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Supreme Court No. 96189-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL WEAVER,

Respondent,

v.

THE CITY OF EVERETT,

Petitioner,

THE DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON,

Petitioner.

**BRIEF OF *AMICI CURIAE* EIGHT STATEWIDE EMPLOYER
ORGANIZATIONS: WASHINGTON SELF-INSURERS ASSOCIATION,
NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL
BUSINESS LEGAL CENTER, WASHINGTON FARM BUREAU,
WASHINGTON FOOD INDUSTRY ASSOCIATION, ASSOCIATED
GENERAL CONTRACTORS OF WASHINGTON, ASSOCIATED
BUILDERS AND CONTRACTORS, MECHANICAL CONTRACTORS
ASSOCIATION OF WASHINGTON, AND ARCHBRIGHT**

*Washington Self-Insurers
Association*

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I. IDENTITY AND INTEREST OF *AMICI CURIAE*

The following *Amici* are deeply concerned with and impacted by the Court of Appeals' analysis of issue and claim preclusion in the context of industrial insurance. A. **The Washington Self-Insurers Association** represents nearly four hundred Washington self insured employers. B. **The National Federation of Independent Business Small Business Legal Center** is a public interest law firm providing legal resources for small businesses. C. **The Washington Farm Bureau** represents farms and ranches across the state. D. **The Washington Food Industry Association** represents independent Washington grocery operators and their suppliers. E. **The Washington Chapter of Associated General Contractors** represents over 600 companies in commercial and industrial construction. F. **Associated Builders and Contractors** represents thousands of small Washington contractors. G. **The Mechanical Contractors Association of Western Washington** represents about fifty of Washington's largest mechanical contracting firms. H. **Archbright** provides employment law solutions to its members in the area of workers' compensation.

II. STATEMENT OF THE CASE

Amici adopt the Petitioners' Statement of the Case in their Joint Supplemental Brief filed January 30, 2019.

III. ARGUMENT

A. Claim Preclusion

In *Weaver v. City of Everett*, 4 Wn. App.2d 303, 421 P.3d 1013 (2018), the analysis of the Court of Appeals (CA) as to both issue preclusion and claim preclusion rests on its conception of an IIA “claim for relief.” That is its unit of analysis. Traditionally, under the IIA, the unit of analysis has been “issues” under the umbrella of a single “industrial insurance claim,” not a series of “claims for relief.” An “industrial insurance claim” is a shorthand way to indicate that as to this claimant, a number of mixed factual and legal administrative issues need to be resolved, such as the predicate allowance issue (was there an “industrial injury” or an “occupational disease”); the issue of necessary and reasonable medical treatment; the issue of temporary total disability (TTD), *etc.* That basic idea informs what follows.

Of the four criteria for claim preclusion, the CA focused on the first and second criteria. Both criteria, the CA ultimately held, were unsatisfied. In so holding, it erred.

1. The “Subject Matter” of the Two Claims Does Not Differ

1.1 The CA defined “subject matter” as “the issue presented for consideration; the thing in which a right or duty has been asserted; the thing in dispute.” This definition is from *Black’s Law Dictionary* (10th ed.

2014). It is not apparent that this definition is coterminous with the concept of “subject matter” which this Court has used. Logically, the definition of “subject matter” should not be coterminous with the definition of “claim for relief.” Because each is a separate criterion for invoking claims preclusion, their defining criteria should differ.¹

Despite identifying the dictionary definition of “subject matter,” the CA does not appear wedded to this definition. It proceeded to case law to elucidate the concept of “subject matter.” See *Mellor v. Chamberlin*, 100 Wn.2d 643, 673 P.2d 610 (1983); *Harsin v. Oman*, 68 Wash. 281, 123 P.1 (1912). Unfortunately, as to these two cases, the concept of “subject matter” remains ambiguous. It appears not to have a coherent set of necessary and sufficient defining criteria. It may have criteria that bear a “family resemblance” to one another.²

In *Mellor*, both the subject matter and the claims for relief differed between the first and second claims. Both claims concerned the same property sold in one transaction under the same real estate contract. In the first claim, the subject matter was held to be a misrepresentation about the

¹ Moreover, the concept “subject matter” should be more abstract or general than that of “claims for relief.”

² That is, more technically, at least one of its defining properties is a disjunctive property whose components are meaning criteria; candidates for inclusion in its denotation may be arranged serially according to the number of component meaning criteria they possess, and no rule of usage specifies how many of these components must be present. See L. Wittgenstein, *Philosophical Investigations* ¶¶65-71 (1953).

property included in the real estate contract. Later, when the buyer completed its payments under the real estate contract, the seller issued the buyer a warranty deed. In the second claim, the subject matter was held to be a breach of covenant in that warranty deed, in that the deeded building encroached upon adjoining property.³

In *Harsin*, the subject matter was the same in the first and second claims but the claims for relief differed. Both claims concerned the same property and the same covenant in the deed to that property. The first claim was for breach of a covenant that the property was lien free. In fact, it was encumbered. Because the grantee had not discharged the lien, a judgment was entered for breach of the covenant with an award of nominal damages. Later, the grantee discharged the lien. The second claim was for breach of the same covenant, but the grantee sought damages in the amount of the discharged lien.⁴

In *Harsin*, this Court cited to *Wisconsin v. Torinus*, 28 Minn. 175, 9 N.W. 725 (1881). In *Torinus*, the plaintiff's agent sold logs to defendant on credit with a promissory note. The defendant defaulted on the note. In the first action, the plaintiff sued on the note. The trial court found that by

³ The subject matter could be as follows: (1) a particular piece of property; (2) a land sale; (3) what property is included in the contract vs. did the property encroach on the property of another; or (4) the nature of the claim for relief: misrepresentation (tort) vs. breach of a covenant.

⁴ The subject matter could be (1) the same property or (2) the same covenant in the deed.

legislation an agent could not sell property on credit. So the sale and the note were held to be void. Judgment was entered for defendant. Later, the legislature ratified the acts of agents selling on credit. So the plaintiff filed a second action on the same promissory note. The court held that the second action was not barred by *res judicata*. The subject matter of the two claims was the same—the same promissory note. But the causes of action were different. The second cause of action was based on an “after-acquired right” (thanks to the recent legislation) to sue on the previously invalidated note. As the court noted:

Care must be taken also to distinguish between *identity of the subject-matter of litigation* and *identity of cause of action*--a distinction often overlooked. The subject-matter of litigation may be the same, and yet the causes of action entirely different.

Wisconsin v. Torinus, 28 Minn. at 180.

1.2 The CA held that the Legislature intended the IIA segregate the relief available to workers into distinct “subject matters” (*viz.*, “compensation schedules”) in lieu of the unified “subject matter” of a common law personal injury claim. *Weaver* 328. The CA held that in *Weaver*’s first claim, the “subject matter” was *temporary time loss* (TTD) *benefits*, and in the second claim *permanent total disability* (PTD) *benefits*. The CA concluded that the claim for PTD could not have been asserted in the first claim because no evidence then existed of PTD. For

both so-called “claims for relief,” the subject matter was not held to be an industrial insurance claim or an occupationally caused disease in the nature of a melanoma. It should have been.

In so holding, the CA appears to conflate the concept of “subject matter” with the concept of “claim for relief.”⁵ If the Legislature intended directly or, under RCW 51.04.020, by delegation to the Department of Labor & Industries (DLI), to bifurcate adjudication of the allowance issue from the issue of applicable benefits, as has been the DLI practice since 1911, then in *Weaver* the “subject matter” would most likely be either an “industrial insurance claim” or “an allowance claim for an occupational disease.” That is, the “subject matter” in Weaver’s first “claim for relief” would be the *same* as it was in his second.

2. There are Not Two “Claims for Relief”

Initially, the CA said that “[w]e accept without analysis and for the limited purpose of resolving the matter before us, the contention that the

⁵ Consider four combinations:

(1) Both the subject matter and the claims for relief differ. This combination is possible. In this event, claim preclusion would not apply.

(2) The subject matter differs and the claims for relief are the same. This combination seems impossible.

(3) The subject matter is the same and the claims for relief differ. This possibility suggests that the subject matter is more general than the claims for relief.

(4) Both the subject matter and the claims for relief are the same. But may the two be coterminous? That is, can the “subject matter” be the “claims for relief?” It does not appear so. If the two concepts are not coterminous, then this combination would signal that, *ceteris parabis*, claim preclusion applies.

Act sets forth a single cause of action for an allowance.” *Weaver*, 321. But then it said that by legislative design, the IIA splits the common law cause of action into separate “claims for relief” based on the various IIA compensation schedules.⁶ *Weaver*, 324 & 326-27. The CA then held that Weaver’s first and second claims assert separate “claims for relief:” the first “claim for relief” for allowance and TTD benefits, and the second “claim for relief” for allowance (given the CA’s decision on issue preclusion) and PTD benefits. *Weaver*, 328.

2.1 The heart of the CA’s holding is that the IIA split the common law claim for relief into separate “claims for relief” based on the various compensation schedules. *Weaver*, 326-27. This is different from the common law. The common law had a *unified* claim for relief: In a single action, proof of liability and damages, with damages being economic, past and future, and non-economic. *McGuire v. Bryant Lumber & Shingle Mill Co.*, 53 Wash. 425, 102 P. 237 (1909). This Court has provided *suggested* defining criteria for a *common law* “claim for relief”: (1) substantially the same evidence would support both claims; (2) the same primary right; (3) the same transactional nucleus of facts. *E.g.*, *Mellor v. Chamberlin*, 100 Wn.2d 643, 646, 673 P.2d 610 (1983); *Buddress v. Schafer*, 12 Wash. 310, 312, 41 P. 43 (1895)(the same evidence test); *Rains v. State*, 100

⁶ The CA uses the concepts “claims for relief” and “subject matter” interchangeably.

Wn.2d 660, 663-64, 674 P.2d 165 (1983)(no simple mechanic test—viz., the same evidence test, the same primary rights test and the same transactional nucleus of facts test); *Meder v. CCME Corp.*, 7 Wn. App. 801, 806, 502 P.2d 1252 (1972)(Div. I)(the same evidence test); *Hadley v. Cowan*, 60 Wn. App. 433, 441-42, 804 P.2d 1271 (1991)(Div. I)(same transactional nucleus of facts).

2.2 In 1911, the Legislature believed this common law scheme to be too costly and inefficient. That is, in a common law “claim for relief,” a plaintiff had to proffer proof of both liability and damages even if he/she failed to prove liability, the predicate to damages. So it scrapped that approach. RCW 51.04.010. It revised the liability prong from fault to no-fault. *Id.* And since 1911, the DLI, the agency assigned to administer the IIA, has correctly interpreted the IIA to authorize bifurcation of the assessment of liability (allowance) from assessment of damages (benefits), a change that would save a claimant litigation costs. *Abraham v. Dep’t of Labor & Indus.*, 178 Wash.160, 163, 34 P.2d 457 (1934); *Marley v. Dep’t of Labor & Indus.*, 125 Wn.2d 533, 539-40, 886 P.2d 189 (1994)(“The Legislature has granted the Department broad authority to decide claims for workers’ compensation”).

In a stepwise administrative process, the DLI determines allowance (no-fault liability) and then, if the claim is allowed, it

determines eligibility for various benefits as the claimant might request.⁷
RCW 51.04.020.

2.3 Despite that longstanding administrative scheme, the CA has split a single industrial insurance claim with a series of issues into a series of “claims for relief.” These so-called “claims for relief” are to be asserted in successive stages as the claimant selects which category of benefits to seek. *Weaver*, 324. That is, the CA implicitly defines “claims for relief” in a multi-staged fashion:

Stage One: Initially, a claim for relief is the conjunction of an allowance issue and particular compensation schedule, which the worker elects to seek.⁸ *Weaver*, 324.

Stage Two: If, in the initial claim, the compensation schedule is too small to vouch for a vigorous litigation, then the second claim is the conjunction of an allowance issue and a different compensation schedule, which the worker has next elected to seek. The “claim for relief” for the earlier compensation schedule would be claim precluded.

⁷ While the DLI is investigating the claim to determine whether the worker had an industrial injury or has an occupational disease, the worker may receive *provisional* payments for medical treatment (often needed to establish whether he/she has an industrial injury or occupational disease) and for temporary total disability (wage loss). RCW 51.36.010; RCW 51.32.010; RCW 51.32.210; RCW 51.32.190; WAC 296-20-124(1).

⁸ Presumably, the claimant can join so-called “claims for relief” (“compensation schedules”) into a single industrial insurance claim application.

Stage Three: If, in the second claim for relief or following claims for relief, the compensation schedule is not too small to vouch for a vigorous litigation, then the third or following claims are requests only for compensation schedules not previously sought. In these subsequent “claims for relief,” the allowance issue would be issue precluded.⁹

The CA held that in Weaver’s first “claim for relief,” the “claim for relief” was TTD benefits. In Weaver’s second claim, the “claim for relief” was PTD benefits. Given the CA’s definition of “claims for relief,” it held that these “claims for relief” differed.¹⁰

2.4 This conclusion is incorrect. A common law “claim for relief” is a bundle of issues legally united for resolution in one judicial proceeding. If that “claim for relief” were split so that that bundle of issues were separated to be resolved in separate judicial proceedings, then

⁹ The one-year statute of limitations for industrial injury claims would begin to run from the date of injury, not from the date the particular compensation scheme became ripe for assertion. RCW 51.28.050. The two-year statute of limitations for occupational disease claims would begin to run from the date a physician first notifies the claimant in writing that he/she has an occupational disease and a right to file an industrial insurance claim, not from the date the particular compensation scheme became ripe for assertion, RCW 51.28.055. Typically, the statute of limitations does not begin to run on a claim for relief until that claim accrues. Under the CA’s interpretation, some in the series of claims for relief would not accrue until well after the industrial injury or well after the claimant with an occupational disease receives the appropriate notice.

¹⁰ The CA also held that the “facts” of the two claims differed owing to the different compensation schemes which Weaver asserted. *Weaver*, 328-29. Clearly, that analysis collapses into the analysis of “claims for relief.” As to the allowance issue, the facts are the same in both claims. Conjoining different compensation schemes to the allowance issue does not change the nature of Weaver’s proof on the allowance issue (*viz.*, that he had an occupational disease) unless the allowance issue and the issue about a particular compensation scheme were legally indivisibly conjoined into a “claim for relief.”

the defense was “claim preclusion.” Under the IIA, an “industrial insurance claim” (arising from a discrete injury or set of exposures) is a bundle of issues logically staged for administrative resolution. If that “industrial insurance claim” were split so that that bundle of issues were separated to be resolved in separate administrative processes, then the defense was “claim preclusion.”

The CA has decided that the IIA splits an “industrial insurance claim” (arising from a discrete injury or set of exposures) into separate bundles of issues based on different compensation schedules. Before *Weaver*, what had been interpreted as separate *issues* under the umbrella of a single industrial insurance claim to be resolved administratively over the course of administering the claim are now interpreted as separate *claims for relief* to be resolved administratively over the course of administering the claim. This distinction is essentially linguistic. Its sole purpose appears to be to relabel various issues within an industrial insurance claim as “claims for relief” to avoid claim preclusion to provide *Weaver* an opportunity to relitigate the allowance issue.

2.5 Whether the IIA is consistent with the CA’s holding on a IIA “claim for relief” is an issue of statutory interpretation. The Court must discern the Legislature’s intent. To do that, the Court first looks to the language of the IIA. If the IIA is unambiguous, its meaning is derived

from its plain language alone. In analyzing the wording of the IIA, the Court must read the IIA as a whole. *SEIU, Local 6 v. Superintendent of Public Instruction*, 104 Wn.2d 344, 348-49, 705 P.2d 776 (1985). If its meaning is ambiguous, its meaning should be otherwise determined. *Everett Concrete Products v. Dep't of Labor & Indus.*, 109 Wn.2d 819, 821-22, 748 P.2d 1112 (1988). The language of the IIA supports the traditional DLI scheme. Moreover, RCW 51.04.020 supports the DLI scheme.

Nowhere in the IIA is the phrase “claim for relief” used to describe a claim for industrial insurance. Nowhere in the IIA is the administrative scheme characterized as a splitting of a common law “claim for relief.” Nowhere in the IIA does it indicate that the allowance issue will be re-litigable because associated with a small value of alleged benefits. Nowhere in the IIA is it suggested that resolution of the allowance issue is not a predicate to a worker’s entitlement to various benefits. The CA’s notion that the IIA creates a series of “claims for relief” for specific kinds of benefits conjoined with the allowance issue (until the allowance issue is determined to be issue precluded) is unfounded.

Under the IIA, the worker files an industrial insurance claim asserting that he/she has had an “industrial injury,” as defined in RCW 51.08.100, or an “occupational disease,” as defined in

RCW 51.08.140. The claim must be supported by a physician's statement in a "Physician's Initial Report" that the worker has an injury or disease.

RCW 51.28.020. Typically, the physician does not opine on causation given that he/she did not witness any industrial incident or occupational exposure.

As RCW 51.28.020 provides:

Where the worker is entitled to compensation under this title he or she shall file ... his or her application for such
[*Emphasis supplied.*]

Cf. RCW 51.32.010.

As the IIA indicates, eligibility for compensation is predicated on a favorable resolution of the allowance issue—*viz.*, whether an industrial injury or occupational disease occurred. Once the claim is allowed, then the worker is invited to apply for various forms of compensation. These two basic *issues* under the umbrella of an "industrial insurance claim" are not assorted into various "claims for relief."

Since 1911, the IIA has been so interpreted by the DLI, the agency assigned to administer the IIA. This Court should defer to that agency's interpretation. *E.g., Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 884-85, 154 P.3d 891 (2007); *Waste Management of Seattle, Inc. v. Utilities & Trans. Comm'n*, 123 Wn.2d 621, 628, 869 P.2d 1034

(1994); *Chevron, USA v. NRDC*, 467 U.S. 837, 842, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984).

Since 1911 (until *Weaver*), a period of 107 years, the appellate courts have not objected to this interpretation.

Moreover, since 1911, the Legislature has not objected to this interpretation—that is, it has not amended the IIA to reject the DLI’s interpretation. That indicates that the Legislature accepts that interpretation. *See, e.g., Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319, 327 n.3, 971 P.2d 500 (1999); *Friends of Snoqualmie Valley v. King County Boundary Review Bd.*, 118 Wn.2d 488, 496, 825 P.2d 300 (1992); *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 789, 719 P.2d 531 (1986).

Here, there are not two “claims for relief.” There is but one claim—an industrial insurance claim--that has been improperly refiled and should be barred by claim preclusion.

B. Issue Preclusion

On issue preclusion, the key premise of the CA’s holding that *Weaver* did not have “sufficient motivation for a full and vigorous litigation of the issues” is its concept of “claim for relief.” That first so-called “claim for relief” was characterized as the conjunction of the allowance issue and the issue of benefits for TTD. Consistent with its

longtime practice, the DLI did not issue an order on the TTD issue because it had disallowed the claim.

To create a foundation for its holding on issue preclusion, the CA needed to marry the allowance issue with the issue of benefits. If in *Weaver* the only issue were the only issue on which the DLI issued an order—viz., the allowance issue—then the CA would have no monetary benefit against which to relate Weaver’s litigation costs to find that Weaver was unmotivated to vigorously litigate that issue. *Christensen v. Grant County Hosp.*, 152 Wn.2d 299, 309, 96 P.3d 957 (2004); *Reninger v. Dep’t of Corr.*, 134 Wn.2d 437, 451, 951 P.2d 782 (1998). Assessing a motivation to vigorously litigate is an issue only when confronted with separate “claims for relief” involving at least one common issue. Issue preclusion is not relevant as to the issues in only one “claim for relief,” say, an “industrial insurance claim,” arising from a discrete “industrial injury” or “occupational disease.”

In the CA’s analysis of issue preclusion, it is unclear (1) whether it decided *as a matter of law* that because the immediate amount at stake in its so-called first “claim for relief” was less than \$10,000 (or some other judicially designated sum), Weaver was unmotivated to vigorously litigate the allowance issue, or (2) whether it decided *as a matter of fact* that he was unmotivated to vigorously litigate that issue. That fact could be

determined by the claimant's direct testimony about his motivation or by virtue of some surrogate measure of motivation, such as that his cost-benefit ratio (cost ÷ benefit) for whatever reason was less than one.

Given that the CA merely *speculated* about Weaver's litigation costs, the CA appears to have chosen option (1), that *as a matter of law* if a stipulated threshold amount of alleged benefits is not at risk (apparently some judicially determined "small" amount rather than some amount of benefits in relation to some amount of litigation costs *viz.*, some cost-benefit ratio), the claimant is *deemed* unmotivated to vigorously litigate the issue. So, in all so-called "claims for relief," where the amount of conjoined benefits is less than say \$10,000, either the claimant or the DLI/SIE can relitigate the allowance issue in the next "claim for relief," which alleges entitlement to a different compensation schedule.

It is bad policy to use a rule that *as a matter of law*, if a threshold amount of alleged benefits is unmet, the claimant is deemed unmotivated to have vigorously litigated the issue. For one, such a rule is over-inclusive. A significant number of claimants who vigorously litigate the allowance issue will not be bound by an adverse result. For another, it builds into the IIA a scheme of so-called artificial "claims for relief," in connection with the CA's holding as to claims preclusion, constituted of an allowance issue conjoined with a benefits issue. For another, it leads to

greater administrative and litigation costs, as issues are relitigated contrary to the intent of the IIA to reduce costs. RCW 51.04.010. For another, it leads to intense efforts to game the system by conjoining, wholly at the claimant's instance, low value compensation schedules (*viz.*, medical benefits or temporary total disability benefits) with the allowance issue.¹¹

If, to the contrary, the CA had decided that *as a matter of fact*, based on the facts in the CABR in the first litigation, that Weaver was unmotivated to vigorously litigate that issue. It has erred. The standard of review of factual determinations would be whether substantial evidence in CABR in the *initial* litigation of the allowance issue at the BIIA supports said finding by substantial evidence. *E.g., Rice v. Johnson*, 62 Wn.2d 591, 384 P.2d 383 (1963). In the CABR, the BIIA did not have a finding that Weaver was unmotivated to vigorously litigate that issue. Nor did the CABR state facts that would support a cost-benefit analysis. That is, Weaver did not testify that he lacked motivation to win. Moreover, the CABR did not identify facts that would support quantification of Weaver's litigation costs. Nor did it indicate why Weaver forwent hiring other or additional medical experts.

The CA's speculations about the evidence of causation which Weaver did not proffer is apparently based on an idealized or benchmark

¹¹ Imagine, in the first claim for relief, at the outset, the claimant announces that he is unmotivated to vigorously litigate that "claim for relief."

case. This benchmark the CA conjures from unknown sources as being sufficient to have won allowance issue in the first litigation. Obviously, the quality of the claimant's proof is one of degree, not of kind. No objective measure or bright line on the quality scale indicates vigorous effort. Apparently, that determination would be a discretionary *ad hoc* judicial decision.

Such a decision here appears arbitrary. No evidence exists that Weaver's counsel committed malpractice. Nor does evidence exist about what motivated Weaver's strategic decisions in proffering his evidence. The Court should not second guess a party's strategic decisions.

Moreover, Weaver, in his first litigation, after he had had sixteen square inches of skin removed, had to appreciate the risks of metastases. Given that severe prophylactic, the value of "claim allowance" (*viz.*, its "subjective expected value") certainly exceeded \$10,000.¹²

As a matter of fact, Weaver was motivated to win. His case was strikingly unlike that in *Hadley v. Maxwell*, 144 Wn.2d 306, 27 P.3d 600 (2001). For one, unlike Hadley, he hired an experienced litigator, Ron Meyers, with expertise in firefighter industrial insurance cases generally,

¹² The value of "claim allowance" would be its "subjective expected value" (SEV). The SEV would be sum of the product of (1) the subjective probabilities of qualifying for the various industrial insurance benefits if the claim were allowed and (2) the dollar value of such benefits. *E.g.*, Keeney, R.L. & Raffa, H., DECISIONS WITH MULTIPLE OBJECTIVES: PREFERENCES AND VALUE TRADEOFFS (1976); Kahneman, D. & Tversky, A. Prospect Theory: An Analysis of Decision under Risk. *Econometrica*, 47: 263-292 (1979).

and in firefighter cases involving melanomas specifically. See *Spivey v. City of Bellevue*, 187 Wn.2d 716, 721-722, 389 P.3d 504 (2017); *Larson v. City of Bellevue*, 185 Wn. App. 857, 879-882, 355 P.3d 331 (2015). This fact alone should have dictated application of issue preclusion.

For another, unlike Hadley, Weaver proffered evidence which had been sufficient to win other melanoma cases. In *Spivey* and *Larson*, Mr. Meyers also only called Dr. Coleman as an expert witness. In both cases, Mr. Meyers' firefighter clients prevailed on the issue general causation as to melanomas. In both *Spivey* and *Larson*, in developing Dr. Coleman's testimony, Mr. Meyers followed a set protocol, with the approval of the CA and this Court, to establish the key issue--"general causation."

Typically, "general causation" is established through hearsay in epidemiologic and/or animal studies using ER 803(a)(18). Those population studies are the gold standard in proving general causation, not anecdotal cases (or "case studies") which a specialist would encounter in his/her daily medical practice. The standard protocol for such proof is to qualify Dr. Coleman as a medical expert, with some experience in diagnosing melanomas. *Kelly v. Carroll*, 36 Wn.2d 482, 491, 219 P.2d 79, cert. denied, 340 U.S. 892 (1950); *State v. Rangitsch*, 40 Wn. App. 771, 700 P.2d 382 (1985). Dr. Coleman would then identify the epidemiologic studies he deemed pre-eminently relevant (a so-called "reliable authority")

to the issue of general causation. He or Mr. Meyers would then read into evidence the portions of those studies upon which Dr. Coleman says he relied in forming his opinion on medical causation. By that means the claimant has enlisted the testimony, by surrogacy, of the best experts in the world.

IV. CONCLUSION

The Supreme Court should reverse the decision of the Court of Appeals.

Respectfully submitted this 21st day of March 2019.

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**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

MICHAEL WEAVER,

Appellant,

v.

CITY OF EVERETT and
DEPARTMENT OF LABOR
AND INDUSTRIES,

Respondents.

CERTIFICATE OF
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declare that on the below date, I caused a true and correct copy of the *BRIEF OF AMICI CURIAE'S EIGHT STATEWIDE EMPLOYER ORGANIZATIONS: WASHINGTON SELF-INSURERS ASSOCIATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, WASHINGTON FARM BUREAU, WASHINGTON FOOD INDUSTRY ASSOCIATION, ASSOCIATED GENERAL CONTRACTORS OF WASHINGTON, ASSOCIATED BUILDERS AND CONTRACTORS, MECHANICAL CONTRACTORS ASSOCIATION OF WASHINGTON, AND ARCHBRIGHT* and this CERTIFICATE OF SERVICE to be served on the following in the manner indicated below:

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