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WASHINGTON STATE SUPREME COURT

DELBERT WILLIAMS, APPELLANT

v.

LEONE & KEEBLE, INC., RESPONDENT

Washington Supreme Court
No. 83743-1

SUPPLEMENTAL BRIEF OF PETITIONER

LAW OFFICES OF RICHARD MCKINNEY

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OVERVIEW

Plaintiff will not repeat the authorities or arguments made in his Motion for Discretionary Review. Plaintiff's previously submitted authorities focused on the lack of final judgment in the Idaho proceedings, thus eliminating a required element of collateral estoppel and/or res judicata. Plaintiff's previous authorities also focused on the lack of any evidence taken or hearing by the Idaho Industrial Commission in relation to the elements of the tort claim filed in Spokane Superior Court. This Supplemental Memorandum seeks to demonstrate that there was not even an opportunity before the Idaho Industrial Commission to litigate the elements of Plaintiff's tort claim.

LAW

1. Lack of full and fair opportunity to litigate tort claim before the Idaho Industrial Commission.

Washington case law requires that there have been a full and fair opportunity to litigate any fact or issue which is later contended to be a basis

for imposing collateral estoppel. *Christensen v. Grant County Hospital*, 152 Wn.2d 294, 96 P.3d 957 (2004); *Nielson v. Spanaway General Medical Clinic, Inc.*, 135 Wn.2d 255, 956 P.2d 312 (1998); *Nims v. Wash. Bd. of Registration*, 113 Wn.App. 499, 53 P.2d 52 (2002) (text at n.24 and n.24).

It is clear that collateral estoppel intends to give a party a full opportunity, but only one opportunity, to litigate a fact or issue to judgment.

It is noteworthy that Leone & Keeble, Inc., (“L&K”) asserted to the trial court and to the Court of Appeals that Williams had an extant right to claim in tort against L&K before the Idaho District Court (the court of general jurisdiction). (Defendant’s Court of Appeals Reply at page 20, CP 257-58(5) and CP 302-04(6)) If this is true, one wonders how Plaintiff can be collaterally estopped from bringing the same action in a Washington court of general jurisdiction. Collateral estoppel bars a party from re-litigating a fact or issue, but does not bar a party from filing a claim in a different state from where he sought worker’s compensation. The point is that even L&K seems to concede that as yet Williams has not had a full and fair opportunity to litigate his tort claim. (Respondent’s Court of Appeals Reply Brief at page 20).

2. Application of “full and fair opportunity” doctrine to present case. The usual elements of a negligence claim are: 1) Duty of care; 2) Act or omission which constitutes breach of duty of care; 3) Damages to Plaintiff; 4) Proximate causation between breach of duty and damages. *Ang v. Martin*, 154 Wn.2d 477, 114 P.3d 637 (2005) (grafting legal malpractice components onto elements of usual negligence claim); *Bowman v. John Doe II, et al.*, 104 Wn.2d 181, 704 P.2d 140 (1985).

In the administrative determination of his worker’s compensation claim in Idaho, Plaintiff did not have the opportunity to demonstrate that L&K had a duty of care to Plaintiff. L&K has asserted that under Idaho law L&K owes a duty of care in tort to Plaintiff Williams. Yet, Idaho worker’s compensation law (like Washington’s) does not require a showing of breach of duty of care by L&K to Williams. I.C. § 72-201 (all civil actions abolished, compensation to worker available regardless of fault); I.C. §72-211 (worker’s compensation remedy is exclusive except for third-party claims under I.C. §72-223); I.C. §72-707 (Industrial Insurance Commission has power to adjudicate worker’s compensation claims, but statute gives Commission no power to adjudicate third-party claims).

Thus, even if L&K is correct in asserting that Williams has available a tort claim against L&K under Idaho law, Williams could never have

adjudicated L&K's duty to Williams in the worker's compensation forum. There was, therefore, no "full and fair opportunity" to achieve in the worker's compensation setting, a final determination of whether L&K had a tort duty to Williams.

There was also no full and fair opportunity to adjudicate whether L&K breached its duty in tort to Williams. The Idaho worker's compensation statute specifically authorizes compensation to workers regardless of fault. I.C. §72-201. The Idaho Industrial Insurance Commission has no jurisdiction to adjudicate fault.

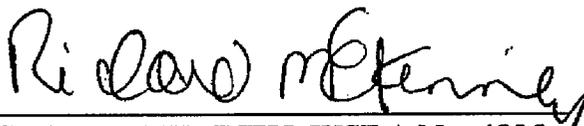
Finally, there was no full and final opportunity to adjudicate Williams' damages caused by L&K. The compensation permitted in the Idaho worker's compensation setting provides for relatively limited range of monetary compensations. IC §§72-401 through 72-451. These statutory sections do not permit any recovery for pain and suffering or inability to enjoy life as permitted in a tort claim under Washington law. Idaho's statutory compensation for wage loss and disability is narrowly circumscribed. I.C. §72-408 and 409 and I.C. §72-430.

Thus, Williams had no full and fair opportunity to litigate the full extent of his damages while he achieved an administrative resolution for his Idaho worker's compensation claim. In summary, Williams had no full and

fair opportunity in the worker's compensation setting to litigate the duty of L&K, the breach of duty of L&K, or the full extent of his damages. This is not a surprising conclusion because the Idaho Industrial Insurance Commission has no jurisdiction to resolve tort claims.

At the risk of redundancy, Plaintiff reiterates that the lack of full and fair opportunity to adjudicate his tort claim in the Idaho worker's compensation setting is merely an additional reason why there should be no finding of collateral estoppel in this case. The lynchpin reason why there should be no finding of collateral estoppel is that there was never any judgment in any Idaho proceeding.

RESPECTFULLY SUBMITTED THIS ^B27 of April, 2010.


RICHARD MCKINNEY, WSBA No. 4895

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CERTIFICATE OF SERVICE

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I hereby certify that on April 27th, 2010, the original and one (1) copy of the **Supplemental Brief of Petitioner** were filed by mail with the Washington State Supreme Court, , at the following address:

WASHINGTON STATE SUPREME COURT

Office of the Clerk

415 12th Avenue SW

PO Box 40929

Olympia, WA 98504-0929

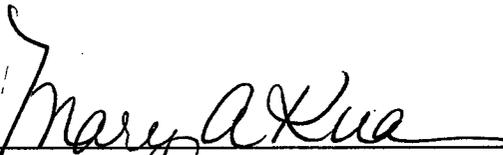
In addition, I served one (1) copy of the **Supplemental Brief of Petitioner**, via hand delivery, to the following:

Andrew C. Bohrsen

9 South Washington, Suite 300

Spokane, Washington 99201

I certify under penalty of perjury, according to the laws of the State of Washington, that the foregoing is true and correct.



Mary A. Rua

WASHINGTON STATE SUPREME COURT

DELBERT WILLIAMS,

APPELLANT

v.

LEONE & KEEBLE, INC.,

RESPONDENT

Washington Supreme Court
No. 83743-1

DECLARATION UNDER GR 17

Mary Rua makes the following Declaration under penalty of perjury under the laws of the State of Washington.

1. I am over the age of eighteen years and competent to testify to the matters stated herein, which are based on personal knowledge.
2. My place of business is the Law Office of Richard McKinney, 201 W. North River, Suite 520, Spokane, Washington 99201; 509/327-2539; fax: 509/327-2504.
3. I have examined the signature page of the Supplemental Brief of Petitioner which is page 5 of this document totaling (7) pages including this Declaration, and determine it to be complete and legible and have confirmed the accuracy thereof telephonically.

EXECUTED in Spokane, Washington this 27th day of April, 2010.



Mary A. Rua