

Docket Number: 11-0397

OCT 14 2011

**IN THE SUPREME COURT OF APPEALS
OF THE
STATE OF WEST VIRGINIA**

KATY ADDAIR, Administratrix of the Estate of Gary Addair;
DAVID FARLEY; DEBORAH STOLLINGS; *et al.*,

Appellants/Plaintiffs,

- v. -

LITWAR PROCESSING COMPANY, *et al.*,

Respondents/Defendants.

APPELLANTS' SUPPLEMENTAL BRIEF

Underlying Case No. 04-C-252
Circuit Court of Wyoming County, WV

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ASSIGNMENT OF ERROR

1. **Did the Circuit Court err in applying the doctrine of collateral estoppel to prior determinations of the Workers' Compensation Commission?**

The Circuit Court committed reversible error by granting summary judgment and giving collateral estoppel effect to prior decisions of a quasi-judicial body. That error exists at four points. First, the Circuit Court erred because the issue of injury was not identical as to parties not involved in the Workers' Compensation proceeding. Second, the issue of injury was not identical because recovery under Workers' Compensation is predominately limited to remedial recovery for lost wages while a deliberate intent claim permits the recovery for all injuries an individual has suffered. Third, the Circuit Court erred in giving collateral estoppel effect to the determination of a quasi-judicial body because the structure of that body's proceedings prevents a full and fair consideration of any issue. Fourth, the application of collateral estoppel to Workers' Compensation proceedings is inconsistent with the express policy of the Workers' Compensation program.

The Court's decisions in *Vest v. Board of Education*, 193 W. Va. 222 455 S.E.2d 781 (1995); *Page v. Columbia Natural Res., Inc.*, 198 W. Va. 378, 480 S.E.2d 817 (1996) and *Abadir v. Dellinger*, 227 W. Va. 388, 709 S.E.2d 743 (2011), require the reversal of the Circuit Court's decision.

2. **Did the Circuit Court err in failing to consider the exceptions to the doctrine of collateral estoppel before dismissing the plaintiffs' deliberate intent causes of action?**

The Circuit Court committed reversible error by granting summary judgment without considering specific exceptions to the doctrine of collateral estoppel. The availability of additional and strong evidence for each of the plaintiffs, as demonstrated in a series of accompanying affidavits from the plaintiffs and expert witnesses, was sufficient to overcome the application of the doctrine. See *Tolley v. Carboline Co.*, 217 W.Va. 158, 164, 617 S.E.2d 508, 514 (2005). Likewise, application of the doctrine was inappropriate as the determinations in the prior compensation proceedings rested, in part, on fraud or misrepresentation.¹ See *Persinger v. Peabody Coal Co.*, 196 W. Va. 707, 474 S.E.2d 887 (1996).

¹ Appellants fully briefed for the Court the question of the fraud or misrepresentation underlying the employer's representations before the Workers Compensation Commission. Rather than repeat that argument, which has not changed, and further burden the Court, appellants incorporate and repeat it here as if fully stated.

3. **Did the Circuit Court err as a matter of law in granting summary judgment for certain defendants where those defendants failed to make the necessary showing under Rule 56 to demonstrate the absence of a genuine issue of material fact?**

The Circuit Court committed reversible error by granting summary judgment where none of the defendants supported their motions with the required submission of competent evidence in admissible form or provided an affidavit to address the relevant facts.

SUMMARY OF ARGUMENT

Workers' Compensation is a "remedial" process which provides a fast and efficient means to compensate an injured employee for lost wages. The procedural rules for the Workers' Compensation Office of Judges state at their outset:

The Worker's Compensation Office of Judges is provided with limited resources with which to resolve many thousands of protests filed each year. Frequently the protesting party fails to submit any evidence, offer any testimony, or provide any argument explaining the basis for the protest.

93 CSR § 1-3.2. This acknowledgement confirms, along with the lack of adherence to the Rules of Evidence, that Workers' Compensation provides a less formal approach to recover for a specific type of injury than the adversarial nature of fully adjudicated Circuit Court litigation. Significant distinctions exist between the two processes and policy reasons exist for the preservation of those differences. Applying a preclusive effect will undercut those policies and convert Workers' Compensation proceedings into a fully litigious process.

The Circuit Court, in giving preclusive effect to various Workers' Compensation proceedings, erred as a matter of law. The Circuit Court applied the collateral estoppel doctrine without confirming that both proceedings involved identical issues. The Circuit Court further

erred in failing to acknowledge or consider this Court's reservations against applying the doctrine of collateral estoppel to quasi-judicial proceedings and also erred in failing to examine the doctrine underlying the Workers' Compensation process. Finally, the Circuit Court erred in failing to recognize the exceptions to the collateral estoppel doctrine.

This Court should also take this opportunity to remind members of the bar of the fundamental obligations of a moving party in seeking summary judgment under Rule 56. The Circuit Court erred in granting motions which the moving parties simply failed to properly substantiate as a matter of law. For all practical purposes, it is impossible for a party to demonstrate the absence of any unresolved issue of material fact when that party identifies the target of its motion in a footnote and then fails to provide either a supporting affidavit or memorandum of law.

STATEMENT REGARDING ORAL ARGUMENT

The Court has notified the parties that it will hear oral argument pursuant to Rule of Appellate Procedure 20.

STATEMENT OF FACTS

Plaintiffs, mindful of the Court's directive that the "reiteration of prior filings is highly discouraged," *see* Order, dated Sept. 8, 2011, expressly adopt and incorporate the discussion of the relevant facts specified within plaintiffs' "Petition for Appeal," dated Dec. 3, 2010 ("Petition"). The following facts merely serve to augment those previously placed before the Court or to orient the necessary facts to the arguments made below.²

² Similarly, appellants repeat and reincorporate the legal arguments that they made in the Petition. Appellants presume that the Court does not wish to review the same legal argument relying on the same cases. Appellants, accordingly, have attempted to streamline and focus their arguments below

The underlying action involves the adverse health impacts associated with perchloroethylene (“PCE” or “Perc”), which is used in coal float-sink labs to determine the washability of the coal.³ See A-44-48. Float-sink testing, generally speaking, involves the placement of coal samples into open vats or containers of PCE and allowing the specific gravity of the chemical to separate the samples between the “float,” what floats to the top, and the “sink,” what drops to the bottom. The separated portions of the sample are then removed from the vats and dried, removing the chemical from the sample, and then weighed for the float/sink ratio. See, e.g., A289-91, A-298-300. Typically, the samples are then pulverized and other testing is performed.

The nine appellants, Gary Addair, Larry Hatfield, Steven Hylton, Kenneth King, Terry Martin, Clarence McCoy, Mitchell McDerment, Roger Muncy and William Weese (collectively, “appellants”), worked in various float-sink labs. In opposition to the underlying motions for summary judgment, appellants submitted individual affidavits which highlighted with detail their work experience in the relevant labs and the conditions that they endured. See, e.g., A288-96, A-329-36, A-661-70. For example, at Virginia Crews Coal (VCC), employees came into direct contact with perchloroethylene during the float-sink testing when the chemical would get on individual employees’ hands or splash on their clothing. A-292 at ¶ 42. Employees, including

and have provided the Court with additional authority or highlighted more recent decisions. This Court ruled on *Abadir v. Dellinger*, 227 W.Va. 388, 709 S.E.2d 743, 748 (2011), after the submission of the Petition.

³ Plaintiffs in *Addair* commenced the action in September 2004, as a class action on behalf of the class of individuals who performed or work in the vicinity of float-sink testing against two sets of defendants. First, plaintiffs asserted a deliberate intent claim against defendant employers. Second, plaintiffs alleged product liability (failure to warn) and medical monitoring claims against the chemical manufacturers and distributors. A-30-56. Judge Hrko subsequently ruled that plaintiffs could not proceed as a class for the deliberate intent cause of action as each claim is different and specific to the employer and employee. See A-22-29. In March 2009, plaintiffs moved to amend the complaint, in part, to reflect that decision and allege individual deliberate intent claims on behalf of each plaintiff. That motion remains pending before the Circuit Court. Various defendants then moved for summary judgment based on the application of the collateral estoppel doctrine and the presumption that the complaint would be amended.

Mr. Muncy and Mr. Addair, also constantly inhaled perchloroethylene-filled air. *See Id.* at ¶ 43. Perchloroethylene fumes filled the lab by escaping from the vats used for float-sink testing, venting from the ovens used to dry float samples (employees had to open the ovens to flip over the samples resulting in the venting of heated PCE into the work area), off gassing from the PCE-soaked samples resting on burlap bags left in any available corner, as well as from the crushing and pulverizing of dried samples. *See* A-293 at ¶ 45. Appellants also submitted expert affidavits detailing the hazards of both the chemical and how exposure exceeded permissible limits. *See, e.g.,* A302-28, A-337-51, A-773-88. Finally, in opposing the initial motions for summary judgment, appellants also submitted expert affidavits connecting appellants Muncy, Addair and McCoy's health ailments with their exposure to PCE. *See* A-516-42.

Appellants' submissions remain unrefuted. None of the defendants submitted to the Circuit Court an affidavit from anyone with first-hand knowledge of the labs⁴ and none of the defendants submitted an expert report.

Each appellant brought a deliberate intent cause of action against certain past employers for specific injuries that arose from their exposure to perchloroethylene and other chemicals. Similarly, prior to the commencement of this case, each gentleman filed a Workers' Compensation claim. Each appellant submitted a "Report of Occupational Injury," signed by a doctor, to commence each claim. *See, e.g.,* A-128, A-192. These appellants submitted their Workers' Compensation claims against specific individual employers. For more than half of the appellants', the defendant seeking to apply the collateral estoppel doctrine for dismissal of the appellants' deliberate intent claim was not the named employer for the Workers' Compensation claim. *See, e.g.,* A-676 (showing that Steven Hylton filed his compensation claim against

⁴ Indeed, none of the moving defendants submitted a single affidavit of any kind in support of their motions for summary judgment.

Procession Testing and that not one of the three defendants who sought summary judgment against Mr. Hylton was a party in that protest).

Plaintiff	Moving Defendant/Respondent	Workers Compensation Employer
G. Addair	Virginia Crews Coal <i>SGS North America</i> ⁵	Virginia Crews Coal Commercial Testing
L. Hatfield	Standard Laboratories <i>Buffalo Mining</i>	Standard Laboratories
S. Hylton	<i>Noone Associates</i> <i>SGS North America</i> <i>Westmoreland Coal</i>	Procession Testing
K. King	Standard Laboratories	Standard Laboratories
T. Martin	Noone Associates <i>SGS North America</i>	Noone Associates
C. McCoy	Independence Coal Co.	Independence Coal Co.
M. McDerment	Standard Laboratories	Standard Laboratories
R. Muncy	Virginia Crews Coal	Virginia Crews Coal
W. Weese	<i>Buffalo Mining</i>	Elkay Mining

Each claim moved through the process and, each claim was eventually denied. *See, e.g.*, A-133-52, A-158-80, A-218-42.

The Administrative Law Judges (ALJ), in their reviews, presented a reoccurring ground for denying the claims. More frequently than not, the ALJ never reached the question of the injury which each appellant claimed. Instead, consistent with apparent frequent practice, the various ALJs noted a simple absence of relevant evidence sufficient to sustain the claim. For example, in review of the denial of Roger Muncy's claim, the ALJ wrote:

[T]here is no documentation, other than Dr. Kostenko's conclusory statements, as to what the claimant was actually exposed, under what conditions, in what amount, and for how long. There is no job description, employment time records,

⁵ The defendants that were not parties in the earlier Workers' Compensation claim are identified with italics.

nor other documentation regarding the claimant's actual amount of time spent doing float sink work and the amount of exposure and at what level of exposure.

A-148. This finding parallels the determination of the McCoy ALJ, who wrote:

There is a lack of information regarding the claimant's actual workplace exposure. His workplace has not been studied, nor has there been provided a clear indication of how much time he spent in the laboratory on a daily basis or what his job duties were. There is also a complete lack of documentation of the claimant's actual physical condition. This claim is not compensable because the claimant's symptoms and medical problems cannot be fairly traced to his employment as the proximate cause.

A-465. Similar language exists in most of the other ALJs' determinations. *See, e.g.*, A-274, A-681-82, A-761. The ALJs entered these decisions during the pendency of this litigation. Defendants⁶ subsequently used these decisions as the basis for motions for partial summary judgment in 2009 and 2010 to dismiss the deliberate intent claims of the appellants. Following oral argument, the Circuit Court granted those motions in an Order entered on August 4, 2010 (the "August 4 Order").

The Circuit Court Decision

The Circuit Court anchored its decision on two of the four elements of the doctrine of collateral estoppel. Initially, the lower court held that the plaintiffs had had a full and fair hearing before the Workers' Compensation Commission (WCC). In support of this finding, the lower court states that plaintiffs "were represented by counsel, conducted written discovery, took depositions and obtained expert witnesses; virtually identical to all of the procedures in a civil

⁶ Defendants Virginia Crews Coal Company (VCC), Independence Coal Company, Inc., Rawl Sales & Processing Co., Buffalo Mining Co., and Noone Associates, Inc. (Noone) filed motions for summary judgment and defendants SGS North America (SGS), Standard Laboratories (Standard Labs) and Westmoreland Coal Company joined those motions.

action.”⁷ A-12. The Circuit Court also determined that “the procedures set forth in Workers’ Compensation claims are substantially similar to those used in a court.” A-14. Next addressing the identity of issues, the Circuit Court held that plaintiffs “weren’t required to prove which employer was responsible for their injuries to be compensable; the only proof required by the Plaintiff was to prove their injuries are causally connected to employment, regardless of their employer.” A-12 (emphasis added).

The lower court concluded that the WCC had addressed the identical issue of injury which was before the court. The lower reviewed the various administrative decisions and concluded that the Workers’ Compensation cases had decided “[t]he issue of whether the Plaintiffs had suffered a serious compensable injury or compensable death as a direct and proximate result of the specific unsafe working condition or employment” *Id.* at 16. The court, in turn, viewed this as precluding the plaintiffs from re-litigating the issue of whether the plaintiffs had suffered an injury, *id.* at 13, which prevented them from meeting their burden of proof on a deliberate intent cause of action. *Id.* at 17-18. At no point did the court identify what injury was before the WCC, what injury each plaintiff now alleged or how those chemical exposure injuries were identical. *See generally Id.* (speaking only in terms of injury); *id.* at 2-9 (providing the finding of facts specific to each plaintiff, but never mentioning the nature of their injury). In assessing whether to give preclusive effect to a quasi-judicial proceeding, the Circuit Court focused on the opportunity for discovery and the underlying burden of proof. *Id.* at 15-16. In *dicta*, the lower court further justified its application of the collateral estoppel doctrine by suggesting that failure to apply the doctrine could make the defendants subject to “greater

⁷ The Court’s determination lacks support within the record. None of the plaintiffs conducted depositions or served interrogatories in their Workers’ Compensation proceeding. *See, e.g.*, A150-52; A-176-79 (reflecting discovery provided to the ALJs).

liability.” *Id.* at 18. Based on this analysis, the lower court granted summary judgment against 12 different plaintiffs.

The Circuit Court originally granted summary judgment as to 12, not 9, plaintiffs in this case. See A-1-8 (providing the factual grounds for summary judgment against 12 plaintiffs). In dismissing the deliberate intent claims of James Jones, Bobby Maynard and Carl McPeake, the lower court, expressly identified (1) the employer of each of these plaintiffs, (2) when they allegedly filed a Workers’ Compensation claim, (3) when the Commission purportedly denied that claim, (4) how the Commission purportedly found that the “alleged injuries had no causal connection to chemical exposure,” (5) confirmed the denied appeal of that determination; and (6) acknowledged the existence of a final order. See A-6-7 (providing the purported facts for these three plaintiffs). No defendant, however, had served or filed a motion to dismiss the deliberate intent claims of Jones, Maynard or McPeake, and no one had submitted any factual information to the Circuit Court on any of these three plaintiffs. The Circuit Court subsequently recognized this “clerical or similarly inadvertent error,” see “Response of Standard Laboratories, Inc. to Petition for Appeal,” served Jan. 14, 2011, at 6, granted plaintiffs’ Rule 60 motion and set aside its prior dismissal of the deliberate intent claims of Jones, Maynard and McPeake. See A-19-21.

Appellants now request that the Supreme Court, upon review, take similar action and reverse the Circuit Court’s August 4 Order in its entirety.

ARGUMENT

I

THIS COURT'S *DE NOVO* REVIEW NECESSITATES A REVERSAL OF THE LOWER COURT'S DECISION

This Court's independent review of the Circuit Court's decision should result in a full reversal of the decision below. This Court conducts a *de novo* review of an underlying decision to grant summary judgment. See *Coleman Estate ex rel. Coleman v. R. M. Logging, Inc.*, 700 S.E.2d 168, 171 (2010); *Painter v. Peavy*, 192 W.Va. 189, 190, Syllabus Point 1, 451 S.E.2d 755, 756 (1994). Similarly, the Court applies a *de novo* review to questions of law. *Hartley Marine Corp. v. Mierke*, 196 W.Va. 669, 673, 474 S.E.2d 599, 603 (1996). This Court has also repeatedly confirmed that "a motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." *Id.*; *Aetna Casualty & Sur. Co. v. Federal Ins. Co.*, 148 W. Va. 160, 160, Syllabus Point 3, 133 S.E.2d 770, 771 (1963).

A full review of the Circuit Court's decision confirms the need to reverse each and every aspect of the August 4 Order. Initially, under the four-pronged test for collateral estoppel, summary judgment was incorrect, as a matter of law, because the issue resolved before the Workers' Compensation Commission was not identical to the deliberate intent cause of action that each plaintiff independently asserts. Further, the Circuit Court erred in applying estoppel effect to a quasi-judicial proceeding as the remedial aspect of the Workers' Compensation proceeding did not provide the opportunity for a full and fair litigation of the relevant issue. The Circuit Court's rejection of the application of exceptions to the collateral estoppel doctrine further necessitates the reversal of the decision below as a matter of law. Finally, the basic

inadequacies of certain defendants' motion, where they simply ignored their burden of proof, fully justifies the reversal of certain aspects of the August 4 Order.

The Court's *de novo* review permits the Court to review the record in its entirety and test the legal basis for the granting of summary judgment. As the Circuit Court's decision reflects, appellants' primary opposition to defendants' motion for summary judgment centered on the quasi-judicial nature of the Workers' Compensation proceedings and how they did not permit a full and fair hearing and how the issue considered was not identical. *See, e.g.*, A-1-18; A-575. Appellants also argued that the availability of additional evidence justified withholding preclusive effect. *See, e.g.*, A-581-82. Appellants further argued that misrepresentations from the defendants' expert, which certain ALJs expressly relied upon, eliminated any valid ground for applying the collateral estoppel doctrine to the tainted Workers' Compensation protest determinations. *See* A-583-84. Plaintiff also challenged the adequacy of certain defendants' motion papers as insufficient on their face. *See* A-124 at 125, A-576.

II

THE CIRCUIT COURT ERRED IN APPLYING THE COLLATERAL ESTOPPEL DOCTRINE

The application of collateral estoppel in this case to the prior Workers' Compensation claims constitutes reversible error as a matter of law. Collateral estoppel is designed to foreclose relitigation of issues in a second suit which have actually been litigated in the earlier suit even though there may be a difference in the cause of action between the parties of the first and second suit. *See Abadir v. Dellinger*, 227 W.Va. 388, 709 S.E.2d at 748 (2011) (quoting *Conley v. Spillers*, 171 W. Va. 584, 301 S.E.2d at 217 (1983)(Syl. Pt. 2)). Collateral estoppel will bar a claim only if four conditions are met: "(1) The issue previously decided is identical to the one

presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.” *Holloman v. Nationwide Mut. Ins. Co.*, 217 W.Va. 269, 617 S.E.2d 816 (2005).

The Court has repeatedly clarified the limited application of the collateral estoppel doctrine in a proceeding. This Court discourages the use of the doctrine offensively. See *Tri-State Asphalt Products Inc. v. Dravco Corp.*, 186 W. Va. 227, 230-31, 412 S. E.2d 225, 228-29 (1991). The Court has also noted repeatedly that it is “wary” of applying the doctrine to “quasi-judicial determinations,” believing that “only rarely, if at all, will administrative proceedings provide the same full and fair opportunity to litigate [a] matter as will a judicial proceeding” See *State ex rel McGraw v. Johnson & Johnson*, 226 W. Va. 677, 688, 704 S.E.2d 677, 688 (2010) (quoting *Page v. Columbia Natural Res., Inc.*, 198 W. Va. 378, 393, 480 S.E.2d 817, 832 (1996)). This Court has also repeatedly affirmed that “[t]he central inquiry on collateral estoppel is whether a given issue has been actually litigated by the parties in the earlier suit.’ Whether those issues could have been litigated is not important; they actually must have been litigated.” *Abadir v. Dellinger*, 227 W. Va. 388, 709 S.E.2d 743, 748-49 (2011) (authority omitted)(emphasis added).

The Circuit Court erred in utilizing the collateral estoppel doctrine with the prior denial of the compensation claims of each appellant. The Court erred in two ways when it found that the injuries presented to the WCC and in the instant case were identical. First, it was error to find that the denial of compensation for one employer applied to all employers. Second, it was error for the Circuit Court to view injury in a general context. Further, the Circuit Court should

not have held that each appellant had a full and fair hearing before the quasi-judicial board without having considered the distinctions in process, or how the application of collateral estoppel would significantly undercut the doctrine underlying Workers' Compensation proceedings.

A. The Issue of Injury was not Identical Between Proceedings

Defendants' failure to meet the first element of their burden of proof necessitates a reversal of the Circuit Court's decision. Courts may apply collateral estoppel only if, in part, "the issue previously decided is identical to the one presented in the action in question." See *State v. Miller*, 194 W.Va. 3, 9, 459 S.E.2d 114, 120 (1995) (emphasis added). An issue "is not identical if the second action involves different facts, legal standards or procedures." *Id.* at 10, 459 S.E.2d at 121. See also *City of Huntington v. Bacon*, 196 W.Va. 457, 463, 473 S.E.2d 743, 749 (1996); *Miller*, 194 W. Va. at 10, 459 S.E.2d at 121. "Therefore, not only the facts but also the legal standards and procedures used to assess them must be similar." See *Miller*, 194 W. Va. at 10, 459 S.E.2d at 121. This Court has consistently reiterated the need for all aspects of the proceedings to be identical. See *Holloman v. Nationwide Mut. Ins. Co.*, 217 W.Va. at 276, 617 S.E.2d at 823; *Frederick Management Co. v. City Nat'l Bank*, No. 35438, 2010 WL 4723412 (W. Va. 2010) (holding that no identity of issues existed between a prior determination addressing the rights of a sub-tenant and an element of the breach of contract claim).

This Court reiterated its standard earlier this year as to a non-party entity asserting the doctrine of collateral estoppel. Citing *Conley*, the Court confirmed that:

Whether a stranger to the first action can assert collateral estoppel in the second action depends on several general inquiries: Whether the issues presented in the present case are the same as presented in the earlier

case; whether the controlling facts or legal principles have changed substantially since the earlier case; and, whether there are special circumstances that would warrant the conclusion that enforcement of the judgment would be unfair.

Abadir v. Dellinger, 227 W. Va. 388, 709 S.E.2d 743, 748 (2011). An examination here of both the parties and the underlying issue confirms the absence of conformity of fact, legal standard and procedure.

i. **Different Parties Prevent Identical Facts**

The Circuit Court erred as a matter of law in dismissing the deliberate intent claims of five of the individual appellants through the application of collateral estoppel to Workers' Compensation determinations where the defendant played no part. The lower court's analysis is fundamentally unsound. Rather than determining whether or not the defendants, in making their Rule 56 motions, had demonstrated that the relevant facts, legal standard and procedure were identical, the Circuit Court adopted an all-inclusive view. The lower court wrote that "the Plaintiffs weren't required to prove which employer was responsible for their injuries to be compensable; the only proof required by the Plaintiff was to prove their injuries are causally connected to employment, regardless of their employer."⁸ A-12. The Circuit Court then held that appellants' failure to prevail on their Workers' Compensation claim as to one employer would preclude a demonstration of injury for any and all employers. *Id.*

The lower court's analysis disregards a point which the defendants made in opposing grouping the employers together in a class, that "the circumstances of any single employee's

⁸ To the extent that the Circuit Court relied on W. Va. Code § 23-4-1(f) to reach this determination, the Court looked to a six-part statutory analysis that is different from the causation requirement underlying appellants' deliberate intent claims. This distinction further justifies the Court's usual reluctance to apply collateral estoppel effect to quasi-judicial proceedings.

claims are unique to the specific employer, and that no individual deliberate intent claim between an employee and his employer(s) can determine the validity of other circumstances of other deliberate intent claims.” A-25. Consistent with the defendants’ own prior argument, the rejection of appellant Hylton’s Workers’ Compensation claim against Precision Testing, would have been “unique” to that employer and could not have any preclusive effect as to SGS North America, Noone Associates and Westmoreland Coal, who were not parties to that claim proceeding, for whom no evidence was entered and regarding whom plaintiff provided no information. Accepting defendants’ own argument, the deliberate intent claims of appellants Addair, Hatfield, Hylton, Martin and Weese must be reinstated with respect to non-parties to the proceedings because the underlying facts specific to the operations at those employers’ labs and each plaintiff’s exposure to hazardous chemicals will not be identical to the employer who appeared in the administrative proceeding. In sum, no ground exists to presume, as the lower court did, that a finding of no evidence of injury arising from exposure in one proceeding bars any finding of injury with respect to any other employer.

ii. **Different Scopes of Injuries Defeat Identical Issues.**

The very narrow focus of Workers’ Compensation claims confirms a lack of identity of issues. Workers’ Compensation solely replaces an individual employee’s lost wages in relation to the degree of being disabled from work. “Workers’ Compensation has never been intended to make the employee whole – it excludes benefits for pain and suffering, for loss of consortium, and it provides a cap on wage benefits.” *Fitzgerald v. Fitzgerald*, 219 W.Va. 774, 781, 630 S.E.2d 866, 873 (2006) (authority omitted). W. Va. Code § 23-2-6 “expressly provides employers with ‘immunity from common lawsuits’ and ‘litigation’ for common-law claims, such

as so-called ‘mental-[anguish]’ negligence claim” *Bias v. Eastern Assoc. Coal Corp.*, 220 W. Va. 190, 196, 640 S.E.2d 540, 546 (2006). Compensable injuries under Workers’ Compensation, accordingly, are injuries that result in lost wages. Conversely, this Court created, and the Legislature subsequently ratified and narrowed, the deliberate intent exception which permits a broader range of injuries for which the plaintiff can recover damages. A cause of action for deliberate intent expressly looks beyond the lost wages that an individual can recover and opens the door to additional possible recoveries for all injuries suffered, so long as the plaintiff meets a five-part test. W. Va. Code § 23-4-2(d)(2). *See also Heine v. Simon*, 702 N.W.2d 752, 762 (MN 2005) (declining to apply collateral estoppels and confirming that the requirements “for determining compensation loss in [a] Workers’ Compensation proceeding are different from those used to determine wage loss in a tort action”).

The distinction between Workers’ Compensation claims and a deliberate intent cause of action prevents the application of collateral estoppel to the denial of the compensation claims. Workers’ compensation permits recovery for injuries that result solely in lost wages due to the injured workers’ degree of disability with respect to work and applied with strict disability guidelines. Deliberate intent, conversely, allows for the recovery of all manner of damages for any injury proximately caused by the subject conduct of the employer, as well as, recovery for lost wages, minus any set-offs paid out in workers’ compensation, of course. For a deliberate intent plaintiff to demonstrate pain and suffering, loss of consortium, or any other injury, he will necessarily have to introduce additional facts and present additional legal arguments than those involved in what is essentially a claim for lost wages before the Workers’ Compensation Commission. The deliberate intent plaintiff also has the opportunity for his/her damages to be determined by a jury as opposed to rigid set of disability guidelines. The appellants have

identified some of their injuries, *see, e.g.*, A-294, A-299-300, A-667-68, A-770-71, A-796, and the damages associated with short-term memory loss, loss of muscle control, depression, lack of coordination and other personal injuries look well beyond remedial compensation for lost employment. As the very injuries are not identical, no preclusive effect should be applied.⁹ The involvement of different facts and different legal arguments from what was used in the quasi-judicial proceeding bars the application of the collateral estoppel doctrine.

B. Workers' Compensation Protests, as Quasi-Judicial Administrative Proceedings, Defy a Full and Fair Hearing

This Court has repeatedly signaled its reluctance to provide preclusive effect to quasi-judicial administrative proceedings. The Court has fashioned a supplemental three-part test and will give preclusive effect to a hearing body's determination, after examining: "(1) whether the body acts in a judicial capacity; (2) whether the parties were afforded a full and fair opportunity to litigate the matters in dispute; and (3) whether applying the doctrine is consistent with the express or implied policy in the legislation which created the body." *Page v. Columbia Natural Resources, Inc.*, 198 W.Va. at 392, 480 S.E.2d at 831. For good reason, however, this Court has not applied collateral estoppel effect to Workers' Compensation proceedings.

This Court has typically emphasized the distinction in procedure between administrative bodies and courts to find that collateral estoppel does not apply to quasi-judicial bodies because the doctrine would be inconsistent with the policy specific to the administrative proceeding. In *Vest*, the Court recognized that "the Legislature designed the grievance process to be simple and

⁹ Indeed, the distinction between the type of injuries further confirms that the issue of injury was not fully and fairly litigated before the Workers' Compensation Commission. Even if each appellant had placed before the Commission extensive evidence demonstrating their injuries and their cause, they also would have limited the introduction of evidence to evidence that demonstrates lost wages. As the Commission cannot provide damages for pain and suffering, loss of consortium or other tort injuries, no reason would have existed for appellants to provide that information.

expeditious. Consequently, the process is streamlined and lacks many of the adversarial accouterments found in judicial and Commission proceedings.” This Court continued that “[b]y not imposing a collateral bar, we reinforce the Legislature’s purpose ... of creating a simple and expeditious procedure for resolving employees’ grievances.” *Vest v. Board of Education*, 193 W. Va. at 227, 455 S.E.2d at 786.

The Court’s decision in *Vest* does not stand alone. In *Page v. Columbia Natural Resources, Inc.*, this Court declined to give collateral estoppel effect to a quasi-judicial body’s determination. In that case, counsel represented Ms. Page in her application for unemployment benefits, but presented no evidence and her application was ultimately denied because the Court found, in reversing the ALJ, that Ms. Page had been terminated for gross misconduct. *Id.* at 392, 480 S.E.2d at 831. Ms. Page subsequently commenced a retaliatory discharge action under the West Virginia Human Rights Act. *Id.* at 384, 480 S.E.2d at 823. The Circuit Court declined to give preclusive effect to the earlier denial of unemployment benefits and this Court affirmed that decision. In explaining its decision, the *Page* Court wrote:

it is appropriate to once again reject a collateral bar here to reinforce the Legislature’s purposes in designing the employment security claim process as a speedy and relatively informal process. Moreover, in view of the relaxation of procedural rules and evidentiary requirements in the administrative proceedings—along with the discovery limitations and prohibitions and the frequent attention to specific policy goals in such proceedings -- we are of the opinion that only rarely, if at all, will administrative proceedings provide the same full and fair opportunity to litigate matters as will a judicial proceeding involving the complexity, intensity, and specific inquiries common to a wrongful discharge case.

Id. at 393, 480 S.E.2d at 832 (emphasis added). The *Page* Court further noted that “where ‘the procedures available in the first court may have been tailored to the prompt, inexpensive

determination of small claims,' a compelling reason exists not to apply collateral estoppel." *Miller*, 194 W.Va. at 10, 459 S.E.2d at 121 (quoting *Restatement (Second) of Judgments* at 279).

Federal courts in West Virginia have followed this Court's lead and decline to give preclusive effect to quasi-judicial proceedings. See *Taylor v. City Nat'l Bank*, 642 F. Supp. 989 (S.D.W.Va. 1986). The federal district court recently followed the *Page* decision and once again denied collateral estoppel effect to a denial of unemployment compensation benefits. See *Osborne v. King*, 570 F. Supp.2d 839, 846-49 (S.D.W.Va. 2008). There, the employee was disqualified from receiving benefits after a hearing involving testimony from various witnesses indicated that the employee had been discharged for using an inappropriate racial slur. *Id.* at 843. Mr. Osborne subsequently commenced a civil rights action alleging a violation of his due process rights and defendants moved for summary judgment on the grounds that the prior determination of the West Virginia Bureau of Employment precluded the re-litigating of the findings of fact resulting from the unemployment compensation proceeding. *Id.* at 843-44. The federal court relied on *Page* to deny the motion for summary judgment. In doing so, the federal court looked to the underlying policy, the third *Vest* element, and concluded:

it is evident the West Virginia court was also concerned that the specter of issue preclusion might cause unemployment compensation proceedings to evolve into heavily contested, time consuming, and expensive affairs. That type of development would significantly undermine a carefully crafted legislative scheme designed to (1) provide a "reasonable and effective" hand up to displaced workers, and (2) reduce "the hazards of unemployment."

Osborne v. King, 570 F. Supp.2d at 848 (citing W. Va. Code § 21A-1-1). The policy consideration and rationale specified in *Page* and *Osborne*, still applies and directs the reversal of the decision below.

i. No full and fair hearing occurred.

Workers' Compensation proceedings fall squarely within the realm of quasi-judicial determinations to which this Court will not give preclusive effect. Workers' Compensation is "remedial" in its basic nature. *State ex rel. Beirne v. Smith*, 214 W.Va. 771, 775, 591 S.E.2d 329, 334 (2003). "[T]he primary objectives of the workers' compensation system ... are to provide benefits to an injured claimant promptly and to effectuate his or her return to work at the earliest possible time" *Fitzgerald v. Fitzgerald*, 219 W.Va. at 781, 630 S.E.2d at 873 (authority omitted). Damage calculations are subject to a statutory scheme. *Id.* The procedural rules reflect the more relaxed nature of the Workers' Compensation protest and fail to provide the safeguards inherent to a fully litigated matter before a court of law. The ALJ, for example, is not bound "by the usual common law or statutory rules of evidence." 93 CSR § 1-3.6(A).

The general comments to the procedural rules further reflect the imprecise nature of the protest. As those rules acknowledge, "[f]requently the protesting party fails to submit any evidence, offer any testimony or provide any argument explaining the basis for the protest." 93 CSR § 1-3.2. At the other extreme, the rules acknowledge that the claimant should not be required to submit new evidence on those occasions where the "Order of the Commission is incorrect on its face." *Id.* In short, Workers' Compensation protests lack many of the indicia of adversarial litigation.

The Workers' Compensation proceedings are inconsistent with the "full and fair opportunity to litigate the matters in dispute." In seeking to balance the desire to provide rapid remedial compensation to the employee with the exemption to tort liability offered to the employer, compensation proceedings are structured to gloss over the extensive discovery process

of litigation and the procedural protections offered both sides in full litigation. The looseness in the introduction of evidence promotes the underlying policy for Workers' Compensation of quick assessment and compensation for wages for the employee and limited liability for the employer. As detailed within *Page*, the tailored nature of Workers' Compensation proceedings is inconsistent with the collateral estoppel doctrine and, accordingly, this Court should reverse the Circuit Court's dismissal of the appellants' deliberate intent claims.

Further, "full and fair" opportunity, within the context of a quasi-judicial proceeding, requires not only the opportunity to litigate an issue, but the actual full, fair and complete litigation of that issue. "The central inquiry on collateral estoppel is whether a given issue has been actually litigated by the parties in the earlier suit.' Whether those issues could have been litigated is not important; they actually must have been litigated." *Abadir v. Dellinger*, 227 W. Va. 388, 709 S.E.2d 743, 748-49 (2011)(authority omitted)(emphasis added). In each case here, however, the appellants' injuries and the causation of those injuries through chemical exposure was never fully litigated. Though represented by counsel, appellants did not conduct any discovery of their employers, did not conduct any depositions, did not seek testimony and did not offer the testimony of the employee.¹⁰ Consistent with the "frequent" approach of employees protesting the denial of a claim, the question of whether each or any appellant was injured as the directed result of exposure to PCE was not fully litigated before the Workers' Compensation Commission. The lack of a full and fair hearing on the issue in the quasi-judicial proceeding

¹⁰ The Circuit Court's determination that the appellants had a full and fair opportunity to litigate the issue of injury is factually unsound. The Circuit Court believed that the plaintiffs "were represented by counsel, conducted written discovery, took depositions and obtained expert witnesses; virtually identical to all of the procedures in a civil action." A-12. Although each appellant did have legal representation, none of the appellants served interrogatories on their employer, none of the appellants served document requests on their employers, none of the appellants noticed or conducted depositions of their employers, none of appellants subpoenaed witnesses for testimony and only a few appellants obtained an independent medical expert. See A-150-52 (listing the discovery provided), A-176-79, A-239-42, A-257-60, A-276-79, A467-69, A-632-35, A-684-87, A-763-64.

prevents the application of collateral estoppel to this issue in a court of law. For this reason, the appellants request that the Court reverse the decision of the Circuit Court.

ii Underlying policy opposes the application of collateral estoppel.

The federal court's decision in *Osborne*, confirms that the policy underlying Workers' Compensation proceedings prevents the application of collateral estoppel to ALJ determinations. As that court observed: "the specter of issue preclusion might cause unemployment compensation proceedings to evolve into heavily contested, time consuming, and expensive affairs. That type of development would significantly undermine a carefully crafted legislative scheme designed to (1) provide a 'reasonable and effective' hand up to displaced workers, and (2) reduce 'the hazards of unemployment.'" *Osborne v. King*, 570 F. Supp.2d at 848 (citing W. Va. Code § 21A-1-1).

Should the Court affirm the decision below, the decision in *Osborne* shall prove prophetic. Individuals who commence a deliberate intent cause of action and file a Workers' Compensation claim will be forced to fully litigate their Workers' Compensation claim with full interrogatories, multiple depositions, extensive document requests and a series of expert reports and place all of this before an already overworked WCC and body of administrative law judges. The review of all of this information will come before individuals under-equipped to handle such cases and within a process where the rules of evidence are not strictly followed. All of this will happen not because the individual wishes to insure that he receives the wages that he lost due to his injury, but solely to preserve and protect his deliberate intent claim. The policy underlying Workers' Compensation proceedings will collapse, and expedited, remedial recovery for the

worker will disappear. Applying the collateral estoppel doctrine, accordingly, would be inconsistent with the relevant policies.

C. Exceptions to the Doctrine Prevent Its Application Here

This Court has recognized an exception to the doctrine of collateral estoppel and discourages application of the doctrine in West Virginia when significant additional evidence is available. For a nonmoving party to “overcome the application of collateral estoppel, [t]here must be additional and strong fact evidence, which has not been shown to have been supplied to the court.” *Tolley v. Carboline Co.*, 217 W.Va. 158, 164, 617 S.E.2d 508, 514 (2005)(citing *Molinaro v. Fannon/Courier Corp.*, 745 F.2d 651, 655 (Fed. Cir.1984)). When looking at the findings of a quasi-judicial agency, rather than another court, West Virginia case law indicates that the individual must have had not only the opportunity to litigate the issue fully, but did indeed litigate the issue. See *Wheeling-Pittsburgh Steel Corp. v. Rowing*, 205 W. Va. 286, 296, 517 S.E.2d 763, 773 (1999); *Rowan v. McKnight*, 184 W. Va. 763, 764, 403 S.E.2d 780, 781 (1991). Relitigation of an issue is not precluded when “[a] new determination of the issue is warranted by differences in the quality or extensiveness of the procedure followed in two courts.” *Miller*, 194 W.Va. at 10, 459 S.E.2d at 121 (authority omitted).

Appellants would not have introduced much of their relevant evidence in the first proceeding. Workers’ Compensation proceedings, as discussed above, principally address lost wages, not pain and suffering and other standard tort injuries. The impact of chemical exposure on appellants’ daily lives would not have been relevant to the Workers’ Compensation Commission. These common tort injuries solely involve injuries recoverable under the deliberate intent provision and constitute additional and strong fact evidence of injury. See, e.g.,

A-288-296 (providing details concerning conditions within the lab, the absence of protective gear, the extent of exposure to PCE and subsequent ailments which plaintiff attributes to that chemical exposure); A-329-336 (same); A-661-70 (same); A-765-72 (same).

Appellants demonstrated the availability of additional and strong factual evidence to the Circuit Court. The affidavits submitted to the Circuit Court from the individual appellants, the industrial hygenist's expert affidavits detailing the employers' violations of government regulations and the resulting level of exposure of appellants to PCE and the affidavits linking that exposure to the injuries that certain appellants sustained fills in each and every gap that existed before the Workers' Compensation Commission. Appellants' ability to come forward with sufficient evidence on each point constitutes the additional, strong factual evidence necessary to support the exception to the collateral estoppel doctrine.

III

SUMMARY JUDGMENT WAS INAPPROPRIATE AS A MATTER OF LAW BECAUSE CERTAIN DEFENDANTS SIMPLY IGNORED THEIR BURDEN TO SUSTAIN THEIR MOTION

Certain defendants' complete failure to carry their burden fully supports a reversal of the decision below as to those defendants. "Under Rule 56(c) of the West Virginia Rules of Civil Procedure, summary judgment is proper only where the moving party shows by 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, ... 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.'"¹¹ *Williams v. Precision Coil Co.*, 194 W. Va. 52, 59, 459

¹¹ In identifying when a motion for summary judgment is appropriate, this Court has stated: "When a motion for summary judgment is mature for consideration and properly is documented with such

S.E.2d 329, 336 (1995) (authority omitted). “[A] party seeking summary judgment must make a preliminary showing that no genuine issue of material fact exists. This means the movant bears the initial responsibility of informing the circuit court of the basis of the motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.” *Powderidge Unit Owners Assoc. v. Highland Props. Ltd.*, 196 W. Va. 692, 698-99, 474 S.E.2d 872, 878-79 (1996) (emphasis added). Rule 56 does not impose a duty on the Court to sift through documents in order to determine whether a party has met its burden. *See Id.* at 700, 474 S.E.2d at 880. This Court has detailed the specific consequence of a moving party failing to meet its burden when seeking summary judgment: “if the moving party fails to meet this initial burden, the motion must be denied, regardless of the nonmovant's response.” *Id.* at 699, 474 S.E.2d at 879 (emphasis added).

The coupling of this initial burden to demonstrate the absence of an unresolved issue of material fact with movant's burden to invoke collateral estoppel directly highlights the inadequacy of certain defendants' motions for summary judgment. Defendants Standard Labs, SGS North America, Noone Associates (as to appellant Martin) and Westmoreland Coal made no independent effort to meet their burden of proof. Standard Labs sought summary judgment against three individuals, including demonstrating the existence of identical issues, through the submission of a four-sentence “joinder” and the placement of 13 unauthenticated documents before the Circuit Court. *See* A-212-13 (identifying all of the documents as relevant to the Workers' Compensation claims), A-214-79. Standard Labs' submission appears lengthy in

clarity as to leave no room for controversy, the nonmoving party must take the initiative and by affirmative evidence demonstrate that a genuine issue of fact exists.” *Williams v. Precision Coil Co.*, 194 W. Va. at 58, 459 S.E.2d at 335. Logically, that moving party must present the evidence in admissible form, rather than simply stacking it on the judge's desk without authentication or explanation.

comparison to SGS's "joinder," which only identified in a footnote the three individuals against whom SGS sought summary judgment, as well as "any other plaintiff who might be similarly situated."¹² A-919. Beyond adopting the arguments made by another defendant, SGS did not provide or identify a single piece of evidence that supported its motion. *See Id.* Although these defendants have argued previously that each lab's facts are "unique," see A-25, none of these defendants identified which issues were common to both proceedings, let alone provided any demonstration to the lower court that the facts, legal standard and procedures were "identical." *See* A-212-13; A-919-20; A-671-72; A-691-97. The judicial process and its integrity should not condone or accept a motion for summary judgment founded upon a single-page motion paper and unexplained documents labeled as Exhibits. Defendants' failure to meet their initial burden necessitated denial of their motions as a matter of law.

¹² It is possible that the Circuit Court also concluded that SGS's motion was inadequate on its face for the August 4 Order makes no reference to SGS. *See generally* A-1-18.

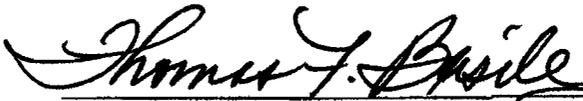
CONCLUSION

For all of the reasons stated above, the plaintiffs-appellants respectfully request that this Court reverse the August 4, 2011 Order of the Circuit Court, Wyoming County, in full, together with such other and further relief as the Court deems just and proper.

Dated: October 14, 2011

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WEST VIRGINIA SUPREME COURT OF APPEALS

-----X
KATY ADDAIR, Administratrix of the Estate of Gary Addair;
DAVID FARLEY; DEBORAH STOLLINGS; et. al.,

Plaintiffs/Appellants,

Appeal No. 11-0397
Civil Action No. 04-C-252
Circuit Court, Wyoming Cty

v.

LITWAR PROCESSING COMPANY, LLC; VIRGINIA
CREWS COAL COMPANY; et. al.,

Defendants/Respondents.
-----X

CERTIFICATE OF SERVICE

I, William A. Walsh, hereby declare under perjury of law that I caused to be served a true and accurate copy of the foregoing:

1. Supplemental Brief of Plaintiffs/Appellants, dated October 14, 2011; and
2. Appendix Record, Volumes I and II;

upon counsel for the respondents listed on the attached service list by U.S. Mail, or by electronic transmission with consent of counsel, on this, the 14th day of October, 2011.



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