

ORIGINAL

IN THE SUPREME COURT OF OHIO

EDIN AGIC,

Plaintiff—Appellant,

v.

NATL. UNION FIRE INS. CO. OF  
PITTSBURGH, et al.,

Defendants—Appellees.

Case No.

14-1924

On Appeal from the Cuyahoga  
County Court of Appeals  
Eighth Appellate District

C.A. Case No. CA-13-100679

MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT EDIN AGIC

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**EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

Collateral Estoppel is the preclusion of litigation of a second action of an issue or issues that have been actually and necessarily litigated and determined in a prior action. *Goodson v. McDonough Power Equip., Inc.* (1983), 2 Ohio St.3d 193, 193. The salient facts or issues must be *identical* to those previously litigated, determined, and conclusively settled by judgment by a court of competent jurisdiction between the same parties and those in privity with the parties. *Id.* Mutuality of the issues and the parties is so important because it invokes due process rights and the right to a trial by jury.

In the trial between Plaintiff-Appellant and another not a party to this case, the sole issue that was litigated was the liability of the Defendant – one Timothy Coy. The jury was provided a special verdict form that asked whether the defendant Timothy Coy’s negligence proximately caused Plaintiff-Appellant’s injuries. The Appellate Court and the Trial Court held that in answering no, the jury not only found that the defendant in that case was not the proximate cause of Plaintiff-Appellant’s injuries, but further interpreted the form to decide that the *accident* was not the cause of Plaintiff-Appellant’s injuries in the instant case against the Defendant-Appellees. They found this despite the fact that none of the Defendant-Appellees were a part of the previous litigation, and Plaintiff-Appellant’s injuries were not disputed in the previous litigation. Because Plaintiff-Appellant had no notice that his injuries were disputed, he had no incentive to fully litigate the issue of whether the accident caused his injuries. The Trial Court and Appellate Court, in holding otherwise, have violated Plaintiff-Appellant’s due process rights, his right to trial by jury, and his right to have a full judicial determination of his claims.

The significance of the precedent that this case sets is far-reaching and highly detrimental to future tort plaintiffs. In this case, the Court of Appeals for the Eighth Appellate District has

abandoned the mutuality of both the parties *and* the issues. The Appellate Court, and the Trial Court before it, have interpreted Collateral Estoppel to apply to *any* issue arising out of the same set of operative facts, even those not fully litigated at trial. This is a grossly unfair holding that caught Plaintiff-Appellant by surprise.

Plaintiffs and defendants must be provided the opportunity to litigate matters in court fully and to have those matters be heard and judicially determined. To allow nonmutuality of the issues violates a party's due process rights and right to a trial by a jury of his peers. Preventing a party from litigating a nonmutual issue violates due process because the party cannot predict in a prior case that said issue would be used in a subsequent Collateral Estoppel action, and therefore the party has no incentive to litigate the issue fully in the prior case. In common practice, when preparing for trial, parties to a trial, with the court's guidance, try to narrow the scope of the issues and focus only on those issues in dispute. If the new standard for Collateral Estoppel is to bar any future action arising out of the same set of facts, neither plaintiff nor defendant will agree to narrow the scope of the trial, but instead will insist on trying every possible issue that they can think of to prevent the jaws of Collateral Estoppel from snapping shut on them in the future. Trials that may have previously taken hours may drag on for weeks as plaintiffs insist upon proving each and every element of a particular claim, whether disputed or not, making litigation more costly and more prolonged for all involved.

Mutuality of the parties is equally crucial. A party must be allowed the opportunity to confront the opposing side, issue discovery, and fully determine the opposing party's case or defenses against him. For all of the reasons outlined above, this case is of great general interest to the citizens of the State of Ohio and involves a substantial constitutional question.

## STATEMENT OF THE FACTS AND THE CASE

On January 3, 2008, Plaintiff-Appellant was involved in a motor vehicle accident while operating his tractor trailer in Seattle, Washington. Plaintiff-Appellant was insured under the policy No. TRK 0009102454 (the "Policy") issued by National Union Fire Insurance Company of Pittsburgh (National Union), administered by the third-party administrator Consolidated Benefits Services (CBR). The insurance policy system of Defendants-Appellants is a private self-insured substitute of the Worker's Compensation programs. If an employee is injured during the course of employment, than benefits are to be paid to him for the entirety of his disability incurred from the accident. Though Plaintiff-Appellant was initially approved for and received benefits under this policy, he received a letter dated July 21, 2008 from Defendants-Appellees, through Attorney R. Jay McAtee (McAtee), informing Plaintiff-Appellant that he was no longer entitled to ongoing benefits under the Policy. This letter stated that the decision to terminate Plaintiff-Appellant's insurance benefits was supported by an investigation and an independent medical evaluation (IME) by Dr. Dunne, which found that Plaintiff-Appellant was no longer entitled to receive benefits under the Policy.

In response, Plaintiff-Appellant, through Attorney Kenneth C. Podor (Podor), sent a series of letters to Defendants-Appellees, through McAtee. These letters, which Defendants-Appellees ultimately ignored, requested information about the investigation and IME and also informed Defendants-Appellants of errors in the investigation and IME. On February 6, 2009, Podor sent another letter to McAtee requesting a copy of the Policy and stating that numerous prior requests for a copy of the Policy had gone unfulfilled. This request was also ultimately ignored.

On January 21, 2011, Plaintiff-Appellant filed a personal injury action in the Superior Court of King County, Washington (Case No. 11-2-03851-3SEA) against two drivers involved in the January 3, 2008 accident. Prior to trial, one of the drivers, Timothy Coy, admitted that his negligence was the cause of the accident. The sole issue tried to the jury was whether Timothy Coy's negligence proximately caused Plaintiff-Appellant's injuries. At the conclusion of the trial, held February 13, 2013, the jury was provided with special verdict forms. Question 1 was, "Was Timothy Coy's fault the proximate cause of injury to Edin Agic?" The jury marked "No" as their answer.

On February 11, 2011, Plaintiff-Appellant filed suit against National Union, CBR, and several other defendants for declaratory judgment, breach of contract, bad faith, civil conspiracy, and intentional and/or negligent infliction of emotional distress. On December 23, 2011, Plaintiff-Appellant filed a "Notice of Voluntary Dismissal" for all defendants pursuant to Ohio R. Civ. P. 41(A). On December 28, 2012, Plaintiff-Appellant re-filed his Complaint against National Union and CBR for declaratory judgment, breach of contract, bad faith, and civil conspiracy. The complaint also asserted a cause of action for intentional and/or negligent infliction of emotional distress, which has since been dismissed.

On September 4, 2013, Defendant-Appellee CBR moved for summary judgment on Plaintiff-Appellant's claims, asserting that such claims were barred by Collateral Estoppel. On September 6, 2013, Defendant-Appellee National Union followed suit. On November 5, 2013 the Trial court ruled on Defendants-Appellees' motions for summary judgment, ordering that all defendants were entitled to judgment as a matter of law, and also included a sua sponte ruling. First, the Trial Court granted National Union's motion for partial summary judgment of August 26, 2013 and CBR's motion for partial summary judgment of August 28, 2013, ruling that

Plaintiff-Appellant, “having failed to re-file the case within the confines of the savings statute, Plaintiff’s breach of the duty of good faith and fair dealing claim is defeating by the statute of limitations.” The Court further stated that, “[a]s Plaintiff’s sole tort claim is dismissed, Plaintiff’s claim for conspiracy must also fail.” Second, the Trial Court granted CBR’s September 3, 2013 motion for summary judgment and National Union’s September 6, 2013 motion for summary judgment, finding:

“Plaintiff’s claims for breach of the duty of good faith and fair dealing and breach of contract are collaterally estopped by the previously adjudicated negligence suit. As the jury in the negligence suit found that the Plaintiff *did not suffer injury* as a result of the accident, Plaintiff is estopped from claiming that the Defendants treated him in bad faith or breached their contract by denying disability payments under his employer’s policy for an occupational injury arising out of the same occurrence.” [emphasis added]

Finally, the Trial Court also ruled sua sponte “that although Plaintiff’s claims fail on their merits, this court also finds that there are insufficient minimum contacts for jurisdiction to be proper in Ohio for Defendant Consolidated Benefits Resources.”

Plaintiff-Appellant timely appealed to the Eighth Appellate District Court of Appeals in Cuyahoga County, Ohio, raising four assignments of error for review: 1) The Trial Court committed prejudicial error in granting motions for summary judgment because there are genuine issues of material fact and Defendants-Appellees are not entitled to judgment as a matter of law; 2) The Trial Court committed prejudicial error in determining that Plaintiff-Appellant’s bad faith and conspiracy claims are barred by the statute of limitations; 3) The Trial Court erred in determining that Plaintiff-Appellant’s claims are collaterally estopped by the previously adjudicated negligence suit; and 4) The Trial Court erred in determining that personal jurisdiction was lacking over Defendant-Appellee CBR. The Appellate Court addressed the Third assignment of error only, finding that Collateral Estoppel barred Plaintiff-Appellant’s

claim against Defendant-Appellees. On that basis, the Appellate Court overruled the First and Third assignments of error, and determined that the Second and Fourth assignments of error were moot.

Plaintiff-Appellant now appeals from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District.

### **ARGUMENT IN SUPPORT OF PROPOSITION OF LAW**

#### PROPOSITION OF LAW:

THE APPELLATE COURT ERRED IN DETERMINING THAT PLAINTIFF'S CLAIMS ARE COLLATERALLY ESTOPPED BY A PREVIOUSLY ADJUDICATED NEGLIGENCE SUIT.

Collateral Estoppel (issue preclusion) is one of the two forms of res judicata, the other being estoppel by judgment, or claim preclusion. Collateral Estoppel prevents a party from relitigating issues of fact or law that have been fully litigated in a different cause of action and may be used offensively or defensively. Plaintiffs use Collateral Estoppel offensively to prevent a defendant from relitigating a fact or issue that the defendant previously litigated unsuccessfully in a previous case. Defendants use Collateral Estoppel defensively to prevent a plaintiff from relitigating a fact or issue that the plaintiff has previously litigated unsuccessfully in a prior case. Collateral Estoppel prevents a party from getting a “second bite at the apple,” prevents inconsistent judgments between courts, and promotes judicial economy, but it should never be “permitted to encroach on fundamental and imperative rights.” *Goodson v. McDonough Power Equip., Inc.* (1983), 2 Ohio St.3d 193, 199.

In invoking Collateral Estoppel, the material facts or issues must be the same as those previously litigated, determined, and conclusively settled by judgment by a court of competent

jurisdiction between the same parties and those in privity with the parties. *Id.* Mutuality of the parties and the issues has been consistently required by this court. (See *Woodward v. Moore* (1862), 13 Ohio St. 136, 143; *State ex rel. Atty. Gen. v. Cincinnati Gas-Light & Coke Co.* (1868), 18 Ohio St. 262, 299; *Frank v. Jenkins Bro. & Chipman* (1872), 22 Ohio St. 597, paragraph four of the syllabus; *Burt v. Wilcox Silver Plate Co.* (1884), 41 Ohio St. 204, 205; *Whitehead v. Gen. Tel. Co.* (1969), 20 Ohio St.2d 108; *Werlin Corp. v. Pub. Util. Comm.* (1978), 53 Ohio St. 2d 76, 81; *Trautwein v. Sorgenfrei* (1979), 58 Ohio St. 2d 493; *State ex rel. Westchester v. Bacon* (1980), 61 Ohio St. 2d 42, 44; *Johnson v. Norman* (1981), 66 Ohio St. 2d 186, 190; *Schomaeker v. First Natl. Bank* (1981), 66 Ohio St. 2d 304, 313; *Goodson v. McDonough Power Equip., Inc.* (1983), 2 Ohio St.3d 193, 196; *Thompson v. Wing* (1994), 70 Ohio St.3d 176, 183). *Goodson* recognized one case that slightly relaxed the mutuality requirement, *Hicks v. De La Cruz* (1977), 52 Ohio St. 2d 71, but stated that the decision was narrow in scope to determine the “*status* of the hospital,” which had been “specifically addressed by this court in the prior cause.” *Id.* at 200.

The most-frequently cited authority on the Collateral Estoppel doctrine for the State of Ohio is *Goodson v. McDonough Power Equip., Inc.* (1983), 2 Ohio St.3d 193, which states that Defensive Collateral Estoppel has a strict requirement of mutuality—mutuality of the issue and mutuality of parties. In the instant case, defendant-appellees are attempting to use Collateral Estoppel defensively and preemptively to decide an issue that wasn’t addressed in the prior hearing: whether the accident was the proximate cause of Plaintiff-Appellant’s injuries. Plaintiff-Appellant asserts that the previously adjudicated suit and the present suit do not have sufficient dual mutuality of party and issue as required by Ohio law to fulfill the requirements of Collateral Estoppel.

In regards to mutuality of the parties, “Collateral Estoppel may generally be applied only when the party seeking to use the prior judgment and the party against who the judgment is being asserted were parties to the original judgment and that party against who the judgment is being asserted were parties to the original judgment or in privity with those parties.” *Id.* at 202. In the instant case, there is no mutuality of the parties. The present Defendants-Appellees are an insurance company and its third party administrator, with no relation to the defendant in the State of Washington trial – one Timothy Coy. Nor are Defendants-Appellees in privity with Defendant Timothy Coy. Plaintiff-Appellant has not received “his day in court” against Defendants-Appellees in regards to the issue of his insurance coverage. The only parties bound by the State of Washington’s trial court’s judgment are Plaintiff-Appellant Edin Agic, the defendant Timothy Coy, and the defendant’s insurance company.

Regarding mutuality of issues, “an absolute due process prerequisite to the application of Collateral Estoppel is that the party asserting the preclusion must prove that the identical issue was actually litigated, directly determined, and essential to the judgment in the prior action.” *Goodson, supra*, at 201. There is no mutuality of issues in this case with the State of Washington trial. The issue that was litigated in the State of Washington was the *liability* of a driver involved in the motor vehicle accident for Plaintiff-Appellant’s injuries. The issue in the present case is whether Defendants-Appellants were justified in revoking injured worker's benefit payments to their employee, Edin Agic. Whether any particular individual's fault was the proximate cause of injury is completely separate from the determination of whether the *accident* was the proximate cause of Plaintiff-Appellant’s injuries. The Cuyahoga County Trial Court, and the Appellate Court after it, has conflated the issues and destroyed the mutuality of issue requirement of Ohio Law, in that both determined that the finding of the negligence suit in the

State of Washington estopped Plaintiff from claiming that Defendants treated him in bad faith or breached their contract by denying disability payments under his employer's policy for an occupational injury arising out of the same occurrence. This was an improper application of the doctrine of Collateral Estoppel. The jury in the State of Washington solely determined that the fault of the defendant in that case was not the proximate cause of Edin Agic's injury (the verdict itself lends to the fact that Edin Agic was indeed injured), and not whether Edin Agic was injured, and thus able to receive employee disability benefits. Although both suits did indeed arise out of the same occurrence, the issues are separate and distinct, with different forms of proof required. While an expert opinion is not required to determine the proximate cause of a defendant's negligence in a motor vehicle accident, experts are almost always required to prove that a plaintiff's injuries were proximately caused by a motor vehicle accident. Had Plaintiff-Appellant known that the proximate cause of his injuries was a matter of dispute, he would have vigorously litigated the issue and offered expert testimony to that effect.

There is an exception to the strict requirement of mutuality, otherwise known as "Nonmutual Collateral Estoppel." However, that exception has yet to be adopted in Ohio jurisprudence. The case *Hicks v. De La Cruz* (1977), 52 Ohio St. 2d 71, that is often cited in order to argue that Ohio has abandoned the mutuality rule, but *Goodson* is clear in stating that the mutuality rule remains a requirement under Ohio law. *Goodson, supra*, at 199.

Even if this Honorable Court were to reconsider its (and Ohio's) position on the mutuality rule, and therefore permit use of Nonmutual Collateral Estoppel (as done in some state courts and at the federal level), the traditional standards set out for the application of Nonmutual Collateral Estoppel would not be met in the present case. As stated in *Goodson, supra*, "Although generally permitting Nonmutual Collateral Estoppel, the Restatement of Judgments

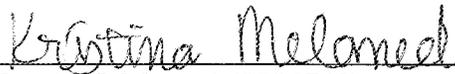
2d, at Section 27, Comment c, sets forth the procedures to be followed upon any consideration of such application. The Restatement states, at page 252, that to inquire into the identity of the issue in each case is one of the most difficult problems posed by issue preclusion. The Restatement proposes an analysis using a variety of factors to aid in making this crucial determination. Factors to be considered are: (1) the existence of substantial overlap between evidence and argument; (2) whether the new evidence or argument involves application of the same rules of law; (3) whether pretrial preparation and discovery reasonably could have been expected to cover the new matters in the prior action; and (4) the closeness of the relationship between the claims involved in the two proceedings.” This list of factors further undermines any attempt at the assertion of Collateral Estoppel in this case via Nonmutual Collateral Estoppel.

For the reasons stated in accordance with pertinent precedent, defensive use of Collateral Estoppel in the State of Ohio must have mutuality amongst parties and issues, neither of which was present in this case. Therefore, the Trial Court's ruling, and the Appellate Court's affirmation, in favor of Defendants-Appellees on the Collateral Estoppel issue was erroneous.

### CONCLUSION

For the above-stated reasons, this Court should accept jurisdiction.

Respectfully Submitted,

  
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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Jurisdiction was forwarded by regular U.S. Mail on this 5th day of November, 2014 to the following:

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**IN THE SUPREME COURT OF OHIO**

<b>EDIN AGIC,</b>	:	Case No.
	:	
Plaintiff—Appellant,	:	On Appeal from the Cuyahoga
	:	County Court of Appeals
v.	:	Eighth Appellate District
	:	
<b>NATL. UNION FIRE INS.CO. OF</b>	:	C.A. Case No. CA-13-100679
<b>PITTSBURGH, et al.,</b>	:	
	:	
Defendants—Appellees.	:	

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**APPENDIX TO**

**MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT EDIN AGIC**

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SEP 25 2014

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 100679

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**EDIN AGIC**

PLAINTIFF-APPELLANT

vs.

**NATIONAL UNION FIRE INSURANCE  
COMPANY OF PITTSBURGH, ET AL.**

DEFENDANTS-APPELLEES

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**JUDGMENT:  
AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-12-798311

**BEFORE:** McCormack, J., Boyle, A.J., and Rocco, J.

**RELEASED AND JOURNALIZED:** September 25, 2014



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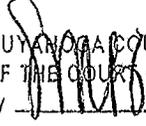
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SEP 25 2014

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TIM McCORMACK, J.:

{¶1} Plaintiff-appellant, Edin Agic, appeals the judgment of the common pleas court granting summary judgment in favor of defendants-appellees, National Union Fire Insurance Company of Pittsburgh (“National Union”) and Consolidated Benefits Resources, L.L.C. (“CBR”). After a careful review of the record and relevant case law, we affirm the trial court’s judgment.

### I. Factual and Procedural History

{¶2} On January 3, 2008, while operating his tractor trailer in the course and scope of his employment, appellant was involved in a motor vehicle accident in Seattle, Washington. Following the accident, appellant made a claim for temporary total disability and medical expense benefits under policy No. TRK 0009102454 (the “Policy”) issued by National Union. CBR served as the third-party administrator with respect to appellant’s claims. Appellant’s claims were initially paid under the Policy, however, in a letter dated July 21, 2008, appellant was informed that he was no longer entitled to ongoing benefits. The letter stated that the decision to terminate his insurance benefits was supported by an investigation and an independent medical evaluation by Dr. John Dunne, which found that “[appellant] no longer suffers from any injuries associated with the motor vehicle accident which would prevent him from his return from gainful employment.”

{¶3} On January 21, 2011, appellant filed a personal injury action in the Superior Court of King County, Washington (Case No. 11-2-03851), against two drivers involved in the January 3, 2008 accident. Prior to trial, one of the drivers, Timothy Coy, admitted that his negligence was the cause of the accident. Thus, the sole issue of whether Coy's negligence was the proximate cause of any injury to appellant was tried to a jury on February 13, 2013. At the conclusion of the trial, the jury found that appellant sustained no injuries as a result of the January 3, 2008 accident and awarded no damages.

{¶4} On February 11, 2011, appellant filed a complaint in Cuyahoga County (Cuyahoga C.P. No. CV-11-774339) asserting causes of action for declaratory judgment, breach of contract, bad faith, civil conspiracy, and intentional and/or negligent infliction of emotional distress. The original lawsuit named 11 defendants, including National Union and CBR. On December 23, 2011, appellant filed a voluntary dismissal pursuant to Civ.R. 41(A). On December 28, 2012, more than one year after the voluntary dismissal, appellant refiled his complaint against National Union and CBR for declaratory judgment, breach of contract, bad faith, civil conspiracy, and intentional and/or negligent infliction of emotional distress. On March 1, 2013, he voluntarily dismissed his claims against National Union and CBR for intentional and negligent infliction of emotional distress. Thus, his remaining claims against defendants were for declaratory judgment, breach of contract, bad faith, and civil conspiracy.

{¶5} On August 26, 2013, National Union moved for partial summary judgment on appellant's claims for bad faith and civil conspiracy, asserting that such claims were "barred as having been filed beyond the statute of limitations." On August 28, 2013, CBR moved for partial summary judgment on the same basis.

{¶6} On September 4, 2013, CBR moved for summary judgment on appellant's claims for breach of contract, bad faith, and civil conspiracy, asserting that such claims were barred by the doctrine of collateral estoppel. On September 6, 2013, National Union moved for summary judgment on the same basis.

{¶7} On November 5, 2013, the trial court entered summary judgment in favor of National Union and CBR on all of appellant's claims. The trial court found that because appellant "failed to refile the case within the confines of the savings statute, [his] breach of the duty of good faith and fair dealing claim is defeated by the statute of limitations." The court further ordered, "[a]s [appellant]'s sole tort claim is dismissed, [his] claim for conspiracy must also fail."

{¶8} Moreover, the trial court held that appellant's claims for bad faith and breach of contract were collaterally estopped by the previously adjudicated negligence suit in Washington. The court explained that appellant was estopped from claiming that defendants treated him in bad faith or breached their

contract by denying benefits under the Policy where a jury had previously determined that appellant did not suffer any injury as a result of the accident.

{¶9} Finally, the trial court sua sponte ruled that “although [appellant]’s claims fail on their merits, this court also finds that there are insufficient minimum contacts for jurisdiction to be proper in Ohio for Defendant CBR.”

{¶10} Appellant now brings this timely appeal, raising four assignments of error for review:

I. The trial court committed prejudicial error in granting motions for summary judgment because there are genuine issues of material fact and defendants are not entitled to judgment as a matter of law.

II. The trial court committed prejudicial error in determining that appellant’s bad faith and conspiracy claims are barred by the statute of limitations.

III. The trial court erred in determining that appellant’s claims are collaterally estopped by the previously adjudicated negligence suit.

IV. The trial court erred in determining that personal jurisdiction was lacking over defendant CBR.

{¶11} Furthermore, CBR raises alternative grounds for judgment as a matter of law in the following four cross-assignments of error:

I. The trial court should have further held that appellant’s claims for breach of contract and declaratory judgment claims against CBR fail as a matter of law.

II. The trial court should have held that appellant’s bad faith claim against CBR fails as a matter of law.

III. The trial court should have further held that appellant's civil conspiracy claim is barred by the statute of limitations and otherwise fails as a matter of law.

IV. The trial court's advisory opinion provides alternative grounds for the dismissal of CBR: there are insufficient minimum contacts for jurisdiction to be proper in Ohio.

## II. Law and Analysis

{¶12} In his first assignment of error, appellant broadly argues that the trial court committed prejudicial error in granting motions for summary judgment in favor of National Union and CBR because there are genuine issues of material fact in dispute as to whether he was injured in the January 3, 2008 accident.

{¶13} An appellate court reviews a trial court's decision on a motion for summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment is appropriate when, construing the evidence most strongly in favor of the nonmoving party, (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, that conclusion being adverse to the nonmoving party. *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201 (1998), citing *Horton v. Harwick Chem. Corp.*, 73 Ohio St.3d 679, 653 N.E.2d 1196 (1995), paragraph three of the syllabus.

{¶14} In challenging the trial court's judgment, appellant argues more specifically in his third assignment of error that the trial court committed prejudicial error in finding that he was collaterally estopped from pursuing his claims based on the previously adjudicated negligence suit in Washington.

{¶15} Based on the following, we agree with the trial court and find that appellant's claims for bad faith, breach of contract, and civil conspiracy are barred by collateral estoppel.

#### A. Collateral Estoppel

{¶16} The doctrine of res judicata consists of two branches: (1) "claim preclusion," also known as "estoppel by judgment," and (2) "issue preclusion," also known as "collateral estoppel." *Chibinda v. Depositors Ins.*, 12th Dist. Butler No. CA2012-04-073, 2013-Ohio-526, ¶ 34. Claim preclusion or estoppel by judgment bars the relitigation of the same cause of action between the same parties. *Id.* Issue preclusion or collateral estoppel precludes a party from relitigating issues of fact or law that have been actually and necessarily litigated and determined in a different cause of action. *Id.*

{¶17} Offensive use of collateral estoppel occurs when the plaintiff seeks to prevent the defendant from relitigating a fact or issue that the defendant has previously litigated unsuccessfully in another action. *Id.*, citing *Providence Manor Homeowners Assn., Inc. v. Rogers*, 12th Dist. Butler No. CA2011-10-189, 2012-Ohio-3532, ¶ 40. Defensive use of collateral estoppel occurs when the

defendant seeks to prevent the plaintiff from relitigating a fact or issue that the plaintiff has previously litigated unsuccessfully in another action. *Id.*

{¶18} To successfully assert collateral estoppel, a party must show that (1) the fact or issue in question was passed upon and determined by a court of competent jurisdiction, (2) there was a final judgment on the merits in the previous case after a full and fair opportunity to litigate the fact or issue in question, (3) the fact or issue in question was either admitted or actually tried and decided and was necessary to the final judgment, (4) the fact or issue in question is identical to the fact or issue involved in the prior suit, and (5) there is a "mutuality of parties." *See Rogers* at ¶ 43. Mutuality of parties exists when all parties or their privies to the present proceedings were bound by the prior judgment. Therefore, in order to preclude either party from relitigating an issue, a judgment must be preclusive upon both. *Goodson v. McDonough Power Equip., Inc.*, 2 Ohio St.3d 193, 195-196, 443 N.E.2d 978 (1983).

{¶19} However, relevant to the case at hand, the Ohio Supreme Court indicated in *Goodson* that the mutuality requirement could be relaxed "where justice would reasonably require it." *Id.* at 199. A number of appellate courts, relying on language in *Goodson*, have relaxed the mutuality requirement and allowed the nonmutual defensive use of collateral estoppel when a party against whom the doctrine is asserted previously had his day in court and was permitted to fully litigate the "specific issue" sought to be raised in the later action. *Rogers*

at ¶ 40, citing *Hoover v. Transcontinental Ins. Co.*, 2d Dist. Greené No. 2003-CA-46, 2004-Ohio-72, ¶ 17; *Frank v. Simon*, 6th Dist. Lucas No. L-06-1185, 2007-Ohio-1324, ¶ 12; *Michell v. Internatl. Flavors & Fragrances, Inc.*, 179 Ohio App.3d 365, 2008-Ohio-3697, 902 N.E.2d 37 (1st Dist.); see also *Michaels Bldg. Co. v. Akron*, 9th Dist. Summit No. 13061, 1987 Ohio App. LEXIS 9881, \*9 (Nov. 25, 1987) (“[N]onmutuality of parties has been acceptable where it is shown that the party seeking to avoid collateral estoppel clearly had his day in court on the specific issue brought into litigation within the later proceeding”).

{¶20} In the instant case, the trial court applied the doctrine of defensive collateral estoppel and determined that, although National Union and CBR were not parties to the litigation in Washington, appellant was “estopped from claiming that defendants treated him in bad faith or breached their contract by denying disability payments under his employer’s policy for an occupational injury arising out of the same occurrence.” We agree.

{¶21} Here, appellant brought causes of action for breach of contract, bad faith, and civil conspiracy against National Union and CBR, alleging that defendants improperly terminated his insurance benefits under the Policy. In support of his claims, appellant contends that he is entitled to disability and medical benefits under the Policy based on the injuries he sustained as a result of the January 3, 2008 accident.

{¶22} The Policy provides, in pertinent part:

### **Temporary Total Disability Benefit**

If Injury to the Insured Person results in Temporary Total Disability \* \* \* the Company [National Union] will pay the Temporary Total Disability Benefit specified below \* \* \* the Temporary Total Disability Benefit shall be payable, retroactively, from the date that disability began, provided the Insured Person remains Temporarily Totally Disabled.

\* \* \*

### **Continuous Total Disability Benefit**

If Injury to the Insured Person, resulting in Temporary Total Disability, subsequently results in Continuous Total Disability, the Company will pay the Continuous Total Disability specified below \* \* \*.

\* \* \*

### **Accident Medical Expense Benefit**

If an Insured Person suffers an Injury that requires him or her to be treated by a physician \* \* \* the Company will pay the Usual and Customary Charges incurred for Medically Necessary Covered Accident Medical Services received due to that Injury \* \* \*.

{¶23} Relevant to the arguments raised herein, the term "injury" is defined in the Policy as "bodily injury to an Insured Person *caused by an Occupational accident while coverage is in force under this Policy \* \* \* .*" (Emphasis added.) "Occupational" means "that activity, accident, incident, circumstance or condition [that] occurs or arises out of or in the course of the

Insured performing services within the course and scope of contractual obligations for the Policyholder, while under Dispatch.”

{¶24} Thus, in order to receive disability and medical benefits, the clear and unambiguous language of the Policy requires appellant to have suffered an injury *caused by* an occupational accident. Accordingly, the “specific issue” in dispute in this case is whether the January 3, 2008 occupational accident caused the injuries that appellant argues entitle him to benefits under the Policy.

{¶25} After a careful review of the record, we find that the issue of causation has already been determined by a court of competent jurisdiction. In his 2011 personal injury lawsuit in the Superior Court of King County, Washington, appellant alleged that he suffered injuries and damages proximately caused by the negligence of Timothy Coy. However, the jury returned a verdict finding that appellant’s alleged injuries were not proximately caused by the accident. Based on the jury’s resolution of causation in his personal injury suit, appellant cannot now relitigate the issue of whether his injuries were caused by the accident, a finding that is necessary for entitlement to benefits under the Policy.

{¶26} While National Union and CBR were not parties to the Washington litigation, the issue of causation was “actually and directly litigated” in a court of competent jurisdiction, and appellant had the opportunity to fully litigate the issue while represented by competent counsel. Because the requirements for

defensive collateral estoppel have been satisfied, the trial court correctly determined that National Union and CBR were entitled to judgment as a matter of law on appellant's claims that they acted in bad faith and breached the contract by denying coverage under the Policy.

{¶27} For these same reasons, defendants were entitled to judgment as a matter of law on appellant's civil conspiracy claim. Generally, "[a] claim for conspiracy cannot be made [the] subject of a civil action unless something is done which, in the absence of the conspiracy allegations, would give rise to an independent cause of action." *Ford Motor Credit Co. v. Jones*, 8th Dist. Cuyahoga No. 92428, 2009-Ohio-3298, ¶ 24. Because we have already held that appellant's bad faith and breach of contract claims are barred by the doctrine of collateral estoppel, we find that the trial court properly determined that there was no longer an independent cause of action to which the conspiracy claim could be coupled. Therefore, appellant's civil conspiracy claim fails as a matter of law.

### III. Conclusion

{¶28} Based on the foregoing, the trial court did not err in granting summary judgment in favor of National Union and CBR. Appellant's first and third assignments of error are overruled. We further find that, because our resolution of appellant's first and third assignments of error are dispositive,

appellant's remaining assignments of error and CBR's cross-assignments of error are moot.

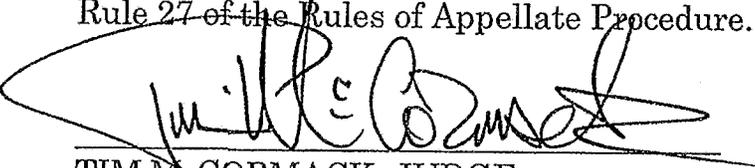
{¶29} Judgment affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



TIM McCORMACK, JUDGE

MARY J. BOYLE, A.J., CONCURS;  
KENNETH A. ROCCO, J., DISSENTS WITH SEPARATE OPINION

KENNETH A. ROCCO, J., DISSENTING:

{¶30} I disagree with the majority's determination that Agic is collaterally estopped from bringing the instant lawsuit. According to the majority, the jury's special verdict form establishes that the issue in the instant case was actually and directly litigated in the Washington state case. The issue in the instant case is whether Agic sustained an injury in the accident. The special verdict form in the Washington case read, "was [Defendant's] fault the proximate cause of the

injury to \* \* \* Agic?" The jury answered "no." In my view, this does not conclusively establish that Agic did not sustain an injury in that accident.

{¶31} While it is true that the Policy covers only those injuries "caused by an occupational accident," the special verdict form in the Washington case merely established that one of the defendants in that lawsuit was not the proximate cause of Agic's injury. Washington courts "recognize[] two elements of causation: cause in fact (sometimes called "actual" or "but for" cause); and legal cause (sometimes called "proximate" cause)." (Citations omitted.) *State v. Bauer*, 180 Wn.2d 929, 329 P.3d 67 (2014), ¶ 13, fn. 5. Unlike other jurisdictions, Washington refers to both elements together as "proximate cause." *Id.* While "cause in fact" refers to "the physical connection between an act and an injury," whether a defendant is the "legal cause" of an injury "depends on mixed considerations of logic, common sense, justice, policy, and precedent." (Internal citations omitted.) *Id.* at ¶ 14.

{¶32} Given the multitude of considerations that go into determining proximate cause, we cannot know why the jury determined that one of the defendants was not the proximate cause of Agic's injuries. But it is certainly possible that the jury could find that Agic was injured in the accident and also find that this one defendant was not the proximate cause of Agic's injury. Further muddying the waters is the fact that the accident involved multiple vehicles, but the special verdict form pertains only to one driver.

{¶33} Because the jury was not called upon to determine whether Agic was injured in the accident, that issue was not actually and directly litigated in the previous case. Because injury is the pivotal issue in the instant case, I would hold that collateral estoppel does not bar Agic from bringing his claims. I would, therefore, sustain the third assignment of error and would go on to reach the remaining assignments of error. For the aforementioned reasons, I respectfully dissent.

The State of Ohio, }  
Cuyahoga County. } ss.

I, ANDREA F. ROCCO, Clerk of the Court of

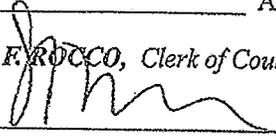
Appeals within and for said County, and in whose custody the files, Journals and records of said Court are required by the laws of the State of Ohio, to be, kept, hereby certify that the foregoing is taken and copied from the Journal entry dated on 09-25-2014 CA 100679 of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing copy has been compared by me with the original entry on said Journal entry dated on 09-25-2014

CA-100679 and that the same is correct transcript thereof.

In Testimony Whereof, I do hereunto subscribe my name officially, and affix the seal of said court, at the Court House in the City of Cleveland, in said County, this 25

day of September A.D. 20 14

ANDREA F. ROCCO, Clerk of Courts

By  Deputy Clerk