

Outline of Answer, Final Essay, Civil Procedure II, Spring 2007

1. First issue is whether the defendant is barred from relitigating issue of whether it is a fertilizer yard in instant action. For issue preclusion to apply, issue must be the same, must have been actually litigated, decided, necessary to judgment, and one of the parties must be the same. Where preclusion is being applied offensively by a party who wasn't present in first action, courts look to see whether party could have joined in first action, and whether preclusion would be unfair—did the party have adequate incentive to litigate, are there any prior inconsistent judgments, were there any procedural differences between actions?

Here, issue is the same, whether Company is operating a "fertilizer yard." [One could possibly argue that the issue of whether Company is a "fertilizer yard" is a technical term of art that differs under county law governing sales permits vs. the federal water act, but there really aren't enough facts to reach such a conclusion.] Issue was actually litigated – the parties presented arguments on this issue to the court. The issue was decided by the court. It was necessary for the judgment—the sole basis of the County's claim that Company needed a special sales permit was that it was operating a fertilizer yard; defendant raised as a defense that it was not a fertilizer yard. For prior court to rule in County's favor, it had to have ruled that Company was operating fertilizer yard. One of the parties, Company, is the same in both actions.

As to issues of whether offensive preclusion is appropriate: Plaintiff could not have joined first action, the actions involve different claims, so the requirements for permissive party joinder under Rule 20 would not be met (particularly requirement that claims by different parties stem from same transaction/occurrence). Also, initial case here was filed by the government, may be hard for private environmental group to join that action (as in *Parklane* case). Second, nothing unfair about binding Company. It had considerable incentive to litigate first case, since that case resulted in a \$40,000 fine. No evidence of prior inconsistent judgments (this is only second case brought). No apparent procedural differences between the cases since both were brought in federal court.

Court was correct in granting the motion.

2. Second issue is whether parties' motions for summary judgment should be granted.

Under Rule 56, summary judgment is appropriate where there is no "genuine issue" of material fact, and the moving party is entitled to judgment as a matter of law. Material fact means a fact that is one that may affect the outcome of the case. A "genuine issue" means a factual dispute about which a reasonable jury could reach different conclusions. In evaluating whether the standard for granting summary judgment has been met, burden of proof issues are relevant. Where the moving party does not bear the burden of proof, it can prevail by disproving any element of the nonmoving party's case, or by pointing to the lack of evidence to support any element of the nonmoving party's case. Where the moving party bears the burden of proof, it must introduce evidence establishing that there is no genuine dispute about any element of its claim or defense.

b. Defendant's affirmative defense The next question is whether defendant has established its affirmative defense that it has fewer than 10 employees. Here, defendant bears the burden of proving that all the evidence points in its favor; plaintiff can defeat defendant's SJ motion by showing there is a genuine dispute about the evidence. Company introduces evidence establishing that it currently has fewer than 10 employees. The evidence is up to date (filed two months ago) and contained in an official filing with the state. While plaintiff has introduced contrary evidence, it is insufficient to create a "genuine issue." Pltf's evidence pertains to another fertilizer yard, and says nothing at all about Company. No reasonable jury could find that Company has fewer than 10 employees based solely on the testimony of an employee from another fertilizer yard. Thus, defendant is entitled to SJ on this affirmative defense.

The court was incorrect in denying defendant's summary judgment motion.