

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 09-CV-00309 MSK-KMT

SUZANNE SHELL  
Plaintiff

v.

AMERICAN FAMILY RIGHTS ASSOCIATION, et. al.

Defendants

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**RESPONSE IN OPPOSITION TO DEFENDANT HENDERSON'S MOTION TO  
DISMISS BASED ON PRIOR CALIFORNIA ACTION [168]**  
filed on May 28, 2009

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**COMES NOW** Plaintiff Suzanne Shell responding in opposition to defendant Henderson's Motion to Dismiss Based on Prior California Action [168]. I contend that this action is not barred by issue preclusion as the defendant asserts.

1. **Claim Preclusion**

- a. **Burden of Proof:** Issue preclusion is an affirmative defense and the defendant bears the burden of proof. *Taylor v. Sturgell*, 128 S.Ct. 2161, 2179-80 (2008) (citing *Jones v. Bock*, 549 U.S. 199, 204, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007); *Nwosun v. Gen. Mills Rest. Inc.*, 124 F.3d 1255, 1257 (10th Cir. 1997)).
- b. **Elements:** Under Tenth Circuit law, issue preclusion applies when four elements exist: (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

*Frandsen v. Westinghouse Corp.*, 46 F.3d 975, 978 (10th Cir. 1995).

i. **Element 2:** The defendant's assertion fails on this element, because the California court never reached the merits of the third party claims. There was no adjudication and no final judgement. I filed the third party claim on November 14, 2008. I filed an application to dismiss all the third party defendants on December 28, 2008, before they were served, and before the court ever considered the merits of this case. The dismissal was entered on December 21, 2008. I incorporate by reference document #24-2.<sup>1</sup>

- (1) Issue preclusion requires the issuance of a final judgment. See *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 831 (10th Cir. 2005) “[I]ssue preclusion 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.’” (quoting Restatement (Second) of Judgments § 27, p. 250 (1982). *Garcia v. Tyson Foods, Inc.*, 534 F.3d 1320 (10th Cir. 07/28/2008).
- (2) In *Arizona v. California*, 530 U.S. 392 (2000), the United States Supreme Court stated, “It is the general rule that issue preclusion 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.” Restatement (Second) of Judgments § 27, p. 250 (1982). “In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated. Therefore, the rule of this Section [describing

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<sup>1</sup> Order granting dismissal of third party defendants without prejudice on 12-31-2008.

issue preclusion's domain] does not apply with respect to any issue in a subsequent action." quoted in *In re Corey*, No. KS-07-115 (10th Cir. 10/06/2008).

Accordingly, the Plaintiff requests that the defendant's motion to dismiss be denied.

Respectfully submitted June 2, 2009

/s/ Suzanne Shell

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#### CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the attached documents **RESPONSE TO DEFENDANT HENDERSON'S MOTION TO DISMISS BASED ON PRIOR CALIFORNIA ACTION [168]** and attachments were placed in the United States Mail, first class mail, postage prepaid on June 2.

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/s/ Suzanne Shell June 2, 2009

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