No. 126730

IN THE SUPREME COURT OF ILLINOIS

CLIFTON ARMSTEAD,

Plaintiff-Appellant

v.

NATIONAL FREIGHT, INC. d/b/a NFI INDUSTRIES, INC. et. al,

Defendants-Appellees

On Appeal from the Illinois Appellate Court, Third District
Case Nos. 3-17-0777 & 3-18-0009

There Heard On Appeal from the Circuit Court of the Thirteenth Judicial Circuit
Grundy County, Illinois, Case No. 2016 L 21
Honorable Lance R. Peterson, Judge Presiding

BRIEF OF *AMICUS CURIAE* ILLINOIS TRIAL LAWYERS ASSOCIATION IN SUPPORT OF CLIFTON ARMSTEAD

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INTERESTS OF *AMICUS CURIAE*

The Illinois Trial Lawyers Association (ITLA) submits this brief in support of injured victims like Clifton Armstead. ITLA is an organization focused on protecting the rights of all injured persons. And there is no right more fundamental than our interest in protecting and preserving bodily integrity, through the mechanisms for redress provided by the State.

ARGUMENT SUMMARY

Courts should rarely, if ever, apply collateral estoppel to handicap any victim's effort to redress a bodily injury. This is especially true when considering the collateral impact of entries on compromise settlement agreements from the Illinois Workers Compensation Commission (IWCC). The IWCC processes claims at an exceptionally high rate through few hearing officers, and settlement agreements are drafted by lawyers and laypeople alike. Moreover, the structure of the system disincentivizes workers from running their cases through the trial process. Thus, references in IWCC settlement agreements should never be applied in a collateral fashion against the worker's tort claim. This common sense and equitable result requires little more than confirming long standing Illinois cases holding that consent judgments are not entitled to collateral estoppel effect. Alternatively, express reservations regarding the preclusive effect of a court's order should be respected for purposes of collateral estoppel and *res judicata*. The tort claim is the only vehicle which affords the worker an opportunity for reasonable redress. It should be decided upon its merits in all but the most compelling of circumstances.

MODERN ROLES FOR EQUITY

Equity is a freewheeling concept covering a wide range of legal matters, including entire bodies of law (e.g., trust law, fiduciary law), practice and procedural rules (e.g., adding/dropping parties to a suit, discovery rules) and some remedies (e.g., injunctive relief). *Armstead* involves the behavior-constraining role of equity, the idea that parties should not benefit from opportunism during litigation. See *Jackson v. Bd. Of Election Comm'rs*, 2012 IL 111928 *P26; Emily Sherwin, 'Equity and the Modern Mind', in J. Goldberg and H.E. Smith (eds), *EQUITY AND LAW: FUSION AND FISSION* (Cambridge Press 2019) ch.15; Yuval Feldman and Henry Smith, *Behavioral Equity*, 170 J. of Inst. And

Theoretical Econ. JITE 137 (2014); Smith, Henry E., Equity as Second-Order Law: The Problem Of Opportunism (January 15, 2015). Harvard Public Law Working Paper No. 15-13, Available at SSRN: https://ssrn.com/abstract=2617413. Collateral estoppel is one of the doctrines that courts created to address unfair opportunism.

COMMON SENSE LIMITATIONS ON THE COLLATERAL ESTOPPEL DOCTRINE

1. THE DOCTRINE SHOULD BE SPARINGLY APPLIED

This Court has cautioned that the doctrine should sparingly be applied even when the elements of collateral estoppel are present. The doctrine should not be used to prevent a party from presenting claims or defenses in later litigation, unless it is clear that no unfairness results to the party being estopped. See *Talarico v. Dunlap*, 177 Ill.2d 185, 191-2 (1987); *Kessinger v. Grefco, Inc.*, 173 Ill.2d 447, 467-468 (1996); *Van Milligan v. Board of Fire & Police Commissioners*, 158 Ill.2d 85, 96 (1994). Moreover, a decision on the issue must also 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. *Talarico* at 191. Thus, collateral estoppel should not be used unless:

1) each case involves the identical relevant issue;

2) the issue was necessary for the judgment in the initial case;

3) the issue was litigated out in the initial case by the targeted party;

4) the doctrine works no unfairness to the targeted party.

For the first 150 years of practice, a party could not use a prior factual finding as an estoppel in Illinois unless both parties were bound by the earlier judgment. *In re Owens*,

125 Ill.2d 390, 398 (1988). The mutuality requirement was removed in 1979 with the idea that there was an obvious difference between a party who has never litigated an issue and one who has fully litigated and lost on an issue. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 (1979); *Illinois State Chamber of Commerce v. Pollution Control Board*, 78 Ill.2d 1, 7 (1979). However, removal of mutuality created its own set of problems. Due Process would not permit a party in the second case to be bound to an issue decided in an earlier case if that party had no role or opportunity to litigate out the issue in the first case. See *Blonder-Tongue Laboratories v. Univ. of Illinois Foundation*, 402 U.S. 313, 329 (1971). Even when a party had litigated out the issue in an earlier case, the Court questioned whether it was fair to use the doctrine in both an offensive and defensive manner. The Court was hesitant to bind a defendant to issues it lost in an earlier case, discouraging offensive use of collateral estoppel. See *In re Owens* at 397-400. The Court also eventually cautioned against overuse of the doctrine in a defensive manner, if the application unfairly impacted the targeted party. See *Talarico*. Thus, after removing the mutuality requirement from the doctrine in 1979, the Court came to realize that the doctrine should sparingly be used as it was not particularly fair. The Court had good reason for concern.

A preference for unequal application of any doctrine would seem to run against the very essence of equity (i.e., fairness). If the doctrine is available against one party, it should be as readily available against both. Even if the doctrine is no longer an equitable exercise, perhaps it retains value as a tool to relieve docket congestion. However, a concern over saving judicial resources is not a good reason to deny litigants their chance to fairly litigate out issues. See *In re Owens*, 125 Ill.2d 390, 401 (1988) (lawyer found

guilty of civil fraud should be able to defend himself at the disciplinary hearing). Rather, a court must balance the need to limit litigation against the right of a fair adversary proceeding in which a party may fully present his case. *Talarico,* 177 Ill.2d at 192. The doctrine should sparingly be used even from a judicial resource perspective. Moreover, applying court authority to favor one party over the other does not seem consistent with the judiciary's duty to ensure a level battlefield for litigants. As the doctrine is applied in *Armstead,* the doctrine is neither equitable nor just.

2. WE SHOULD FOCUS ON THE INTENDED PURPOSE OF THE DOCTRINE

Our focus should again return to the original role of the doctrine—dealing with party opportunism. Any time a party asks a court for equitable intervention, a court should consider what misconduct it is being asked to address. Will unfairness result from application of the doctrine? Is the requestor itself engaging in opportunism by seeking the relief? Will the court tilt the battlefield in favor of one party by granting an equitable intervention? That is the assessment the appellate panel failed to do in *Armstead.* It failed to consider whether the case truly warranted an equitable intervention against Armstead. ITLA contends that collateral estoppel should never play a role in handicapping any victim's injury case. Courts already have an assortment of tools and doctrines available to use when they run across true opportunism by a party. There is no reason to stretch the collateral estoppel doctrine beyond its intended application.

3. THE *ARMSTEAD* COURT CLEARLY MISAPPLIED THE DOCTRINE

Armstead involves a particularly poor illustration of the doctrine. There is zero evidence that Armstead could have gained any advantage in his tort case with a knee strain reference on the Pennsylvania contract ("PA contract"). His knee strain language gifted

the tortfeasor an admission to use against him in the Illinois tort case, an unforced error which may prove damaging for the tort case. We must also recognize that Armstead is obligated to reimburse the workers compensation payments through his tort recovery. 77 P.S. § 671.[1] Armstead's employer expressly retained its rights to subrogation in the settlement contract. C 105; Separate Appendix of Appellant A-13 (hereinafter "A-"). Armstead also has statutory and contractual obligations to reimburse government benefit plans and group carriers for payments they made. It is inconceivable that Armstead could have gained an advantage in the tort case by putting a knee strain reference in his PA contract.

Also consider the knee strain reference for its own sake. Knee strains can refer to any soft tissue tearing in the knee, whether ligament, cartilage or muscle. Muscles and most ligaments have a blood supply and can heal to some degree on their own. But tears in the knee joint might involve structures lacking a blood supply and ability to heal. For example, the anterior cruciate ligament and inner two-thirds of either meniscal body lack a blood supply. *See* Rao AJ, Erickson BJ, Cvetanovich GL, Yanke AB, Bach BR, Cole BJ. The Meniscus-Deficient Knee: Biomechanics, Evaluation, and Treatment Options. *Orthopaedic Journal of Sports Medicine*. October 2015. The same is true for articular cartilage. *See id.* These structures all play a major role in stability of the knee joint. When these structures are damaged, the tissues do not repair themselves and the joint articulates differently than it had during the preceding years of life. *See id.* This leads to a predictable breakdown of the joint structures and the damage is rarely limited to the

[1] The same is true for any recovery in an Illinois workers compensation case. 820 ILCS 305/5(b).

single knee joint. *See id.* People often modify adjacent joints to compensate for the change in use of the injured joint, leading to compensatory deterioration of adjacent joints of the same leg, the other leg or even the spinal segments. While the appellate court said it was limiting Armstead to a knee strain recovery, the diagnosis could range from almost nothing to a complete inability to ambulate and to work.

Further consider the uncertainty in Armstead's PA contract. He entered into a compromise settlement agreement for the work injury about a year and a half after his injury. The employer had not paid a dime in survival benefits or treatment over that period. C 104; A-12 par.5. By the time he settled the claim, Armstead would have had little idea how his knee injury would progress or how compensating joints would respond. The PA contract also tells us that Armstead is receiving compensation for his "remaining lifetime earning power". C 106; A14 par.13. Thus, Armstead was not even compensated for a specific impairment to the knee. Yet the appellate court collaterally estopped him from seeking anything more than a knee strain recovery in his tort case. The *Armstead* holding is clearly wrong. But it does illustrate why collateral estoppel should be limited to cases where a party has fully litigated out an issue in earlier litigation. An incentive to litigate is not enough for civil consent judgments because of the ambiguity regarding the extent of actual litigation.

4. THE PARTY WHO WRONGFULLY CAUSED THE INJURY SHOULD NOT BE ABLE TO USE THE DOCTRINE

There is a related concern about applying the doctrine against victims in a tort setting. It is not obvious why tortfeasors should be able to use a court's equitable powers to carve away at their victims' legal claims. Assuming the tort claim has merit, National

Freight's wrongful conduct led to Armstead's losses and mobilization of legal machinery in two states. What concept of equity grants a wrongdoer the right to employ the inherent powers of a court to carve away at its victim's legal claims? That would seem a misapplication of court authority. The wrongdoer should stand last in line to enjoy equitable intervention by the court in an action at law.

National Freight was also not a party to the PA contract and would not stand in the shoes of a third-party beneficiary to the contract. It has no enforceable rights in the PA contract. No party is entitled to equitable relief. The party must convince a court to apply its equitable powers against an opponent. This Court should fashion a limitation on a wrongdoer's ability to leverage estoppel doctrines against their victim's cases—a tort version of the *clean hands* doctrine. Juries should decide the nature and extent of injuries resulting from a tortfeasor's misconduct.

5. Illinois Courts Have Long Held That Civil Consent Judgments Do Not Collaterally Bind Parties In Actions Against Third Parties

Simply reaffirming longstanding cases holding that civil consent judgments are not entitled to collateral estoppel effect would alleviate many of the concerns that have arisen since the "incentive to litigate" standard was applied to criminal guilty pleas. Illinois courts have extended *Talerico's* reasoning to civil consent judgments without meaningful analysis of whether civil settlements should be treated identically to criminal pleas. More troubling, Illinois courts have allowed a failure of terminology to result in *res judicata* considerations driving later collateral estoppel decisions without a recognition of the differing principles underlying the two separate but interrelated doctrines.

Courts nationwide have long disagreed about whether a civil consent judgment binds the parties collaterally upon facts which had been in issue in the action which was settled. Fleming James, Jr., Consent Judgments As Collateral Estoppel, 108 U. Pa. L. Rev. 173, 174-75 (1959). One line of cases treats the consent judgment as implying a determination of those issues in the same way as would a judgment as implying a determination of those issues in the same way as would a general verdict of a jury. *Id.* Other courts reject this result, reasoning that a consent judgment implies no determination by the court of any issues in the case. *Id.*

Prior to *Talerico,* Illinois courts routinely and consistently applied the later bright line rule and held that consent judgments, such as worker's compensation settlements, were not entitled to collateral estoppel effect because the extent to which the issues were actually litigated and resolved is uncertain. *See e.g. Arnett v. Environmental Science & Engineering, Inc.*, 275 Ill.App.3d 938, 944 (1995); *Sleck v. Butler Brothers*, 53 Ill.App.2d 7, 13 (1964); *Prill v. Illinois State Motor Service, Inc.*, 16 Ill.App.2d 202, 207-08 (1958).

For example, in *Arnett*, an asbestos abatement worker brought suit against a project manager and air sampling professional seeking damages for injuries sustained when he was exposed to fumes. 275 Ill.App.3d at 940. Previously, the asbestos worker filed a worker's compensation claim against his employer, but the Industrial Commission arbitrator ruled that he failed to establish that his ill-being was caused by exposure to the fumes. *Id.* at 943. The worker's compensation case settled while review was pending in the circuit court. *Id.*

The *Arnett* Court held that the worker's compensation settlement did not collaterally estop the asbestos abatement worker's claim because there was not an adjudication of any facts. *Id.* at 944. Rather, when a third party asserts collateral estoppel

based upon a consent judgment, he is attempting to rely upon an administrative act of the court recording an agreement of the parties, rather than a judicial determination of the rights of the parties and the issues involved. *Id.* citing *Sleck*, 53 Ill.App.2d at 13.

The U.S. Supreme Court and modern commentators agree that consent judgments support claim preclusion but not issue preclusion. *Arizona v. California,* 530 U.S. 392, 414, *supplemented,* 531 U.S. 1 (2000) citing 18 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 4443, pp. 384–385 (1981). As Justice Ginsburg explained, the distinction is necessary because, in most circumstances, it is recognized that consent agreements ordinarily are intended to preclude any further litigation on the claim presented but are not intended to preclude further litigation on any of the issues presented. *Arizona*, 530 U.S. at 414. "The differentiation is grounded in basic res judicata doctrine" because collateral estoppel generally attaches only "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment." *Id.* at 414 citing Restatement (Second) of Judgments § 27, p. 250 (1982). Accordingly, collateral estoppel does not apply to consent judgments because "none of the issues is actually litigated." *Id.* citing comment *e*, at 257.

It's unclear why Illinois courts have departed from this well-reasoned distinction.

a. Policy objectives caution against treating civil consent judgments and criminal pleas identically for collateral estoppel purposes

Illinois courts have applied *Talerico* to civil consent judgments without considering whether civil settlements should be treated identically to criminal pleas. As the appellate court noted, only the incentive and opportunity to litigate is required for a criminal plea to collaterally bind the defendant in later third party litigation absent mitigating circumstances. *Talerico,* 177 Ill.2d 185, 192 (1997). However, this court has not extended

Talerico's reasoning to civil consent judgments and the *Talerico* Court itself confines its analysis to criminal pleas. *Id.* If anything, this court has found that the differences between civil and criminal judgments militate in *favor* of according estoppel effect to criminal convictions because of the greater safeguards of their reliability. *American Family Mutual Insurance Co. v. Savickas*, 193 Ill.2d 378, 385-86 (2000). Put simply, ignoring the preclusive effects of criminal convictions would undermine faith in our justice system. *Id.* The same rationale holds for criminal guilty pleas.

Unlike a civil settlement, non-parties have a vested interest in criminal plea bargains because they represent justice to crime victims and to society at large. In Illinois, crime victims have a constitutional right to participate in the trials of their attackers. Illinois Const., Art. I, § 8.1(a). A crime victim has the right to have an attorney file an appearance on his or her behalf. 725 ILCS 120/4.5(b)(9.3). A crime victim has the right to be consulted and heard during criminal plea negotiations. *See* 725 ILCS 120/4.5(b)(15). Accordingly, a victim's involvement in plea bargains justifies an expectation that they will not be forced to relitigate the facts of the crime committed against them. A sexual assault victim who has participated in their attacker's plea bargain process should not be forced to relive their trauma by testifying in a later civil case because their attacker denies the truth of his plea after accepting its rewards. A murder victim's family should not be forced to relitigate the admitted guilt of one who robbed them of a loved one. *See Savickas*, 193 Ill.2d at 386.

A tortfeasor that injures a worker does not share any these characteristics with the settlement negotiated between its victim and his employer. Giving preclusive effect to civil consent judgments is bad policy because it will intensify litigation by decreasing the likelihood that issues in an action will be narrowed by stipulation and discouraging

compromise. *In re: General Motors LLC Ignition Switch Litigation*, No. 14-MD-2543 (JMF), 2016 WL 4480093, *2 (S.D.N.Y. Aug. 24, 2016) citing Restatement (Second) of Judgments § 27 cmt. E. Accordingly, giving preclusive effect to consent judgments undermines the doctrine's goal of preserving judicial resources. There is little justification for treating a criminal victim and a third party tortfeasor identically by giving civil consent judgments and criminal pleas identical effect in later third party actions.

b. Courts should distinguish situations where parties have agreed to be bound and subsequently collaterally estopped from contesting the agreement in a separate action

"Where the agreement upon which a consent judgment is based is fairly to be construed as providing that the parties should be bound collaterally upon a certain point, that agreement will and should generally be given effect." Fleming. 108 U. Pa. L. Rev. at 193. Both *Richter* and *Kinn* are consistent with this general rule because both cases involve little more than enforcing the parties' prior settlement. *See e.g. Richter v. Village of Oak Brook,* 2011 IL App (2d) 100114; *Kinn v. Prairie Farms/Muller Pinehurst*, 368 Ill.App.3d 728 (2006).

In *Richter*, collateral estoppel applied to factual findings in a worker's compensation settlement agreement because the parties agreed that they would be binding between themselves. *Richter*, 2011 IL App (2d) 100114, ¶¶24, 27, 37. The *Richter* Court specifically noted that the parties could have disclaimed the preclusive effect of the worker's compensation settlement order had they so intended. *Id.* at ¶24; *See also Robinson v. Toyota Motor Credit Corp.*, 201 Ill.2d 403, 416 (2002)(holding that parties to settlement order effectively limited the order's preclusive effect by virtue of their agreement). The unremarkable conclusion that parties will be bound when they previously stipulated to be

bound between themselves should not be transformed into a rule that parties to a settlement will be bound to third parties when they did not intend to be.

Here, the Appellate Court's reliance on *Richter* is problematic because *Richter* fails to distinguish between a consent order's *res judicata* and collateral estoppel effect. The *Richter* Court did not consider the *Arnett, Sleck*, or *Prill* holdings. 2011 IL App (2d) 100114, ¶18. Rather, the *Richter* Court relied upon *Kinn*, which applied *res judicata* effect to a worker's compensation settlement when it was collaterally attacked by a party to the settlement. *Richter*, 2011 IL App (2d) 100114, ¶19 citing *Kinn v. Prairie Farms/Muller Pinehurst*, 368 Ill.App.3d 728, 730 (2006). The *Kinn* Court's enforcement of the worker's compensation settlement is consistent with the U.S. Supreme Court's conclusion that claim preclusion should apply to a civil consent judgment, but that issue preclusion should not. *See Arizona*, 530 U.S. at 414 (citations omitted). There was not a reasoned departure from long-standing Illinois law. Rather, conflation of terms created a new rule.

Accordingly, simply reaffirming longstanding cases holding that civil consent judgments are not entitled to collateral estoppel effect would alleviate many of the concerns that have arisen since the "incentive to litigate" standard was applied to criminal guilty pleas. There is no just reason to treat guilty pleas and civil settlements identically.

6. Express Language Disclaiming Preclusive Effect Of A Consent Judgment's Findings Should Be Respected

Courts should be allowed to dictate the preclusive effects of their orders for collateral estoppel purposes to the same extent they are for *res judicata* purposes if civil consent orders are given issue preclusive effect. This Court has previously adopted the exceptions to claim preclusion found in section 26(1) of the Restatement (Second) of

Judgments (1982) *Hudson v. City of Chicago*, 228 Ill.2d 462, 472-73 (2008) citing *Rein v. David A. Noyes & Co.*, 172 Ill.2d 325, 341-42 (1996). Under this section the rule against claim splitting would not bar a second action if "...the court in the first action expressly reserved the plaintiff's right to maintain the second action..." *Hudson*, 228 Ill.2d at 472 citing *Rein*, 172 Ill.2d at 341; *see also Nowak v. St. Rita High School*, 197 Ill.2d 381, 392-93 (2001). This Court has applied this same "express reservation" exception to negotiated settlement orders. *Robinson,* 201 Ill.2d at 414. For example, in *Robinson*, a California court had previously approved a settlement in a class action lawsuit where the settlement agreement explicitly preserved certain claims. *Id.* at 412- 414. This Court held that the settlement agreement effectively reserved Plaintiff's claims because the reservation was both in writing and specifically identified. *Id.* at 414.

The Ninth Circuit Court of Appeals recently reached a similar result in an opinion that clearly sets forth the rationale for applying the "express reservation" exception to civil consent orders. In *Wojciechowski v. Kohlberg Ventures, LLC*, the defendant claimed that a bankruptcy court's order approving the plaintiff's settlement against other entities barred his subsequent action. 923 F.3d 685, 688 (9th Cir. 2019). The *Wojciechowski* Court found the "express reservation" exception applied because the bankruptcy court's settlement order explicitly excluded claims against third parties. *Id.* at 688, 690-91. The Ninth Circuit reasoned that "[t]he basically contractual nature of consent judgments has led to general agreement that preclusive effects should be measured by the intent of the parties." *Wojciechowski*, 923 F.3d at 691 quoting *F.T.C. v. Garvey*, 383 F.3d 891, 898 n. 7 (9th Cir. 2004). Accordingly, the Court effectively preserved the parties right to pursue subsequent litigation by adopting their agreement into its order. *Id.* at 690-91.

Illinois courts should apply this same principle to collateral estoppel claims. Commentators generally suggest that courts should respect any explicit statement by a first court to limit their judgment's preclusive effect for both issues and claims. *General Motors*, 2016 WL 4480093, *2 citing Wright & Miller, 18 Fed. Prac. & Prov. Juris. § 4424.1 (3d ed. 2017)("It has been seen that a court can declare that its judgment should not preclude a second action on part of the same claim. The same rule should hold for issue preclusion"). In *Holt v. Regional Trustee Services Corp.*, the Nevada Supreme Court followed this modern rule in holding that a judge's express statement was sufficient to disclaim both the claim preclusive (*res judicata)* and issue preclusive (collateral estoppel) effect of its order. 127 Nev. 886, 894-895 (2011) citing Wright & Miller, *supra*, § 4424.1.

In another example, the Southern District of New York determined that a bankruptcy court's factual findings should not be given collateral estoppel effect because the bankruptcy court stated its findings "shall have no force or applicability in any other legal proceeding or matter, including without limitation, [the MDL]". *General Motors*, 2016 WL 4480093, *2. The *General Motors* Court noted that it would be unfair to upend the parties' settled expectation regarding the preclusive effects of their settlement and would likely result in less judicial efficiently in the long run. *Id.* citing Restatement (Second) of Judgments § 27 cmt. E ("[I]f preclusive effect were given to issues not litigated, the result might serve to discourage compromise, to decrease the likelihood that the issues in an action would be narrowed by stipulation, and thus to intensify litigation").

Holding that express reservations should be respected for purposes of *res judicata* but ignored for purposes of collateral estoppel will create traps for the unwary with little theoretical basis. Such a rule provides a stranger to an agreement greater rights to that

agreement than the parties themselves enjoy. Moreover, unrepresented litigants, such as tenants in forcible detainer actions seeking possession only, will have little reason to know that they will be held to the terms of a settlement order in subsequent litigation despite express language to the contrary.

For example, minors' settlements in multi-party motor vehicle accident cases could become problematic under the lower court's analysis because a driver would have "incentive to litigate fault" when sued by the minor and also when suing another driver for their own injuries. These cases are not always consolidated. The cases could be filed in different counties or the more severely injured plaintiff may file much later because they were completing medical treatment. In these scenarios, the driver's two actions will be handled by two separate attorneys with very different incentives when an injured party is insured and is represented by his or her insurer's attorney. The insurance company may want to settle with the minor because of the cost of defense or because it believes its insured is at least partially at fault. The order approving the minor's settlement is fraught with issue preclusive danger if a later court believes it is required to find an "incentive to litigate," but is not allowed to consider language in the settlement order disclaiming any future preclusive effect.

Of course, *Talerico* provides an off-ramp for such unjust results; however, such fairness based conceptual rules are often difficult to implement in practice. Litigants simply won't be able to guaranty that their settlements won't be used against them in later actions. The predictable result is increased litigation costs as parties refrain from settlement or conflicts of interest are needlessly created between insurance companies and their insureds. A bright line rule that holds that an express reservation in a civil consent order regarding

its collateral estoppel effect is effective will provide Illinois litigants and their attorneys with the guidance necessary to efficiently reach fair settlements without unintended consequences.

OUR STATE WORKERS' COMPENSATION SYSTEM PROVIDES NO INCENTIVE FOR VIGOROUS LITIGATION OF CLAIMS

Finally, the nature of practice at the Illinois Workers Compensation Commission ("IWCC") cautions against the use of settlement agreement language in a collateral fashion. The system practically disincentivizes injured workers from vigorously litigating out their claims.

First, injury claims are processed in bulk through the IWCC. The IWCC's 2019 Annual Report tells us that claims were down in comparison to prior years. Still, 37,707 new claims were filed in 2019, 30,797 settlements were reached before trial and 1,815 claims went to trial. See p. 6-7 of *FY 2019 Annual Report from the Illinois Workers Compensation Commission.*[2] Fewer than thirty arbitrators processed the settlement agreements, held the trials and ruled on thousands of motions. All manner of lawyers and laypersons draft settlement agreements and many claims are processed without an attorney representing the worker. Unsurprisingly, settlement agreement language is not standardized and is often inconsistent. If every reference in a compromise agreement threatens a collateral impact, more cases will be forced to trial in a system that was already backed up before the pandemic brought trial proceedings to a standstill. Given the

[2] www2.illinois.gov/sites/iwcc/Documents/annualreportFY19.pdf

mountain of settlement agreements flowing through the IWCC in any given year, entries on compromised settlement agreements should not be given preclusive effect.

Second, the IWCC system presents an array of unfortunate structural features which discourage workers from fully litigating out their claims. IWCC practice thus lacks the important guardrail against unfair application of collateral estoppel—the incentive to vigorously litigate out issues. See *Talarico*, 177 Ill.2d at 192; *Herzog v. Lexington Township*, 167 Ill.2d 288, 296 (1995) (inadequacy of the forum can also result in unfairness).

Average case values are vanishingly small. Values have actually fallen since 2014 when the IWCC stopped publishing average case values in its annual reports. But the 2014 report tells us that claims had an average value of $2,389 in 2013 and $2,346 in 2012. See *FY 2014 Annual Report from the Illinois Workers Compensation Commission.*[3]

The Illinois Workers Compensation Act further limits the worker's attorney to a 20% contingency fee. 820 ILCS 305/16(a). A lawyer can ask for an enhanced fee in theory, but the requests are rarely granted and there is no standard for granting enhanced fees. What is truly oppressive about this structure is that employers and their carriers can throw their entire treasury at the worker during the case. The Act does not limit the defense on any aspect of their defense efforts. They can spend as much as they want on attorney fees, expert costs, investigative costs, and claims handling resources. The Act also permits employers to pay nominal charges ($25-$30) to utilization reviewers to dispute any form of treatment recommended for the worker or already received by the worker. See 820 ILCS

[3] www2.illinois.gov/sites/ iwcc/Documents/annual reportFY14.pdf

305/8.7. The undersigned has experienced up to a dozen of these defense reviews in a single case. The worker's attorney must spend time and resources preparing for and deposing each utilization reviewer simply to ensure that bills and treatment are not denied in the case. The attorney must similarly devote substantial time and effort to each independent medical examiner and vocational expert the employer hires.

The worker and his lawyer must also pay more than the defense for records, medical witness testimony, expert witnesses and general litigation costs. Even though a worker's lawyer advances money to litigate out the worker's case, advanced expense payments are not deductible from the lawyer's income. *Burnett v. Commissioner*, 356 F.2d 755 (5th Cir. 1966). Mind you, the expenses are paid out of money which has already been taxed. Thus, even the tax code delivers an upcharge blow to the worker's lawyer that the defense does not bear.

There is no mechanism for transferring any element of these litigation costs to the employer or its carrier. And for the 4.8% of cases which do proceed to trial, the Act provides no additional fees for handling the case through four possible layers of appeal, from the commission review level through the Supreme Court. Defense lawyers have no similar limit on their billing or expenditures. There is nothing about practice before the IWCC that incentivizes any worker to vigorously litigate out their claims—*unless they have absolutely no other option.*

Collateral estoppel should never be applied to references placed in compromise IWCC settlement agreements. Settlement agreements must obviously be enforceable between the parties to the contract. That is what this Court told us as early as 1922, in *Stromberg Motor Device Co. v. Industrial Com'n*, 305 Ill. 619, 622 (1922). Remember

that *Stromberg* was written when mutuality of parties was still a required element for collateral estoppel. The *Stromberg* decision should not be more adventurously stretched to give collateral effect to references in compromised settlement agreements from the IWCC.

CONCLUSION

The Third District's decision in *Armstead* should be reversed. Few workers have any incentive to litigate out their IWCC claims at trial. Compromise settlement agreements from the IWCC should not be given preclusive effect, except in disputes between the parties to the settlement. More broadly, the current collateral estoppel doctrine seems to have largely lost sight of its equitable origins. ITLA encourages the Court to discourage lower courts from allowing tortfeasors to use the doctrine against their victims. That is not the purpose of an equitable doctrine.

Respectfully Submitted,
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CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 20 pages.

Dated: 5·10·21

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