IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

ROSEMARY STOGNIEW,

Petitioner,

vs.

THOMAS J. McQUEEN,

Respondent.
_____/

CASE NO. 83,881
District Court of Appeal
2d District - No. 93-00436

On Discretionary Review of a Question Certified to be of Great Public Importance By the Second District Court of Appeal

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ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Petitioner, ROSEMARY STOGNIEW, was the plaintiff in the trial court and the appellant/cross-appellee in the district court. In this brief she will be referred to as STOGNIEW. Respondent, THOMAS J. McQUEEN, was the defendant in the trial court and the appellee/cross-appellant in the district court. He will be referred to as McQUEEN.

References to the record on appeal will be designated by the symbol R followed by the appropriate page number. References to the trial transcript will be designated by the symbol T followed by the page number.

STATEMENT OF THE CASE AND FACTS

Because the statement of the case and the facts submitted by STOGNIEW is argumentative and presents as "facts" the very contentions rejected by the jury below, the following statement is provided to facilitate a clear understanding of the issues presented by this appeal.

A. STATEMENT OF THE CASE

Six Pinellas County citizens considered the evidence and arguments presented during a five-day trial and returned a verdict completely rejecting the tort claims of STOGNIEW. (R:792) An experienced trial judge denied STOGNIEW'S post-trial motion for new trial concluding that the verdict was not contrary to the manifest weight of the evidence. (R:793-800, 801) The Second District Court of Appeal affirmed the final judgment. Stogniew v. McQueen, 638 So. 2d 114 (Fla. 2d DCA 1994). The decision of the District Court passed upon a question it certified to be of great public importance. Id. at 116. Because the appellate court affirmed the jury's verdict and the corresponding judgment, it did not address the issues raised on cross-appeal. Id. at 114. STOGNIEW timely filed a Notice To Invoke Discretionary Jurisdiction and this Court entered its Order Postponing Decision on Jurisdiction And Briefing Schedule.

B. STATEMENT OF THE FACTS

On January 7, 1986, Gerald STOGNIEW, Jr., the twenty-one year old son of Gerald and Rosemary STOGNIEW, suddenly and unexpectedly died. (T.640) As a result of this death, STOGNIEW experienced a severe grief reaction for which she sought counseling. (T.64) At the time of her son's death, Rosemary STOGNIEW was

employed at the office of Holy Cross Catholic Church, in St. Petersburg, Florida. (T.64) A practicing Catholic, STOGNIEW requested spiritual advice and guidance from an associate pastor. (T.64-65) To assist her in dealing with the grief response, her pastor referred STOGNIEW to Thomas McQUEEN. (T.65) McQUEEN, a former Catholic priest, was a licensed marriage and family therapist then counseling from an office at Espiritu Santo Catholic Church. (T.66-67; 972)

In January, 1986, STOGNIEW, acting voluntarily and without any prior contact with McQUEEN, either personally or through her pastor, set a counseling appointment. (T.67) STOGNIEW attended this first counseling session on January 30, 1986. (T. 66) At this initial appointment, McQUEEN diagnosed her as suffering from an acute grief response to a major depressive episode, single occurrence and assigned a diagnostic code from the DSM-111 R. (T. 223, 979, and 984) This diagnosis was consistent with Dr. Luis Herrero's subsequent the later diagnosis by Dr. Luis Herrero, who treated STOGNIEW, and Dr. Robert Woody, the expert witness employed by STOGNIEW for evaluative purposes and to testify at trial. (T. 494, 567, 633-634, 707, 713, and 1003) Also after the initial session, McQUEEN formulated a treatment plan to assist STOGNIEW in coping with her grief through short-term cognitive psychotherapy administered on an on call basis. (T. 984-987 and 995)

At the time of STOGNIEW'S initial visit, McQUEEN was qualified to perform grief counseling by virtue of his status as a licensed Marriage and Family Therapist. (T. 972) McQUEEN received that license in 1982, mounted it on a plaque, and displayed the plaque on the wall of his office. (T. 972, and 988-989) The plaque

was present during each of the fourteen counseling sessions with STOGNIEW. (T. 989)

In addition to his status as a licensed professional, McQUEEN was qualified to engage in grief counseling based on his education and experience. Before meeting STOGNIEW, McQUEEN held a Masters in Divinity degree, had been an ordained Roman Catholic priest, and had counseled parishioners and members of the public for grief and grief related issues. (T. 957-962) After voluntarily leaving the priesthood, McQUEEN was employed as a psychologist by Pinellas County. (T. 963-966) During the period of this employment, McQUEEN held an occupational license as a psychologist and, despite the fact that it was not required by licensing laws or his employer, earned a Ph.D. in psychology. (T.965-968, and 970-972) The State of Florida did not require a license to provide psychological services or to hold oneself out as a psychologist during the entire time McQUEEN was employed by Pinellas County and was counseling with STOGNIEW. (T. 970-973) The requirement of a license to practice psychology became effective October 1, 1992. (T. 812)

Despite entitlement to do so, throughout the course of his therapy with STOGNIEW, McQUEEN never referred to himself as a psychologist. (T. 211-212) Nonetheless, despite admitting that McQUEEN never referred to himself as a psychologist or licensed psychologist, STOGNIEW claimed McQUEEN misrepresented his credentials by leading her to believe he was a licensed psychologist rather than a licensed marriage and family therapist. (T. 211-212, and 216) At trial, the jury rejected this claim.

Over the next ten months, from January 1986 through November 1986, McQUEEN counseled twelve additional sessions with STOGNIEW. (T. 217) Each session occurred at the same location, McQUEEN'S office at the rectory of Espiritu Santo Church, each lasted approximately one hour. (T. 68, and 217) Each session, through November 6, 1986, was scheduled in advance and, at the conclusion of each, STOGNIEW wrote a check to McQUEEN as payment for the counseling services. (T. 223) Each session followed the treatment plan of cognitive short-term grief therapy and, as part of that therapy, included discussions of religious issues associated with grief response. (T. 230, 233, and 989-997) During the counseling session of April 3, 1986, STOGNIEW asked McQUEEN whether it would be possible to counsel at a location closer to her home. McQUEEN indicated that he had been trying to open a counseling center in northern Pinellas County, in association with Catholic Social Services, for several years. (T. 72-74)

While counseling with McQUEEN, STOGNIEW was pursuing the question of the physical cause of her son's death. (T. 235) Although her son died in January 1986, no final report was issued by the medical examiner until August 1986. (T. 238) After receiving the report, STOGNIEW began experiencing renewed grief responses and symptoms including a feeling of wanting to disappear as well as an inability to sleep. (T. 240-242, 1000, and 1002) Because of the autopsy report, STOGNIEW contacted McQUEEN and requested a counseling appointment. (T.240-241, and 1001) This appointment took place on September 24, 1986. (T. 241) At that appointment, McQUEEN administered a Beck Depression Inventory test and advised STOGNIEW that

he believed she should receive medication. (T. 242) As a result, McQUEEN referred STOGNIEW to a psychiatrist, Dr. Luis Herrero, for an appointment on October 9, 1986. (T-86 and 242)

At their first session, Dr. Herrero diagnosed STOGNIEW as manifesting a major depressive disorder (unresolved pathological grief response) for which he prescribed Ludiomil. (T. 494 and 502) Additionally, Dr. Herrero referred STOGNIEW back to McQUEEN for ongoing supportive psychotherapy (T. 504, 506; R. 655 Plaintiff's composite Exhibit No. 9)

During the month of October, McQUEEN counseled STOGNIEW on two occasions. On October 30, 1986 she returned to Dr. Herrero who determined that his initial diagnostic impression of "extreme severe depression" was correct but that STOGNIEW had improved in her depressive symptomatology and was sleeping better. (T. 506- 508) Dr. Herrero recommended that STOGNIEW remain on medication and continue counseling with McQUEEN. (T. 507-508)

On November 6, 1986, almost a month after her initial visit with Dr. Herrero and eleven months after beginning grief therapy, STOGNIEW attended a counseling session with McQUEEN. (T. 245) During this session, STOGNIEW experienced a turning point in her therapy. (T. 247 and 1005) McQUEEN and STOGNIEW recognized that the need for continuing therapy no longer existed and they mutually and voluntarily terminated the counseling relationship. (T. 1004-1005) At trial, STOGNIEW denied that the counseling relationship terminated at this time, testifying instead that it continued for another two years, until at least November 1988. (T.

273) By contrast, STOGNIEW admitted at trial that she had prepared a written summary of her thoughts in which she indicated that she terminated her counseling relationship with McQUEEN before resigning from her position at Holy Cross in February 1987. (T. 286)

At the conclusion of the November 6, 1986 session, STOGNIEW made her last payment for McQUEEN'S counseling services through a check which was cashed by McQUEEN. (T. 245-246) At the time of this termination of counseling with McQUEEN, STOGNIEW was still treating with Dr. Herrero and taking the prescribed medication, although she failed to attend any follow-up appointments with Dr. Herrero after October 30, 1986. (T. 251)

Almost two weeks after her November 6, appointment with McQUEEN, STOGNIEW wrote a letter to him describing the positive results of her counseling. (T. 246-247) In her letter dated, November 18, 1986, STOGNIEW confirmed that she had reached the "turning point" on November 6, 1986. (T. 247) STOGNIEW also prayed she would have the strength to get over future obstacles and that McQUEEN would "be there to help me if I fall." (T. 101; Plaintiff's Exhibit No. 11 -- R.657) McQUEEN interpreted the letter as verification of the mutual termination of the counseling relationship previously discussed at the session of November 6, 1986. (T.1005, 1007- 1008)

Documents confirmed the November 6, 1986 termination of therapy by McQUEEN. Progress notes of Dr. Shiflett from August 1, 1991 refer to a meeting with McQUEEN after the donation was initially offered and stated "No tx." (T. 630).

Dr. Shiflett confirmed that this abbreviation indicates that STOGNIEW told her no treatment occurred at that meeting. (T. 629-630) STOGNIEW, in her summary of thoughts written on February 5, 1989 wrote, "I then terminated my counseling relationship with Doctor McQUEEN, resigned from my position of Holy Cross, and proceeded to found the Counseling and Development Center, Inc." (T. 280, 286) Applying for life insurance in March 1988, STOGNIEW identified therapy for depression caused by grief response but limited the duration of that therapy to 1986. (T. 273-276)

In October 1986, STOGNIEW attended a meeting of the Bishops Insight Group for the Catholic Diocese of St. Petersburg. (T. 263) That meeting specifically identified the need for a counseling center in northern Pinellas County. (T. 263, 1013) Through her participation in this meeting, STOGNIEW became aware of the Diocese's goal to open such a center. (T. 1013).

Also during November, 1986, STOGNIEW'S husband met with a financial adviser concerning the management of their excess income. (T. 941) Gerald STOGNIEW received a recommendation to establish a charitable foundation in the name of his son as a vehicle to provide a tax shelter. (T. 941-942) Considering the available funds, Gerald STOGNIEW decided to establish the foundation with an initial donation of $ 100,000.00. He communicated this plan, and the availability of the funds for donation, to his wife for the first time over the Thanksgiving weekend, 1986. (T. 941-943)

On December 12, 1986, at STOGNIEW'S request the parties met again. (T. 1008-1009) At this meeting, STOGNIEW told McQUEEN for the first time about her intention to establish a charitable foundation in the name of her son and to make a donation from that foundation to the Catholic Diocese for the purpose of establishing a counseling center. (T. 1010) Indeed, Mrs. STOGNIEW did not even become aware of her husband's intention to establish the Foundation or make any donation until the Thanksgiving holiday, after the counseling session of November 6, 1986 and after her letter of November 18, 1986. (T. 942-943) STOGNIEW also communicated to McQUEEN, for the first time, her desire to have McQUEEN appointed as executive director of the counseling center. No counseling occurred and no payment was made to McQUEEN for services. (T. 1011-1012)

McQUEEN and STOGNIEW met again, on December 17, 1986. (T. 1013) During this visit, STOGNIEW and McQUEEN took a walk in the park and discussed the possibility of the counseling center. (T. 1014) Again, no counseling occurred and no payment was made for services. (T. 1011-1012 and 1014) On Christmas Day, 1986, STOGNIEW voluntarily stopped taking the medication prescribed by Dr. Herrero. (T. 116)

From December 12, 1986 through May 1, 1987, STOGNIEW and McQUEEN worked together to persuade the Diocese of St. Petersburg to open a counseling center. (T. 1014-1018) STOGNIEW and McQUEEN submitted a joint proposal, but this proposal was ultimately rejected by the Diocese. (T. 1016) During this same time period, STOGNIEW never requested a counseling appointment with McQUEEN, never

advised McQUEEN that she considered him her therapist, and never made any payment to McQUEEN for the counseling services allegedly rendered. (T. 1020)

Determined to bring their joint goal to completion, STOGNIEW and McQUEEN continued to work to establish a counseling center, although without a direct affiliation with the Catholic Diocese of St. Petersburg. (T. 1017-1018) On May 1, 1987, the Counseling & Development Center, Inc. (CDC) opened in Clearwater, Florida. (T. 1018) The CDC was incorporated by STOGNIEW and governed by a Board of Directors. STOGNIEW, McQUEEN, Dr. Dean Fauber, a pediatrician, Richard Junkerman, an employee of STOGNIEW, and Father Shannon, a Catholic priest comprised the Board of Directors. McQUEEN was also appointed as the executive director of the CDC. (T. 1018)

By October, 1988, the Gerald STOGNIEW Jr. Charitable Foundation had donated over $80,000.00 to fund the start-up and operating expenses of the CDC (T. 152-53; R.667 -- Plaintiff's composite Exhibit No. 21) As a result of these expenses, and a concern regarding the operation of the center, Mr. STOGNIEW performed an internal review of the records of the CDC. (T. 944) After this review and because there had been disputes that arose between STOGNIEW and McQUEEN concerning the operation and management of the CDC, STOGNIEW recommended to the Board of Directors that McQUEEN be removed as executive director and that she fill the position until a replacement could be hired . (T. 946) The Board of Directors considered McQUEEN'S refusal to resign. (T:1014-1046) On December 28, 1988, fully aware that a vote to retain McQUEEN would result in the termination of any

funding for the CDC from STOGNIEW, the Board of Directors nonetheless refused the STOGNIEWS' demand. (T. 1041-1042 and 1046) In response, on December 28, 1988, STOGNIEW resigned from the Board of Directors of the CDC and severed all relationship with McQUEEN (T. 186-192) STOGNIEW identified December 1988 as the time when the counseling and therapeutic relationship with McQUEEN ended. (T. 338)

Prior to the time she left the Board of Directors of the CDC, STOGNIEW had established another counseling center. (T. 316) Within one month of the critical vote, STOGNIEW was actively involved in the operation of the Counseling Services Center, Inc. located approximately one mile from the CDC. (T. 317) After she resigned from the Board and severed all ties with the CDC, STOGNIEW and her employees entered the offices of the CDC and, without supervision of McQUEEN or any agent of the CDC, removed items. (T. 320-321)

On February 5, 1989, STOGNIEW complained about McQUEEN to the Department of Professional Regulation (DPR). (T. 280 and 286) Based on her statement, summarized in written form, DPR initiated an action against McQUEEN. (R.694) While the action was pending, STOGNIEW initiated her own civil action against McQUEEN and the CDC. (R. 115) This civil action was commenced on April 3, 1990 by the filing of a multi-count complaint asserting the alternative theories of negligence, breach of fiduciary duty, misrepresentation and breach of contract. (R. 1-15) The Second Amended Complaint filed by STOGNIEW, on April 15, 1991, added a count for malpractice against McQUEEN. (R. 129-47)

Prior to the filing of the Second Amended Complaint, DPR reached its final decision. On February 28, 1991, the DPR entered a Final Order concluding that McQUEEN violated Florida Statute, Section 491.009(2)(s), (1989), by failing to meet the minimum standards of performance in his professional activities when measured against generally prevailing peer performance in his relationship with STOGNIEW (R.197-99). Specifically, the Board of Clinical Social Work, Marriage and Family Therapy and Mental Health Counseling determined that McQUEEN violated Section 491.009(2)(s) by: 1) failing to properly safeguard STOGNIEW'S patient file and the confidentiality of its contents; 2) terminating counseling and entering into a business relationship to further his personal interests; 3) discussing his personal goals and frustrations during therapy; and 4) failing to refer STOGNIEW to another therapist for continuing formal therapy. (R.223-24)

Based upon the Final Order of the DPR, STOGNIEW moved for partial summary judgment in the civil action. (R.193-244) STOGNIEW requested that the court apply the doctrine of offensive collateral estoppel to preclude the litigation of whether McQUEEN had acted negligently in his relationship with STOGNIEW. (R.193-244 and 255-318) After argument of counsel (R.811-64) and supporting and opposing memoranda (R. 255-318; R. 432-444), the trial court denied this motion. (R.470-71) In a second attempt to have the court in the civil action preclude the litigation of issues concerning the alleged negligence of McQUEEN, STOGNIEW moved to have the court take judicial notice of the Final Order of the DPR proceeding. (R. 629-36) That motion was denied. Prior to the trial, McQUEEN filed a motion in limine to exclude

any reference to the prior DPR proceeding. (R.544-47 and 562-65) This motion was granted. The court also granted McQUEEN'S motion for partial summary judgment as to Count II of the Second Amended Complaint, asserting fraudulent misrepresentation, but denied the motion as to Count III, asserting negligent misrepresentation. (R. 551-557)

The jury trial proceeded from November 3 through November 9, 1992. After presentation of the case, McQUEEN moved for a directed verdict as to Count I, the claim asserting breach of fiduciary duty. (T. 1227) The court granted this motion. (T. 1230) Similarly, McQUEEN moved for directed verdict as to STOGNIEW'S ability to recover damages for mental anguish or pain and suffering on the basis that the evidence failed to establish that STOGNIEW suffered any physical impact, thereby barring the recovery of non-economic damages under the impact rule. (T. 1230-1251) The court denied this motion. (T. 1251) That ruling was the subject of McQUEEN's cross-appeal.

As part of his case, McQUEEN presented the testimony of a well qualified expert witness. (T. 1162-1218) Dr. Arthur Foreman, a board-certified psychiatrist, who teaches at the University of South Florida College of Medicine, testified that McQUEEN was not negligent as alleged by STOGNIEW. (T. 1163, 1171, 1173, 1175, 1176 and 1177-1184) Specifically, Dr. Foreman testified that McQUEEN did not negligently diagnose nor treat STOGNIEW. (T. 1173, 1175) He stated that McQUEEN was not negligent in the manner in which he kept STOGNIEW'S file or in the referrals he made. (T. 1171, and 1183-1184) Dr. Foreman opined that there was

nothing improper about using concepts of spirituality or religion in counseling, or in the way McQUEEN conducted his sessions with STOGNIEW. (T. 1176) Finally, Dr. Foreman testified that McQUEEN was not negligent in terminating his treatment of STOGNIEW and then later entering into a business relationship with her. (T. 1177-81)

At the close of McQUEEN'S case, STOGNIEW moved for directed verdict on the defense of comparative negligence. (T. 1262-63) This motion was denied. (T. 1267) The jury considered the case under the theory of negligence, and STOGNIEW demanded judgment for over Eight Million ($8,000,000.00) Dollars. (T. 1340) A jury verdict, rejecting STOGNIEW'S claim was returned in favor of McQUEEN. (T. 1441)

ISSUES CERTIFIED AND AS RESTATED

The Second District Court of Appeal certified the following as a question of great public importance:

> **MAY AN ADMINISTRATIVE DETERMINATION OF A PROFESSIONAL'S MISCONDUCT BE USED AS CONCLUSIVE PROOF OF THE FACTS UNDERLYING THAT DETERMINATION IN A SUIT AGAINST THE PROFESSIONAL FOR NEGLIGENCE BASED ON THE SAME FACTS?**

Because that question raises matters not presented by the facts of this case nor considered below, McQUEEN suggests that the issue actually presented is:

> **MAY A LITIGANT, WHO WAS NOT A PARTY TO A PRIOR ADMINISTRATIVE PROCEEDING, OFFENSIVELY USE THE ADMINISTRATIVE DETERMINATION OF A PROFESSIONAL'S MISCONDUCT AS CONCLUSIVE PROOF OF THE FACTS UNDERLYING THAT DETERMINATION IN A SUIT AGAINST THE PROFESSIONAL FOR NEGLIGENCE BASED UPON THE SAME FACTS?**

SUMMARY OF ARGUMENT

STOGNIEW asks this Court to exercise its discretionary jurisdiction and profoundly alter well-established Florida law so that findings of a lone administrative hearing officer can be used offensively to negate a jury verdict reached following a fair trial. The arguments she presents fail to justify that change.

Contrary to STOGNIEW'S claim, the lower courts did not err in allowing the jury to determine whether McQUEEN was negligent. At trial, there existed numerous fact questions which were particularly within the province of the jury. And, STOGNIEW was not entitled to use the DPR's finding of misconduct to conclusively establish negligence because she met neither the identity of issue nor the identity of party requirements necessary for application of the doctrine of offensive collateral estoppel.

Because she cannot meet the traditional requirements, STOGNIEW argues for a new standard, the relaxed nonmutual collateral estoppel recognized by the federal courts. Such a change would offend the doctrine of stare decisis and would ignore sound policy justifications which support Florida's long-held requirement of mutuality of parties, a view shared by a substantial number of states and supported by scholarly analysis.

Nonmutual collateral estoppel is not necessarily more efficient because litigants would be forced to aggressively litigate all proceedings large or small rather than run the risk of estoppel. Further, substantial judicial effort would be involved in exploring and defining the parameters of the doctrine's application.

Nonmutual collateral estoppel is not necessarily fair to the defendant against whom it is used. The relaxed view compounds the effect of an "incorrect" or "untrue" judgment and presents plaintiffs with the ability to delay, without risk, institution of their action in hope they may receive the benefit of a prior favorable judgment. And, when introduced into the administrative arena the relaxed view deprives the defendant of the right to a jury trial and many of the procedural safeguards of a trial. At the same time nonmutuality may actually damage the administrative agency's attempts to swiftly investigate the professional's skills, and if needed, to discipline him.

Finally, legislative enactments indicate that the Florida legislature recognizes and accepts the continued viability of Florida's current mutuality requirement. In short, there is no need to plow new ground at the cost of stability within the court system.

ARGUMENT

THE TRIAL COURT DID NOT ERR BY ALLOWING A JURY TO DETERMINE WHETHER THE ALLEGATIONS OF STOGNIEW'S OPERATIVE COMPLAINT WERE TRUE.

STOGNIEW asks this Court to exercise its discretionary jurisdiction and dramatically alter well-established Florida law so that the findings of a lone administrative hearing officer can be used to negate the verdict of six Pinellas County citizens reached after they considered the evidence and argument presented during a five-day trial. She asks this Court to ignore the doctrine of stare decisis and overrule previous decisions upon which the lower courts and McQUEEN have relied. In short, STOGNIEW asks this Court to greatly expand application of the doctrine of *offensive* collateral estoppel and provide those who were not parties to the prior action with a powerful weapon with which to prevent a jury from determining a defendant's civil liability.

To support these suggestions, STOGNIEW presents the same speculative policy arguments this Court previously considered and rejected. McQUEEN respectfully suggests that the Court retain the stability created by Florida's current approach to this issue and reject STOGNIEW's request for change.

A. THE LOWER COURTS DID NOT ERR BY DENYING STOGNIEW'S MOTION FOR PARTIAL SUMMARY JUDGMENT, AND ALLOWING A JURY TO DETERMINE WHETHER THE ALLEGATIONS OF HER OPERATIVE COMPLAINT WERE TRUE.

The Florida Constitution guarantees civil litigants the right to trial by jury. Art. 1, §22, Fla. Const. For that reason, extreme caution is required when a court considers whether to withdraw any issue from the jury's consideration. Particular care must be accorded in ruling on motions for summary judgment so that controverted issues are resolved by a jury functioning under proper instructions. Drahota v. Taylor Constr. Co., 89 So. 2d 16 (Fla. 1956)

A summary judgment is proper only in those limited instances where (1) there is no genuine issue as to any material fact, and (2) the moving party is entitled to a judgment as a matter of law. Fla. R. Civ. P. 1.510(c) Where there is even the slightest doubt that an issue of material fact might exist, summary judgment is improper. Martin v. Golden Corral Corp., 601 So. 2d 1316 (Fla. 2d DCA 1992)

STOGNIEW contends that the lower courts erred in allowing a jury to consider whether her allegations regarding McQUEEN'S liability were true. She asks this Court to reverse and remand the case for trial solely on the issue of damages. INITIAL BRIEF, p. 47. STOGNIEW'S position is wrong for two fundamental reasons. First, the facts upon which McQUEEN'S liability, if any, rested, were in sharp dispute. And second, the doctrine of offensive collateral estoppel was inapplicable to the liability issues addressed in the motion for partial summary judgment. Simply stated, STOGNIEW met neither requirement for entry of a summary judgment.

In reality, STOGNIEW seeks to avoid the factual disputes which exist between the parties. She asks this Court to simply ignore the settled law of this state which places very stringent requirements on the application of offensive collateral estoppel,

and to apply the "relaxed" standard applied by the federal courts. She makes this request even though this Court has unequivocally rejected the federal approach. See, Trucking Employees of N. Jersey Welfare Fund, Inc. v. Romano, 450 So. 2d 843 (Fla. 1984)

1. MATERIAL ISSUES OF FACT EXISTED WHICH PRECLUDED SUMMARY JUDGMENT

Summary judgment is improper if the record raises even the slightest doubt that an issue of material fact might exist. Martin v. Golden Corral Corp., 601 So.2d 1316, 1317 (Fla. 2d DCA 1992) It is a movant's burden to clearly demonstrate that, at the time the court considered the motion for summary judgment, the record contained no material issues of fact. If the record reflects the existence of any genuine issue of material fact, or the possibility of any issue, or if the record raises even the slightest doubt that an issue might exist, the summary judgment should not be granted. Wilson v. Woodward, 602 So. 2d 547 (Fla. 2d DCA 1992)

In this case, the facts regarding liability and damages have always been in sharp dispute, and since the record before him clearly evidenced these disputes, the trial judge acted properly in refusing to grant STOGNIEW'S motion for partial summary judgment. As illustrated by the facts set forth in the parties' respective statements of the facts, there are few facts which were not in dispute. The record which existed when the trial court considered this motion consisted primarily of the operative pleadings and the exhibits attached to STOGNIEW'S motion for partial summary judgment. (R:129-47, 191-92 and 197-244) From these items it is clear that

STOGNIEW contended that a patient-counselor relationship existed during the time she carried out business activities with McQUEEN and yet McQUEEN believed that the counselor relationship ended in 1986, before any business activities were commenced. (R:131-132, and 232-233) Further, STOGNIEW contended that McQUEEN misrepresented his professional qualifications, and yet McQUEEN believed he had never misinformed STOGNIEW. (R:137-38, and 218-19) In short, STOGNIEW and McQUEEN disagreed regarding the material allegations of this case. (R:129-47, and 191-92)

This disagreement continued through trial. For example, STOGNIEW contended that her patient-counselor relationship existed with McQUEEN until at least November 1988. (T.273) This served as a factual predicate for her allegation that McQUEEN improperly entered into a business relationship with his patient. However, McQUEEN testified that the patient-counselor relationship ended two years earlier, in 1986. (T.1004-5) He offered additional evidence to support his position including the records of Dr. Shiflett and a life insurance application. (T.629-30, 273-76)

STOGNIEW'S own actions evidence a 1986 termination of the relationship. Almost two weeks after her November 6th appointment with McQUEEN, STOGNIEW wrote a letter describing the positive results of her counseling. (T.246-47) She confirmed that during that session she had reached a turning point and prayed that McQUEEN would be there to help if she needed strength to overcome future obstacles. (T.101, Plaintiff's Exhibit No. 11 and R.657) McQUEEN interpreted this

letter as verification of the mutual termination of the counseling relationship. (T.1005 and 1007-8)

Another example of the factual disputes which exist in this case concerns STOGNIEW'S claim that McQUEEN misrepresented his credentials by leading her to believe he was a licensed psychologist rather than a licensed marriage and family therapist. (T.211-12, and 216) McQUEEN again testified that he never misled STOGNIEW as alleged, and that his license as a marriage and family therapist was on display during each of the counseling sessions. (T.1063-19064) In light of the significant disputes regarding the facts upon which liability, if any, rested, the trial judge did not err in submitting the liability issues to a jury for resolution.

2. THE DOCTRINE OF OFFENSIVE COLLATERAL ESTOPPEL IS INAPPLICABLE BECAUSE STOGNIEW FAILED TO MEET THE DOCTRINE'S IDENTITY OF THE PARTIES AND IDENTITY OF THE ISSUES REQUIREMENTS

Florida courts have long recognized the doctrine of collateral estoppel, or estoppel by judgment, and the parameters of its application are well defined. See Prall v. Prall, 58 Fla. 496, 50 So. 867, 870 (1909) Collateral estoppel is a judicial doctrine which in general terms prevents parties from relitigating issues that have been decided previously between them. Mobil Oil v. Shevin, 354 So. 2d 372, 374 (Fla. 1977) It may be used "defensively," precluding an unsuccessful litigant from prevailing in a subsequent action. Or, the doctrine may be used "offensively" precluding a defendant from raising defenses already rejected in the previous action. Zeidwig v. Ward, 548 So. 2d 209, 212-13 (Fla. 1989)

STOGNIEW attempted to use collateral estoppel *offensively* so that her motion for partial summary judgment would sweep away all factual disputes regarding liability. Yet, STOGNIEW has cited no case in which the doctrine has been applied so that the conclusions of the Florida Department of Professional Regulation were used to deprive a defendant of his constitutional right to have his civil liability determined by a jury. She has presented no case in which a party's civil liability was adjudicated by virtue of a DPR finding. The reason is obvious. The doctrine of offensive collateral estoppel does not and should not convert the result of a licensing agency's investigation of a professional's qualifications into a judgment awarding all allegedly aggrieved parties money damages.

The well-established rule in Florida has been and continues to be that offensive collateral estoppel may be asserted only when the identical issue has been litigated between the same parties or their privies. Trucking Employees of N. Jersey Welfare Fund, Inc. v. Romano, 450 So. 2d 843, 845 (Fla. 1984); Zeidwig v. Ward, 548 So. 2d 209, 213 (Fla. 1989) Thus, there must be identity of the parties and identity of the issues. In the present case, the trial court determined that neither identity was established. The District Court did not address the identity of issues element because it concluded that STOGNIEW failed to meet the identity of parties requirement. Stogniew v. McQueen, 638 So. 2d 114 (Fla. 2d DCA 1994). Both Courts were correct.

a. STOGNIEW HAS NOT ESTABLISHED IDENTITY OF THE PARTIES.

The first essential element for application of the doctrine of collateral estoppel is identity of the parties or mutuality of the parties. Or, as stated in Trucking Employees of N. Jersey Welfare Fund, Inc. v. Romano, 450 So. 2d 843, 845 (Fla. 1984):

> [T]he well-established rule in Florida has been and continues to be that collateral estoppel may be asserted only when the identical issue has been litigated between the same parties or their privies. (emphasis added)

Since STOGNIEW was not a party to the DPR proceeding, she advances two arguments in her effort to show that she satisfies the identity of parties requirement. First, she claims to be in privity with the State of Florida Department of Professional Regulation as it carried out its investigation and licensing functions. Second, she asks this court to expand the notion of privity to include a notion of "virtual representation." INITIAL BRIEF, pp. 25-30. The first theory is illogical, unsupported by Florida case law, and was rejected by the lower courts. The second theory was never presented below and misapprehends the role played by the identity of parties requirement.

STOGNIEW claims that she is in privity with the DPR as it conducted the prior investigation and disciplinary proceedings. She is not. One not a party to a suit is in privity with one who is where his interest is such that he would be bound by the final judgment as if he were a party. Southeastern Fidelity Ins. Co. v. Rice, 515 So. 2d 240 (Fla. 4th DCA 1987). It is interesting to note that, STOGNIEW cites no Florida

case decision which specifically holds that a former patient is in privity with the DPR as it investigates and disciplines a licensed professional. She presents no case which suggests that a DPR victory would have defeated her right to present her tort claims. The reason is obvious, due process would not allow her to be denied her day in court.

There are numerous decisions which have discussed application of collateral estoppel to persons not directly named in the initial action. These cases illustrate that persons such as STOGNIEW who were merely "interested" in a proceeding do not meet the standard by which to invoke collateral estoppel.

The case which conclusively rejects STOGNIEW'S privity claim is Trucking Employees of N. Jersey Welfare Fund, Inc. v. Romano, 450 So. 2d 843 (Fla. 1984), where civil litigants were prevented from using collateral estoppel offensively to establish liability. In Romano the plaintiffs, limited partners, filed civil claims against their general partners and business managers alleging fraud and breach of fiduciary duty. While the civil case was pending, a federal criminal indictment was filed charging the defendant with twenty-one counts of fraud and misrepresentation. The plaintiffs were named in the indictment as victims of the specific acts which had been alleged in their complaint. The defendants were found guilty on all counts.

Thereafter, the plaintiffs filed a motion for partial summary judgment asserting that the conviction conclusively established the factual allegations of the civil complaint. The trial judge agreed, entered summary judgment on the issue of liability and retained jurisdiction to determine damages. He was reversed.

In Romano, this Court refused to apply collateral estoppel to aid the victim of a crime even though the criminal was convicted by a jury. The Court refused to conclude that the victim was in privity with the government and therefore the doctrine was inapplicable. The same logic applies here. Was STOGNIEW in a different position than the Romano plaintiffs? Obviously not. There can be no serious dispute that both the victim of a crime and the victim of professional misconduct share an interest that the wrongdoer be punished. Both will undoubtedly assist the government as it investigates and prosecutes improper conduct. Neither can individually prosecute the wrongdoer. Why should collateral estoppel aid the civil claim of the patient and not that of the victim? Certainly it should not, and like the criminal victims in Romano, STOGNIEW does not meet the identity of parties requirement necessary to invoke offensive collateral estoppel.

Other cases, in various civil contexts further illustrate the very narrow scope of privity in this context. For example, in Keesee v. Estate of Neely, 498 So. 2d 1026 (Fla. 2d DCA 1986), one beneficiary of a life insurance policy filed an action seeking a refund of the amount of tax she had paid on the policy proceeds. She alleged that the estate's personal representative had misconstrued a statute and a provision in the decedent's will, and thereby caused an unnecessary tax payment. The trial judge denied that claim. Later, a second beneficiary filed an identical petition for refund. On appeal, the court held that the "present matter lacks the necessary identity of parties to permit application of the doctrine of estoppel by judgment." Id. at 1027-1028.

Similarly, in Zurich Ins. Co. v. Bartlett, 352 So. 2d 921 (Fla. 2d DCA 1977), cert. denied, 359 So. 2d 1210 (Fla. 1978), the court held that the doctrine **did not preclude relitigation** of a defendant's **negligence** in driving his truck even though that defendant was previously found guilty of negligence in an action brought by an identically situated passenger. The court simply refused to find a sufficient identity of the parties to allow the negligence finding of the first action to bind the defendant in the second passenger's claim.

Barnett Bank of Clearwater, N.A. v. Romano, 359 So. 2d 571 (Fla. 2d DCA 1978), considered whether a bank was in privity with mortgagors for the purposes of applying estoppel. The court noted that while it is true that one who acquires an interest in the subject matter of the suit **after** rendition of judgment is a privy bound by the judgment, one whose interest arises **prior** to that judgment is not bound unless made an actual party to the action. The court refused to allow estoppel to be used offensively to prevent the bank from litigating its interest.

These cases clearly demonstrate that because estoppel denies a party his right to a jury, the courts have limited its application to those actually involved in the prior proceeding or those whose interest arises through one actually involved. STOGNIEW'S interest, if any, arose not by virtue of the DPR investigation and discipline, but in addition to it.

STOGNIEW argues for an expanded view of privity by asserting that, since she participated and cooperated in the DPR proceedings, the DPR acted as her "virtual representative." Her argument is illogical and ignores the fact that had the DPR failed

to prove its charges against McQUEEN, STOGNIEW would have been totally free to institute her civil suit and attempt to prove that McQUEEN was negligent. It ignores the fact that because of due process considerations she had no direct financial stake in the outcome of the administrative proceeding. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7 (1979(city Blonder-Tongue Labs. v. University of Ill. Found., 402 U.S. 313, 329 (1971) and Hansberry v. Lee, 311 U.S. 32, 40 (1040)). In short, while she certainly had an interest in the outcome, since it could not bind her, she was not in privity. See Southeastern Fidelity Ins. Co. v. Rice, 515 So. 2d 240 (Fla. 4th DCA 1987).[1]

b. STOGNIEW HAS NOT ESTABLISHED IDENTITY OF THE ISSUES

STOGNIEW'S motion for partial summary judgment was also deficient because the record failed to establish an identity of issues. Collateral estoppel is applicable only where the issues are identical to necessary and material issues resolved in the previous litigation. Mobil Oil v. Shevin, 354 So. 2d 372 (Fla. 1977); Florida Dep't of Transp. v. Gary, 513 So. 2d 1338 (Fla. 1st DCA 1987)

It is the essence of collateral estoppel that it be made certain that the precise facts were determined by the former judgment. If there is any uncertainty as to the matter formally adjudicated, the burden of showing it with sufficient certainty in the record is on the party who claims the benefit of the former judgment. Prall v. Prall,

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[1]In fact, STOGNIEW'S wait and see strategy illustrates one major criticism of nonmutual collateral estoppel. It motivates plaintiffs to delay presentation of their claims in hope that a prior litigation will establish their right to recover. See Ratliff, Offensive Collateral Estoppel and the Option Effect, 67 Tex. L. Rev. 63 (1988)

58 Fla. 3496, 50 So. 867 (Fla. 1909) The determination of whether the facts are indeed identical must be left to the discretion of the trial judge in the subsequent civil suit. Trucking Employees of N. Jersey Welfare Fund, Inc. v. Romano, 450 So. 2d 843, 845 (1984).

In this case, the trial judge agreed with McQUEEN that STOGNIEW had not established identity of issues. While the District Court did not address this issue, the the present case lacks the required identity of issues. In the DPR proceeding, the Final Order addressed issues of fact and rendered conclusions of law. Included within these conclusions was a determination that McQUEEN violated Florida Statute, Section 491.009(2)(s) (1989), by the following actions: failing to properly safeguard a file and the confidentiality of its contents; terminating counseling and entering into a business relationship with a patient; discussing personal goals and frustrations during therapy; and not referring a client to another therapist for continuing therapy. The critical factor for each of these conclusions of law was that the conclusions were related solely to the alleged violations of Section 491.009(2), as framed in the Administrative Complaint. It was within this statutory context, and solely within it, that the issues of fact were considered and conclusions of law rendered.

The operative complaint in this civil action raises substantially different issues of fact and law to be considered in an entirely nonstatutory framework. Significantly, the civil complaint raises no violation of Section 491.009(2), the only claim raised in the DPR proceeding. At the time the trial judge denied STOGNIEW'S motion, the multi-count civil complaint sought, instead, an award of monetary damages for the

alleged negligence, breach of fiduciary duty, fraudulent misrepresentation, and breach of contract by McQUEEN. Accordingly, the legal and factual issues resolved in the DPR proceeding are not identical to those which would have been necessary and material to the issues raised by the civil complaint. Lacking these identical issues, the doctrine of collateral estoppel should not have been applied offensively. See Smith v. Perry, 635 So. 2d 1019 (Fla. 1st DCA 1994) (issues of effect of dissolution settlement agreement not identical to those of attorney's negligence in representing client); Dep't of Transp. v. Clark Construction Co., 621 So. 2d 511 (Fla. 1st DCA 1993) (the issues involved in the actions while similar and somewhat overlapping were not identical). Thus, under existing Florida law the lower courts did not err in allowing the jury to determine whether McQUEEN was negligent.

B. THIS COURT SHOULD NOT "FEDERALIZE" FLORIDA LAW AND ABANDON THE MUTUALITY OF PARTIES REQUIREMENT FOR APPLICATION OF OFFENSIVE COLLATERAL ESTOPPEL

Because STOGNIEW cannot establish sufficient identity of the parties under existing law, she suggests that this Court should adopt the relaxed approach of the federal cases, a view which she argues is more modern and fair. However, that relaxed approach and the arguments and authorities which support it have been expressly rejected by this Court.

In Zeidwig v. Ward, 548 So. 2d 209 (Fla. 1989), this Court revisited the requirement of a strict identity of parties where collateral estoppel was invoked *defensively*. After recounting the evolution of the federal application of this doctrine,

the Court concluded that where a defendant in a criminal case has had a full and fair opportunity to present his claim in a prior criminal proceeding, and a judicial determination is made that he has received the effective assistance of counsel, then his attorney, the defendant in a subsequent civil malpractice action brought by the criminal defendant, may defensively assert collateral estoppel. Id at 214.

It is critical to note that in Zeidwig, the Court extensively reviewed its previous decision in Trucking Employees of N. Jersey Welfare Fund, Inc. v. Romano, 450 So. 2d 843 (Fla. 1984), and did **not** relax the strict identity of parties requirement where collateral estoppel is to be invoked *offensively*. In Romano, this Court considered modification of the strict identity of party requirement in the offensive context. It recognized that the federal courts have abandoned the requirement of mutuality of parties as a prerequisite to asserting the doctrine of collateral estoppel. Id. at 845. It also conceded that some other states have receded from the mutuality requirement. Id. Nevertheless, it rejected the pleas for change, and held that the well-established rule in Florida has been and continued to be that collateral estoppel may be asserted only when the identical issue has been litigated between the same parties of their privies. Id. **In short, it rejected the very request advanced here by STOGNIEW.**

STOGNIEW suggests that this Court's decision to retain mutuality in Romano was based upon a passing consideration of the foreign authorities which support the relaxed view. However, a review of the briefs filed and considered in that proceeding show unequivocally that the parties and amicus curiae provided the court with exhaustive research and scholarly arguments regarding this issue. See Petitioner's

Brief on Certified Question, Respondents' Brief on Certified Question, and Brief of Amicus Curiae, Florida Defense Lawyers Association, Trucking Employees of N. Jersey Welfare Fund, Inc. v. Romano, 450 So. 2d 843 (Fla. 1984)(No. 63,487). Thus, one must conclude that this Court gave serious consideration to those authorities and arguments and reached an informed decision.[2]

Apart from the implications of the certifications made in Zeidwig and in the present case, there has been no suggestion by any of the District Courts of Appeal that Florida should abrogate the long established requirement of mutuality in cases involving offensive collateral estoppel. Simply put, the Florida approach is not "dysfunctional" as suggested by STOGNIEW. Notwithstanding, STOGNIEW'S desire for change, sound arguments and valid policy considerations exist which support Florida's adherence to mutuality in this context.

1. THE DOCTRINE OF STARE DECISIS

This Court has recognized the doctrine of stare decisis which holds that precedent must be followed except where departure is necessary to vindicate other principles of law or to remedy continued injustice. McGregor v. Provident Trust Co., 119 Fla. 718, 162 So. 323 (1935) The rule promotes uniformity, certainty, and stability in the law. Forman v. Florida Land Holding Corp., 102 So. 2d 596 (Fla. 1958) It keeps the scales of justice steady, and not liable to waiver with every new

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[2]Indeed, many of the arguments were reconsidered when this court decided Zeidwig. See Petitioners' Brief on the Merits and Respondent's Brief on the Merits, Zeidwig v. Ward, 548 So. 2d 209 (Fla. 1989)(No. 72,316).

justice's opinion. Old Plantation Corp. v. Maule Industries, Inc., 68 So. 2d 180 (Fla. 1953).

In the present case, respect for the rule of stare decisis requires the Court to follow the precedents which have governed this question for so long. This is especially true where the argument for change is persuasive but not overwhelming. McQUEEN suggests that the greatest good will be achieved and the greatest stability in the law maintained by adhering to the long-established mutuality requirement instead of plowing new ground, especially when the result would be to create new legal battles regarding application of the doctrine to be waged in the courts of this state.

2. MANY OTHER JURISDICTIONS REQUIRE MUTUALITY AS A PRECONDITION TO THE IMPOSITION OF OFFENSIVE COLLATERAL ESTOPPEL

Many other jurisdictions join Florida in adhering to the time honored rule that mutuality or identity of the parties is an essential element for the imposition of collateral estoppel. E.g., Hogan v. Bright, 218 S.W. 2d 80 (Ark. 1949); C.F. & I. Steel Corp. V. Charnes, 637 P. 2d 324 (Col. 1981); Stiltjes v. Ridco Exterminating Co., Inc., 197 Ga. App. 852, 399 S.E. 2d 708 (1990); Idaho State University v. Mitchell, 97 Idaho 724, 552 P. 2d 776; State Farm Mut. Auto. Ins. Co. v. Glasgow, 478 N.E. 2d 918 (Ind. Ct. App. 1985); (1976); State, Ind. State Highway Comm'n v. Speidel, 392 N.E. 2d 1172 (Ind. Ct. App. 1979); McDermott v. Kansas Public Service Co., 238 Kan. 462, 712 P. 2d 1199 (1986); City of Louisville v. Louisville Professional Firefighters, Ass'n., 813 S.W. 2d 804 (KY 1991); Safeco Insurance Co.

of America v. Palermo, 422 So. 2d 1375 (La. Ct. App. 1982); affirmed, 436 So. 2d 536 (La. 1983); Federal Ins. Co. v. Gates Learjet Corp., 823 F.2d 383 (10th Cir. 1987)(applying Michigan law); Pace v. Barrett, 205 So. 2d 647 (Miss. 1968); Thomas M. McInnis & Assoc., Inc. v. Hall, 349 S.E. 2d 552 (N.C. 1986); Armstrong v. Miller, 200 N.W. 2d 282 (N.D. 1972); Goodson v. McDonough Power Equipment, Inc., 2 Ohio St. 3d 193, 443 N.E. 2d 978 (1983); Oklahomans for Life, Inc. v. State Fair of Oklahoma, 634 P.2d 704 (Ok. 1981); Dickerson v. Godfrey, 825 S.W. 2d 692 (Tenn. 1992); Reid v. Ayscue, 436 S.E. 2d 439 (Va. 1993).

The continued judicial support for mutuality even after fifty years of experience in California following Bernhard v. Bank of America National Trust & Savings Association, 19 Cal.2d 807, 122 P.2d (1942), and fifteen years following Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322 (1979), is illustrative of the serious debate which exists as to whether the relaxed view is indeed better.

3. NONMUTUAL COLLATERAL ESTOPPEL IS NOT NECESSARILY MORE EFFICIENT

The most frequently cited justification for elimination of mutuality is the claim that judicial efficiency is promoted. At first blush, the potential savings from nonmutual collateral estoppel seem clear: the common party's loss of the first proceeding eliminates the need to completely litigate all future cases. There is little empirical data to support this claim and yet there is strong evidence that the actual effect would be to the contrary.

Undoubtedly, there would be some instances in which court time would be reduced if the judge and jury did not have to hear evidence on an issue. But there would be countervailing losses in time too. First, the effort needed in the second case to litigate whether to apply the doctrine may be substantial. For example, the second court would be forced to consider whether the initial proceeding fairly litigated identical issues as those presented in the latter proceeding. This could lead to unusual discovery and evidentiary battles such as deposing members of the first jury. See Katz v. Eli Lilly & Co., 84 F.R.D. 378 (E.D.N.Y. 1979) (allows depositions of jurors in prior state court case); Goodson v. McDonough Power Equip., Inc., 443 N.E. 2d 978 (Ohio 1983) (demonstrating the extent to which litigating the issue of nonmutual collateral estoppel consumes judicial resources). Of course, these "application" determinations would be fertile ground for appeal. Romano, 450 So. 2d at 845.

In addition, the defendant is likely to litigate the first case more intensively and extensively because of the exposure created by nonmutual offensive collateral estoppel. Under the current state of the law, many a prudent litigant may well be willing to present an inexpensive and brief defense to relatively insignificant claims or charges. They may be willing to forego appeal of a proceeding which results in minor discipline or a small monetary award. Yet, faced with nonmutual collateral estoppel, no sensible and financially responsible litigant will submit to an adverse judgment without exhausting every possible means to avert it. In short, abandonment of mutuality will necessarily force all defendants to adopt a more aggressive posture and

litigate each suit to the utmost.[3] See Waggoner, Fifty Years of Bernhard v. Bank of America is Enough: Collateral Estoppel Should Require Mutuality But Res Judicata Should Not, 12 Rev. Litig. 391 (1993) (hereinafter Waggoner).

And finally, evidence of the underlying facts may be relevant in the second proceeding to some issue other than liability. The jury may need to hear much, if not all, of the same evidence to make determinations about comparative negligence, damages and perhaps punitive damages. There can be little actual economy where the same effort is expended for other purposes. Romano at 846.

4. NONMUTUAL COLLATERAL ESTOPPEL IS NOT NECESSARILY FAIR TO THE DEFENDANT AGAINST WHOM IT IS USED

A necessary precondition for application of nonmutual collateral estoppel as suggested by STOGNIEW is that the party estopped must have had a full and fair opportunity to establish its position in regard to that issue. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 328 (1979). It is suggested that once nonmutuality is established precedent, parties will be on notice that there is a substantial risk of being estopped and therefore cannot claim surprise. While that one possible source of

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[3] In the years following Romano, Florida courts have published approximately 159 opinions which in some way referenced collateral estoppel. In that same period, the California courts, applying nonmutual collateral estoppel, published approximately 457 opinions which referenced collateral estoppel. See Westlaw query:" collater! /s estop! and date(aft 1984) and date(before 1994)." While McQUEEN concedes that these results are not scientific proof that nonmutuality is less efficient than Florida's doctrine, the almost 3 to 1 ratio does certainly suggest that the relaxed approach of nonmutual collateral estoppel may not be more efficient.

unfairness may be eliminated for litigants other than McQUEEN, the concept of nonmutuality does not thereby become fair.

A fundamental problem exists which renders nonmutual collateral estoppel unfair. All litigation, including that before judge and jury as well as that before an administrative hearing officer, involves a substantial risk of being inaccurate.[4] Once the likelihood of inaccurate litigation results is acknowledged the unfairness of nonmutual collateral estoppel is manifest.

While the court system, and to a lesser degree the administrative process, employ a variety of mechanisms designed to resolve disputes accurately, few would suggest that these systems infallibly reach the "right" result in each instance. Indeed, STOGNIEW contends that her jury trial resulted in an incorrect verdict while the administrative process found the truth. McQUEEN obviously believes the reverse is true. With mutuality eliminated a defendant who suffers the misfortune of a "wrong" or "untrue" verdict in the initial proceeding suffers not only the unfair loss of the first proceeding but also the automatic loss of all subsequent proceedings which are collaterally controlled![5]

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[4]While it is difficult to construct a method to determine how often decisions are incorrect, it is beyond dispute that errors are made. A crude indicator is the number of reported decisions which apply collateral estoppel to overturn the result of a trial. See, e.g., Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971)(a first decision invalidating a patent was held to be collateral estoppel although the trial court in the case on appeal found the patent valid).

[5]Not only does the court system accept that many questions could be decided either way, it also insists that decisions that are probably erroneous be accepted. See e.g. Laskey v. Smith, 239 So. 2d 13 (Fla. 1970)(not every verdict which raises a judicial eyebrow should shock the judicial conscience); Volume Services Division v.

Academic commentators have repeatedly urged that this unavoidable risk of erroneous fact-finding calls for mutuality:

> The fallibility of the litigation process is the most fundamental basis for the mutuality requirement as well as for all other limitations upon the preclusive effects of judgments; no one should ever undertake to guarantee the accuracy of the results of litigation. For some purposes(to meet due process requirements, for example) the law asks a yes or no question as to whether a party has had an adequate day in court. Days in court, however, in fact vary greatly in quality.

Greenebaum, In Defense of the Doctrine of Mutuality of Estoppel, 45 Ind. L. J. 1,2 (1969); See also Waggoner, at 409-19). To consider the point from a somewhat different perspective, the elimination of mutuality could make the fact finding process significantly less accurate. The theory of the jury system is that a cross section of the community can find the facts accurately and fairly in most instances even though it cannot achieve perfection. 33 Fla.Jur. 2d Juries §1 (1982). It follows that the broader the cross section, the better the chance the findings will represent the views of the community and the better the chance that the total body of decision on that point will be realistic. If, for example, twenty juries consider a single question, there is greater ground for confidence than there would be if only one heard the matter. A single trial might come out "right" or "wrong" on a fifty-fifty basis, but the traditional faith in the jury system compels the conclusion that the work of twenty juries, taken

Canteen Corp., 369 So. 2d 391 (Fla. 2d DCA 1979)(courts will not generally interfere with an agency decision even though the decision reached may appear to some persons to be erroneous).

together, would produce a fair assessment of the overall controversy which led to the individual trials. Conversely, the smaller the number of fact finders, the greater the chance that the outcome will be distorted by individual quirks, be they those of the juror, judge, lawyer or witness.

With nonmutuality the worst that can happen is that a percentage of litigants will be forced to unfairly bear the burden of an initial erroneous result. But, with mutuality the worst that can happen is that all litigants will receive a full and fair trial on the merits. Is that so wrong?

5. THE DIFFERENCES BETWEEN JURY TRIALS AND DPR PROCEEDINGS SUPPORT CONTINUATION OF FLORIDA'S CURRENT APPROACH

It cannot be seriously suggested that, in Florida, an administrative hearing, such as that afforded to McQUEEN, is the equivalent to a civil jury trial. The differences are fundamental and obvious because the two proceedings are designed to fulfill very different functions.

As Professor Waggoner points out;

> The weakest case for estoppel is where the government is seeking only civil penalties. Here the defendant lacks the extra safeguards available in a criminal prosecution, and here it is hard to argue that the government is in privity with the private litigants because the government is not seeking relief for the private litigants' particular benefit. The case for estoppel is weaker still if the action for a civil penalty is conducted in a special proceeding lacking the normal procedural protections of civil litigation. (emphasis added)

Waggoner, at 492.

The jury trial system is the foundation of our entire judicial concept. The right to trial by jury is perhaps the most basic of our constitutional rights. Art. 1, §22 Fla. Const. It is designed to provide litigants with a fair factual determination before judgment. Florida Power Corp. v. Smith, 202 So. 2d 872 (Fla. 2d DCA 1967). On the other hand, the administrative proceedings utilized in this case are designed to ensure that the public is protected from incompetent practice of the profession by swift and effective discipline and, where needed, license revocation. Florida Admin. Code R.61F13 - 10.001; §§491.002 and 491.009 Fla. Stat. (1993).

To further the goals of civil jury trials, Florida has adopted strict guidelines for juror conduct, admission of evidence, discovery and proof of claims. See, e.g., Levy v. Hawk's Cay, Inc., 543 So. 2d 1299 (Fla. 3d DCA 1989) (where reasonable doubt exists as to whether juror possesses state of mind necessary to render impartial verdict based solely on evidence submitted and law announced, he should be excused); Bowen v. Manuel, 144 So. 2d 341 (Fla. 2d DCA 1962) (purpose of the discovery provisions of Florida Rules of Civil Procedure is to make all relevant facts available to parties in advance of trial of cause, and so render surprise at trial a practical impossibility).

Administrative proceedings are governed by a different, more relaxed, set of rules. For example, all evidence is admitted if it is the sort of evidence on which reasonably prudent persons are accustomed to rely. This can include rank hearsay. Fla. Admin. Code R.28-5.304(3). The evidence is evaluated by a presiding officer, typically a hearing officer assigned by the Division of Administrative Hearings. Fla.

Admin. Code R.28-5.102. And, because the formal hearing can be scheduled with as little as fourteen days notice, discovery is frequently hurried. Fla. Admin. Code R.28-5.208 and 28-5.209. In short, the administrative process favors speed over thoroughness. This reality is clearly illustrated by the present case where the hearing officer rapidly reached one conclusion and later the jury reached another.[6] Because claimants can delay filing of their civil suits limited only by the applicable statute of limitation, and because due process considerations preclude using a professional's administrative victory to defeat a later civil claim, adoption of STOGNIEW'S approach to offensive collateral estoppel would seriously damage the administrative process' laudable goal of providing speedy review of the professional's fitness to continue his profession.

Faced with the risk of a later offensive use of an administrative defeat, professionals will have few options. First, they will be forced to vigorously and completely defend the administrative complaint even where the risk of serious discipline is small. They will use the administrative hearing as a full dress rehearsal for all potential civil lawsuits because it may in fact decide those yet unpresented civil claims. Second, there will be substantial incentive to stay, enjoin, or otherwise delay

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[6]In addition, STOGNIEW'S suggested approach raises significant constitutional questions. Article I Section 18 of the Florida Constitution limits the penalties which may be imposed by administrative proceedings to those penalties prescribed by law. Florida Statute Section 491.009(1)(1993), places a $1,000 per offense limit on the penalty which may be imposed upon a professional such as McQUEEN. If an administrative defeat operates offensively to establish the professional's negligence, the administrative action has de facto resulted in a penalty far in excess of that authorized by the statute and constitution.

the administrative proceeding until after judgment by the courts. Either way, the goal of a speedy evaluation is seriously damaged, if not fully frustrated.[7]

6. LEGISLATIVE ENACTMENTS SUPPORT CONTINUATION OF THE REQUIREMENT OF MUTUALITY

STOGNIEW argues that the legislature has abrogated Romano through the enactment of Florida Statute, Sections 775.089(8) and 772.14 (1993) and therefore this Court should **totally** abandon the requirement of mutuality for offensive collateral estoppel. However, the legislature's conduct shows that it **recognizes and accepts** the doctrine of mutuality in all but a few specifically identified situations.

It would be easy for the legislature to entirely abrogate mutuality much as it has done with other judicial doctrines. See, e.g., §§768.16-768.27 Fla.Stat. (1993) (creates a new right of recovery for wrongful death not recognized by common law); §768.28 Fla.Stat. (1993) (creates new right of recovery against State of Florida not recognized by common law). Yet, the legislature has **not** mandated such a sweeping change. Instead, it has authorized nonmutual offensive collateral estoppel in only a handful of situations. See §403.413(6)(f) Fla.Stat.(1993) (a final judgment rendered in a criminal proceeding based upon violation of the Florida Litter Law estops the defendant from asserting common issues in any subsequent civil action); §542.25

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[7]Because most of the penalties set forth by Florida Statute, Section 491.009, are nonmonetary and involve merely increased professional supervision, some may have little motivation to fully contest administrative charges. Further, since liability insurance frequently does not cover governmental charges and fines, some professionals will be unable to fund the same quality of defense that their insurer would provide to the civil claim.

Fla.Stat. (1993) (a final judgment rendered in a proceeding brought by the government to prohibit specified unfair trade practices is prima facie evidence and may estop defendant in subsequent civil action); §§775.089(8) and 772.14 Fla.Stat. (1993)(certain criminal convictions estop defendant as to all matters as to which estoppel would exist had the plaintiff been a party in the criminal action).

Why has the legislature not passed a similar provision for use against licensed professionals? Perhaps it is because the legislature does not have the same confidence in administrative disciplinary proceedings as it has in criminal prosecutions which are replete with constitutionally guaranteed procedural safeguards. Perhaps the legislature recognizes the damage which might be done to the administrative process if defendants were forced to use exhaustive efforts to delay and ultimately defeat disciplinary proceedings. Perhaps the legislature would simply prefer that the civil liability of a counselor, physician, broker or attorney be decided by a jury. Whatever the reason, the legislature's failure to act in this arena certainly indicates that it believes Florida's current system is not dysfunctional.

the facts of this case.

Respectfully submitted,

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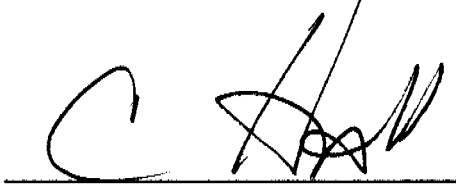
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Answer Brief of Respondent, THOMAS J. McQUEEN, has been furnished by U.S. Mail this 26th day of August, 1994, to **Sid J. White, Clerk, The Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, FL 32399-1927;** and a copy to **MURRAY B. SILVERSTEIN, ESQUIRE**, Attorney for Petitioner, Enterprise Plaza, Suite 1511, 201 E. Kennedy Boulevard, Tampa, FL 33602.

Fowler, White, Gillen, Boggs,
Villareal and Banker, P.A.



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