IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

ROSEMARY STOGNIEW,

Petitioner,

v.

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

THOMAS J. McQUEEN,

Respondent.
_____/

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

INITIAL BRIEF OF PETITIONER

Murray B. Silverstein, Esquire
SILVERSTEIN & SNYDER, P.A.
Enterprise Plaza, Suite 1511
201 E. Kennedy Boulevard
Tampa, Florida 33602
(813) 222-8080
Florida Bar No. 349216
Attorneys for Petitioner

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PRELIMINARY STATEMENT

Petitioner, ROSEMARY STOGNIEW ("STOGNIEW") was the plaintiff in the trial court and the appellant/cross-appellee in the appellate proceedings. Respondent, THOMAS J. McQUEEN ("McQUEEN"), was the defendant in the trial court and the appellee/cross-appellant in the appellate proceedings. The parties will be referred to simply as "STOGNIEW" or "McQUEEN".

The following reference symbols will be used:

"R" to designate the page number of the record on appeal;

"T" to designate the page number of the trial proceedings which took place during November 3 through 9, 1992.

STATEMENT OF THE CASE AND OF THE FACTS

Rosemary Stogniew seeks discretionary review of the Second District Court of Appeal's certified question of great public importance concerning the preclusive and binding effect of a prior administrative determination of a professional's misconduct on a subsequent suit for negligence against the same professional. Stogniew also seeks reversal of the Second District's decision affirming the trial court's final judgment rendered November 18, 1992 on a jury verdict for the defendant, McQueen (R.792), after five days of trial during November 2 through 9, 1992 (R.792).

Stogniew commenced her negligence action against McQueen on April 3, 1990 in a multi-count complaint which also contained alternative theories of recovery based upon breach of fiduciary duty, intentional and negligent misrepresentation, and breach of contract. All actionable claims were based upon the counseling relationship that started in January 1986 and ended December 1988 between McQueen, a licensed marriage and family therapist, and Rosemary Stogniew, his patient/client (R.1-15).

Prior to her civil action Stogniew filed her complaint against McQueen with the Department of Professional Regulation ("DPR") (R.694), which resulted in an investigation, administrative complaint and a final evidentiary hearing.

While the action in the trial court was pending, a final decision was reached February 28, 1991 by the DPR which concluded, among other things, that McQueen violated Section 491.009(2)(s), Florida Statutes (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).

In her civil action Stogniew then moved for partial summary judgment based on offensive collateral estoppel requesting the trial court to preclude relitigation of the issue of whether

McQueen failed to meet the minimum standards of his profession in his counseling relationship with Stogniew based upon the DPR's Final Order (R.193-244). Attached to both her motion for partial summary judgment and her supporting memorandum of law (R.255-76) were copies of the DPR Final Order, the DOAH Hearing Officer's Recommended Order, and supporting documentation from the DPR proceedings. After arguments of counsel (R.811-64) the trial court denied Stogniew's motion (R.470-71), and the case proceeded to trial resulting in a defense verdict for McQueen.

The Evidence at Trial

The same facts which formed the basis for the DPR proceedings also formed the basis for Stogniew's action in the trial court below. The following evidence was presented at trial.

After the sudden and unexpected death of her 21-year-old son, Gerald, Jr., on January 7, 1986, Stogniew was inconsolable and unable to resolve the severe grief she experienced. Unable to return to work at the office at Holy Cross Catholic Church in St. Petersburg, she sought out the spiritual guidance and advice of an associate pastor who referred her to a "psychologist friend" by the name of Tom McQueen (T.65). Stogniew was informed that McQueen was a former priest which led her to believe that she could trust him (T.66). After making an appointment, Stogniew saw McQueen in his office at the rectory offices of Espiritu Santo Catholic Church on January 30, 1986 (T.67). Over the remainder of 1986, Stogniew continued her office visits with McQueen on approximately fifteen different occasions, meeting each time for approximately fifty to sixty minutes and then calling sometime thereafter to schedule the next session (T.72).

Throughout the various sessions, although no formal treatment plan was identified by McQueen, he continuously encouraged Stogniew to be "proactive," rather than "reactive," about her son's death, which concepts Stogniew never really understood and she so advised McQueen

(T.77). Stogniew testified that the topics of God and religion were utilized by McQueen throughout their counseling sessions. McQueen regularly told Stogniew that her son's death was the "will of God" and that God would use McQueen and others to "make clear the way" (T.81). As she testified, she "had to trust Mr. McQueen to help [her] reestablish that connection to God" (T.82).

After several counseling sessions, on April 3, 1986, McQueen mentioned to Stogniew that he had been trying for approximately seven years to open a counseling center in northern Pinellas County in association with Catholic Social Services but that he had been unsuccessful and experienced frustration in his efforts (T.74-75). From the April 3rd session and thereafter the subject of McQueen's interest in a counseling center continued to come up (T.78).

Later, during the September, 1986 time frame, after receiving conflicting reports from the medical examiner regarding the cause of her son's death, Stogniew advised McQueen that she was "going to disappear", meaning that she was going to kill herself. She made this clear to McQueen (T.85). McQueen determined that, after nine months of counseling, she was still suffering severe depression and needed to be on medication. He referred her to psychiatrist Luis Herrero for an appointment on October 9, 1986 (T.86).

Dr. Herrero, a Diplomate of the American Board of Psychiatry and Neurology specializing in psychoneuroendocrinology, testified that his initial diagnostic impression of Stogniew was: "major depressive disorder (unresolved pathological grief response)" for which he prescribed Ludiomil to be gradually increased to a therapeutic level. He also recommended that Stogniew return to McQueen for "ongoing supportive psychotherapy" (T.504; R.655 -- Plaintiff's composite Exhibit No. 9 consisted of Dr. Herrero's file). Dr. Herrero's initial testing included administering a Zung Depression Scale. Stogniew's scaled score showed a depression index of 76 which amounted to "extreme severe depression". As Dr. Herrero explained, Stogniew's

condition was very severe. The highest score he ever saw was 80 to 84. (T.492-93).

Stogniew returned to Dr. Herrero for a second visit on October 30 at which time he determined that she was sleeping better and that she had some good days and some bad days (T.89). His initial diagnostic impression that Stogniew was suffering "extreme severe depression" had not changed at this final visit (T.507). Dr. Herrero told her that he would be available to monitor Stogniew's medication but that ongoing supportive psychotherapy was left to McQueen (T.506).

Stogniew thereafter returned to McQueen for ongoing supportive psychotherapy on November 6, 1986. At this session, McQueen discussed the concept of the Resurrection as the means for Stogniew to accept her son's death (T.94-96), Stogniew described to McQueen her need to lie down on her son's bed and remember the morning she found him dead as a means to accept his death. In response, McQueen left the room abruptly and returned approximately five minutes later as Stogniew was leaving. McQueen apologized and explained that they had just encountered a "spiritual experience" and the session was over (T.97). Stogniew felt that she should accept McQueen's explanation on faith.

During their next session, on November 12, 1986, McQueen described prior week's the event as being "like a sacrament passing between" them (T.98). Thereafter, on November 18, believing that God had blessed their relationship, Stogniew wrote about the experience (Plaintiff's Exhibit No. 11 -- R.657) in which she described reaching a "turning point" on November 6th and stated that she was "on [her] way to the finish line" but there were still "obstacles and hurdles" ahead of her. She prayed that she would have the strength to get over the obstacles and that McQueen would "be there to help me if I fall" (T.101).

It was the events of the November 6, 1986 session and Stogniew's subsequent letter of November 18, 1986 that McQueen testified signaled the "mutual termination" of their therapeutic

relationship. Therefore, when the two met again on December 12, 1986, McQueen saw nothing wrong in favorably considering Stogniew's offer to contribute $25,000.00 from her deceased son's charitable foundation (Gerald F. Stogniew, Jr. Private Foundation, Inc.) to the Catholic Diocese for the purpose of establishing a counseling center and naming McQueen as the executive director (T.107).

Dr. Herrero testified that it would have been inappropriate for McQueen to have attempted to terminate the therapeutic relationship on November 6th or immediately thereafter because, in his opinion, the therapeutic relationship continues in the patient's mind (T.518). Because of Stogniew's condition as of October 30, Dr. Herrero testified that it was doubtful that she could have, within one week, learned to resolve her grief and been in a position to terminate therapy (T.514). He also indicated that any expressions by Stogniew during that particular period that she was "feeling better" or had reached a "turning point" were explainable by reference to the concept of "flight into health" which is a temporary phase of perceived improvement during which time the patient still has impaired judgment (T.514-18).

Stogniew testified that she had another session with McQueen on December 17, 1986 which was more informal and consisted of a walk in the park. McQueen told Stogniew that their relationship was more than "psychologist/patient" and had taken on a "new dimension" (T.113-14).

Stogniew continued taking Ludiomil from October 9 until Christmas day, 1986 but was not able to determine why she stopped at that time (T.91). Stogniew testified that as of December 25, 1986 she was not cured, had not resolved her grief and still was unable to accept her son's death (T.92).

During the next several months, Stogniew and McQueen continued to meet and discuss their goals and objectives regarding setting up the counseling center, including McQueen's

suggestion that the center would be a memorial to her deceased son, dedicated to his memory, and would represent her son's resurrection. McQueen further indicated to Stogniew that her involvement in the center would be therapeutic and beneficial to her as a means of resolving her grief.

As of May 1, 1987, the Counseling & Development Center, Inc. ("CDC") had been incorporated and officially opened for business. McQueen served as executive director at a salary of $50,000. Stogniew served as a corporate officer and board member. Throughout the start-up and ongoing operations of the CDC during 1987 and early 1988, Stogniew continued to consult with McQueen regarding personal, emotional, spiritual and various other concerns she had, still considering that she enjoyed a therapeutic relationship with McQueen (T.155).

By October, 1988 Stogniew's charitable foundation had contributed over $80,000.00 toward the start-up and ongoing operations of the CDC (T.152-53; R.667 -- Plaintiff's composite Exhibit No. 21). It was as of October 1988 that a number of disputes had arisen between Stogniew and McQueen regarding the operations and management of the CDC. Stogniew recommended that McQueen step down as executive director and that she would hold the post with no compensation until an appropriate replacement was found. This was unacceptable to McQueen. The matter was then presented to the CDC board for full consideration with the eventual result that Stogniew resigned from the board on December 28, 1988 and, at that time, severed all relationships with McQueen (T.186-92).

The DPR Proceedings

Because of the trial court's order in limine, the jury never learned of Stogniew's actions with the DPR after the termination of her relationship with McQueen. Specifically, as of February 1989, Stogniew filed her complaint with the DPR regarding McQueen's exploitation of their therapeutic relationship (R.694). After a two-day evidentiary hearing held September 20-21,

1990 before the Division of Administrative Hearings on the DPR's Administrative Complaint against McQueen, DEPARTMENT OF PROFESSIONAL REGULATION, Petitioner vs. THOMAS J. McQUEEN, Respondent, DPR Case No. 0112730, Division of Administrative Hearings Case No. 89-1216 (hereinafter "DPR proceedings") (R.197-226), the DOAH Hearing Officer entered his detailed 26-page Recommended Order containing the following findings of fact based upon the evidence presented by McQueen and the DPR:

> The Respondent's first response to the client's offer of financial support should have been to decline. But his judgment immediately became clouded by the personal benefits he saw that he could derive from it. He quickly came to view the idea as the perfect opportunity to achieve his personal goals...

(R.207, ¶13).

. . .

> In fact, the Respondent knew, or should have known, that the client was not "healed" in December 1986, when he agreed to accept the benefits of her proposal to use her son's foundation to establish a counseling center headed by the Respondent. Her grief remained unresolved and led to such emotional pain on her son's birthday, Mother's Day and Christmas, her son's favorite holiday, that she refused to celebrate those holidays.

(R.214, ¶32).

> A de facto client/therapist relationship continued even after formal counseling ceased. As the client herself explained it in a November 18, 1986 card she sent to the Respondent: "I am on my way to the finish line now, but I know there are obstacles and hurdles ahead of me. I pray that I'll have the strength to get over them, and that you'll be there to help me if I fall".

(R.214, ¶33).

> Even if it were appropriate to terminate the client's formal therapy in December, 1986, it is clear that, despite her continuing considerable talents and abilities to make business decisions and implement them, the client was not at that time, or for many months to come, able to deal with the Respondent as an equal in a true arm's length business transaction. When it came to looking at the Respondent, the client saw through rose-tinted glasses. In her eyes, he could do no wrong.

(R.214, ¶34).

Based upon the foregoing findings of fact, the DOAH Hearing Officer concluded, as a matter of law, that McQueen failed to meet the minimum standards of performance in his

professional activities when measured against generally prevailing peer performance as required under Section 491.009(2)(s), Florida Statutes (1989), 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 therapy when he terminated formal therapy (R.223-24). The Hearing Officer recommended that McQueen's license be suspended for one year, that he be fined $1,000.00, complete one year of probation and complete specified continuing education courses in professional ethics.

The full Board of Clinical Social Work, Marriage and Family Therapy and Mental Health Counseling ("Board") adopted all of the recommendations of the Hearing Officer in its Final Order entered February 27, 1991 (R.197-99), with the exception that McQueen's license was suspended for six months and probation changed to two years under the supervision of an individual to be approved by the Board (R.197-99). No appellate review of the Final Order was sought by McQueen.

Disposition by the Appellate Court

In the trial court below, after Stogniew's motion for partial summary judgment on collateral estoppel was denied, the case was tried to a jury resulting in a defense verdict. Stogniew appealed and challenged the trial court's failure to grant her requested partial summary judgment via offensive collateral estoppel, as well as a number of evidentiary rulings and the trial court's failure to grant a new trial.

The Second District affirmed the trial court concluding that mutuality of the parties was still required for offensive collateral estoppel and that Stogniew could not be deemed in privity with the DPR in order to meet the mutuality requirement. Stogniew v. McQueen, _ So.2d __,

19 Fla.L.Weekly D1229 (Fla.2d DCA June 3, 1994).

Despite its opinion affirming the trial court, the Second District, "[r]ecognizing the strength of Stogniew's arguments," certified the following question to this Court 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?**

SUMMARY OF ARGUMENT

The evils of blind adherence to the antiquated doctrine of "mutuality," requiring strict identity of the parties before applying offensive collateral estoppel, were made apparent by the results in the trial and appellate courts below. Despite having previously litigated and lost the issue before the DPR of whether he was negligent in his relationships with Stogniew, McQueen was able to defend the same allegations of failure to meet his minimum professional standards a second time and convince a jury that he was not negligent.

The only difference in the two proceedings was that Stogniew was the plaintiff in the subsequent civil action whereas the DPR, acting upon Stogniew's complaint, was the plaintiff in the prior proceedings. Based on this difference the trial and appellate courts concluded that sufficient identity of parties was lacking such that offensive collateral estoppel could not be applied.

The identity of parties requirement has been utilized by the courts as a means of achieving "mutuality," a concept thought to ensure fairness by imposing symmetry under the law: neither party can rely on a prior judgment unless both would be bound. In other words, if the judgment had gone the other way and McQueen prevailed before the DPR, he would not have been able to use his prior exoneration to bar Stogniew's subsequent civil action because, as a different party, she would not have been bound by the DPR's loss. Since both could not use the DPR judgment, neither could.

In its historical development, the mutuality doctrine has rarely ensured fairness because its mechanical approach focused on all parties or not exclusively on the party to be estopped. As a result, mutuality has been applied inconsistently and often irrationally.

Exceptions to strict identity have evolved and include those instances where the formal party's claim is derivative or where the one party could be deemed in privity with or acting as

the virtual representative for the party to be estopped. Both Stogniew and the DPR were closely aligned in attempting to achieve the same objective of holding McQueen responsible for his negligence. The DPR functioned as Stogniew's virtual representative.

This Court's 1989 decision in Romano refused to apply offensive collateral estoppel absent strict mutuality in the criminal-to-civil setting. Since Romano the legislature has created statutory offensive collateral estoppel to protect the rights of victims of crimes in their subsequent civil actions as plaintiffs. They need no longer demonstrate identity with the government. Convicted defendants are now estopped to deny the essential facts underlying their convictions in subsequent civil proceedings.

Further, this Court's 1989 decision in Zeidwig relaxed mutuality defensively in the criminal-to-civil content with subsequent district court decisions extending Zeidwig to the civil-to-civil setting as well. Relaxation occurred by following the Restatement (Second) of Judgment's approach which has not required mutuality defensively, or offensively, for years.

Ultimately, the most effective and consistent means for ensuring fairness when applying collateral estoppel offensively (and defensively to add clarity to Zeidwig) is, in each specific factual setting, to look at the party to be estopped and determine whether that party had a full and fair opportunity to litigate the issue in the prior proceeding. Under the Restatement approach, added considerations should be reviewed for offensive applications.

Based on the availability of a better and fairer approach to applying offensive and defensive collateral estopped it is time now for this Court to abandon strict mutuality and bring Florida within the preferred approach prevailing throughout most of the states. The alternative of continued adherence to the antiquated concept of mutuality will allow others to suffer Stogniew's injustice under the dreaded judicial aberration of different results based on the same facts involving the same issue litigated by the same responsible party.

ARGUMENT

THE TRIAL COURT ERRED IN ALLOWING RELITIGATION OF THE DPR'S PRIOR CONCLUSIVE DETERMINATION THAT McQUEEN FAILED TO MEET THE MINIMUM STANDARDS OF PERFORMANCE IN HIS PROFESSIONAL ACTIVITIES WITH STOGNIEW.

The question certified by the Second District Court of Appeal necessarily involves an inquiry into the continued propriety of mutuality and the "identity of parties" requirement for invoking the doctrine of collateral estoppel. The factual context for the Second District's opinion focuses our inquiry upon *offensive* collateral estoppel in the administrative-to-civil setting. For purposes of this discussion, however, no distinction is made between the administrative-to-civil or civil-to-civil context since a prior administrative decision may also be afforded the status of a final decision of a court of competent jurisdiction.[1]

It is apparent that the Second District's decision affirming the trial court's refusal to apply collateral estoppel offensively was based upon this Court's prior decision in Trucking Employees of North Jersey Welfare Fund, Inc. v. Romano, 450 So.2d 843 (Fla. 1984), which gave passing

[1]As an administrative body acting in a judicial capacity, the DPR's prior determination is afforded the same binding effect as any other fully litigated matter resulting in a final decision from a court of competent jurisdiction. Jet Air Freight v. Jet Air Freight Delivery, Inc., 264 So.2d 35,40 (Fla. 3d DCA 1972); United States Fidelity & Guaranty Co. v. Odoms, 444 So.2d 78, 80 (Fla. 5th DCA 1984); City of Tampa v. Lewis, 488 So.2d 860 (Fla. 2d DCA 986); Florida Department of Transportation v. Gary, 513 So.2d 1338, 1339-40 (Fla. 1st DCA 1987); School Board of Seminole County v. Unemployment Appeals Commission, 522 So.2d 556 (Fla. 5th DCA 1988); Akins v. Hudson Pulp & Paper Company, Inc., 330 So.2d 757 (Fla. 1st DCA 1976), *cert. denied*, 344 So.2d 323 (Fla. 1977); and, Restatement (Second) of Judgments § 83 (1982).

reference to the federal courts' abandonment of the requirement of mutuality and strict identity of the parties, but nevertheless adhered to mutuality and decided that "the 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*." Id. at 845 (emphasis added).

The Second District's certified question concerns the doctrine of mutuality. Under mutuality, a litigant may not invoke the conclusive effect of a judgment unless that litigant would have been bound if the judgment had gone the other way. The reason for requiring identity of parties or their privies is to satisfy mutuality. Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 327 (1979) (mutuality doctrine defined, criticized and declared inapplicable to offensive collateral estoppel); Bernhard v. Bank of America National Trust & Savings Association, 19 Cal.2d 807, 122 P.2d (1942) (noted that many courts had abandoned requirement of mutuality and confined requirement of identity of parties to the one against whom plea of estoppel is asserted).

Under the question, as worded, the possibilities for conclusive use of the prior DPR determination include: 1) our facts wherein non-party Stogniew sought to offensively estop McQueen from relitigating the prior determination that he was negligent; and, 2) the hypothetical scenario where McQueen would seek to defensively estop non-party Stogniew from maintaining her subsequent civil action based upon a prior DPR determination that he was not negligent. To see the mutuality doctrine applied to our facts, if a prior DPR determination under hypothetical 2) would not bind Stogniew, she similarly could not use the determination that he was negligent to bind McQueen. For the reasons described hereinbelow, the mutuality doctrine should be abandoned.

After Romano this Court decided Zeidwig v. Ward, 548 So.2d 209 (Fla. 1989) which

holds that strict mutuality of the parties is no longer required when collateral estoppel is asserted *defensively* in a criminal-to-civil setting. Cases following Zeidwig have declared that strict identity or mutuality of the parties or their privies is not required when collateral estoppel is asserted defensively in a *civil-to-civil* setting. United Services Automobile Association v. Selz, ___ So.2d __, 19 Fla.L.Weekly D1160 (4th DCA May 25, 1994); Dixie Auto Transport Co. v. Louttit, 588 So.2d 68 (Fla. 2d DCA 1991); Hochstadt v. Orange Broadcast, 588 So.2d 51 (Fla. 3d DCA 1991); and, Verhagen v. Arroyo, 552 So.2d 1162 (Fla. 3d DCA 1989), *rev. denied*, 574 So.2d 144 (Fla. 1990). *See also*, Blackwell, The Silent Demise of the Mutuality Requirement in the Defensive Use of Collateral Estoppel, 66 Fla. B. J. 18 (April 1992).

Therefore, this Court's discretionary review calls into question the continued viability of the Romano decision itself, as well as any remaining policy justifications for continued adherence to the mutuality of parties doctrine for offensive collateral estoppel. It is respectfully suggested that the opportunity has now been presented for this Court to reconsider the appropriateness of focusing on mutuality or identity of the parties as a prerequisite to an application of offensive collateral estoppel, and instead focus upon the party to be estopped and whether that party had a prior opportunity to fully litigate the particular issue in the prior proceeding.

When commenting on the paradox of how form and substance interact in the development of the law, Oliver Wendell Holmes noted that, in form, the law's growth is logical:

> The official theory is that each new decision follows syllogistically from existing precedents. But just as the clavicle in the cat only tells of the existence of some earlier creature to which a collarbone was useful, precedents survive in the law long after the use they once served is at an end and the reason for them has been forgotten.

Holmes noted further that, in substance, the growth of the law may also be "legislative,"

meaning that the "secret root from which the law draws all the juices of life" is based on "considerations of what is expedient for the community concerned." Despite the perceived paradox, Holmes nevertheless concludes that:

> If truth were not often suggested by error, if old implements could not be adjusted to new uses, human progress would be slow. But scrutiny and revision are justified.

Oliver Wendell Holmes, The Common Law, 31-33 (Mark DeWolfe Howe ed., Belknap Press 1963). As will be demonstrated hereinbelow, the precedent of achieving mutuality through strict identity of the parties has long since ceased to serve any useful purpose when considering the proper application of offensive collateral estoppel. A case-by-case analysis with proper consideration of whether the party to be estopped had a full and fair opportunity to litigate the particular issue in the prior proceeding is the approach which will continue the progressive evolution of Florida law.

The alternative of continued adherence to the antiquated concept of mutuality and strict identity of the parties will result in others suffering the same injustice that befell Stogniew: that dreaded judicial aberration of dramatically different and inconsistent results based upon the same facts concerning the same identical issue litigated by the same responsible party. The trial court should have availed itself of the remedy of offensive collateral estoppel to enforce repose as to the issue of McQueen's failure to meet his minimum standard of care. In Holmes' words, "scrutiny and revision" are now warranted and justified, especially on the facts of this case.

A. Neither Strict Identity of the Parties Nor Mutuality Has Ensured Fairness When Applying Collateral Estoppel.

Should strict identity of the parties and mutuality continue as a requirement before collateral estoppel may be used *offensively* to bar a defending party from relitigating issues and facts which were previously determined against him in a prior proceeding? A review of the

judge-made doctrine of collateral estoppel from its genesis in the state of Florida reveals little analysis whatsoever regarding the element of identity of the parties nor any cogent discussion of the reason for the rule. Inferentially, as stated above, the reason for requiring strict identity of the parties is to achieve mutuality, the measure of fairness. As shown below, however, neither strict identity of the parties nor mutuality ensures fairness when applying collateral estoppel.

Many of the earliest decisions were still grappling with the distinction between res judicata and collateral estoppel and offered little or no guidance as to the strict identity of parties requirement yet, remarkably, they are still cited for the proposition.

Consider Gordon v. Gordon, 59 So.2d 40 (Fla.), *cert. den.* 344 U.S. 878 (1952), one of the seminal decisions in Florida concerning the doctrines of collateral estoppel and res judicata. This Court's analysis was limited to determining whether the same issue (*i.e.* constructive desertion) was litigated in the prior Pennsylvania divorce proceedings and whether the identical facts were litigated and essential to a determination in the prior case. The court ultimately concluded that neither res judicata nor estoppel by judgment was applicable and, in so holding, presented the oft-quoted definition of the doctrines which appears to be one of the sources under Florida law for the "identity of parties" requirement:

> The difference which we consider exists between res adjudicata and estoppel by judgment is that under res adjudicata a final decree or judgment bars a subsequent suit between the **same parties** based upon the same cause of action and is conclusive as to all matters germane thereto that were or could have been raised, while the principle of estoppel by judgment is applicable where the two causes of action are different, in which case the judgment in the first suit only estops **the parties** from litigating in the second suit issues—that is to say points in question—common to both causes of action and which were actually adjudicated in the prior litigation.

59 So.2d at 44 (emphasis added). The "same parties" reference was also used in Universal

Construction Co. v. City of Ft. Lauderdale, 68 So.2d 366, 369 (Fla. 1953), where identity of the parties was not an issue. Nevertheless, both Gordon and Universal Construction Co. are cited by this Court in Romano as authorities for the proposition that the parties must be the same in the prior and subsequent action for collateral estoppel to apply. *See*, Romano, 450 So.2d at 845.

Much judicial labor has been wasted in applying artificial concepts of "parties" and in attempting to find them identical in both proceedings, instead of focusing on the real party in interest, Seaboard Coast Line Railroad Co. v. Cox, 338 So.2d 190 (Fla. 1976), and whether the party to be estopped fully litigated the precise issue in the prior proceedings. As other courts have held, the only fair and rational basis to ever impose an estoppel of this type is if the party sought to be estopped, and not all parties, already had a full and fair opportunity to litigate the precise issue in the prior proceeding. *See*, Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) (complete abrogation of mutuality of parties requirement in defensive use of collateral estoppel); Parklane Hosiery Co., Inc. v. Shore, supra, (qualified abrogation of mutuality requirement in offensive use); and, Bernhard v. Bank of America National Trust & Savings Association, supra, (requirement of privity has been confined to the party against whom the plea of estoppel is asserted).

Fairness has been accomplished in applying collateral estoppel without requiring strict identity of the parties in both proceedings. In other words, it is entirely possible to achieve the type of fairness sought under the mutuality doctrine without strict identity of the parties. Examples include those cases involving derivative/successor claims and those cases concerning the concepts of privity and virtual representation. However, many of the decisions appear inconsistent and unfair because of artificial attempts to find identity or because the mutuality test does not always ensure fairness. Where fairness has resulted the focus was upon the party to

be estopped and whether **that party** had previously litigated the same issue in the prior proceeding.

1. The Derivative/Successor Cases Depart From Strict Identity of the Parties But Continued Reliance on Mutuality Has Resulted in Inconsistent and Unfair Results.

In Epps v. Railway Express Agency, Inc., 40 So.2d 131 (Fla. 1949), a widow brought a wrongful death action for her husband's death. The jury found no negligence. Thereafter, the widow, as personal representative for her husband's estate, brought a survival action against the same defendant for the husband's personal injuries sustained while he was still alive. This Court affirmed the defendant's plea of estoppel by judgment and concluded that, even though the personal representative and the widow had separate rights to recover different items of damages, the right of each to sue stemmed from the original act of negligence which initially gave rise to the cause of action in favor of the decedent, the injured party. Id. at 133.

Even though the two plaintiffs were not identical (*i.e.* plaintiff in first action for wrongful death was widow and plaintiff in second action for personal injury was decedent's estate through his personal representative), the Epps court nevertheless focused on the party to be estopped (*i.e.* plaintiff-personal representative) and found sufficient sameness based on the derivation of each plaintiff's right to sue from the decedent. Regardless of her representative capacity in the second action, the widow had previously litigated the issue of defendant's negligence and lost. In checking for fairness under the mutuality doctrine, if the decision was in favor of the widow the personal representative could have relied on same in a subsequent action against the defendant who, as the party to be estopped, was the same in both proceedings and fully litigated its negligence in the prior case.

Defensive estoppel was also applied in Rehe v. Airport U-Drive, Inc., 63 So.2d 66 (Fla. 1953), where the plaintiff in the first action—a father who sued in his own right for his son's

wrongful death—lost. In the second action the father sued the vehicle owner, as personal representative for his son's injuries. This Court affirmed estoppel by judgment for the defendant in the second action on the authority of Epps.

Under the rationale of Epps and Rehe, this Court has looked at the decedent's heirs and estate as the same real party in interest and found sufficient sameness to preclude a second chance to litigate the same issue of the defendant's negligence when the party to be estopped (*i.e.* successor/representative) had previously litigated the precise issue.

While both Epps and Rehe dealt with estoppel by judgment in a defensive setting, **offensive** collateral estoppel was applied in Shearn v. Orlando Funeral Home, Inc., 88 So.2d 591 (Fla. 1956). The Shearns' vehicle was struck at an intersection by defendant's ambulance resulting in Mr. Shearn's death. Mrs. Shearn also suffered injuries and the vehicle was damaged. Mrs. Shearn commenced two actions. The first in her capacity as personal representative seeking damages for Mr. Shearn's pain and suffering, and the second in her own right for the wrongful death of her husband. The cases were consolidated for trial resulting in verdicts against the defendant of $3,000.00 for the personal injury action and $18,000.00 for Mr. Shearn's wrongful death.

The following year Mrs. Shearn sued the same defendant to recover for her own personal injuries and damage to the automobile alleging the same negligence as in the prior proceedings. This Court affirmed Mrs. Shearn's offensive application of collateral estoppel and concluded that the former adjudication was conclusive as to all issues pertaining to the liability of the funeral home, leaving only for determination the question of Mrs. Shearn's damages. Id. at 594. While not specifically addressing the sufficiency of the identity of the plaintiffs (which clearly was lacking) in the two proceedings, the Shearn court focused upon the funeral home, as the party to be estopped, which had previously litigated and lost the issue of its negligence in the first

actions.

Unless the Shearn court implicitly determined that Mrs. Shearn shared sufficient identity in both proceedings, the result fails the mutuality test since Mrs. Shearn would not be bound if the decision had gone the other way. Another possible explanation is that the Shearn court only found it necessary to focus upon the identity of the funeral home as the party to be estopped who had already fully litigated its negligence. This latter view is preferred and, on a case-by-case basis, is a superior means of ensuring fairness, as opposed to the mechanical application of the mutuality test.

Within months of deciding Shearn, this Court rendered its opinion in Youngblood v. Taylor, 89 So.2d 503 (1956), which purportedly addressed head on the issue of identity of the parties but actually created more confusion than clarification. The Youngblood court focused upon the identity of the party to be estopped but created an artificial distinction to avoid identity and prevent estoppel.

In Youngblood, a minor child was injured by an automobile while riding his bicycle. His father bought an action for negligence, "as next friend," on behalf of his son against the owner of the vehicle. The father lost. Then the father brought his own action to recover his damages against the same defendant upon the same allegations of negligence. The trial court dismissed the second action based on estoppel by judgment. This Court, incredibly, reversed the judgment for defendant, concluding that estoppel by judgment was inappropriate because of lack of identity of the plaintiffs since the father appeared on behalf of his minor son as "next friend" in the first case and, as such, was not the identical litigant who appeared as plaintiff in the subsequent suit.

In attempting to explain this apparent inconsistency with Epps and Rehe, the Youngblood court concluded that a "next friend" is not a party to the suit but is, instead, an officer of the court appearing to look after the interests of the minor whom he represents. Id. at 505. In a

technical sense, this reasoning distinguishes between the difference in the real parties in interest (*i.e.* minor child in the first action and the father in the second). However, the court's decision conflicts with Epps and Rehe where the derivative/successor capacity of a party was deemed "the same." In focusing exclusively on the father's identity, the court completely missed the fact that the father, as the party to be estopped, had fully litigated and lost the precise issue of negligence in the prior proceeding. The father's only difference in the two proceedings is traceable to the type and amount of damages sought which is unimportant when considering issue preclusion on the basis of liability. Epps, 40 So.2d at 133; Rehe, 63 So.2d at 67.

Moreover, the decision demonstrates why the mutuality doctrine does not ensure fairness or pass the test of common sense. Under the mutuality concept, neither may use a prior judgment as an estoppel against the other unless both parties are bound. If the decision had gone the other way and the father won the first case, he would not be able to bind the defendant in the subsequent proceeding because the defendant could not bind him under the facts. Mutuality looks at the label of party identity instead of ensuring that the party to be estopped fully litigated the issue. It makes no common sense that if the vehicle owner was found negligent in the first case with the father appearing as next friend, that the owner would have a chance to litigate its negligence a second time when the father was appearing on his own behalf. A common sense approach to fairness would not require the father to prove the same defendant's negligence twice.

Youngblood's focus on party identity and mutuality significantly contributed to Florida's dysfunctional approach to invoking collateral estoppel. The Second District attempted to follow Youngblood in Culloden v. Music, 226 So.2d 240 (Fla. 2d DCA 1969) where two sons were killed in the same automobile accident. The father brought an action for his first son's wrongful death and for personal injuries in his capacity as personal representative of his first son's estate. He obtained a favorable judgment. Thereafter, he filed his second wrongful death and personal

injury actions on behalf of his other son and moved for partial summary judgment on liability urging offensive collateral estoppel against the same defendant on the issue of his negligence.

The Culloden court however, became enmeshed in the trap of focusing on the identity of the plaintiffs, rather than the defendant as the party to be estopped. Even though the court, in an apparent departure from Youngblood, stated that an administrator could be an officer of the court and still be the real party in interest Id. at 242, the court ultimately relied on Youngblood, and concluded that collateral estoppel did not apply because the second action involved the second son, "an entirely different person". Id. at 244.

The troubling language in Youngblood which apparently was the source of confusion for the Culloden court came from Justice Thomas' attempt to demonstrate why "identicalness of the parties" was a prerequisite to either res judicata or collateral estoppel:

> To illustrate, if two persons wholly unrelated are passengers in a motorcar that becomes involved in an accident, only one set of circumstances arises as a basis for recovery. But it does not follow that there is but one cause of action for each of the injured persons has the right to sue and the action of one is not determined by the adjudication of the action of the other.

Youngblood, 89 So.2d at 505. After requoting the above passage, the Second District in Culloden concluded that since sons Chester and Roger were two different persons, the favorable or unfavorable outcome of Chester's prior wrongful death action or his estate's personal injury action could not affect Roger's, and vice versa. 226 So.2d at 244.

The Second District later corrected the fallacious conclusion in Culloden, when it receded from that opinion in Seaboard Coast Line Railroad Co. v. Cox, 308 So.2d 154 (Fla. 2d DCA 1975). In Cox, a minor child's parents were both killed when their automobile collided with a train. The son brought his first action for damages for the wrongful death of his mother and obtained a final judgment in the amount of $255,000. He then brought a subsequent suit for the

wrongful death of his father and, via *offensive* collateral estoppel, was awarded a partial judgment on the issue of liability to preclude relitigation of the issue of defendant's negligence. The Second District was prompted to reverse based on Culloden and this Court's Youngblood decision but, instead, chose to rely on Shearn v. Orlando Funeral Home, supra, where, despite the widow's representative capacity in her first action compared to her second suit on her own behalf involving her injuries, this Court focused on the party to be estopped and whether that party had an opportunity to fully litigate the same issue of its negligence in the prior proceeding. Similarly, the Second District in Cox applied collateral estoppel offensively and concluded that both injuries occurred as the proximate result of the same accident caused by the same defendant, even though different persons were killed in the accident. 308 So.2d at 156.

The confusing language in Youngblood was again addressed by the Supreme Court in Tuz v. Edward M. Chadbourne, Inc., 310 So.2d 8 (Fla. 1975).[2] In Tuz, a widow sought damages for the wrongful death of her husband who was a passenger in an automobile that collided with a road grader. The driver of the car and the owner of the grader were named as defendants. The appellate court affirmed the jury's finding of gross negligence as to the driver but reversed as to the owner of the road grader. When the driver later sued the equipment owner, the Tuz

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[2]The Tuz opinion was authored by Hillsborough County Circuit Judge Harry Lee Coe, III and added the following highlighted language in an effort to clarify the infamous Youngblood quote:

> To illustrate, if two persons wholly unrelated are passengers in a motorcar that becomes involved in an accident, only one set of circumstances arises as a basis for recovery. But it does not follow that there is but one cause of action for each of the injured persons has the right to sue and the action of one is not determined by the adjudication of the other, **so long as the person was not a party to an earlier action that involved points and questions common to both causes of action and which were actually adjudicated.**

310 So.2d at 10 (emphasis added).

court concluded that sufficient identity existed as to the vehicle driver in the two proceedings to estop him from suing the equipment owner.

The driver was not a plaintiff in the prior proceeding but a co-defendant who never litigated the issue of the equipment owner's negligence by cross-claim or otherwise in the original suit. 310 So.2d at 11 (Ervin, J., dissenting). Accordingly, the Tuz court narrowly and improperly focused on the fact that the driver was "a party" in both proceedings but failed to focus on whether the driver, as the party to be estopped, was an adverse party who had fully and fairly litigated the issue of the equipment owner's negligence in the prior proceeding.

The wisdom and viability of Tuz and Youngblood decision are questionable. This Court subsequently confirmed that its decision in Shearn v. Orlando Funeral Home, supra, was not modified by Youngblood. Seaboard Coast Line Railroad Co. v. Cox, 338 So.2d at 192. One can only guess as to what remaining strength or viability Youngblood or Tuz has, although the confusion these opinions have contributed to the issue of "identity of parties" cannot be doubted.

Considering the foregoing cases in the context of identifying the real parties in interest and then determining whether the party to be estopped fully litigated the precise issue in the prior proceeding, fairness is easier to measure than when attempting to mechanically apply the mutuality test. Of course, even though strict identity of the parties was not always required, the concept of mutuality resulted in inconsistent and unfair results.

2. The Concepts of Privity and Virtual Representation Ensure Sufficient Identity of the Party to be Estopped, Without Requiring Strict Identity of the Parties.

Florida's courts have not strictly adhered to the identity of parties requirement in all cases when invoking the doctrine of collateral estoppel, as has been demonstrated hereinabove.[3]

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[3]Additionally, *see* West v. Kawasaki Motors Manufacturing Corp., 595 So.2d 92 (Fla. 3d DCA 1992), for a discussion of the exception to the strict identity of parties requirement

Further, the term "parties" has been broadly interpreted to include more than just record parties and will include persons in privity with the record party or those who serve as "virtual representatives" for the real party in interest.

In Kline v. Heyman, 309 So.2d 242 (Fla. 2d DCA 1975), *cert. den.*, 317 So.2d 767 (Fla.), *cert. den.*, 423 U.S. 1034 (1975), a husband had his wife's consent to represent her in proceedings in Connecticut concerning the husband's rights under an employment agreement which had a subsequent bearing upon Mr. and Mrs. Klines' claims to an interest in real property located in Florida. In the subsequent Florida action, in which Mrs. Kline joined her husband as plaintiffs, the defendants argued that the prior Connecticut determination could not be relied upon because the identical parties were not involved in both proceedings. The Second District disagreed and held that Mrs. Kline was in privity with her husband in the prior proceeding and the new defendant in the Florida proceeding had acquired its interest in the property from the original defendants. The court concluded that the parties were able to rely upon the binding effect of the prior judgment. In quoting from Moore's treatise on federal practice, the Second District stated that:

> The doctrine of privity qualifies the requirements of identity of parties and mutuality, by extending the conclusive effect of a judgment to persons who were not parties to the earlier action, but are in privity with parties to it.

309 So.2d at 244. Additionally, with respect to the notion of "virtual representation", the Second District stated that, under Florida law:

> It is well settled that even though a party in a subsequent suit was not a named party in a prior suit, such party is bound by the prior judgment if he **participated** in the first proceeding or was **represented** by a party to that proceeding.

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recognized when applying collateral estoppel/res judicata in products liability cases.

Id. at 244 (emphasis added).

The Fourth District's decision in Southeastern Fidelity Insurance v. Rice, 515 So.2d 240 (Fla. 4th DCA 1987), involved the purchaser's breach of contract claim for the seller's failure to deliver a vehicle after same was badly damaged while under the seller's care. The plaintiff-purchaser obtained a directed verdict and final judgment for the full purchase price he paid, with the court determining that he was the owner of the vehicle at the time of the damage which prevented the seller's delivery. Subsequently, the purchaser and seller brought claims for declaratory relief against the seller's insurer who denied coverage or liability and, via collateral estoppel, argued that it was determined in the prior proceedings (in which it was not a party) that the purchaser was the owner of the vehicle at the time of the loss, therefore the seller had no coverage. The Fourth District reversed the trial court's failure to grant the insurer's motion for summary judgment concluding that the issue of ownership of the vehicle was fully litigated and decided in the prior case and stated that the same parties or their privies were involved in the second suit because the insurer was in privity with the seller, its insured. As the court stated:

> In its broadest sense, privity is defined as mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as to represent the same legal right. *Black's Law Dictionary* 1079 (5th ed. 1979). One not a party to a suit is in privity with one who is where his interest in the action was such that he will be bound by the final judgment as if he were a party. Id.

515 So.2d at 242.

Similarly, in Progressive American Insurance Company v. McKinnie, 513 So.2d 748 (Fla. 4th DCA 1987), the court considered whether an insurer was in privity with its insured in a prior action where only the insured was a party. For purposes of addressing the identity of parties element in estoppel by judgment, the court also referred to virtual representation stated

that this:

> includes, alternatively, ones in privity with actual parties, participants in the action having an interest but not technically parties, and persons **virtually, though not actually, represented by the parties of record**. . . . A privy is one who is identified with the litigant in interest.

513 So. 2d at 749 (emphasis added).

3. Stogniew Was in Privity With the DPR.

To the extent this Court adheres to strict identity and mutuality and a showing of privity or sameness is required under our facts, it can be said, alternatively, that the concepts of privity and virtual representation are applicable. Before Stogniew commenced her civil action in the trial court below, she filed her complaint with the DPR (R.694) which resulted in the subsequent investigation and Final Order that she relied on in the trial court. Stogniew participated in the DPR investigation and testified at the final evidentiary hearing. While Stogniew was not a party to the DPR proceedings, in a formal sense, for purposes of showing an identification of interest, the DPR acted as Stogniew's virtual representative. This same concept of privity has been applied to "one who, although not a party, controls or substantially participates in the control of the presentation on behalf of a party." Restatement (Second) of Judgments § 39 (1982). As well, privity will exist if a person who is not a party to an action is represented by a party, including "an official or agency invested by law with authority to represent the person's interest". Id. at § 41(d).

As applied to our facts, the particular board which regulated McQueen under Chapter 491, Florida Statutes—Board of Clinical Social Work, Marriage and Family Therapy and Mental Health Counseling—was specifically empowered to maintain minimum standards of performance for its licensed professionals as a means of ensuring adequate protection to members of the

public, such as Stogniew, to be free from potential abuse by incompetent and/or malpracticing licensees, such as McQueen. Although factual issues will always exist as to the adequacy of any such representation of an individual by an official or agency, the legislative intent behind Chapter 491 shows real regard for the interests of individuals like Stogniew.[4]

Moreover, the Legislature has addressed the factual situation similar to our case by eliminating the concern over whether a private plaintiff can rely upon and enforce a favorable administrative determination. In Section 120.69 of Florida's Administrative Procedure Act agency action is enforceable when "any substantially interested person who is a resident of this state" files a petition for enforcement in the circuit court. § 120.69(1)(b), Fla. Stat. (1993).

The same section of the Act further provides that:

> A petition for enforcement filed by a non-governmental person shall be in the name of the State of Florida or relation of the petitioner, **and the doctrines of res judicata and collateral estoppel shall apply**.

§ 120.69(1)(c), Fla. Stat. (1993) (emphasis added). By virtue of this enactment the Legislature clearly intended to benefit the private litigant by authorizing offensive collateral estoppel notwithstanding a potential lack of privity or mutuality with the state agency. Although

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[4]Section 491.002, Florida Statutues (1993), provides that:

> The Legislature finds that as society becomes increasingly complex, emotional survival is equal in importance to physical survival.
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> . . .
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> The Legislature further finds that . . . the practice of . . . marriage and family therapy . . . by persons not qualified to practice such professions presents a danger to public health, safety, and welfare. The Legislature finds that, to further secure the health, safety, and welfare of the public and also to encourage professional cooperation among all qualified professionals, the Legislature must assist the public in making informed choices of such services by establishing minimum qualifications for entering into and remaining in the respective professions.

Stogniew never sought to enforce the Final Order, this Statute should remove any further doubt that it was intended that Stogniew could rely upon and enjoy the benefits of enforcement of the prior DPR determination in an offensive capacity against McQueen.

B. *Romano* No Longer Serves as Authority for Requiring Strict Identity or Mutuality of the Parties When Applying Collateral Estoppel Offensively in the Criminal-to-Civil Context.

It was against the backdrop described hereinabove that this Court, in Trucking Employees of North Jersey Welfare Fund, Inc. v. Romano, supra, considered the Fourth District Court's certified question of whether a litigant who was not a party to a prior criminal proceeding could use the judgment of conviction offensively in a subsequent civil proceeding to prevent the same defendants from relitigating the issues resolved in the earlier criminal proceedings. *See*, Romano v. Trucking Employees of North Jersey Welfare Fund, Inc., 427 So.2d 802, 803 (Fla. 4th DCA 1983). As noted, the development of the collateral estoppel doctrine in the state of Florida has been marked by a somewhat inconsistent application of the concern over identity of parties with little or no real analysis or explanation of the underlying fairness reasons for the rule. It is suggested that the most effective means for harmonizing the underlying need for "sameness" as a prerequisite to preventing a party from relitigating an issue previously determined, is to focus upon the party to be estopped, and whether that party had an opportunity to fully litigate the precise issue in the prior proceeding. This preferred approach, however, was not followed by either the Fourth District or this Court in Romano.

The Fourth District in Romano was compelled to follow this Court and adhered to mutuality and the strict identity of the parties requirement and reversed the trial court's partial summary judgment on the issue of liability entered offensively in favor of the limited partners. The Fourth District determined that there was not sufficient identity between the limited partners in the subsequent civil action and the United States, as prosecuting authority, in the prior

criminal proceedings. The Fourth District was limited further by several Florida cases which had held that a judgment of conviction is not admissible in a subsequent civil action to prove the truth of the facts in question.

This Court, in affirming the Fourth District's refusal to apply offensive collateral estoppel, acknowledged other courts' abandonment of the requirement of strict mutuality of the parties and nevertheless concluded that:

> the **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**. Mobil Oil Corp. v. Shevin, 354 So.2d 372 (Fla. 1977); Universal Construction Co. v. City of Ft. Lauderdale, 68 So.2d 366 (Fla. 1953).

450 So.2d at 845 (emphasis added). Now, of course, it is highly debatable whether and to what extent the rule requiring identity of parties could be deemed "well-established" under Florida law. Moreover, the cited cases for that particular proposition, Mobil Oil and Universal Construction Co., hardly dealt with the need for identical parties.

Romano was clearly decided under the "doctrine of mutuality of parties", which this Court defined as a "corollary" to the doctrine of collateral estoppel. Id. at 845. As the Romano court explained it, under the mutuality of parties doctrine, "strangers to a prior litigation—those who were neither parties nor in privity with the party—are not bound by the results of that litigation." Id. at 845.

In support of this proposition on mutuality, the Romano court referred to Yovan v. Burdine's, 81 So.2d 555 (Fla. 1955), where Burdine's, as employer, was prevented from raising defensive collateral estoppel against an employee who sued for negligence. In the employee's prior proceeding before the Florida Industrial Commission (to which Burdines was not a party) she was held to be an employee of Burdine's. Therefore, in the subsequent civil action,

Burdine's urged this prior determination as to her employment status as a bar, under the Workers Compensation Statute, to the employee's ability to maintain an action for negligence. This Court refused stating that "estoppel by judgment is applicable only in those cases wherein the parties are the same in the second suit as in the former action . . . ". 81 So.2d at 557.

The Yovan court's analysis is another example of the misguided application of mutuality, requiring identity of all of the parties, rather than focusing on the identity of the party to be estopped (*i.e.* the employee) and whether she had a full opportunity to litigate the issue in the prior proceeding.

The mutuality rule, when applied to the facts in Romano, shows how the defendants were able to litigate their liability a second time because, as the analysis goes, if the prosecution had resulted in acquittals, the defendants could not bind the civil plaintiffs because they were "strangers" to the government's prior prosecution.

I. Rather than focus on "if the decision had gone the other way," however, it makes entirely more sense and appears eminently fairer to, in every case, look at the party to be estopped and then determine whether they had a full and fair opportunity to fully litigate the issue.[5] Therefore, it should not matter that the civil plaintiffs would not be bound had there been an acquittal when determining that the Romano defendants were bound by the prior conviction in the subsequent civil action because they did fully litigate the same facts and issues of fraud in their prior prosecution. Having had that opportunity they should not now

[5]As the mutuality rule stands based on Romano, the only argument still in favor of mutuality is that without it the law of collateral estoppel might be asymmetrical. As the U.S. Supreme Court has said however, "the achievement of substantial justice rather than symmetry is the measure of fairness of the rules" of collateral estoppel. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. at 325.

complaint that they are bound by the determination.[6]

As related to our facts, mutuality should not be allowed to dictate the result. The focus should be on the party to be estopped, McQueen, and on whether he had a full and fair opportunity to litigate the issue the prior time. To do otherwise will sanction the most unfair of results whereby McQueen, as the party to be estopped, had a full opportunity with every incentive to fully litigate the issue of his negligence yet, despite having lost, was allowed a second opportunity producing a different result.

To the extent Romano's lack of reliability is not apparent based on mutuality having outlasted its usefulness, one need only consider that the real policy basis for this Court's decision in Romano was the inability, at that time in 1984, to use a criminal conviction as conclusive proof of those facts in a subsequent civil action. As this Court stated, notwithstanding issues concerning the identity of the parties:

> The question presented by the district court, however, further limits our inquiry to the use of a criminal conviction as conclusive proof of the facts underlying the conviction in a civil suit arising from those same facts.

450 So.2d at 845. This Court concluded that Florida law prohibited such use of a conviction and saw "no need for nor advantage in receding from the established rule of evidence." Id. The law in this regard has since changed.

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[6] A party who has had a full and fair opportunity to litigate an issue has been accorded the elements of due process. In the absence of circumstances suggesting the appropriateness of allowing him to relitigate the issue, there is no good reason for refusing to treat the issue as settled so far as he is concerned other than that of making the burden of litigation risk and expense symmetrical between him and his adversaries.

Restatement (Second) of Judgments § 29 at 292.

1. Through Statutory Enactments, the Legislature Has Created Offensive Collateral Estoppel in the Criminal-to-Civil Context and Thereby Effectively Abrogated the Ruling in *Romano*.

In Paterno v. Fernandez, 569 So.2d 1349 (Fla. 3d DCA 1990), *rev. den.*, 581 So.2d 1309 (Fla. 1991), the Third District Court of Appeal upheld the constitutionality of Section 775.089(8), Florida Statutes (1985) and, in so doing, affirmed the trial court's partial summary judgment in favor of the plaintiff which offensively barred the defendant from denying a theft of more than $20,000.00. In Paterno, Dorothy Paterno pled guilty to a criminal information charging her with grand theft. In a subsequent civil proceeding, the plaintiffs sued Dorothy Paterno for civil theft alleging the same facts which formed the basis for Paterno's criminal conviction. In their motion for partial summary judgment on liability, the plaintiffs urged offensively that Paterno should be estopped from denying the allegations that she stole money from the plaintiffs under Sections 775.089(8) and 772.14, Florida Statutes (1985).

In affirming the application of offensive collateral estoppel under the statute, the Third District noted that the particular statute is almost identical to the federal counterpart under the Victim and Witness Protection Act of 1982 which was previously upheld as constitutional. 569 So.2d at 1351. And, notwithstanding defendant's argument that the facts underlying the criminal offense were not fully and fairly litigated at the criminal trial because of her guilty plea, the Third District determined that, by virtue of the plea, she admitted all facts contained in the information.

It has been noted that, while the federal Victim and Witness Protection Act of 1982 represented a codification of existing federal law, the equivalent provisions under Florida's Section 775.089(8) constitute a substantial change in Florida law that should have a major impact on a victim's ability to recover damages against a convicted criminal defendant. *See*, Sawaya, Use of Criminal Convictions in Civil Proceedings: Statutory Collateral Estoppel Under Florida

and Federal Law and the Intentional Act Exclusion Clause, 40 U. Fl. L. Rev. 479 (1988) ("By enacting § 775.089(8), the legislature did what the courts have long been reluctant to do by giving collateral estoppel effect to criminal convictions in subsequent civil proceedings brought by the victim of the crime." Id. at 494)

The Section was enacted and made effective after the date of Romano[7] and reads as follows:

> The conviction of a defendant for an offense involving the act giving rise to restitution under this section **shall estop the defendant from denying the essential allegations of that offense in any subsequent civil proceeding**. An order of restitution hereunder will not bar any subsequent civil remedy or recovery, but the amount of such restitution shall be set off against any subsequent independent civil recovery.

§ 775.089(8), Fla. Stat. (1993). Additionally, as a means of giving the same preclusive effect to the facts determined in other criminal proceedings (*i.e.* in addition to offenses giving rise to restitution), the legislature enacted Section 772.14, entitled "Estoppel of defendant", which provides that:

> A final judgment or decree rendered in favor of the state in a criminal proceeding **concerning the conduct of the defendant** which forms the basis for a civil cause of action under this chapter, or in any criminal proceeding under chapter 895, **shall estop the defendant** in any action brought pursuant to this chapter as to all matters as to which such judgment or decree would be an estoppel **as if the plaintiff had been a party in the criminal action**.[8]

§ 772.14, Fla. Stat. (1993) (emphasis added). Accordingly, it appears that the legislature has statutorily abrogated the limitation contained within Romano that prevented this Court from

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[7] § 775.089(8), Fla. Stat. (1989), effective Jan. 3, 1989, Ch. 88-96, § 15, Laws of Fla.

[8] Provisions substantially similar to § 772.14 can also be found at §§ 812.035(8), Fla. Stat. (1993) (civil theft and related remedies); and, § 895.05(8), Fla. Stat. (1993) (racketeering and illegal debts).

allowing a prior criminal conviction to be used a conclusive proof of the facts underlying the conviction in a subsequent civil action arising from the same facts.

If the facts of Romano were presented today for determination, the result would have to be one of applying offensive collateral estoppel in favor of the victims who subsequently brought a civil action for recovery of damages against the same defendants. This makes sense. The parties to be estopped under the facts of Romano were the defendants who were convicted in the prior prosecution and, as the parties to be estopped, were the same individuals who defended the subsequent civil action. The defendants had their opportunity to fully litigate the issues in the prior criminal prosecution which later formed the basis for the plaintiffs' civil proceeding. As such, they should be estopped to deny the essential allegations of fact which were common to both proceedings. By not effecting repose, however, the actual Romano defendants were allowed a second opportunity to litigate the same issues they previously lost in the criminal proceeding. This exposes the law to inconsistent results based upon the same facts when litigated by the same party.

C. *Zeidwig* Relaxed Strict Identity of Parties When Collateral Estoppel Is Asserted Defensively, but Failed to Address the Need to Determine Whether the Party to Be Estopped Fully Litigated the Issue in the Prior Proceeding.

The next instance wherein this Court considered the requirement of strict mutuality or identity of parties when asserting collateral estoppel was in the *defensive* setting. In Zeidwig v. Ward, 548 So.2d 209 (Fla. 1989), this Court determined that identity or mutuality of the parties or their privies is no longer a prerequisite in Florida to the defensive application of collateral estoppel in the criminal-to-civil context. In relaxing strict identity or mutuality, the Zeidwig court approved the rationale expressed in the Restatement (Second) of Judgments, Section 85 (1982), entitled "Effect of Criminal Judgment in Subsequent Civil Action." Id. at

209, 213. The Romano court did not mention Section 85(2)(a) of the Restatement (Second) of Judgments although this Section was adopted by Zeidwig and provides, in pertinent part:

> With respect to issues determined in a criminal prosecution:
>
> (2) A judgment in favor of the prosecuting authority is preclusive in favor of a third person in a civil action;
>
> (a) Against the defendant in a criminal prosecution as stated in § 29.

548 So.2d at 213. The Zeidwig court then quoted extensively from comment "e" to Section 85 of the Restatement which provides as follows:

> At an earlier period in the development of res judicata doctrine, the "mutuality" requirement was an obstacle to applying issue preclusion in favor of such a third party. That is, since the third party would not have been bound in his civil action if the prosecution had resulted in an acquittal, under the mutuality rule it would follow that the third party could not take advantage of the issue determined in a conviction. However, long before the mutuality rule was repudiated in civil cases, well-reasoned decisions had extended the rule of preclusion to operate in favor of third persons where the first action is criminal and the second is civil. **This result corresponds to the repudiation of the mutuality rule where the successive actions are both civil**. *See*, § 29.

Zeidwig, 548 So.2d at 213; (emphasis added to last sentence: "This result corresponds to the repudiation . . . ", which did not appear in Zeidwig, but is the last sentence of the quoted portion that actually appears in the Restatement (Second) of Judgments as part of comment "e" at 298.)

The referenced passage from comment "e" of the Restatement, which appeared in Zeidwig and refers to repudiation of the mutuality rule where the successive actions are both civil, makes specific reference to Section 29 of the Restatement. Section 29 specifically provides for and authorizes *offensive* collateral estoppel in subsequent litigation with third parties. The Restatement position acknowledges that mutuality had been repudiated for some time in the civil-

to-civil setting. Did the Zeidwig court intend to adopt, *sub silentio*, the Restatement position in Section 29 that mutuality is no longer required for offensive collateral estoppel in the criminal-to-civil and civil-to-civil contexts? Such a move would hardly be considered inconsistent after relaxing mutuality defensively. Or, was the deletion of the last sentence of comment "e" in Section 85 intentional so as not to signal this type of inference?

Although, at first glance, the Zeidwig decision might be viewed as an antidote to the Romano court's preoccupation with the confounding concept of "mutuality," the decision may have exacerbated the problem. Under Zeidwig, mutuality of the parties or their privies is no longer a prerequisite to the defensive application of collateral estoppel in the criminal-to-civil context. Under our hypothetical above, if the Romano defendants had been acquitted, Zeidwig indicates that the civil plaintiffs, as the parties to be estopped, need not share identity or be in privity with the government in the prior criminal prosecution for collateral estoppel to apply. The defendants could have effectively barred the civil plaintiffs' subsequent action via defensive collateral estoppel. Such a result of estopping the civil plaintiffs would have the effect of barring parties who never previously litigated the particular issue. This would not be a fair or proper result and would likely be seen as depriving such civil plaintiffs of their due process rights.

Unfortunately, Zeidwig failed to address the scenario of defensive collateral estoppel as to a non-mutual third party who never litigated the particular issue in the criminal-to-civil setting. This scenario was addressed by the Legislature in the enactment of Section 772.15, entitled "Admissibility of Not Guilty Verdict", which provides that:

> A verdict or adjudication of not guilty rendered in favor of the defendant or in favor of any other person whose conduct forms the basis for a claim under this chapter shall be admissible in evidence, **but shall not act as an estoppel against the plaintiff**.

§ 772.15, Fla. Stat. (1993), effective Oct. 1, 1986, Ch. 86-277, § 3, Laws of Fla., (emphasis added). While not addressed or referenced in Zeidwig, this particular statute prevents defensive estoppel against a third party plaintiff who did not participate in a prior criminal proceeding. Because of relaxation of mutuality when asserted defensively in a criminal-to-civil context, absent further clarification by this Court, Section 772.15 appears to be the only way to redirect the focus to whether the party to be estopped fully litigated the precise issue in the prior proceeding.

By way of extension, Zeidwig's progeny has relaxed mutuality for defensive collateral estoppel when applied in the civil-to-civil setting. *See*, supra at 14-15. What is the impact of relaxing mutuality defensively upon the continued requirement of mutuality for offensive estoppel? It could be argued that Zeidwig actually creates mutuality.

For example, the trial court determined that Stogniew could not assert offensive collateral estoppel because the mutuality test was not satisfied. If the decision had gone the other way and McQueen were exonerated, the analysis goes, prior to Zeidwig McQueen would not be able to bind Stogniew because she shared no identity with the DPR. However, Zeidwig eliminates mutuality and the identity of parties requirement so that McQueen would be able to estop Stogniew under the hypothetical (ie. "mutuality" exists offensively). For that matter, McQueen would, theoretically, be able to bind any non-mutual third party who tried to sue him for any issue of negligence that emanated from the prior DPR proceedings. (Of course, only Stogniew was involved as victim-complainant in the prior proceedings). This result where defensive collateral estoppel could bind a non-party who never litigated the issue previously is contrary to all notions of due process and fundamental fairness.

Or, conversely, if mutuality is retained for offensive collateral estoppel, plaintiffs would still have to demonstrate identity of the parties (presumably plaintiffs and defendants) and, under

the Stogniew facts, the lack of identity between the parties plaintiff alone could defeat application of the estoppel even though McQueen, as the party to be estopped, is identical in both proceedings. Like our actual facts he would have a second chance to relitigate the same facts and issue of his negligence. Then, when considering our same Stogniew facts defensively if McQueen had been exonerated, since mutuality has been abandoned defensively, McQueen could freely bar Stogniew even though she never had an opportunity to fully litigate the issue of his negligence in the DPR proceedings.

Relaxing mutuality defensively without the corresponding elimination of the requirement offensively has compounded the previous unfairness in a substantial way. So long as mutuality exists, the strained administration of mechanical testing for symmetry will go on, only now the real shortcomings of mutuality's measure of unfairness have been exposed. The most sensible, fair and consistent approach to deciding appropriate instances to apply offensive collateral estoppel can be found in the Restatement approach.

D. Adoption of Restatement Section 29 Ensures Fairness and Consistency in Applying Collateral Estoppel Offensively in the Civil-to-Civil Setting.

With the statutory abrogation of Romano's requirement of mutuality for criminal-to-civil offensive collateral estoppel and Zeidwig's and subsequent cases' relaxation of mutuality in the criminal-to-civil and civil-to-civil defensive setting[9], it appears that the way has now been cleared

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[9]Nonmutual offensive collateral estoppel has also been applied in the *criminal-to-administrative* setting. *See*, McGraw v. Department of State, Division of Licensing, 491 So.2d 1193 (Fla. 1st DCA 1986) (private investigator, in license revocation proceeding, was barred from relitigating the underlying facts concerning witness tampering when he was previously convicted for the same offense); and Department of Professional Regulation, Board of Pharmacy v. Allan R. Edmunds, 13 FALR 181 (Oct. 30, 1990) (defending licensee successfully urged collateral estoppel on the basis of a prior criminal prosecution against licensee in which he successfully suppressed illegally seized evidence (*i.e.* marijuana), which evidence was the basis for DPR's administrative complaint against the licensee. Even though the two state agencies involved—office of state attorney and DPR—constituted different parties, the "more modern trend

to formally announce abrogation of the requirement of mutuality offensively in the civil-to-civil setting, both offensively and defensively. When Zeidwig adopted Section 85 of the Restatement, it implicitly approved the rationale for relaxed mutuality in the civil-to-civil context as well because Section 29 of the Restatement is incorporated in Section 85.[10] Section 29 of the Restatement authorizes issue preclusion as to third parties and provides that:

> A party precluded from relitigating an issue with an opposing party, in accordance with §§ 27 and 28, is also precluded from doing so with **another person** unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue.

Restatement (Second) of Judgment § 29 at 291. The balance of the text then describes those circumstances wherein it would be appropriate to allow the party to relitigate the issue.

The Restatement follows the same basic approach as the U.S. Supreme Court announced in Parklane Hosiery, 439 U.S. at 327. There, the Supreme Court determined that it was appropriate to apply offensive collateral estoppel in favor of a civil plaintiff in a class action against Parklane Hosiery Co., Inc. and thirteen of its officers, directors and stockholders. While the action was pending, the SEC obtained a judicial declaration that Parklane's proxy statements were materially false and misleading. That prior determination was applied offensively to bind the defendants in the pending civil action.

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seems to be, however, to apply or interpret the doctrines of collateral estoppel or estoppel by judgment as one of issue preclusion, not necessarily requiring mutuality of parties." Id. at 183).

[10]In an effort to determine what circumstances give rise to collateral estoppel under Florida law, the U.S. Court of Appeals for the Eleventh Circuit reviewed this Court's decision in Zeidwig and concluded that the standards set forth in Restatement Sections 27 and 29 were incorporated within Section 85 which was "expressly adopted" in Zeidwig. Vazquez v. Metropolitan Dade County, 968 F.2d 1101, 1108 (11th Cir. 1992) (although the decision ultimately rested on whether an issue forming the basis for a civil action was necessarily resolved in a prior criminal proceeding—the case did not turn on mutuality of parties).

In relaxing a strict application of the mutuality doctrine, the Parklane Hosiery court held that it is no longer appropriate to strictly apply mutuality whereby neither party was able to use a prior judgment as an estoppel against the other unless both parties were bound by the judgment. 439 U.S. at 327. Instead, in allowing a non-party to apply a prior judgment offensively, the Court stated that the appropriate test for application of collateral estoppel is whether the party to be precluded in the latter case had a full and fair opportunity to litigate the same question in the earlier case so that there will be no resulting injustice. Id.

Even the earliest criticisms of strict mutuality have recognized that fairness would be ensured if the party to be estopped was the same party who had an opportunity to vigorously participate in the prior proceedings. In writing for a unanimous California Supreme Court, Justice Traynor, while criticizing the doctrine, explained that the doctrine of mutuality holds that it would be unfair for one who was not bound by a determination to be able to take advantage of that determination in subsequent litigation. Therefore, under mutuality, the only way to obtain estoppel is if the one seeking to take advantage of the earlier adjudication would also have been bound by it had it gone against him. Bernhard v. Bank of America National Trust & Savings Association, 19 Cal.2d 807, 122 P.2d 892 (1942).[11]

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[11]Justice Traynor's opinion for a unanimous California Supreme Court stated that:

> No satisfactory rationalization has been advanced for the requirement of mutuality. Just why a party who was not bound by a previous action should be precluded from asserting it as res judicata against a party who was bound by it is difficult to comprehend [citation omitted]. Many courts have abandoned the requirement of mutuality and confined the requirement of privity to the party against whom the plea of res judicata is asserted.

19 Cal.2d 807 at 817, 122 P.2d at 895. *See also*, Parklane Hosiery, 439 U.S. at 328, n.8.

A growing number of states[12] have abandoned the mutuality requirement for collateral estoppel and follow the so-called "modern view" taken by the federal courts and the Restatement, which applies collateral estoppel on the basis of whether the party to be estopped had a full and fair opportunity to litigate the same issue in the prior proceedings, while also ensuring that due process considerations of fairness are properly safeguarded.

While due process requirements prevent a judgment from being used against a litigant who is neither a party nor in privity with a party to a prior suit because that individual never had an opportunity to be heard, a party who has received a fair and complete opportunity to litigate an issue has received all to which he is entitled. Parklane Hosiery, 439 U.S. at 327. Relitigation of the same issue results not only in the dissipation of judicial resources but adds the possible result of two diametrically opposed verdicts and exposes the law to inconsistent decisions on the same set of facts.

The U.S. Supreme Court in Parklane Hosiery offered several "fairness" considerations when applying *offensive* collateral estoppel. These considerations include: (1) whether the defendant had an incentive to vigorously defend in the first action; (2) whether the judgment relied on is inconsistent with previous judgments against the same defendant; and (3) whether the first proceedings were lacking in certain procedural opportunities present in the subsequent proceedings that could have impacted the result in the second action. 439 U.S. at 331.

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[12]*See*, South Carolina Property and Casualty Insurance Guaranty Association v. Wal-Mart Stores, 304 S.C. 210, 403 S.E.2d 625 (S.C. 1991) (adopts § 29 of the Restatement); Silva v. State, 106 N.M. 472, 745 P.2d 380 (N.M. 1987) (adopts "modern view" of mutuality which does not require identity of parties); Bresnahan v. May Department Stores Company, 726 S.W.2d 327 (Mo. 1987); Hossler v. Berry, 403 A.2d 762 (Me. 1974) (principles of finality and certainty in proper administration of justice suggest a final decision should stand unless some compelling reason suggests relitigation); and, Oates v. Safeco, 583 S.W.2d 713 (Mo. 1979) (adopts Bernhard standard of determining whether party against whom estoppel asserted is party to or in privity with party to prior adjudication and adds "whether the party against whom collateral estoppel is sought had a full and fair opportunity to litigate the issue in the prior suit").

The Restatement position, as a corollary to Parklane Hosiery, offers a comprehensive list of considerations in determining whether the defendant had a full and fair opportunity to litigate in the prior case before applying collateral estoppel offensively, but also added that:

> the distinct trend if not the clear weight of recent authority is to the effect that there is no intrinsic difference between "offensive" and "defensive" issue preclusion, although a stronger showing that the prior opportunity to litigate was adequate may be required in the former situation than the latter.

Restatement (Second) of Judgments § 29 at 291 (1982).

An application of the Section 29 Restatement considerations of fairness demonstrates that our facts are particularly ripe for offensive collateral estoppel:

(1) Would issue preclusion be incompatible with an applicable scheme of administering the remedies in the actions involved?

No specific scheme of remedies or specific statute exists which limits or controls the prior DPR determination or, in any way, indicates that giving preclusive effect would be incompatible with the DPR's regulatory scheme. Similarly, under the first of the Parklane Hosiery considerations, McQueen vigorously defended against the DPR proceedings and had every incentive to do so because suspension of his license to practice was the objective of those proceedings which could not be deemed nominal or insignificant since his practice as a marriage and family therapist was his sole livelihood. *See,* Imen v. Glassford, 247 Cal. Rptr. 514 at 519 (Cal. App. 1988) ("The revocation of a professional license should not be viewed by either the professional organization or the licensee as an insignificant proceeding treated in a cavalier fashion", and the administrative "statutory purpose is served when the licensee has further reason to vigorously contest an accusation which can result in financial liability beyond the scope of the hearing.")

(2) Whether the forum in the second action affords the party against whom preclusion is sought procedural opportunities that were not available in the

first action and could likely result in the issue being decided differently?

McQueen had full use of the Florida Rules of Civil Procedure, the ability to call and cross examine lay and expert witnesses, present documentary evidence and make legal arguments through counsel. Further, the presence or absence of a jury as fact finder was considered by the U.S. Supreme Court in Parklane Hosiery as a "neutral consideration." 439 U.S. at 333, n. 19. Specifically regarding whether deprivation of a jury trial in the second proceeding was a violation of the Seventh Amendment, the Court noted that the alternative of requiring mutuality begs the question. Regardless of whether the party to be estopped relitigates the same factual issues with the same party or a new party, in either event the defendant already had the facts determined against him and there is no further factfinding function to perform since the common factual issues were resolved in the previous action. 439 U.S. 334-38.

(3) Could the person seeking to apply collateral estoppel have effected joinder in the first action?

Stogniew was not able to join the DPR as a formal party in prosecuting its claim as enforcement and disciplinary jurisdiction is vested exclusively in the DPR and/or its Board under Section 491.009, Florida Statutes (1989).

(4) Was the determination to be relied on as preclusive itself inconsistent with another determination of the same issue?

There had been no determinations prior to the DPR Final Order on the issue of whether McQueen failed to meet the minimum standards of performance in his professional relationship with Stogniew.

(5) Could the prior determinations have been affected by relationships among the parties to the first action who were not present in the subsequent action, or was it based on a compromise verdict or finding ?

No other parties were present in the first proceedings and Stogniew, as she was in the

DPR proceedings, continues to be adverse to McQueen. The issues were all fully litigated. While a compromise was initially offered to McQueen by the DPR, same was rejected.

(6) Will treating the prior issues as conclusively determined complicate determination of issues in the subsequent action or prejudice the interest of another party thereto?

No other issues would be complicated in the subsequent proceeding and there are no other parties who have an interest that could be prejudiced.

(7) If the issue is one of law, would treating it as conclusively determined inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based?

The prior DPR Final Order was not decided strictly as a matter of law. Instead, the decision was based upon detailed findings of fact by the Hearing Officer. Therefore, no future reconsideration of any legal rules would be foreclosed.

(8) Whether other compelling circumstances make it appropriate that the party be permitted to relitigate the issue?

Examples cited in the comments to this section indicate that the circumstances to look for include a prior determination that was "plainly wrong" or that new evidence has become available that could lead to a different result. Restatement § 29, Comment "j". Obviously, neither of these is applicable to our facts, nor is there any other compelling circumstance which would indicate that McQueen did not have a full and fair opportunity to litigate the issue of his negligence in the prior DPR proceedings.

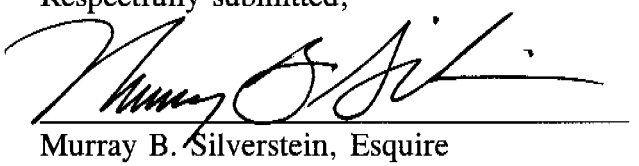
Accordingly, having considered all applicable fairness considerations, no legally justifiable reason exists which would support this Court's refusal to apply offensive collateral estoppel and thereby preclude relitigation of the issue of whether McQueen failed to meet the minimum standards of performance in his professional activities with Stogniew. It is now appropriate for this Court to formally abandon mutuality and strict identity of the parties or their privies as a

requirement for applying offensive collateral estoppel in the administrative/civil-to-civil context. The district court's order must be quashed, the trial court's order denying Stogniew's motion for partial summary judgment should, therefore, be reversed and this cause remanded for a new trial on the issue of damages.

CONCLUSION

For all of the foregoing reasons, Stogniew respectfully requests this Court to quash the Second District's opinion determining that offensive collateral estoppel was not applicable and, in so doing, return this case to the trial court for a new trial on damages while instructing the trial court to enter a partial summary judgment determining that McQueen failed to meet the minimum standards of performance in this professional relationship with Stogniew, as previously conclusively determined in the DPR proceedings, and that such departure from his applicable standard of care renders McQueen liable in damages to Stogniew for negligence.

Respectfully submitted,



Murray B. Silverstein, Esquire
Florida Bar No. 349216
SILVERSTEIN & SNYDER, P.A.
Enterprise Plaza, Suite 1511
201 E. Kennedy Blvd.
Tampa, Florida 33602
(813) 222-8080
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail this 18 day of July, 1994 to CHARLES W. HALL, ESQUIRE, Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., P.O. Box 210, St. Petersburg, FL 33731.

Attorney