lower court correctly observed, “course of employment” is generally a question of fact for the jury. In this particular case, and viewing the facts most favorable to Orris, the court also observed that a jury may well find that “one hundred percent or 90 some percent of [Orris’s] reason for riding” home with Lingley was as a favor to a friend. It is unjust to bind Orris to a determination made by an L&I administrator, who considered the Accident Report filled out by Orris’s father, which correctly stated that Orris was “on way home,” and, on the basis of that Report, initiated worker’s compensation benefits for Orris while Orris was in still in a coma.

Applying judicial estoppel on the basis of the verification form is equally unjust. Even accepting that the form qualifies as a prior “judicial proceeding,” it is not at all clear that the position taken in the form contradicts Orris’s claim against the Estate. As described above, the verification form represents Orris’s position regarding the dates on which

⁶ The lower court never recognized the important distinction between the Accident Report and the Worker Verification Form. The Accident Report’s significance is that it was the only document submitted on Orris’s behalf before L&I began providing Orris with benefits. It truthfully stated that he was “on way home.” The Worker Verification Form, on the other hand, derives its significance not from L&I’s reliance on it to make a decision about Orris’s employment status, but on the lower court’s apparent (and erroneous) belief that L&I did rely on this document and that this supposed reliance somehow elevated this administrative form to a “prior position in a judicial proceeding.”

he was unable to perform any work, paid or unpaid. It was not used to obtain any benefit—benefits had already been allowed, unilaterally, by L&I without any administrative or judicial proceeding—and contains no reference or statement about Orris’s injury or the context in which it occurred.

To the extent the lower court applied judicial estoppel simply to the specter of receiving L&I benefits, its decision was unjust and unfair. The consequences of this unwarranted extension of a long-standing equitable doctrine are also far-reaching. The court’s decision forces injured parties to decline L&I benefits in order to even pursue a third party claim in which their success is neither guaranteed nor expedient. The new doctrine, as framed by the lower court, confronts injured parties with a veritable Hobson’s Choice: accept worker’s compensation benefits unilaterally allowed by L&I and permit third-party tortfeasors to escape liability *or* pursue protracted litigation in which the other side is certain to argue “course of employment” as a bar to recovery. This is not the manipulation of judicial process or duplicity that the doctrine guards against.

Finally, the doctrine of judicial estoppel does not protect a defendant’s interest in avoiding liability. *Miller v. Campbell*, 164 Wn.2d 529, 192 P.3d 352 (2008). It is not meant as a “technical defense” to

derail a meritorious claim, nor is it a “sword to be wielded by adversaries” unless judicial estoppel is “necessary to secure substantial equity.” *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 365 (3d Cir. 1996) (cited favorably by the Washington Supreme Court in *Miller*). Our Legislature has enacted a “strong policy *in favor*” of third party actions, *Evans v. Thompson*, 124 Wn.2d 435, 437, 879 P.2d 938 (1994), including authorizing L&I to bring a third party suit if the injured employee elects not to do so. By allowing the Estate to derail Orris’s claim and avoid all liability for Lingley’s negligence, the application of judicial estoppel here creates a windfall for the Estate.⁷

C. Orris Was Not in the Course of Employment When He Rode Home With Lingley as a Favor.

The lower court correctly understood that, setting aside Orris’s signature on the L&I form, a jury could conclude that Orris was doing Lingley a favor when he rode home with him on the day of the accident:

I can – when I look at the facts in a light most reasonable to the plaintiff, my inclination would be to leave the in the course of employment issue to the finder of fact, because he wasn’t – he was free to leave the work place once he finished the day. He was not the one that brought the truck down; he came down by a different means of transportation.

⁷ Although not relevant to this proceeding, in the event that Orris prevails here and on remand, L&I will be notified and the lien associated with the accident will be resolved.

(Feb. 14, 2011 Record of Proceedings, at 1:8-11.) The court further explained that a jury “could find that one hundred percent, or 90 some percent of his reason for riding was just as a friend, helping out a friend 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.” (*Id.* at 1:13-19.)

But for the erroneous application of judicial estoppel, the question of whether Orris was in the course of his employment would have gone to the jury, as it should have. *E.g. Evans*, 124 Wn.2d at 444 (“Usually it is a question for the jury whether an employee was acting within the scope of employment.”)

As explained in *Cochran Elec. Co. v. Mahoney*, 129 Wn. App. 687, 693, 121 P.3d 747 (2005), to act within the course of employment an employee must (1) be engaged in the performance of the duties required of the employee by his contract of employment; (2) act at the specific direction of the employer; or (3) be engaged in the furtherance of the employer’s interest. Viewed in the light most favorable to Orris, none of these tests are met.

Orris was not paid by Caliber for traveling home with Lingley, he was not required by Caliber to return to the office after completing work, and he rode with Lingley only because of his (and Lingley’s) concern that

Lingley might get stranded and have no cell phone to call for help, not to further Caliber's interest in any way. Because Orris was not in the course of his employment, he was not in the "same employ" as Lingley and IIA's exclusive remedial provisions do not apply.

D. 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.) The lower court never commented on or decided this separate basis on which to deny the Estate's motion for summary judgment.

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.

Even if Lingley would otherwise have been acting in the course of his employment because he was returning Caliber's truck to its office, a question of fact exists as to whether Lingley abandoned his employment when he consumed marijuana and drove under its influence. *E.g.*, *Flavorland Indus., Inc. v. Schumacker*, 32 Wn.App. 428, 435, 647 P.2d 1062 (1982) (approving a jury instruction that a worker otherwise acting in this course of employment departs from his employment when he engages in action "neither incident to his employment nor in furtherance of his employer's interests"). If a fact finder determines that Lingley did abandon his employment, he was not in the course of employment when his negligence and the accident occurred and Orris's claim against him would not be barred by IIA.

VII. Conclusion

The lower court erred when it applied the "logic" of judicial estoppel to conclude that Orris could not deny that he was in the course of employment at the time of the accident. The basis for the court's application of logic was Orris's signature on a pre-printed form that was never used in litigation or relied on or accepted by a court, and did not form the basis for L&I's decision to give Orris worker's compensation

benefits. Orris should be permitted to argue to the 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. Summary judgment must be reversed and the case remanded for trial.

DATED this 14th day of November, 2011.

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CERTIFICATE OF SERVICE

I, Diane M. Meyers, declare and state as follows:

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STATE OF WASHINGTON
BY: Ch
DEPUTY

On the 14th day of November, 2011, I sent via U.S. Mail, First Class, postage prepaid, the subjoined Brief of Appellant directed:

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On the 14th day of November, 2011, I sent via U.S. Mail, First Class, postage prepaid for filing, the subjoined Brief of Appellant directed to and to be delivered to:

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I declare and state under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 14th day of November, 2011 at Seattle, Washington.

By: Diane M. Meyers
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