

2008

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

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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FILED
UTAH APPELLATE

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. 78-2-2(3)(j) (“orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction.”).

ISSUES PRESENTED FOR REVIEW

Issue No. 1: The district court erred in granting summary judgment to the defendants on the basis of collateral estoppel.

Standard of Review (as to all issues): In reviewing the grant of a motion for summary judgment, the appellate court gives no deference to any finding by the trial court, *Blue Cross & Blue Shield v. State*, 779 P.2d 634, 636 (Utah 1989); *Schurtz v. BMW of N. Am., Inc.*, 814 P.2d 1108, 1112 (Utah 1991), but essentially reviews the case *de novo*, being free to reappraise the trial court’s legal conclusions, *Barber v. Farmers Ins. Exch.*, 751 P.2d 248, 251 (Utah App. 1988); *Winegar v. Froerer Corp.*, 813 P.2d 104, 107 (Utah 1991), applying the same standard as that applied by the trial court, *Durham v. Margetts*, 571 P.2d 1332, 1334 (Utah 1977); *Briggs v. Holcomb*, 740 P.2d 281, 283 (Utah App. 1987). Because disposition of a case on summary judgment denies the benefit of a trial on the merits, the appellate court must review the evidence in the light most favorable to the losing party, and may affirm *only* where it appears that there is no genuine dispute as to any material issues of fact, or where, even according to the facts as contended by the losing party, the moving party is entitled to judgment as a matter of law, *Barber*, 751 P.2d at 251; *Winegar*, 813 P.2d at 107.

Determinative law (as to Issues 1 and 2):

Utah R. Civ. P. 56(c). “The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact* and that the moving party is *entitled to a judgment as a matter of law*.” (Emphasis added). *Jackson v. Dabney*, 645 P.2d 613, 615 (Utah 1982) (A genuine issue of fact exists where on the basis of the facts in the record, reasonable minds could differ on whether defendant’s conduct measures up to the required standard). *Young v. Felornia*, 121 Utah 646, 648, 244 P.2d 862, 863 (Utah 1952) (If there exists any genuine issue of material fact, a motion for summary judgment must be denied). *Ruffinengo v. Miller*, 579 P.2d 342, 343 (Utah 1978); *Billings v. Union Bankers Ins. Co.*, 819 P.2d 803, 803 (Utah 1991).

Issue No. 1A: The trial court erred in finding that the elements of collateral estoppel were met in the instant case, in that application of collateral estoppel to the facts of this case violates the purposes behind the Workers Compensation Act, by forcing an injured worker to either avail himself of the exclusive remedies of the Workers Compensation Act against the employer *or* the civil litigation remedies against the non-employer third party, but not both.

- i. The requirement that the issues in the first trial be identical to those in the second case is not met here.
- ii. The Utah Workers Compensation Act was instituted to provide a quick, informal remedy for injured Utah workers.
- iii. Workers compensation proceedings are far different from and serve different purposes than civil litigation.

- iv. The workers compensation scheme does not anticipate nor provide a “full and fair” lawsuit resulting in a “final judgment on the merits” that precludes a subsequent third-party suit.
- v. The Utah Workers Compensation Act expressly permits a separate action against a third party – not a bar against such an action.
- vi. By forcing an injured worker to make an election of remedies of either workers compensation or third-party litigation, the district court’s erroneous reading of the law defeats the purposes behind the Utah Workers Compensation Act.

Issue No. 1B: Application of collateral estoppel to this case violates the “open courts” provision of the Utah Constitution.

Issue No. 1C: Application of collateral estoppel to the facts of this case is manifestly unjust.

Issue No. 2: The trial court erred in determining that because “Plaintiffs have failed to produce evidence that Del Ozone’s ozone generator was defective,” Del Ozone was entitled to summary judgment.

Issue No. 2A: The district court erred in denying Plaintiffs’ Utah R. Civ. P. 56(f) motion for additional time to adduce evidence in opposition to Del Ozone’s motion for summary judgment.

Standard of Review (as to Issue No. 2A): Denials of Utah R. Civ. P. 56(f) motions are decided on an “abuse of discretion” standard. *Brown v. Glover*, 2000 UT 89,

¶ 29, 16 P.3d 540, 547 (2000); *Price Dev. Co. v. Orem City*, 2000 UT 26, ¶ 9, 995 P.2d 1237, 1243 (2000).

Issue No. 2B: The district court erred in determining that Plaintiffs had failed to introduce evidence that Del Ozone's ozone generator was defective.

Issue No. 3: The June 4, 2008 (Second) Notice of Appeal from the district court's final judgment issued May 28, 2008 was timely as to all parties and issues in this case.

STATEMENT OF THE CASE

Procedural summary.

This appeal is from the Order Granting Summary Judgment dated May 28, 2008, (Record on Appeal – hereafter ROA – 1845, attached hereto as Appendix A), appealed herein on June 4, 2008 (ROA 1848). In that order, the district court certified that order as the final judgment of the court on the entire matter, as follows:

“This Ruling and Order shall constitute the final Order of the Court on this matter. No further Order need be submitted by the parties.”

(ROA 1846).

Factual summary.

In December, 2004, Wendy Gudmundson worked as a supervisor at the Wasatch Laundry Facility of the Utah State Prison (run by the Utah Department of Corrections). (ROA 487-490). In mid-December, 2004, an ozone generating system – intended to boost water and cleaning efficiency through the injection of ozone into the laundry water (ROA 435) – was installed at the prison laundry. Within days after the system

commenced operations, Mrs. Gudmundson began to suffer severe, debilitating headaches, (ROA 495-505, 605). She also developed brain swelling, (ROA 612), chemical encephalopathy, multiple chemical sensitivity, vagal maladaptation, (ROA 685), weight loss, (ROA 509:111) fatigue and other physical pain. Ultimately, she underwent brain surgery to remedy a Chiari malformation [a defect that causes the brain to impinge downward on the spinal column]. (ROA 278). She continues to suffer medical problems to this day. She has suffered a significant brain injury, which has rendered her totally unable to perform her normal work and daily activities. (ROA 1791).

The ozone generating system had been designed in part by Del Ozone (ROA 544:12-13; 549:31), and contained parts purchased from Del Ozone (ROA 545:16-17; ROA 549:30-31). OzoneSolutions supervised the installation of the system, (ROA 550:35; ROA 552:44-45), under the supervision and control of Johnson Controls, Inc. (ROA 241; ROA 552:45 – 553:46). Johnson Controls had a contract with the Utah Department of Corrections to install the ozone system. (ROA 414:24-25). Johnson Controls subcontracted with OzoneSolutions to install the ozone system. (ROA 548:27-28; 549:30-32).

Ozone, the chemical used in the system, is a powerful oxidizing agent in air and water disinfection. It generally exists as a gas and is highly chemically reactive. (ROA 537-539) Ozone is closely regulated by the US Environmental Protection Agency, in part, because when combined with naturally occurring organic matter in water it creates known disinfection byproducts such as total trihalomethanes, haloacetic acids, bromate and chlorite, that pose serious health hazards. *See Safe Drinking Water Act* (“SDWA”),

42 U.S.C.S. § 300j-9(i)(2)(A) (2008); *See also National Primary Drinking Water Regulations: Disinfectants and Disinfection Byproducts*, 63 Fed. Reg. 69,390, 69,398-69,435 (1998) ("Explanation of Final Rule"). The EPA warns that ozone as a water disinfectant creates byproducts from organic material (in the water or laundry) that have shown to be neurotoxic, as well as toxic or carcinogenic to most organ systems. *See id.* *See also* ROA 635-644, Peter Dowideit & Clemens Von Sonntag, *Reaction of Ozone with Ethene and Its Methyl- and Chlorine-Substituted Derivatives in Aqueous Solution*, 32 *Envtl. Sci. Tech.* 1112 (1998).

The laundry room at the Utah State Prison did not have the recommended six (6) air changes per hour ("ACH") for the ozone system. (ROA 557:62). Prior to installing and starting the ozone laundry disinfection system, OzoneSolutions did not verify that the prison laundry facility had the requisite ACH, nor did OzoneSolutions inform prison authorities that six ACH were required. (ROA 549:33-550:34). The OzoneSolutions ozone laundry disinfection system installed in the prison did not have an ambient ozone monitoring devices to signal when ozone levels are in excess of EPA and OSHA regulations. (ROA 559:70). *See also* 40 C.F.R. §§ 50.9, 50.10; *See also Encyclopedia of Occupational Health & Safety* 45.10 (Jeanne Mager Stellman et al. eds., 4th ed., International Labor Office 1998) (ROA 588). Even after ventilation was put in to try and control ozone levels, the ambient ozone levels continued to exceed OSHA and EPA levels. Ultimately, the ozone laundry disinfection system was shut down and, to date, has not been restarted. (ROA 590; ROA 592-593; ROA 595-599).

Del Ozone knew that the ozone generator and other key Del Ozone components used in the system in question was to be shipped to “Utah D[e]partment O[f] C[orrections], Draper Prison, 14425 Bitter Brush Lane, Draper, Utah 84020.” (ROA 601).

After the installation of the ozone system, at least one other prison employee working in the laundry department, Adrian Jesse Manzanares, also suffered symptoms after exposure to the ozone system. (ROA 711-712). A couple of inmates who worked in the laundry (whose identity has not been ascertained to this point) also complained of headaches from the ozone system. (ROA 412:15-16; ROA 415:26).

On May 13, 2005, Mrs. Gudmundson filed a workers compensation claim with the Utah Labor Commission for medical expenses and disability benefits. (*See* ROA 281). In accordance with the statutes regulating workers compensation, this claim was her exclusive remedy against her employer. *See* Section 34A-2-105, Utah Code Ann. It was processed in accordance with the applicable statutes and regulations, which provide for an abbreviated and limited process – time limits on the presentation of evidence; medical reports submitted in lieu of testimony subject to cross-examination; limited discovery and limits on attorneys fees, among other limitations. *See, generally*, Utah Admin. Code r. 602 and Utah Code Ann. § 34A-2-802(1).

Because the worker’s compensation system is set up to expedite the award of benefits to an injured worker, most applicants do not develop a worker’s compensation case as they would a personal injury lawsuit. (ROA 1779). In general practice, once a case is filed, the Labor Commission requires the employer and its insurance carrier to

respond within 30 days. Once an answer has been submitted, notice of a date for a hearing is set, usually three to four months from the date of the notice. No later than 45 days before a hearing, the parties are required to file a disclosure statement with the Labor Commission indicating all witnesses who will testify and the evidence that will be submitted at the hearing. (ROA 1775-1776).

Medical experts are not allowed to testify nor undergo cross-examination at a worker's compensation hearing. Instead, written reports are submitted in advance of the hearing as part of a joint medical exhibit. Hence, supportive reports of the applicant's doctors, and the opposing reports of the defense doctors are included in that exhibit. When there exists a medical controversy in a worker's compensation case, the Administrative Law Judge (ALJ) will send the case to a "medical panel" to review and report to the ALJ on the medical issues. The "medical panel" reviews the medical records and then reports to the ALJ. There is no cross-examination of the "medical panel" nor, for that matter, of any medical "expert" whose evidence, presented entirely in writing, is presented before the panel. (ROA 1777-1778). The "medical panel" report will trump any other expert opinions, so long as there is substantial evidence in the record to support the panel's conclusions. (ROA 1780). Most Labor Commission hearings last only an hour to an hour and a half, with most of the time being taken up by lay testimony, including the injured worker. (ROA 1778).

Given these limitations, it is extremely rare for an applicant's attorney to take the deposition of a defense doctor. (ROA 1776). Similarly, it is rare for an applicant's attorney to hire their own medical expert, due mainly to financial considerations. (ROA

1776). The applicant usually has no money to pay for a special expert, and often medical insurance coverage issues limit primary medical treatment. An applicant's attorney is often left with trying to "get a report from whoever is available and willing to write a report." (ROA 1777). Some complex cases (in which, for example, a worker has been exposed to toxins in the workplace, as opposed to a common low back or knee injury), are considered to be "works in progress," in that it takes time and continued medical testing to determine what is wrong with the injured worker. (ROA 1778-1779). In those types of cases, it is not always clear early on what is causing the worker to be ill, and an initial assessment by a treating physician may not be correct as to the actual illness that the worker is suffering. (ROA 1778-1779). In such cases, counsel for the applicant may not have all of the information or medical workup that they would like. Nonetheless, most clients simply press their workers compensation attorney to move forward with the workers compensation matter because of their financial circumstances. Often the worker and the attorney "just have to hope for the best when the case gets before a medical panel." (ROA 1779).

The standards for review of medical and other evidence are different in Labor Commission matters than litigation in the district courts. The standards of *Daubert* do not apply to a worker's compensation hearing. Hearsay evidence is not restricted as it is under the Utah Rules of Evidence. (ROA 1179-1780). Of course, there is no jury in an administrative Labor Commission proceeding.

In Mrs. Gudmundson's case, the Labor Commission considered a medical report from an "Independent Medical Evaluation" performed by Edward B. Holmes, M.D.,

which concluded that Mrs. Gudmundson's medical condition was not caused by "the December 17, 2004 exposure to ozone." (ROA 618). He specifically concluded that he found it "highly improbable" and "not medically reasonable" that Mrs. Gudmundson's brain swelling leading to the Chiari Malformation was caused by ozone exposure (ROA 295), despite his notation in his records of a letter dated June 28, 2005, from Dr. Howard Reichman of the Utah Valley Regional Medical Center, (who had actually *treated* Mrs. Gudmundson), had stated that "ozone exposure was responsible for brain swelling and that the lumbar puncture allowed a negative pressure to develop in the spinal canal which, in turn, allowed the tonsils [the Chiari Malformation] to drop." (ROA 292-293; emphasis in original). The commission also considered the opinion of Dr. Joseph Jarvis, who could not "opine a medical causal connection." (ROA 349-350; ROA 283). Ultimately, the Labor Commission denied Mrs. Gudmundson's claim, stating in its Findings of Fact, Conclusions of Law, and Order, dated October 2, 2006 (ROA 281, *et. seq.*):

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, could not opine a medical causal connection. Dr. Holmes, also an expert 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 283).

Mrs. Gudmundson appealed the Labor Commission's decision to the Utah Labor Commission's Appeals Board on November 2, 2006. (ROA 322). That appeal was denied by way of an "Order Affirming ALJ's Decision," (ROA 357 *et. seq.*), which cited the Labor Commission's decision that "denied Ms. Gudmundson's claim on the grounds that her medical problems were not caused or aggravated by her work-related exposure to ozone during December 2004," (ROA 357), with the following finding:

[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 Ms. Gudmundson's claim.

(ROA 358).

In accordance with Section 34A-2-106, Utah Code Ann., which allows claims against non-employer third parties arising from industrial injuries, Mrs. Gudmundson, along with her husband, Kay, commenced the action that is on appeal before this court, against Del Ozone and OzoneSolutions, by way of a complaint filed September 20, 2005. (ROA 1). The complaint was later amended on November 6, 2006, to add Johnson Controls, Inc. as a defendant. (ROA 100).

Some discovery was undertaken in the case, including the depositions of Doug Wright, facilities coordinator at the Utah Department of Corrections (ROA 408), George Eddleman, former laundry employee at the Utah Department of Corrections (ROA 466), the plaintiff, Wendy Gudmundson (ROA 481), and John Downey, part owner of

OzoneSolutions (ROA 541). Additionally, there were requests for production of documents and interrogatories. Evidence has been adduced and made part of the record that demonstrated that Mrs. Gudmundson's injuries *were in fact* caused by exposure to the ozone laundry disinfection system and that, contrary to the findings of the Utah Labor Commission, such injuries arose from exposure to ozone *and to chemical byproducts* (the Utah Labor Commission's findings were limited to "ozone exposure" alone, with no mention or consideration of the chemical byproducts that also injured Mrs. Gudmundson (ROA 283)). For instance, Dr. Kay H. Kilburn, designated by Plaintiffs as an expert witness, (ROA 660), diagnosed Mrs. Gudmundson with: "(1) Chemical encephalopathy due to ozone and other chemicals; (2) Multiple chemical sensitivity; (3) Vagal maladaptation – nearly fixed heart rate; (4) Chiari malformation with herniation relieved surgically; (5) No history of seizures." (ROA 685). He then concluded:

Ms. Gudmundson worked as a supervisor in the prison laundry for four years without difficulty. She was a correctional officer for 9 years. She had exposures to chlorine, phosphoric acid, sodium hydroxide sulfide and hydrofluorosalic acid. A new ozone bleach process was installed in the laundry. Within 10 days of this new exposure, she developed severe headaches, cramping, dehydration, dizziness, vomiting and sought emergency care. During work-up of these problems a Chiari malformation was found and surgically corrected. Many medicines were given for headaches, which are not abated. When I evaluated her on April 3, 2007, she had five impairments of function including balance, reaction time, vibration, and hearing. Her most disabling problem is profound chemical sensitivity that makes ordinary life impossible because she must avoid many scents and chemicals and building [sic]. Chemical sensitivity has continued since 2004 and is most probably permanent. *The sequence of events is explained best by ozone inhalation producing increased absorption of it and the background chemicals: chlorine, phosphoric acid, sodium hydroxide, hydrofluorosalic acid-fluorine and resmethrin, a pyrethroid insecticide, and detergents that caused intolerance to many chemicals* manifested by headache, reduced sense of smell, memory loss, dryness of skin and mucous membrane. This made Wendy Gudmundson totally and permanently disabled.

This expert opinion is rendered to the legal standard of more probable than not.

(ROA 686; emphasis added).

In addition, expert witness Douglas E. Rollins, M.D., Ph.D. opined:

It is my opinion that Wendy Gudmundson's exposures to the ozone laundry purification while she worked at the Wasatch Laundry facility exposed her to ozone *and to the disinfection byproducts catalyzed by the ozone*. These substances resulted in the severe, intractable frontal headaches that resulted in her admission to the Timpanogos Hospital on December 20, 2004.

(ROA 688, 692; emphasis added).

On August 28, 2007, nearly two years after the instant action was originally filed, new plaintiffs' counsel was substituted into the case (ROA 219), after Mr. and Mrs. Gudmundson's original lawyers withdrew (ROA 210). Within three weeks, on September 10, 2007, counsel for all of the parties had a telephone conference to discuss the status of the case. In that conversation, the Gudmundsons' new counsel noted that the fact discovery deadline of September 5, 2007, had passed, although the parties had scheduled the deposition of Plaintiffs' expert, Dr. Reichman for December 11, 2007 – some three months into the future and a month past the time that the parties had stipulated for the expert discovery deadline. (ROA 534; see also ROA 525-526). In that conversation of September 10, 2007, Plaintiffs' counsel candidly informed opposing counsel that they needed time to get up to speed on the case and conduct further discovery, and requested a nine-month extension to conduct fact discovery, and three additional months to conduct expert discovery. Counsel for Johnson Controls and OzoneSolutions stated that they would not oppose a Plaintiffs' motion for a new scheduling order, since they themselves needed additional time to conduct discovery.

Counsel for Del Ozone objected to any extension of discovery timelines, however. (ROA 534).

That same day, September 10, 2007, Del Ozone moved for summary judgment (ROA 297), arguing that Mrs. Gudmundson's claims were barred by the doctrine of *res judicata* and/or collateral estoppel. (ROA 234-235). In that connection, Del Ozone argued that the Utah Labor Commission's determination constituted a final judgment on the merits of Mrs. Gudmundson's claim of injury, which had been "completely, fully and fairly litigated." (ROA 234-235). Del Ozone further asserted that was no basis upon which to impose any duty on it because it, the manufacturer of the ozone generator, could not foresee that it would cause Mrs. Gudmundson any harm (ROA 231-232), that the ozone generator was not defective (ROA 232-233) and that there was no evidence that Mrs. Gudmundson's injuries were caused by ozone (ROA 233). Johnson Controls soon followed suit in filing a motion for summary judgment, (ROA 299), as did OzoneSolutions (ROA 370). Johnson Controls' and OzoneSolutions' arguments were limited to the assertion that collateral estoppel precluded Mrs. Gudmundson from attempting to prove causation of her damages in a separate third-party lawsuit. (ROA 308-319 [Johnson Controls]; ROA 1333-1334 [OzoneSolutions]).

Plaintiffs opposed the motions for summary judgment on the basis that the application of collateral estoppel to this case undermined both the letter and spirit behind the Utah Workers Compensation Act, (Section 34A-2-101 *et. seq.*, Utah Code Ann.), violated Utah public policy and was in any case manifestly unjust. Plaintiffs also argued that the elements of collateral estoppel were not met in this case, inasmuch as the case

before the court was not identical, but was fundamentally different from, the case presented to the Labor Commission, since convincing evidence had been adduced that Mrs. Gudmundson had indeed been injured as a result of ozone exposure *and* chemical byproduct exposure. (ROA 389-400; ROA 1406-1433).

As to Del Ozone's argument that it owed no duty to Wendy Gudmundson, Plaintiffs argued that Del Ozone's manufacture of a defective product and its introduction of that product into the stream of commerce to foreseeable users, such as Mrs. Gudmundson, precluded its dismissal. (ROA 393).

In this connection, Plaintiffs also asked for additional time to conduct discovery in order to adduce further evidence in opposition to Del Ozone's motion, in accordance with Utah R. Civ. P. 56(f). (ROA 373, *et. seq.*). Among the items that Plaintiffs indicated they needed to conduct discovery on were 1) the interpretation of Mrs. Gudmundson's MRIs, taken in December, 2004, June, 2006 and again in August, 2006; 2) information on the neurotoxicity or carcinogenic effects of an ozone water disinfectant system; 3) information on water being pulled from a geo-thermal well below the Utah State Prison which had not been metered or quantified, as required by an EPA water permit (ROA 387); and 4) further information from Del Ozone relating to Del Ozone's denial of whether any of its "instruments that are similar to the Device in question [the ozone generator at the Utah State Prison] have ever been known to cause a health problem as a result of the use or improper use of said similar device," in response to interrogatories from Plaintiffs. (ROA 388). Plaintiffs also pointed out that they needed to take the depositions of various Del Ozone personnel, including Rick Salter, Jim White and Joel

Peterson, or compel documents to supplement Del Ozone's inadequate and deficient answers to interrogatories and document requests. (ROA 392-393). In that regard, Plaintiffs pointed out that the need for further discovery was not a "fishing expedition," in that two of the three defendants in the case had agreed that they needed to take further discovery as well. In light of these factors, as well as the entry of new counsel into the case, Plaintiffs argued that an extension of time for further discovery under Utah R. Civ. P. 56(f) was warranted in the case. (ROA 393). This argument was accompanied by an affidavit of Plaintiffs' new counsel, referencing the above-stated factors, and stating that he had exercised due diligence to become familiar with the facts at issue in the case, and stating affirmatively that more time was needed to conduct additional fact discovery and expert discovery. (ROA 533-534).

A hearing was held on the motions for summary judgment on March 3, 2008. District Court Judge Denise Lindberg commenced the hearing by announcing that she had already made up her mind that the moving defendants would win and that the Plaintiff would lose, but indicated that the Plaintiffs could nonetheless be heard if they so desired. (ROA 1889:6-1889:7). In so doing, the court rejected Del Ozone's argument that "the connection between its role as a manufacturer of the ozone system is so attenuated to the injury of the worker in this case, Ms. Gudmundson, that it was unforeseeable." The court did, however, agree with Del Ozone that "the plaintiff presented no evidence that the ozone generator was defective." (ROA 1889:6). Nonetheless, the court announced that "most importantly I agree – and this last round is really the basis also for my ruling on Johnson Controls' motion – that issue preclusion

applies. So for that reason I believe that Del Ozone's argument and Johnson Controls' argument has merit, and summary judgment should be granted on those grounds." (ROA 1889:6). After oral argument, the court denied Plaintiffs' Utah R. Civ. P. 56(f) request, and granted the motions filed by Del Ozone and Johnson Controls, Inc., ordering that counsel for Del Ozone prepare an order to that effect. (ROA 1327). Judge Lindberg stated that she would consider OzoneSolutions' motion at a later time, since its motion was defective in that it was not accompanied by a memorandum that the court found sufficient. (ROA 1889:41).

OzoneSolutions filed a memorandum in support of its motion for summary judgment on March 4, 2008, incorporating the arguments that had been made by Johnson Controls. (ROA1328), to which Plaintiff responded on March 14, 2008 (ROA 1406).

Counsel for Johnson Controls prepared a written order with regard to the summary judgment in favor of Del Ozone and Johnson Controls only, to which Plaintiffs objected. (ROA 1802). Notwithstanding the objection, the trial court signed Del Ozone's order on March 24, 2008. (ROA 1813; attached hereto as Appendix B).

The district court's order of March 24, 2008, denied Plaintiffs' request for additional discovery under Utah R. Civ. P. 56(f), stating that they had failed to establish that they had been unable to submit evidence to oppose summary judgment. In this regard, the district court noted that Plaintiffs had had two and a half years to "uncover any available evidence to support their claims." (ROA 1812). [Actually, less than two years had elapsed between the time the complaint had been filed and the date that Del Ozone's motion for summary judgment had been filed]. In its order, the district court

neither acknowledged nor apparently considered the fact that Plaintiffs' new counsel had been in the case a mere eight days before the fact discovery deadline expired, and a mere 12 days before Del Ozone filed its motion for summary judgment. Nonetheless, a handwritten note from Judge Lindberg – one among many written in the margins of the Plaintiff's opposition to Del Ozone's motion for summary judgment, (found at ROA 388), is telling. Paragraph 24 of that opposition reads, "Plaintiffs recently retained new counsel and, therefore, need additional time to perform fact and expert discovery. *See* Exhibit 'I,' Affidavit of Rick S. Lundell." (ROA 388). Judge Lindberg's hand-written note, written in the left-hand margin next to that paragraph, states, "Too bad – Ct. unlikely to grant a 3rd extension on this case where P's have been represented by competent counsel throughout case & discovery has proceeded w/o interruption." (ROA 388).

The district court's order of March 24, 2008, also stated that "Plaintiffs have failed to produce evidence that Del Ozone's ozone generator was defective," (ROA 1812) and went on to state that the plaintiffs were precluded from pursuing their claim "by the doctrine of issue preclusion," finding that "Plaintiffs had a complete, full and fair hearing before the Utah Labor Commission," (ROA 1812), the order from which had made a finding that the Plaintiff's symptoms were not the result of exposure to ozone, "the identical issue of causation upon which plaintiffs' present claims hinge." (ROA 1813). Thus, the order concluded, "the elements of issue preclusion have been satisfied and Del Ozone's and Johnson Controls' motions for summary judgment on this ground are hereby GRANTED." (ROA 1813).

That order did not make any express or implied determination that there was no reason for delay, nor did it provide an express direction for the entry of a final judgment as to the adjudication of all of the claims and the rights and liabilities of all the parties. Instead, that order granted summary judgment to only two of the three named defendants; Del Ozone and Johnson Controls, Inc. (ROA 1813). On April 2, 2008, Plaintiffs filed a notice of appeal of that order, (the First Notice of Appeal) and specified that the appeal went only to the dismissal of Del Ozone and Johnson Controls, and that it did not apply to OzoneSolutions, whose motion for summary judgment was still pending. (ROA 1815). By letter dated April 17, 2008, the Supreme Court gave that appeal the number of Appellate Case No. 20080320. (ROA 1836).

In accordance with the direction of the district court at the earlier summary judgment hearing, OzoneSolutions, the only defendant left in the case, filed its memorandum of points and authorities to its motion for summary judgment on April 11, 2008 – after the notice of appeal in Appellate Case No. 20080320 had been filed.

On May 12, 2008, the Supreme Court issued an order electing to retain the appeal on the Supreme Court’s docket rather than the Court of Appeals. (ROA 1843).

On May 28, 2008, the district court issued its Ruling and Order Granting Defendant OzoneSolutions’ Motion for Summary Judgment. (ROA 1845; Appendix A). In it, the district court incorporated by reference its prior analysis as reflected in the earlier summary judgment order that “Plaintiff had a complete, full and fair hearing before the Utah Labor Commission” (ROA 1845). Despite this finding, the district court conceded in a footnote that “Ms. Gudmundson apparently now has physician

testimony to challenge the Commission's determination that her medical issues were not caused by ozone exposure." (ROA 1845). The district court apparently believed that this evidence countering the Commission's findings should not be considered by the district court in the instant case, but should be directed solely to the Labor Commission, stating "[h]owever, there is no claim that she [Mrs. Gudmundson] has taken the matter back to the Commission." (ROA 1845). The district court then confirmed that "the Court has already determined that the Commission's procedures were sufficiently trial-like to say that the issue in the first action was 'completely, fully, and fairly litigated,'" – despite the presence of evidence that challenged the Commission's findings – and that thus OzoneSolutions, "much like Del Ozone, is entitled to summary judgment on *res judicata* grounds." (ROA 1846). It was only at this point that the district court specifically directed entry of a final judgment in the case, stating that the Ruling and Order "shall constitute the final Order of the Court on this matter" and that "no further Order need be submitted by the parties." (ROA 1845-1846).

On June 4, 2008, Plaintiffs filed a Notice of Appeal from the May 28, 2008 Ruling and Order, (hereafter the "Second Notice of Appeal") and moved that the appeal be consolidated with the appeal on file; Appellate Case No. 20080320. (ROA 1848).

On June 25, 2008, the Supreme Court issued an order in Appellate Case No. 20080320 on a *sua sponte* motion to dismiss for lack of jurisdiction, stating that "the appropriate cure for a premature appeal is a timely appeal that pertains to all aspects of the judgment the Appellants wish to challenge." (As mentioned, Appellate Case No. 20080320 only applied to two of the three defendants and did not involve a final order of

the court). Accordingly, the Supreme Court dismissed Appellate Case No. 20080320 “without prejudice to any subsequent timely appeal.” (ROA 1852).

The next day, June 26, 2008, the Supreme Court filed a submission of the *sua sponte* motion, with a notation that the order had been issued. (ROA 1851). That same day, on June 26, 2008, the Supreme Court sent a letter advising that the Second Notice of Appeal – appealing the May 28, 2008 “final Order of the court” – had been filed, and assigned it Appellate Case No. 20080537. (ROA 1854).

On June 28, 2008, Plaintiffs, in an abundance of caution, filed yet another “Notice of Appeal” (the “Third Notice of Appeal”), in which Plaintiffs noted that they had already appealed from the May 28, 2008 order within seven days of its issuance – on June 4, 2008 – but wished to make sure, in light of the somewhat confusing letter Plaintiff’s counsel had received, that it was clear that the Second Notice of Appeal pertained to all outstanding issues and parties in the case, and had been timely filed. To the degree that the Third Notice of Appeal was unnecessary, Plaintiffs indicated that it should be stricken. If there was any question of the timeliness of the Second Notice of Appeal as to all issues and all parties, Plaintiff requested that the Third Notice of Appeal nonetheless be considered timely under URAP 22(d) and URAP 4, including any extension necessary based on good cause or excusable neglect (ROA 1856).

On July 9, 2008, the Supreme Court acknowledged the filing of the Third Notice of Appeal, and indicated that it had “been filed as an amended notice of appeal in case number 20080537 and this case number should be indicated on future filings and correspondence.” (ROA 1887).

ARGUMENT

POINT I.

THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANTS ON THE BASIS OF COLLATERAL ESTOPPEL.

Utah R. Civ. P. 56(c) provides:

The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact* and that the moving party is *entitled to a judgment as a matter of law.*”

(Emphasis added).

If there exists any genuine issue of material fact, a motion for summary judgment must be denied. *Young v. Felornia*, 121 Utah at 648, 244 P.2d at 863. *See also, Jackson*, 645 P.2d at 615 (A genuine issue of fact exists where on the basis of the facts in the record, reasonable minds could differ on whether defendant’s conduct measures up to the required standard); *Salt Lake City Corp. v. James Constructors, Inc.*, 761 P.2d 42, 47 (Utah App. 1988) (In order for a nonmoving party to successfully oppose a motion for summary judgment and send the case to a fact-finder, it is not necessary for the party to prove its legal theory; it is only necessary that the nonmoving party show “facts” controverting the “facts” stated in the moving party’s affidavit); *Ruffinengo*, 579 P.2d at 343; *Billings*, 819 P.2d at 803.

In reviewing the grant of a motion for summary judgment, the appellate court gives no deference to any finding by the trial court, *Blue Cross & Blue Shield*, 779 P.2d 636; *Schurtz*, 814 P.2d at 1112, but essentially reviews the case *de novo*, being free to reappraise the trial court’s legal conclusions, *Barber*, 751 P.2d at 251; *Winegar*, 813 P.2d

at 107, applying the same standard as that applied by the trial court, *Durham*, 571 P.2d at 1334; *Briggs*, 740 P.2d at 283. Because disposition of a case on summary judgment denies the benefit of a trial on the merits, the appellate court must review the evidence in the light most favorable to the losing party, and may affirm only where it appears that there is no genuine dispute as to any material issues of fact, or where, even according to the facts as contended by the losing party, the moving party is entitled to judgment as a matter of law, *Barber*, 751 P.2d at 251; *Winegar*, 813 P.2d at 107.

In the instant case, the district court found, as a matter of law, that the principles of *res judicata* and collateral estoppel precluded recovery by Plaintiffs. In so doing, the district court specifically found that Mrs. Gudmundson “had a complete, full and fair hearing before the Utah Labor Commission,” (ROA 1812,1845), and that thus summary judgment in favor of all defendants was warranted.

The district court was wrong. As demonstrated below, not only do there exist genuine issues of material fact that preclude summary judgment, (a fact conceded by the district court in its order granting summary judgment, ROA 1845, fn.1), but the district court’s interpretation and application of the law to this case was erroneous, thus mandating a reversal of the judgment in favor of the defendants, and a remand of the case to the district court for a trial on the merits.

POINT IA. Application of collateral estoppel to the facts of this case violates the letter and spirit of the Utah Workers Compensation Act.

Where, as here, the application of the principles of *res judicata* or collateral estoppel would result in injustice, violate public policy, undermine the policies

underlying the “open courts” provision of the Utah constitution and contravene the clear mandates of Utah statute, such should be rejected. This principle was addressed at length in the 2004 case of *Buckner v. Kennard*, 2004 UT 78, 99 P.3d 842 (2004), in which the issue determined by the court was whether an arbitration decision could stand as an adjudication sufficient for collateral estoppel to attach to its findings. In rejecting any preclusive effect of an arbitration award, the Utah Supreme Court stated:

The doctrine of *res judicata* embraces two distinct theories: claim preclusion and issue preclusion. *Snyder v. Murray City Corp.*, 2003 UT 13, ¶33, 73 P.3d 325 (citing *Salt Lake City v. Silver Fork Pipeline Corp.*, 913 P.2d 731, 733 (Utah 1995)). Claim preclusion involves the same parties or their privies and the same cause of action. It “precludes the relitigation of all issues that could have been litigated as well as those that were, in fact, litigated in the prior action.” *Macris & Assocs. v. Neways, Inc.*, 2000 UT 93, ¶19, 16 P.3d 1214 (quoting *Schaer v. State*, 657 P.2d 1337, 1340 (Utah 1983) (citation omitted)). In contrast, issue preclusion, also known as collateral estoppel, “arises from a different cause of action and prevents parties or their privies from relitigating facts and issues in the second suit that were fully litigated in the first suit.” *Id.* In effect, once a party has had his or her day in court and lost, he or she does not get a second chance to prevail on the same issues. *Berry v. Berry*, 738 P.2d 246, 249 (Utah 1987). In the instant case, the deputies argue that the dispute over pay inequities was resolved in the Diamant arbitration proceedings, and that collateral estoppel therefore precludes the county from relitigating the issue.

A party seeking to invoke collateral estoppel must establish that: (1) the issue decided in the prior adjudication is identical to the one presented in the instant action; (2) the party against whom issue preclusion is asserted was a party, or in privity with a party, to the prior adjudication; (3) the issue in the first action was completely, fully, and fairly litigated; and (4) the first suit resulted in a final judgment on the merits. *Snyder*, 2003 UT 13 at ¶35; *Timm v. Dewsnup*, 851 P.2d 1178, 1184 (Utah 1993).

Application of the doctrine of collateral estoppel may be unwarranted in circumstances where its purposes would not be served. See Estate of Covington v. Josephson, 888 P.2d 675, 678 (Utah Ct. App. 1994). These purposes include: (1) preserving the integrity of the judicial system by preventing inconsistent judicial outcomes; (2) promoting judicial economy by preventing previously litigated issues from being relitigated; and (3) protecting litigants from harassment by

vexatious litigation. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979); *State ex rel. J.J.T.*, 877 P.2d 161, 162-63 (Utah Ct. App. 1994); *Mel Trimble Real Estate v. Monte Vista Ranch*, 758 P.2d 451, 453 (Utah Ct. App. 1988).

Moreover, collateral estoppel can yield an unjust outcome if applied without reasonable consideration and due care. Parklane Hosiery, 439 U.S. at 330-31. In particular, allowing a party who took no part in the first suit to take advantage of the findings therein and use them offensively in subsequent litigation can result in adverse, unjust, and unforeseen consequences for the party against whom collateral estoppel has been asserted. *Id.* at 326-33. Courts, then, must carefully consider whether granting preclusive effect to a prior decision is appropriate. *Id.* at 330-31. Collateral estoppel "is not an inflexible, universally applicable principle[.]... [P]olicy considerations may limit its use where the ... underpinnings of the doctrine are outweighed by other factors." *Jackson v. City of Sacramento*, 172 Cal. Rptr. 826, 829 (Cal Ct. App. 1981); see also *Estate of Covington*, 888 P.2d at 678; *Parklane Hosiery*, 439 U.S. at 330-31 (indicating that applying collateral estoppel may be unfair where, for example, a party had little incentive to defend vigorously, the judgment relied upon is inconsistent with prior judgments, or different procedural opportunities are offered in each proceeding).

Buckner, 2004 UT 78, ¶¶ 11-15, 99 P.3d at 846-847 (emphasis added).

Here, there was no “complete, full and fair” litigation of Plaintiff Wendy Gudmundson’s claims before the Utah Labor Commission – a “suit” from which issued a “final judgment.” Not only are the factual and legal issues in the instant case different from those determined in the Labor Commission workers compensation process, but the workers compensation statutory scheme in Utah precludes the type of “complete, full and fair” litigation that could stand as a bar to a subsequent civil case.

- i. The requirement that the issues in the first trial be identical to those in the second case is not met here.*

In the instant case, the first of the four conditions for the application of collateral estoppel – that the issues be identical – is missing here. As pointed out above, the Labor Commission found that “[t]he petitioner’s medical condition was not *caused or*

aggravated by her exposure to ozone” (ROA 283; emphasis added). In affirming this decision, the Labor Commission Appeals Board referenced and affirmed the earlier decision which “denied Ms. Gudmundson’s claim on the grounds that her medical problems were not *caused or aggravated by her work-related exposure to ozone* during December 2004,” (ROA 357; emphasis added). It appears that there was no consideration of nor decision rendered on any possible cause of Mrs. Gudmundson’s medical problems other than ozone exposure only.

The instant personal injury case, by contrast, includes evidence that ozone exposure was not the only cause of Mrs. Gudmundson’s injuries, however. As indicated above, evidence has been adduced that exposure *to other chemicals*, in addition to and in combination with the ozone, caused or contributed to her symptoms and problems. Dr. Kay H. Kilburn, one of Plaintiffs’ experts, (ROA 660), diagnosed Mrs. Gudmundson with, *inter alia*, “*Chemical encephalopathy due to ozone and other chemicals*,” (ROA 685), specifying that Mrs. Gudmundson’s “most disabling problem is profound chemical sensitivity that makes ordinary life impossible because she must avoid many scents and chemicals and building [sic].” He concluded that this was caused by the combination of the ozone exposure and the increased absorption of toxic chemicals:

The sequence of events is explained best by ozone inhalation producing increased absorption of it and the background chemicals: chlorine, phosphoric acid, sodium hydroxide, hydrofluorosalic acid-fluorine and resmethrin, a pyrethroid insecticide, and detergents that caused intolerance to many chemicals manifested by headache, reduced sense of smell, memory loss, dryness of skin and mucous membrane. This made Wendy Gudmundson totally and permanently disabled.

(ROA 686).

Another of Plaintiff's experts, Douglas E. Rollins, M.D., Ph.D. stated that Mrs. Gudmundson's symptoms and problems originated from the fact that "Wendy Gudmundson's exposures to the ozone laundry purification while she worked at the Wasatch Laundry facility exposed her to ozone *and to the disinfection byproducts catalyzed by the ozone.*" (ROA 692, emphasis added).

It is significant that in its Ruling and Order Granting Defendant OzoneSolutions' Motion for Summary Judgment, (ROA 1845) the district court conceded that Mrs. Gudmundson had produced evidence in contravention of the Labor Commission's findings, stating "Ms. Gudmundson apparently now has physician testimony to challenge the Commission's determination that her medical issues were not caused by ozone exposure." (ROA 1845, fn. 1). Nonetheless, the district court appeared to have been of the opinion that since Mrs. Gudmundson had made "no claim that she has taken the matter back to the Commission," the district court was somehow precluded from considering the fact that the case before the district court was fundamentally different from the case that had been presented to the Labor Commission. (The district court cited no authority for this assumption, however). Inexplicably, the Ruling and Order then went on to simply find that the Plaintiff "had a complete, full and fair hearing" before the Labor Commission, which precluded any further consideration of Mrs. Gudmundson's claims before the district court. (ROA 1845-1846).

The fact of the matter is that the issue of causation of Mrs. Gudmundson's medical problems applicable to her workers compensation claim is not identical to that issue in the present action. In fact, they are not even close – a point the district court recognized.

It was thus error for the district court to find that the element of “identical issues” – the first criteria upon which a *res judicata* ruling must rest – was met in this case.

- ii. *The Utah Workers Compensation Act was instituted to provide a quick, informal remedy for injured Utah workers.*

The *Utah Workers Compensation Act*, Utah Code Ann. § 34A-2-101 *et. seq.*, was instituted in order to assure an injured employee and his family an income during the period of his disability from an industrial injury, as well as compensation for any resulting permanent disability, and to eliminate the expense, delay and uncertainty of the employee having to prove the employer’s negligence in court, and to place the burden of industrial injuries on industry. It is intended to replace and preempt common law claims against employers, in order to afford injured workers a quick, economical and convenient forum for the redress of industrial injuries. *Wilstead v. Industrial Commission*, 407 P.2d 692,693 (Utah 1965). *See also Park Utah Consolidated Mines Co. v. Industrial Commission*, 84 Utah 481, 36 P.2d 979 (Utah 1934). The Workers Compensation Act provides a “no-fault” type insurance protection scheme for work-related injuries, which is intended to entirely replace a worker’s ability to seek redress to the courts for claims against an employer for industrial injuries:

The Workers Compensation Act is a comprehensive scheme enacted to provide speedy compensation to workers who are injured as a result of an accident occurring in the course and scope of their employment, irrespective of negligence on the part of employers or employees. The Act basically creates a no-fault type insurance protection scheme for work-related injuries in lieu of traditional common law tort remedies. Although in some cases, the amount of compensation a worker can receive under the Act is more limited than the worker might receive in common law damages, 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.

The remedies provided by the Act for injuries to workers are exclusive of common law remedies. Section 35-1-60 of the Utah Code provides that compensation awarded under the Act is "exclusive" and the "liabilities of the employer imposed by the Act shall be in place of any and all other civil liability whatsoever, at common law or otherwise." That section further provides that "no action at law may be maintained against an employer or against any officer, agent, or employee of the employer based upon any accident, injury, or death of an employee."

Although the Act does not specifically state that no court may award benefits provided by the Act, that is its clear import. District courts have no jurisdiction whatsoever over cases that fall within the purview of the Workers Compensation Act. *See Morrill v. J & M Constr. Co.*, 635 P.2d 88, 89 (Utah 1981); *Bryan v. Utah Int'l*, 533 P.2d 892 (Utah 1975); *Ortega v. Salt Lake Wet Wash Laundry*, 108 Utah 1, 5, 156 P.2d 885 (1945); *Murray v. Wasatch Grading Co.*, 73 Utah 430, 435, 274 P. 940 (1929). They may enforce an award only if it is properly docketed. Utah Code Ann. § 35-1-59. The court of appeals has power only to exercise appellate review of Commission awards, not to make awards itself. Utah Code Ann. § 35-1-86.

Sheppick v. Albertson's, Inc., 922 P.2d 769, 773-774 (Utah 1996). *See also, Vigos v. Mountainland Builders, Inc.*, 2000 UT 2, ¶ 24, 993 P.2d 207,213 ("The purpose of the Act is to provide relief from industrial accidents.").

iii. *Workers compensation proceedings are far different from and serve different purposes than civil litigation.*

To the ends stated above, Workers Compensation proceedings are different than civil court proceedings. As stated by the Utah Supreme Court in the case of *Mollerup Van Lines v. Adams*, 398 P.2d 882, 884-885 (Utah 1965), "[I]t is well to keep in mind that this [Workers Compensation] proceeding is different from an ordinary lawsuit in that it is not an adversary proceeding. It is purposed to be an impartial inquiry as to whether

the applicant is eligible for workmen's compensation." Thus, "neither party is necessarily bound by any statement or admission made either in the [panel medical] report, or in the testimony of the [commission-appointed] doctor," *Id.* at 885, and "[t]he ordinary rule of *res judicata* is not applicable to the instant proceeding [to re-open a workers compensation case]." *Id.* at 883.

Workers Compensation proceedings are, and are intended to be, very informal and, in some respects, *sui generis*. *Utah Fuel Co. v. Industrial Commission*, 59 Utah 46, 49, 201 P. 1034, 1034 (Utah 1921). The rules of evidence that apply to civil proceedings do not apply to Workers Compensation proceedings. *See, e.g.*, Utah Code Ann. § 34A-2-802(1), "Rules of evidence and procedure before commission – Admissible evidence":

The commission, the commissioner, an administrative law judge, or the Appeals Board, is not bound by the usual common law or statutory rules of evidence, or by any technical or formal rules or procedure, other than as provided in this section or as adopted by the commission pursuant to this chapter and Chapter 3, Utah Occupational Disease Act. The commission may make its investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of the chapter.

From the outset of the institution of the Workers Compensation Act, it has been accepted that hearings should be informal in manner, time, and place, in order that a case may be processed without the need for a lawyer's assistance.

There is no attempt to observe the forms of rules which govern judicial trials, and the strict and formal rules of judicial procedure are as inapplicable to the form and manner of making objections and defenses as they are to the presentation and proof of claims for compensation. The main reason back of all of this is to enable lay members of society, if necessary, to prosecute proceedings under the Workers Compensation Act, with the assistance, if necessary, of the commission.

Taslich v. Industrial Commission, 71 Utah 33, 40, 262 P. 281, 283 (Utah 1927). Thus, the procedures governing the filing and handling of a Workers Compensation case are far different, and far more informal, than, for example, the Utah Rules of Civil Procedure. See *Adjudication of Workers Compensation and Occupational Disease Claims*, Utah Admin. Code r. 602 (2008). Although some pleadings are required under the rules (*Application for Hearing*, Utah Admin. Code r. 602-2-1(B) (2008) and *Answer*, Utah Admin. Code r. 602-2-1(C) (2008)), and some discovery allowed (see *Discovery*, Utah Admin. Code r. 602-2-1(F) (2008) (interrogatories, document requests, depositions and medical examinations – although requests for admissions are *not* allowed)), the Workers Compensation procedures do not contemplate full-scale adversarial litigation.

All of this accords with the purposes behind the Workers Compensation Act – a quick, uncomplicated procedure to help injured workers get help. Consistent therewith, and in an apparent attempt to limit the involvement of an attorney, as well as a lengthy litigation process, attorney fees at the time of Wendy Gudmundson’s hearing were capped under Utah Admin. Code r. 602-2-4 (2005) at \$125/hr. up to four hours for consultation; 20% of weekly benefits up to \$24,275; 15% of weekly benefits between \$24,275 and \$48,550, plus 10% of benefits above \$48,550, up to a maximum attorney’s fee of \$12,250. Thus, opportunities for the hiring and examination of medical experts was, and is, at best, limited for an injured, unemployed and often destitute claimant, and the ability to fully cross-examine and challenge testimony is, by definition, severely restricted in a Workers Compensation proceeding.

As pointed out in the fact section above, most workers compensation applicants do not develop a worker's compensation case as they would a personal injury lawsuit, because they are most interested in a quick resolution of their claims, in accordance with the purposes behind the statute. (ROA 1779). Thus, it is extremely rare for an applicant's attorney to take the deposition of a defense doctor. (ROA 1776). Similarly, it is rare for an applicant's attorney to hire their own medical expert, due mainly to the financial limitations inherent in the workers compensation scheme, as outlined above. (ROA 1776). The injured applicant usually has no money to pay for a special expert, and often medical insurance coverage issues limit primary medical treatment. Instead of expending the time, effort and expense of a full expert work-up of a medical witness – who would not, in any case, be allowed to testify (ROA 1777-1778) – an applicant's attorney is often left with trying to “get a report from whoever is available and willing to write a report.” (ROA 1777). Where a complex case exists, such as the instant case, in which a worker has been exposed to toxins in the workplace, counsel for the applicant may not have all of the information or medical work up that they would like. Nonetheless, most clients simply press the attorney to move forward with the worker's compensation matter because of their financial circumstances. Often the worker and the attorney “just have to hope for the best when the case gets before a medical panel.” (ROA 1779).

- iv. *The workers compensation scheme does not anticipate nor provide a “full and fair” lawsuit resulting in a “final judgment on the merits” that precludes a subsequent third-party suit.*

As pointed out above, neither the statutes, the administrative rules nor the case law anticipates or provides that a Workers Compensation proceeding constitutes a *complete, full and fair litigation*, resulting in a *final judgment on the merits* that would preclude a subsequent third-party suit. (Two of the elements for collateral estoppel; *Buckner*, 2004 UT 78, ¶ 13, 99 P.3d at 847). In fact, the cases setting forth the requirements for collateral estoppel require that the “first action” whose decision is to be applied in the second case should be a “*suit*” that “resulted in a final judgment on the merits.” *Id.*; see also *Snyder*, 2003 UT 13 at ¶¶ 34-35, 73 P.3d 325, 332 (“the claim that is alleged to be barred must have been presented in the *first suit* or be one that could and should have been raised in the first action ... the *first suit* must have resulted in a final judgment on the merits,” quoting *Miller v. USAA Cas. Ins. Co.*, 2002 UT 6, 44 P.3d 663 (2002) and *Macris & Assoc. v. Neways*, 2000 UT 93, 16 P.3d 1214 (2000)).

Such a requirement is not fulfilled in a workers compensation case. To the contrary, the sole purpose of Workers Compensation *administrative proceeding* (not lawsuit) is to determine whether a worker qualifies for benefits – nothing more. *Mollerup Van Lines*, 398 P.2d 882. The only “issue” before a Workers Compensation board is a worker’s qualification for benefits under the unique and preemptive Workers Compensation scheme. There is no “suit”; there is only an application for a hearing. There is no “trial,” in which the applicant is allowed to cross-examine adverse medical witnesses; there is only an administrative review of a cold medical report. There is no right to a jury of one’s peers; there is only an administrative law judge. There is no opportunity for full exploration of all issues pertinent to an applicant’s claims of injury;

there is only an abbreviated “hearing” that is limited to two hours – most of which is taken up by the applicant’s testimony, and in which neither the Utah Rules of Civil Procedure nor the Utah Rules of Evidence apply (as they would in a lawsuit). Finally, there is no “judgment”; there is only an administrative determination as to whether benefits will be granted.

- v. *The Utah Workers Compensation Act expressly permits a separate action against a third party – not a bar against such an action.*

The fact that workers compensation is the exclusive remedy an injured worker has against an employer does not mean that it is that an injured worker’s exclusive remedy against anyone. To the contrary, the Workers Compensation Act, Utah Code Ann. § 34A-2-106, provides that an injured employee may sue a third party “[w]hen any injury or death for which compensation is payable under this chapter ... is caused by the wrongful act or neglect of a person other than an employer, officer agent or employee of the employer”

In this regard, the Utah Supreme Court has repeatedly recognized that because the purposes behind the Workers Compensation Act are different from those in a civil action, determinations in Workers Compensation proceedings are not to be given the *res judicata* effect of a judgment:

The [Workers Compensation] Act is a humanitarian and economical system designed to provide relief to the victims of industrial accidents:

“The Workers Compensation Act is a comprehensive statutory scheme that provides remedies for injuries to workers occurring in the course of their employment, irrespective of fault, in lieu of common law tort actions. The Act provides temporary total disability benefits, § 35-1-65; temporary partial disability benefits, § 35-1-65.1; permanent partial and permanent

total disability benefits, § 35-1-81; and medical expenses for injured employees, § 35-1-81, as well as certain other benefits. These remedies, whether viewed individually or together, are not analogous to an ordinary lump-sum judgment that the common law provides for personal injury actions. *Not only may benefits be paid over a period of time rather than in a lump-sum judgment, but an award of benefits does not generally have the res judicata effect of a judgment.*"

Stoker v. Workers Comp. Fund & Indus. Comm'n, 889 P.2d 409, 411 (Utah 1994). "To give effect to that purpose, the Act should be liberally construed and applied to provide coverage. 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); *see also Olsen v. McIntyre*, 956 P.2d 257, 260 (Utah 1998) ("This court construes workers compensation statutes liberally in favor of finding employee coverage.").

Burgess v. Siaperas Sand & Gravel, 965 P.2d 583, 585 (Utah 1998) (emphasis added).

See also Stoker v. Workers Comp. Fund & Indus. Comm'n, 889 P.2d 409, 411 (Utah 1994).

Under the district court's erroneous reading of the law in this case, however, the findings of the Utah Labor Commission denying Wendy Gudmundson's Workers Compensation application are forever etched in stone as against everyone – including third parties – and have preclusive collateral estoppel effect against her as well as her husband, (who was not a party to the Workers Compensation proceeding). This conclusion not only flies in the face of the clear statutory and administrative mandates set forth above but, in practice, defeats the entire purpose behind the Workers Compensation statutory scheme.

- vi. *By forcing an injured worker to make an election of remedies of either workers compensation or third-party litigation, the district court's erroneous reading of the law defeats the purposes behind the Utah Workers Compensation Act.*

Under the district court's erroneous interpretation of the law, in every case in which a potential claim against a non-employer third party exists, the injured worker would be forced to make an exclusive election as to which remedy to pursue – either a claim against the employer under the Workers Compensation statutes (in which the worker could secure immediate compensation for medical bills and lost wages) *or* a lengthier, although possibly more remunerative third-party civil action against the non-employer. From a practical standpoint, the employee could not elect both remedies, since by undertaking the Workers Compensation claim, the worker would risk a final, adverse decision that would forever preclude the third-party lawsuit. No longer could the purposes of the Workers Compensation statutes be fulfilled – to quickly and efficiently make a determination of a worker's eligibility for workers compensation benefits under a limited, abbreviated and *sui generis* claim process. Instead, in the event that a worker decided to pursue a claim in the Workers Compensation system, it would, by necessity, be full-scale, scorched-earth combat. The worker simply could not afford to lose the claim. The stakes would be too high.

Under these circumstances, even if the employee were to win in a Workers Compensation proceeding, the worker would only have won the ability to shield his claim from dismissal in a subsequent third-party lawsuit. The worker would not have won the ability to use his Workers Compensation win as a sword in that subsequent third-party action. This would essentially give the non-employer third-party two chances to avoid risk; first, if the worker loses before the Workers Compensation board, and second, if the

worker wins in Workers Compensation and is defended against in the subsequent suit against the third party.

The only way for the injured worker to avoid the result described above would be to either 1) litigate the third-party claim first and wait until it has been ultimately decided before bringing the Workers Compensation action – if the statute of limitations hasn’t run by that time – or 2) simply skip the Workers Compensation process altogether. Neither one of these options is optimal for the injured worker (who needs medical bills and wage compensation paid immediately), and both would undermine the entire purpose behind the Workers Compensation scheme – to provide “a humanitarian and economical system designed to provide relief to the victims of industrial accidents,” *Burgess*, 965 P.2d at 858 to “provide remedies for injuries to workers occurring in the course of their employment, irrespective of fault, in lieu of common law tort actions,” *Stoker*, 889 P.2d at 411, and to afford injured workers a quick, economical and convenient forum for the redress of industrial injuries. *Wilstead*, 407 P.2d at 693. Instead, application of the district court’s decision to workers compensation cases leads to exactly the type of combative and adversarial process that the Workers Compensation statutes were designed to avoid.

POINT 1B. Because the district court’s decision violates the Open Courts provision of the Utah Constitution, it must be rejected.

Article I, Section 11, clause 19 of the Utah Constitution – the “open courts” provision – provides:

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law. which shall be administered without denial or unnecessary delay; and no person shall be barred

from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

According to the early Utah Supreme Court case of *Brown v. Wightman*, 47 Utah 31, 151 P. 366 (Utah 1915), that provision was specifically intended to place “a limitation upon the Legislature to prevent that branch of the 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.” *Id.* at 366-367. Subsequent Utah Supreme Court cases have indicated that the clause provides both procedural and substantive guarantees. As to procedural guarantees, the courts have determined that the clause provides “access to the courts and a judicial procedure that is based on fairness and equality.” *Berry v. Beech Aircraft*, 717 P.2d 670, 675 (Utah 1985). The substantive guarantee is that “an individual cannot be arbitrarily deprived of effective remedies designed to protect basic individual rights.” *Id.*

While most cases addressing the “open courts” provision deal specifically with the question of whether the Utah legislature’s passage of any particular piece of legislation deprives Utah residents of their procedural and substantive rights to redress to the courts, a review of those cases reveals that the policy undergirding the “open courts” jurisprudence in Utah is, in essence, this: if a citizen’s remedy to the courts is taken away or diminished, there must either be an evil that is being remedied in a reasonable way, or there must be a reasonable alternative. See Glen E. Roper, *An Open Question in Utah’s Open Courts Jurisprudence: The Utah Wrongful Life Act and Wood v. University of Utah*

Medical Center, 2004 BYU L. Rev. 893, 898 (Comprehensive review of Utah “open courts” decisions).

As discussed at length above, under the district court’s interpretation of the Utah Workers Compensation Act, a claimant is precluded from her day in court in a separate third-party action – an action anticipated and recognized in the Utah Worker’s Compensation Act in Utah Code Ann. § 34A-2-106 – if she loses her workers compensation claim. The Act would thus have the effect of requiring that any injured worker make an exclusive election of remedies – to either avail herself of the exclusive remedies of the Workers Compensation Act against the employer, Utah Code Ann. § 34A-2-105, *or* the civil litigation remedies against the non-employer third party, Utah Code Ann. § 34A-2-106, but not both. This equates to a deprivation of the worker’s right to access to the courts for redress of her injuries, without any compelling reason therefore and without any reasonable alternative. The injured worker is thereby “barred from prosecuting ... before any tribunal in this State, by himself or counsel, [a] civil cause to which [s]he is a party.” Utah Const. art. I, § 11, clause 19. She cannot receive full compensation for her injuries as against all of the parties liable for those injuries, despite the clear intention of the Workers Compensation Act that she be allowed to do so. For all intents and purposes, either the courthouse doors or the administrative tribunal’s doors are closed to her. She can’t walk through both. Her right to access to the courts is thus denied.

The district court’s reading of the statute should be rejected out of hand, in that it flies in the face of the plain and unambiguous language of the Workers Compensation

Act. *See State v. Ostler*, 2001 UT 78, ¶ 7, 31 P.3d 528, 529 (2001) (When construing statutory language, the court need look no further than the plain language of the statute unless there exists some ambiguity). Even if there existed ambiguity in the statute, (which there is not), the court must read that language in such a way that it renders the statute neither superfluous nor inoperative (*State v. Wallace*, 2006 UT 86, ¶ 9, 150 P.3d 540, 542 (2006); *State v. Tooele County*, 2002 UT 8, ¶ 10, 44 P.3d 680, 685 (2002); *Hall v. State Dept. of Corrections*, 2001 UT 34, ¶ 15, 24 P.3d 958, 963 (2001)), nor unreasonable nor impractical. *Currier v. Holden*, 862 P.2d 1357 (Utah Ct. App. 1990) (rejecting unreasonable application of statute of limitations for filing *habeas corpus* petition under Open Courts provision of the Utah constitution); *Tanner v. Phoenix Insurance Co.*, 799 P.2d 231 (Utah Ct. App. 1990).

In the instant case, the district court has unreasonably read the Workers Compensation Act in such a way as to render Utah Code Ann. § 34A-2-106 superfluous and inoperative once a workers compensation determination has been made with regard to causation of injury – a reading that flies in the face of the Utah Constitution’s Open Courts provision and common sense. Here, Wendy Gudmundson, the injured worker, has been denied her access to the civil courts by the Utah Workers Compensation Act, as defined and adjudged by the district court. For that reason, it is clear that the district court’s judgment was wrong and should be overturned.

POINT 1C. Application of collateral estoppel to the facts of this case is manifestly unjust.

As pointed out above, the Utah Supreme Court has specifically held that “[a]pplication of the doctrine of collateral estoppel may be unwarranted in circumstances where its purposes would not be served” and that “collateral estoppel can yield an unjust outcome if applied without reasonable consideration and due care.” *Buckner*, 2004 UT 78, ¶¶ 14-15, 99 P.3d at 846-847. Where an injustice may occur through the application of the principle, it should be rejected. “In particular, allowing a party who took no part in the first suit to take advantage of the findings therein and use them offensively in subsequent litigation can result in adverse, unjust, and unforeseen consequences for the party against whom collateral estoppel has been asserted. Courts, then, must carefully consider whether granting preclusive effect to a prior decision is appropriate. Collateral estoppel ‘is not an inflexible, universally applicable principle. ... [P]olicy considerations may limit its use where the ... underpinnings of the doctrine are outweighed by other factors.’” *Id.* (citations omitted).

In the instant case, application of the principle of collateral estoppel results in a manifest injustice. Wendy Gudmundson will be permanently barred from her day in court because of the draconian imposition on her unrelated third-party lawsuit of an administrative decision, to which none of the defendant/appellees, (nor, for that matter, plaintiff Kay Gudmundson), was a party. Her chance to be heard in a fair and impartial judicial forum will be crushed. Her ability to fully develop her case, with adequate time, resources and care devoted to the prosecution of her claim will be foreclosed forever. As a matter of simple fairness and justice, then, the district court’s misapplication of the doctrines of *res judicata* and collateral estoppel must be rejected.

POINT II.

THE DISTRICT COURT ERRED IN DETERMINING THAT BECAUSE “PLAINTIFFS HAVE FAILED TO PRODUCE EVIDENCE THAT DEL OZONE’S GENERATOR WAS DEFECTIVE,” DEL OZONE WAS ENTITLED TO SUMMARY JUDGMENT.

In its order of March 24, 2008, the district court found that “Plaintiffs have failed to produce evidence that Del Ozone’s ozone generator was defective.” In this regard, the district court also denied Plaintiffs’ request for additional discovery under Utah R. Civ. P. 56(f), stating that they had failed to establish that they had been unable to submit evidence. The district court erred with regard to both findings. Each will be discussed in turn below.

POINT 2A. The district court erred in denying Plaintiffs’ Utah R. Civ. P. 56(f) motion for additional time to adduce evidence in opposition to Del Ozone’s motion for summary judgment.

Rule 56(f) of the Utah Rules of Civil Procedure provides that:

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

In applying Rule 56(f), the Utah courts have stated “Rule 56(f) motions opposing a summary judgment motion on the ground that discovery has not been completed should be granted liberally unless they are deemed dilatory or lacking in merit.” *Energy Management Services LLC v. Shaw*, 2005 UT App 90, ¶10, 110 P.3d 158, 160 (2005) (citing *Salt Lake County v. Western Dairymen Coop., Inc.*, 2002 UT 39, ¶ 24, 48 P.3d 910):

[W]hen a party timely presents an affidavit under rule 56(f) stating reasons why it is unable to proffer an evidentiary affidavit in opposition to its opponent's motion for summary judgment, the trial court's discretion is invoked. Unless the court finds the affidavit "dilatory or lacking in merit, the motion should be liberally treated."

United Park City Mines Co. v. Greater Park City Co., 870 P.2d 880, 893 (citing *Cox v. Winters*, 678 P.2d 311, 312-13 (Utah 1984) (additional citation omitted).

Further, "Rule 56(f) motions should be granted liberally and that inasmuch as an adequate opportunity for discovery ha[s] not been provided, the motion for summary judgment should be adjourned pending the completion of such discovery." *Cox*, 678 P.2d at 315; see also *Downtown Athletic Club v. Horman*, 740 P.2d 275, 278 (Utah Ct. App. 1987).

A rule 56(f) motion has merit when it targets core issues that might defeat the pending summary judgment motion. *Energy Management Services LLC*, 2005 UT App. 90, ¶ 11, 110 P.3d at 161(citing *Western Dairymen Coop., Inc.*, 2002 UT 39, ¶ 24, 48 P.3d 910).

In this case, all of the relevant factors militated in favor of allowing additional discovery under Rule 56(f).

The reasons stated in the opposition to Del Ozone's motion for summary judgment, referenced and adopted in the affidavit of Plaintiffs' counsel, were certainly adequate under Rule 56(f). New counsel entered appearances on August 28, 2007. Fact discovery then concluded on September 5, 2007 – *eight days later*. Plaintiffs' new counsel, in a short time, had uncovered new and provable theories as to Wendy's

injuries and requested that the district court exercise its discretion and grant time to flesh those theories out. The information sought by Plaintiffs' counsel, set forth in the Opposition, was specific and would have defeated summary judgment in Del Ozone's favor. As pointed out above in the factual summary hereto, Plaintiffs sought further discovery on, *inter alia*, 1) the interpretation of Mrs. Gudmundson's MRIs, taken in December, 2004, June, 2006 and again in August, 2006; 2) information on the neurotoxicity or carcinogenic effects of an ozone water disinfectant system; 3) information on water being pulled from a geo-thermal well below the Utah State Prison which had not been metered or quantified, as required by an EPA water permit (ROA 387); and 4) further information from Del Ozone relating to Del Ozone's denial of whether any of its "instruments that are similar to the Device in question [the ozone generator at the Utah State Prison] have ever been known to cause a health problem as a result of the use or improper use of said similar device," in response to interrogatories from Plaintiffs. (ROA 388). Plaintiffs also pointed out that they needed to take the depositions of various Del Ozone personnel, including Rick Salter, Jim White and Joel Peterson, or compel documents to supplement Del Ozone's inadequate and deficient answers to interrogatories and document requests. (ROA 392-393).

Furthermore, it was clear that Plaintiffs' counsels' request for additional discovery was no "fishing expedition." In a teleconference held on October 10, 2007, every party to this lawsuit, but one, agreed that additional time was necessary to conduct both fact and expert discovery. (*See* ROA 534).

This case thus closely resembles the situation found in *Strand v. Associated Students of Univ. of Utah*, 561 P.2d 191 (Utah 1977), in which the Supreme Court of Utah, quoting the United States Court of Appeals for the Third Circuit, stated:

The case must, therefore, go back for further proceedings as to this cause of action in order to afford the plaintiffs an opportunity to produce evidence of the facts necessary to support the relief for which they ask. It is obvious that this evidence must come largely from the defendants. This case illustrates the danger of founding a judgment in favor of one party upon his own version of facts within his sole knowledge as set forth in affidavits prepared *ex parte*. Cross-examination of the party and a reasonable examination of his records by the other party frequently bring forth further facts which place a very different light upon the picture. The plaintiffs should, therefore, be given a reasonable opportunity, under proper safeguards, to take the depositions and have the discovery which they seek....

Id. at 193.

It is thus clear that the district court abused its discretion in denying Plaintiffs' Rule 56(f) motion. This is evidenced by two points. First, the district court was dead wrong in its conclusion that Plaintiff had had "two and a half years" to "uncover any available evidence to support their claims." (ROA 1812). In actuality, less than two years had elapsed between the time the complaint had been filed and the date that Del Ozone's motion for summary judgment had been filed. Second, the district court appeared to have discounted and belittled the fact that Plaintiffs claimed that they needed additional time because they had only recently found new counsel willing to go forward on their case – less than two weeks before Del Ozone filed its motion for summary judgment. In a handwritten note – one among many written in the margins of the Plaintiff's opposition to Del Ozone's motion for summary judgment – Judge Lindberg responded to the assertion that "Plaintiffs recently retained new counsel and, therefore, need additional time to perform

fact and expert discovery” by replying, “Too bad – Ct. unlikely to grant a 3rd extension on this case where P’s have been represented by competent counsel throughout case & discovery has proceeded w/o interruption.”

As important as a district court’s scheduling order may be to the orderly progress of a case, such should not trump the importance of allowing a plaintiff, who has only recently had the opportunity to hire new counsel, to find and produce sufficient evidence to defeat a summary judgment against her. Under these circumstances, it was an abuse of discretion for the district court to preclude Wendy and Kay Gudmundson from adducing all evidence necessary to defeat Del Ozone’s summary judgment motion based its assertion that it had “no duty” to them.

POINT 2B. The district court erred in determining that Plaintiffs had failed to introduce evidence that Del Ozone’s ozone generator was defective.

In its motion for summary judgment, Del Ozone argued that there was no basis upon which any duty could be imposed on Del Ozone and further, that the ozone generator was not defective. (ROA 231-234).

At oral argument on the motion, the district court rejected Del Ozone’s argument that “the connection between its role as a manufacturer of the ozone system is so attenuated to the injury of the worker in this case, Ms. Gudmundson, that it was unforeseeable.” The court did, however, agree with Del Ozone that “the plaintiff presented no evidence that the ozone generator was defective.” (ROA 1889:6). This finding was formalized in the district court’s order of March 24, 2008, which stated,

“Plaintiffs have failed to produce evidence that Del Ozone’s ozone generator was defective.” The district court was wrong in this finding, and should be overturned.

Although it was crucial that Plaintiff be allowed further discovery under Utah R. Civ. P. 56(f) in order to adduce evidence to dispute Del Ozone’s summary judgment motion, (see above), Plaintiff did provide evidence that the ozone disinfection laundry system, designed in corroboration with Del Ozone (the manufacturer of key components), was unreasonably dangerous due to a defective condition. The ozone generator did not include an ambient air monitor, for example, nor did it have an automatic shut off valve that would automatically engage if pollutant levels exceeded EPA or OSHA limits. (ROA 559:70). (In fact, uncontroverted evidence adduced by Plaintiffs show that tests demonstrated that pollutant levels ultimately did exceed EPA and OSHA levels even after ventilation was installed – ROA 590; ROA 592-593; ROA 595-599). Plaintiff further produced evidence that Del Ozone was informed through the purchase order that the ozone generator and other key Del Ozone components was to be shipped to “Utah D[e]partment O[f] C[orrections], Draper Prison, 14425 Bitter Brush Lane, Draper, Utah 84020.” (ROA 601).

Given this, it is clear that the trier of fact could certainly determine that Del Ozone sold defective components into the stream of commerce, and that Del Ozone was aware of the installation of these defective products at the Utah State Prison. Construing these facts in the light most favorable to Mrs. Gudmundson, the district court should have denied Del Ozone’s motion for summary judgment on this ground and allowed the case to be tried on the merits.

In this connection, it should be noted that Mrs. Gudmundson was also entitled to a construction of the evidence that would allow her to overcome by a preponderance of the evidence the presumption of nondefectiveness in Utah Code section 78-15-6(3). *See Egbert v. Nissan N. Am., Inc.*, 2007 UT 64, ¶ 14, 167 P.3d 1058, 1062 (Utah 2007). In light of the facts adduced by Plaintiffs, it cannot be reasonably asserted that there exist no circumstances under which Mrs. Gudmundson could prevail. The summary judgment was thus erroneously granted against her. *Bridge v. Backman*, 353 P.2d 909 (Utah 1960).

POINT III.

THIS APPEAL IS TIMELY.

By order dated September 22, 2008, this Court has invited the parties to address the issue of the timeliness of the appeal, and the jurisdictional issues implicated in a “motion to clarify” filed by Del Ozone and joined by Johnson Controls. For the reasons set forth below, it is clear that the appeal in this case was timely as to all claims and all parties.

The June 4, 2008 (Second) Notice of Appeal from the district court’s final judgment issued May 28, 2008 was timely as to all parties and issues in this case.

Utah R. App. P. 4(a), which sets forth the 30-day appeal period for an appeal as of right, goes to appeals “from final judgment and order.” The docketing statement for an appeal involving multiple parties, as is this case, requires that a statement contain a statement that “the judgment has been certified as a final judgment by the trial court pursuant to Utah R. Civ. P. 54(b), Utah Rules of Civil Procedure.” Rule 54(b) provides

that a district court may only direct the entry of a final judgment as to one or more but fewer than all of the claims or parties “upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment.” Where this is not done, the rule provides that the action is not terminated “as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.”

Here, there was no express determination in the order of March 24, 2008 (ROA 1813; Appendix A hereto), prepared by counsel for Del Ozone, that there was “no just reason for delay,” nor “an express direction for the entry of judgment.” Neither was there any language indicating that the order constituted a final judgment. Accordingly, the First Notice of Appeal (ROA 1815) – Appellate Case No. 20080320 – was premature, and was properly dismissed as such. Here, the “final judgment” was not entered by the district court until May 28, 2008, in which the district court specifically incorporated its analysis pertinent to its earlier (non-final) order of March 24, 2008 (ROA 1813), and stated that that Ruling and Order “shall constitute the *final Order of the Court on this matter*” and that “no further Order need be submitted by the parties.” (ROA 1845-1846; Appendix B hereto)(emphasis added). Importantly, the district court indicated in the May 28, 2008 order that it had considered – and rejected – amendment or entry of an order contrary to its previous order, stating “Nevertheless [despite Plaintiffs’ ‘more complete analysis’ in new argument] the Court is not persuaded to amend its decision or to enter an order contrary to its previous order and judgment.” This is clearly indicative that the

court did not consider the previous order a final and appealable order, but instead “subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.” Utah R. Civ. P. 54(b). (ROA 1845). Thus, the appeal from the May 28, 2008 order, filed seven days later – the Second Notice of Appeal – went to the final judgment of the court, including all aspects of the case and all parties thereto. (ROA 1848). It was timely, and included all defendant/appellees. The Third Notice of Appeal – the “abundance of caution” filing – was thus unnecessary, but nonetheless preserved all rights of the Plaintiffs/Appellants in the case. It was properly accepted by the Supreme Court as an amended notice of appeal.

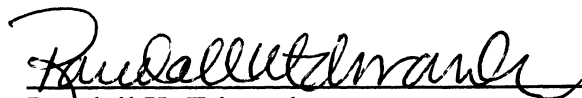
In any case, the appeal is timely, and goes to all issues and all parties in the underlying proceeding; Del Ozone, Johnson Controls, Inc. and OzoneSolutions, L.C.

CONCLUSION

For the reasons set forth above, Plaintiffs/Appellants request that this Court overturn the district court’s order of summary judgment and remand this case for a trial on the merits.

DATED this 14th day of October, 2008.

**RANDALL K. EDWARDS, PLLC
LUNDELL & LOFGREN, P.C.**


Randall K. Edwards
Rick S. Lundell
Attorneys for Plaintiffs

ADDENDUM

- A. Ruling and Order Granting Defendant OzoneSolutions' Motion for Summary Judgment, dated May 28, 2008 (ROA 1845)
- B. Order Granting Summary Judgment as to Del Ozone and Johnson Controls, dated March 24, 2008 (ROA 1811-1814)

FILED DISTRICT COURT
Third Judicial District

MAR 24 2008

SALT LAKE COUNTY

By Deputy Clerk

Joseph E. Minnock (Bar No. 6281)
Sara Becker (Bar No. 10277)
Morgan, Minnock, Rice & James, L.C.
Kearns Building, Suite 800
136 South Main
Salt Lake City, UT 84101

Attorneys for Defendant, Johnson Controls, Inc.

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

WENDY GUDMUNDSON, and KAY
GUDMUNDSON,

Plaintiffs,

vs.

DEL OZONE, OZONESOLUTIONS, L.C.,
JOHNSON CONTROLS, INC., et. al.,

Defendants.

**ORDER GRANTING SUMMARY
JUDGMENT**

Case No. 050916518

Judge Denise Lindberg

The following motions, being duly noticed, were presented for oral argument on March 3, 2008, at 2:30 p.m.: (1) Plaintiffs' motion for additional time pursuant to Utah R. Civ. P. 56(f), (2) Del Ozone's motion for summary judgment, and (3) Johnson Controls' motion for summary judgment. Having heard oral argument and reviewed all memoranda and supporting papers pertaining to these motions, including plaintiffs' supplemental memorandum in opposition to summary judgment, and having independently reviewed the relevant case law and statutes, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1811

1. Plaintiffs have failed to establish that they have been unable to submit evidence to oppose summary judgment pursuant to Utah R. Civ. P. 56(f). This case was filed on September 20, 2005 and the Court has granted multiple extensions to allow for further discovery. On October 10, 2006, the Court granted a Stipulation and Proposed order for Amended Case Management Order. On June 6, 2007, the Court granted a Second Amended Case Management Order and on February 1, 2008, the plaintiffs moved to modify the Second Amended Case Management Order. Plaintiffs have had two-and-a-half years to obtain the necessary evidence to oppose summary judgment, which the Court finds to have been more than adequate to uncover any available evidence to support their claims. The Court further finds that plaintiffs have failed to identify the specific facts that are within the defendants' exclusive knowledge, the steps that they have taken to obtain that information, and how that information would help them respond to defendants' motions for summary judgment. For these reasons, plaintiffs' motion for additional time under Utah R. Civ. P. 56(f) is hereby DENIED;

2. Plaintiffs have failed to produce evidence that Del Ozone's ozone generator was defective. Therefore, Del Ozone's motion for summary judgment on this ground is hereby GRANTED;

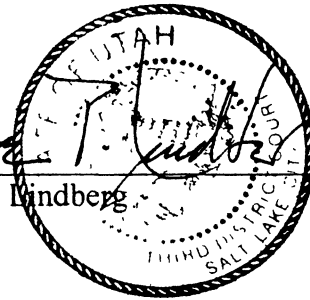
3. Plaintiffs are precluded from pursuing their claim for injuries caused by exposure to ozone or related byproducts by the doctrine of issue preclusion. Plaintiff had a complete, full and fair hearing before the Utah Labor Commission. Plaintiff was provided notice of the hearing, allowed to present her arguments, represented by counsel, allowed to conduct discovery, and allowed to have her case evaluated by a medical panel. The Utah Labor Commission's

Order dated October 2, 2006 found that plaintiff's symptoms were not the result of exposure to ozone, but rather caused by her Chiari 1 malformation, the identical issue of causation upon which plaintiffs' present claims hinge. For these reasons, the elements of issue preclusion have been satisfied and Del Ozone's and Johnson Controls' motions for summary judgment on this ground are hereby GRANTED.

IT IS SO ORDERED.

DATED this 24 day of March, 2008.

Hon. Denise Lindberg



CERTIFICATE OF MAILING

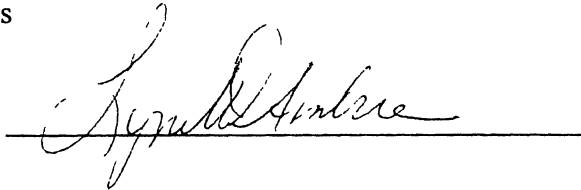
I hereby certify that on the 19th day of March, 2008, I caused a true and correct copy of
ORDER GRANTING SUMMARY JUDGMENT, to be mailed, first class, postage prepaid to
the following:

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Attorneys for Ozone Solutions

A handwritten signature in cursive script, appearing to read "Lynette D. Ambrose", is written over a horizontal line.

MAY 28 2008

SALT LAKE COUNTY

Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
SALT LAKE DEPARTMENT

WENDY GUDMUNDSON, and KAY
GUDMUNDSON

Plaintiffs,

v.

DEL OZONE, OZONESOLUTIONS, L.C.,
JOHNSON CONTROLS, INC., et. al,

Defendants.

RULING AND ORDER GRANTING
DEFENDANT OZONESOLUTIONS'
MOTION FOR SUMMARY JUDGMENT

Case No. 050916518

Judge Denise Posse Lindberg

Date: May 28, 2008

¶1 This matter is before the Court on Defendant Ozonesolutions, L.C.'s Motion for Summary Judgment. After considering the parties' submissions the Court GRANTS Defendant's Motion.

¶2 In a prior summary judgment motion brought by Defendant Del Ozone, the Court ruled that "Plaintiffs are precluded from pursuing their claims for injuries caused by exposure to ozone or related byproducts by the doctrine of issue preclusion. Plaintiff had a complete, full and fair hearing before Utah Labor Commission. . . ." See Order Granting Summary Judgment, dated March 24, 2008. Based on its prior analysis the Court concludes it must similarly grant Ozonesolutions' present motion.

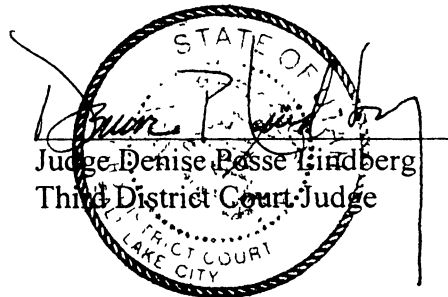
¶3 To be sure, Plaintiffs have now presented a more complete analysis in opposition to Defendant's argument that Plaintiffs' claims are precluded by *res judicata*. Nevertheless, the Court is not persuaded to amend its decision or to enter an order contrary to its previous order and judgment. Plaintiff has cited cases in which the appellate court determined that *res judicata* did not apply because of the nature of the proceedings and the continuing jurisdiction of the Commission to revise its decisions. See, e.g., *Mollerup Van Lines v. Adams*, 398 P.2d 882 (Utah 1965). Be that as it may, Plaintiffs have not provided evidence that Ms. Gudmundson challenged the Commission's Order, or that she has asked the Commission to exercise its continuing jurisdiction to amend its previous Order. Additionally, they have not demonstrated that Ms. Gudmundson would be entitled to an amended order from the Commission.¹ See *Burgess v Siaperas Sand & Gravel*, 965 P.2d 583, 587 (Utah App. 1998) (finding that the Commission must have a basis to reopen a claim and exercise its continuing jurisdiction provided by "evidence of some significant change or new development

¹Ms. Gudmundson apparently now has physician testimony to challenge the Commission's determination that her medical issues were not caused by ozone exposure. However, there is no claim that she has taken the matter back to the Commission.

in the claimant's injury or proof of the previous award's inadequacy." (citations and quotations omitted)). This, coupled with the fact that the Court has already determined that the Commission's procedures were sufficiently trial-like to say that the issue in the first action was "completely, fully, and fairly litigated" (see *Brigham Young Univ. v. Tremco Consultants, Inc.*, 2005 UT 19, ¶27, 110 P.3d 687), persuades the Court that this Defendant, much like Del Ozone, is entitled to summary judgment on *res judicata* grounds. The Court hereby incorporates by reference its prior analysis as reflected in the Del Ozone summary judgment.

This Ruling and Order shall constitute the final Order of the Court on this matter. No further Order need be submitted by the parties.

DATED this 28 day of May, 2008.



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 050916518 by the method and on the date specified.

METHOD	NAME
Mail	RANDALL K EDWARDS Attorney PLA 136 SOUTH MAIN STREET STE 700 SALT LAKE CITY, UT 84101-1020
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Mail	JOSEPH E MINNOCK Attorney DEF 136 S MAIN ST KEARNS BLDG 8TH FLR SALT LAKE CITY UT 84111
Mail	RICK LUNDELL Attorney 136 S Main Street Suite A-200 Salt Lake City UT 84101

Dated this 28 day of may, 2008.

WJB
Deputy Court Clerk

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of October, 2008, I personally served a true and correct copy of the within and foregoing to the following counsel of record:

Attorneys for Del Ozone:

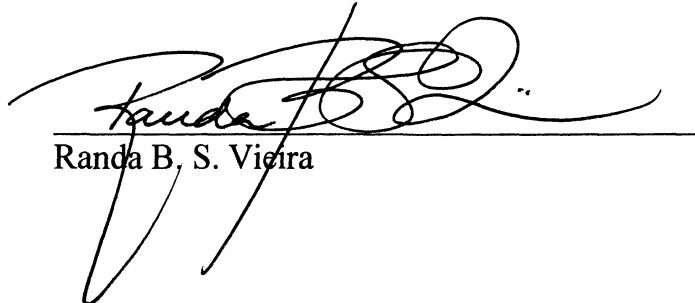
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