

STATE OF MICHIGAN  
IN THE SUPREME COURT

WAYLON E. GEE,

Plaintiff-Appellee,

vs

ARTHUR B. MYR INDUSTRIES, INC.,

Defendant-Appellant.

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Supreme Court:  
133762

Court of Appeals:  
269351

Lower Court: WCAC  
Docket No: 03-0402

133762

PLAINTIFF'S ANSWER TO DEFENDANT'S  
APPLICATION FOR LEAVE TO APPEAL

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**FILED**

JUL 9 2007

CORBIN R. DAVIS  
CLERK  
MICHIGAN SUPREME COURT

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COUNTER-STATEMENT OF BASIS FOR JURISDICTION

Plaintiff accepts defendant's statement of the basis for this Court's jurisdiction.

STATEMENT OF QUESTIONS PRESENTED

I

DID THE COURT OF APPEALS CORRECTLY HOLD THAT CAREGIVERS HAVE A SEPARATE CLAIM FOR BENEFITS WHICH MAY NOT BE BARRED BY THE ACTION, OR INACTION, OF THE INJURED EMPLOYEE?

Plaintiff-Appellee answers "YES."  
The WCAC answered "YES."  
The Court of Appeals answered "YES."

II

WHERE THE COURT OF APPEALS DID NOT RELY UPON ITS PRIOR UNPUBLISHED OPINION IN *BARNOWSKY*, DEFENDANT'S ARGUMENT BASED UPON THAT CASE IS IRRELEVANT?

Plaintiff-Appellee answers "YES."  
The WCAC answered "YES."  
The Court of Appeals answered "YES."

III

WHERE DEFENDANT FAILED TO OBJECT TO ANY RELIANCE UPON CLAIMS FILED INDEPENDENTLY OF PLAINTIFF'S OWN CLAIM DURING ANY PROCEEDINGS BELOW, HAS IT THEREFORE WAIVED THAT ARGUMENT, AND WOULD IT SERVE NO USEFUL PURPOSE TO RELY UPON THAT ISSUE IN ANY EVENT?

Plaintiff-Appellee answers "YES."  
The WCAC answered "YES."  
The Court of Appeals did not answer.

IV

IF, AND ONLY IF, THIS COURT FINDS IT SIGNIFICANT THAT THE COURT OF APPEALS FOUND THAT PLAINTIFF'S CONDITION HAD WORSENERD SINCE THE ORIGINAL HEARING, SHOULD IT REMAND THE CASE FOR FURTHER FINDINGS, ALTHOUGH SUCH FINDINGS WOULD BE UNNECESSARY GIVEN THAT IT WAS PART OF AN ALTERNATIVE BASIS FOR THE COURT OF APPEALS' CONCLUSION THAT RES JUDICATA DID NOT APPLY

Plaintiff-Appellee answers "YES."  
The WCAC answered "YES."  
The Court of Appeals did not answer.

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**PLAINTIFF'S ANSWER TO DEFENDANT'S  
APPLICATION FOR LEAVE TO APPEAL**

NOW COMES Plaintiff-Appellee WAYLON E. GEE, by and through his attorneys, and respectfully requests that this Honorable Supreme Court deny defendant's application for leave to appeal, stating as grounds the following:

**STATEMENT OF MATERIAL FACTS AND PROCEEDINGS**

(Numbers in parentheses shall refer to the trial transcript pages as follows:

"I"                July 29, 2003  
"II"                July 31, 2003

"PX" shall refer to plaintiff's exhibits, while "DX" shall refer to defendant's exhibits.)

Plaintiff Waylon Gee sustained a work-related back injury on August 10, 1992. He was paid benefits voluntarily for several years. On March 27, 2000, he filed an application claiming that he had suffered the loss of industrial use of both lower extremities as the result of his 1992 injury, and was totally and permanently disabled as a result. The application further noted that the case involved a disputed claim for medical benefits.

A hearing was subsequently held before Magistrate Michael Barney, after which the magistrate issued a decision mailed from the Bureau on July 9, 2001. In that opinion, Magistrate Barney found that plaintiff had established an injury date of August 10, 1992, and ongoing disability resulting from that injury, including not only residuals of his back injury but also the subsequent development of reflex sympathetic dystrophy, or "RSD."

The magistrate further found that plaintiff had proven total and permanent disability, with an onset date of January 10, 1998. In that regard, he wrote:

I base my finding that Plaintiff has lost the industrial use of his legs, and is thus totally and permanently disabled, on Plaintiff's testimony that he can only stand for several minutes at a time, that he cannot walk more than a few steps at a time, even with the assistance of a cane, and especially that in order to prevent and/or to alleviate the discoloration, pain and coldness that Plaintiff's lower extremities are subject to, he must, with assistance, change the position of his legs every few minutes.

In addition, all three doctors who examined Plaintiff indicated in their reports that Plaintiff had for all practical purposes lost the functional use of his legs, Dr. Nakhleh, indicating that Plaintiff was "totally and permanently disabled", and Dr. Harwood opining that Plaintiff "...will not be able to return to any occupation at all." (Emphasis added [by the magistrate]) [Magistrate Barney's July 9, 2001 Opinion, at 8]

As a result, the Second Injury Fund was directed to pay differential benefits.

Magistrate Barney's decision also expressly directed defendant Arthur B. Myr Industries, Incorporated to pay "[a]ll reasonable medical treatment related to plaintiff's injury." Although testimony was taken on the subject, no specific finding was rendered as to whether plaintiff required attendant care as the result of his condition.

Both parties filed an appeal from this determination with the Workers' Compensation Appellate Commission ["WCAC"]. In an order and opinion dated April 19, 2002, the WCAC affirmed the magistrate's award, modifying it only as to the number of dependents. The

WCAC rejected plaintiff's request that the matter be remanded back to the magistrate for express findings on the issue of attendant care. The Court of Appeals and Supreme Court declined to review the WCAC's order.

Plaintiff subsequently filed a new application on May 22, 2002, seeking payment for 56 hours per week of family-provided attendant care. In addition, his wife and mother also filed their own applications, seeking payment for their services.

At the hearing held on the most recent applications, plaintiff testified that his condition had worsened since the original hearing, and he was having problems with his hands, feet, and back (I 75). He testified that he had difficulty standing, getting out of bed, using the toilet, and getting in and out of the house (II 15). He indicated his preference that family members provide the assistance he required (I 75).

Further testimony came from LaVerne Jackson, a registered nurse and certified case manager who interviewed plaintiff and conducted a nursing assessment of his home (I 14,21; PX #2). Ms. Jackson believed that plaintiff required attendant care for 56 hours per week, to assist with bathing, grooming, meal preparation, and mobility (PX #2). She also recommended other measures, including an elevated toilet seat, a portable shower, a mobile shower chair/bench, a lightweight wheelchair, and a stair/chair lift (PX #2).

Defendant presented testimony from Patsy Borchak, another registered nurse and certified case manager (II 19). Ms. Borchak interviewed plaintiff and concluded that he would need attendant care, although not necessarily eight hours per day (II 51; DX #2).

In a decision mailed from the Bureau on September 8, 2003, Magistrate Barney directed as follows:

In summary, I award Plaintiff 56 hours of attendant care per week, commencing 5/22/01, at the rate of \$8.50/hour, to be

paid collectively to Ms. Nancy Gee and Ms. Lucille Gee, and to be divided between them at their discretion. I also order defendant to provide to Plaintiff a portable shower bench and an elevated toilet seat, and to reimburse Plaintiff the cost of the light wheelchair, if Plaintiff paid for that item himself. [Magistrate's September 8, 2003 Opinion, at 9-10.]

The magistrate rejected defendant's contention that an award of attendant care was barred by res judicata.

Defendant filed an appeal from this determination with the WCAC, after which plaintiff cross-appealed. In an order and opinion dated April 12, 2005, the WCAC affirmed the magistrate's opinion in its entirety.

Defendant sought leave to appeal to the Court of Appeals, which was denied on August 29, 2005. A subsequent motion for reconsideration, also filed by defendant, was denied on October 11, 2005.

Defendant subsequently sought leave to appeal to this Honorable Court. In an order dated March 29, 2006, the Court remanded the matter to the Court of Appeals "for consideration, as on leave granted, of whether the current claim for attendant care benefits under MCL 418.315(1) is barred by the doctrine of res judicata." Supreme Court's March 29, 2006 Order. The Court further wrote, "In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions should be reviewed by this Court."

As a result, the case returned to the Court of Appeals, which issued a unanimous and unpublished opinion on March 15, 2007, affirming the WCAC's decision. The Court held that the WCAC properly determined that a claim for payment for nursing services provided the injured employee by a family member, in his or her name, would not be barred

by res judicata. It further held that res judicata did not bar a claim by plaintiff himself, because his condition had changed since the original hearing.

Defendant now again seeks leave to appeal to this Honorable Court.

### **ARGUMENT I**

**THE COURT OF APPEALS CORRECTLY HELD THAT CAREGIVERS HAVE A SEPARATE CLAIM FOR BENEFITS WHICH MAY NOT BE BARRED BY THE ACTION, OR INACTION, OF THE INJURED EMPLOYEE.**

**Standard of Review.** Plaintiff agrees with defendant's statement that this Court may reverse the WCAC if it applies erroneous legal reasoning or operates within the wrong legal framework. MCL 418.861a(14); *DiBenedetto v West Shore Hospital*, 641 Mich 394; 605 NW2d 300 (2000); *Oxley v Dep't of Military Affairs*, 460 Mich 536; 597 NW2d 89 (1999).

In *Sewell v Clean Cut Mgmt, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001), this Court described the elements of res judicata as follows:

Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. *Eaton Co Bd of Co Rd Comm'rs v Schultz*, 205 Mich App 371, 375; 521 NW2d 847 (1994). A second action is barred when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies. *Id.* at 375-376; 521 NW2d 847.

Defendant's application would effectively re-write these elements, eliminating the requirement that the same parties be involved in both actions. Instead, defendant would have this Court find that, once *anyone* has litigated the issue, *everyone else* would be barred from subsequently litigating it as well. This is contrary to the most basic definition of res judicata, and is also contrary to simple logic.

In any workers' compensation matter, the injured employee obviously has a right to seek weekly benefits and the payment of medical expenses. If that employee fails or neglects to litigate the right of one of his physicians or other caregivers to receive payment for the treatment or care provided, defendant would bar those individuals from later seeking payment themselves. This is as unfair as it is contrary to established principles of res judicata. Why should physicians that provide appropriate and necessary care to an injured employee be deprived of payment for those services because they did not join an action they may have known nothing about?

The Court of Appeals noted that plaintiff's wife and mother had filed claims, seeking payment for attendant care services they provided to plaintiff. They filed these claims in their own names and had not been involved in prior litigation, and they were therefore permitted to proceed:

We find no error warranting reversal. First, as noted by the magistrate and the WCAC, this Court has recognized that where a family member of an injured employee files a claim for reimbursement for nursing services provided to the injured employee in his or her own name, and not as a subrogee of the injured employee, res judicata is inapplicable. *Ivezaj, supra* at 464. In this case, plaintiff's wife and mother each filed her own application for attendant care benefits. As a result, under *Ivezaj, supra*, we find no legal error in the WCAC's conclusion that the doctrine of res judicata was inapplicable to the magistrate's granting of payment for attendant care to plaintiff's wife and mother. [Opinion below, slip op, at 3-4]

This analysis is completely consistent with the doctrine of res judicata. As a result, it is simply inaccurate to state that this case raises an issue of first impression.

In fact, the same issue was dealt with by the Court of Appeals 14 years ago, in *Ivezaj v Federal Mogul Corp*, 197 Mich App 462, 464; 495 NW2d 800 (1993). In that

matter, the claimant's wife was found to have an independent right to file a claim, which was not barred by any prior litigation in which that claimant may himself have engaged:

Lula Ivezaj filed the claim for nursing benefits in her own name, and not as a subrogee of her husband. She therefore stands in the position of any other health care provider with an original claim. Such a provider is entitled to seek reimbursement, or payment for services rendered, either directly from the injured employee or from the employer, by means of a petition properly filed. (citations omitted)

Similarly, the instant plaintiff's spouse and mother have an independent right to file their own claims, which would not be barred by any prior litigation in which plaintiff himself may have engaged. This is not a new concept by any means.

Defendant, however, suggests that plaintiff's wife and mother are somehow in privity with plaintiff, and are therefore bound by his prior actions. However, the case cited by defendant for that proposition clearly does not support it.

In *Sloan v City of Madison Heights*, 425 Mich 288, 295-296; 389 NW2d 418 (1986), this Court defined "privity," for res judicata purposes, as follows:

In its broadest sense, privity has been defined as "mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as to represent the same legal right." *Petersen v Fee Int'l, Ltd*, 435 F Supp 938, 942 (WD Okla, 1975). This Court has also interpreted a privy as "one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession or purchase." *Howell v Vito's Trucking & Excavating Co*, 386 Mich 37, 43; 191 NW2d 313 (1971).

This situation is not present here. Plaintiff and his wife/mother do not have an interest in the same right of property. Plaintiff himself is not entitled to payment for attendant care, as he did not provide it. His wife and mother hold that right independently. Nor did they or could they acquire such a right from plaintiff by virtue of such means as inheritance,

succession, or purchase. Instead, they are obliged to earn their right, by providing services for the compensation they are owed, just as would any other caregiver like a doctor or physical therapist. As a result, there is no privity here and, as the Court below and Ivezaj properly noted, the interests of plaintiff's wife and mother may be asserted by them, without regard to anything plaintiff himself may have done. Their claims are related, but distinct, and res judicata does not attach accordingly.

Reaching any contrary result would have an unfortunate chilling effect. If medical providers are not permitted to seek payment on their own, where their patients failed to protect their rights, they might become reluctant to treat workers' compensation claimants in the first place. This is not a desirable state of affairs.

The Court of Appeals correctly held that a provider of attendant care services with an independent right to payment is not bound by the action, or inaction, of an injured employee in prior litigation. That being so, there is no need for further review by this Court, and leave to appeal should be denied.

## **ARGUMENT II**

**THE COURT OF APPEALS DID NOT RELY UPON ITS PRIOR UNPUBLISHED OPINION IN *BARNOWSKY*, SO THAT DEFENDANT'S ARGUMENT BASED UPON THAT CASE IS IRRELEVANT.**

**Standard of Review.** Plaintiff agrees with defendant's statement that this Court may reverse the WCAC if it applies erroneous legal reasoning or operates within the wrong legal framework. MCL 418.861a(14); *DiBenedetto v West Shore Hospital*, 641 Mich 394; 605 NW2d 300 (2000); *Oxley v Dep't of Military Affairs*, 460 Mich 536; 597 NW2d 89 (1999).

Defendant's brief attacks the WCAC's reliance upon the Court of Appeals' opinion in *Barnowsky v General Motors Corp*, unpublished opinion of the Court of Appeals dated December 21, 2001 (Docket No. 231169). The *Barnowsky* Court held that a worker's compensation magistrate has a right to correct an omission from an original order, and this was one of the bases for the WCAC's opinion.

However, it was *not* one of the bases for the Court of Appeals' subsequent opinion. Instead, the Court expressly held that it did not need to address the *Barnowsky* issue:

Defendant claims that the magistrate and the WCAC erred in relying upon *Barnowsky, supra*. However, because we find *res judicata* to be inapplicable notwithstanding *Barnowsky, supra*, we need not address this claim. [Opinion below, at 4, n2]

Since this issue was not necessary to the decision below, it is also unnecessary to this appeal.

### **ARGUMENT III**

**DEFENDANT FAILED TO OBJECT TO ANY RELIANCE UPON CLAIMS FILED INDEPENDENTLY OF PLAINTIFF'S OWN CLAIM DURING ANY PROCEEDINGS BELOW AND HAS THEREFORE WAIVED THAT ARGUMENT, AND IT WOULD SERVE NO USEFUL PURPOSE TO RELY UPON THAT ISSUE IN ANY EVENT.**

**Standard of Review.** Plaintiff agrees with defendant's statement that this Court may reverse the WCAC if it applies erroneous legal reasoning or operates within the wrong legal framework. MCL 418.861a(14); *DiBenedetto v West Shore Hospital*, 641 Mich 394; 605 NW2d 300 (2000); *Oxley v Dep't of Military Affairs*, 460 Mich 536; 597 NW2d 89 (1999). However, plaintiff would also note that this Court does not generally review issues that were not preserved before the Court below. *Portell v Feldman*, 354 Mich 611; 93

NW2d 305 (1958). This principle precludes the review of the question defendant now brings before this Court.

In its application for leave to appeal to this Honorable Court, defendant contends that applications filed by plaintiff's wife and mother were erroneously relied upon by the Court of Appeals. In point of fact, those applications were first relied upon by the magistrate [Magistrate Barney's September 8, 2003 Opinion, at 7-8], and then by the WCAC [WCAC's April 12, 2005 Opinion, at 7-8], before also forming the basis for the Court of Appeals' decision [Opinion below, at 3-4]. However, at no prior point in these proceedings did defendant object to this consideration.

Defendant challenged the finding that plaintiff's wife and mother's independent claim for payment was not subject to res judicata in appellate pleadings filed with the WCAC, the Court of Appeals (before remand), this Supreme Court (on its original application), and again before the Court of Appeals (after remand). It never raised this issue in any of those pleadings.

As a result, that issue should be deemed waived at this late juncture in the proceedings. *Portell v Feldman*, 354 Mich 611; 93 NW2d 305 (1958).

In any event, it would be a pointless exercise to find now that these applications had yet to be formally served during the proceedings below. The parties were all undeniably aware of them. Furthermore, the same result would obtain if this matter were sent back for formal service of the applications. At that point, the same holding would apply.

It is ironic that, in an application in which defendant would rely upon res judicata, a doctrine designed to promote judicial economy, *Gose v Monroe Auto Eqpt Co*, 409 Mich

147; 294 NW2d 165 (1980), it would suggest a procedure that is completely contrary to that laudable objective. This is no reason to grant leave to appeal.

#### ARGUMENT IV

**IF, AND ONLY IF, THIS COURT FINDS IT SIGNIFICANT THAT THE COURT OF APPEALS FOUND THAT PLAINTIFF'S CONDITION HAD WORSENERD SINCE THE ORIGINAL HEARING, IT SHOULD REMAND THE CASE FOR FURTHER FINDINGS, ALTHOUGH SUCH FINDINGS WOULD BE UNNECESSARY GIVEN THAT IT WAS PART OF AN ALTERNATIVE BASIS FOR THE COURT OF APPEALS' CONCLUSION THAT RES JUDICATA DID NOT APPLY.**

Standard of Review. Plaintiff agrees with defendant's statement that this Court may reverse the WCAC if it applies erroneous legal reasoning or operates within the wrong legal framework. MCL 418.861a(14); *DiBenedetto v West Shore Hospital*, 641 Mich 394; 605 NW2d 300 (2000); *Oxley v Dep't of Military Affairs*, 460 Mich 536; 597 NW2d 89 (1999).

Defendant complains that the Court of Appeals should not have found as fact that plaintiff's condition had worsened since the original hearing in this matter. However, that finding was part of an alternative basis for the Court of Appeals' conclusion:

Furthermore, the holding in *Ivezaj, supra*, notwithstanding, we find res judicata to be inapplicable because there has been a change in plaintiff's condition since the initial proceedings. [Opinion below, at 4].

In other words, this reasoning was only necessary if the Court's reliance upon the *Ivezaj* issue was inappropriate. As demonstrated above, it was not. That being so, the issue not raised concerned merely an alternative basis for the same result, and further review is not necessary.

If there is any need for the resolution of this issue, this Court should remand the case for a finding as to whether plaintiff's condition has actually worsened. However, again, plaintiff submits that there is no need for such a procedure, when the independent claims filed by plaintiff's wife and mother form an adequate and appropriate basis for the relief granted below.

Leave to appeal should be denied accordingly.

**RELIEF**

WHEREFORE Plaintiff-Appellee WAYLON E. GEE respectfully requests that this Honorable Supreme Court deny defendant's application for leave to appeal, and further grant him any other relief to which he may be entitled.

Respectfully submitted,



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