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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF DAVID W. HOWARD,

Respondent,

-against-

No. 29

STATURE ELECTRIC, INC., et al.,

Appellants.

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20 Eagle Street  
Albany, New York 12207  
February 05, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.

Appearances:

SUSAN B. MARRIS, ESQ.  
GENERAL ATTORNEY OF THE STATE INSURANCE FUND  
Attorneys for Appellants  
1045 Seventh North Street  
Liverpool, NY 13088

CHRISTINE ANN SCOFIELD, ESQ.  
OFFICE OF CHRISTINE A. SCOFIELD  
Attorney for Respondent  
506 East Washington Street  
Suite D  
Syracuse, NY 13202

Penina Wolicki  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: We're going to number  
2 29, Matter of Howard v. Stature Electric.

3 MS. MARRIS: Good afternoon, Your Honors.  
4 Susan Marris, attorney - - -

5 CHIEF JUDGE LIPPMAN: One second,  
6 counselor.

7 Okay, counselor. Would you like any  
8 rebuttal time?

9 MS. MARRIS: Yes. May I have three  
10 minutes?

11 CHIEF JUDGE LIPPMAN: Sure.

12 MS. MARRIS: Thank you - - -

13 CHIEF JUDGE LIPPMAN: Go ahead.

14 MS. MARRIS: - - - Your Honor. Susan  
15 Marris, attorney for the State Insurance Fund and  
16 Stature Electric.

17 May it please the court. The Third  
18 Department committed reversible error when it held  
19 that because claimant's conviction was entered by an  
20 Alford plea, the Workers' Compensation Board could  
21 not use that conviction - - -

22 CHIEF JUDGE LIPPMAN: Counsel, what did the  
23 judge know about the facts in this? Had the judge  
24 inquired of the facts before taking the plea?

25 MS. MARRIS: No. Oh, the criminal judge?

1 CHIEF JUDGE LIPPMAN: Yes.

2 MS. MARRIS: Well, in order to take a plea,  
3 there must be strong evidence of guilt. Otherwise  
4 the judge won't accept the - - -

5 CHIEF JUDGE LIPPMAN: Maybe.

6 MS. MARRIS: - - - plea.

7 CHIEF JUDGE LIPPMAN: But what did the  
8 judge know about the facts of this case that would  
9 make the Alford plea preclusive in this case?

10 MS. MARRIS: Based upon this record, we  
11 don't know. But in or - - -

12 JUDGE SMITH: Isn't that - - - isn't that a  
13 problem for you, though? I mean, isn't it - - - I  
14 mean, assume you're right. Assume Alford pleas  
15 count, how do we know what he pleaded to?

16 MS. MARRIS: He pled guilty to insurance  
17 fraud.

18 JUDGE SMITH: But what act of insurance  
19 fraud did he plead guilty to?

20 MS. MARRIS: The filing of a false  
21 statement to an insurance company for - - -

22 JUDGE SMITH: How do we even know that?  
23 There're several - - - there are several subdivisions  
24 of the statute. How do we know that that's what he  
25 did?

1 MS. MARRIS: Well, in this - - - well, the  
2 State Insurance Fund is the party that notified the  
3 DA.

4 JUDGE SMITH: Oh, I know you know. But I  
5 mean, how does a judge - - - how do you - - - I'm  
6 sure you know a lot about the underlying facts, and  
7 so does your client. But how can - - - looking at  
8 this record, can you tell me what document he  
9 admitted or he pleaded guilty to filing falsely?

10 MS. MARRIS: Well, yes, I can. In my  
11 application for review before the Workers'  
12 Compensation Board, which is page 115 of the record,  
13 I refer to the WA-1 forms that were submitted to the  
14 Workers' State Insurance Fund.

15 JUDGE SMITH: But how do we know that - - -

16 MS. MARRIS: That wasn't - - -

17 JUDGE SMITH: - - - but how do we know that  
18 that's what he pleaded to?

19 MS. MARRIS: Because he pled guilty to  
20 insurance fraud. And - - -

21 JUDGE SMITH: How do you know he didn't  
22 commit another one that he pleaded to?

23 MS. MARRIS: Well, but there was no - - -  
24 there was no dispute that what he pled to in the  
25 criminal court was the same acts that was before the

1 Workers' Compensation Board. On page 92 of the  
2 record, claimant's counsel concedes that it's the  
3 same issue.

4 JUDGE READ: So you're saying there's no -  
5 - - no question about identity?

6 MS. MARRIS: There is none, no. That was  
7 conceded in - - -

8 JUDGE READ: How do we know that, again?

9 MS. MARRIS: On page 92 of the record,  
10 claimant's counsel agreed that the arrest and  
11 conviction were based upon the same action - - -

12 JUDGE SMITH: Well, the lines you're  
13 referring to are:

14 "MR. SANISTREET:" (sic) - - - that's the  
15 insurance fund, "There's no dispute that what was  
16 handed up here today is in connection with this file?

17 "MS. SCOFIELD: Certainly."

18 That's the concession?

19 MS. MARRIS: Correct. And it starts on  
20 page 90. I just thought I would get to the line  
21 where she - - - where Ms. Scofield said "certainly".

22 There's no dispute that that was handed up  
23 today, which was the arrest - - - and the arrest,  
24 there were four charges on that arrest, one of them  
25 being Workers' Compensation Law fraud, 114[1].

1 That's Workers' Compensation Law.

2 JUDGE GRAFFEO: I think the difficulty is  
3 the lack of the factual underpinning here. Because  
4 in the Merchant case, there were some - - - there was  
5 some factual background placed before the Alford plea  
6 was taken. So I guess the question is was this case  
7 sufficient for the purpose that you're looking to use  
8 it for, since it didn't quite meet the standard that  
9 we had in the Merchant case?

10 MS. MARRIS: Well, I think it does meet the  
11 standard, because insur - - - again, the arrest was  
12 Workers' Compensation Law 114[1], a violation of  
13 that; a violation of insurance fraud; filing a false  
14 instrument. Then the - - -

15 JUDGE GRAFFEO: But you could have filed, I  
16 don't know how many false instruments. I mean, it's  
17 a little bit different than the case with - - - where  
18 the attorney was disbarred. You know, that's one  
19 act. But you could have different acts going on  
20 here.

21 MS. MARRIS: That's true, Your Honor. But  
22 in this case, there was no dispute. The only issue -  
23 - - maybe it would have been developed if - - -

24 JUDGE SMITH: Well, there's no dis - - - I  
25 guess there's no dispute that it arose out of his

1 claim for an injury - - - his Workers' Comp claim for  
2 an injury. But I don't see - - - apart from that, I  
3 don't see how we can infer anything. Is the  
4 indictment even in the record?

5 MS. MARRIS: Yes, it is.

6 JUDGE SMITH: Where is it?

7 JUDGE READ: Where is it, yeah?

8 MS. MARRIS: Starts on page 79. Page 82 -  
9 - - well, no, no, no. Well, the - - - page 83, which  
10 is the arrest information, and then on the backside,  
11 page 84, which lists the offenses - - -

12 JUDGE SMITH: But the indictment itself is  
13 not there.

14 MS. MARRIS: Well, on page 82, I guess we  
15 have - - - that's the transcript which states what he  
16 pled guilty to. And that he - - -

17 JUDGE GRAFFEO: Can we presume in every  
18 Alford plea allocution, that all the counts or  
19 charges set forth in the indictment are what the  
20 defendant is responding to?

21 MS. MARRIS: Well, no. Because actually,  
22 in this case, he only pled guilty to insurance fraud.  
23 And by its very nature, we're the insurance company.  
24 He defrauded the State Insurance Fund - - -

25 JUDGE PIGOTT: But he could have defrauded

1           you by submitting a bill that didn't relate to that  
2           particular injury. He could have defrauded you as to  
3           the date of the accident. He could have defrauded  
4           you as to his ability to work. He could have been  
5           working when he said he couldn't. All of those are  
6           insurance fraud of one sort or another. And I guess  
7           what this one came down to was that you found out  
8           that he was working when he said he couldn't. Right?

9                     MS. MARRIS: Correct, Your Honor.

10                    JUDGE PIGOTT: Right. But if he pled  
11           guilty to submitting medical records that didn't  
12           apply to his injury, that would be insurance fraud  
13           too. And if he took an Alford plea on that, it would  
14           not relate to the second one.

15                    MS. MARRIS: I don't know if that's  
16           technically accurate. He doesn't submit medical  
17           records to the State Insurance Fund. The only forms  
18           that a claimant submits to the State Insurance Fund -  
19           - -

20                    JUDGE PIGOTT: Oh, no, but - - - all right.  
21           So he goes to the doctor and he's got a broken arm,  
22           and he says this was part of my job injury, and it  
23           wasn't. But then the doctor submits it to Workers'  
24           Comp and gets paid; that would be insurance fraud.

25                    MS. MARRIS: That would be one type of

1 insurance fraud. But he wouldn't be plead - - -  
2 well, it would be fraud. It would be a material  
3 misrepresentation under 114.

4 JUDGE PIGOTT: But we - - -

5 MS. MARRIS: It wouldn't be insurance  
6 fraud.

7 JUDGE PIGOTT: Well, you get my point. In  
8 other words, he pled guilty to insurance fraud.

9 MS. MARRIS: Correct.

10 JUDGE PIGOTT: In the state system, we're  
11 not as sophisticated as the WCL, where we say well,  
12 it's 114, it's 114-a, it's this, that or the other  
13 thing.

14 MS. MARRIS: But again, I go back to the  
15 arrest, which says he was arrested for Workers'  
16 Compensation fraud. When we get before the Workers'  
17 Compensation Law judge, the attorney says we're not  
18 disputing the basis of the fraud.

19 JUDGE SMITH: She says we're not disputing  
20 that it came out of this file.

21 MS. MARRIS: Out of this conviction. What  
22 she was - - - what she was stating was, because it  
23 was an Alford plea, there was no factual admission,  
24 which is why the record doesn't say what it was; and  
25 that her client is entitled to a hearing, because

1           there was no factual admission.

2                       CHIEF JUDGE LIPPMAN:   Okay, thanks  
3           counselor.

4                       MS. MARRIS:   Thank you.

5                       MS. SCOFIELD:   Unfortunately, because I  
6           have trouble I'd - - -

7                       CHIEF JUDGE LIPPMAN:   You're good,  
8           counselor.   Go ahead.

9                       MS. SCOFIELD:   I'm Christine Scofield.   I'm  
10          here representing David Howard, who is the respondent  
11          in this case.

12                      The purpose of the appellant's position is  
13          to tell the court that there shouldn't be a hearing  
14          on this case; there should not have been a hearing on  
15          this case.   And everything they've done is based on  
16          the idea that somehow or other, the language in the  
17          case law that says that a plea or a conviction may be  
18          preclusive, they read it consistently as saying that  
19          it must be preclusive.

20                      This case is the one that - - -

21                      CHIEF JUDGE LIPPMAN:   An Alford plea is - -  
22          -

23                      MS. SCOFIELD:   - - - demon - - -

24                      CHIEF JUDGE LIPPMAN:   - - - generally  
25          preclusive, would you say?

1 MS. SCOFIELD: Not necessarily, Judge. I  
2 mean, the point here is that I think that an Alford  
3 plea is exactly the situation that means that  
4 collateral estoppel shouldn't have to apply.

5 JUDGE PIGOTT: Well, if you look at - - - I  
6 mean, I know you have - - - Alford - - - I mean, it's  
7 pretty clear, the guy was trying to avoid the death  
8 penalty.

9 MS. SCOFIELD: Yeah, absolutely.

10 JUDGE PIGOTT: Good reason - - - even  
11 though they had him absolutely dead to rights.

12 MS. SCOFIELD: Absolutely.

13 JUDGE PIGOTT: So in this case, what is it  
14 that he thought he was pleading guilty to that now  
15 would shock the judge and the State Insurance Fund to  
16 say wait a minute, you pled guilty to the very thing  
17 that we're now saying you don't get comp anymore,  
18 because you committed a fraud with respect to the  
19 State Insurance Fund. Are you denying that he did  
20 that?

21 MS. SCOFIELD: Yes, we're denying that he  
22 did that.

23 JUDGE PIGOTT: You're saying he did not  
24 commit insurance fraud.

25 MS. SCOFIELD: He did not commit insurance

1 fraud.

2 JUDGE PIGOTT: Then why did he plead guilty  
3 to it?

4 MS. SCOFIELD: Because the judge, not  
5 unreasonably, at the moment the trial was being  
6 scheduled, said if I find you guilty, I'm going to  
7 send you to one and a third to four in state prison.  
8 The man had no prior criminal history. He had a bad  
9 back. He had two back surgeries. He was terrified.  
10 And therefore, when they offered the plea as plead to  
11 this and you'll get a conditional discharge, a  
12 certificate of relief from civil disabilities, that -  
13 - - he went ahead and he took the plea. He had - - -

14 JUDGE SMITH: Are you really - - -

15 MS. SCOFIELD: - - - difficulty - - -

16 JUDGE SMITH: - - - are you really saying  
17 that an Alford plea is sort of the equivalent of a  
18 nolo plea in federal court, that you don't get the  
19 civil consequences of a guilty plea?

20 MS. SCOFIELD: In this instance, yes, in  
21 light of the fact that - - -

22 JUDGE SMITH: This - - -

23 MS. SCOFIELD: - - - the certificate of  
24 relief - - -

25 JUDGE SMITH: - - - in this instance or

1 generally?

2 MS. SCOFIELD: Your Honor, really, this is  
3 one of those things where it depends on the facts of  
4 the case. I think that it could be regarded in that  
5 way. But in this instance, our position throughout  
6 has always been he didn't do this crime.

7 JUDGE READ: What if the judge had put  
8 things on the record - - - the criminal judge - - -  
9 that - - - so that we did know what the acts and the  
10 facts were. Would you make the same argument then,  
11 that the Alford plea could still not be used, if - -  
12 -

13 MS. SCOFIELD: If he pled guilty with a  
14 full description of the facts, then we would be in a  
15 very different posture.

16 JUDGE READ: Well, if he did an Alford plea  
17 with a full description of the facts?

18 MS. SCOFIELD: Right.

19 JUDGE READ: Right. You'd be in a  
20 different posture. You'd - - -

21 MS. SCOFIELD: Right.

22 JUDGE READ: - - - you concede that?

23 MS. SCOFIELD: Yes.

24 JUDGE PIGOTT: Well, the second leg, or the  
25 second prong of an Alford plea, as I understand it,

1 is the facts are so overwhelming that the court will  
2 accept the plea. They're not going to accept a plea  
3 unless you are, in fact, guilty, even if you want to  
4 say I'm not.

5 MS. SCOFIELD: That is - - -

6 JUDGE PIGOTT: I mean, they have to be  
7 convinced, right, that a crime has been committed?

8 MS. SCOFIELD: Your Honor, that is part of  
9 the - - - that is one of the legs of the Alford plea.  
10 The problem is - - -

11 JUDGE PIGOTT: Well, what wiggle room have  
12 you got left?

13 MS. SCOFIELD: What?

14 JUDGE PIGOTT: What wiggle room have you  
15 got left? I mean - - -

16 MS. SCOFIELD: Well, I mean, that - - - I  
17 can't tell why the judge accepted the plea.

18 JUDGE READ: It might not be adequate as an  
19 Alford plea?

20 MS. SCOFIELD: It - - - well, it shouldn't  
21 have - - - it shouldn't have happened, Judge. It  
22 should have been that we got our trial.

23 JUDGE PIGOTT: Can he move to vacate - - -

24 MS. SCOFIELD: And we didn't get a trial -  
25 - -

1 JUDGE PIGOTT: - - - his Alford plea, and  
2 then make everybody happy?

3 MS. SCOFIELD: Well, we're going to do that  
4 any time now.

5 JUDGE PIGOTT: Are you really?

6 MS. SCOFIELD: Especially once you folks  
7 find, as I think you ought, that he had the right to  
8 the trial, that he wasn't collaterally estopped from  
9 having a trial, that it was right to test the  
10 evidence. I know that you've all received my  
11 supplementary appendix. I know that you know how  
12 that trial went. And I know that you know that the  
13 judge who heard the case finally saw the evidence,  
14 interacted with the witness - - -

15 JUDGE SMITH: But are we - - - I mean,  
16 isn't that - - - isn't the whole point of collateral  
17 estoppel that if you're collaterally estopped, we're  
18 not allowed to look at that? Collateral estoppel  
19 makes the just unjust and vice versa. I mean, if  
20 you're collaterally estopped, it doesn't matter how  
21 right you are; you still lose.

22 MS. SCOFIELD: That's true, Your Honor.  
23 But I want to say that the reason that I don't  
24 believe it should be that collateral estoppel applies  
25 here, is that in fact, he didn't commit the crime.

1                   JUDGE PIGOTT: Well, yet - - - but you're  
2 using evidence that we're not supposed to look at.  
3 And why don't you go back and vacate the plea, and  
4 then you can come back to the state - - - and after  
5 you get acquitted, then you can go back to the  
6 Workers' Compensation and say see, we were right all  
7 along, and get that vacated?

8                   MS. SCOFIELD: I think the Workers'  
9 Compensation Board has concluded that we were right  
10 all along, now that they've reached - - - now they've  
11 gotten the decision from the judge, and they've  
12 gotten - - - which got appealed. And the Board,  
13 again - - - the Board said, oh, yeah, now we're  
14 affirming what the judge did as a response to that  
15 plea.

16                   You know, I think, in fact, that is what  
17 the board had said.

18                   JUDGE GRAFFEO: Wasn't there - - - just  
19 procedurally, wasn't there a motion here, and we  
20 struck part of the supplemental brief? So - - -

21                   MS. SCOFIELD: Part of my brief, but not  
22 the supplementary appendix. So that - - -

23                   JUDGE SMITH: What do you say the test  
24 should be? When is an Alford - - - when, if ever,  
25 can an Alford plea have collateral estoppel effect?

1 MS. SCOFIELD: Your Honor, I believe that  
2 if there had been a full statement about the facts of  
3 - - - that then you'd know what it was - - -

4 JUDGE SMITH: If it had been clear on the  
5 record what acts he was pleading to, even though he  
6 denied committing it?

7 MS. SCOFIELD: Right.

8 JUDGE PIGOTT: Well, whose burden would  
9 that be, then? I mean, he's the one that's saying I  
10 want to take a plea; I want to plead guilty to  
11 insurance fraud. Even though I don't want to admit  
12 my guilt, I realize that the facts are so  
13 overwhelming that I - - - you know, that this is in  
14 my best interest to do.

15 MS. SCOFIELD: Your Honor, the problem is  
16 that, of course, the facts weren't actually so  
17 overwhelming. But - - -

18 JUDGE PIGOTT: Well, then, why did he take  
19 the plea?

20 MS. SCOFIELD: Because he was scared he'd  
21 go to state prison.

22 JUDGE PIGOTT: Well, a lot of people are  
23 afraid to go to state prison. They don't - - - I  
24 guess you like the - - - you like the sentence offer.  
25 I mean, he would have pled guilty to homicide if they

1           said I'll give you a conditional discharge and - - -

2                   MS. SCOFIELD: I don't think that would  
3 have happened at all.

4                   JUDGE PIGOTT: Not quite that far, huh?

5                   MS. SCOFIELD: I mean, and the judge  
6 wouldn't have offered that. I mean, obviously, that  
7 would not have been a plea that made any - - - that  
8 would make any sense.

9                   JUDGE PIGOTT: So it was more than just the  
10 sentence that made him plead this way, and that would  
11 have been the overwhelming facts?

12                   MS. SCOFIELD: And - - - yes, it was that  
13 he got scared of going to state prison for something  
14 he didn't do. And - - -

15                   JUDGE PIGOTT: But you don't take a plea  
16 for that.

17                   MS. SCOFIELD: - - - thinking about going.

18                   JUDGE PIGOTT: You don't - - - okay.

19                   MS. SCOFIELD: Judge, I used to do criminal  
20 law. I got acquittals when I was defending and I got  
21 convictions when I was prosecuting. So I have a lot  
22 of background in this. And in truth, what I think is  
23 very important is that the Third Department - - -  
24 when the case reached the Third Department, it was  
25 the first time that it appeared in front of a body

1           that knew both the penal law and the Workers' Comp  
2           law. Up until that point, the criminal judge is  
3           dealing with the criminal law; the Workers' Comp  
4           Board is dealing with the Worker's Comp law. Each  
5           one is not fully understanding what the other statute  
6           is all about.

7                         And that's why I think, when we got to the  
8           Third Department, the Third Department was able to  
9           say no, you get a trial. Collateral estoppel does  
10          not apply in this instance. I'm not asking for the  
11          court to say in any Alford plea collateral estoppel  
12          won't apply. I think that if it were like some of  
13          the other pleas that have happened in the case law,  
14          where there was - - - or findings of guilt where  
15          there's a full trial, certainly - - - there would not  
16          be any basis for doing - - - for saying that  
17          collateral estoppel doesn't apply.

18                         And if it were carefully laid out in the  
19          statement to the judge as to what the facts were,  
20          then there - - - clearly, there would be an argument  
21          that says yes, he pled to that thing.

22                         JUDGE PIGOTT: Did you take Alford pleas  
23          when you were involved in the criminal side?

24                         MS. SCOFIELD: I don't remember if I ever  
25          had.

1                   JUDGE PIGOTT: The reason I ask is,  
2 sometimes you take Alford plea because you've got a  
3 crazy client.

4                   MS. SCOFIELD: Yes, you do.

5                   JUDGE PIGOTT: In other words - - -

6                   MS. SCOFIELD: But that's not true here.

7                   JUDGE PIGOTT: - - - you say to the judge,  
8 this guy isn't getting it. You know, he said he's  
9 willing to plead guilty as long as he doesn't have to  
10 admit that he was at the scene. Can we take a plea  
11 here and leave? And everybody agrees, and - - -

12                   MS. SCOFIELD: I have - - - I never had  
13 that case.

14                   JUDGE PIGOTT: I'm exaggerating.

15                   MS. SCOFIELD: Right. But - - - you know,  
16 yes, there are certainly times when - - -

17                   CHIEF JUDGE LIPPMAN: Counselor, let just  
18 interrupt - - -

19                   MS. SCOFIELD: - - - an offer - - -

20                   CHIEF JUDGE LIPPMAN: - - - to say you have  
21 one minute left.

22                   MS. SCOFIELD: Absolutely. Thank you.

23                   CHIEF JUDGE LIPPMAN: Sure, go ahead.

24                   JUDGE GRAFFEO: Could you just tell us what  
25 the rule is you're looking for here?

1 MS. SCOFIELD: That there is - - - that, in  
2 fact, there's no basis for changing the case law that  
3 says that it "may be preclusive" to "must be  
4 preclusive".

5 JUDGE GRAFFEO: That's a little different  
6 than the Appellate Division. They did a broader  
7 rule, in my opinion.

8 MS. SCOFIELD: They indicated that there  
9 was no identity of the facts. And that makes  
10 sense that that is what they found, and that's  
11 perfectly okay. But I realize that what the  
12 appellant is asking the court to do is to move the  
13 law over so that it then says it must be preclusive.  
14 And that's what I think is a very wrong - - -

15 JUDGE READ: You're saying it - - -

16 MS. SCOFIELD: - - - outcome.

17 JUDGE READ: - - - you're saying it may be,  
18 and here it isn't, because the facts were not  
19 displayed on the record in the criminal proceeding?

20 MS. SCOFIELD: Absolutely. I think - - - I  
21 realize that sometimes there can be a fear that  
22 you're asking for another bite of the apple. This  
23 poor guy didn't get a bite of the apple.

24 CHIEF JUDGE LIPPMAN: Okay, counselor,  
25 thanks.

1 MS. SCOFIELD: Thank you.

2 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

3 MS. MARRIS: Yes, thank you, Your Honor.

4 The Appellate Division did not question the  
5 underlying facts in this case. The Appellate  
6 Division stated that "these charges," the criminal  
7 charges, "arose from evidence collected by SIF  
8 allegedly revealing that claimant was employed while  
9 collecting benefits." And then in its footnote 1,  
10 it's - - -

11 JUDGE SMITH: But that it arose from facts  
12 allegedly revealing something, doesn't mean that he  
13 pleaded guilty to it. I mean, how - - - I guess my  
14 real question is, how do you prove - - - assuming  
15 you're right on the law - - - how do you prove  
16 identity of issues here? What is the issue, the  
17 identical - - - the issue to which - - - which is  
18 identical in both cases?

19 MS. MARRIS: Again, Your Honor, all I can  
20 say is it's insurance fraud. Filing a false  
21 statement to an insurance company to collect  
22 payments. And as I indicated in my application for  
23 review before the Board, that was the issue. He was  
24 filing WA - - - we call them WA-1 forms, or  
25 questionnaires. And those questionnaires state, "Are

1           you working?" The claimant checked off "no".

2                       JUDGE SMITH: Can we infer from - - - that  
3 he pleaded guilty to filing one false WA-1?

4                       MS. MARRIS: You can infer that he pled  
5 guilty to filing a false statement - - -

6                       JUDGE SMITH: Which one?

7                       MS. MARRIS: - - - to an insurance company.

8                       JUDGE SMITH: What false statement? I  
9 mean, you've got several in there that you say are  
10 false. Which one did he plead to?

11                      MS. MARRIS: The WA-1 statement.

12                      JUDGE SMITH: Aren't there several?

13                      MS. MARRIS: Well, if I can go on, the  
14 surveillance evidence in this case that we had, which  
15 counsel points out the dates of that surveillance  
16 evidence in her memorandum of law, which is in the  
17 record - - -

18                      CHIEF JUDGE LIPPMAN: What's the answer to  
19 Judge Smith's question, though? Which one did he  
20 admit to doing? Which one of the paper false  
21 statements?

22                      MS. MARRIS: I don't know that that's  
23 relevant.

24                      CHIEF JUDGE LIPPMAN: Why is it not  
25 relevant?

1                   JUDGE SMITH:  Whether it's relevant or not,  
2                   do you have an answer?

3                   MS. MARRIS:  It's not part of the record.  
4                   I could tell you the years that he filed the WA-1  
5                   forms, but it's not in this record.  It's in the  
6                   Board's eCase file, because all of those WA-1 forms  
7                   from 2003 - - -

8                   JUDGE SMITH:  You're doing collateral  
9                   estoppel.  Shouldn't a specific identification of the  
10                  record be somewhere other than in your file?

11                  MS. MARRIS:  In hindsight, Your Honor, yes.  
12                  I would have - - - I would have noted - - - when - -  
13                  - I was the respondent below.  I would not have  
14                  stipulated to the record without those WA-1 forms  
15                  being in the record based upon hindsight.  
16                  Absolutely.

17                  But the point is that the Appellate  
18                  Division ignored *Silmon v. Travis*.  The Appellate  
19                  Division didn't dispute the fact that he pled guilty  
20                  to insurance fraud and it was the same issue that was  
21                  before the Workers' Compensation Board.  The  
22                  Appellate Division looked at civil cases and said  
23                  well, there's no identity of issues; and they looked  
24                  at *Kaufman v. Eli Lilly*, a civil case in - - - from  
25                  1985, where there was no identity of issues because

1 the issue was not pled, litigated, and resolved.

2 In criminal Alford pleas, they're given - -  
3 - or any guilty plea is given collateral estoppel  
4 effect when the conviction in the criminal court is  
5 before the civil tribunal based upon the same action.

6 CHIEF JUDGE LIPPMAN: Okay, counsel.

7 Thanks, counselor.

8 MS. MARRIS: Thank you, Your Honors.

9 CHIEF JUDGE LIPPMAN: Thank you both.  
10 Appreciate it.

11 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of David W. Howard v. Stature Electric, Inc., et al., No. 29 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Penina Wolicki*

Signature: \_\_\_\_\_

Agency Name: eScribers

Address of Agency: 700 West 192nd Street  
Suite # 607  
New York, NY 10040

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