

ORIGINAL

IN THE COURT SUPREME COURT OF OHIO

EDIN AGIC	)	Case No. 2014-1924
	)	
Plaintiff-Appellant,	)	
	)	On Appeal from the Cuyahoga County
v.	)	Court of Appeals, Eighth Appellate
	)	District
NATL. UNION FIRE INS. CO. OF	)	
PITTSBURGH, et al.,	)	Court of Appeals Case No. CA-13-100679
	)	
Defendants-Appellees.	)	

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MEMORANDUM OPPOSING JURISDICTION OF DEFENDANT-APPELLEE  
CONSOLIDATED BENEFITS RESOURCES, L.L.C.

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**EXPLANATION OF WHY THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A CONSTITUTIONAL QUESTION**

Collateral estoppel applies “when the fact or issue 1) was actually and directly litigated in the prior action, (2) was passed upon and determined by a court of competent jurisdiction, and (3) when the party against whom collateral estoppel is asserted was a party [or] in privity with a party to the prior action.” *State ex rel. Davis v. Public Employees Retirement Board*, 120 Ohio St.3d 386, 392, (2008), quoting *Thompson v. Wing*, 70 Ohio St.3d 176, 183 (1994). 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 v. McDonough Power Equip., Inc.*, 2 Ohio St.3d 193, 201 (1983). This Court recognized nonmutual application of collateral estoppel over thirty years ago in *Hicks v. De La Cruz*, 52 Ohio St.2d 71 (1977), as explained in *Goodson, supra*, 2 Ohio St.3d at 199-200. In this case, the Court of Appeals merely applied these well established principles of Ohio law to affirm the decision of the trial court dismissing Appellant Agic’s claim.

Appellant Edin Agic alleges he sustained work-related injuries in a January 31, 2008 vehicular accident. He filed suit in the Superior Court of King County, Washington. The defendant in that action, Tim Coy, admitted in his “Neutral Statement of the Case” that he was negligent and that “his negligence was the proximate cause of the collision.” Defendant Coy denied, however, that “his negligence was a proximate cause of injury and damage to the plaintiffs” in that litigation. The issue of whether Agic sustained any injuries caused by the accident was tried to a jury. The jury in its Special Verdict Form found that Agic’s alleged injuries were not proximately caused by the accident and the jury awarded no damages.

Meanwhile, Agic brought causes of action for breach of contract, bad faith, and civil conspiracy against National Union Fire Insurance Company of Pittsburgh, Pa. (“National Union”) and Consolidated Benefits Resources, L.L.C. (“CBR”), alleging that these Defendants/Appellees improperly terminated his insurance benefits under National Union’s policy. Agic claims that he is entitled to disability and medical benefits under the policy based on the injuries he allegedly sustained as a result of the January 31, 2008 accident. However, in order to be entitled to benefits under National Union’s policy, he must have sustained an “injury” which is defined by the policy as “bodily injury to an Insured Person *caused* by an Occupational accident.”

“After a careful review of the record,” the Court of Appeals found that “the issue of causation has already been determined by a court of competent jurisdiction.” (Court of Appeals Opinion at ¶25). In Agic’s personal injury lawsuit in the Superior Court of King County, Washington, he alleged that he suffered injuries and damages proximately caused by the negligence of Timothy Coy who caused the January 31, 2008 accident. Mr. Coy admitted he negligently caused the collision, but denied that his negligence was the proximate cause of Agic’s injuries. The jury returned a verdict that none of plaintiffs’ alleged injuries, the same injuries he claims here, were caused by the accident. Thus, the Court of Appeals applied well-established Ohio law in determining that “[b]ased 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.” (Court of Appeals Opinion at ¶25).

Appellant asserts that “Plaintiff-Appellant’s injuries were not disputed in the previous litigation” and that “he had no incentive to fully litigate the issue of whether the accident caused

his injuries.” (Appellant’s Brief at p. 1). There is absolutely no merit to this assertion. The **only** issue the jury was asked to resolve in the King County litigation was whether Agic’s alleged injuries were the proximate result of the accident. The jury found they were not.

This Court in *Goodson* held that the “mutuality of parties” requirement of collateral estoppel could be relaxed “where justice would reasonably require it.” Id. at 199. This Court in *Thompson* then clarified the criteria to establish “collateral estoppel.” These criteria permit the nonmutual use of the doctrine where the identical issue was actually and directly litigated in a prior action. Contrary to Appellant’s argument, the Court of Appeals did **not** abandon the “mutuality of both the parties *and* the issues,” nor did it interpret collateral estoppel to “apply to any issue arising out of the same set of operative facts, even though it was not fully litigated at trial.” (Appellant’s Brief at 2). Instead, the Court of Appeals correctly observed that “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” and therefore the “specific issue” in dispute in this case is “whether the January 31, 2008 occupational accident caused the injuries that appellant argues entitle him to benefits under the policy.” (Court of Appeals Opinion at ¶24). The Court of Appeals found that the requirements for the defensive use of collateral estoppel had been satisfied in this case because, “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.” (Court of Appeals Opinion at ¶26).

There is no basis for Appellant’s characterization of the appellate court decision as allowing “nonmutuality of the issues.” (Appellant’s Brief at p.2). The court of appeals did not announce a new standard for collateral estoppel. Instead, the Court of Appeals applied well

established Ohio law in affirming the decision of the trial court, consistent with the constitutional guidelines announced in *Goodson*. This case does not present an issue of great general interest in the state of Ohio nor does it involve a substantial constitutional question.

### **STATEMENT OF THE CASE AND FACTS**

#### **A. Agic is involved in an accident while driving his tractor-trailer rig in the course and scope of his duties for John Christner Trucking, Inc.**

On January 31, 2008, Plaintiff-Appellant Edin Agic, while operating his tractor-trailer rig in the course and scope of his duties for John Christner Trucking, Inc., was involved in an accident in Seattle, Washington. The accident was due to the admitted negligence of Timothy Coy who was operating a Saab coupe.

Agic thereafter made a claim for Temporary Total Disability (“TTD”) Benefits and Medical Expense Benefits under a policy of “Truckers Occupational Accident Insurance” bearing policy no. TRK 0009102454 (the “Policy”) issued by National Union to John Christner Trucking, Inc. CBR served as the third-party administrator with respect to Agic’s claim.

Appellant asserts that this policy is a “private self-insured substitute of the Worker’s Compensation programs.” (Appellant’s Brief at p. 3). In fact, the Policy prominently displays an “IMPORTANT NOTICE” on the first page which provides that:

#### **THIS IS NOT A WORKERS’ COMPENSATION POLICY AND IS NOT A SUBSTITUTE FOR WORKERS’ COMPENSATION COVERAGE**

Moreover, the Policy contains a clause which provides for the “**Non-Duplication of Workers’ Compensation Benefits.**” Thus, Appellant’s attempt to confuse the issues on appeal with principles of Workers’ Compensation should be ignored.

#### **B. National Union’s “Truckers Occupational Accident Insurance” Policy Provides Benefits Only for Bodily “Injury” Caused by an “Occupational” Accident**

Mr. Agic made a claim for benefits under the Policy he had purchased through Christner

Trucking. The Policy provides benefits for Temporary Total Disability which means “disability that: (1) prevents an Insured Person from performing the duties of his or her regular, primary occupation; and (2) requires that, and results in, the Insured Person receiving Continuous Care.” The injury preventing Plaintiff from performing his duties must arise from an occupational accident. Specifically, the Policy provides as follows:

**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.

“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 . . .” “Occupational” means “that the activity, accident, incident, circumstance or condition 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.”

The Policy also provides for a “Continuous Total Disability Benefit” and an “Accident Medical Expense Benefit.” Eligibility for Continuous Total Disability Benefits necessarily depends on whether Plaintiff first qualifies for Temporary Total Disability Benefits. Eligibility for Accident Medical Expense Benefits is contingent upon Plaintiff suffering an “Injury” as defined in the Policy.

**C. Appellees’ Investigation revealed that Agic Did not Suffer an “Injury” caused by an “Occupational” Accident and, Therefore, His Claim for Benefits Under National Union’s Policy was Eventually Denied.**

Mr. Agic began receiving benefits pursuant to the Policy’s terms in February of 2008. Shortly thereafter, Plaintiff began presenting to unapproved physicians with new injuries that were inconsistent with his original presentations and inconsistent with the severity of the

accident itself. Surveillance and an independent medical exam were authorized. Surveillance showed Plaintiff gardening, bending, and ambulating normally. After the surveillance, an independent medical examination was conducted by Dr. John Dunne of the Ohio Sports & Spine Institute. Dr. Dunne opined in three separate reports that Agic's subjective complaints did not match his objective findings and that benefits were not warranted.

Temporary Total Disability Benefits and Medical Expense Benefits were suspended, and then ultimately denied by a letter of July 21, 2008, when Agic was advised that "based upon investigation of the claim subsequent to the motor vehicle accident, AIG Claims Services, Inc. has determined that [Agi] no longer suffers from any injuries associated with the motor vehicle accident which would prevent his return to a gainful employment." Agic was further advised that "AIG Claims Services, Inc. is withdrawing any authorization for further treatment for any injuries that may have been suffered as a result of the motor vehicle accident." Because Agic's TTD Benefits were terminated, no Continuous Total Disability Benefits were ever provided.

**D. The Jury in Agic's Personal Injury Action Against the Tortfeasor Timothy Coy Determined that Agic did not Suffer any Injuries as the Result of the January 31, 2008 Occupational Accident.**

Mr. Agic filed a personal injury action in the Superior Court of King County, Washington, on January 21, 2011. He was represented by attorney Ronald Metzler. Defendant Timothy Coy admitted in his Neutral Statement of the Case that he was negligent and that "his negligence was the proximate cause of the collision." Defendant Coy denied, however, that "his negligence was a proximate cause of injury and damages to the Plaintiffs" in that litigation. Agic conceded in deposition that the Neutral Statement of the Case was an admission by Coy that Coy's negligence caused the accident at issue. Mr. Coy's admission was also acknowledged by Agic's attorney. The issue of whether Agic sustained any injuries caused by the accident was tried to a jury. The jury in its Special Verdict Form found that Edin Agic sustained no injuries as

a result of the January 31, 2008 accident and awarded no damages. Agic did not appeal the verdict.

**E. The Original Litigation Against National Union and CBR**

Mr. Agic originally filed this Lawsuit on February 11, 2011 in Cuyahoga County Common Pleas Court Case No. CV 11 747339. He asserted causes action for declaratory judgment, breach of contract, bad faith, conspiracy and intentional and/or negligent infliction of emotional distress. The original lawsuit named eleven defendants including CBR's employee, Angie Clancy, National Union, numerous AIG entities allegedly associated with National Union, CBR's attorneys with the McAtee Law Firm in Oklahoma, and Dr. Dunne of the Ohio Sports and Spine Institute. The litigation concluded when Plaintiff voluntarily dismissed all claims pursuant to Civ. R. 41(A) on December 23, 2011.

**F. The Current Litigation was refiled Too Late**

On December 28, 2012, **more than a year after Plaintiff's voluntary dismissal** of all claims on December 23, 2011, Plaintiff re-filed the **same** complaint as he had filed in the original litigation. The re-filed complaint included previously dismissed claims and parties. Plaintiff eventually dismissed the McAtee defendants, Dr. Dunne, and Angie Clancy. In addition, Plaintiff's negligent and intentional infliction of emotional distress claims were dismissed by the Court as to all remaining parties. Plaintiff's remaining claims were for declaratory judgment, breach of contract, bad faith, and civil conspiracy.

**G. The Trial Court Properly Grants Defendants' Motions for Summary Judgment**

On November 5, 2013, the trial court entered summary judgment in favor of National Union and CBR on all of Plaintiff's claims. The trial court found that because Plaintiff "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.”

Moreover, the trial court held that Plaintiff’s claims for bad faith and breach of contract were collaterally estopped by the previously adjudicated negligence suit in Washington. The court explained that Plaintiff was estopped for 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 “Plaintiff did not suffer injury as a result of the accident.”

#### **H. CBR’s Cross Assignments of Error Under Ohio App. 3(C)(2) and R.C. 2505.22**

In the Court of Appeals, Appellee CBR set forth the following alternative grounds supporting the trial court’s order granting summary judgment:

1. “The trial court should have further held that Plaintiff’s claims for breach of contract and declaratory against CBR fail as a matter of law.” CBR is simply a third-party administrator and not in privity of contract with Agic for the purposes of holding CBR liable on his declaratory judgment and breach of contract claims.
2. “The trial court should have further held that Plaintiff’s bad faith claims against CBR fail as a matter of law.” Ohio does not recognize bad faith claims against a TPA. Moreover, Plaintiff failed to present any evidence that CBR acted in bad faith.
3. “The trial court should have further held that Plaintiff’s civil conspiracy claim is barred by the statute of limitations and otherwise fails as a matter of law.” Plaintiff’s “bad faith” and “civil conspiracy” claims are both barred by the same four year statute of limitations. Moreover, Plaintiff failed to present any evidence of an “unlawful independent act” or of a “malicious combination” to support his claim of conspiracy.
4. “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.

The Court of Appeals affirmed the decision of the trial court holding that collateral estoppel barred Plaintiff’s claims against the Defendants. The court concluded that: “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." (Court of Appeals Opinion at ¶25). The court also determined that Appellant's remaining assignments of error and CBR's cross assignments of error had been rendered moot.

### **ARGUMENT IN SUPPORT OF APPELLEE'S PROPOSITIONS OF LAW**

**Appellee Proposition of Law No. I:** Collateral estoppel applies "when the fact or issue 1) was actually and directly litigated in the prior action, 2) was passed upon and determined by a court of competent jurisdiction, and 3) when the party against whom collateral estoppel is asserted was a party [or] in privity with a party to the prior action." *State ex rel. Davis v. Public Employees Retirement Board*, 120 Ohio St.3d 386, 392, 2008-Ohio-6254 at ¶28, 899 N.E.2d 975, 982, quoting *Thompson v. Wing*, 70 Ohio St.3d 176, 183, 1994-Ohio-358, 637 N.E.2d 917, 923, approved and followed.

**Appellee Proposition of Law No. II:** The 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. *State ex rel. Davis*, supra, 120 Ohio St.3d at 392 citing *Goodson v. McDonough Power Equipment, Inc.*, 2 Ohio St.3d 193, 201, 443 N.E.2d 978, 985 (1983) approved and followed.

**Appellee Proposition of Law No. III:** Where a jury in a court of competent jurisdiction has already found in Plaintiff's personal injury lawsuit arising from a work-related vehicular accident that Plaintiff did not suffer any injuries as the proximate result of the other driver's admitted negligence, Plaintiff is precluded by collateral estoppel from relitigating the same issue of proximate causation in a subsequent suit seeking disability benefits under an insurance policy where Plaintiff's entitlement to benefits depends upon Plaintiff having suffered bodily injury as a result of the same occupational accident. *State ex rel. Davis*, supra; *Goodson*, supra; applied and followed.

The Supreme Court of Ohio in *Whitehead v. Gen. Tel. Co.*, 20 Ohio St.2d 108, 112 (1969) explained "collateral estoppel" as follows:

The second aspect of the doctrine of *res judicata* is "collateral estoppel." While the merger and bar aspects of *res judicata* have the effect of precluding a plaintiff from relitigating the same cause of action against the same defendant, the collateral estoppel aspect precludes the relitigation, in a second action, of an *issue* that has been actually and necessarily litigated and determined in a prior action which was based on a different cause of action. Restatement of the Law, Judgments, Section 45, Comment (c), and Section 68(2); *Cromwell v. County of*

*Sac* (1876), 94 U.S. 351. In short, under the rule of collateral estoppel, even where the cause of action is different in a subsequent suit, a judgment in a prior suit may nevertheless affect the outcome of the second suit.

The court, however, continued to honor the historical requirement of “mutuality” for the application of collateral estoppel. The requirement that there be an identity of parties or their privies was founded upon the principle that all persons are entitled to their day in court.

The Supreme Court of Ohio did not require mutuality in *Hicks v. De La Cruz*, 52 Ohio St.2d 71 (1977). *Hicks* arose out of an action for negligence brought against a physician, the city of Cincinnati, the University of Cincinnati, the board of trustees of the university, and Cincinnati General Hospital. The trial court granted summary judgment in favor of the city-defendants concluding that they had state governmental immunity in the ownership and/or operation of the hospital. The court of appeals affirmed. The judgment was reversed by the Ohio Supreme Court on the basis that collateral estoppel precluded defendants from relitigating the immunity issue. This court relied on the prior case of *Sears v. Cincinnati*, 31 Ohio St.2d 157 (1972) in which the issue of ownership and control of the same hospital was before the court and it was determined that the hospital was a municipal institution and subject to suit. Even though the requirement of mutuality of parties was lacking, the court nevertheless applied collateral estoppel reasoning that, “the **pertinent appellees** herein were represented parties or were in actual privity with represented parties in *Sears* and were accorded a full and fair day in court in that proceeding.” *Id.* at 75 (emphasis added).

The Supreme Court of Ohio revisited the issue of collateral estoppel in *Goodson*. This court explained its recent decision in *Hicks* and held that although it had not abandoned the mutuality rule, it would be relaxed “where justice would reasonably require it.” *Goodson* at 199. This court explained its decision as follows:

This court in effect was stating in *Hicks* that under those facts where it was shown that the party defendant clearly had his day in court on the specific issue brought into litigation within the later proceeding, the non-party plaintiff could rely upon the doctrine of collateral estoppel to preclude the relitigation of that specific issue. We believe this exception to the principle of mutuality to be a proper one. *Id.* at 200.

Many Ohio appellate courts, relying on this 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. *Providence Manner Homeowners Assn., Inc. v. Rogers*, 12 Dist. No. CA 2011-10-189, 2012-Ohio-3532, at ¶41; *Hoover v. Transcontinental Ins. Co.*, 2nd Dist. No. 2003-CA-46, 2004-Ohio-72, ¶16 (“ . . . mutuality is not required if the party against whom collateral estoppel is asserted fully litigated an issue in an earlier action.”); *Frank v. Simon*, 6th Dist. No. L-06-1185, 2007-Ohio-1324, ¶12; *Michell v. Internation Flavors & Fragrances, Inc.*, 179 Ohio App.3d 365, 2008-Ohio-3697, at ¶27 (1st Dist.); see also *Miller v. Coldwell Banker Hunter Realty*, 8th Dist. Nos. 93529 and 93662, 2010-Ohio-5840, 2010 Ohio App. LEXIS 4941 (December 2, 2010); *Michaels Bldg. Co. v. Akron*, 9th Dist. No. 13061, 1987 Ohio App. LEXIS 9881, \*9 (Nov. 25, 1987); *Young v. Gorski*, 6th Dist. No. L-03-1243, 2004-Ohio-1325; *Carpenter v. Long*, 196 Ohio App.3d 376, 388-89, 2011-Ohio-5414, 963 N.E.2d 857 (2nd Dist.).

The “essential test in determining whether the doctrine of collateral estoppel is to be applied is whether **the party against whom the prior judgment is being asserted** had full representation and a ‘full and fair opportunity to litigate that issue in the first action.’” *Cashelmara Villas Limited Partnership v. DiBenedetto*, 87 Ohio App.3d 809, 813, 623 N.E.2d 213, 215 (8th Dist. 1993), citing *Goodson*. Facts or issues that were “fully, fairly and necessarily determined” in a previous action may not be relitigated in a subsequent action “regardless of

whether the claims in the two actions are identical or different.” *Woodrow v. Heintschel*, 194 Ohio App.3d 391, 396, 956 N.E.2d 855, 859 (6th Dist. 2011), citing *Fort Frye Teachers Ass’n, OEA/NEA v. S.E.R.B.*, 102 Ohio St.3d 283, 2004-Ohio-2947; *Balboa Ins. Co. v. S.S.D. Distrib. Systems, Inc.*, 109 Ohio App.3d 523, 527-528, 672 N.E.2d 718, 721 (12th Dist. 1996).

The “defensive use of collateral estoppel has been upheld in the majority of Ohio appellate courts.” See *Frank v. Simon*, 6<sup>th</sup> Dist. No. L-06-1185, 2007-Ohio-1324, 2007 Ohio App. LEXIS 1231 at ¶12 (March 23, 2007).<sup>1</sup> The Court of Appeals in *Hoover*, supra, at ¶15 provides the following summary of Ohio law and the **consensus** (among the appellate courts addressing the issue) favoring the defensive use of collateral estoppel.

Among the other appellate districts to have addressed the issue, the apparent consensus is that *Hicks* and *Goodson* in essence eliminate the mutuality requirement if the party against whom collateral estoppel is asserted has had his day in court in a prior action and, in that forum, was permitted to fully and fairly litigate the specific issue raised in a later proceeding. In *McCrorry v. Children’s Hospital* (1986), 28 Ohio App.3d 49, 53, 28 Ohio B. 61, 501 N.E.2d 1238, a Tenth District case, then-judge Thomas Moyer reached precisely this conclusion, relying on the language from *Goodson* quoted above. In addition to the Tenth District, at least seven other appellate districts (the First, Fourth, Fifth, Sixth, Eighth, Ninth, and Twelfth Districts) have interpreted *Goodson* as providing an exception to the requirement of mutuality when the party against whom a prior judgment is asserted had his day in court and there was permitted to fully litigate the specific issue raised in a later proceeding. See *Keck v. Masters* (Dec. 31, 1996), Hamilton App. No. C-940967, 1996 Ohio App. LEXIS 5871; *Blackburn v. Springer* (March 22, 1994), Scioto App. No. 93CA2161, 1994 Ohio App. LEXIS 1158; *Staats v. Motorists Mut. Ins. Co.* (Aug. 17, 1987), Stark App. No. CA-7142, 1987 Ohio App. LEXIS 8357; *Wilson v. Britz & Zimmelman* (Jan. 10, 1992), Lucas App. No. L-91-031, 1992 Ohio App. LEXIS 84; *Home Ins. Co. v. Gordon*

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<sup>1</sup> The doctrine of mutuality required both parties to have been bound by a prior judgment in order for either party to assert that prior judgment in a subsequent action. This doctrine was rejected in the federal courts by *Parkland Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979), which permitted limited “offensive use” of collateral estoppel. In contrast, the “defensive use” of collateral estoppel seeks to use a prior judgment as a shield, not a sword; the defendant seeks to prevent a plaintiff from asserting a claim that the plaintiff had previously litigated and lost. The United States Supreme Court discarded mutuality and allowed defensive collateral estoppel in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971). See discussion in *Goodson*, supra, 2 Ohio St.3d at 197 note 12.

(Aug. 20, 1987), Cuyahoga App. No. 52100, 1987 Ohio App. LEXIS 8390; *Michaels Building Supply Co. v. City of Akron* (Nov. 25, 1987), Summit App. No. 13061, 1987 Ohio App. LEXIS 9881; *Balboa Ins. Co. v. S.S.D. Distribution Sys., Inc.*, 109 Ohio App. 3d 523, 672 N.E.2d 718 (1996). Similarly, in *McAdoo*, supra, the Sixth Circuit did not read Ohio law, post-*Goodson*, "as insisting on mutuality in defensive collateral estoppel cases" such as the case before us. Rather, the *McAdoo* court interpreted Ohio law as requiring only that the party against whom collateral estoppel is asserted previously had "a fair opportunity to fully litigate" the issue. *McAdoo*, supra, at 525; see also *Schroyer v. Frankel* (6th Cir. 1999), 197 F.3d 1170, 1178 (reasoning that Ohio law allows the use of non-mutual defensive collateral estoppel if the plaintiff was afforded "a fair opportunity to fully litigate the issue").

In cases cited after *Goodson*, the Ohio Supreme Court has consistently held that collateral estoppel applies "when the fact or issue (1) was actually and directly litigated in the prior action, (2) was passed upon and determined by a court of competent jurisdiction, and (3) *when the party against whom collateral estoppel is asserted was a party [or] in privity with a party to the prior action.*" *State ex rel. Davis v. Public Employees Retirement Board*, 120 Ohio St.3d 386, 392, at ¶28 (2008) quoting, *Thompson v. Wing*, 70 Ohio St.3d 176, 183 (1994) and citing *Goodson v. McDonough Power Equip., Inc.*, supra 2 Ohio St.3d at 201; See also *New Winchester Gardens, Ltd. v. Franklin County Bd. of Revision*, 80 Ohio St.3d 36, 41 (1997). In accordance with these Ohio Supreme Court decisions, and the numerous Ohio appellate court decisions cited above, it is now well established that mutuality is not required for the defensive use of collateral estoppel if the party against whom collateral estoppel is asserted has fully litigated an issue in an earlier action. *Scherer v. JP Morgan Chase & Co.*, 508 Fed. Appx. 429, 435 (6th Cir. 2012).

Appellant recognizes that "[t]here is an exception to the strict requirement of mutuality, otherwise known as 'Nonmutual Collateral Estoppel.'" (Appellant's Brief at p. 9). Appellant maintains, however, that this "exception has yet to be adopted in Ohio Jurisprudence" and that "*Goodson* is clear in stating that the mutuality rule remains a requirement under Ohio law." (Id.). Appellant's discussion of collateral estoppel is without merit and outdated by over twenty years.

Contrary to Appellant's alarmist rhetoric, his constitutional rights were not violated by the application of nonmutual collateral estoppel to bar his claims. The "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." *State ex rel Davis v. Public Employees Retirement Board*, 120 Ohio St.3d 386, 392 (2008) citing *Goodson, supra*, 2 Ohio St.3d at 201. The decision of the court below comports with this Due Process requirement. Appellant asserted causes of action for breach of contract, bad faith, and conspiracy against National Union and CBR, alleging that Defendants improperly terminated his insurance benefits under the policy. He claims that he is entitled to disability and medical benefits under the policy based on the injuries he allegedly sustained as a result of the January 31, 2008 accident. However, in order to be entitled to benefits under the policy, he must have sustained an "injury" which is defined by the policy as "bodily injury to an Insured Person caused by an Occupational accident . . ." "Occupational" means "that the activity, accident, incident, circumstance or condition occurs or arises out of or in the course of the Insured performing services within the course and scope of the contractual obligations for the Policyholder, while under Dispatch." Thus, the "specific issue" is whether Agic suffered "bodily injury" caused by the January 31, 2008 occupational accident entitling him to benefits under the policy.

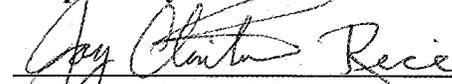
"After careful review of the record," the Court of Appeals found that "the issue of causation has already been determined by a court of competent jurisdiction." (Court of Appeals Opinion at ¶25). In Appellant's 2011 personal injury lawsuit in the Superior Court of King County, Washington, he allegedly suffered injuries and damages proximately caused by the negligence to Tim Coy. Tim Coy admitted in the King County litigation that he was negligent

and that his negligence was the proximate cause of the collision. Coy simply denied that “his negligence was the proximate cause of injury and damage to the plaintiffs” in that litigation. The jury returned a verdict that none of Plaintiff’s alleged injuries, the same injuries he claims here, were caused by the accident. Thus, the Court of Appeals correctly determined that “[b]ased 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 of benefits under the policy.” (Court of Appeals Opinion ¶25). The issue of causation was “actually and directly litigated” in a court of competent jurisdiction. Appellant had the opportunity to fully litigate the issue while represented by competent legal counsel. The jury’s conclusion that Agic’s injuries were not caused by the accident was “essential to the judgment in the prior action.” The Due Process requirements for the application of collateral estoppel have been completely satisfied.

**CONCLUSION**

The Supreme Court of Ohio announced the criteria for collateral estoppel twenty years ago. These criteria were satisfied in this case. Appellant raises no issue requiring further review by this Court. This Court should not accept jurisdiction.

**Respectfully submitted,**



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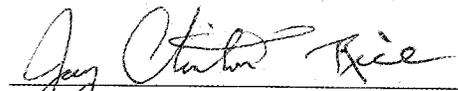
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing *Memorandum Opposing Jurisdiction of Defendant-Appellee Consolidated Benefits Resources, L.L.C.* was served by U.S. regular mail, postage pre-paid this 2 day of December, 2014 upon the following:

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