

2008

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

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

Appeal from the Third Judicial Court,
Hon. Denise P. Lindberg

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STATEMENT OF JURISDICTION

No timely notice of appeal was filed respecting the district court's March 24, 2008 grant of summary judgment in favor of defendants and appellees Johnson Controls, Inc. and Del Ozone. Accordingly, this Court lacks jurisdiction over those appellees.

ISSUES PRESENTED FOR REVIEW

Issue No. 1: Whether any of plaintiffs' notices of appeal was timely as to defendants, Del Ozone and Johnson Controls.

Issue No. 2: Whether the district court properly granted defendants' motions for summary judgment based on the doctrine of collateral estoppel where the Utah Labor Commission's Administrative Law Judge and its Appeals Board had found plaintiffs' alleged injuries were not caused by exposure to ozone.

Issue No. 3: Whether the district court abused its discretion in denying plaintiffs' motion for additional discovery under Utah Rule of Civil Procedure 56(f) where plaintiffs failed to establish that they were unable to submit evidence to oppose summary judgment.

Standard of Review. Timeliness of the filing of a notice of appeal is a matter governed by rule and generally is strictly enforced as a matter of jurisdiction. Serrato v. Utah Transit Auth., 2000 UT App. 299, ¶ 7, 13 P.3d 616, 618. If this Court determines that its jurisdiction was properly invoked over Johnson Controls, Inc., then this Court reviews the district court's grant of summary judgment for correctness, without according deference to the trial court's legal conclusions. See Stevenson v.

First Colony Life Ins. Co., 827 P.2d 973, 976 (Utah Ct. App. 1992) (quoting Bonham v. Morgan, 788 P.2d 497, 499 (Utah 1989)). However, with respect to the district court's denial of plaintiffs' motion for additional discovery, this Court reviews that determination for an abuse of discretion and must not reverse the district court's decision unless the ruling "exceeds the limits of reasonability." Overstock.com, Inc. v. SmartBargains, Inc., 2008 UT 55, ¶ 20, 192 P.3d 858, 865 (quoting Crossland Sav. v. Hatch, 877 P.2d 1241, 1243 (Utah 1994)).

STATEMENT OF THE CASE

In September 2005, Wendy Gudmundson and her husband, Kay Gudmundson, ("plaintiffs") sued Del Ozone, OzoneSolutions, L.C., and Johnson Controls, Inc. ("Johnson Controls") asserting claims for negligent installation, strict liability, *res ipsa loquitor*, breach of implied warranty and merchantability, and negligent manufacture. (See generally ROA 127-134, Am. Compl. ¶¶ 36-71.) The claims asserted by plaintiffs were all predicated on plaintiffs' claim that Mrs. Gudmundson had been exposed to ozone while working at the Wasatch Laundry Facility of the Utah Department of Corrections and that this exposure caused plaintiffs physical, emotional, and financial damage. (See ROA 125-127, *id.* ¶¶ 33-35.)

Mrs. Gudmundson had previously asserted before the Utah Labor Commission that her alleged injuries were caused by exposure to ozone. But, the Utah Labor Commission's Administrative Law Judge and Appeals Board both rejected Mrs. Gudmundson's claims for lack of evidence of causation. (ROA 354, Findings of Fact, Conclusions of Law, and Order at 3, Gudmundson v. State of Utah Dep't of Corr.,

Case No. 05-0469 (Utah Labor Comm’n Adj. Div. Oct. 2, 2006); ROA 358, Order of Utah Labor Comm’n Appeals Board at 2, Gudmundson v. State of Utah Dep’t of Corr., Case No. 05-0469 (Utah Labor Comm’n App. Bd. Apr. 23, 2007).)

On March 24, 2008, the district court ruled that plaintiffs’ state court claims were precluded by the doctrine of collateral estoppel, concluded that plaintiffs had failed to produce evidence that Del Ozone’s generator was defective, and rejected plaintiffs’ request for additional discovery. On these grounds, the district court granted summary judgment in favor of Del Ozone and Johnson Controls. (ROA 1812-13, March 24, 2008 Order Granting Summary Judgment at 2-3.) Just over two months later, on May 28, 2008, the district court granted summary judgment to the remaining defendant, OzoneSolutions, and issued a final order disposing of the entire case, again finding that plaintiffs’ claims were precluded by the doctrine of collateral estoppel. (ROA 1845-46, May 28, 2008 Ruling and Order Granting Defendant OzoneSolutions’ Motion for Summary Judgment at 1-2.)

On April 2, 2008 plaintiffs prematurely filed a notice of appeal with the district court purporting to take an appeal from the order granting summary judgment in favor of Del Ozone and Johnson Controls, Inc. (ROA 1816, Pls.’ April 2, 2008 Notice of Appeal at 2.) On May 28, this Court notified all parties that this notice of appeal was being considered for *sua sponte* summary dismissal as prematurely filed because the appeal was not taken from a final order adjudicating all claims between all parties. (ROA 1845-47, Order, Gudmundson v. Del Ozone, No. 20080320 (Utah May 28, 2008) (“May 28 Order”).) On June 4, plaintiffs filed a second notice of appeal,

expressly appealing only the grant of summary judgment to OzoneSolutions and moving for the second appeal to be consolidated with the plaintiffs' first appeal. (ROA 1848-49, June 4, 2008 Notice of Appeal and Motion to Consolidate with Pending Appeal at 1-2.) On June 25, this Court dismissed as premature the first notice of appeal, without prejudice to the filing of a timely subsequent appeal. (ROA 1852, Order, Gudmundson v. Del Ozone, No. 20080320 (Utah June 25, 2008) ("June 25 Order").) Plaintiffs then filed a third notice of appeal on June 28, appealing all aspects of the district court's final order issued on May 28. (ROA 1859, June 28, 2008 Notice of Appeal at 4.)

FACTUAL BACKGROUND

A. Plaintiffs' Theory of Causation.

In early December, 2004, an ozone generating machine was installed at the Utah Department of Corrections in the Wasatch Laundry Facility where Mrs. Gudmundson worked. (ROA 124, Am. Compl. ¶ 27.) Plaintiffs allege that Mrs. Gudmundson was "exposed to ozone from an ozone generating machine newly installed at the Utah Department of Corrections in the Wasatch Laundry Facility." (Id.) Plaintiffs contend that, "The ozone exposure triggered a series of events, eventually necessitating brain surgery." (Id.)

Mrs. Gudmundson was diagnosed with a Chiari 1 malformation. (ROA 125-26, id. ¶ 34(a).) As explained in reports of the independent medical examiners, a Chiari malformation occurs when the base of the brain (cerebellum) is pushed downward through the opening to the brain stem (foramen magnum). (ROA 343,

Letter from E. Holmes, MD, MPH to D. Proctor (“Holmes Report”) at 8 (Dec. 8, 2005); ROA 349, Letter from J. Jarvis, MD, MSPH to ALJ D. George (“Jarvis Report”) at 1 (Mar. 1, 2006).) As these physicians pointed out, the condition is generally congenital and there is no research suggesting it could be caused by exposure to ozone or other chemicals. (ROA 343-44, Holmes Report at 8-9; ROA 349-50, Jarvis Report at 1-2.)

More specifically, beginning in December 2004, Mrs. Gudmundson claims that she began to experience “severe headaches and fatigue.” (ROA 124, Am. Compl. ¶ 28.) As of December 18, 2004, plaintiffs assert that Mrs. Gudmundson exhibited “flu-like symptoms,” which worsened, allegedly culminating in her inability to move and migraine headaches. (ROA 124-25, id. ¶¶ 28-32.) Eventually, plaintiffs claim that Mrs. Gudmundson’s symptoms necessitated brain surgery, which was performed on March 2, 2005. (ROA 124, id. ¶ 28.)

Plaintiffs contend that “Mrs. Gudmundson’s medical condition was caused by ozone overexposure.” (ROA 125, id. ¶ 33.) As a result of this alleged ozone overexposure, plaintiffs claim that they suffered physical, emotional, and financial injury. (ROA 125-27, id. ¶¶ 34-35.) Mrs. Gudmundson’s exposure to ozone is the only alleged source of Johnson Controls’ liability.

B. Findings of the Utah Labor Commission.

Mrs. Gudmundson previously adjudicated the issue of whether her alleged exposure to ozone caused her alleged injuries. Mrs. Gudmundson filed an Application for Hearing with the Utah Labor Commission on May 13, 2005, seeking

medical expenses and disability benefits based on her alleged exposure to ozone. (See ROA 322, Pet'r's Mot. for Review by the Utah Labor Comm'n Appeals Board Based on the Discovery of New Evidence at 1, Gudmundson v. State of Utah Dep't of Corr., Case No. 05-0469, (Utah Labor Comm'n App. Bd. Nov. 1, 2006).) In that proceeding, Mrs. Gudmundson conceded that "the ozone exposure did not directly cause Petitioner's neurological problems." (ROA 324, id. at 3.) Instead, Mrs. Gudmundson alleged that she "was subjected to a reasonable, standard, routine, and even necessary diagnostic procedure to rule out meningitis, which, in turn triggered a Chiari malformation, required brain surgery, and ultimately left the Petitioner with serious, permanent neurological and physical handicaps." (Id.) Mrs. Gudmundson claimed that "the mechanism that started the entire chain reaction . . . was exposure to dangerous levels of ozone at work in the prison laundry." (Id.)

During the proceeding before the Utah Labor Commission, the Commission requested an Independent Medical Evaluation of Mrs. Gudmundson, which was conducted by Dr. Edward Holmes. (ROA 338, Holmes Report at 3.) Dr. Holmes considered Mrs. Gudmundson's symptoms at the time (including her continuing headaches and memory loss) and the symptoms she experienced in December 2004 (including headaches, nausea, vomiting, sensitivity to noise and light, and dehydration). (Id.) Dr. Holmes reviewed Mrs. Gudmundson's medical records, examined Mrs. Gudmundson herself, conducted a site visit of the prison laundry facility, and reviewed relevant published medical and scientific literature. (ROA 345-36, id. at 10-11.)

Based on this information, Dr. Holmes concluded that, “There is no medically demonstrable causal connection between her current condition and the December 17, 2004 ozone exposure.” (ROA 345, id. at 10) He noted that “ozone half-life is generally considered about 12 hours, and she has no signs of pulmonary or ocular toxicity” and thus found that Mrs. Gudmundson’s “symptoms can only be explained by her non industrial medical condition, in this case, the presence of a congenital Chiari 1 malformation.” (ROA 338, id. at 3.)

By stipulation of the parties, Mrs. Gudmundson’s case was also referred to a Commission medical panel, chaired by Dr. Joseph Q. Jarvis, to conduct an independent evaluation of Mrs. Gudmundson’s medical condition in connection with her claim for workers’ compensation. (ROA 349, Jarvis Report at 1.) Dr. Jarvis was provided with Mrs. Gudmundson’s medical records and diagnostics and Dr. Holmes’ report. (Id.) Based on these records, as well as a clinical interview with Mrs. Gudmundson, Dr. Jarvis concluded, as had Dr. Holmes, that there is “no medically demonstrable causal connection between the applicant’s current condition and the alleged exposure of 12/17/04.” (Id.) More specifically, Dr. Jarvis noted that “ozone has a relatively short half life and exposure during the first part of December 2004 would not account for ongoing symptoms later in the month.” (Id.)

Citing the conclusions of the two independent medical experts that ozone exposure did not cause or aggravate Mrs. Gudmundson’s injuries, the Utah Labor Commission rejected her claim for workers’ compensation, stating:

The preponderance of evidence does not support a medical causal connection between the petitioner's exposure to ozone and the Chiari Malformation for which she was treated. Dr. Jarvis, acting as a neutral medical panel evaluator with expertise in occupational medicine, reviewed the medical literature and the medical records of this case and was unable to correlate the ozone exposure and the petitioner's medical condition.

The petitioner's medical condition was not caused or aggravated by her exposure to ozone at work in December 2004 while employed by the respondent, State of Utah, Department of Corrections.

(ROA 354, Findings of Fact, Conclusions of Law, and Order at 3.) In other words, the Labor Commission found on the basis of neutral medical examination, research, and analysis that there was insufficient evidence to support Mrs. Gudmundson's theory that her injuries were caused by exposure to ozone.

On appeal, the Appeals Board of the Utah Labor Commission also rejected Mrs. Gudmundson's claim, finding inadequate evidence to support her theory that her injuries were caused by exposure to ozone:

[T]he existing facts, which are fully supported by evidence that was actually presented and accepted into the record, fully support the medical panel's opinion.

In summary, the Appeals Board concludes that the medical panel's report and, in turn, Judge Hann's decision, are supported by the evidence adduced during the evidentiary proceedings in this matter. The Appeals Board finds no sufficient reason to reopen the evidentiary proceeding. The Appeals Board therefore affirms Judge Hann's denial of Mrs. Gudmundson's claim.

(ROA 358, Order of Utah Labor Comm'n Appeals Board at 2.)

Thus, the Utah Labor Commission's Administrative Law Judge and Appeals Board both rejected Mrs. Gudmundson's claim that exposure to ozone in the Wasatch Laundry Facility caused her injuries. Mrs. Gudmundson chose not to appeal this administrative determination to the Utah Court of Appeals. The Utah Court of Appeals has original appellate jurisdiction over the "final orders and decrees resulting from formal adjudicative proceedings of state agencies." Utah Code Ann. § 78-2a-3(2)(a).

C. Appellate Procedural History

On March 24, 2008, the district court granted summary judgment to Del Ozone and Johnson Controls, ruling that plaintiffs' claims were precluded by the doctrine of collateral estoppel and that plaintiffs had failed to produce evidence that Del Ozone's generator was defective. (ROA 1812-13, March 24, 2008 Order Granting Summary Judgment at 2-3.)

On April 2, plaintiffs filed a Notice of Appeal ("First Notice of Appeal") with the district court purporting to take an appeal from "the Order Granting Summary Judgment in favor of Defendants and Appellees Del Ozone and Johnson Controls, Inc. only." (ROA 1816, Pls.' April 2, 2008 Notice of Appeal at 2.) The First Notice of Appeal expressly states that the appeal did not apply to "Defendant OzoneSolutions, L.C. who at the time of the filing of this Notice of Appeal, have [sic] not been granted Summary Judgment." Id. This Court docketed this first appeal as Supreme Court Case No. 20080320.

On May 28, the district court granted summary judgment to the final remaining defendant, OzoneSolutions, and issued a final order disposing of the entire case, again finding that plaintiffs' claims were precluded by the doctrine of collateral estoppel. (ROA 1845-46, May 28, 2008 Ruling and Order Granting Defendant OzoneSolutions' Motion for Summary Judgment at 1-2.) On that same date, this Court entered an order notifying all parties to this case that plaintiffs' first appeal was being considered for *sua sponte* summary dismissal because the First Notice of Appeal facially conceded that claims and parties remained before the district court, making the notice premature. (ROA 1845-47, May 28 Order.)

On June 4, plaintiffs filed a Notice of Appeal and Motion to Consolidate with Pending Appeal ("Second Notice of Appeal"), which this Court docketed as Supreme Court Case No. 20080537. In the Second Notice of Appeal, plaintiffs, notwithstanding this Court's May 28 Order warding of the contemplated dismissal of the previously filed notice of appeal, specified that they appealed only the grant of summary judgment to OzoneSolutions, and they moved for the Second Notice of Appeal to be consolidated with the plaintiffs' First Notice. (ROA 1848-49, June 4, 2008 Notice of Appeal and Motion to Consolidate with Pending Appeal at 1-2.)

On June 25, this Court dismissed plaintiffs' first appeal as premature, observing that:

Appellants have failed to document that their appeal is timely, requesting instead that this Court simply consolidate this appeal with a subsequent appeal. The appropriate cure for a premature appeal is a timely appeal that pertains to all aspects of the judgment the Appellants wish to challenge. Accordingly, the appeal is dismissed without prejudice to any subsequent timely appeal.

(ROA 1852, June 25 Order.)

In response to this Court's June 25 Order, plaintiffs filed yet another Notice of Appeal ("Third Notice of Appeal") on June 28, purporting to appeal all aspects of the district court's final order issued on May 28. In the Third Notice of Appeal, plaintiffs asserted that the third notice was timely filed, and, in the alternative, requested that it be deemed as timely filed due to excusable neglect. (ROA 1859, June 28, 2008 Notice of Appeal at 4.) This Court docketed the Third Notice of Appeal on July 3 as "Amended Notice of Appeal" in the instant appeal.

On September 22, 2008, in response to Johnson Controls' motion to clarify the properly named appellees, this Court ordered Johnson Controls and Del Ozone to consider themselves parties to this appeal for briefing purposes. However, this Court expressly stated that neither its Order, "nor the manner in which the notices of appeal were docketed, shall be construed as a ruling or comment on the merits of the jurisdictional issues." (Order, Gudmundson v. Del Ozone, No. 20080537 (Utah Sept. 22, 2008).)

SUMMARY OF ARGUMENTS

This Court lacks jurisdiction over defendants, Johnson Controls and Del Ozone, because no timely appeal was filed with respect to the district court's grant of summary judgment in favor of those defendants and because the district court did not extend the time by which such an appeal could be filed. Serrato v. Utah Transit Auth., 2000 UT App. 299, ¶ 7, 13 P.3d 616, 618 (Utah App. Ct. 2000). Should this Court find that it does have jurisdiction over defendants, Johnson Controls and Del Ozone, the district court was correct to grant defendants summary judgment and well within its discretion to deny plaintiffs' motion for additional discovery, and so the district court's ruling should be affirmed in its entirety.

In Utah "the doctrine of res judicata has been applied to administrative agency decisions in Utah since at least 1950". Career Serv. Review Bd. v. Utah Dep't of Corr., 942 P.2d 933, 938 (Utah 1997). Mrs. Gudmundson was afforded the opportunity to present evidence and argument at an administrative adjudication in support of her claim for benefits under the Utah Workers' Compensation Act. (ROA 354, Findings of Fact, Conclusions of Law, and Order at 3.) Her deposition was taken in that proceeding, physicians conducted independent medical evaluations, and her medical records were evaluated. (See ROA 336-46, Holmes Report; ROA 348-50, Jarvis Report; ROA 253, Gudmundson Dep. (June 23, 2006).)

The Labor Commission's final adjudication and rejection of Mrs. Gudmundson's claim is precisely the sort of "quasi-judicial adversary proceeding" to which the doctrine of collateral estoppel applies. Career Serv., 942 P.2d at 938. All

four elements of collateral estoppel are met in the instant case: (1) The causation issue decided in the Labor Commission is identical to the one presented in plaintiffs' civil action; (2) there was a final judgment on the merits; (3) Mrs. Gudmundson was a party and Mr. Gudmundson is a party in privity with a party to the Labor Commission proceeding; and (4) the causation issue in the Labor Commission proceeding was completely, fully, and fairly litigated.

Finally, the district court was well within its discretion in denying plaintiffs' motion for additional discovery. As the district court noted, plaintiffs were "granted multiple extensions to allow for further discovery" and had over two years to obtain the necessary evidence. (ROA 1812, March 24, 2008 Order Granting Summary Judgment at 2.) Moreover, as the court further found, "plaintiffs have failed to identify the specific facts that are within the defendants' exclusive knowledge, the steps they have taken to obtain that information, and how that information would help them respond to defendants' motions for summary judgment." (Id.) Plaintiffs failed to suggest any discovery sought from Johnson Controls or regarding the collateral estoppel issue. These reasons more than justify denial of plaintiffs' motion.

ARGUMENT

A. Because No Timely Notice of Appeal was Filed with Respect to Johnson Controls' and Del Ozone's Grant of Summary Judgment, this Court Lacks Jurisdiction over Those Defendants.

The Utah Rules of Appellate Procedure require that a notice of appeal from a final judgment be filed within 30 days of the entry of judgment. The notice must include “the judgment or order, or part thereof,” from which the appeal is taken. Utah R. of App. P. 3(a), (d) and 4(a). If a notice of appeal is not filed within 30 days of entry of judgment, this Court may entertain that appeal “only if the time for appeal was appropriately extended” by the trial court. Serrato v. Utah Transit Auth., 2000 UT App. 299, ¶ 7, 13 P.3d 616, 618 (dismissing appeal for lack of jurisdiction when notice of appeal filed thirty-four days after entry of judgment). “If an appeal is not timely filed, this court lacks jurisdiction to hear the appeal.” Id. “Although such deadlines are concededly arbitrary, they must be adhered to in order to prevent cases from continually lingering and to ensure finality in the system.” Id. at ¶ 11, 13 P.3d at 620. And, “It is axiomatic in this jurisdiction that failure to timely perfect an appeal is a jurisdictional failure requiring dismissal of the appeal.” Id. at ¶ 7, 13 P.3d at 618 (quoting Prowswood, Inc. v. Mountain Fuel Supply Co., 676 P.2d 952, 955 (Utah 1984)).

Here, no *timely* appeal was made respecting the grant of summary judgment to Johnson Controls and Del Ozone, and plaintiffs are in the wrong forum to be excused from that fact. Plaintiffs' First Notice of Appeal, which expressly appealed the grant of summary judgment to Del Ozone and Johnson Controls, was dismissed as

prematurely filed by this Court's June 25 Order. (See ROA 1852, June 25 Order.)

Plaintiffs' Second Notice of Appeal (also the instant appeal) expressly applied to only the district court's grant of summary judgment to OzoneSolutions. (ROA 1848-49, June 4, 2008 Notice of Appeal and Motion to Consolidate with Pending Appeal at 1-2 (distinguishing between plaintiffs' First Notice, which pertained to Johnson Controls and Del Ozone, and the Second Notice, which concerned only OzoneSolutions).)

Plaintiffs' Third Notice of Appeal, which purports to appeal all aspects of the district court's final order, was not timely filed. The district court entered judgment on May 28, but the Third Notice of Appeal was filed *31 days later* on Saturday, June 28. The plaintiffs did not submit any motion requesting, and the district court has not granted, an extension of time due to excusable neglect for plaintiffs to appeal the final May 28 Order, as permitted by Rule 4(e) ("The trial court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the [30-day] time [period] prescribed by . . . this rule.") (emphasis added). More than 30 days have passed since the period for a timely filing expired, and no motion was filed with the trial court.¹

¹ Even if plaintiffs had filed a motion for an extension of time due to excusable neglect, it may well have been denied. "Excusable neglect 'is an admittedly neglectful delay that is nevertheless excused by special circumstances,' whereas good cause 'pertains to special circumstances that are essentially beyond a party's control.'" *Serrato*, 2000 UT App. 299 at ¶ 7, 13 P.3d at 618-19 (quoting *Reisbeck v. HCA Health Serv. of Utah, Inc.*, 2000 UT 48 at ¶ 13, 2 P.3d 447, 450). Here, plaintiffs have never claimed, nor are there any facts to support a claim, that special circumstances beyond their control caused the untimely filing of the notice of appeal relating to Johnson Controls and Del Ozone.

Because no timely appeal was filed with respect to the district court's grant of summary judgment in favor of Johnson Controls and Del Ozone and because the district court did not extend the time by which such an appeal could be filed, this Court lacks jurisdiction over those defendants.

B. The District Court Properly Precluded Plaintiffs from Pursuing their Claim for Injuries Allegedly Caused by Exposure to Ozone Under the Doctrine of Issue Preclusion.

1. Collateral Estoppel Prevents Reconsideration of an Issue Decided Against the Claimant in a Workers' Compensation Proceeding.

a. Utah Supreme Court Precedent Holds Collateral Estoppel Applies to Administrative Agency Adjudications.

Collateral estoppel, or issue preclusion, "prevents ... parties from relitigating issues resolved in a prior related action." Sevy v. Sec. Title Co., 902 P.2d 629, 632 (Utah 1995). This Court has consistently ruled that, "Res judicata, which subsumes the doctrine of collateral estoppel, applies to administrative adjudications in Utah." Career Serv. Review Bd. v. Utah Dep't of Corr., 942 P.2d 933, 938 (Utah 1997) (internal citation and quotation marks omitted) (reversing trial court and applying res judicata to final administrative agency adjudication). Indeed, "the doctrine of res judicata has been applied to administrative agency decisions in Utah since at least 1950." Id. (internal citation and quotation marks omitted) Since then, this Court has made it clear that the various proceedings of such administrative agencies are "precisely the sort of quasi-judicial adversary proceeding to which the doctrines of res judicata and collateral estoppel should apply." Id. This established rule of law

applies to the Labor Commission's adjudication of Mrs. Gudmundson's claim that ozone exposure caused her injuries.

In Career Service, the Utah Department of Corrections ("Corrections") disciplined and demoted an employee, Tim Parker, for violating its weapons policy. Id. at 935-36. Parker challenged this punishment before the Utah Career Service Review Board (the "Board"). Id. at 936. The Board granted Parker an evidentiary hearing, in which a hearing officer considered evidence of both parties, found that Parker had violated Corrections policy but reduced the severity of his punishment. Id. Corrections and Parker cross-appealed the decision to the Board's full review board, which upheld the decision of the hearing officer. Id. In the meantime, Parker transferred to a new position at Corrections and moved the Board to direct Corrections to apply the Board's Order to his new position. Id. The Board granted most of Parker's request and issued a modified Order. Id. Corrections refused to comply with the modified Order, and the Board filed a complaint seeking judicial enforcement of the modified Order. Id. at 937.

In the enforcement action, Corrections collaterally attacked the Board's modified Order. Id. The trial court granted Corrections summary judgment, ruling that the Board lacked standing and authority to bring an enforcement action. Id. The Supreme Court reversed, held the Board had enforcement authority and further ruled that Corrections' collateral attacks could not be considered. Id. at 940. Importantly, in doing so, the court found that, "the Board's adjudication of Parker's grievance ... is

precisely the sort of quasi-judicial adversary proceeding to which the doctrines of res judicata and collateral estoppel should apply.” Id. at 938.

Here, Mrs. Gudmundson, like the parties in Career Service, was afforded the opportunity to present evidence and argument at an administrative adjudication in support of her claim for benefits under the Utah Workers’ Compensation Act. (ROA 354, Findings of Fact, Conclusions of Law, and Order at 3.) Mrs. Gudmundson’s deposition was taken in that proceeding, physicians conducted independent medical evaluations, and Mrs. Gudmundson’s medical records were evaluated. (See ROA 336-46, Holmes Report; ROA 348-50, Jarvis Report; ROA 253, Gudmundson Dep. (June 23, 2006).)

When Administrative Law Judge Hann rejected Mrs. Gudmundson’s claim for workers’ compensation, Mrs. Gudmundson appealed the decision. (See ROA 322, Pet’r’s Mot. for Review by the Utah Labor Comm’n Appeals Board Based on the Discovery of New Evidence at 1.) The Appeals Board affirmed the administrative law judge’s decision. (ROA 358, Order of Utah Labor Comm’n Appeals Board at 2.) Mrs. Gudmundson did not seek appellate relief from the Labor Commission’s findings, rendering the Labor Commission’s ruling a final order fully and fairly litigated by the parties. Mrs. Gudmundson could have appealed the decision of the Labor Commission to the Utah Court of Appeals, which has original appellate jurisdiction over “the final orders and decrees resulting from formal adjudicative proceedings of state agencies.” Utah Code Ann. §78-2a-3(2)(a). Instead, she chose

not to do so². Thus, as in Career Service, the Labor Commission’s final adjudication is precisely the sort of quasi-judicial adversary proceeding to which the doctrine of collateral estoppel applies.

Remarkably, in plaintiffs’ opening brief, they do not even cite Career Service. Plaintiffs make no attempt to distinguish the instant case from this controlling Utah holding. The same was true below, despite full briefing of the case before the district court on defendants’ motions for summary judgment. This glaring omission seems to be a tacit acknowledgment that plaintiffs have nothing to say about Career Service. But absent overruling or distinction, neither of which are urged by plaintiffs, Career Service seems to control this case.

b. Plaintiffs’ Argument that Collateral Estoppel Should Apply Only to Judicial Proceedings has No Support in Utah or the Majority of Other Jurisdictions.

Rather than address Career Service and its clear ruling, plaintiffs mount essentially two arguments. First, plaintiffs argue that collateral estoppel should not apply because the Labor Commission adjudication was not a “suit” and did not possess each and every feature available to a plaintiff in civil litigation. Second, plaintiffs argue that applying collateral estoppel to Mrs. Gudmundson’s workers’ compensation proceeding would violate general Utah public policy and the Utah Constitutional provision that there be remedies for injuries.

² The Utah Rules of Appellate Procedure apply to an appeal from a formal adjudicative action by the Utah Labor Commission, and Rule 4 requires a notice of appeal to be filed within 30 days of the agency decision. See Utah Code Ann. §63-46b-16; Utah R. of App. P. 4.

In support of their first argument, plaintiffs rely primarily on two older Utah cases: Mollerup Van Lines v. Adams, 16 Utah 2d 235, 398 P.2d 882 (1965) and Utah Fuel Co. v. Industrial Comm’n, 59 Utah 46, 201 P. 1034 (1921). In Mollerup, on the direct appeal of a ruling by the Labor Commission, the Supreme Court of Utah refused to set aside the finding by the Labor Commission that a worker’s injury had been caused by an earlier accident and affirmed the supplemental order of the Labor Commission. Mollerup, 16 Utah 2d at 238, 240-41, 398 P.2d at 883, 885. In so doing, the court emphasized the deference due the Labor Commission’s factual findings in proceedings before that agency: “[I]t is firmly established that the Commission has the exclusive prerogative of judging the credibility of the witnesses, appraising the evidence and finding the facts, which must not be disturbed if there is a reasonable basis therein to support them.” Id. at 240, 398 P.2d at 885.

Yet, plaintiffs contend this case stands for the opposite proposition: That no deference is due the Commission’s finding, in other words res judicata does not apply to workers’ compensation proceedings. Plaintiffs make this argument by taking out of context the Court’s uncontroversial observation that res judicata did not apply to that particular case, which was a direct appeal. (See Pls.’ Brief at 30 (quoting Mollerup, 398 P.2d at 883).) But, res judicata and collateral estoppel apply to subsequent disputes, not direct appeals of the initial dispute. Mollerup simply does not stand for the proposition for which plaintiffs cite it. In fact, Mollerup’s emphasis on the deference due the Labor Commission’s factual findings, notwithstanding any procedural difference between workers’ compensation proceedings and civil

litigation, lends further support to the Court's ruling 32 years more recently in Career Service. Of course, the holding in Career Service is directly contrary to plaintiffs' interpretation of language from Mollerup.

Plaintiffs also point to the Mollerup court's observation that parties are not bound by reports of the independent medical examiners. (See Pls.' Brief at 30 (quoting Mollerup, 398 P.2d at 885).) But, plaintiffs make too much of this uncontroversial statement. The court merely observed that parties are not judicially estopped from taking a position contrary to the independent medical panel, as they might be if the medical expert had been their own. But while parties are not bound by the testimony of the independent medical panel, they are bound by the ruling of the Labor Commission.

Plaintiffs similarly misconstrue comments from the Court in Utah Fuel. (See Pls.' Brief at 30.) In affirming a ruling of the Commission, the Court observed that "the proceedings before the Commission are very informal and in some respects 'sui generis.'" Utah Fuel, 59 Utah 46, 201 P. at 1034. But, of course, the informality of the process is designed to and does inure to the benefit of the employee, e.g. Mrs. Gudmundson. See Taslich v. Industrial Comm'n of Utah, 71 Utah 33, 262 P. 281, 283 (1927) (observing that the formality of civil litigation is done away with in order to work out a speedy adjustment and payment of claims to workers). As plaintiffs' admit, the Act creates a no-fault liability scheme where the employee need not prove negligence. (Pls.' Brief at 28.) "Any doubt respecting the right of compensation will

be resolved in favor of the injured employee.” State Tax Comm’n v. Industrial Comm’n, 685 P.2d 1051, 1053 (Utah 1984).

Generally, the employee can lose only if the injury does not arise out of her employment (usually not material to any subsequent third party claim) or if there is no medical causation (rarely an issue except in toxic torts). Thus, it would be out of the ordinary for a workers’ compensation claimant to face a risk of collateral estoppel. Moreover, plaintiffs fail to point out that, although proceedings for workers’ compensation claims are very informal and of their own kind or class, the proceedings still must satisfy basic notions of fairness. Color Country Mgmt. v. Labor Comm’n, 2001 UT App. 370, ¶ 28, 38 P.3d 969, 975 (citing Utah Fuel, 59 Utah 46, 201 P. at 1034-35).

Plaintiffs’ protestations notwithstanding, proceedings before the Labor Commission utilize many tools familiar to civil litigation. A complaint (in the form of an “application for a hearing”) and answer must be filed. Discovery is allowed, parties may serve interrogatories and requests for production of documents, and depositions may be taken. Further, a party may object to the independent medical panel report and offer its own medical testimony. See generally Utah Admin. Code R. 602-2.

In addition, Utah Fuel did not concern the application of collateral estoppel to Labor Commission proceedings. However, as the Court in Utah Fuel affirmed the findings of the Labor Commission, this 87-year-old opinion does stand for the proposition that deference is due the findings of the Commission. Applying the

doctrine of issue preclusion to later, collateral hearings accords the Labor

Commission the deference it is due.

Indeed, the vast majority of jurisdictions apply the doctrine of collateral estoppel to workers' compensation proceedings.³ This is not surprising because

³ See Hazel v. Alaska Plywood Corp., 16 Alaska 642, 648 (D. Alaska 1957) (factual issues determined in a workers' compensation proceeding were binding on both parties in subsequent litigation); Nunez v. Arizona Milling Co., 439 P.2d 834, 837 (Ariz. Ct. App. 1968) (same); Bussell v. Georgia-Pacific Corp., 981 S.W.2d 98, 100 (Ark. Ct. App. 1998) (res judicata is applicable to workers' compensation proceedings); Scott v. Industrial Accident Comm'n, 293 P.2d 18, 22 (Cal. 1956) ("The determinations of the commission, like those of the superior court, are res judicata in all subsequent proceedings, including court actions, between the same parties or those privy to them."); Greator v. Bd. of Admin., 91 Cal. App. 3d 54, 58 (Cal. Ct. App. 1979) (applying res judicata to judgment of workers' compensation appeals board and rejecting argument that difference in burden of proof in subsequent proceeding precluded application of res judicata); Wellcraft Marine Corp. v. Turner, 435 So.2d 864, 865 (Fla. Dist. Ct. App. 1983) (res judicata applies to workers' compensation proceedings); Coleman v. Columns Props., Inc., 467 S.E.2d 328, 329 (Ga. 1996) ("It has been held that 'res judicata . . . [is] applicable to workers' compensation awards in the context of subsequent lawsuits on all questions of fact . . .'" (citation omitted)); Shea v. Bader, 638 P.2d 894, 896 (Idaho 1981) ("[T]he doctrine of collateral estoppel may remain applicable [to workers' compensation proceedings] when the doctrine is used defensively and the party against whom the doctrine is asserted litigated the relevant issue with vigor in the action resulting in the prior judgment."); Beson v. Campbell, 220 N.W. 301, 302-03 (Mich. 1928) ("[T]he doctrine of res adjudicata applies to [workers' compensation] proceedings, and [the] decisions are binding on the applicant, the employer, and the insurance company."); General Motors Corp. v. Holler, 150 F.2d 297, 300 (8th Cir. 1945) (applying Missouri law: "The Commission's findings of fact, supported by evidence, are conclusive on the courts."); Roy v. Jasper Corp., 666 F.2d 714, 718 (1st Cir. 1981) (applying New Hampshire law and holding worker and his spouse were collaterally estopped from maintaining civil suits where the theory of causation of the worker's injury in the civil suit had been adjudicated and rejected in the proceedings before the labor commission); Mangani v. Hydro, Inc., 194 A. 264, 265 (N.J. 1937) ("A 'finding and determination' by the bureau is essentially a final judgment, and may properly be pleaded as a basis for the application of the doctrine of res adjudicata."); O'Connor v. Midiria, 435 N.E. 2d 1070, 1071 (N.Y. 1982) (res judicata applies "to administrative determinations when the agency is acting, as does the [workers'] compensation board, in a quasi-judicial capacity."); Capobianchi v. BIC Corp., 666 A.2d 344, 348 (Pa. Super. Ct. 1995) ("Principles of collateral estoppel apply to judgments of the Workmen's Compensation Appeal Board."); Owens-Corning Fiberglas Corp. v. Gagnon, 235 A.2d 864, 865 (R.I. 1967) (factual finding of workmen's compensation commission forecloses raising issue in later proceeding due to res judicata); Anderson v. New York Underwriters Ins. Co., 613 S.W.2d 16, 18 (Tex. Civ. App. 1981) ("A final award of the Industrial Accident Board, after the time for appeal has passed, is a final judgment, and that award is on a parity with a judgment of a court.").

Of course, if the elements for the application of collateral estoppel are not satisfied, as in two cases cited in the amicus brief, the doctrine will not apply in that particular instance,

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failing to show deference to these proceedings by not applying collateral estoppel would only “undermine the concept of workmen’s compensation which has served the workers and economic structure of our society so well.” Capobianchi v. BIC Corp., 666 A.2d 344, 348 (Pa. Super. Ct. 1995) (holding plaintiff was collaterally estopped from maintaining tort suit against third party where the causation of plaintiff’s injury had been adjudicated in her workmen’s compensation claim).

c. No Utah Public Policy or Constitutional Provision Precludes Workers’ Compensation Rulings Having Collateral Estoppel Effect.

In support of their public policy arguments, plaintiffs rely on a decision addressing application of collateral estoppel to a private arbitration decision, Buckner v. Kennard, 2004 UT 78, 99 P.3d 842, provisions of the Workers Compensation Act (Utah Code Ann. § 34A-2-106), and the Open Courts provision of the Utah Constitution (Utah Const. Art. 1, Sec. 11, cl. 19).

Continued from previous page
even though collateral estoppel generally applies. See, e.g., Le Parc Cmty. Ass’n v. Workers’ Comp. Appeals Bd., 110 Cal. App. 4th 1161, 1172-73 (Cal. Ct. App. 2003) (refraining from applying collateral estoppel because different issue involved in subsequent litigation); Horn v. Dep’t of Corr., 548 N.W. 2d 660, 663 (Mich. Ct. App. 1996) (refusing to allow offensive use of collateral estoppel where issues were significantly different).

Two cases cited in the amicus brief (Amicus Brief at 12, 20), held that collateral estoppel does not apply to workers’ compensation proceedings due to specific statutory provisions in those states. See Messick v. Star Enterprise, 655 A.2d 1209, 1213 (Del. 1994) (refusing to follow majority rule in applying collateral estoppel to workers’ compensation proceedings due to Delaware statute’s unique provision that the statute not serve as an election of remedies); Robertson v. Popeye’s Famous Fried Chicken, Inc., 524 So.2d 97, 99 (La. Ct. App. 1988) (refusing to follow majority rule in applying collateral estoppel to workers’ compensation action due to Louisiana statutory provision that workers’ rights against third parties not be affected by such actions). The District of Columbia appears generally to not apply collateral estoppel to workers’ compensation proceedings. Segal v. Travelers Ins. Co., 94 F. Supp. 123, 126 (D.D.C. 1950).

In Buckner, the court held that collateral estoppel may be applied to arbitration proceedings only where the parties expressly agree to be so bound. Buckner, 2004 UT 78 at ¶ 59, 99 P.3d at 858. In requiring express contractual language for collateral estoppel to apply to arbitration proceedings, the Court sought to protect the intent of the parties to the contract. Id. at ¶ 18, 99 P.3d at 848 (“arbitration contracts are to be enforced according to their terms”). The Court observed the threat of offensive⁴ collateral estoppel would create incentives for parties to behave as they would in civil litigation, thereby undermining the parties’ purpose for contractually selecting arbitration -- speedy, cost-effective and informal resolution of civil disputes. Id. at ¶ 28, 99 P.3d. at 850.

Plaintiffs claim this contract interpretation decision supports their argument that collateral estoppel should not apply to the statutory administrative proceeding at issue in this case. (See Pls.’ Brief at 24-25.) But, the concerns of contract interpretation raised by Buckner simply do not apply here. The true public policy concern at issue in this case is preventing plaintiffs from wasting judicial resources by re-litigating factual disputes that have been resolved fairly and completely by a governmentally created and operated dispute resolution process that feeds directly into the state’s appellate court system. Cf. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329 (1979) (“Defensive use of collateral estoppel precludes a plaintiff from

⁴ “[O]ffensive use of collateral estoppel occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party. Defensive use occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant.” Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.4 (1979).

relitigating identical issues by merely switching adversaries.”) (internal citations and quotations omitted).

Plaintiffs also maintain that collateral estoppel should not be applied in this case because, “The Utah Workers Compensation Act expressly permits a separate action against a third party,” and that allowing the defense would allegedly amount to a violation of the Open Courts provision of the Utah Constitution. (Pls.’ Brief at 34-40.) Plaintiffs, citing the Act, argue that “an injured employee may sue a third party ‘[w]hen any injury . . . is caused by the wrongful act or neglect of a person other than an employer.” (Id. at 34 (quoting Utah Code Ann. § 34A-2-106).) Of course, here plaintiffs did sue third parties claiming their negligence led to plaintiffs’ injuries. Plaintiffs had full access to the courts. However, these defendants happened to have a valid affirmative defense, which they chose to raise and pursue.

Because the plaintiffs have no statutory right to win a lawsuit against third parties who have a valid affirmative defense giving effect to collateral estoppel does not violate the Workers Compensation Act. And, because plaintiffs have no such right, it cannot credibly be said that the Open Courts provision of the Utah Constitution is implicated.

Moreover, the Open Courts provision simply has no bearing on this case because, as plaintiffs concede, the provision places “a limitation upon the Legislature to prevent that branch of state government from closing the doors of the courts against any person who has a legal right which is enforceable in accordance with some known remedy.” (Pls.’ Brief at 38 (quoting Brown v. Wightman, 151 P. 366 (Utah 1915).)

Here, plaintiffs' options to seek workers' compensation and bring a civil suit remained available, but not without risk that events occurring in the administrative proceeding could result in the civil suit being found to be without merit.

In any event, plaintiffs did not raise this Constitutional issue in the trial court, and therefore waived it. Doug Jessop Const., Inc. v. Anderton, 2008 UT App. 348, ¶ 18, 195 P.3d 493, 497-98 (deeming as waived arguments not raised in trial court).

2. Undisputed Facts Establish all the Elements for Collateral Estoppel to Apply to the Instant Case.

a. The Trial Court Applied the Proper Standard.

Having correctly determined that under Utah law collateral estoppel was applicable to plaintiffs' claims, the district court properly precluded plaintiffs from re-litigating the issue of whether exposure to ozone caused Mrs. Gudmundson's injuries. In giving collateral estoppel effect to the Utah Labor Commission's rulings, the trial court applied Utah's four point analysis:

Four elements of issue preclusion are required for collateral estoppel: (1) The issue decided in the prior adjudication must be identical to the one presented in the action in question; (2) there must be a final judgment on the merits; (3) the party against whom the plea is asserted must be a party in privity with a party to the prior adjudication; and (4) the issue in the first action must be completely, fully, and fairly litigated.

Career Serv., 942 P.2d at 938; see also Sevy v. Sec. Title Co., 902 P.2d 629, 632 (Utah 1995).

b. The Causation Issue Decided in the Labor Commission Proceedings is Identical to the Causation Issue Presented in Plaintiffs' Civil Action.

The Labor Commission decided the same issue that is currently before this Court: whether exposure to ozone caused Mrs. Gudmundson's injuries. In her application for an administrative hearing, Mrs. Gudmundson alleged entitlement to medical expenses, disability compensation, and other expenses "as the result of an occupational disease/industrial injury overexposure to ozone on December 17, 2004." (ROA 352, Findings of Fact, Conclusions of Law, and Order at 1.) In addressing Mrs. Gudmundson's claim, the Commission ruled that: "The preponderance of evidence does not support a medical causal connection between [Mrs. Gudmundson's] exposure to ozone and the Chiari Malformation for which she was treated. . . . [Her] medical condition was not caused or aggravated by her exposure to ozone at work in December 2004 while employed by the respondent, State of Utah, Department of Corrections." (ROA 354, id. at 3.)

Mrs. Gudmundson had been diagnosed with a Chiari 1 malformation and migraine headaches. (ROA 353, id. at 2.) Dr. Holmes' evaluation, upon which the Labor Commission relied in drawing its conclusion, noted "no indication in the literature that the Chiari malformation could have resulted from ozone exposure." (ROA 345, Holmes Report at 10.) To the contrary, evidence suggests that Mrs. Gudmundson's condition "may be a medodermal disorder," *i.e.* congenital. (Id.) Further, the Holmes Report noted that, "Severe migraine headaches may lead to the discovery of the Chiari malformation, which was already present." (Id.) In sum, Dr.

Holmes' report concluded: "it is no[t] medically reasonable to conclude that the Chiari 1 malformation was caused by ozone exposure." (Id.)

Dr. Jarvis' report confirmed Dr. Holmes' conclusions:

Question: Is there a medically demonstrable causal connection between the applicant's current condition and the alleged exposure of 12/17/04?

Answer: *No.* Mrs. Gudmundson's treating physicians have postulated that her medical condition (Chiari Malformation) occurred after her initial MRI (12/21/04) but obviously before the subsequent scan on 2/1/05. They ascribe this to either ozone-induced brain swelling or lumbar puncture (allegedly necessitated by ozone induced headache), or a combination of both. Mrs. Gudmundson herself refers to a literature search concerning the health effects of ozone which refers to central nervous system effects (most of these are animal studies). I find no evidence of brain swelling on the brain MRI of 12/21/04, eliminating the possibility of ozone-induced brain swelling. Further, the toxicological literature concerning ozone does not indicate a risk for such a direct effect of ozone on the brain. Additionally, ozone has a relatively short half life and exposure during the first part of December 2004 would not account for ongoing symptoms later in the month....Based upon the reported toxicology of ozone (not a cause of serious CNS disorders), the lack of evidence of clinically significant exposure to ozone, and the actual course of events documented in the records of this case, *the most likely explanation for Mrs. Gudmundson's medical condition is that it pre-existed before December 2004, became symptomatic during that month, requiring treatment and eventual surgery, with the ozone episode at work being only a coincidental, non-related event.*

(ROA 349, Jarvis Report at 1 (emphasis added).)

Both independent medical analyses found no scientific support for a causal link between ozone exposure and Mrs. Gudmundson's claimed injuries. According to the independent experts' review of the medical literature the cause of the brain malformation suffered by Mrs. Gudmundson was likely congenital. Thus, despite the general temporal coincidence of her symptoms, they were no more related to the

laundry's new ozone machine than they were to any other environmental exposures Mrs. Gudmundson experienced that month. The issue decided by the Labor Commission, whether ozone exposure caused Mrs. Gudmundson's injuries, is identical to the causation question presented in this action. Cf. Sevy, 902 P.2d at 632-33 (holding that issue is identical even where party against whom collateral estoppel was asserted sought a different remedy in subsequent action).

Plaintiffs argue, as they did below, that because they have hired their own medical expert and changed their theory of causation to include ozone *byproducts*, the issues are not identical for collateral estoppel purposes. (See Pls.' Brief at 25-28.) But, plaintiffs are trying to draw a distinction that is not material, and, if accepted, would be likely to undermine every claim of collateral estoppel.

As an initial response, it is important to note that the First Amended Complaint alleges only ozone overexposure as the cause of Mrs. Gudmundson's alleged injuries and makes no mention of any byproducts. Further, plaintiffs' newly proffered expert, Dr. Kay H. Kilburn, makes clear that he believes ozone was the ultimate cause of Mrs. Gudmundson's condition. Dr. Kilburn opined: "The sequence of events [leading to Mrs. Gudmundson's injuries] *is explained best by ozone inhalation* producing increased absorption of it and the background chemicals[.]" (ROA 686, Pls.' Disclosure of Expert Witness (Kay H. Kilburn, M.D.) (emphasis added).) It is clear then that, even with their new "multiple chemical sensitivity" twist, plaintiffs are advancing the identical issue that was before the Commission: that ozone exposure caused Mrs. Gudmundson's symptoms.

Nonetheless, to the extent that there are now more steps added to plaintiffs' theory of medical causation than in the Labor Commission, *total identity* between the matters is unnecessary for collateral estoppel to apply:

When there is a lack of total identity between the particular matter presented in the second action and that presented in the first, there are several factors that should be considered in deciding whether . . . the 'issue' in the two proceedings is the same, for example: Is there a substantial overlap between the evidence or argument to be advanced in the second proceeding and that advanced in the first? Does the new evidence or argument involve application of the same rule of law as that involved in the prior proceeding? Could pretrial preparation and discovery relating to the matter presented in the first action reasonably be expected to have embraced the matter sought to be presented in the second? How closely related are the claims involved in the two proceedings?

Restatement (Second) of Judgments § 27 cmt. c; see also Robertson v. Campbell, 674 P.2d 1226, 1231 (Utah 1983) (citing Restatement (Second) of Judgments § 27, cmt. c approvingly).

Here, the overlap between the issue presented at the Commission proceedings and the issue presented here is more than substantial, it is nearly complete. There is total identity of (1) time, (2) place, (3) injured person, (4) events, (5) symptoms, (6) medical diagnosis, (7) treatment, (8) equipment involved, (9) exposure, (10) injuries, and other facts and evidence. Evidence and argument to be presented in this litigation will overlap substantially with evidence and argument presented in the Commission proceedings. The same determinative rule of law requiring causation-in-fact that was at issue in the Commission proceedings will be at play in this action. Accordingly, plaintiffs are collaterally estopped from again advancing their ozone causation theory.

See Robertson, 674 P.2d at 1231 n.2 (holding that where two actions “involved substantial overlap in pretrial preparation, discovery, and evidence offered at trial” collateral estoppel was warranted).

c. The Labor Commission Issued a Final Judgment on the Merits.

Plaintiffs do not appear to contest that the Utah Labor Commission entered a final judgment on the merits. “Key factors in determining whether a judgment may be considered as on the merits are that there have been notice and an opportunity to be heard.” Dennis v. Vasquez, 2003 UT App. 168, ¶ 9 n.3, 72 P.3d 135 (citation omitted). In Dennis, the Court of Appeals affirmed a grant of summary judgment, holding that a judgment on the merits was entered where a small claims court “unambiguously determined, after hearing opposing arguments from both parties, that [plaintiff] had ‘No Cause of Action.’” Id. at ¶ 9, 72 P.3d at 138.

Similarly here, Mrs. Gudmundson had notice and an opportunity to be heard on the merits. The Labor Commission unambiguously determined, after hearing evidence, expert testimony, and arguments from both parties, that Mrs. Gudmundson had no cause of action. The Labor Commission explicitly ruled on the determinative issue here, that Mrs. Gudmundson’s “medical condition was not caused or aggravated by her exposure to ozone at work in December 2004.” (ROA 354, Findings of Fact, Conclusions of Law, and Order at 3.)

d. Plaintiffs were Indisputably in Privity or Parties to the Labor Commission Proceeding.

Likewise plaintiffs do not seem to dispute the privity element. Mrs. Gudmundson, against whom collateral estoppel is asserted, was a party to the prior adjudication. Although her husband and co-plaintiff, Mr. Gudmundson, was not a party to the prior adjudication, he is nevertheless bound by its outcome. “When a person with a family relationship to one suffering personal injury has a claim for loss to himself resulting from the injury, the determination of issues in an action by the injured person to recover for [her] injuries is preclusive against the family member” Restatement (Second) of Judgments § 48(2).

The Utah courts have recognized this rule. Berry v. Berry, 738 P.2d 246, 249 (Utah 1987) (collateral estoppel “prevents parties and their privies from relitigating facts and issues”). Many other jurisdictions have expressly held that, where a husband’s claims are based on his wife’s alleged injuries, he is bound by a prior decision involving the wife. See, e.g., Eubanks v. FDIC, 977 F.2d 166, 170 (5th Cir. 1992) (“Here, the interests at stake could not be more closely aligned.... The claims she asserts derive exclusively from claims asserted by her husband. Thus, under the circumstances, we conclude that the district court properly found that there was sufficient identity of parties to apply principles of res judicata to Mrs. Eubanks’ claims.”); Sanchez v. Martin, 416 So.2d 15, 16 (Fla. Dist. Ct. App. 1982) (where a spouse “has an interest in the litigation only in privity ... if the wife’s claim is defeated, the derivative claim of the spouse also falls.”); Laws v. Fisher, 513 P.2d

876, 878 (Okla. 1973) (“Because of the privity between the plaintiff husband in our action and the plaintiff wife in her earlier action ... we hold that the husband was and is collaterally estopped from litigating the question -- already once determined in defendant’s favor”).

e. The Issue was Completely, Fully, and Fairly Litigated before the Labor Commission.

The issue of causation was completely, “fully, and fairly litigated” in the adversary administrative hearing before the Utah Labor Commission. In Utah, proceedings of administrative agencies can be “precisely the sort of quasi-judicial adversary proceeding to which the doctrines of res judicata and collateral estoppel should apply.” Career Serv., 942 P.2d at 938. For such hearings to constitute complete, full, and fair litigation, “the parties must receive notice, reasonably calculated, under all the circumstances, to apprise them of the pendency of the action and afford them an opportunity to present their objections.” Id. at 939 (quoting Copper State Thrift & Loan v. Bruno, 735 P.2d 387, 391 (Utah Ct. App. 1987)). No hearing is required. Id.

Here, the Commission proceedings, similar to the adjudication process in Career Service, afforded Mrs. Gudmundson the opportunity to present evidence and argument at an administrative proceeding. In addition, her deposition was taken, her medical records were examined, and physicians conducted independent medical evaluations. (See ROA 336-46, Holmes Report; ROA 348-50, Jarvis Report; ROA 253, Gudmundson Dep. (June 23, 2006).) Further, there is no dispute that since Mrs.

Gudmundson initiated the proceeding, she received notice of it, and she presented her case in that adversary action.

After Mrs. Gudmundson's claims were denied by the Administrative Law Judge, she filed an appeal with the Utah Labor Commission. In that appeal, she presented a modified causation theory, arguing that alleged exposure to ozone caused her "to suffer severe headaches, nausea, and vomiting. These symptoms ... led Petitioner's physician, Dr. Howard Reichman, to run tests on the Petitioner for meningitis, one of which involved performing a spinal tap. It was this spinal tap...that caused Petitioner's Chiari malformation, resulting brain surgery, and total disability...." (ROA 324, Pet'r's Mot. for Review by the Utah Labor Comm'n Appeals Board Based on the Discovery of New Evidence at 3.)

In support of this new theory, Mrs. Gudmundson relied on evidence uncovered in this very lawsuit. (ROA 324-32, id. at 3-10.) She also submitted three articles from neurosurgery journals to the Labor Commission. (ROA 358, Order of Utah Labor Comm'n Appeals Board at 2.) The Utah Labor Commission rejected Mrs. Gudmundson's modified causation theory, and found the new evidence "of little probative value. At best, even when considered as a whole, it serve[d] as little more than a basis for speculation." (Id.) Such bare speculation fails as a matter of law to demonstrate causation. See Harline v. Barker, 912 P.2d 433, 439 (Utah 1996) (affirming grant of summary judgment where proximate causation was not established). Plaintiff could have, but failed to, appeal this decision to the Utah Court

of Appeals. Now she seeks to present a third theory about how the same ozone might cause the same symptoms.

Thus, after a complete, full, and fair litigation of Plaintiffs' case, the Utah Labor Commission rejected any causal connection between Mrs. Gudmundson's exposure to ozone and her alleged injuries. The Labor Commission's adjudication is exactly the type of quasi-judicial, adversary proceeding to which collateral estoppel applies, and its decision is preclusive upon plaintiffs in this action. Because all of plaintiffs' claims stem from the injuries Mrs. Gudmundson allegedly suffered from her exposure to ozone, the district court properly granted summary in favor of Johnson Controls and its co-defendants.

C. The District Court Properly Found Plaintiffs Failed to Establish They were Unable to Submit Evidence to Oppose Summary Judgment.

Rule 56(f) provides that a district court may reserve ruling on a motion for summary judgment in appropriate circumstances if the non-moving party is unable present facts to support its opposition to the motion. Importantly, a party invoking Rule 56(f) must explain how additional discovery would “aid his . . . opposition to summary judgment.” See Riddle v. Celebrity Cruises, Inc., 105 P.3d 970, 975 (Utah Ct. App. 2004) (quoting Sandy City v. Salt Lake County, 794 P.2d 482, 488 (Utah Ct. App. 1990)). An appellate court may review a ruling by the district court for an abuse of discretion, but it will not reverse the district court's decision to deny a rule 56(f) motion for discovery unless it “exceeds the limits of reasonability.” Overstock.com,

Inc. v. SmartBargains, Inc., 2008 UT 55 at ¶ 20, 192 P.3d at 865 (quoting Crossland Sav. v. Hatch, 877 P.2d 1241, 1243 (Utah 1994)).

Here, the district court was well within its discretion and the limits of reasonability in denying plaintiffs' motion for additional discovery. As the district court noted, plaintiffs were "granted multiple extensions to allow for further discovery" and had over two years to obtain the necessary evidence. (ROA 1812, March 24, 2008 Order Granting Summary Judgment at 2.) The district court further found that "plaintiffs have failed to identify the specific facts that are within the defendants' exclusive knowledge, the steps they have taken to obtain that information, and how that information would help them respond to defendants' motions for summary judgment." (Id.)

Now, plaintiffs list several areas of discovery they would like to explore, but they still fail to provide any explanation of how the discovery would impact or defeat summary judgment. Further, as explained in the district court below, the sheer volume of materials filed in support of plaintiffs' opposition memorandum belies their argument that insufficient time was given them to conduct discovery.⁵ Accordingly, the district court had more than sufficient justification to conclude that plaintiffs had not met their burden under Rule 56(f), and it was well within its discretion in denying plaintiffs' motion for additional discovery.

⁵ Plaintiffs' observation that Johnson Controls and other defendants did not oppose plaintiffs' motion for an extension of time to complete discovery on all issues in the case is of no moment. There were no material facts undiscovered or in dispute regarding the summary judgment motion.

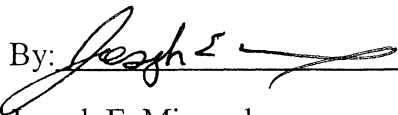
CONCLUSION

No timely notice of appeal was filed with respect to the order granting Johnson Controls and Del Ozone summary judgment. Thus, this Court lacks jurisdiction over those defendants. In addition, the district court properly granted summary judgment in favor of defendants based on the doctrine of collateral estoppel. Plaintiffs fully, fairly, and completely litigated their theory of medical causation before the Labor Commission, which rejected that theory in a final decision on the merits. Accordingly, plaintiffs are estopped from re-litigating that issue now. Finally, the district court was well within its discretion in denying plaintiffs motion for additional discovery. Therefore, the district court's grant of summary judgment in favor of defendants should be affirmed in its entirety.

DATED this 17th day of December, 2008.

Respectfully submitted,

JOHNSON CONTROLS, INC.

By:  _____

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MORGAN, MINNOCK, RICE & JAMES, L.C.
Attorneys for Defendant Appellee
Johnson Controls, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 17 day of December, 2008, I caused two true and correct copies of **BRIEF OF APPELLEE JOHNSON CONTROLS** to be mailed, first class, postage prepaid to the following:

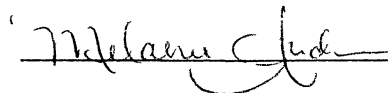
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UTAH SUPREME COURT
FILED
SEP 22 2008

IN THE SUPREME COURT OF THE STATE OF UTAH

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Wendy Gudmundson and Kay
Gudmundson,

Appellants,

v.

Case No. 20080537-SC

Del Ozone, Ozonesolutions, L.C.,
and Johnson Controls, Inc.,

Appellees.

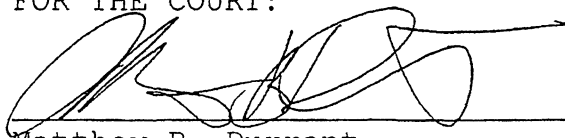
ORDER

This matter is before the Court on "motion to clarify the properly named party-appellees to this pending appeal." While the motion describes issues relating to this Court's jurisdiction over Johnson Controls, Inc., (and, by joinder with the motion, Del Ozone), it also expressly "takes no position" on those issues. The Court declines at this time to address the jurisdictional issues necessarily implicated in the motion and defers consideration of those issues until plenary treatment on the merits. Johnson Controls and Del Ozone should consider themselves to be parties to the appeal for purposes of presenting briefs and argument to this Court. Nonetheless, neither this instruction, nor the manner in which the notices of appeal were docketed, shall be construed as a ruling or comment on the merits of the jurisdictional issues implicated by the motion to clarify. The parties are invited to address those issues in their briefs on the merits. The scheduling order for briefing is reset. The briefs of Appellant and Amicus Curiae shall be due on or before October 15, and the deadlines for response and reply briefs shall be adjusted accordingly, as provided by rule or any subsequent order of the Court.

FOR THE COURT:

9-22-08

Date



Matthew B. Durrant
Associate Chief Justice