

No. 66265-1

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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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SILVERIA LOPEZ-VASQUEZ,

Appellant

v.

WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES

Respondent.

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**APPELLANT'S OPENING BRIEF**

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**A. INTRODUCTION<sup>1</sup>**

The Honorable John Meyer is on the record stating the Department of Labor and Industries' (Department's) decision to deny the appellant's application for crime victim's benefits was "patently unfair." Clerk's Papers (CP) at 75. Ms. Lopez-Vasquez was driving with her four year old son Diego Montar Lopez in Skagit County when they were hit head-on by Neil Marx. CP at 119-122. Diego was killed and Ms. Lopez-Vasquez was seriously injured. CP at 119-122.

Mr. Marx was charged with vehicular assault based on the injuries to Ms. Lopez-Vasquez and vehicular homicide based on the death of Diego Lopez. CP at 91. Mr. Marx pled guilty to the vehicular homicide charge against Diego. CP at 91. In exchange, and without consulting Ms. Lopez-Vasquez, the prosecution dropped the charge relating to Ms. Lopez-Vasquez, but not before the sentencing judge made findings that Ms. Lopez-Vasquez was a victim of a crime and eligible for crime victims compensation. CP at 124-128.

However, based on the deal struck by the prosecutor in the criminal case, the Department denied Ms. Lopez-Vasquez's application

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<sup>1</sup> The Appellant designated the Certified Appeal Board Record in her Designation of Clerk's Papers. Those pages were not prepared by the clerk in the initial preparation. They have subsequently been prepared and designated as pages 84-214.

for crime victim's benefits on October 10, 2007, and, after reconsideration, on December 11, 2007 and January 28, 2008. CP at 93-94. That decision was upheld by the Board of Industrial Insurance Appeals (Board) and on appeal to Skagit County Superior Court. CP at 86-87, 75, and 79-81. Therefore, Ms. Lopez-Vasquez filed this appeal. CP at 76-78 and 82-83.

**B. ASSIGNMENTS OF ERROR**

The court erred in entering the orders of October 13, 2010 and December 23, 2010 upholding the October 8, 2009 decision of the Board of Industrial Insurance which upheld the Department's denial of the appellant's application for crime victim's benefits.

**C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

- 1) Whether the doctrine of collateral estoppel bars the Department from denying Ms. Lopez-Vasquez's crime victims application when the Skagit County Superior Court had determined at sentencing that she was entitled to benefits?
- 2) Whether Ms. Lopez-Vasquez is entitled to crime victims compensation benefits under RCW 7.68.020(2)(i)(c) when the defendant is unavailable for prosecution based on the State's decision to drop the charges which would allow for her benefits?

3) Whether, considering the Legislative intent of the Crime Victim's Compensation statute, Ms. Lopez-Vasquez is entitled to crime victims benefits?

**D. STATEMENT OF THE CASE**

On November 21, 2006, Ms. Lopez-Vasquez was driving east on Cook Road in Mt. Vernon, Washington with her four year old son Diego Montar Lopez. Clerk's Papers (CP) at 119-122. Neil Marx was traveling west on Cook Road at approximately the same time. CP at 119-122. Mr. Marx entered the eastbound lane in an apparent attempt to pass a vehicle in front of him. CP at 119-122. He collided head-on with Ms. Lopez-Vasquez's vehicle. CP at 119-122. Ms. Lopez-Vasquez was seriously injured and her son Diego was killed. CP at 119-122.

Mr. Marx was charged with vehicular assault based on the injuries to Ms. Lopez-Vasquez and vehicular homicide based on the death of Diego. CP at 91. Mr. Marx pled guilty to the vehicular homicide charge against Diego, and in exchange, the prosecution dropped the charge relating to Ms. Lopez-Vasquez. CP at 91.

In making Sentencing findings, Skagit County Superior Court Judge Michael Rickert ruled the "court makes findings as to the victim that she should be compensated by the crime victims fund," and further that, "Court finds Silveria Lopez-Vasquez, as well as Diego Montar Lopez

as a victim of this crime and should be eligible for crime victims compensation as such.” CP at 124 -128.

On behalf of her son, Ms. Lopez Vasquez filed a Crime Victims claim that was allowed. CP at 121-122. This paid for grief counseling for the family. The Department denied Ms. Lopez-Vasquez’s application for crime victim’s benefits to cover her own injuries on October 10, 2007, and, after reconsideration, on December 11, 2007 and January 28, 2008. CP at 93-94. Ms. Lopez-Vasquez appealed to the Board which affirmed the Department’s decision on October 9, 2008. CP at 86-87. Ms. Lopez-Vasquez’s Petition for Review of that decision was denied on November 6, 2008 and she filed an appeal in Superior Court. CP at 85 and 1. On October 13, 2010, the Honorable John Meyer entered an order upholding the denial of Ms. Lopez-Vasquez’s application despite concluding that the result was “patently unfair.” CP at 75. A further order was entered on December 23, 2010 and Ms. Lopez-Vasquez filed this appeal. CP at 76-83.

**E. SUMMARY OF ARGUMENT**

The facts are clear, Ms. Lopez-Vasquez was a victim of a crime at the hands of Mr. Marx. As a result of her vehicle being hit head on, she suffered significant personal injuries and lost her four-year old son. Based upon the actions of the State in its criminal prosecution, the findings

entered during those proceedings, the legislative intent behind the Act, and the facts of this case, Ms. Lopez-Vasquez's application for benefits should be granted.

**F. STANDARD OF REVIEW**

The standard of review on appeal remains the same as that for the superior court which acted as an appellate court in reviewing the administrative decision. Chemithon Corp. v. Puget Sound Air Pollution Control Agency, 19 Wn. App. 689, 577 P.2d 606 (1978). Issues of law, or mixed questions of law and fact are reviewed *de novo*. Devine v. Employment Sec. Dept., 26 Wn. App. 778, 614 P.2d 231 (1980). If the court erred in applying one of the standards under the standards outlined in RCW 34.05.570(3) then the decision should be reversed. Questions regarding the application of collateral estoppels are reviewed *de novo*. Christensen v. Grant County Hosp., 152 Wn.2d 299, 305, 96 P.3d 957 (2004).

**G. ARGUMENT**

RCW 7.68.070 states that, "Each victim injured as a result of a criminal act, including criminal acts committed between July 1, 1981, and January 1, 1983, or the victim's family or dependents in case of death of the victim, are entitled to benefits in accordance with this chapter." RCW

7.68.020(2) clarifies what is meant by a "criminal act" in reference to a motor vehicle accident and provides in relevant part:

1. The operation of a motor vehicle, motorcycle, train, boat, or aircraft in violation of law does not constitute a "criminal act" unless:
  - (a) The injury or death was intentionally inflicted;
  - (b) The operation thereof was part of the commission of another non-vehicular criminal act as defined in this section;
  - (c) The death or injury was the result of the operation of a motor vehicle after July 24, 1983, and a preponderance of the evidence establishes that the death was the result of vehicular homicide under RCW 46.61.520, or a conviction of vehicular assault under RCW 46.61.522, has been obtained: PROVIDED, That in cases where a probable criminal defendant has died in perpetration of vehicular assault or, in cases where the perpetrator of the vehicular assault is unascertainable because he or she left the scene of the accident in violation of RCW 46.52.020 or, because of physical or mental infirmity or disability the perpetrator is incapable of standing trial for vehicular assault, the department may, by a preponderance of the evidence, establish that a vehicular assault had been committed and authorize benefits;

Here, even if the State is not bound by the prior determination of the Skagit County Superior Court, when considering the Legislative intent of the Act, Ms. Lopez-Vasquez still qualifies under the subsection C of RCW 7.68.020(2)(i).

1. **The doctrine of collateral estoppel bars the State from asserting that Ms. Lopez-Vasquez is not entitled to benefits under the Act.**

On December 6, 2007, it was judicially determined that Ms. Lopez-Vasquez was a victim of a crime and entitled to benefits under the Act. The State acquiesced in those determinations and they should be bound to them. It is clear that Judge Rickert made the plea and dismissal of the vehicular assault case contingent on Ms. Lopez-Vasquez receiving crime victim's benefits.

The doctrine of collateral estoppel is intended to prevent the re-litigation of issues to aid judicial economy. Bordeaux v. Ingersoll Rand Co., 71 Wn.2d 392, 429 P.2d 207 (1967). The party seeking to enforce the rule must show that the issue decided in the prior adjudication “(1) must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea of collateral estoppel is asserted must have been a party or in privity with a party to the prior litigation; and (4) application of [the] doctrine must not work an injustice.” State v. Mullin-Coston, 152 Wn.2d 107, 114, 95 P.3d 321 (2004).

(a) **Issues were identical.**

In the criminal proceeding, the Court found that Ms. Lopez-Vasquez was a victim of a crime and entitled to benefits under the Act. CP at 124-128.

(b) **The prior proceeding ended in a final judgment.**

There is no dispute that the criminal proceeding ended in a final judgment. CP at 124-128. In that final judgment the Court determined that Ms. Lopez-Vasquez was a victim of a crime and entitled to benefits under the Act. CP at 124-128. Thus, the second prong of the collateral estoppel doctrine has been met.

(c) **Privity is present.**

Despite being different branches of the same Sovereign, where the same Sovereign is involved in both proceedings, privity is present between the branches. State v. Dupard, 93 Wn.2d 268, 273, 609 P.2d 961 (1980). Here, the State, by and through the Skagit County Prosecuting Attorney's office, approved the plea agreement for Mr. Marx and the finding that Ms. Lopez Vasquez was a victim of a crime who was entitled to benefits under the Act. Now the State, by and through the Department, asks to be relieved of their prior actions. The law does not allow it. Both branches are part of the same Sovereign, thus, privity is present.

(d) **Injustice would not occur if collateral estoppel is applied.**

In Superior Court, the State argued that applying collateral estoppel would work an injustice. CP at 18. That argument is based on their claim that the Court did not have jurisdiction to enter the judgment finding that Ms. Lopez-Vasquez is entitled to benefits as a crime victim.

CP at 18. Based on that argument, the State argues that the prior judgment is void. CP at 18.

The State's argument is similar to the argument it made in Thompson v. Dep't of Licensing, 138 Wn.2d 783, 982 P.2d 601 (1999), in which it attempted to argue that the legal conclusion in the prior proceeding was erroneous. The Court rejected that argument and denied the State's approach to collateral estoppel by stating, "[j]udicial economy and the desirability of avoiding inconsistent results militate against a rule stating the meaning of injustice in the context of collateral estoppel means a substantively incorrect prior decision." Thompson, 138 Wn.2d at 795 (emphasis added). The Court concluded that the State could not avoid collateral estoppel by asserting that the prior determination was incorrect.

Injustice has been further explained as only present where there was not a full and fair opportunity to litigate the same issue in the prior hearing. Shuman v. Dep't. of Licensing, 108 Wn. App. 673, 681-682, 32 P.3d 1011 (2001) (emphasis added). Where the parties in the prior proceeding recognize that the issue was important, the parties had a full and fair opportunity to litigate the case regardless of whether the issue was decided by a trial, motion, or settlement. Id. at 681.

There is no question that the State, through the prosecutor, recognized that Ms. Lopez-Vasquez's entitlement to benefits under the

Act was important in the prior proceedings. It was the lynchpin of Mr. Marx's plea agreement. It was so important that the Court took the time to hand write in language stating Ms. Lopez-Vasquez was entitled to benefits. The State agreed to the finding made in the criminal proceedings and did not later challenge it on appeal. The State cannot now challenge that ruling, their opportunity to do so has passed. They are bound by their agreement.

If there is any injustice, it would be in preventing Ms. Lopez-Vasquez from receiving benefits under the Act. She was not a party to the deal struck by the State in the criminal proceeding. Despite agreeing that she was entitled to benefits, the State now uses that same agreement deny her benefits. She should not be further penalized by proceedings that she had no voice in. Injustice would only occur if the State is not bound by the deal that it struck.

**2 A conviction for vehicular assault is not required to establish entitlement to benefits under RCW 7.68.020(2)(i)(c).**

Even if the State is not bound by the deal that it struck, the determination that a conviction of Mr. Marx for vehicular assault is required for Ms. Lopez-Vasquez to be entitled to benefits under the Act is inaccurate. Rather, the statute permits benefits be granted when a conviction is not obtained because the defendant driver is unavailable for

prosecution. RCW 7.68.020(2)(i)(c). In that situation, the State is permitted to grant applications where a preponderance of the evidence establishes that a vehicular assault occurred. Id.

Here, based upon the State's plea bargain resulting in dismissal, Mr. Marx was never available to stand trial on the vehicular assault charge. Thus, the question for the Department should have been whether the facts of Ms. Lopez-Vasquez's case demonstrate, by a preponderance of the evidence, that she was a victim of a vehicular assault. The elements for vehicular assault and vehicular homicide differ only in degree of harm to the victim. Since Mr. Marx was convicted, beyond a reasonable doubt, of vehicular homicide against Diego Lopez, clearly a preponderance of the evidence standard is met as to Ms. Vasquez-Lopez. The harm he caused to both Diego Lopez and Silveria Lopez-Vasquez arise from the same incident. Thus, Ms. Lopez-Vasquez is a victim of a "criminal act" as defined by RCW 7.68.020(2)(i)(c) and is entitled to benefits under the Act.

### **3 Legislative Intent of the Crime Victim's Compensation and Assistance Act.**

Any decision in this case should be viewed in light of the Legislative intent behind the Act, as is noted in RCW 7.68.035:

**Findings -- Intent -- 1996 c 122:** "The legislature finds that current funding for county victim-witness advocacy programs is inadequate. Also, the state crime victims compensation program should be

enhanced to provide for increased benefits to families of victims who are killed as a result of a criminal act. It is the intent of the legislature to provide increased financial support for the county and state crime victim and witness programs by requiring offenders to pay increased penalty assessments upon conviction of a gross misdemeanor or felony crime. The increased financial support is intended to allow county victim/witness programs to more fully assist victims and witnesses through the criminal justice processes. On the state level, the increased funds will allow the remedial intent of the crime victims compensation program to be more fully served. Specifically, the increased funds from offender penalty assessments will allow more appropriate compensation for families of victims who are killed as a result of a criminal act, including reasonable burial benefits." [1996 c 122 § 1.]

Clearly the intent of the Act is to provide benefits for crime victims and their families. Here, there is no doubt that a vehicular homicide occurred when Ms. Lopez-Vasquez's son was killed. In the same accident, vehicular assault was committed against her. The legislature intended for people who have been victimized, as Ms. Lopez-Vasquez has, to receive benefits under the Act. She should not be denied on a plea bargain of the State's making over which she had no control. The Department denied her claim, because no *conviction* was obtained in regards to her claim. However, Ms. Lopez-Vasquez was not consulted regarding Mr. Marx's plea bargain. In effect, her rights to benefits were

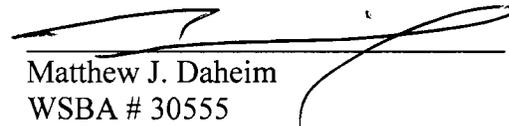
bargained away. This was recognized by the Sentencing Judge, which led to his additional findings in an effort to protect her rights.

**H. CONCLUSION**

Ultimately, this Court should find that it was error to uphold the denial of Ms. Lopez-Vasquez's application for benefits under the Act. Considering the Legislative intent, Sentencing Judge's comments, and all facts of this case, Ms. Lopez-Vasquez is a victim of a crime and is entitled to benefits.

Based on the foregoing, the Plaintiff respectfully requests that this Court find that she is a victim of a crime and is entitled to benefits under the Act.

Respectfully submitted this 21<sup>st</sup> day of March, 2011.

  
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WSBA # 30555  
Attorney for Claimant

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CERTIFICATE OF SERVICE

The undersigned certifies that under penalty of perjury under the laws of the State of Washington that on the below date I caused the Appellant's Opening Brief to be served the foregoing document on:

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