



For a fully searchable and synchronized transcript and oral argument video, go to the TX-ORALARG database on Westlaw.com.

This is an unofficial transcript derived from video/audio recordings

Supreme Court of Texas.  
Liana Leordeanu, Petitioner,  
v.  
American Protection Insurance Company, Respondent.  
No. 09-0330.

April 15, 2010.

Appearances:

Bradley Dean McClellan, The Law Offices of Richard Pena, P.C., Austin, TX, for petitioner.  
Jack W. Latson, Flahive, Ogden & Latson, Austin, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Justice Nathan L. Hecht, Justice Harriet O'Neill, Justice Dale Wainwright, Justice David M. Medina, Justice Paul W. Green, Justice Phil Johnson, Justice Don R. Willett, Justice Eva Guzman.

CONTENTS

ORAL ARGUMENT OF BRADLEY DEAN MCCLELLAN ON BEHALF OF THE PETITIONER

ORAL ARGUMENT OF JACK W. LATSON ON BEHALF OF THE RESPONDENT

REBUTTAL ARGUMENT OF BRADLEY DEAN MCCLELLAN ON BEHALF OF PETITIONER

JUSTICE NATHAN L. HECHT: The Court is ready to hear argument in 09-0330, Leordeanu v. American Protection Insurance Company.

MARSHAL: May it please the Court, Mr. McClellan will present argument for the petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF BRADLEY DEAN MCCLELLAN ON BEHALF OF THE PETITIONER

ATTORNEY BRADLEY DEAN MCCLELLAN: May it please the Court, my name is Brad McClellan and I want to thank the Court for taking up this critical issue

in a workers compensation matter, a traveling salesperson's. Liana Leordeanu, it's a tough pronunciation, has been waiting over seven years to get her first payment of workers compensation benefits in this matter. This and I know this Court's dealt over the years with all kinds of workers compensation matters and this case really was decided back probably in the 1930s. It was at best in TEIA v. Smith case when this Court acknowledged there are street risks, as they called it the time, or I'll call it the traveling employee doctrine inherent risks of employment. She was traveling.

JUSTICE NATHAN L. HECHT: Do you think the 1957 statute just codified existing Court law?

ATTORNEY BRADLEY DEAN MCCLELLAN: Yes and I think it was even clarified a little bit more in 1989 and with the 1993 codification when they made it even, I wouldn't suggest this Court even a little bit more limited with the exceptions and the exceptions that were codified in the change do not even affect this case, I believe. I don't think this Court even has to reach the exceptions and I will get to that in a moment. I want to concede in a typical commuter case when you go to or from our office in our personal car, you're not in the course and scope of employment. This isn't a commuter case. The coming-and-going rule doesn't apply. The dual-purpose doctrine doesn't apply because there is no personal, there was not a single personal matter, personal purpose involved in Ms. Leordeanu's travel on the day in question, March 21, 2003, when she suffered severe injuries in a motor vehicle accident.

JUSTICE HARRIET O'NEILL: And you don't pin that argument on the use of a company car?

ATTORNEY BRADLEY DEAN MCCLELLAN: The use of the company car is the question too and, Judge, if the state of Texas provided you cars to get to and from this building and they paid for all the costs and they paid for the mileage, I believe that's enough and that's the exception because the exceptions to the general rule is transportation to and from the place of employment is not included unless--

JUSTICE EVA GUZMAN: Well what about like for police officers. They're provided cars and to and from work is not necessarily covered even though some of them have vehicles.

ATTORNEY BRADLEY DEAN MCCLELLAN: That is why this case even affects especially like BPS troopers who are provided vehicles out in a rural area and they actually start their jobs when they leave their house, their apartment, their ranch. They start the job when they get in that car and they head out on the streets, they start their job. And that's what so different about this case is why you don't get there because Ms. Leordeanu's office was her home. Her principal place of employment and it was conceded at the jury trial by the sales operation director for the employer who came in from New Jersey. Not a single employee in the state of Texas had an office separate from their place of residence and that's where they worked out of, but in more effect, even greater in this case, like the BPS troopers, Justice, she spent most of the time on the road and on the day

in question, she had made visits with 11 different doctors and pharmacies, ending it with an employer-sponsored event at a restaurant and I don't see how there can be any distinction from the time you leave your office home in the company-provided car where the mileage, the gas is paid for, the repairs are paid for and the insurance was even paid for.

JUSTICE DAVID M. MEDINA: At some point, your work and your business stops. It doesn't matter if you have a home office, a company car, you're out entertaining clients. At some point, the business of the company stops and your personal interests or your personal business takes over. That's just clear. So tell me about this continuous coverage.

ATTORNEY BRADLEY DEAN MCCLELLAN: Yes, in the continuous coverage I've briefed and I've obviously argue it sensibly. I think it's the correct application of law as this Court's decision in Shelton. In Shelton, I recall it was a truck driver who was injured crossing the street to eat while he was staying overnight in I believe it was Dallas or Ft. Worth and under that principal, you're covered once you get outside your employment activities. Ms. Leordeanu in this case was still in her employment activities in the company car, driving back to the storage locker.

JUSTICE EVA GUZMAN: But didn't that include a personal purpose. I think the Orgon case and sort of that line of cases, they did not include any personal purpose and here, she had to get home regardless.

ATTORNEY BRADLEY DEAN MCCLELLAN: Very good question. Orgon case was a personal comfort doctrine was actually extended to the traveling employees and in Orgon, the issue dealt with we have to go eat. That's a personal reason, but because of the travel and because he was away from home and he was on the road, he's covered crossing that street even though he's not even driving the truck.

JUSTICE EVA GUZMAN: But if he had been on the way to visit a relative in that city, he would not have been covered even though he was going to go eat and he was in the city and he was on business, correct?

ATTORNEY BRADLEY DEAN MCCLELLAN: Correct, but he would have to go eat. Now I want to talk to I want to directly address, because I think that is a total mischaracterization of the law from the respondent to try to characterize traveling home from a business trip is personal. Your outbound segment's not personal nor is your inbound segment and if I travel to a trial in Houston and I have or a hearing in Houston and I get up at 6 in the morning. I get in my car. I leave from my house and I get back at midnight that night, I am covered as long as I've engaged in work purposes the entire time, especially.

JUSTICE DON R. WILLETT: But the record, does the record show what your client was doing before the outbound segment? Whether she was working in her home office and then went to the work dinner and took the work side trip and back to the work office?

ATTORNEY BRADLEY DEAN MCCLELLAN: The only evidence in the record is it was a business travel day, her typical day. She was required to be out on the

road and they suggested from even 8 to 5, 9 to 5. There were two different witnesses and she's a pharmaceutical sales rep. That was her job and she left that morning. She went by the storage locker, picked up the supplies and necessary pamphlets. It's a climate-controlled storage locker. If you want to consider a place of employment, maybe that's another place of employment besides her home and she traveled around to pharmacies and doctors' offices that day, including the business dinner that night that the employer provided and sponsored for several doctors and their staff at La Feria Restaurant.

JUSTICE DON R. WILLETT: Does the record show what she was doing before she left for the work dinner?

ATTORNEY BRADLEY DEAN MCCLELLAN: She came from Bastrop straight to the work dinner from doctors' offices in Bastrop, yes [inaudible].

JUSTICE DALE WAINWRIGHT: Is it your argument that any time an employee with a home office leaves a work dinner in the evening headed toward home that that trip home is a covered trip, that that's in the scope portion scope any time that happens.

ATTORNEY BRADLEY DEAN MCCLELLAN: I believe yes and it goes back to the Fritzmeier case and this Court affirmed the commission of appeals case back in 1938, I believe, and the real issue is unless there's a deviation and I would concede if Ms. Leordeanu decided after the business dinner to start and there was testimony on the record she was going to Fredericksburg on Saturday, surely personal. If she had driven from there to Fredericksburg on a purely personal purpose, that would be right and I want to -

JUSTICE DALE WAINWRIGHT: Well let's put deviation to the side. There's no evidence of a deviation here.

ATTORNEY BRADLEY DEAN MCCLELLAN: No deviation.

JUSTICE DALE WAINWRIGHT: Unless you consider the stop at the work file storage location deviation. What if she's heading back to her home apartment in the evening and is intending to go directly to sleep and do no work. Does that change anything in your analysis?

ATTORNEY BRADLEY DEAN MCCLELLAN: Not for a traveling salesperson. The only reason she went out that was for business purposes and you don't change the character of the trip, get back to your question, is determined by the purpose of the trip. If I got to a, if I go talk to a CLE courts in Houston again, that's considered maybe a business trip. If I'm taking my teenage daughters to a dance competition in Houston, it's a personal trip and it's personal coming and going.

JUSTICE DALE WAINWRIGHT: If the dinner were personal, if your client's dinner that evening were personal and then she was going home and had the wreck, would your argument be the same that she's covered?

ATTORNEY BRADLEY DEAN MCCLELLAN: I would think she's still covered unless

it's a substantial deviation and that's where you get back to the personal comfort and what was addressed in Shelton. [inaudible]

JUSTICE DALE WAINWRIGHT: What if she went out to have drinks with friends after the dinner? Personal dinner, drinks with friends, no alcohol causing involvement in causing the accident, but after drinks with friends, then goes home, still covered?

ATTORNEY BRADLEY DEAN MCCLELLAN: That gets tougher and that's what--

JUSTICE DALE WAINWRIGHT: She has a work place, a work office in her apartment.

ATTORNEY BRADLEY DEAN MCCLELLAN: And that's where you look at the facts of the case and it was how much was her deviation, and was it on the way, and that kind of is where you, whether you apply the continuous coverage or not and the continuous coverage has actually covered people when they've been traveling and albeit this case is a more, is a narrower case. She's traveling just around her territory. No question she's in her business territory, which encompassed Austin and the Bastrop area before coming back in. I think that gets to be a closer question. I think then you would at least have some facts of a personal purpose when they're meeting the clients. In the Shelton case, this Court and it may be dicta acknowledged going to and from work has an employee, I mean it's for employer. It's for the employer you go to work. You don't go to work to see your kids perform. You don't go to work to meet friends so you all are probably friends, you don't go to work except for business reasons and in Shelton, there was a paragraph and it talks about you're furthering the affairs of the employer by just going to work.

JUSTICE NATHAN L. HECHT: But it's not covered though.

ATTORNEY BRADLEY DEAN MCCLELLAN: Not the normal, not you or I when we're commuting to our fixed place of employment. Ms. Leordeanu's fixed place of employment and it says the definition, the exception is travel to and from the place of employment, but the general definition covers the term includes before you ever get to are the exceptions, which I don't think you reach. The term includes an activity on the premises of the employer or at other locations. [inaudible]

JUSTICE DAVID M. MEDINA: So are we doing a carve out or special rule here for home offices and, I mean, this seems to be a very narrow situation, but you're asking for a broad interpretation?

ATTORNEY BRADLEY DEAN MCCLELLAN: No carve-out whatsoever and this follows the line of cases going back to the Benkin case. In 1922, this Court recognized it was the inherent risk of employments in the access doctrine, the Smith v. TI case recognized the street risks and then it was followed in the Jecker case, which involved a salesman and then Meyer, in traveling the public streets and in all those cases. In Meyer and Jecker involves someone using their own personal automobile but because their employment required them to travel as their job, this Court considered them within

the course and scope of employment and there are a number of cases. I certainly don't want to exclude the traveling salesperson that doesn't get paid or isn't provided a car, but their job is go out and sell and they may or may not make money, but they're in their car and their business out there is an employer-related business.

JUSTICE HARRIET O'NEILL: Would it matter if she had said I'm going home to go to sleep rather than to go do some more work?

ATTORNEY BRADLEY DEAN MCCLELLAN: Not when she's returning from the what I call the inbound leg of a business segment. I jokingly thought you look at Southwest Airlines employees, pilots, when they're flying back. Their case is based on she'd have taken the same route home because her home is her office, but what if she'd eaten of a restaurant in north Austin. She'd have taken a route home. What if she was in San Antonio, Houston, Dallas on business. This is where her business was that determined her route in this case and it's the business purpose of the travel.

JUSTICE PHIL JOHNSON: So the only time she would be not in the course of employment is when she is in her own home, at her work desk, shuts it down, turns the light off. She's walking to the bedroom, trips and falls. Then she's not in the course of employment.

ATTORNEY BRADLEY DEAN MCCLELLAN: Those are very interesting. That case will be here, I'm sure, eventually, but I would probably agree that once you're not actually working at your work.

JUSTICE PHIL JOHNSON: But any travel outside her house is going to be covered until she gets in and says I'm through with my office and it's all completely subjective to her. I'm through with my office work once I'm in the house, not going to be doing it. I'm going to bed now [inaudible]. I mean, that's the only time she's not covered.

ATTORNEY BRADLEY DEAN MCCLELLAN: It depends on the facts, Justice. If her travel that day is business, which most of the work days were and I want to distinguish that versus her going to like the record she was going to go to Fredericksburg the next day if she hadn't been severely injured, but yes, and it's just like a baker living above the bakery and he needs to make a delivery of a cake one day to a wedding and he drives the cake over to the wedding. Until he gets back to the bakery, unless he goes out on a deviation, a substantial deviation, he should be covered delivering the cake and on the return trip back.

JUSTICE PHIL JOHNSON: Even though once he delivers the cake, it's 12:30 in the morning and he's tired and he's going home to go to sleep.

ATTORNEY BRADLEY DEAN MCCLELLAN: But it was the business purpose for the travel.

JUSTICE PHIL JOHNSON: I know, that's why I'm saying in your position, as long as it's, as long as he's still going back to his business place, he's covered.

ATTORNEY BRADLEY DEAN MCCLELLAN: Yes.

JUSTICE PHIL JOHNSON: 'til when in this case? Until he locks the door and walks up the steps?

ATTORNEY BRADLEY DEAN MCCLELLAN: Probably until he, yes, until he departs, clearly departs the business travel that day. And I mean, this case goes all the way from the individual employee who travels sporadically who is paid whether they are paid or not, I think it makes a difference under the transportation to and from the place of employment, but when it becomes travel, you don't reach those exceptions under the definition and under the cases decided by this Court. I want to briefly address, you know, I, and it may surprise this Court, I think this case is so clear because she is a traveling employee. It's an inherent risk of her employment to be in an auto accident in the company car when she's out on a business trip. Coming, going in the middle segments or anything else, I know this Court addressed bad faith yesterday, but for Chapter 416. I think Ms. Leordeanu would have a great bad faith because Chapter 416 prevents her because the administrative judge brought into the dual-purpose argument that it was personal once she turned towards home. There was nothing personal about the trip that day. It was all business and what carriers can do and they did in this case, a carrier can get an order to suspend benefits and a carrier, just like a worker, can go get try and get an order quickly to start benefits. A carrier's got a right to stop benefits and any carrier that's worried and what happened in this case and the carrier could actually get an early determination and then it puts the worker without benefits now. It's over seven years since the date of injury. I think this Court's interpretation of course and scope of employment before the exceptions are written in were clear and I think this Court, I think it's even clearer now with the codification of the labor code.

JUSTICE NATHAN L. HECHT: Any other questions? Thank you, Counsel. The Court's ready to hear argument from the respondent.

MARSHAL: May it please the Court. Mr. Latson will present argument for the respondent.

ORAL ARGUMENT OF JACK W. LATSON ON BEHALF OF THE RESPONDENT

ATTORNEY JACK W. LATSON: May it please the Court, much has been said about the complicated nature of the course and scope definition contained in the act. I propose today that it's a simple, logically ordered statute that one simply looks at the big picture, focuses not on the trees, but the entire forest, which is contained in the statute.

JUSTICE NATHAN L. HECHT: Just before you get to that, do you think that the 1957 enactment did anything but codify what the case law was prior to that?

ATTORNEY JACK W. LATSON: Absolutely did, Your Honor. This Court considered that enactment the 1957 law and the first case it considered of course and scope when traveling in the case of TGI v. Bottoms and this Court clearly said at that time that the intent of the legislature at the time of the

enactment of the '57 statute was a circumscribed, the purview of the course and scope definition. What is overlooked here, I think, and the argument by my distinguished counsel, opposing counsel is that in 1957, the statute added the dual-purpose doctrine, which is implicated by the facts in this case.

JUSTICE NATHAN L. HECHT: But it had been in the case law.

ATTORNEY JACK W. LATSON: Pardon?

JUSTICE NATHAN L. HECHT: It had been in the case law.

ATTORNEY JACK W. LATSON: It had been in the case law, but it wasn't clearly prescribed in the case law as an exclusion where a grant of coverage otherwise applied and I think that we have lost in the course of integrating that concept the idea that it operates as an exclusion when coverage would otherwise apply to the case. That's why I say the structure of this particular statute is like the structure of an insurance policy. The general section that precedes the two subsections is a grant of coverage. It prescribes the boundary of course and scope. It applies two tests for purposes of simplicity of the structure.

JUSTICE DAVID M. MEDINA: Okay, well the policy giveth and the policy taketh away. Where is the coverage taken away here in this statute?

ATTORNEY JACK W. LATSON: The coverage is taken away by two exclusions. If either exclusion applies, then there's no coverage even if there's otherwise been coverage under the general grant of coverage in the general definition. It's like an automobile policy, Your Honor. If I am in a wreck driving my car and I have insurance coverage, I'm a named insured on the policy. The car is a listed car and, therefore, there's coverage. However, if I drive that car intentionally into a tree, it's excluded under the intentional injury or intentional act exclusion in the policy. This operates exactly the same way. There's a coverage grant and then there are two exclusions. The statute could say, but for these following exclusions. What it says instead is that the course and scope does not include.

JUSTICE EVA GUZMAN: Well, if you look at two, it says the travel would not have been made had there been no affairs or business of the employer to be furthered. She worked out of her home office. She would not have been on the road coming back from La Feria restaurant but for having to go to this client dinner so arguably this travel would not have been made.

ATTORNEY JACK W. LATSON: But I think, Judge, you're driving at the very heart of the confusion in the statute. Certainly, the confusion of the application of the statute by practitioners in this area. There's something intuitive about the idea that when one is working and driving home from the work task that one is still working.

JUSTICE EVA GUZMAN: Not really because she is a sales. When I leave here, then I stop working sometimes. Sometimes I go home and work, but certainly on the way home, I've stopped working. Her job was to travel there and get back. That return home, I think, could be a little bit different. She



would have never gone to this restaurant at this time but for having to engage in this client dinner.

ATTORNEY JACK W. LATSON: In all due respects, her job was not the traveling. Her job was the task of meeting doctors and selling pharmacy drugs. If she commuted--

JUSTICE EVA GUZMAN: Interesting that they would provide her a car if her job didn't involve some travel.

ATTORNEY JACK W. LATSON: And that is one of the exceptions in an exclusion, which is subsection A and to meet an exception within the exclusion means the exclusion doesn't apply. That's all it means. It doesn't create coverage. It simply voids the possibility of excluding coverage and people have not really argued that, I think, to this Court and other courts very frequently, but it's a very clear wording in the statute and that's the way that it operates. So another point that would address that same concern, Your Honor, is that these are two exclusions and like any exclusion in an insurance policy, for coverage to be excluded, one need not fall under every exclusion if one falls under any exclusion [inaudible].

JUSTICE NATHAN L. HECHT: But she was going to the warehouse at the time she was injured.

ATTORNEY JACK W. LATSON: But then that deals with the question of the nature of her trip and we have admitted in our briefing and admitted before the Court of Appeals that there's sufficient evidence in the record for a jury to have found that there was a business purpose to be served by the trip. But, Your Honor, in any dual-purpose case, it assumes at least one business purpose. It's a dual so there's got to be a business purpose and the question is is there a personal purpose? That gets to the second leg of the test.

JUSTICE HARRIET O'NEILL: But then why don't we look at the only purpose to go to the warehouse was business. There was no dual purpose there.

ATTORNEY JACK W. LATSON: There was a dual purpose, Your Honor, if one considers and I think one must that the travel from her last workplace to this workplace, we'll call it that, you know, in the most liberal sense of that fact situation. When traveling from one workplace to another workplace, she was traveling home. The facts in this case establish--

JUSTICE HARRIET O'NEILL: No. I'm talking about when she went to the warehouse because that was her place.

ATTORNEY JACK W. LATSON: So am I, Your Honor. The warehouse was adjacent to her home.

JUSTICE EVA GUZMAN: Does that really make a difference though, the fact that the warehouse was next to the apartment? What if it hadn't been? Would that change, I guess, the analysis?

ATTORNEY JACK W. LATSON: It would change it if it's on a different route of travel, but if it's on the same route of travel, then the travel to the warehouse and from the warehouse to home is in a continuous line and before she arrived at the warehouse, she was serving the additional personal purpose of driving home.

JUSTICE NATHAN L. HECHT: Well that's hard to, it's hard to understand why it would make a difference that the warehouse was a block out of the way, a mile out of the way, the other direction from the restaurant. I mean, sure, she was going home. She was going to the warehouse.

ATTORNEY JACK W. LATSON: Certainly, it doesn't make a difference if the line of travel is direct and the same route of travel if she would have traveled home. In the cross-examination in this case, she admitted that had she not been going to the warehouse, she would have driven this exact same route.

JUSTICE NATHAN L. HECHT: But she wouldn't have stopped at the warehouse.

ATTORNEY JACK W. LATSON: She wouldn't have stopped at the warehouse, but she'd nevertheless drive this route and she would have arrived at the same point where this accident occurred at the same time of day notwithstanding the errand of going to the warehouse. So that the risk--

JUSTICE DALE WAINWRIGHT: So if it were a pub and she was going there to meet friends instead of the warehouse and the pub is located at the same place, you'd be arguing to the contrary?

ATTORNEY JACK W. LATSON: No, I would, well, I would certainly say that there is little evidence, maybe no evidence that she was furthering the purposes of her employer and that's within the general grant of coverage.

JUSTICE DALE WAINWRIGHT: Which didn't that prove the point that it doesn't matter if the travel stop is a block from her house or 10 miles from her house if it's part of her stop to do work and then go to her home office, it's part of that trip whether it's a block away or a mile away?

ATTORNEY JACK W. LATSON: We admit it's part of the work. That's not an issue. It is one purpose of the trip, but there's a dual purpose served by traveling home.

JUSTICE DALE WAINWRIGHT: But I want to be very clear. You think the case would be different if the warehouse were out of the way?

ATTORNEY JACK W. LATSON: Yes, Your Honor, I do. In that event, I think there's a direction from place to place that doesn't serve a personal purpose of driving home. In that case, there's no second personal purpose and that's why I think that the particular structure of this act, adding the dual-purpose doctrine is an elegant solution to the problem of how you deal with an employee who's doing something personal rather than something business. Now this Court and other courts historically have looked at the question of travel from business to home and from home to business in the context that the risk of the accident occurs as a result of something that we all do. All of us who work outside of our home travel from our home and

work and that's a fundamentally personal purpose. It's not a work purpose at all.

JUSTICE HARRIET O'NEILL: Does it matter if she had had lunch with this business group and then gone to the warehouse and then gone to her office at home to continue working?

ATTORNEY JACK W. LATSON: No, I don't think it would matter so long as her day was a work day. She had visited other doctors. She had actually been working that day and was proceeding from one workplace to another workplace, which also served the purpose of getting home. In that event, there's still dual purposes.

JUSTICE EVA GUZMAN: If she were going home to work that night, would that be any different?

ATTORNEY JACK W. LATSON: Your Honor, that introduces some confusion. I acknowledge that, but I think the confusion has to do with the effect of having a work office at home.

JUSTICE EVA GUZMAN: Well and that's such a, I mean, there are so many people that are now working from home so that is sort of an important question.

ATTORNEY JACK W. LATSON: It's an expanding situation within our culture. Many people telecommute. Those who don't telecommute and actually drive into an office many times, will check email before they leave home. They may they check voicemail with the telephone. They may make calls on the phone that are business related. So many things happen in the home which are of a work nature.

JUSTICE HARRIET O'NEILL: But shouldn't it be a distinction if the employer does not have a place of business for the employee to work?

ATTORNEY JACK W. LATSON: No, Your Honor, it is not a distinction because like a construction worker travel from home into a worksite even though it may not be an official place of an office building or an office yard or construction yard or something like that. This Court made it very clear in the Evans case where a supervisor who was traveling from his home to a worksite, traveling at an earlier hour of the morning and transporting a co-employee to attend a safety meeting, which was special. It wasn't in his routine course of business. It only happened once a week, was performing a purpose that this Court characterized as purely personal. That Evans case is the last Supreme Court case on the topic characterizing the travel from one's home into one's office. It followed the case of TGI v. Bottom, which I referred to. In Bottom, the worker drove a truck leased to his employer at home over the weekend in order to service the truck and then was returning on the following Monday morning in order to get a job and take his truck out on the road.

JUSTICE NATHAN L. HECHT: But those aren't home office cases.

ATTORNEY JACK W. LATSON: Those aren't home offices, but in the Bottom case, he serviced the truck while he was home.

JUSTICE NATHAN L. HECHT: Well, but this is more than that. At least we can hypothesize more where the employee really their only office is in their home.

ATTORNEY JACK W. LATSON: But, Your Honor, their only home is in their home as well.

JUSTICE NATHAN L. HECHT: So what happens when that happens? When that's your only place of business is your home?

ATTORNEY JACK W. LATSON: Well if one were to believe that traveling to one's home in which there was an office served a business purpose, it doesn't void the idea. It doesn't viciate, it doesn't abolish the idea that one is also going home for her personal purposes. The dual-purpose doctrine applies. That's why this is an elegant solution. I think it can be fairly and equitably applied and be understood by everybody if this Court will simply make it clear.

JUSTICE DAVID M. MEDINA: I don't know if you finished answering my question, but you started to.

ATTORNEY JACK W. LATSON: I don't think I did, Your Honor.

JUSTICE DAVID M. MEDINA: Well you got another question there, but course and scope does not include and what's the rest of the answer? I asked you how does the statute exclude coverage and your response was course and scope does not include?

ATTORNEY JACK W. LATSON: In subsection (a), course and scope does not include travel to and from home, but that exclusion doesn't apply if you meet one of the three exceptions and she did. She was proceeding, directed from one place to another. I think the evidence supports that. I disagree with that finding, but the evidence supports that and she was driving in a company car. So she meets the exceptions and the exclusion doesn't apply in which event if there's any kind of personal purpose implicated in the facts, then one must apply subsection (b). Subsection (b) says if the travel is personal, it's not covered. It's excluded even though coverage may otherwise be afforded, it is excluded.

JUSTICE DAVID M. MEDINA: So the personal business here was going home?

ATTORNEY JACK W. LATSON: Was going home. Whether she had a home office or not, the point that I wanted to add about the home office, Your Honor, and addressing a question perhaps from Justice Johnson, the employer does not control the premises of the one's own home. Although I have a home office, my law firm does not specify how that office should be arranged, what part of the house it's supposed to be in, doesn't control the fact I've got carpet instead of tile. The circumstances of those premises are personal in nature in that I control them and my employer doesn't. So even if there's a home office, it doesn't convert it into a place of business even

though business may occur there anymore than making a telephone call from an automobile converts that into a place of business.

JUSTICE HARRIET O'NEILL: The entire purpose of the course and scope coverage is to protect an employee from the inherent risk of the employment and the argument's been made that an inherent risk for a traveler salesman is driving.

ATTORNEY JACK W. LATSON: And that argument was rebutted by this Court in its holding in *Evans v. Illinois Employers*. In that case, the worker was traveling from his home into a safety meeting and the *Dryden* case--

JUSTICE HARRIET O'NEILL: But he wasn't a traveling salesman.

ATTORNEY JACK W. LATSON: He wasn't a traveling salesman so--

JUSTICE HARRIET O'NEILL: And the argument inherent in the job of a traveling salesman is the risk of driving seems to me that the course and scope of employment would be intended to encompass an inherent risk of the employment.

ATTORNEY JACK W. LATSON: To be clear, there are two things that occur in the case of a traveling salesman or anybody else who has to travel or commute to a remote place. There are two things that happen. In the travel from the home--

JUSTICE HARRIET O'NEILL: Well there's a big distinction between commute to a remote place and traveling salesman because with the traveling salesman, you're visiting your customers not at your place of business, so I think there's a distinction there.

ATTORNEY JACK W. LATSON: Well, Your Honor, I think the distinction is and in a traveling salesman case, the travel from one time to the first call is certainly travel from home into work. There's no question about that. I contend that if the first call is in a direct line of travel to the second call, even the second call would be personal in that one is still traveling outbound to a place of work. It's a commute. The work occurs once she arrives at the site. The commute is what is involved in getting to the site and that's what brings it within the line of cases of *Bottom*, *Dryden* and *Evans*. I haven't mentioned *Dryden*, Your Honor, and I think that may help the Court. In the *Dryden* case, a foreman for a work crew was instructed by his employer to carry power tools to the job. He loaded the power tools in his truck. On that Monday morning, at the beginning of the job he had to transport the tools there without which the work could not have occurred. This Court even said in that case that the facts are clear that it was more important to get the tools to the job than it was to get him to the job. So this Court had three opinions in that case--a majority, a concurring and a dissent which covered the gamut really of the different perceptions people have about this fact situation. In the first opinion, a majority opinion, this Court concluded that notwithstanding the fact that he was carrying tools, *Dryden* in that case was simply commuting from his

home into work, which this Court characterized as a regular and common purpose. It was a common purpose of getting it to work to get to the work-site even though he was transporting tool, he was getting to where the work was going to occur.

JUSTICE DALE WAINWRIGHT: In the Dryden case, if the person had gotten up in the morning, let's make it this case or similar to this case. If petitioner had gotten up in the morning at home, called the client, was working on the computer getting let's assume getting some charts together and preparing some and then left home that morning at 9 a.m. to go have a meeting with the client 10 miles away somewhere in Austin. Would you still say that that first trip is a commuter trip [inaudible]?

ATTORNEY JACK W. LATSON: Absolutely. Absolutely, Your Honor. Again, the dual purpose.

JUSTICE DALE WAINWRIGHT: For a traveling salesperson?

ATTORNEY JACK W. LATSON: That's correct. First of all, there's no traveling salesperson exception in the act. The act is clear. It provides the exception and it provides the dual-purpose rule. If this Court is persuaded that under those circumstances there is a business purpose to the trip, I would even concede that for purposes of argument. There is also the second personal purpose, which implicates and requires the application of the dual-purpose exception or exclusion to compensability.

JUSTICE DALE WAINWRIGHT: And that second purpose is, excuse me?

ATTORNEY JACK W. LATSON: Traveling from home into work.

JUSTICE DALE WAINWRIGHT: That's a personal trip?

ATTORNEY JACK W. LATSON: Absolutely, this Court found it [inaudible]

JUSTICE DALE WAINWRIGHT: [inaudible] Okay.

ATTORNEY JACK W. LATSON: Pardon me, it found it to be purely personal. That is the last opinion this Court dealing with travel cases. It's purely personal so the commute.

JUSTICE DALE WAINWRIGHT: I understand your position.

JUSTICE EVA GUZMAN: Counsel, was there anything in the record about whether stopping at the warehouse was, I guess, discretionary on her part or was that sort of a requirement at that particular time sort of like a special mission, if you will, in Evans, there was some discussion about a special mission. So was that stop discretionary on her part or was that something that was required to continue to do the work that night?

ATTORNEY JACK W. LATSON: There was evidence on both sides of that particular issue. She testified that the employer required that she store the samples that were in her car in a secure air-conditioned space and so I

think the jury has sufficient evidence to find that there was a work purpose to the trip at that point.

JUSTICE EVA GUZMAN: Was there like a special mission though? Was that something that she was specifically assigned to do that night because she had to take the samples to the dinner or?

ATTORNEY JACK W. LATSON: Special mission is a troublesome set of words, Your Honor, because that tends to suggest that anytime there's anything out of the ordinary then it's a special mission and therefore covered. This Court, I think in the Dryden case, made it clear and it may have been Evan that special mission doctrine as it existed before 1957 has been subsumed into the exception in subsection (a), which provides the employees directed from place to place. So rather than using special mission, I would concede that there's evidence that she was directed from her employer to proceed from a workplace to another workplace.

JUSTICE PAUL W. GREEN: Let me ask you this. It's a bit surprising to me that with all the traveling salesmen out there that we haven't settled this in this state yet apparently. What about other states? How do they treat this situation?

ATTORNEY JACK W. LATSON: Your Honor, Larson recites a general rule. The general rule is that a commute involves personal risk, the risk to which never the public in general is subjected and not peculiar to any particular employment, but then he notes exceptions. There are a range of exceptions that attempt to achieve a balance when there's a personal and a business purpose included and they involve things like foreseeability and strange concepts. This Court and other courts had travel provided by the employer as part of the contracted employment. A traveling employee exception was one of those things articulated by this Court prior to the 1957 amendment and repeated in one case since and there are other. There are many exceptions and the result of that type of confusion is illustrated by the Mullikin case cited by us in our brief and in the Mullikan case, an employee of a car dealership drove a car owned by the dealership, for sale by the dealership to a funeral and they found that just having that car available at the funeral in essence advertised its availability for purchase and therefore, Mullikan was in the course of employment. That was criticized by a law review article and following that law review article in another out-of-state case with a similar counterintuitive and bad result, I would argue, precipitated, we think, and we think the law clearly shows the legislative act adding these exceptions and adding the dual-purpose doctrine is a statutory exclusion and changed the law and this Court then said that that change was intended to circumscribe the purvue of the course and scope definition. My opposing counsel has not addressed that in his argument before the Court and in his opening argument, he never mentioned the dual-purpose exclusion or the personal purpose exclusion, which is avoided by the dual purpose test.

JUSTICE NATHAN L. HECHT: Any other questions? Thank you, counsel.

ATTORNEY JACK W. LATSON: Thank you very much.

JUSTICE PHIL JOHNSON: Counsel, under B2 of section 12, it says that travel would not have been made had there been no affairs or business of the employer to be furthered by the travel.

ATTORNEY BRADLEY DEAN MCCLELLAN: Yes, sir.

JUSTICE PHIL JOHNSON: When she finished the dinner that night, if she had not been going to the storage area and if she had not been going to do anymore work that night, it looks as though that might gather you within the terms of the exception.

REBUTTAL ARGUMENT OF BRADLEY DEAN MCCLELLAN ON BEHALF OF PETITIONER

ATTORNEY BRADLEY DEAN MCCLELLAN: Absolutely not because you look at the purpose of the travel and the only reason she left the office home that day was a business purpose and that's how purpose, dual purpose, you need to [inaudible] that's dual-purpose travel and the two exceptions. A is the commuter rule. It's transportation to and from the place of employment. It's important the legislature use the word transportation in that exception and B it was travel and they don't exclude, because they considered business travel is included in the general definition of course and scope, especially for someone like a traveling salesperson. [inaudible]

JUSTICE PHIL JOHNSON: This specifically says it's not covered if the travel would not have been made had there been no affair. So she goes. She was heading to her home. It seems like can you address that because it does as counsel says, you have the general rule and I think the court of appeals said it's a policy decision by the legislature. The legislature could say all of this is covered if there's any business purpose, but they've said it's covered except this is not covered. So how does you get out from under that part that says even with, she would have been going home anyway.

ATTORNEY BRADLEY DEAN MCCLELLAN: There would have to have been a personal purpose for the travel. It's just like I said. If she had gone to the mall that day in addition to going out to all these work activities, all her travel that day was business purposes. Kind of like probably the taxis and we if it's business travel or personal travel, it makes a difference. If I travel to Disneyworld with the kids, that's personal and when I travel to a trial in Amarillo, that's business and it doesn't change the character of that travel whether it's the outbound segment or the inbound segment and the dual-purpose rule only applies and that's what this Court said in Meyer. It only applies if there was a personal purpose for the travel and then you only get into the deviation.

JUSTICE NATHAN L. HECHT: But there [inaudible] she was going home.

ATTORNEY BRADLEY DEAN MCCLELLAN: And I want to address to and you brought up the fact what does it matter whether it was the storage unit was right next to her home or office? What if her principal place of employment and she was going to drop the car off was right across the street from where she lived? A number of people live downtown here in Austin, for example.



That shouldn't make a difference and, in fact, you think most employers would want a storage unit closer by when they're providing the transportation rather than saying you're only covered if you deviate 20 miles out of your way to the storage unit and then head back home. It would create more risk. It would create more liability and create more possibilities for an accident.

JUSTICE NATHAN L. HECHT: Well it would and maybe that's bad policy, but as Justice Johnson says, we have a statute so it says unless this is in statute section B1. "The travel to the place of occurrence of the injury would have been made had there been no personal private affairs." That may be true, but that travel I guess to the place of occurrence would not have been made if there hadn't been a personal purpose and at the place of occurrence, why wasn't the business and personal purpose mixed?

ATTORNEY BRADLEY DEAN MCCLELLAN: She was still returning towards the end of a long day of purely business travel. No different than if I travel to Houston for one case and I'm on I-10 before I make the turnoff on to 290 to 71, before I even make that turnoff, I'm taking the route I would take back to my home here in Austin, but it's still a business trip at that point. I've done nothing personal. I've been deviated in no way to take it out. I want to emphasize--

JUSTICE DON R. WILLETT: And this record, quickly, this record shows she was returning home where she would continue working when she returned home?

ATTORNEY BRADLEY DEAN MCCLELLAN: The record is that she was going to go to the storage locker and she won. The 12 members of the jury ruled in her favor. Going to the storage locker and then to her home office where she would have completed paperwork. This case, Ms. Leordeanu went from a six-figure salary to if she prevails in this case, she will be awarded the first year of \$27,000 and 75% reduction in benefits. That's comp, it's remedial statute. Is it fair? In some cases it helps, some cases it doesn't fully compensate someone for losing an eye and suffering severe injuries. This case is clearly a traveling employee case with inherent risk where you don't reach the commuter exception or the dual-purpose travel exception and I would encourage this Court, respectfully, to reverse the decision from the lower court of appeals, uphold the district judge's decision and the jury's decision and find that Ms. Leordeanu was in the course and scope of employment as a traveling salesperson is an inherent risk of her employment.

JUSTICE NATHAN L. HECHT: Any other questions? Thank you, counsel. That concludes the argument in the cases and they are submitted. The Marshal will adjourn the Court.

MARSHAL: All rise.

2010 WL 1640341 (Tex.)

END OF DOCUMENT

