

2008

# Gudmundson v. Ozone : Reply Brief

Utah Supreme Court

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**IN THE SUPREME COURT OF THE STATE OF UTAH**

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WENDY GUDMUNDSON and KAY  
GUDMUNDSON,

Plaintiffs and Appellants,

vs.

DEL OZONE, OZONESOLUTIONS, L.C.,  
JOHNSON CONTROLS, INC., and JOHN and  
JANE DOES 1-10,

Defendants and Appellees.

Supreme Court Case No. 20080537

Trial Court Case No. 050916518

---

**PLAINTIFFS/APPELLANTS' REPLY BRIEF**

---

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## **INTRODUCTION**

In accordance with Utah R. App. P. 24(c), Wendy and Kay Gudmundson hereby file this reply brief, answering those new matters set forth in defendants' opposing briefs.

## **FACTS**

In their zeal to attack Mrs. Gudmundson personally, the defendants have attempted to infect this appeal with reference to and emphasis on so-called "facts" that are irrelevant and gratuitously inflammatory. Specifically, Del Ozone asserts as relevant "facts" that "Mrs. Gudmundson is an alcoholic and she has struggled with anorexia and bulimia throughout her adult life. She has smoked since she was 17 and she also has anemia. And prior to December 2004, Ms. Gudmundson did not participate in any exercise routine." Del Ozone brief, pp. 12-13. Similarly, Ozone Solutions asserts as a relevant "fact" that "Prior to December 2004 Mrs. Gudmundson had a history of alcoholism, smoking, anorexia, bulimia and anemia and had not participated in any exercise routine." OzoneSolutions brief, p. 6. One searches in vain for any further reference in the record as to why or how these "facts" may have even the most minimal relevance. These "facts" were not referenced by the district court, and they are of no value in determining any party's legal liability or the application of collateral estoppel to the workers compensation determination that is at issue here. There is, of course, no indication that the workers compensation board heard or made any determination based on these "facts." They appear to be asserted simply to prejudice this court against Mrs. Gudmundson.

Similarly, Del Ozone and OzoneSolutions make much of the fact that Mrs. Gudmundson began to experience headaches after she went to the desert to go rock-hunting with her husband the day after she left work on December 17, 2004 – within 12 hours after her last potential

exposure to ozone. OzoneSolutions brief, pp. 4-5; Del Ozone brief, p. 11. Del Ozone even goes so far as to point out that on that day, Mrs. Gudmundson “had eaten only some pretzels and jerky prior to leaving Duchesne with her husband at 2 p.m.” *Id.* Again, there is no reference in either brief as to how these “facts” may have any relevance to any issue in the case. They are extraneous, and appear to be calculated to lead this court to some independent negative conclusion about either the source or severity of Mrs. Gudmundson’s injuries.

There actually *are* relevant facts with regard to Mrs. Gudmundson’s injuries that the defendants have apparently glossed over or ignored; that she suffered brain swelling, (ROA 612), chemical encephalopathy, multiple chemical sensitivity, vagal maladaptation (ROA 685), and ultimately required brain surgery to remedy a Chiari malformation (ROA 278). Despite OzoneSolutions’ and Del Ozone’s implications from their recitation of “facts,” no one has ever drawn a direct or indirect correlation between these serious medical problems and alcoholism, anorexia or bulimia – or, for that matter, pretzels and jerky.

## **ARGUMENT**

### **ISSUE I.**

#### **COLLATERAL ESTOPPEL AND *RES JUDICATA* DO NOT APPLY TO WORKERS COMPENSATION DETERMINATIONS IN UTAH.**

As pointed out in the Gudmundsons’ opening brief, this court has specifically stated that “the ordinary rule of *res judicata* is not applicable” to workers compensations proceedings. *Mollerup Van Lines v. Adams*, 398 P.2d 882, 883 (Utah 1965). It has further stated that in a workers compensation proceeding, which is different from an ordinary lawsuit in that it is not an adversary proceeding, “neither party is necessarily bound by any statement or admission made

either in the [panel medical] report, or in the testimony of the [commission-appointed] doctor.” *Id.* This court has recognized that workers compensation proceedings are informal and, in some respects, *sui generis*. *Utah Fuel Co. v. Industrial Commn.*, 201 P. 1034, 1034 (Utah 1921). *See also, Taslich v. Industrial Commn.*, 262 P. 281, 283 (Utah 1927). Because the remedies provided under the Workers Compensation Act “are not analogous to an ordinary lump-sum judgment that the common law provides for personal injury actions,” “an award of benefits does not generally have the *res judicata* effect of a judgment.” *Burgess v. Siaperas Sand & Gravel*, 965 P.2d 583, 585 (Utah 1998), quoting *Stoker v. Workers Comp. Fund & Indus. Commn.*, 889 P.2d 409, 411 (Utah 1994).

Notwithstanding these clear pronouncements, the defendants in this case ask this court to abandon its clear precedent relating to workers compensation claims on the basis of a misconstruction of language found in *Career Servs. Review Bd. v. Utah Dept. of Corrections*, 942 P.2d 933, 938 (Utah 1997), which states, “[r]es judicata, which subsumes the doctrine of collateral estoppel, applies to administrative adjudications in Utah.” *Id.* at 938. A reasoned analysis of the *Career Service Review Board* case and the other cases cited by defendants reveals that this expansive language does not apply to workers compensation claims, such as the one at bar.

Simply put, the “administrative adjudications” to which *res judicata* applies are *not* workers compensation claims. Both the statutes and the case law make a clear distinction between administrative adjudications – the type of adjudications under the Utah Administrative Procedures Act, to which *res judicata* applies – and workers compensation cases, to which it does not. In fact, the Utah Administrative Procedures Act (UAPA), under which the *Career*

*Service Review Board* case was decided, specifically exempts workers compensation cases from its ambit. See Utah Code Ann. § 63G-4-102(i). (As demonstrated below, pre-UAPA cases also recognized the distinction). There exist obvious reasons for the different treatment of “administrative adjudications” and workers compensation claims.

## ISSUE IA.

### *Administrative Adjudications.*

The type of “administrative adjudications” addressed in the UAPA (and even in the cases preceding the adoption of the UAPA, as discussed below) are intended to determine issues 1) between *competing governmental agencies*, or 2) between *governmental agencies and regulated utilities*, or 3) between *governmental agencies and government employees* with regard to personnel matters or 4) between *governmental agencies and regulated businesses or professions*. The common denominator is that in these administrative adjudications, there is of necessity always a governmental agency as a party. *Res judicata* and collateral estoppel under these cases thus apply to the government – the one consistent party in these cases.

On the other hand, the “administrative adjudications” referenced in the cases are not intended to address disputes between employees who are hurt on the job and their employers – whether public or private. There is no necessity that a governmental agency be a party in a workers compensation claim. Thus, “administrative adjudications” and workers compensation claims are not one and the same. They should not – indeed. cannot – be lumped together. They are separate processes, running down separate tracks, with different standards and different public policy foundations. A comparison of the cases cited by the defendants in support of the

proposition that administrative adjudications are subject to *res judicata* with cases dealing directly with workers compensation illustrates the difference between these two.

**(i) *Career Services Review Board – government agency v. government agency – res judicata applied.***

For example, the *Career Service Review Board* case revolved around a dispute between two government agencies under the Utah Administrative Procedures Act (UAPA). On the one side was the Career Service Review Board, an agency of the state of Utah, (and which was represented by the Utah Attorney General’s Office), whose personnel determination regarding a prison employee was not being carried out. On the other side was the Utah Department of Corrections, yet another agency of the State of Utah (and which was also represented by the Utah Attorney General’s Office), which had refused to carry out the other agency’s directive. Both were “agencies” under the UAPA, and both claimed rights thereunder – rights which the Utah Supreme Court ultimately decided on the basis that the Career Service Review Board’s adjudication of a grievance was “precisely the sort of quasi-judicial adversary proceeding to which the doctrines of *res judicata* and collateral estoppel should apply” under the UAPA. *Id.* at 938. The “administrative adjudications in Utah” to which the doctrines of collateral estoppel and *res judicata* applied in the *Career Service Review Board* case were limited to those brought under the UAPA by one agency against another agency. In that case, there was no determination of whether an aggrieved employee could bring any action for damages against a third party, nor, for that matter, was any aggrieved employee even a party to the case. Instead, the issue in contention related to how two state agencies should resolve an internal squabble between them.

**(ii) *Salt Lake Citizens Congress – Government agency v. regulated utility – res judicata not applied.***

The same limitations stand true of the cases cited in the *Career Service Review Board* case in support of the proposition that “the doctrine of *res judicata* has been applied to administrative agency decisions in Utah since at least 1950.” *Id.* at 938 (citing *Salt Lake Citizens Congress v. Mountain States*, 846 P.2d 1245(Utah 1992) and *North Salt Lake v. St. Joseph Water & Irrigation Co.*, 223 P.2d 577, 582-83 (Utah 1950)).

For example, despite the language in the *Salt Lake Citizens Congress v. Mountain States* case, that *res judicata* had been applied to administrative agency decisions in Utah since 1950, 846 P.2d at 1251, the Utah Supreme Court did not decide that case on the basis of *res judicata*. Instead, that case, which dealt with the issue of whether the application of an administrative rule regarding charitable contributions by a regulated utility should be upheld, was decided on the principle of *stare decisis* – the applicability of administrative determinations of law to subsequent similar cases. Ultimately, neither collateral estoppel nor *res judicata* were bases upon which the court made any determination in the *Salt Lake Citizens Congress v. Mountain States* case. The court’s reference to *res judicata* was gratuitous and certainly non-dispositive of any issue in the case.

**(iii) *North Salt Lake v. St. Joseph Water & Irrigation Co. – Government agency v. public service corporation and consumer – res judicata not referenced.***

Similarly, in *North Salt Lake v. St. Joseph Water & Irrigation Co.*, 223 P.2d at 582-83, the Utah Supreme Court determined that the Public Service Commission (PSC), a public agency, had the right to determine the rights of a public service corporation and consumers with regard to decisions made under the authority of the PSC within the context of governmental

administrative proceedings. Because the order of the PSC was not appealed within the statutory administrative scheme governing utility regulation – and because there was no statutory provision allowing for original recourse to the court system in matters of utility regulation, (only appellate recourse was anticipated) – the PSC’s determinations were upheld and found to be controlling. Neither the words *res judicata* nor any of its requisites are found in the opinion.

**(iv) *Utah Department of Administrative Services v. Public Service Commission – Government agency v. government agency – res judicata applied in pre-UAPA case.***

In *Utah Dept. of Admin. Servs. v. Pub. Serv. Commn.*, 658 P.2d 601 (Utah 1983), the Utah Supreme Court was faced with a dispute between two governmental agencies regarding the allocation of payment for utility operating expenses to oil and gas exploration by a regulated utility. The court noted that Utah did not have an administrative procedures act in place at the time, (the case was decided in 1983, four years before the adoption of the UAPA), and looked to general established principles governing judicial review of administrative agencies generally. In a lengthy opinion, the court treated the issue of the finality of an order of the PSC regarding the application of a settlement relative to a “no profits-to-affiliates” rule. Various interested parties sought guidance from the court as to whether the PSC opinion should be given “*res judicata* finality.” This court stated that an administrative agency dealing with a dispute between a government regulatory agency and a regulated utility could issue an order that would have *res judicata* effect “when an administrative agency has acted in a judicial capacity in an adversary proceeding to resolve a controversy over legal rights and to apply a remedy.”

**(v) *Nebeker v. Utah State Tax Commission – government agency v. regulated business – res judicata not applied.***

In *Nebeker v. Utah St. Tax Commn.*, 34 P.3d 180 (Utah 2001), a regulated interstate trucking company filed suit against the Utah State Tax Commission, a governmental agency, alleging that the 12 percent interest rate imposed in an administrative proceeding against him violated the Utah Constitution. The district court dismissed the case, finding that it did not have jurisdiction over the matter because of the company's failure to exhaust its administrative remedies. According to the district court, the issue of the constitutionality of the tax could and should have been brought before the Tax Commission.

The company appealed to this court, and simultaneously applied to the Tax Commission for a refund of overcharge, based on his contention that the tax was unconstitutional. The Tax Commission rejected the application on the basis of *res judicata*, stating that the issue should have been raised in his first administrative proceeding.

In its appeal to this court, the company argued that since the Tax Commission did not have the authority to determine constitutional issues, it made no sense to raise that issue before the commission, preserving it instead for determination by the courts; thus, there were no administrative remedies with regard to the constitutional issue that could have been exhausted. This court agreed, stating that indeed the Tax Commission did not have jurisdiction to determine the constitutionality of the tax. Nonetheless, this court found that the business should have gone to the Tax Commission for a redetermination of its tax deficiency, which could have led to a determination that the imposition of interest on the deficiency was unwarranted – thus obviating the necessity of a constitutional inquiry that the Tax Commission did not have jurisdiction to consider. Thus, in this court's view, the district court was right; the company didn't exhaust its administrative remedies.



Even though this court found that the Tax Commission had no jurisdiction to decide the constitutionality issue, it nonetheless held that the company should have raised that issue before the Tax Commission anyway so as to give the Tax Commission notice of a potential constitutional challenge. Having failed to raise the issue, the company waived any opportunity to raise it before the district court. With regard to the propriety of the Commission's rejection of the company's second application on the basis of *res judicata*, however, the court stated that an administrative agency's decision cannot constitute *res judicata* if it had no jurisdiction to issue that decision.

(vi) **Kirk v. Division of Occupational and Professional Licensing- governmental agency v. applicant for admission to state-regulated profession – res judicata not applied.**

In *Kirk v. Div. of Occupational and Prof. Licensing*, 815 P.2d 242 (Utah App. 1991), the Division of Occupational and Professional Licensing (DOPL), a governmental agency, denied an applicant for a dentistry license because he had not passed a Western Regional Examining Board (WREB) examination. A Special Appeals Board (SAB) upheld DOPL's denial. The applicant tried (and failed) a second time to obtain a license on the basis of reciprocity with a license he held in another state. Finally, he petitioned the district court for a trial de novo on the reciprocity issue, on which DOPL defended on the basis of *res judicata* – claiming that because he had not raised it at the time of his first application, it was waived. He lost and appealed. While the Utah Court of Appeals stated that “we agree that *res judicata* can apply to administrative proceedings,” it went on to say “we do not believe that it should be applied to the case at bar.” *Id.* at 243. Stating that “the reasons for treating [an agency's] decision as *res judicata* are the same as the reasons for applying *res judicata* to a decision of a court that has

used the same procedure,” the court concluded that when the formality of a judicial-type proceeding is “sufficiently diminished,” the “administrative decision may not be *res judicata*.” In Dr. Kirk’s case, the court concluded, “Given the informal nature in which this [SAB] hearing was conducted, we cannot conclude that it afforded Kirk the rights and procedural safeguards that must be present when an agency acts in a judicial capacity conducting a trial-type hearing. For this reason, *res judicata* could not attach to the proceeding before the SAB.” *Id.* at 244. The court went on to conclude that because *res judicata* did not apply to any formal hearing, the district court erred in declining a de novo review of Dr. Kirk’s claim to licensure by reciprocity in his second application – which, the court pointed out, was governed by the UAPA (his first application was made before the UAPA was adopted). The district court’s order of summary judgment against Dr. Kirk was reversed and the case remanded.

### ***Governmental agencies – the common denominator.***

Importantly, the one common denominator of all of the afore-mentioned “administrative adjudication” cases is that a governmental agency, to which administrative rules, including the UAPA, applies, is a necessary party. Any *res judicata* or collateral estoppel effect of these administrative adjudications applies to the governmental entity in applying administrative governmental rules to highly-regulated governmental situations.

### **ISSUE IB.**

#### ***Workers Compensation cases.***

By contrast, the cases cited in the Gudmundsons’ opening brief demonstrate that the Workers Compensation Act and the case law dealing with workers compensation all recognize that the “no-fault” type of insurance protection scheme for work-related injuries, which is intended to

entirely replace a worker's ability to seek redress to the courts for claims against an employer for industrial injuries, is not focused on the administrative procedures by which government carries out its duties, but is instead focused on the victim of an industrial accident. See, e.g., *Sheppick v. Albertson's, Inc.*, 922 P.2d 769, 773-4 (Utah 1996). See also, *Vigos v. Mountainland Builders, Inc.*, 993 P.2d 207 (Utah 200) ("The purpose of the Act is to provide relief from industrial accidents."). *Taslich v. Industrial Commission*, 262 P. 281 at 283 (Utah 1927)(The reason for this is to "enable lay members of society, if necessary, to prosecute proceedings under the Workers Compensation Act, with the assistance, if necessary, of the commission," obviously a far different process than an adversarial judicial proceeding).

In such cases, a governmental agency is not a necessary party – unless, of course, the governmental entity is the employer – and the policy considerations behind providing administrative consistency in carrying out governmental duties in "administrative adjudications" are inapplicable to workers compensation claims.

This is especially relevant when considering that although the workers compensation scheme is exclusive as far as claims by the injured worker against the employer are concerned, it is not exclusive between the injured worker and a non-employer third party. The public policy of the state of Utah specifically favors allowing the injured worker recourse to both the workers compensation system (for claims against the employer) *and* the court system (for claims against everyone else). *Burgess* at 585 (emphasis added). See also, *Stoker* at 411 (Utah 1994); *Wilstead v. Industrial Commn.*, 407 P.2d 692 (Utah 1965).

As pointed out in the Gudmundsons' opening brief, the misapplication of the principles of *res judicata* and collateral estoppel to workers compensation cases would seriously

undermine the purposes behind the Workers Compensation Act. since it would discourage an injured worker from pursuing a workers compensation claim for fear that in the event of a loss, the worker would be barred from a case against a responsible third party, essentially requiring that the injured worker elect her remedies.

Utah case law on election of remedies demonstrates why any reading of the workers compensation statutes that would require such – including the imposition of collateral estoppel from workers compensation claims to third-party actions – should be rejected. Where, as here, the statutes provide two separate methods for recovery against two parties responsible for one’s injuries, the pursuit of recovery from one party should not practically preclude the pursuit of the other. As stated in the case of *Taylor v. Epley*, 2002 UT App. 199, ¶ 14, the doctrine of election of remedies in Utah is “a ‘technical rule of procedure and its purpose is . . . to prevent double redress for a single wrong. Said doctrine presupposes a choice between inconsistent remedies, and knowledgeable selection of one thereof.’ *Palmer v. Hayes*, 892 P.2d 1059, 1061-62 (Utah Ct. App. 1995) (citation omitted) (emphasis omitted). *This doctrine applies as a bar only where the two actions are inconsistent, generally based upon incompatible facts; the doctrine does not operate as an estoppel where the two or more remedies are given to redress the same wrong and are consistent*” *Id.* (emphasis added). *See also, Salt Lake City v. Industrial Commission*, 17 P.2d 239 (Utah 1932)(commencement by policeman against third person which was dismissed without prejudice, commenced prior to assignment of cause of action to city, was not an election so as to bar policeman’s subsequent claim for compensation from city). Obviously, under Utah law, an “election of remedies” defense, whether specifically articulated as such or merely relied on through implication, such as defendants have done here. should be rejected. Here, the

Workers Compensation Act specifically allows an injured worker to pursue an exclusive worker's compensation claim against the employer, Utah Code Ann. § 34A-2-105, *and* a third-party claim, Utah Code Ann. § 34A-2-106.

The issue of "election of remedies" within the context of workers compensation cases has been analyzed and rejected in other jurisdictions. *See, e.g., Vasquez v. Sorrells Grove Care, Inc.*, 962 So.2d 411 (Fla. App. 2007)(settlement of a worker's compensation case did not act as an election of remedies precluding relief in a tort claim action against a third party); *Messick at 1213* (Del. 1994)(election of remedies in workers compensation action specifically disfavored under Delaware law); *see also Gourley v. Nielson*, 318 N.W.2d 160, 161 (Iowa 1982)(worker's compensation award did not preclude employee from seeking third-party recovery against negligent fellow-employee; "the doctrine [of election of remedies] is not regarded favorably in workers' compensation cases." (citing A. Larson, *The Law of Workers' Compensation* § 73.30 (1976))).

For the reasons articulated at length in the Gudmundsons' opening brief, such would also deprive an injured worker from his right to access to the courts guaranteed under the Utah Constitution. Thus, the defendants' reliance on the *Career Service Review Board* case, as well as the other "administrative adjudication" cited cases, is misplaced.

## ISSUE IC.

### *The foreign cases.*

Equally inapposite are the numerous cases from other jurisdictions string-cited by Johnson Controls in its lengthy footnote 3, on pp. 23 and 24 of its brief. The limitations of time and space preclude exhaustive analysis of each of the 21 cases cited from the 16 foreign

jurisdictions referenced therein, but it is important to note each of them is easily distinguishable from the case at bar. For example, several of the cases cited do not involve a separate lawsuit against a third party. Instead, they involve either a direct appeal to a court from the workers compensation determination (*Nunez v. Arizona Milling Co.*, 439 P.2d 834 (Ariz. Ct. App.1968); *Bussell v. Georgia-Pacific Corp.*, 981 S.W.2d 98 (Ark. Ct. App. 1998); *Wellcraft Marine Corp. v. Turner*, 435 So.2d 864 (Fla. Dist. Ct. App. 1983); *Shea v. Bader*, 638 P.2d 894 (Idaho 1981); *Owens-Corning Fiberglas Corp. v. Gagnon*, 235 A.2d 864 (R.I. 1967); *Anderson v. New York Underwriters Ins. Co.*, 613 S.W.2d 16 (Tex. Civ. App. 1981)) **or** they involve separate litigation by the same parties in subsequent litigation (*Scott v. Industrial Accident Commn.*, 293 P.2d 18 (Cal. 1956); *Greatorex v. Bd. of Admin.*, 91 Cal. App. 3d 54, 58 (Cal. Ct. App. 1979); *General Motors Corp. v. Holler*, 150 F.2d 297, 300 (8th Cir. 1945); *Mangani v. Hydro, Inc.*, 194 A. 264, 265 (N.J. 1937)).

Other cases cited by Johnson Controls are equally inapposite, in that they involve situations 1) in which the issue before the court was not causation of injury but whether the employee was actually on the job when the injury occurred, *Coleman v. Columns Props., Inc.*, 467 S.E.2d 328, 329 (Ga. 1996); 2) in which the issue before the court was whether the heirs of a minor injured on the job could, through the application of *res judicata*, use a workers compensation determination in favor of the child offensively against the employer, *Besonen v. Campbell*, 220 N.W. 301, 302-03 (Mich. 1928); *see also Hazel v. Alaska Plywood Corporation*, 16 Alaska 642 (D. Alaska Terr. 1957)(decided prior to Alaska's statehood)(finding of workers compensation board binding on heirs of plaintiff who brought action against employer); or 3) where the issue before the court was whether an employee could bring an

action against her employer for an intentional tort where the workers compensation board had already determined that the injury was caused accidentally. *O'Connor v. Midiria*, 435 N.E.2d 1070, 1071 (N.Y. 1982).

Johnson Controls cites only two cases in its support where there was a separate claim against a third party, both of which are clearly distinguishable from the case at bar. In *Roy v. Jasper Corp.*, 666 F.2d 714, 718 (1st Cir. 1981), the issue before the court was not whether collateral estoppel precluded an employee's claim against a third party, but whether it extended to the employee's spouse (which the court held that it did). Similarly, in *Capobianchi v. BIC Corp.*, 666 A.2d 344, 348 (Pa. Super. Ct. 1995), the issue at bar was whether it was error for a court to grant summary judgment four days prior to trial on the basis that collateral estoppel applied to a workers compensation determination that an injury was in no way work-related. Johnson Controls brief, p. 22.

Of course, Johnson Controls cannot help but concede that there exists a substantial body of foreign law in which *res judicata* and collateral estoppel are *not* given effect to workers compensation determinations under various circumstances. See, e.g., *Robertson v. Popeye's Famous Fried Chicken, Inc.*, 524 So.2d 97, 99 (La. Ct. App. 1988); *Messick v. Star Enterprise*, 655 A.2d 1209, 1213 (Del. 1994); *Segal v. Travelers Ins. Co.*, 94 F. Supp. 123, 126 (D.D.C. 1950); *Le Parc Cmty. Ass'n v. Workers' Comp. Appeals Bd.*, 110 Cal. App. 4th 1161, 1172-73 (Cal. Ct. App. 2003), *Horn v. Dep't of Corr.*, 548 NW2d 660, 663 (Mich. App. 1996), cited in Johnson Controls' brief, fn. 3, p. 24.

In the end, however, it can be stated that none of the foreign cases cited by the defendants indicates that any of the referenced jurisdictions enjoys either the Utah state constitutional

protection for access to the courts or Utah's explicit strong public policy favoring the rights of an injured employee to have his *sui generis* workers compensation claim heard in a abbreviated and efficient manner that is "different from an ordinary lawsuit in that it is not an adversary proceeding," *Mollerup Van Lines* at 885, and by which "an award of benefits [and, presumably, a denial of benefits] does not generally have the *res judicata* effect of a judgment." *Burgess* at 585 (citing *Stoker* at 411). For that reason alone, if no other, those cases are of little, if any, instructive assistance. The same holds true of the unpublished case cited by OzoneSolutions, *Stokes v. American Express*, 989 F.2d 508 (10<sup>th</sup> Cir. 1993) which, while arising from Utah, is technically "foreign" in the sense that it is a federal, and not a state, case. In any case, it does not apply to the situation at bar, inasmuch as the case involved an attempt by a claimant to re-try her case against the employer against whom she had already lost her workers compensation claim, within the context of a federal Title VII case. The case is of little help here, since the federal lawsuit involved the same parties and the same claims as the denied workers compensation claim. There, the employer had an adequate opportunity to be heard, and put up its specific defenses. Importantly, the case did not involve any third-party claim, as is the case here. It is inapposite.

Ultimately, for the reasons set forth above, Utah workers compensation determinations do not, and should not, have collateral estoppel effect with regard to the third-party claims allowed under the Workers Compensation Act.



## ISSUE II.

### **EVEN IF THE PRINCIPLES OF COLLATERAL ESTOPPEL AND *RES JUDICATA* APPLIED TO UTAH WORKERS COMPENSATION CLAIMS, THEIR ELEMENTS HAVE NOT BEEN MET HERE.**

As pointed out in the Gudmundsons' Opening Brief, the district court conceded that "Mrs. Gudmundson apparently now has physician testimony to challenge the Commission's determination that her medical issues were not caused by ozone exposure." (ROA 1845, fn. 1). The testimony referenced by the district court was that Mrs. Gudmundson's injuries were caused by exposure to other chemicals aside from ozone alone. (See ROA 685, diagnosis of Dr. Kay H. Kilburn of "Chemical encephalopathy due to ozone *and other chemicals*" and ROA 692, statement of Douglas E. Rollins, M.D., Ph.D. that Mrs. Gudmundson's symptoms originated from exposure to "ozone *and to the disinfection byproducts catalyzed by the ozone.*" [emphasis added]). Given that the Labor Commission's determination of Mrs. Gudmundson's ineligibility for workers compensation benefits was based on the finding that her medical condition "was not caused or aggravated by her exposure *to ozone*" only, it is clear that the issue before the court was *not* identical to the issue decided by the Labor Commission. Thus, the first element for the application of collateral estoppel – that "the issue decided in the prior adjudication is identical to the one presented in the instant action." *Buckner v. Kennard*, 2004 UT 78, ¶ 13, 99 P.3d at 846-47 – is missing here. As a result, the third and fourth elements – that "the issue in the first action was completely, fully, and fairly litigated" and that "the first suit resulted in a final judgment on the merits." *Id.* – are also missing.

The defendants have made much of the fact that the original complaint in this case framed its claims in terms of "ozone overexposure," asserting at least by implication either that

the plaintiffs were precluded thereby from developing any further facts in the case with regard to the cause of Mrs. Gudmunsons' injuries or that they are somehow estopped from developing this case outside the skeletal framework set forth in her notice pleadings. (See, e.g., OzoneSolutions brief, pp. 5-6, 24, Del Ozone brief, pp. 20-21)

This assertion fails for two reasons. First, notice pleading is exactly what its name implies – a method whereby fair notice of the nature and basis or grounds of a claim and indication of the type of litigation is given. *Blackham v. Snelgrove*, 280 P.2d 453 (Utah 1955). It is not intended to be comprehensive, nor is it meant to be restrictive; to the contrary, the sufficiency of pleading in a complaint is to be liberally construed. *Gill v. Timm*, 720 P.2d 1352 (Utah 1986). In fact, the construction of pleadings is so liberal that the Utah Rules of Civil Procedure even allow amendment of the pleadings to conform to the evidence after a trial has occurred, where the parties consent to trial on the issue. Even where evidence is objected to at a trial on the ground that it is not within the issues made by the pleadings, the court may still allow the pleadings to be amended when the presentation of the merits of the case will be subserved thereby. Utah R. Civ. P. 15(b). See *Lloyd's Unlimited v. Nature's Way Marketing, Ltd.*, 753 P.2d 417 (Utah 1990).

Here, the averments of the complaint and the amended complaint that Mrs. Gudmundson's injuries were caused by "ozone overexposure" certainly encompassed within them all of the consequences of that ozone overexposure. including the byproducts of ozone and exposure to other chemicals which, in combination with ozone, caused injury. None of the defendants here has claimed that they were somehow either surprised or prejudiced because they did not read the averments of the complaint broadly enough.

Secondly, the district court was certainly aware that Mrs. Gudmundson's claims in the instant case were broader than the claims determined in the workers compensation proceeding – and that Mrs. Gudmundson had adduced evidence in support of those broader claims, as evidenced above. Whether these claims were mischaracterized as a “moving target” or not, (ROA 1890), the fact remains that the claims that the district court denied were *not* identical to the claims denied by the Labor Commission – a fact frankly admitted by the district court. Had the district court construed the facts in a light most favorable to the Gudmundsons, as required by myriad Utah cases, summary judgment simply could not have issued in favor of the defendants on the finding that workers compensation issue was identical to the third-party claim, because it wasn't. See *Themy v. Seagull Enters., Inc.*, 595 P.2d 526 (Utah 1979); *Briggs v. Holcomb*, 740 P.2d 281 (Utah App. 1987); *Copper State Leasing Co. v. Blacker Appliance & Furn. Co.*, 770 P.2d 88 (Utah 1988); *Reeves v. Geigy Pharmaceutical, Inc.*, 764 P.2d 636 (Utah App. 1988).

Thus, even if *res judicata* and collateral estoppel applied to workers compensation claims, they should not apply here. Mrs. Gudmundson's workers compensation claim was not identical to the instant case against the defendants.

### ISSUE III.

#### **EVEN IF THE PRINCIPLES OF COLLATERAL ESTOPPEL AND *RES JUDICATA* APPLIED TO WORKERS COMPENSATION CASES, THEIR APPLICATION TO THE INSTANT CASE WOULD RESULT IN MANIFEST INJUSTICE.**

In their reply briefs, all of the defendants have assiduously avoided discussion of the fact that the application of collateral estoppel to this case would be manifestly unjust to Wendy and Kay Gudmundson. Instead, they have concentrated on asserting that the abbreviated and

informal workers compensation scheme is somehow as procedurally adequate as full-blown litigation – an issue refuted at length in the Gudmundson’s opening brief. The question of simple fairness and rightness and justice has been ignored in the defendants’ pronouncements in this regard.

Nonetheless, the question of whether it is ultimately fair, right and just to apply the principle of collateral estoppel to this case is crucial in determining whether it should be engaged here. As this court has specifically held, “[a]pplication of the doctrine of collateral estoppel *may be unwarranted in circumstances where its purposes would not be served,*” and “collateral estoppel can yield an unjust outcome if applied without reasonable consideration and due care.” *Buckner* at 846-847. Where, as here, an injustice will most certainly occur through the blind application of the principle, it should be soundly rejected. “In particular, allowing a party who took no part in the first suit to take advantage of the findings therein and use them offensively in subsequent litigation can result in adverse, unjust, and unforeseen consequences for the party against whom collateral estoppel has been asserted. Courts, then, must carefully consider whether granting preclusive effect to a prior decision is appropriate. Collateral estoppel ‘is not an inflexible, universally applicable principle. ... [P]olicy considerations may limit its use where the ... underpinnings of the doctrine are outweighed by other factors.’” *Id.* (citations omitted).

As pointed out in the Gudmundson’s opening brief herein, application of the principle of collateral estoppel to this case results in a manifest injustice. Wendy Gudmundson will be permanently barred from her day in court to be heard against these third-party defendants because of the draconian imposition of the workers compensation decision to which none of

them, (nor, for that matter, plaintiff Kay Gudmundson), were parties. Her chance to be heard in a fair and impartial judicial forum will be crushed. Her ability to fully develop her case, with adequate time, resources, and care devoted to the prosecution of her claim will be foreclosed forever. If ever a case cried out for simple justice, this is it.

#### **ISSUE IV**

#### **DEL OZONE IS STRICTLY LIABLE DUE TO THE UNCONTROVERTED EVIDENCE THAT IT SUBSTANTIALLY HELPED IN THE DESIGN OF OZONESOLUTIONS' OZONE LAUNDRY DISINFECTION SYSTEM.**

##### **i. Del Ozone's "Statement Of The Case" is Factually Incorrect.**

In this appeal, Del Ozone has attempted to pass off as facts statements that were either disputed or outright debunked in Gudmundsons' Opposition to Del Ozone's Motion for Summary Judgment (ROA 729-747). They should be rejected here.

For example, Del Ozone has confused Workers Compensation Fund's ("WCF") hired medical examiner with the medical panel of the Labor Commission. Del Ozone Brief p. 14. The fact is that WCF paid Dr. Holmes to conduct a medical examination to either limit or avoid paying Wendy permanent disability benefits. Thus, Dr. Holmes' biased medical report was addressed to Darlene Proctor, a Legal Adjustor for WCF – not a judge at the Utah Labor Commission (ROA 385). Second, despite Del Ozone's assertions to the contrary (Del Ozone brief, p. 7), the facts are clear that Del Ozone knew the ozone laundry disinfection system was to be installed at the Prison through a purchase order which instructed Del Ozone to ship its ozone generator and other key components to "Utah D[e]partment O[f] C[orrections], Draper Prison, 14425 Bitter Brush Lane, Draper, Utah 84020 (ROA 601). Third, contrary to Del Ozone's assertion found on page 12 of its brief, the facts demonstrate that Mrs. Gudmundson's brain

MRI on December 21, 2004 was abnormal (i.e., Chiari Malformation). (ROA 608). This is significant to demonstrate the temporal relationship of injury to Wendy's exposure to ozone and its neurotoxic byproducts.

Finally, contrary to Del Ozone's calculations, the actual discovery period in this case has been surprisingly short considering its complex medical and scientific nature. Less than 30 days after the first Case Management Order was signed, the parties stayed discovery to add Johnson Controls as a Defendant. (ROA 518-520). The Second Amended Case Management Order was signed on June 6, 2007 and cut fact discovery off three months later. (ROA 525-527). In sum, there has been a total of only four months of fact discovery from orders to deadlines. Within the context of this case, this is insufficient time to depose all the essential witnesses, especially when coordinating the schedules with counsel for all three defendants, especially where this case presents complicated facts, timelines, technical issues, scientific issues and medical issues which require extensive discovery.

**ii. Because Del Ozone Substantially Assisted In The Design Of The Ozone Laundry System That Injured Wendy Gudmundson, It Was Error to Dismiss IT From the Case.**

The ozone-generating apparatus installed at the prison comprised a *system* – not simply one piece of machinery. The evidence in this case demonstrates that Del Ozone not only manufactured and sold each and every key component that is part of this ozone laundry disinfection system, but according to Mr. Downey, the owner of OzoneSolutions. “[t]he initial design of that system, *Del Ozone collaborated with us to design that system*. What was put in there [the Prison] was a design we use over and over again. . . .” (ROA 554; emphasis added). In fact, OzoneSolutions held “annual meetings [with Del Ozone] to look at the design and see if

there was anything better that we [OzoneSolutions and Del Ozone] could do or things that we [OzoneSolutions and Del Ozone] could omit or add to make it a better *system*.” (ROA 549; emphasis added). OzoneSolutions purchased all of the key components in its system “exclusively from Del Ozone.” (ROA 545). Mr. Downey stated that “I rely on engineers from Del Ozone . . . to help me design the [ozone laundry disinfection] *systems*.” (ROA 585; emphasis added). Mr. Downey relied on Del Ozone’s design when he installed his ozone laundry disinfection system without an ambient air monitoring device, stating “I don’t believe with the Del Ozone generator an ambient ozone monitor is necessary.” (ROA 584). Failure to include an ambient ozone monitor and automatic shut off valve would constitute a defect in the design, according to OzoneSolutions’ own “Application Guidelines.” (ROA 441). *See also* ROA 588, Encyclopedia of Occupational Health & Safety, Fourth Edition, stating that “When oxonizers are installed, they should be provided with ozone specific detectors . . . connected directly to an alarm system that acts when certain concentrations are reached.”

Del Ozone points out that OzoneSolutions unilaterally selected a 15-gram generator for the Prison instead of a larger generator that may have been recommended by Del Ozone. This does not, however, change the actual *design* of the ozone laundry disinfection *system* that was, undisputedly, designed in collaboration with Del Ozone and its engineers. Del Ozone, naturally, is framing this issue narrowly in an effort to limit this Court’s focus of the defective system. Nonetheless, as the record indicates, the ozone generator is just one single part or component to the ozone laundry disinfection system, the overall design of which was developed with Del Ozone (and which required that every key component be purchased from Del Ozone).

Del Ozone's substantial contribution to the design of OzoneSolutions' ozone laundry disinfection *system* renders Del Ozone liable for defects in the system even if, *arguendo*, the ozone generator itself – only one piece of equipment in the system – was not defective. This principle is well settled under products liability in Utah and was even cited, (although tellingly not analyzed), in Del Ozone's brief. In *House v. Armour of Am.*, 886 P.2d 542, 553, (Utah Ct. App. 1994), *aff'd*, 929 P.2d 340 (Utah 1996), the Utah Court of Appeals stated that “[s]trict liability may extend . . . to the manufacturer of the product and the manufacturers of its component parts.” (citations omitted). However, strict liability for a component manufacturer is limited when that component is integrated into a larger unit, thus, ‘if the component part manufacturer does not take part in the design or assembly of the final system or product, he is not liable for defects in the final product if the component part itself is not defective.’” *Id.* at 553 (quoting *Koonce v. Quaker Safety Prod. & Mfg.*, 798 F.2d 700, 715 (5th Cir. 1986)). Logically, if the component manufacturer does take part in the design of the final system, it is liable for defects in the final product even if the component itself is not defective.

Finally, Del Ozone's reliance on *Utah Local Gov't Trust v. Wheeler Machinery Co.*, 154 P.3d 175 (Utah App. 2006) is misplaced, for two reasons. First, since the analysis in *Utah Local Gov't Trust* focused on the issue of application of a statute of limitations to a products liability case, which is not at issue here, it is inapplicable to the case at bar. Second, since *Utah Local Gov't Trust* was reversed and remanded by this court for having applied the wrong test in a product liability-services provided hybrid case – also not at issue here – *see Utah Local Gov't Trust v. Wheeler Mach. Co.*, 2008 UT 84 (Utah 2008), it is obviously inapplicable to this case.



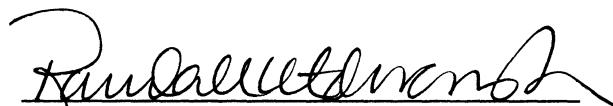
Unfortunately, the district court focused on the ozone *generator* only – not the *system* as a whole. Had the facts set forth in the Gudmundsons’ opposing memorandum been read in a light most favorable to the Gudmundsons, it is clear that a finding that material facts relative to the defective design of the system were in serious dispute was mandated. Thus, it was error to dismiss Del Ozone from the case.

#### RELIEF SOUGHT

For the reasons set forth above, the district court’s order granting summary judgment against the Gudmundsons should be reversed, and the case remanded for trial on the merits.

DATED this 19<sup>th</sup> day of February, 2009.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 19<sup>th</sup> day of February, 2009, I personally served a true and correct copy of the within and foregoing to the following counsel of record:

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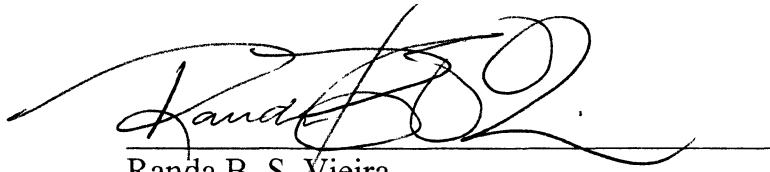
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