

2008

Wendy Gudmundson, Kay Gudmundson v. Del Ozone, Ozonesolutions, L.C. Johnson Controls, Inc., John and Jane Does 1-10 : Amicus Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

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STATEMENT OF ISSUES PRESENTED

Should issue preclusion apply to determinations made in workers' compensation proceedings?

SUMMARY OF ARGUMENT

The general rule of res judicata supports our modern civil system requirement that all claims and counterclaims to be brought in one action. A number of exceptions to the general rule of res judicata apply when the assumptions supporting our modern civil system do not apply. In particular, issue preclusion should not apply (1) when the first action involves a statutory scheme that provides a summary, expedited procedure, (2) when the procedures available in the first action are inappropriate to apply to the determination of the same issues when presented in the context of a much larger claim, (3) when differences in procedural rules governing the proceedings could result in a different outcome, (4) when differences in the values at stake in the proceedings affect the parties' financial incentives to vigorously pursue or defend claims, (5) when differences in jurisdiction of the forums limit the grounds or theories presented in the first action, and (6) when the adjudication of facts in the first action are determined under a different rule of law.

All of the foregoing exceptions apply to workers' compensation proceedings. Any one of them could, standing alone, support a conclusion that issue preclusion should not apply to workers' compensation decisions.

BACKGROUND

Gudmundson filed a claim for workers' compensation benefits and a third party civil action for injuries arising from exposure to toxic fumes while at work. Gudmundson's claim for workers' compensation benefits was denied after a finding that her injuries were not caused by exposure to toxic fumes. The trial court granted summary judgment in favor of the third party Defendants based on issue preclusion.

ARGUMENT

UAJ's position is that issue preclusion should not apply to workers' compensation decisions because of policy considerations and other factors. This brief does not address whether the specific elements required to invoke issue preclusion were met in this particular case. Instead, this brief assumes that the elements necessary to invoke issue preclusion are satisfied – although UAJ recognizes that Gudmundson argues that they are not – and addresses the policy considerations and other factors that would preclude application of issue preclusion generally to workers' compensation determinations.

Issue preclusion is a branch of res judicata that prevents parties from relitigating facts and issues in a second suit that were fully litigated in a first suit. *See Buckner v. Kennard*, 2004 UT 78 ¶ 12, 99 P.3d 842.

But issue preclusion is not a “universally applicable principle” and is only warranted where its purposes are served, including: (1) preserving the integrity of

the judicial system; (2) promoting judicial economy; and (3) protecting litigants from harassment by vexatious litigation. *Id.* at ¶ 14.

Further, its application in some cases can yield an unjust outcome, especially when a party seeking to invoke issue preclusion offensively was not a party in the first suit. *See id.* at ¶¶ 14 and 15. Thus, policy considerations and other factors limit the application of issue preclusion and courts should therefore carefully consider whether to grant preclusive effect to a prior decision. *See id.* at ¶ 15 and ¶ 30 (refusing to give nonmutual preclusive effect to arbitration decisions in light of public policy supporting inexpensive and speedy alternative dispute methods); *see also State in Interest of J.J.T.*, 877 P.2d 161, 164 (Utah Ct. App. 1994) (expressing concern about applying *res judicata* to child custody proceedings); and *In re Juvenile Appeal (83-DE)*, 460 A.2d 1277, 1282 (Conn. 1983) (noting that doctrines of preclusion should be flexible and must give way when their mechanical application would frustrate other social policies based on values equally or more important than the convenience afforded by finality in legal controversies).

In *Buckner*, this Court considered the policies supporting arbitration in light of the purposes supporting issue preclusion and concluded that the justifications for promoting arbitration and for applying issue preclusion did not require giving nonmutual preclusive effect to arbitration decisions. Some of these considerations apply with more force to the application of issue preclusion to worker's compensation decisions because worker's compensation claims are the exclusive

remedy an injured worker has against an employer, and therefore, the workers' compensation proceedings, unlike arbitration, are not voluntary. *See* UTAH CODE ANN. § 34A-2-105(1) (2007).

Following the analysis in *Buckner*, denying nonmutual application of issue preclusion to a workers' compensation decision does not expose parties to harassment by vexatious litigation. Instead, it only prevents a third party from gaining vicarious advantage from a litigation victory won by another. And it does not undermine judicial economy because a worker's compensation claim and a tort claim are cumulative. *See* UTAH CODE ANN. § 34A-2-106(1) (2007).

Applying nonmutual issue preclusion, however, would increase the risks at stake in a workers' compensation proceedings when a worker has a third party claim, and therefore, intensify litigation. It would undermine the benefits derived from the more relaxed and expedited procedures applicable to workers' compensation proceedings. And finally, it would undermine public policy supporting a speedy and inexpensive claims process.

The *Buckner* Court only addressed a few of the policy considerations supporting issue preclusion. So a discussion of the historical development of issue preclusion can aid the Court's understanding of the purposes served by issue preclusion and the reasons behind various exceptions to the general rule of preclusion.

Back sometime before my earthly existence, cases involving law and equity were administered by different courts. *See Petty v. Clark*, 129 P.2d 568, 569

(Utah 1942). Under that system, a party was often required to bring multiple suits to determine the action. *See id.* at 570. For example, in *Petty v. Clark*, this Court explained that two different suits were potentially required for a party to obtain a full recovery in a breach of a real estate contract action. *See id.*

Under the common law, a party who lost an action grounded in one theory could pursue another action based on another theory even though the acts that gave rise to the actions were identical. *See* Restatement (Second) Judgments § 24 cmt. a (explaining rationale supporting purposes of merger and bar). In those days, if the “defendant had invaded a number of primary rights conceived to be held by the plaintiff, the plaintiff had the same number of claims, even though they all sprang from a unitary occurrence.” *Id.*

In contrast, a modern procedural system usually provides parties with the means to fully develop the entire transaction in one action. A modern system requires all claims and counterclaims to be brought in one action without regard to distinctions between law and equity, allows general pleadings, allows amendment of pleadings, and allows mutually inconsistent allegations. *See id.* Accordingly, the “law of res judicata now reflects the expectation that parties who are given the capacity to present their ‘entire controversies’ shall in fact do so.” *Id.*

The Restatement recognizes that the law of res judicata rests on the foregoing procedural assumptions. It follows that exceptions to the general rule of res judicata apply when the foregoing assumptions are absent. *See id.* Accordingly, issue preclusion is unwarranted:

- when the first action involves a statutory scheme that provides a summary, expedited procedure, Restatement (Second) Judgments § 26 cmt e;
- when “the procedures available in the first court [are] tailored to the prompt, inexpensive determination of small claims and thus . . . wholly inappropriate to the determination of the same issues when presented in the context of a much larger claim,” Restatement (Second) Judgments § 28 cmt. d.¹
- when differences in procedural rules governing the proceedings could result in a different outcome; *see* Restatement (Second) Judgments § 29(2);
- when differences in the values at stake in the proceedings affect the parties’ financial incentives to vigorously pursue or defend claims, *see Parklane Hoisery Co., Inc. v. Shore*, 439 U.S. 322 (1979);
- when differences in jurisdiction of the forums limit the grounds or theories presented in the first action, *see* Restatement (Second) Judgments § 25 cmt e (noting that if court in the first action did not have jurisdiction to entertain omitted theory or ground then a second action presenting the omitted ground should not be precluded), § 25 cmt. f (noting that preclusion is narrower when a procedural system in fact does not permit the plaintiff to claim all possible remedies in one action); and § 26(c) (stating that

¹ All of the relevant considerations pertinent to determining whether issue preclusion should be applicable between the party sought to be bound and the adversary with whom he originally litigated are applicable when issue preclusion is invoked by a non-party. *See* Restatement (Second) Judgments § 28 cmt. b.

preclusive effect won't be given when plaintiff was unable to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts); and

- when the adjudication of facts in the first action are determined under a different rule of law, *see Salt Lake Citizens Congress v. Mountain States Tel. & Tel. Co.*, 846 P.2d 1245, 1252 (Utah 1992).

Each of the foregoing exceptions to the general rule of res judicata apply to workers' compensation determinations. A discussion of each exception follows below.

A NUMBER OF EXCEPTIONS TO THE GENERAL RULE OF RES JUDICATA APPLY TO WORKERS' COMPENSATION DETERMINATIONS

A. Differences exist in the rule of law governing workers' compensation proceedings and tort actions

Issue preclusion should not apply to workers' compensation decisions because the law governing workers' compensation claims is different than the laws governing a tort claim. This Court noted that res judicata only bars a second adjudication "under the same rule of law." *Salt Lake Citizens Congress v. Mountain States Tel. & Tel. Co.*, 846 P.2d 1245, 1252 (Utah 1992). This Court pointed out in *Ahlstrom v. Salt Lake City Corp.*, 2003 UT 4, 73 P.3d 315, that negligence claims and compensation claims involve "very different presumptions" and standards of proof. *Id.* ¶ 7 n.1. Further, this Court noted that the method utilized to resolve certain questions in a workers' compensation claim is

“markedly different” than the method used in a negligence claim. Thus, this Court concluded that importing workers’ compensation rules into negligence cases “would not be wise . . . because the legal effect of identical facts may be different in a negligence case than in a worker’s compensation case.” *Id.*; see also *Spencer v. V.I.P., Inc.*, 910 A.2d 366, 371 (Me. 2006) (refusing to apply workers’ compensation standards to tort claim because the standards are different “serve different purposes and effectuate different policies.”).

The *Ahlstrom* case involved a civil case where a city employee who caused a collision while driving a city vehicle was not found to be in the course of employment at the time she caused a collision; so the city was not vicariously liable for her negligence. But later she was found to be in the course of employment when she applied for workers’ compensation benefits for injuries she sustained in the collision. The city appealed that determination in *Salt Lake City Corp. v. Labor Com’n*, 153 P.3d 179 (Utah 2007). This Court noted in that case the different standards and purposes applicable to workers’ compensation proceedings and tort actions justify the apparently conflicting findings in the two cases. *See id.* at ¶ 18.

This Court did not apply issue preclusion to the determination in the civil action that the city employee was not in the course of employment. And had the appeals board of the Labor Commission ruled first on whether the city employee was in the course of employment at the time of the collision, Ahlstrom could have argued, as the appellees do here, that the city was prohibited from relitigating the

issue in the civil case under the doctrine of issue preclusion. But it seems that such a finding would be inconsistent with the Court's determination that different results can come from applying the different standards found in workers' compensation and tort actions. Thus, issue preclusion should not apply to workers' compensation determinations because different standards govern workers' compensation and tort actions.

B. Differences in the jurisdiction of the forums limit the grounds or theories presented in each

The assumptions supporting the general res judicata rule do not apply to workers' compensation proceedings because a worker's claim to workers' compensation benefits is processed in a different forum than the worker's third party tort claim. Under Utah law, an injured worker has two potential claims: (1) a worker's compensation claim against his employer and (2) a tort claim against a third party. *See* UTAH CODE ANN. § 34A-2-106 (2007); *see also* UTAH CODE ANN. § 34A-2-105(1) (2007) (providing that workers compensation claim is exclusive remedy against employer); and *Lieber v. ITT Hartford Ins. Center, Inc.*, 2000 UT 90, 15 P.3d 1030 (holding that Workers' Compensation Act is not the exclusive remedy for injured employees who seek to recover from someone who is not their employer and such employees do have viable claims against such third parties).

This Court explained that the Workers' Compensation Act ("Act") was to benefit injured employees "and not to impair or destroy natural rights which exist by reason of the common law to sue for redress of wrongful acts." *Lanier v. Pyne*, 508 P.2d 38, 41 (Utah 1973). The Worker's Compensation Act expressly preserves the right for the employee to sue a negligent third party for damages. *See Shell Oil Co. v. Brinkerhoff-Signal Drilling Co.*, 658 P.2d 1187 (Utah 1983) and UTAH CODE ANN. § 34A-2-106(1) (2007) (providing worker with the right to simultaneously maintain both a compensation claim and a third party claim). The Act does not require an election of remedies. Thus, the right to workers' compensation benefits and the right to pursue a third party tort claim are clearly cumulative.

However, a worker is barred from bringing both claims in one proceeding. *See Working RX, Inc. v. Workers' Compensation Fund*, 2007, 2007 UT App 376, 173 P.3d 853 (stating that district courts have no jurisdiction whatsoever over cases that fall within the purview of the Workers' Compensation Act). Thus, issue preclusion should not apply to workers' compensation proceedings because the assumptions supporting the general res judicata rule do not apply when claims arising from one transaction are split and adjudicated in different forums.

This position has support in Utah decisions. The Utah Court of Appeals has held that res judicata should not apply to decisions made by an administrative agency that lacks jurisdiction to resolve the claim. *See SMP, Inc. v. Kirkman*, 843 P.2d 531, 533 -534 (Utah Ct. App. 1992).

Similarly, this Court refused to apply res judicata to a small claims court proceeding because of the limited jurisdiction of the small claims court. *See Faux v. Mickelsen*, 725 P.2d 1372 (Utah 1986). In *Faux*, this Court noted that a small claims court is a creature of statute and its jurisdiction “is ***not exclusive*** and is limited.” *Id.* at 1374. This Court noted that small claims courts were intended to dispense “speedy justice between the parties.” *Id.* at 1375. To further that purpose, this Court concluded that the defendant in the small claims court proceeding was not compelled to bring a counterclaim and a subsequent action by the defendant against the plaintiff “was not barred by the doctrine of res judicata.” *Id.*

Courts of other states refuse to apply issue preclusion to workers’ compensation proceedings because of the limited jurisdiction of the administrative agency. In *Le Parc Community Ass’n v. Worker’s Comp.*, 110 Cal.App. 4th 1161 (Cal. Ct. App. 2003), the California Court of Appeals discussed in length res judicata and its application to workers’ compensation decisions. The court explains the general rule and notes that splitting claims is generally prohibited. It then notes the exception to the “general rule of indivisibility of a primary right” if the plaintiff was precluded from asserting a second action on a different legal theory because of limitations on the subject matter jurisdiction of the first forum. *Id.* (citing Restate (Second) Judgments § 26).

The court also points out another exception to issue preclusion when “administrative and civil proceedings afford cumulative remedies that cannot all

be sought in one proceeding.” *Id.* In such circumstances, the statutory scheme plainly envisions that both an administrative proceeding and a civil action may be brought; “and res judicata does not apply.” *Id.*

The court then explains that an injured worker has two primary rights, the right to no-fault workers’ compensation benefits and a common law tort claim. The court notes that the lower court lacked jurisdiction under the workers’ compensation laws to determine the employee’s right to worker’s compensation benefits and that tort damages were not available in a workers’ compensation proceeding. It then concluded, “In light of the Legislature’s express intent to permit cumulative recoveries, resolution of the first proceeding, whether by dismissal with prejudice or any other form of judgment on the merits, cannot be given res judicata effect that bars continued litigation of the second action. The contrary position asserted by the workers’ compensation administrative law judge and adopted by Le Parc would, in effect, make the remedies mutually exclusive, in direct conflict with the statutory command that they be cumulative.”

The same conclusion was reached by the Delaware Supreme Court. In *Messick v. Star Enterprise*, 655 A.2d 1209 (Del. 1995), a worker claimed that he had a heart attack due to inhalation of gases while on his job. He lost on the causation issue during his workers’ compensation proceedings. The worker argued that if an election of remedies was required he would be forced to choose between trying to secure immediate workers compensation benefits or instituting a lengthier and, possibly more remunerative, third party action. The court explains

that the risk of an adverse decision in the workers' compensation proceeding "forced an election of remedies in contravention of the statute." *Id.* The court notes that the only way to eliminate the risk is to litigate the third party claim first. But that would defeat the purpose of the workers' compensation law because the worker would have to forego immediate assistance "in the hope that he wins his third party suit." The court also points out that giving nonmutual preclusive effect to workers' compensation proceedings would give third parties an incentive to delay litigation to see if the worker loses the workers' compensation claim and use issue preclusion as a shield even though the worker, if successful in the workers' compensation proceeding, cannot use issue preclusion as a sword against the third party.

In sum, the Restatement's position that issue preclusion should not apply to decisions made in a forum with limited jurisdiction is supported by Utah's Workers' Compensation Act, which expressly grants a worker the right to simultaneously pursue a claim for benefits and a third party tort claim. The cumulative rights afforded injured workers would be impaired if issue preclusion applied to workers' compensation decisions because a worker would be forced to make an election of remedies.

C. A workers' compensation claim is processed pursuant to a statutory scheme that provides a summary, expedited procedure

Issue preclusion should not apply to workers' compensation decisions because a workers' compensation claim is processed pursuant to a statutory

scheme that provides a summary, expedited procedure. *See* Restatement (Second) Judgments § 26 cmt e. The Restatement provides the following illustration and explanation in support of its position:

For nonpayment of rent, landlord A brings a summary action to dispossess tenant B from leased premises. A succeeds in the action. A then brings an action for payment of the past due rent. The action is not precluded if, for example, the statutory system discloses a purpose to give the landlord a choice between, on the one hand, an action with expedited procedure to reclaim possession which does not preclude and may be followed by a regular action for rent, and, on the other hand, a regular action combining the two demands. *Id.* Illustration 5.

A workers' compensation proceeding falls under this exception because it involves an expedited proceeding and allows the worker to simultaneously pursue a third party tort claim. The Act is a comprehensive scheme intended to provide speedy compensation to injured workers. The Act "creates a no-fault type insurance protection scheme for work-related injuries in lieu of traditional common law tort remedies." *Sheppick v. Albertson's*, 922 P.2d 769, 773 (Utah 1996). Although the amount of compensation a worker can receive under the Act is typically limited compared to a tort claim, "compensation is available without regard to fault, is more flexible in providing for physical disabilities and loss of wages, medical benefits, and benefits for dependents and survivors, and is provided more speedily and generally with less expense." *Id.* Thus, "proceedings for workers' compensation claims are very informal." *Color Country Management v. Labor Com'n*, 2001 UT App 370, 38 P.3d 969.

The policy supporting a speedy determination of benefits owed to injured workers would be undermined by applying issue preclusion to workers' compensation decisions because the consequences of an adverse decision would lead to more intense litigation.

If a party is aware of the potential (and perhaps not wholly foreseeable) preclusive effects of a judgment, he may feel compelled to over-litigate an issue, or pursue an appeal that might not otherwise be taken, out of fear of the consequences in later litigation.

Restatement (Second) Judgments, Title E, Introductory Note;

This is the reason the Michigan Court of Appeals declined to apply issue preclusion to workers' compensation proceedings. "[W]e note that application of judicial estoppel in the present case would undermine worker's compensation policy objectives by increasing employers' litigiousness in worker's compensation proceedings." *Horn v. Department of Corrections*, 548 N.W.2d 660 (Mich. App. 1996).

D. The value at stake in a workers' compensation proceeding versus a third party claim affects the worker's financial incentive to vigorously pursue a compensation claim

The potential compensation to worker under the Act is significantly less than the potential compensation the worker might recover in a third party tort claim. Thus, a worker has less incentive to vigorously pursue a worker's compensation claim when the worker simultaneously files a third party tort claim. Issue preclusion should not apply when differences in the values at stake in the proceedings affect the parties' financial incentives to vigorously pursue or defend

claims. *See Parklane Hoisery Co., Inc. v. Shore*, 439 U.S. 322 (1979); *see also* Judge Learned Hand in *Evergreens v. Nunan*, 141 F.2d 927, 929 (2d Cir. 1944) (stating “[I]t often works very harshly inexorably to make a fact decided in the first suit conclusively establish . . . a fact ‘ultimate’ in the second. The stake in the first suit may have been too small to justify great trouble and expense in its prosecution or defense.”); Restatement (Second) Judgments § 27 cmt. e. (noting that “[t]here are many reasons why a party may choose not to raise an issue, or to contest an assertion, in a particular action. The action may involve so small an amount that litigation of the issue may cost more than the value of the lawsuit.”); and Restatement (Second) Judgments § 28(5)(c) (explaining that “[r]elitigation of issues is not precluded when the party sought to be precluded did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.”).

The foregoing principle is supported by the following illustration:

In the crash of C’s plane, A and B are killed. In a wrongful death action by A’s representative, a judgment is awarded of \$35,000 despite evidence establishing damages recoverable by A’s representative substantially exceeding that amount. In a subsequent action for the wrongful death of B, C is not precluded as to the issue of liability.

Restatement (Second) Judgments § 29 cmt. g. illustration 7.

The Act provides limited benefits to a worker compared to the types of damages the worker may recover in a tort claim. For example, a worker’s compensation for disability benefits equals only two-thirds of the worker’s

average weekly wages, subject to other limitations. *See* Utah Code Ann. §§ 34A-2-408 and 34A-2-412.

Further, attorney fees in workers' compensation cases are significantly limited. *See* Admin. R. 602-2-4 (forcing attorneys to charge contingency fee, limiting fee to amount recovered for disability benefits, and capping fee). These limitations significantly deter attorneys from vigorously pursuing workers' compensation claims. To illustrate, consider my experience handling my first and only worker's compensation claim. I represented an illegal alien who was injured while building a home. The employer picked my client up in the morning from a location known to employers looking to hire illegal aliens. The employer paid my client in cash so there was no documentation that my client worked for the employer. The claim for worker's compensation benefits was contested because the employer denied employing my client. Anyway, after a significant effort on my part I was able to obtain full benefits for my client. The amount of benefits paid on his behalf was about \$60,000. However, about \$51,000 was for medical bills and only about \$9,000 for disability. The administrative rules at the time capped fees at 20 percent and precluded me from charging a fee for the medical bills. So I got paid about \$1,800 for about 60 hours of work. I lost money helping that poor guy out (after deducting my overhead costs).

My practice, and it is shared by most personal injury attorneys, is to handle the third party claim and refer a client with a worker's compensation claim to one of the few attorneys in the state who exclusively handle workers' compensation

claims. These attorneys, who handle a significant volume of cases, develop efficiencies in processing these cases to financially warrant the pursuit of claims for a relatively small fee (compared to fees earned in third party claims). But neither the attorney nor the claimant can financially afford to engage in intense litigation of worker's compensation claim. And an attorney who is going to generate a small fee from a worker's compensation claim is less likely to pursue a claim as vigorously as an attorney who could recover a significantly higher fee for the same injuries in a third party claim.

If issue preclusion applies to workers' compensation decisions it would have a chilling effect on the pursuit of workers' compensation claims when a worker has a third party claim because attorneys handling the third party claim would be less likely to advise a client to pursue a workers' compensation claim when there is a risk that the pursuit of workers' compensation benefits could tank the third party claim.

But an injured worker who can maintain a third party claim should be able to pursue a speedy recovery of worker's compensation benefits without risk of losing his third party claim.

E. Differences in procedural rules governing workers' compensation proceedings and civil litigation could result in a different outcome

Issue preclusion should not apply to workers' compensation proceedings because the use of procedures allowed in civil cases but not allowed in a workers' compensation hearing could result in a different outcome. Relitigation of issues is

not precluded when there are differences in the quality or extensiveness of the procedures followed in the two courts. Restatement (Second) Judgments § 28(3).

“Preclusion may be withheld when the party against whom it is invoked can avail himself of procedures in the second action that were not available to him in the first action and that may have been significantly influential in determination of the issue. Differences in this regard include such procedures as discovery devices and plenary as distinct from summary hearing. It may also be relevant that the party against whom preclusion is invoked had no choice, or restricted choice, as to the forum in which the issue was litigated.” Restatement (Second) Judgments § 29 cmt. d.

The procedural differences between workers’ compensation proceeding and a civil action are significant. As noted above, the workers’ compensation proceedings are informal, expedited, and the rules of evidence are relaxed. These differences led the Delaware Supreme Court to conclude that issue preclusion should not apply to workers’ compensation claims. *See Messick v. Star Enterprise*, 655 A.2d 1209, 1213 (Del. 1995) (noting that both forums allow claimant opportunity to present a claim but the tools available are not equal and could lead to a different outcome (citing Restatement (Second) Judgments § 29(2) cmt. d.)).

Similarly, the Louisiana Court of Appeals refused to apply res judicata to a worker’s compensation hearing because of differences in procedures. “Although both cases involve the same accident and the question of plaintiff’s disability,

nonetheless, the demands of the parties, the nature of the evidence, and the burdens of proof are different in the tort and compensation actions.” *Robertson v. Popeye's Famous Fried Chicken, Inc.*, 524 So.2d 97 (La. Ct. App. 1988).

One fundamental tool available in civil litigation and not available in worker’s compensation proceedings is cross examination of medical experts. “Cross examination is a fundamental trial right in our judicial system and is an essential element of a fair trial and the proper administration of justice.” 81 Am. Jur. 2d Witnesses § 771 (2004). Cross-examination is “beyond any doubt, the greatest legal engine ever invented for the discovery of truth.” Wigmore, Evidence, § 1367 (Chadbourn Rev. 1974).

Cross examination of medical experts is not available because medical experts are not allowed to testify at workers’ compensation hearings. *See* R. 1102-03. This procedural difference alone could change the outcome of a case.

Other procedural differences could make a change in the outcome of a determination. A medical panel, and not a jury or judge, makes determinations of medical issues in dispute. *See id.* The hearings are very brief and usually last less than two hours (it took me two hours just to format my table of authorities for this brief). *See id.* at 1104. Standards governing the admissibility of expert evidence are different. *See id.* at 1105. Finally, hearsay evidence is admissible in worker’s compensation proceedings. *See id.* at 1106.


All of the foregoing procedural differences could result in a different outcome if an issue was litigated in a civil action. Accordingly, issue preclusion

should not prevent a claimant from relitigating an issue decided in a workers' compensation proceeding.

CONCLUSION

Any one of the foregoing exceptions justify a conclusion that nonmutual issue preclusion should not apply to workers' compensation decisions. These exceptions show that application of issue preclusion to workers' compensation decisions could yield an unjust outcome. Accordingly, UAJ respectfully requests that the Court no apply issue preclusion to worker's compensation decisions.

Dated October 12, 2008.



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CERTIFICATE OF SERVICE

I hereby certify that on October ~~12~~¹⁴, 2008 I mailed two true and correct

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