

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 18

WCC No. 9705-7747

BARBARA BIRCH

Petitioner

vs.

LIBERTY MUTUAL FIRE INSURANCE COMPANY

Respondent/Insurer for

CUT BANK IGA STORE

Employer.

ORDER DISMISSING WITH PREJUDICE

Summary: Petitioner asked the WCC to find that she was an employee of a grocery store when she was injured while demonstrating food products to store customers. The workers' compensation insurer moved to dismiss, arguing, among other things, that claimant had sued the store for negligence, successfully resisted a motion for summary judgment by stating under oath that she was an independent contractor, not an employee, and recovered \$60,000 in settlement of her tort claim.

Held: The doctrine of judicial estoppel precludes petitioner from taking a position in this proceeding contrary to the position taken in the tort case. Motion to dismiss with prejudice granted.

Topics:

Estoppel and Waiver: Judicial Estoppel. The doctrine of judicial estoppel precludes petitioner from asserting she is was an employee when injured in a workers' compensation proceeding where she sued the alleged employer for negligence, successfully resisted a motion for summary judgment by stating under oath that she was an independent contractor, not an employee, and recovered \$60,000 in settlement of her tort claim.

Introduction

¶1 Petitioner, Barbara Birch (Birch), seeks judgment determining that she was an employee of Cut Bank IGA Store (IGA)⁽¹⁾ when she was injured on April 28, 1994. At the time of the injury, she was demonstrating food products to store customers.

¶2 Following her injury, Birch sued IGA for negligence. IGA responded that she was its employee and that her claim was therefore barred under the exclusive remedy doctrine of the Workers' Compensation Act, section 39-71-411, MCA. Birch insisted she was an independent contractor, successfully opposing IGA's motion for summary judgment based on the employment issue, and then persuaded IGA to pay \$60,000 to settle her tort claim. She then filed the present petition to collect workers' compensation benefits.

Submission of Case on Agreed Facts and Exhibits

¶3 Birch and IGA have submitted this case for decision based on an Agreed Statement of Facts and an agreed set of exhibits. The exhibits consist of copies of various pleadings, motions, and other documents, including a deposition of Birch, from the district court litigation.

Issues

¶4 Based on the agreed facts and exhibits, Birch and IGA submit the following issues for the Court's determination:

1. Whether the claimant was an employee of Cut Bank IGA when injured.
2. Whether claimant is estopped or collaterally estopped from claiming workers' compensation benefits.
3. Whether the claimant's claim for workers' compensation benefits is barred by the doctrine of judicial admissions and/or judicial estoppel.
4. Whether the claimant's claim for workers' compensation benefits is barred by the holding in *Torres v. State of Montana*, ____ Mont. ____, ____ P.2d ____, 52 St.Rep. 833 (1995) and/or the election of remedies.

(Stipulation to Issues.)

Discussion

¶5 The Court finds the judicial estoppel argument to be dispositive. The doctrine precludes a party from taking a position or asserting a fact in one judicial proceeding and thereafter taking an inconsistent position in a subsequent proceeding. *Fiedler v. Fiedler*, 266 Mont. 133, 139, 879 P.2d 675, 679 (1994). The nature of the doctrine was set out in *Rowland v. Klies*, 223 Mont. 360, 368, 626 P.2d 310, 316 (1986), and was repeated in *Brown v. Small*, 251 Mont. 414, 418, 825 P.2d 1209, 1212 (1992), as follows:

Judicial estoppel may arise when a person has taken a position or asserted a fact under oath in a judicial proceeding contrary to the position he is taking in the present litigation ... The rule's purpose is to suppress fraud and prevent abuse of the judicial process by deliberate shifting of positions to suit the exigencies of a particular action, and it will not be applied when the previous act or statement is uncertain or based on undetermined facts, but only when it is clear and certain. (Citations omitted.) [Emphasis in original.]

¶16 Judicial estoppel applies not just to facts a party presents under oath, but also to positions taken. "Judicial estoppel is equally applicable to a party like Brown who seeks to take a position contrary to his pleadings in an earlier judicial proceeding." *Brown*, 251 Mont. at 418, 825 P.2d at 1212. In *Fiedler* the Supreme Court elaborated that a party cannot take the opposing viewpoint when he has induced another to stipulate to his position and drop his arguments for that opposing position.

¶17 Four elements must be shown. Those elements are:

- 1) the estopped party must have knowledge of the facts at the time the original position is taken;
- 2) the party must have succeeded in maintaining the original position;
- 3) the position presently taken must be actually inconsistent with the original position; and
- 4) the original position must have misled the adverse party so that allowing the estopped party to change its position would injuriously affect the adverse party.

Fiedler, 266 Mont. at 140, 879 P.2d at 679-680. All elements are met in the present case.

¶18 Birch's tort action against IGA was predicated on her being found to be an independent contractor. If she were found to be an employee, then the exclusive remedy provision set forth in section 39-71-411, MCA, barred her action and precluded her recovery of damages.

¶19 Birch was well aware of the exclusive remedy provision. IGA raised it initially in a motion to dismiss (Ex. 3B) and then renewed it in a motion for summary judgment (Ex. 3J) which was supported by an affidavit setting forth facts consistent with an employment relationship between IGA and Birch. (Ex. 3E.) Birch vigorously resisted IGA's motion and countered it with her own affidavit which, on its face, was clearly calculated to show that she was an independent contractor, not an employee.⁽²⁾ (Ex. 3F.)

¶10 In her brief opposing summary judgment, Birch expressly denied that she was IGA's employee. There was no equivocation in the statement:

However, Barbara (Birch) was not at that time [the time of the accident] an employee of Cut Bank IGA store and was not then acting within the course and

scope of any employment for the Cut Bank IGA food store, and there is therefore no bar to this proceeding.

(Ex. 3K at 1-2.) Birch proceeded to support her contention with sworn statements she made in her affidavit, her deposition and answers to interrogatories. She characterized her sworn statements as proving that she "was at no time an employee of the Cut Bank IGA food store" (*Id.* at 7, underlining in original) and even went on to argue that the IGA was estopped from contending that she was an employee.

¶11 She was successful in defeating IGA's motion for summary judgment. The district judge denied the motion, holding:

The Court concludes the question whether Plaintiff was an employee or independent contractor on the date of her injury is inherently a question of fact to be resolved by the trier of fact. A consideration of the documentation submitted in support of Defendant's request does not convince this Court all material issues of fact regarding this question have been removed which would entitle Plaintiff to recover on that question.

(Ex. 3N at 2.)

¶12 Birch's statements under oath, and her assertions concerning the legal effect of those statements, are sufficient to satisfy the first estoppel element. While estoppel does not apply when facts are uncertain or undetermined, *Rowland*, 223 Mont. at 368, 726 P.2d at 316, there was no uncertainty as to the facts underlying the employment dispute. This case is distinguishable from *Caekaert*, a case in which the claimant testified that he had been forced to quit working on account of back pain. In *Caekaert* the Supreme Court found that claimant's testimony was not inconsistent with a subsequent claim for temporary total disability benefits based on carpal tunnel syndrome. There was no inconsistency because at the time claimant testified concerning his back he was describing his condition as it existed at that time and the condition was not necessarily permanent. The Supreme Court wrote:

Although we agree with the above stated principles of judicial estoppel, that doctrine does not apply here. *Caekaert* did not offer inconsistent testimony in a previous case. He previously claimed that his back pain was so severe that it forced him to quit working for Star Service and left him with no earning capacity. However, *Caekaert* had injured his back and was merely describing his physical condition following that injury. ***Caekaert* did not, and because he is not a medical professional, could not, anticipate the duration of his disability from that injury.**

Caekaert, 268 Mont. at 116, 885 P.2d at 502 (emphasis added.) This case is different. The facts were frozen as of the time of injury.

¶13 The second element is satisfied. It was unnecessary that Birch obtain a judgment against IGA. *Traders State Bank of Poplar v. Mann*, 258 Mont. 226, 243, 852 P.2d 604, 615 (1993). It was sufficient that she was "at least successful in arguing . . . [her] original position against the party asserting the estoppel." *Id.* Birch's statements prevented IGA from obtaining summary judgment. She thereby induced IGA to drop its arguments and settle the case in the amount of \$60,000, a substantial sum which contradicts any characterization of the settlement as for "nuisance value."

¶14 The third element is satisfied. Birch's present claim that she was an IGA employee is absolutely contrary to her position in district court that she was not an employee. Her argument that she was uncertain of her status is disingenuous. She vigorously resisted all attempts to characterize her as an employee.

¶15 Finally, the fourth element is satisfied. In the face of Birch's assertion of independent contractor status, and its loss of the motion for summary judgment, IGA paid a substantial settlement and dropped its pursuit of the exclusive remedy defense.

¶16 The fact that IGA, rather than its workers' compensation insurer, was the defendant in the district court action does not preclude application of the estoppel. The situation here is no different than in *Brown*. In that case, the plaintiff's attorneys commenced an action against plaintiff's insurer following fire damage to plaintiff's property. They settled the case. Subsequently, they discovered that there was an additional endorsement providing additional coverage of which they were unaware at the time of settlement. They brought a second action on behalf of plaintiff, alleging that the insurer violated its duty to its insured by failing to disclose the additional coverage. Based on the allegations, they procured an additional \$75,000 settlement for plaintiff, who displayed his gratefulness by suing the attorneys for malpractice and alleging that they were negligent in failing to discover the additional coverage in the first place. Even though the allegations in the second action were directed at a third party, i.e., the insurer, the Supreme Court held that plaintiff was judicially estopped from pursuing a legal malpractice action:

After accepting the benefits of that allegation [in the second action], Brown cannot now change his position and allege that negligence by Small and Doubek [his attorneys] was the real reason they did not discover the mid-term endorsement sooner.

251 Mont. at 418-19, 825 P.2d at 1212.

¶17 Having found that Birch is judicially estopped from seeking workers' compensation benefits, it is unnecessary to consider the other issues raised by the parties.

JUDGMENT

¶18 1. The petition is **dismissed with prejudice**.

¶19 2. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶20 3. Any party to this dispute may have 20 days in which to request a rehearing from this Order Dismissing with Prejudice.

DATED in Helena, Montana, this 3rd day of March, 1998.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Cameron Ferguson

Mr. Larry W. Jones

Date Submitted: December 4, 1997

ADDENDUM

BARBARA BIRCH being first duly sworn deposes and says,

1. For approximately four years prior to April 30, 1994, I worked at the Cut Bank IGA store as a demo person demonstrating food products to store customers. For the most part, I worked on Fridays and Saturdays, with an occasional Thursday, however I did not work every Friday and Saturday, but only when demo work was available.

2. During this time period, my work fell into three general categories as follows:

a. I demonstrated food products for individual food companies such as Skolniks, Eddy's Bread, Shelby Distributors, Pet Ritz, Montana Cheese, etc.

b. I demonstrated different food products for Samplers' Plus which is a company which arranges demo work for various individual companies.

c. I demonstrated food products for the Cut Bank IGA store.

3. I would estimate that about 75% to 80% of the time I was demonstrating food products for individual food companies or Samplers' Plus as opposed to the Cut Bank IGA store.

4. On April 30, 1994, the date of the accident, I was demonstrating food products for Skolniks, not the Cut Bank IGA store.

5. No matter for which company I was demonstrating food products, I was paid in cash from a Cut Bank IGA store promotion fund. When I was demonstrating products for Samplers' Plus or any other food company, then Samplers' Plus or such other food company reimbursed the Cut Bank IGA store for whatever sum they paid

to me. In such event, Sampler's Plus or such other food company paid for my services.

6. I had no set schedule to demonstrate food products. Sometimes Samplers' Plus would ask me to demo work, sometimes representatives from the other food companies would ask me, and sometimes a Cut Bank IGA store representative would ask me. I was free to choose for whom I would demonstrate food products. If I did not wish to work any particular weekend, I did not have to do so. I was not "on call". If no demo work was available, then I would not be able to work.

7. I wish to respond to certain of the statements made in Russ William's affidavit of October, 1995 as follows:

a. With reference to his statements in paragraph 2 of his affidavit, IGA did not set the dates and hours. I suggested the days of the week and hours to work and IGA agreed. I worked when work was available and I wished to work, as I have already stated. I rarely worked on Thursdays.

b. With regard to his statement in paragraph 3 of his affidavit, the other companies I have mentioned above or an IGA employee would ask me if I wanted to do a demo on a particular weekend and if I was able to do it, I would. I worked the same hours each time, so there was no question about hours.

c. With regard to his statement in paragraph 4 of his affidavit, the food company asking me to do the demo would supply the product, or if IGA supplied the product then the food company would reimburse IGA for the cost of the product supplied. Often the food company asking me to do the demo would supply the equipment. For example, Eddys would supply a toaster, and for a table I generally used milk crates belonging to a milk supply company.

d. With regard to his statement in paragraph 5, no one instructed me how to do the demos. Obviously, since I was working in the IGA store, which is private property, IGA had a certain element of control. If they didn't want me to do a demo in their store, they obviously had the power to tell me to leave their store, just like they could tell anyone else to leave.

e. With regard to his statement in paragraph 9, I don't believe that IGA had the right to "fire" me. They could decide not to ask me to do a demo for them, and they could keep me out of their store so I could not do a demo for any other company.

8. When I demonstrated food products for Samplers' Plus or some other food company, they would tell which product to demonstrate. When I demonstrated food products specifically for IGA, an IGA employee would tell me what product to demonstrate, although I could change of my own decision to another product if the first one wasn't selling.

9. On April 30, 1994, I was demonstrating bagels and cream cheese for Skolniks. I was using the Eddys' toaster to cook the bagels and the milk company crates as a table.

10. The Defendant has referred to a Columbus Hospital record dated 7/25/94. I note that the hospital worker completing the form has typed "IGA" in the blank marked "employer". When I went to the hospital I explained that I was a demo worker and that I worked at the IGA store. I did not say that my employer was IGA. The hospital worker apparently chose to list IGA as my employer, but that was not pursuant to my direction.

11. I did not wear an IGA store uniform or a store name tag. I was free to wear my own clothes. I was not asked to attend store employee meetings. To the best of my knowledge, I was not listed on any IGA paperwork as an employee. IGA provided no employee benefits for me. They withheld no taxes or any other kind of withholdings from their cash payments to me.

DATED this 14th day of March, 1995.

/s/ Barbara Birch

(Ex. 3F.)

1. The store is legally known as Supervalu, Inc., but will be referred to hereinafter as "IGA".
2. The text of the affidavit is set forth in an addendum to this decision.