

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

MEMORANDUM OF APPELLEE NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PA. IN RESPONSE TO APPELLANT'S MEMORANDUM IN
SUPPORT OF JURISDICTION

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I. **THIS CASE DOES NOT INVOLVE A CONSTITUTIONAL QUESTION OR ISSUE OF PUBLIC OR GREAT GENERAL INTEREST**

Appellant Edin Agic (“Agic”) is requesting this Court to accept jurisdiction based solely on *Goodson v. McDonough Power Equip., Inc.*, 2 Ohio St.3d 193, 199, 443 N.E.2d 978 (1983), which already addressed the very issue upon which Agic is seeking review. Appellee National Union Fire Insurance Company of Pittsburgh, Pa. (“National Union”) respectfully submits that there is no reason for this Court, and in fact, Agic has articulated none, to re-visit the sound and well-reasoned precedent set forth in *Goodson*. Thus, as this appeal does not present a constitutional question or any issue of public or great interest, National Union respectfully submits that the Court should decline to exercise its jurisdiction to hear this matter.

Although Agic asserts that this case involves a constitutional issue, he never articulates what the constitutional question is, instead giving a passing reference that his due process rights were violated by the Trial Court and the Court of Appeals for the Eighth Appellate District (“Eighth District”) (Agic Memorandum In Support of Jurisdiction at 1.) This Court, however, has previously addressed public policy and due process concerns with regard to collateral estoppels. In this regard, it has concluded that the defensive use of collateral estoppel, absent mutuality of parties, does not violate due process where the party against whom the doctrine is applied has had a full and fair opportunity to litigate his claims, just as Agic has had in this matter. *Goodson*, 2 Ohio St.3d at 201, 443 N.E.2d at 985-86 (due process requires that identical issue was litigated and essential to judgment in prior action); *Hicks v. De La Cruz*, 52 Ohio St.2d 71, 75, 369 N.E.2d 776, 778 (1977) (doctrine of collateral estoppel does not violate due process where defendant was a party with full representation in the initial action). Furthermore, Agic failed to raise any constitutional issue in his appeal to the Court of Appeals for the Eighth Appellate District (“Eighth District”), thereby waiving any argument he now seeks to present to

the Court. *State ex rel. Zollner. Indus. Comm'n*, 66 Ohio St.3d 276, 278, 1993-Ohio-49, 611 N.E.2d 830, 832, citing *State ex rel. Gibson v. Indus. Comm'n*, 39 Ohio St.3d 319, 530 N.E.2d 916 (1988) (a party who fails to raise an argument in the court below waives the right to raise it before the Supreme Court of Ohio).

Cases involving question of public or great general interest are to be distinguished from questions of interest primarily to the parties. *Williamson v. Rubich*, 171 Ohio St. 253, 254, 168 N.E.2d 876, 877 (1960). This case falls within the latter category. This Court has already addressed the issue Agic seeks to certify in *Goodson*. 2 Ohio St.3d at 201, 443 N.E.2d at 985-86. Moreover, the Appellate Courts have ruled, in turn, uniformly applying *Goodson* to permit the application of defensive collateral estoppel in instances where there is not a mutuality of parties. *Providence Manor Homeowners Ass'n, Inc. v. Rogers*, 12th Dist. Butler No. CA2011-10-189, 2012-Ohio-3532, ¶¶ 40-41; *Carpenter v. Long*, 196 Ohio App.3d 376, 388, 2011-Ohio-5414, 963 N.E.2d 857 (2nd Dist.); *Cornell v. Rudolph Foods, Inc.*, 3rd Dist. Allen No. 1-10-89, 2011-Ohio-4322, ¶ 19; *Mitchell v. Internatl. Flavors & Fragrances, Inc.*, 179 Ohio App.3d 365, 2008-Ohio-3697, 902 N.E.2d 37 (1st Dist.); *Frank v. Simon*, 6th Dist. Lucas No. L-06-1185, 2007-Ohio-1324, ¶ 15; *Hoover v. Transcontinental Ins. Co.*, 2nd Dist. Greene No. 2003-CA-46, 2004-Ohio-217, ¶ 17; *Young v. Gorski*, 6th Dist. Lucas, No. L-03-1243, 2004-Ohio-1325; *Michaels Bldg. Co. v. City of Akron*, No. C.A. 13061, 1987 WL 25758, at *3 (9th Dist. Nov. 25, 1987). Although Agic relies solely on *Goodson* to support his argument, *Goodson*, as recognized by the Eighth District, actually supports National Union's position that collateral estoppel bars his claim. As this Court and the Appellate Courts have clearly and unequivocally answered the question Agic seeks to certify, there is no question of public or great general interest.

Agic also presents a hypothetical situation which describes how trials will be lengthened

as a result of the Eighth District's ruling because future tort plaintiffs will insist upon proving every element of a claim. However, tort plaintiffs must already prove all elements of their claims to be successful, and Agic's hypothetical situation is not an accurate description of the issue before this Court. *See, e.g., Leizerman v. Kanous*, 2009-Ohio-1469, ¶ 13, 181 Ohio App. 3d 579, 582, 910 N.E.2d 26, 28 (plaintiff has burden to prove all elements of negligence to recover). The issue of whether the January 31, 2008 accident caused the injuries that Agic believes entitle him to benefits under the Policy was already fully and fairly litigated. Agic tried the issue to a jury of his peers, who found that the accident did not cause his injuries. To permit Agic a "second bite at the apple" would undermine the inherent goals of collateral estoppel, including justice, public policy, and judicial economy. It would essentially allow parties the opportunity to re-litigate identical issues repeatedly with different defendants in the hopes of obtaining a better result with a new jury. *O'Nesti v. DeBartolo Realty Corp.*, 2007-Ohio-1102, ¶ 24, 113 Ohio St. 3d 59, 65, 862 N.E.2d 803, 809 (collateral estoppel encourages judicial economy and prevents unfairness by barring the re-litigation of a decided issue); *State ex rel. Smith v. Smith*, 110 Ohio App. 3d 336, 340, 674 N.E.2d 398, 401 (8th Dist. 1996) (collateral estoppel serves the dual purpose of protecting parties from re-litigating an identical issue and promoting judicial economy by preventing needless litigation).

Moreover, Agic's claim fails on the merits. To fall within the Insuring Agreement of the Policy issued by National Union, Agic must have suffered an "Injury", *i.e.* a bodily injury, as a result of an "Occupational" accident. The accident which he asserts caused him bodily injury is the same accident at issue in his personal injury action, and is the same accident which the jury in that action found did not cause the injuries for which Agic seeks to recover. Thus, as Agic was not injured as a result of the January 31, 2008 accident he is not entitled to benefits under the

Policy.

Accordingly, National Union respectfully submits that the Court should decline to accept jurisdiction of this appeal.

II. AGIC'S PROPOSITION OF LAW MISAPPLIES *GOODSON* AND IGNORES ITS PROGENY

Agic's sole proposition of law is a self-serving attempt to depart from this Court's long-standing and well established precedent, which is binding and precludes his claim. *Goodson*, 2 Ohio St.3d at 199, 200, 443 N.E.2d at 983, 985; *Hicks*, 52 Ohio St.2d at 74, 369 N.E.2d at 776. There is no reason for this Court to re-visit the application of defensive collateral estoppel against non-mutual parties where it has been a settled issue of Ohio law for over three decades, especially given that Agic has not expressed any valid rationale aside from his displeasure with the result. *Goodson*, 2 Ohio St.3d at 201, 443 N.E.2d at 985-86; *Providence Manor Homeowners Ass'n, Inc.*, 12th Dist. Butler No. CA2011-10-189, 2012-Ohio-3532, ¶¶40-41; *Carpenter*, 196 Ohio App.3d 376, 388, 2011-Ohio-5414, 963 N.E.2d 857; *Cornell*, 3rd Dist. Allen No. 1-10-89, 2011-Ohio-4322, ¶ 19; *Mitchell*, 179 Ohio App.3d 365, 2008-Ohio-3697, 902 N.E.2d 37; *Frank*, 6th Dist. Lucas No. L-06-1185, 2007-Ohio-1324, ¶ 15; *Hoover*, 2nd Dist. Greene No. 2003-CA-46, 2004-Ohio-217, ¶ 17; *Young*, 6th Dist. Lucas, No. L-03-1243, 2004-Ohio-1325; *Michaels Bldg. Co.*, No. C.A. 13061, 1987 WL 25758, at *3.

Collateral estoppel applies where a fact or issue: (1) was actually and directly litigated in a prior action; (2) was passed upon and determined by a court of competent jurisdiction; and (3) the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action. *Thompson v. Wing*, 70 Ohio St.3d 176, 183, 1994 Ohio 358 (1994). Agic, in an effort to avoid this precedent, conspicuously omits the portions of the *Goodson* decision that expressly recognized exceptions to the requirement of mutuality of parties. In *Goodson*, this

Court held that it “is willing to relax the rule [of mutuality of parties] where justice would reasonably require it”, and specifically recognized the use of defensive collateral estoppel as an exception to the principle of mutuality where a plaintiff like Agic already had his day in court. 2 Ohio St.3d at 199, 200, 443 N.E.2d at 983, 985. Applying this clear precedent, the Eighth District held that Agic had the “opportunity to fully litigate the issue while represented by competent counsel”, and therefore held that the requirements for defensive collateral estoppel were satisfied. (Eighth District Sept. 25, 2014 Order, ¶¶ 19-20, 26.) Thus, *Goodson*, the only case cited by Agic to support his argument, runs contra to the very issue for which he cites it.

Since the *Goodson* decision, seven of Ohio’s Appellate Courts have addressed defensive use of collateral estoppel where a party has had “their day in court” on a specific issue, and each Appellate Court has ruled that the defensive use of collateral estoppel does not require mutuality of parties where the litigant had already had an opportunity to fully and fairly litigate the issue. *See Providence Manor Homeowners Ass’n, Inc.*, 12th Dist. Butler No. CA2011-10-189, 2012-Ohio-3532 at ¶¶ 40-41, 44 (defensive use of collateral estoppel deals away with the requirement of mutuality of parties); *Carpenter*, 196 Ohio App.3d at 388, 2011-Ohio-5414 at ¶ 30, 963 N.E.2d at 865 (recognizing exception to rule of mutuality for defensive collateral estoppel); *Cornell*, 3rd Dist. Allen No. 1-10-89, 2011-Ohio-4322 at ¶ 19 (husband was precluded from re-litigating a claim to a check after issue of marital property was decided by domestic relations court); *Mitchell*, 179 Ohio App.3d at 376, 2008-Ohio-3697 at ¶ 33, 902 N.E.2d at 45 (plaintiff was collaterally estopped from litigating cause of his injuries where he previously had an opportunity to litigate them in workers compensation action); *Frank*, 6th Dist. Lucas No. L-06-1185, 2007-Ohio-1324 at ¶ 15 (plaintiff’s criminal conviction collaterally estopped her from re-litigating cause of automobile accident); *Hoover*, 2nd Dist. Greene No. 2003-CA-46, 2004-Ohio-

217 at ¶ 17 (findings in workers compensation trial collaterally estopped plaintiff from re-litigating cause of injury in subsequent civil suit); *Young*, 6th Dist. Lucas, No. L-03-1243, 2004-Ohio-1325 (plaintiff was precluded from re-litigating cause of her injury where previously decided by the BWC and not appealed); *Michaels Bldg. Co.*, No. C.A. 13061, 1987 WL 25758, at *3 (9th Dist. Nov. 25, 1987) (nonmutuality 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).

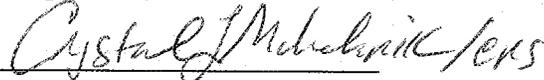
This matter warranted the use of defensive collateral estoppel, as Agic not only had the opportunity, but did in fact, fully and fairly litigate the identical issue he is attempting to re-litigate here. (Eighth District Sept. 25, 2014 Order, ¶¶ 24-26.) Agic was represented in the prior action by competent counsel, and as the plaintiff in that action, carried the burden to prove that his injuries were caused by the January 31, 2008 automobile accident. (Eighth District Sept. 25, 2014 Order, ¶¶ 24-26.) That issue is identical to the one in this case, where Agic has to show that his injuries were caused by the January 31, 2008 automobile accident in order to fall within the Insuring Agreement of the Policy. (Eighth District Sept. 25, 2014 Order, ¶¶ 24.) Agic has already litigated that issue and is bound by the prior jury's findings. Accordingly, National Union respectfully submits that Agic's appeal fails on the merits.

III. CONCLUSION

Agic fails to articulate a constitutional question or an issue of public or great general interest in this matter. Ohio law is clear on this issue, and the Eighth District's and Trial Court's rulings dismissing Agic's claims are consistent with this precedent. As there are no constitutional questions nor issues of public or great general interest, National Union respectfully

requests this Court deny discretionary review of this case.

Respectfully submitted,



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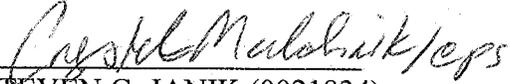
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