No. 30243—*Douglas Brown, Administrator v. City of Wheeling*

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McGraw, Justice, dissenting:

I disagree with the majority's decision to affirm summary judgment granted in favor of the City. The City, when it saw an advantage to be gained, initially took the position that Mrs. Brown was not acting within the course of her employment at the time of her death, and thereby denied appellant the survivor benefits afforded by W. Va. Code § 8-22-9(a)(1) (1987) (1998 Repl. Vol.). Later, when the downside of this stance became apparent, and after Mrs. Brown's estate and its lawyers had expended considerable time and resources in commencing the present action, the City chose to assert the diametrically opposite position concerning Mrs. Brown's status in order to claim immunity under the Workers' Compensation Act. I cannot think of a more appropriate circumstance for application of the doctrine of estoppel.

Estoppel "precludes a person from maintaining a position or attitude inconsistent with another position or attitude which is sought to be maintained at the same time or which was asserted at a previous time." 31 C.J.S. *Estoppel and Waiver* § 121 (1996). This court has indicated that "'[e]stoppel applies when a party is induced to act or to refrain from acting to her detriment because of her reasonable reliance on another party's misrepresentation or

concealment of a material fact.'" *Potesta v. U.S. Fidelity & Guaranty Co.*, 202 W. Va. 308, 315, 504 S.E.2d 135, 142 (1998) (quoting syl. pt. 2, in part, *Ara v. Erie Ins. Co.*, 182 W. Va. 266, 387 S.E.2d 320 (1989)); *see Shelton v. Johnson*, 82 W. Va. 319, 322, 95 S.E. 958, 959 (1918) ("'Where one by his words or conduct willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.'") (citation omitted).

Appellant relied on the original statement from the City that the death did not occur in the course of Mrs. Brown's employment. Had the City initially taken its current position—that Mrs. Brown was in fact acting within the course of her employment at the time of the accident—then appellant in all likelihood would have filed a claim under § 8-22-9(a)(1). The City therefore should be estopped from altering its position after appellant detrimentally relied upon it in choosing to initiate the present litigation. Application of the principle of equitable estoppel "amounts to a preclusion in law which prevents a litigant from alleging or denying a fact, because of his previous inconsistent conduct or statements." *Kimble v. Wetzel Natural Gas Co.*, 134 W. Va. 761, 769, 61 S.E.2d 728, 733 (1950) (citation omitted); *see also Petition of Shiflett*, 200 W. Va. 813, 820 n.26, 490 S.E.2d 902, 909 n.26 (1997) (noting that the doctrine of quasi estoppel operates to "'preclude[ ] a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken by him'") (quoting 31 C.J.S. *Estoppel and Waiver* § 120, at 543).

Although the majority rightly acknowledges the fact that the City presented "conflicting positions," and states that "the parties and the circuit court, as well as other governmental agencies, should not impede appellant's right to secure entitled benefits" under § 8-22-9(a)(1), I nevertheless disagree with the decision to affirm the summary judgment granted in this case. The City simply should not be permitted to set appellant on an expensive and time-consuming course, and then attempt to block that path by later claiming statutory immunity.

I therefore respectfully dissent.