No. 126730

In the

Supreme Court of Illinois

CLIFTON ARMSTEAD,

Plaintiff-Appellant,

vs.

NATIONAL FREIGHT, INC. d/b/a NFI INDUSTRIES, INC. and DERRICK ROBERTS,

Defendants-Appellees.

Appeal from the Illinois Appellate Court,
Third Judicial District, Nos. 3-17-0777 consolidated with 3-18-0009.
There Heard on Appeal from the Circuit Court of the Thirteenth Judicial Circuit,
Grundy County, Illinois, No. 2016 L 21.
The Honorable **Lance R. Peterson**, Judge Presiding.

REPLY BRIEF OF PLAINTIFF-APPELLANT CLIFTON ARMSTEAD

MICHAEL W. RATHSACK
Attorney for Plaintiff-Appellant
10 South LaSalle Street
Suite 1420
Chicago, Illinois 60603
(312) 726-5433
mrathsack@rathsack.net

Of Counsel:

ADAM J. ZAYED
and
MICHAEL W. RATHSACK

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REPLY BRIEF OF PLAINTIFF-APPELLANT CLIFTON ARMSTEAD

I. Plaintiff's case before this Court is not moot.

National Freight contends that events in the trial court have made Plaintiff's case here moot. Examination of those events shows that is not correct.

The appeal process began when National Freight in its motion for partial summary judgment requested findings under Supreme Court Rule 304(a). When the court granted that motion in 2017, limiting Armstead's claim to a knee sprain, it included the 304(a) finding that National Freight sought. C92; C176 (request in reply); C288 (order). The court repeated that finding after denying a motion for reconsideration. C511.

Plaintiff appealed from the partial summary judgment, the case now before this Court. C512. Shortly after that, Plaintiff voluntarily dismissed the balance of the case in the circuit court, with leave to refile (C522), and filed a precautionary second notice of appeal. C523.

The appellate court initially reversed on January 17, 2019, after rejecting the finding that Plaintiff had made a judicial admission in the Pennsylvania case. National Freight moved for reconsideration. The court granted their petition on March 5, 2019, and this time affirmed the summary judgment on November 20, 2020. *Armstead v. Nat'l Freight, Inc.*, 2020 IL App (3d) 170777.

National Freight contends this appeal should be dismissed. It claims procedural developments in the circuit court after the appeal was taken make the case here moot despite the fact the appellate court issued a decision and the case is now pending here.

National Freight raised the same argument in the appellate court in a motion for leave to file a supplement containing that argument, more than a year ago, and that motion was denied. App. at A1, A8. The motion and the order denying it are presumably in re:SearchIL. In their reply here in support of their motion to dismiss, National Freight claimed the order denying their motion in the appellate court was not a ruling on its merits, but there was no other reason for that court to reject that motion.

National Freight contends the case is moot because it believes that even if this Court reverses and reinstates Plaintiff's case, Plaintiff could not refile. It reasons that because Plaintiff did not refile the case remaining in the circuit court that he voluntarily dismissed in 2017, the case remanded from this court to the circuit court (assuming Plaintiff prevails) cannot be filed there. Its rationale is that "there would be no viable lawsuit to remand this appeal(sic)." Def. br. at 13. They reason that refiling could not occur because the one-year period for refiling after a voluntary dismissal expired and was not tolled by the appeal.

The flaw in their reasoning is their assumption that Plaintiff would have to refile after remand. However, their premise fails, and consequently their argument must fail.

To explain requires a closer review of case history. The court granted summary judgment on that part of Plaintiff's case based on injuries to his back and knee that required surgery, and included Rule 304(a) findings. That left only his claim for a knee strain injury pending there. Plaintiff appealed from the summary judgment. Plaintiff also voluntarily dismissed the knee sprain case in 2017, with leave to refile, properly splitting his claims under the procedure provided in *Hudson v. City of Chicago*, 228 Ill.2d 462 (2008) and confirmed in *Quintas v. Asset Mgmt. Group, Inc.*, 395 Ill. App. 3d 324, 328 (2009). That is not at issue in Defendants' motion. When the one-year mark came following the dismissal, he did not refile the knee strain case.

Defendants' contention, that this case became moot when the part of the case in the trial court was not refiled, is premised on a misunderstanding of the procedural posture of Plaintiff's claims. They rely on *Wade v. Byles*, 25 Ill.App.3d 545 (1998), but that case is critically different in both its facts and its procedural path. The plaintiff there filed multiple claims in federal district court. The court granted summary judgment on the civil rights claims. It dismissed the state law claim for want of jurisdiction because dismissal of the civil rights claims destroyed federal jurisdiction.

The plaintiff appealed the summary judgment to the federal circuit court but unlike Armstead's case, that judgment was affirmed, ending the civil rights claims. There was nothing to remand. That is a critical difference. That plaintiff's claim on appeal there was over. Here, Armstead's appeal remains pending. If he prevails, his case will be remanded.

National Freight also cited *Hupp v. Gray*, 73 Ill. 2d 78, 84, 382 N.E.2d 1211, 1214 (1978) and *Suslick v. Rothschild Sec. Corp.*, 128 Ill. 2d 314, 317, 538 N.E.2d 553, 555 (1989). Def. mot at 12. However. both cases presented situations similar to *Wade*. Their holdings were simply that the time for refiling ran from the date of the nonsuit, not the date of the appellate decision.

Returning to *Wade*, the plaintiff in *Wade* did not refile the voluntarily dismissed state law claim in state court until more than a year after the district court had dismissed that claim for lack of jurisdiction. Consequently, the state appellate court held he was barred from refiling that claim by Section 13-217

because the time for refiling that separate claim had expired. The court's point was that appealing the dismissal of the federal claims did not toll the time for refiling the state law claim, the part of the case not on appeal. However, if that plaintiff had prevailed in his federal appeal, that claim would have been remanded to the district court and proceeded regardless of what had occurred with respect to the part of the case brought in state court.

Here, Armstead similarly has no need to refile if this Court reverses. If he prevails, the Court will remand, and Armstead will prosecute his case regardless of what occurred in the circuit court after he commenced this appeal. If instead this Court affirms, he will be in the same position as the plaintiff in *Wade*. This case will be over and there will be no other case in the trial court.

That reasoning is compatible with the analysis in *Sager Glove Corp. v. Cont'l Cas. Co.*, 37 Ill. App. 2d 295, 301, 185 N.E.2d 473, 475–76 (1962), where the court said "A litigant may choose one or both courses of action. If an appeal is chosen and suit is not refiled within a year, should the judgment appealed from be affirmed, then the litigant has played and lost." The court clearly meant that, alternatively, if the litigant prevailed on appeal, his case would proceed despite not refiling the part of the case left behind and then dismissed.

By way of analogy, assume Armstead had immediately refiled the dismissed knee strain claim after its dismissal, but then dismissed it because he did not believe it merited pursuing. That would not have affected his claim

pending here. After this Court's opinion issued, the claim on appeal would still be remanded (if Armstead prevailed) and would proceed. The same outcome should logically occur in this circumstance.

National Freight implicitly reasons that because the complaint was a single count, the case could not be both in this Court and in the trial court, and that the voluntary dismissal of the part left in the trial court somehow erased the entire case. Def. motion at 14. However, the court split the case at Defendants' request. A party should not be able to take advantage of a scenario it created. And the appeal was not like a certified question under Rule 308, with only a specific question on appeal. The appellate court had, and now this Court has, an entire case before it, not some metaphysical part of a case. That reasoning is consistent with the fact that the appellate court issued an opinion deciding this claim, and that decision is now here.

In addition, the case presents an unusual procedural history, and that implicates Rule 366 which allows the Court to enter any appropriate order to ensure a fair result.

Standard of Review

Neither party addressed the standard of review. Typically, whether collateral estoppel is applicable in a particular case is a question of law reviewed *de novo*. *Pedersen v. Vill. of Hoffman Estates*, 2014 IL App (1st) 123402, ¶ 42, 8 N.E.3d 1083, 1095, citing *State Building Venture v. O'Donnell*, 239 Ill.2d 151, 158, 940 N.E.2d 1122 (2010). However, in *Herzog v. Lexington*

Township, 167 Ill.2d 288, 296, 657 N.E.2d 926, 930 (1995), the Court said that, where "nonmutual offensive collateral estoppel" is applied, courts have discretion to ensure fairness. The court reached that finding after distinguishing between offensive and defensive collateral estoppel. *Id.* at 295.

However, the disincentives described for a defendant in that posture (one seeking offensive estoppel) are the equivalent of the disincentives to litigate described in *Talarico* for plaintiffs resisting a defendant's argument for defensive collateral estoppel. *Talarico v. Dunlap*, 177 Ill. 2d 185, 192-93, 685 N.E.2d 325, 328-29 (1997). The Court there stressed the necessity of fairness. *Id.* at 191. To do that, a trial court that has determined the threshold requirements for collateral estoppel are met has broad discretion in determining whether to apply the doctrine. *In re Estate of Ivy*, 2019 IL App (1st) 181691, ¶ 28, 131 N.E.3d 1181, 1191, relying on *Seymour v. Collins*, 2015 IL 118432, ¶ 48.

For those reasons, the same standard of review, abuse of discretion, should apply in a situation like this where a defendant seeks defensive collateral estoppel. Here, the trial court rejected collateral estoppel (R31-32) and National Freight should be required to prove abuse of discretion.

II. The Pennsylvania case did not decide anything. Without a decision, it follows that nothing was litigated, and consequently there was no basis for applying collateral estoppel based on what occurred there.

As explained in Plaintiff's main brief, to decide means to have an authority choose between two conflicting positions. National Freight did not

address that explanation. That is critical because, as explained in the main brief at 14, nothing was decided in Pennsylvania. Because National Freight did not carry its burden of clearly showing that the identical and precise issue (the nature of the injury) was decided there, the court erred when it concluded that the Pennsylvania settlement agreement implicated collateral estoppel and barred this action. *Talarico v. Dunlap*, 177 Ill. 2d 185, 191, 685 N.E.2d 325, 328 (1997); *Hexacomb Corp. v. Corrugated Sys., Inc.*, 287 Ill. App. 3d 623, 631–32, 678 N.E.2d 765, 771 (1997) (party asserting preclusion bears burden of showing with clarity and certainty what was determined by the prior judgment).

It claims Armstead is attempting to relitigate the nature of his injury. Def. br. at 18. But that begs the question. The initial question is not whether anything is being relitigated, but rather whether anything was ever actually litigated in Pennsylvania. If nothing was litigated, nothing was adjudicated and collateral estoppel cannot apply.

National Freight's response simply echoes the appellate court's explanation. It contends that when Armstead argued nothing was litigated there, he conflated litigation with prior adjudication. Def. br. at 20. National Freight says those two are distinct, and that litigation is not a prerequisite for collateral estoppel, but that the only prerequisite is prior adjudication.

There are really two "litigation" questions, intermingled in Defendants' brief. One is whether anything *was litigated* in Pennsylvania; the other is

whether Armstead had both the opportunity and the incentive *to litigate* there, the latter guided by this Court's explanation of opportunity and incentive in *Talarico v. Dunlap*, 177 Ill. 2d 185, 192, 685 N.E.2d 325, 328 (1997).

As to the first one, it is not a question of whether litigation occurred, that being the very broad definition implicit in both the appellate court's analysis and National Freight's brief. If the question were simply whether litigation occurred in a prior matter, there would always be collateral estoppel because as soon as claims go into a legal setting, that by definition is litigation. That could not be the test. Rather, the test is whether the matter at issue in the prior case was *litigated*, not whether it was at some point *in litigation*. An issue is litigated only when it has been submitted for a determination *and determined* by that court. "A*ctually litigated"*, Black's Law Dictionary (11th ed. 2019).

National Freight at page 20 calls Armstead's contention that the nature of his injury was not litigated "specious". But Armstead was correct. When courts say collateral estoppel requires that the issue have been "litigated", they mean it must have been decided. That is evident from the analysis in *In re N.R.L.*, 200 Ill. App. 3d 820, 824, 558 N.E.2d 538, 541 (1990). The court, addressing an even more critical issue of personal liberty under the double jeopardy clause, said collateral estoppel means once an issue has been *determined* by a final judgment, it cannot again be relitigated. Implicit in that analysis is that a matter has been litigated only if it has been determined, and

that means decided. A matter has not been litigated if it was simply the subject *of litigation*.

It is further instructive that the modifier "actually" almost always precedes "litigated" in discussions of collateral estoppel. For example, in *Hous. Auth. for La Salle County v. Young Men's Christian Ass'n of Ottawa*, 101 Ill. 2d 246, 252, 461 N.E.2d 959, 962 (1984), the Court held that a judgment in a prior suit operated as an estoppel only as to the point "actually litigated and determined", not as to matters which might have been determined or that at some point *were* in litigation.

Housing Authority took its guidance from *Charles E. Harding Co. v. Harding*, 352 Ill. 417, 427, 186 N.E. 152, 155 (1933). The Court there held that a prior matter operates as estoppel only as to a question actually litigated and determined. The Court was addressing claim preclusion rather than issue preclusion there, but the analysis logically applies to both. The Court confirmed *Harding's* analysis in *Consol. Distilled Products, Inc. v. Allphin*, 73 Ill. 2d 19, 25–26, 382 N.E.2d 217, 219 (1978). See also, *People v. One 2014 GMC Sierra*, 2018 IL App (3d) 170029, ¶ 32 (cannot relitigate matter previously "fully litigated"). In contrast, something that was settled has by definition not been litigated.

National Freight claims Armstead "distorts" *Talarico's* holding when he said *Talarico* requires that the question in the prior case was actually litigated. Def. br. at 20. It first says *Talarico* contains no such bright line rule but quickly

backslides, saying that to the extent *Talarico's* "*dicta*" does require that the matter have been actually litigated, that was satisfied. Def. br. at 23. First, *Talarico* was clear. It said, "For collateral estoppel to apply, a decision on the issue must have been necessary for the judgment in the first litigation, and the person to be bound must have *actually litigated* the issue in the first suit (emphasis in original)." *Id.* at 191. That was not *dicta* but rather a summary of the law being applied.

Turning to the second prong, the opportunity *and* incentive to litigate in the prior case, that requirement assumes the case presenting the opportunity to litigate must itself have gone to conclusion, i.e., actually been litigated. There cannot be an opportunity to litigate a fact if the case in which that fact had relevance was not itself litigated, i.e., adjudicated. The opportunity to litigate does not exist in a vacuum. The subject is issue preclusion, not claim preclusion. If the case was not litigated, by definition there was no opportunity to fully litigate an issue that was part of that case.

In any event, Armstead explained why he did not have an opportunity or incentive to fully litigate the extent of his injuries there. Pl. main br. at 22. In opposition, National Freight says he had the opportunity and contends he did not take it because he thought the report of a so-called "independent medical examiner" would defeat him. Def. br. at 21. That report was also the lynchpin of the appellate court's finding that Armstead forfeited the right to litigate his claim.

There is nothing "desperate and unsupported" about Plaintiff's position with respect to that report. Def. br. at 22. Plaintiff' explained that the employer selected and paid the expert, meaning the doctor was not an independent witness, contrary to the conclusion of the author of the decision. National Freight's brief acknowledges that the employer paid the doctor but omits that the employer chose that doctor. And it does not rebut Plaintiff's point that the doctor's phrasing of the issues in his report shows courtroom-savvy. For example, he said, "Failure to comment on a particular record does not imply a lack of importance attached to such a record nor a lack of consideration given to such a record." C376. That cries out that the doctor was well versed in courtroom tactics and thus likely a professional expert.

National Freight says Plaintiff means the doctor cannot be trusted and that he would violate the Hippocratic Oath simply because he was paid by the employer. Def. br. at 22. Plaintiff's brief contains nothing so coarse. Plaintiff simply contends, as would be the case in any trial, that the expert's report is hardly conclusive for purposes of estoppel. The position that such "experts" are not independent has always been acknowledge by the courts.

For example, the Court has pointed out that judges are well aware some experts appear particularly willing to testify for one side and other experts for the other side. *Trower v. Jones*, 121 Ill. 2d 211, 220, 520 N.E.2d 297, 301 (1988). Locator services exist which find experts who will help advocate a desired position. And the Court noted many experts spend so much time

testifying that they are not only experts in their field but experts in the art of being persuasive and handling cross-examination.[1] *Id.* at 216.

The Court has not suggested anything improper with hiring experts but has emphasized that whether to accept the expert's opinion is for a factfinder. *Sears v. Rutishauser*, 102 Ill. 2d 402, 410, 466 N.E.2d 210, 214 (1984). The Court there pointed to the analysis in *Kemeny v. Skorch* (1959), 22 Ill.App.2d 160, 159 N.E.2d 489, where the court explained:

> "That he is being paid by one side is always skillfully lost in casual answers to cross-examining cynical questions, by a modest shrug indicating that a charge is made per hour or day, which seems wholly inconsequent to the large proportions from which his great capacities emerge."

Sears v. Rutishauser, *supra* at 406–07, quoting *Kemeny*.

Given that, there was no basis for the appellate court to give governing weight to Dr. Fras' report and make it the basis for its conclusion that the report caused Armstrong to settle.

That leads to the next question, whether Armstead had incentive to litigate that claim to its conclusion. He explained why not. Pl. main br. at 23. National Freight disagrees, claiming he had incentive because he was looking for maximum compensation. Def. br. at 23. But National Freight does not show the amount received was insignificant, nor does it explain why Armstead could not have considered that he was going to obtain full compensation from

[1] For example, his credibility would be sorely impeached for finding that Armstead could drive a truck despite a back brace, a cane, and a prescribed daily regimen of fentanyl and oxycodone. CC373-74.

the real tortfeasor. This was a rear-end accident, and he knew he would recover against National Freight.

Defendants' amicus support surmises a further reason for Armstead to forego litigating the extent of the injury; it conjures up intent to avoid payment for the medical bills for the back fusion. IDC Amicus br. at 8, 12.[2] First, the amicus was wrong when it said Armstead only recovered for "the" knee injury. There were two knee injuries: a strain and an extensive arthroscopy. Only the strain was listed. More importantly, the amicus created that scenario out of whole cloth. In the common law case, the medical payer, whether through ERISA or otherwise, will have a lien.

But the amicus' argument does serve to move the focus to Plaintiff's point, that estoppel awards a windfall to National Freight. National Freight denies that (Def. br. at 37), but does not explain how avoiding responsibility for bills and injuries it caused is not a windfall.

The amicus ignores that an employer has a right of reimbursement out of any recovery without regard to the type of damages the employee receives payment for in the third-party action. *Page v. Hibbard*, 119 Ill. 2d 41, 47, 518 N.E.2d 69, 71 (1987). This Court describes protecting the workers' compensation lien as being of "*utmost importance*." *Gallagher v. Lenart*, 226 Ill. 2d 208, 239, 874 N.E.2d 43, 61 (2007) (emphasis in original). The amicus's

[2] The amicus at 12 cites *Auler Law Offices v. Indus. Comm'n*, 99 Ill. 2d 395, 399–400 (1984) for the proposition that collateral estoppel applies. But the Commission there resolved the question of the applicant's credibility in a hearing. It did not apply estoppel.

argument also reminds us that estoppel will similarly deny repayment to the bill payers.

III. Nothing was adjudicated in Pennsylvania because there was no decision on the merits. For that further reason, the court erred in applying collateral estoppel.

Plaintiff in his main brief explained there was no adjudication and no final judgment on the merits in Pennsylvania because the agency order restricted its reach. The order was "entered without adoption or litigated determination on the merits of the matters agreed upon." C102; App. to main br. at A9. National Freight insists Plaintiff twists the meaning of that limitation. Def. br. at 25. National Freight focuses on whether the agreement could affect the rights of third parties.

However, Armstead's primary point was premised on the earlier part of the sentence. The sentence begins with the admonition that, "This Decision is entered without adoption or litigated determination on the merits of the matters agreed upon, ..." C102. National Freight's Facts included that paragraph, but Defendants' argument did not address the effect of those proscriptive words, leaving unrebutted Plaintiff's primary argument against estoppel.

The quoted words are the "proscriptive language" that National Freight claims is missing. Def. br. at 27. They are critical because they mean the order and the settlement did not represent a litigated determination of the merits of the case, and that is a fundamental requirement for estoppel. To adjudge a

question is to deem or pronounce it to be or to award judicially. *Adjudge*, Black's Law Dictionary (11th ed. 2019). The agency judge did not pronounce anything to be or award anything, so it did not adjudge or adjudicate.

National Freight also argues that parties to a court resolution cannot prevent that document from being used for collateral estoppel. Def. br. at 26. The point is that nothing prevents a *court* from making that determination. National Freights' brief does not cite any case barring a court like the Pennsylvania agency, with knowledge of the proceeding and the intent of the parties, from including the kind of restriction found there.

As pointed out in Plaintiff's main brief at 18, that restrictive language is critical because it distinguishes these facts from those in *Richter v. Vill. of Oak Brook*, 2011 IL App (2d) 100114, ¶ 27, 958 N.E.2d 700, 712, and *Stromberg Motor Device Co. v. Indus. Comm'n*, 305 Ill. 619, 621–22, 137 N.E. 462, 463–64 (1922). Pl. main br. at 17-18. There was no such language in *Richter*. National Freight argues that *Richter* controls. Def. br. at 28. Plaintiff explained in his main brief at 18 why *Richter* and its precursor do not control.

National Freight focuses only on the sentence's further language, saying neither it nor the agreement alter the rights or obligations of any third party. Def. br. at 25. National Freight focuses only on "rights", ignoring "obligations." The judge presumably intended to prevent a third party like National Freight from using this document to shield itself from its "obligation" for this incident, because there is no other reason for that word. Courts will not interpret a

contract in a way that would render provisions meaningless or be contrary to the plain meaning of the language used, and there is no reason to treat agreed orders differently. *Thompson v. Gordon*, 241 Ill. 2d 428, 442, 948 N.E.2d 39, 47 (2011); *Woods v. City of Berwyn*, 2014 IL App (1st) 133450, ¶ 24, 20 N.E.3d 808, 813; *Covinsky v. Hannah Marine Corp.*, 388 Ill. App. 3d 478, 484, 903 N.E.2d 422, 427 (2009) (applying the plain and ordinary meaning to unambiguous contract terms).

National Freight contends the judge intended to protect its "right" to use issue preclusion (Def. br. at 26), but cites no authority. Plaintiff submits it is highly unlikely a workers' compensation judge specifically had collateral estoppel in mind and intended to protect that defense when it addressed rights and obligations there.

As part of this section, National Freight says Plaintiff suggests the Pennsylvania judge acted as an automaton rather than considering each case, and used a rubber stamp. Def. br. at 29, referring to Pl. main br. at 20 and 28. However, that is not the argument the court will find there. Plaintiff did explain the reason that most agency judges likely limit review of such documents to their critical elements, and described the likely limited nature of such reviews. As long as the parties before the agency judge agree, there is no reason for the judge to perform an in-depth review. Sheer case volume explains that. That practical background was ably explained in the amicus of the WCLA, a group of over 700 lawyers who represent both sides in workers'

compensation cases. That amicus is unusual because it represents a joint brief by lawyers on both sides of the relevant bar.

The defense amicus claims this argument "impugns the integrity and competence of all workers' compensation practitioners." IADTC br. at 7. Such name-calling does not advance the discussion. Suggesting that the judge and counsel had no reason to check every element of a contract, there or here, a description verified by lawyers involved in that practice here, hardly amounts to impugning integrity.

National Freight points to Pennsylvania cases to support its contention that the document represented a final adjudication. Def. br. at 20. However, the quote from the first case (*Frederick*) disposes of that decision's relevance because the court simply recited the general rule that findings in such cases may bar relitigation of identical issues. *Frederick v. Action Tire Co.*, 1999 PA Super 332, 744 A.2d 762, 764 (1999). That judge had dismissed the claim after finding the worker's testimony not credible, following trial. Unlike this case, that claim was litigated to its conclusion and adjudicated.

Holts v. Thyssenkrupp Elevator Corp., 2011 Phila. Ct. Com. Pl. (C271) and *McConnell v. Delprincipe*, 2014 Pa. Dist. & Cnty. Dec. (2014) (C177), cited at Def. br. at 30 and 33, are trial court orders and thus without even persuasive value. Notably, *McConnell,* like *Frederick* but unlike this case, involved a decision after trial. In *Holts*, the worker never made any claim in the compensation case for the injury she claimed in a second case. The court

deemed that a judicial admission (the appellate court rejected that here), and also that any error was harmless. And no one raised an issue like the one driving this appeal, the order's restrictive language.

In *Com., Dept. of Labor & Indus., Bureau of Workers' Comp. v. W.C.A.B. (US Food Serv.)*, 932 A.2d 309, 310, 314 (Pa. Commw. Ct. 2007) (Def. br. at 31), the issued involved the employer's claim for reimbursement from a fund after entering into a C&R agreement that resolved liability, disability, and all litigation claims prior to the grant of a Termination Petition which the court said was a predicate for seeking reimbursement. The actions were all related, and the case has nothing to do with the issues here. Similar, in *Grant v. GAF Corp.*, 415 Pa. Super. 137, 146, 608 A.2d 1047, 1052 (1992) (Def. br. at 31) and *Wisnewski v. Home Mut. Ins. Co.*, 42 Pa. D. & C.3d 207 (Pa. Com. Pl. 1986) (Def. br. at 33), workers' compensation claims went to trial and were decided. The cases represents unremarkable applications of classic collateral estoppel in critically different circumstances.

National Freight's brief next claims the tort case would fail in Pennsylvania and therefore should fail here, arguing the Full Faith & Credit clause requires that result.[3] Def. br. at 35. The first case cited, *Morris B. Chapman & Associates, Ltd. v. Kitzman*, 193 Ill. 2d 560, 565, 739 N.E.2d 1263, 1267–68 (2000) (Def. br. at 35), mentions full faith and credit but simply compared two cases and rejected collateral estopped. Interestingly, the court

[3] This contrasts with National Freight's objection in the trial court to Pennsylvania law. C170.

said issue preclusion cannot be applied to a party who could not have appealed from the earlier judgment. Here, Armstead could not have appealed from an agreed order.

Two further cited authorities, *Du Page Forklift Serv., Inc. v. Material Handling Services, Inc.*, 195 Ill. 2d 71, 79, 744 N.E.2d 845, 849–50 (2001) and *Chicago, R. I. & P. Ry. Co. v. Schendel*, 270 U.S. 611, 614–15, 46 S. Ct. 420, 421–22, 70 L. Ed. 757 (1926) (Def. br. at 35), do not mention full faith and credit. They simply apply classic collateral estoppel following a trial and decision. Neither deals with the critical restrictive language here.

Finally in this section, Defendant attacks counsel's analysis of the likely effect of the decision on the operations of the Workers' Compensation Commission. Def. br. at 36; Pl. main br. at 28. National Freight calls the reasoning vacuous, as in showing a lack of thought or mindless. If Plaintiff's counsel had argued what National Freight portrays, i.e., that parties to settlement contracts do not pay attention to their contents, that criticism, uncivil as it is, might be true. But that was not what counsel said.

Using statistics, counsel showed it is unlikely those involved in the system have the ability or motivation to check and confirm every detail of contracts, given that the parties had agreed on their contents. Significantly, the amici filed by lawyers from both sides who actually practice there confirm that analysis. The decision did create a potential problem, because it requires

everyone at the Commission to cast a critical eye on contract elements never intended to have weight beyond that moment.

Nor would reversal give Armstead a second bite of the apple, contrary to Defendants' argument at 38. Their analogy fails because there are figuratively two very different apples – his workers' compensation claim and his tort claim. So far, Armstead has had only the first. If he is allowed the second, the employer as well as medical payors will be recompensated by the entity that was the real cause of the accident. That would fulfill the intent of the Pennsylvania Workers' Compensation Act which provides an absolute right of subrogation to prevent double recovery, ensures that an employer is not required to pay for the negligence of a third party like National Freight, and prevents a third party from escaping liability for wrongful conduct. *Gillette v. Wurst*, 594 Pa. 544, 554, 937 A.2d 430, 436 (2007).

IV. Judicial estoppel is inapplicable.

Finally, National Freight argues for judicial estoppel.[4] Def. br. at 38. A word search of its motion for summary judgment and its reply did not show any mention of judicial estoppel. C82, C163. That is significant because this Court has ruled it is up to a trial court to determine whether the prerequisites for judicial estoppel are met. *Seymour v. Collins*, 2015 IL 118432, ¶ 47, 39 N.E.3d 961, 976–77. The trial court's role is critical because multiple factors

[4] National Freight abandoned judicial admission, the only ground the trial court agreed with.

inform its decision, among them the significance or impact of the party's action in the first proceeding and whether there was an intent to deceive or mislead as opposed to the prior position having been the result of inadvertence or mistake. *Id.*

Defendant's failure to raise this issue denied that court the opportunity to carry out its duty. It has therefore waived this issue. In addition, if it had raised that defense, counsel could have explored the details of the two cases, including whether Armstead received any real benefit from the description in the agreement, that being a requirement for estoppel.

As to whether this issue was before the appellate court, Defendant admits that court did not address judicial estoppel, but says "the issue was raised before it." Def. br. at 38. Counsel again used word search and did not locate judicial estoppel in their brief. To the best of counsel's knowledge, Defendant raised judicial estoppel for the first time in its Petition for Rehearing, footnote 2. That was hardly sufficient to claim the issue was effectively and timely raised in that court. The issue should therefore be deemed waived.

Turning to the merits, judicial estoppel is a two-step process. The trial court first determines whether the party to be estopped has "(1) taken two positions, (2) that are factually inconsistent, (3) in separate judicial or quasi-judicial administrative proceedings, (4) intending for the trier of fact to accept the truth of the facts alleged, and (5) have succeeded in the first proceeding

and received some benefit from it." Then the court exercises its discretion. *Seymour v. Collins*, 2015 IL 118432, ¶ 47, 39 N.E.3d 961, 976–77.

In doing the latter, the court must further consider factors, including the impact of the party's action in the first proceeding and whether there was an intent to deceive as opposed to inadvertence or mistake. *Id.* That further prerequisite was not included in National Freight's description of the prerequisites for this estoppel set out in *Seymour*. Finally, judicial estoppel must be proved by clear and convincing evidence. *Id.* at ¶ 39.

Here, Armstead did not take two positions despite the injury description in the agreement. Both sides there knew the nature and extent of his injury. That came out in his deposition there (R. C337-38), and the trial court here was familiar with that (R. 23-24). In the trial court, National Freight argued the deposition should not be considered because it was not tendered until reconsideration. C357; R. 59. But it now raises the deposition here (Def. br. at 5), making it available for use by Plaintiff. In addition, the language of the Pennsylvania decision showed the compensation judge did not accept anything in the settlement because it declared that it did not find anything on the merits, meaning Armstead did not receive any benefit from the description of the injury.

Further, Armstead did not "succeed" there because there was no trial in which success or failure was the outcome. Finally, nothing shows an intent to deceive because, as described, both sides there were aware of the extent of the

injury. In the same vein, nothing in the record shows that the description of the injury there had any impact on the settlement or the judge's approval of the settlement amount.

For those reasons, even if the Court considers this defense, National Freight has not carried its burden of proving judicial estoppel by clear and convincing evidence.

CONCLUSION

For the reasons stated, Plaintiff-Appellant Clifton Armstead requests that the appellate court decision be reversed, and that the matter be remanded for further appropriate proceedings.

Respectfully submitted,

/s/ *Michael W. Rathsack*

Michael W. Rathsack
Attorney for Plaintiff-Appellant
10 South LaSalle St. - 1420
Chicago, Illinois 60603
(312) 726-5433
mrathsack@rathsack.net

Of counsel:

Adam J. Zayed
and
Michael W. Rathsack

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding the words containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance and the certificate of service is 5,930 words.

/s/ *Michael W. Rathsack*

MICHAEL W. RATHSACK
Attorney for Plaintiff-Appellant
10 South LaSalle St. - 1420
Chicago, Illinois 60603
(312) 726-5433
mrathsack@rathsack.net

SUPPLEMENTAL APPENDIX

TABLE OF CONTENTS TO SUPPLEMENTAL APPENDIX

No. 126730

IN THE
SUPREME COURT OF ILLINOIS

CLIFTON ARMSTEAD,	)
	)
Plaintiff-Appellant,	)
	)
vs.	)
	)
NATIONAL FREIGHT, INC., d/b/a NFI INDUSTRIES, INC., and DERRICK ROBERTS,	)
	)
Defendants-Appellees.	)

Certification

The undersigned, counsel for Plaintiff-Appellant, certifies that the attached copies of a Supplement and order are true and correct copies of the original documents. Under penalties as provided by law, pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies the statements set forth in this instrument are true and correct.

/s/ *Michael W. Rathsack*

Dated: 7-27-21

No. 3-17-0777 Consolidated with 3-18-0009

In the
Appellate Court of Illinois
Third Judicial District

CLIFTON ARMSTEAD,

Plaintiff-Appellant,

v.

NATIONAL FREIGHT, INC., d/b/a, NFI INDUSTRIES INC., and DERRICK ROBERTS,

Defendants-Appellees.

Appeal from the Circuit Court of the Thirteenth Judicial Circuit,
Grundy County, Illinois, No. 2016 L 21.
The Honorable **Lance R. Peterson,** Judge Presiding.

SUPPLEMENT TO PETITION FOR REHEARING OF DEFENDANTS-APPELLEES NFI INTERACTIVE LOGISTICS, LLC and DERRICK ROBERTS

ROBERT M. BURKE
GARRETT L. BOEHM, JR.
JOHNSON & BELL, LTD.
33 West Monroe Street, Suite 2700
Chicago, Illinois 60603
312.372.0770
burker@jbltd.com
boehmg@jbltd.com

Attorneys for Defendants-Appellees NFI Interactive Logistics, LLC and Derrick Roberts

SUPPLEMENT TO PETITION FOR REHEARING

On January 17, 2019, this court issued a Supreme Court Rule 23 Order reversing summary judgment previously granted to Defendants National Freight, Inc., (NFI) and Derrick Roberts, and remanding for further proceedings. On February 5, 2019, this court granted Plaintiff's motion to publish the Rule 23 Order. An opinion was released the same day. *Armstead v. National Freight, Inc.*, 2019 IL App (3d) 170777.

On February 7, 2019, NFI and Roberts filed a Rule 367 Petition for Rehearing. NFI and Roberts now supplement that Petition for Rehearing and argue that the February 5, 2019 opinion should be vacated and this appeal dismissed as moot.

ARGUMENT

This appeal is moot because Plaintiff failed to re-file his complaint within one year of the December 7, 2017, voluntary dismissal order.

The procedural history of this case shows that Plaintiff has abandoned any claim because he did not timely refile his action pursuant to 735 ILCS 5/13-217, after voluntarily dismissing it in December 2017.

On May 5, 2016, Plaintiff filed a two count negligence complaint against NFI and Roberts. C9-12. Count I alleged negligence against NFI and count II alleged negligence against Roberts for injuries incurred on May 6, 2015. *Id.*

On June 14, 2017, the Circuit Court granted Defendants' motion for partial summary judgment as to claimed damages for shoulder and back

injuries finding that Plaintiff had judicially admitted that his injury was limited to a right knee strain. C288. The Circuit Court made a Supreme Court Rule 304(a) finding with respect to the June 14, 2017 Order. C288.

Plaintiff moved to reconsider. C301. On October 18, 2017, the Circuit Court denied the motion for reconsideration. C511; R 60-61. The Circuit Court made a Supreme Court Rule 304(a) finding with respect to the October 18, 2017 Order. C511.

On November 14, 2017, Plaintiff filed a notice of appeal from the Orders entered June 14, 2017 and October 18, 2017, which granted Defendants' motion for partial summary judgment and denied Plaintiff's motion to reconsider. C512.

On November, 29, 2017, Plaintiff apparently realizing that the Appellate Court would lack jurisdiction over the appeal of the partial summary judgment order, which was not final as to any party or claim, moved to voluntarily dismiss his case pursuant to 735 ILCS 5/2-1009(a). C517. On December 7, 2017, the Circuit Court granted, over Defendants' objection, Plaintiff's motion to voluntarily dismiss his case. C522. On January 3, 2018, Plaintiff filed a second notice of appeal. C523.

Because Plaintiff voluntarily dismissed his case on December 7, 2017, Plaintiff had one year to refile his case according to 735 ILCS 5/13-217. The statute provides:

> In the actions specified in Article XIII of this Act or any other act or contract where the time for commencing an action is limited, ***if*** judgment is entered for the plaintiff but reversed

> on appeal, or if there is a verdict in favor of the plaintiff and, upon a motion in arrest of judgment, the judgment is entered against the plaintiff, or ***the action is voluntarily dismissed by the plaintiff***, or the action is dismissed for want of prosecution, or the action is dismissed by a United States District Court for lack of jurisdiction, or the action is dismissed by a United States District Court for improper venue, ***then, whether or not the time limitation for bringing such action expires during the pendency of such action, the plaintiff, his or her heirs, executors or administrators may commence a new action within one year or within the remaining period of limitation***, whichever is greater, after such judgment is reversed or entered against the plaintiff, or ***after the action is voluntarily dismissed by the plaintiff***, or the action is dismissed for want of prosecution, or the action is dismissed by a United States District Court for lack of jurisdiction, or the action is dismissed by a United States District Court for improper venue.

735 ILCS 5/13-217 (emphasis added).

According to section 13-217, Plaintiff had until December 7, 2018, to refile his action against NFI and Roberts. He failed to do so. Regardless of this Court's decision on appeal of the partial summary judgment, Plaintiff cannot pursue his previously voluntarily dismissed action before the Circuit Court because the time for pursuing a refiled action has expired.

Notably, Plaintiff's appeal did not toll the time for refiling allowed by section 13-217. *See Wade v. Byles*, 295 Ill. App. 3d 545, 546 (1st Dist. 1998). In *Wade*, the Appellate Court considered whether the plaintiff's refiled action was timely pursued according to section 13-217. In that case, on September 28, 1992, the plaintiff filed a three-count complaint against the defendants, in the United States District Court for the

Northern District of Illinois. 295 Ill. App. 3d at 546. On May 25, 1995, the district court granted the defendants' motion for summary judgment on the Civil Rights Act claim and dismissed State law claims for lack of Federal supplemental subject matter jurisdiction. *Id.*

The plaintiff then chose to appeal the district court's decision to the United States Court of Appeals for the Seventh Circuit. *Id.* On May 13, 1996, the decision was affirmed. *Id.* On October 15, 1996, the United States Supreme Court denied the plaintiff's petition for *certiorari*. *Id.*

On November 1, 1996, almost a year and a half after the dismissal in the Federal district court, the plaintiff filed a seven-count complaint in the circuit court of Cook County. *Id.* at 546. The re-filed action was not timely under section 13-217, was dismissed, and that dismissal was affirmed. *Id.* at 546-48.

The reasoning of *Wade* controls the disposition of this case. Here, in order to resume any litigation, Plaintiff will be required to refile his previously voluntarily dismissed action. However, to be timely, Plaintiff was required to refile his action within one year of the December 7, 2017 voluntary dismissal. According to the plain language of section 13-217, any attempt by Plaintiff to refile his action now would fail.

In its Opinion rendered February 5, 2019, this Court stated that it was reversing the circuit court's grant of partial summary judgment and remanding for further proceedings. *Armstead v. National Freight, Inc.*,

2019 IL App (3d) 170777, ¶¶ 18-21. However, there is no pending case in which to remand this matter.

Based on the foregoing, the appeal is now moot. The law is well-settled that a reviewing court should not issue an opinion in a case when the dispute has ended and no relief need be given to either party. The Illinois Supreme Court stated this rule as follows:

> Courts of review will not decide moot or abstract questions, will not review cases merely to establish precedent, and will not render advisory opinions. Courts of review will also ordinarily not consider issues that are not essential to the disposition of the causes before them or where the results are not affected regardless of how the issues are decided.

Condon v. AT&T Co., 136 Ill.2d 95, 99 (1990); *see also In re Marriage of Peters-Farrell*, 216 Ill.2d 287, 291 (2005) (an appeal is moot if no actual controversy exists or if events have occurred that make it impossible for the reviewing court to grant the complaining party effectual relief). Accordingly, this Court should vacate the Opinion rendered February 5, 2019 as moot.

CONCLUSION

For the foregoing reasons, Defendants National Freight and Derrick Roberts petition this Court to rehear this appeal and either (1) affirm partial summary judgment entered by the trial court finding that Plaintiff's damages claim is limited to a right knee strain, or (2) vacate the Opinion entered February 5, 2019, and dismiss this appeal as moot.

Respectfully submitted

NATIONAL FREIGHT, INC. AND
DERRICK ROBERTS

By: *Garrett L. Boehm, Jr.*
One of Defendants' attorneys

Robert M. Burke (burker@jbltd.com)
Garrett L. Boehm, Jr. (boehmg@jbltd.com)
JOHNSON & BELL, LTD.
33 W. Monroe St. Suite 2700
Chicago, Illinois 60603
(312) 372-0770
#5467427

STATE OF ILLINOIS
THIRD DISTRICT APPELLATE COURT

BARBARA TRUMBO
Clerk of the Court
815-434-5050

1004 Columbus Street
Ottawa, Illinois 61350
TDD 815-434-5068

March 5, 2019

Garrett Lee Boehm, Jr.
Johnson & Bell, Ltd.
33 West Monroe Street, Suite 2700
Chicago, IL 60603

RE: *****CONSOLIDATED APPEAL*****
Armstead, Clifton v. Nat'l. Freight, Inc., et al.
General No.: 3-17-0777, 3-18-0009
County: Grundy County
Trial Court No: 16L21

The court has this day, March 05, 2019, entered the following order in the above entitled case:

Motion of Appellees to File a Supplement to the Petition for Rehearing, objection of Appellant noted, is DENIED.

Barbara A. Trumbo
Barbara Trumbo
Clerk of the Appellate Court

c: Adam Zayed
Michael William Rathsack
Robert Michael Burke

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

CLIFTON ARMSTEAD, *Plaintiff-Appellant,* v. NATIONAL FREIGHT, INC. d/b/a NFI INDUSTRIES, INC. and DERRICK ROBERTS, *Defendants-Appellees.*	)	No. 126730

The undersigned, being first duly sworn, deposes and states that on July 28, 2021, there was electronically filed and served upon the Clerk of the above court the Reply Brief of Appellant. On July 28, 2021, service of the Reply Brief will be accomplished by email as well as electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

Garrett L. Boehm, Jr.
Robert M. Burke
Johnson & Bell
boehmg@jbltd.com
burker@jbltd.com

Kurt Niermann
Porro Niemann Law Group LLC
kurt@pnlawoffice.com

Michelle LaFayette
Ganan & Shapiro
mlafayette@gananlaw.com

Nicholas Nepustil
Benjamin and Shapiro Ltd.
nnepustil@benshaplaw.com

Vitas J. Mockatis
Costa & Ivone
vmockatis@costaivone.com

Within five days of acceptance by the Court, the undersigned states that thirteen copies of the Reply Brief bearing the court's file-stamp will be sent to the above court.

/s/ Michael W. Rathsack
Michael W. Rathsack

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Michael W. Rathsack
Michael W. Rathsack