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

REPLY BRIEF OF PETITIONER

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SUMMARY OF ARGUMENT

McQueen's efforts to rebut Stogniew's position by arguing the existence of disputed facts and that a different issue was decided by the DPR are unpersuasive. This case was decided by the lower courts purely on the basis of the mutuality doctrine which Stogniew has shown to be an archaic and inflexible rule producing unfair results.

The basis for the mutuality of the parties doctrine is not "well established," especially as applied to our certified question concerning collaterally estopping a professional from denying his negligence when previously determined by an administrative board charged with regulating and maintaining minimum standards for that profession. Beyond judicial economy, abandoning strict mutuality will promote greater stability, consistency and predictability in the law. Conversely, continued reliance on mutuality fosters inconsistency and the same unfair results that befell Stogniew.

McQueen's arguments that nonmutuality is unfair and deprives a litigant of his right to a jury trial are also unconvincing. Florida's Administrative Procedure Act ensures all procedural and substantive due process rights while actually affording the professional more extensive protections than a jury trial. Finally, this question concerns a judge-made doctrine not particularly appropriate for further modification by the legislature. Nevertheless, the legislature has acted by eliminating mutuality in enforcement actions. This Court simply needs to clarify that mutuality is no longer required for offensive collateral estoppel in the administrative-to-civil context.

ARGUMENT

McQUEEN HAS FAILED TO REBUT STOGNIEW'S ARGUMENTS THAT OFFENSIVE COLLATERAL ESTOPPEL SHOULD HAVE BEEN APPLIED TO THE FACTS OF THIS CASE.

McQueen has attempted to re-cast the issue presented for review and urges this Court to reject change in favor of stability. However, McQueen's notion of stability means adhering to the antiquated and inflexible doctrine of mutuality of the parties. As seen from our facts, neither stability, consistency nor predictability in the law will be accomplished by following McQueen's approach sanctioning a rule of law which promotes dramatically inconsistent results in two proceedings even though both were based upon the same identical facts and issues litigated between the same parties. The true test of the law's permanence is its ability to remain dynamic and flexible. A determination that our facts are not ripe for offensive collateral estoppel would demonstrate the intractable nature of the mutuality doctrine and the injustice resulting from its application.

A. Summary Judgment Was Appropriate as No Issues of Material Fact Existed and Stogniew's Motion Raised Purely Questions of Law Concerning the Applicability of Offensive Collateral Estoppel.

1. No Material Issues of Fact Were Raised by McQueen in the Trial Court.

In his effort to support the trial court's Order denying Stogniew's Motion for Partial Summary Judgment, McQueen argues that several facts were in dispute between the parties such that the motion was appropriately denied. However, this argument merely begs the question.

To be sure, many facts were in dispute between the parties. However, these were the **same** disputed facts that were **previously litigated** between the parties and **resolved** when the DPR determined that McQueen failed to meet the minimum standards of his profession in his dealings with Stogniew. McQueen never sought appellate review from the adverse DPR Final

Order. Once final, the existence of the DPR's determination—the only fact material to Stogniew's motion—was never in dispute.

Contrary to McQueen's arguments, the trial court's refusal to grant Stogniew's request for partial summary judgment was not based upon any disputed issues of fact. The order itself (R. 470-71) simply denied Stogniew's motion and lacks any particular findings or reasoning. Yet the record clearly demonstrates that McQueen's trial counsel never argued the existence of disputed material facts in opposing Stogniew's motion in either his opposing memorandum of law (R.432-44) or in oral argument at the hearing (R.811-64). Accordingly, McQueen should not be permitted to now argue, for the first time, that material facts were in dispute.

2. McQueen Previously Acknowledged Identity of Issue in the Trial Court.

McQueen's statement that "the trial judge agreed with McQueen that Stogniew had not established identity of issues" (Answer Brief at 29) is inaccurate. The trial court's order contained no such findings (R.470-71; 851). In fact, McQueen's trial counsel never argued the lack of identity of issues between the DPR proceedings and the then-pending action for damages. Instead, in acknowledging that the DPR Final Order determined that McQueen failed to meet the minimum standards of his profession as required under Section 491.009(2)(s), McQueen, through counsel, admitted that this was "precisely the same issue" pending in the trial court:

> [A]llowing the [DPR Final Order] to come in as evidence in this case, whether it's by judicial notice or otherwise, would effectively prohibit the jury from deciding the case on their own. They would be faced with a Board that's charged with regulating these groups of professionals, who previously had entered an order that he had fell [sic] below the minimum standards of care.
>
> That's precisely the same issue that's before them in this case.

(R.940).

McQueen misunderstands the effect that collateral estoppel would have on this case. His

argument that applying the doctrine would "convert the result of a licensing agency's investigation of a professional's qualifications into a judgment awarding all allegedly aggrieved parties money damages" (Answer Brief at 23) is simply not correct. Stogniew only sought to preclude relitigation of the issue of McQueen's negligence. It would then be incumbent upon Stogniew to prove causation and damages at trial.

Perhaps mistakenly, McQueen argues that the civil complaint filed by Stogniew in the trial court below "raises no violation of Section 491.009(2), the only claim raised in the DPR proceeding" (Answer Brief at 29). Stogniew's Amended Second Amended Complaint (R.129-47) was the operative pleading on file at the time she pursued her motion for partial summary judgment and at the time of trial. In her negligence claim (Count IV), Stogniew alleged specifically that McQueen was under a statutory obligation to meet the minimum standards of performance in his professional activities when measured against generally prevailing peer performance in his relationship with Stogniew, as required under Section 491.009(2)(s) (R.142, ¶ 56). Stogniew additionally alleged that McQueen was under a statutory duty to not take on activities for which he was not qualified by training or experience (R.142, ¶ 57). Further, Stogniew specifically alleged that:

> McQUEEN breached his duty to STOGNIEW and departed from the acceptable standard of care by misdiagnosing and/or improperly treating Stogniew's depression, introducing his personal interests and goals into his confidential counseling relationship with Stogniew, permitting and/or promoting Stogniew to go forward with the major decision of establishing through Foundation, the CDC which involved substantial personal and financial risks, at a time when Stogniew, still in her depressed state, was experiencing certain cognitive and/or perceptual limitations, improperly and prematurely terminating Stogniew's counseling, entering into a business venture with Stogniew and failing to provide a referral to Stogniew for continuing counseling.

(R.142, ¶ 58). In sum, these were precisely the same issues raised and determined adversely

to McQueen in the DPR proceedings. *See*, Initial Brief at 8-9.

Moreover, despite McQueen's arguments that Stogniew was a "wait and see" plaintiff (Answer Brief at 11 and 28)[1], Stogniew initiated her civil action in the trial court below on April 3, 1990 (R.1-15), **well before** the February, 1991 DPR Final Order (R.197-99). **In her original** complaint (Counts III and V—negligence and negligence per se, respectively) she alleged the same statutorily-imposed duty of care under Chapter 491 and violations thereof as she alleged in the operative complaint upon which the case was ultimately tried (R.13, ¶ 59; R.10-14).

Notwithstanding McQueen's arguments to the contrary, the issues decided in the DPR proceedings were necessary and material to the issue of McQueen's negligence which was the foundation for all of Stogniew's claims for damages in the trial court below. Said another way, had the trial court afforded issue preclusion with respect to McQueen's negligence, the only remaining issue for trial would have concerned causation and Stogniew's recoverable damages, which proceedings would have been significantly more streamlined or obviated entirely because of the much greater likelihood for settlement.

B. McQueen Has Failed to Advance any Persuasive Reasons for Adhering to the Antiquated and Inflexible Doctrine of Mutuality of the Parties.

1. <u>Existing Law Does Not Address the Certified Question of Applying Offensive Collateral Estoppel in the Administrative-to-Civil Context Where a Professional's Negligence was Previously Determined Based Upon the Same Facts.</u>

McQueen has wholly misconstrued Stogniew's position. He argues that Stogniew seeks to "federalize" Florida law in abandoning the requirement of strict mutuality which would run counter to "existing law" and the doctrine of *stare decisis*. He also argues that Stogniew's

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[1]The concern over a "wait and see" plaintiff in professional negligence actions is more hypothetical than real in light of Florida's two-year statute of limitations. § 95.11(4)(a) and (b).

position of "plowing new ground" should be rejected in favor of the precedents which have governed "this question" for so long in the state of Florida (Answer Brief at 33).

Interestingly, the question actually certified by the Second District Court of Appeal concerns issue preclusion based upon a prior administrative determination of a professional's negligence, a question not previously addressed in the state of Florida. This is "new ground" for which Florida's "existing law" does not provide a precedent. Therefore, to cling to *stare decisis* as the basis for continuing to require strict mutuality results in the kind of stagnation and inflexibility that the law was never meant to further.

McQueen's "existing law" argument is predicated upon this Court's prior two decisions in Romano and Zeidwig. While Romano refused to relax mutuality for offensive collateral estoppel, the case was confined to the criminal-to-civil context and, in the ten years since that decision, substantial legislative enactments have essentially abrogated the rule in Romano. *See*, Petitioner's Initial Brief at 33-36. If the facts in Romano were presented today for resolution, offensive collateral estoppel **would** be applied in favor of the civil plaintiffs.

As well, Zeidwig was not an opportunity for this Court to relax mutuality in the **offensive** context. As this Court specifically stated:

> [i]t is important to note that the **defensive** use of collateral estoppel was not an issue in *Trucking Employees*. We did not consider in that case the mutuality requirement as it applies to defensive collateral estoppel nor did we discuss section 85(2)(a) of the Restatement (Second) of Judgments.

Zeidwig v. Ward, 548 So.2d 209, 213 (Fla. 1989) (emphasis added). In distancing its opinion from its prior decision in Romano, the Zeidwig court restricted its ruling to defensive collateral estoppel while adopting Restatement § 29. *See,* Initial Brief at 36-38.

McQueen attempts to bolster his position by relying upon the dated arguments presented

in the briefs of the litigants before this Court in Romano , and urges that Stogniew's research and arguments were previously considered and rejected by this Court in 1984. Interestingly, the respondents in Romano who argued in favor of strict mutuality said that:

> If mutuality is abandoned in Florida as a requirement for offensive collateral estoppel, then mutuality will also have to be abandoned in cases involving defensive collateral estoppel. **This could result in dire, adverse consequences**, as exemplified by the RICO cases.

Respondents' Brief on Certified Question at 12, Trucking Employees of North Jersey Welfare Fund, Inc. v. Romano 450 So.2d 843 (Fla. 1984) (No. 63,487) (emphasis added). Since mutuality has now been relaxed defensively under Zeidwig without "dire, adverse consequences", it likely follows that the corollary of relaxation offensively in this limited administrative-to-civil context is not only possible, but long overdue.

2. McQueen Has Failed to Present Any Significant Policy Reason for Adhering to Strict Mutuality in the Administrative-to-Civil Application of Offensive Collateral Estoppel.

While this Court's ultimate decision on whether to relax strict mutuality for offensive collateral estoppel in the administrative-to-civil context will not rest entirely upon what other states have done, despite McQueen's argument that other jurisdictions still require mutuality (Answer Brief at 33-34), the clear majority and dominant trend throughout the country is to relax mutuality in favor of a test which favors whether the party to be estopped had a full and fair opportunity to contest the same issue in the prior proceedings. In addition to the federal courts and those states mentioned in Stogniew's Initial Brief (*i.e.* Maine, Missouri, New Mexico and South Carolina—*see,* Initial Brief at 43, many other states have abandoned the mutuality rule for both offensive and defensive collateral estoppel in favor of the fairness assessment which focuses

upon the party to be estopped.[2] It is extremely unlikely that one attempting an objective analysis of the prevailing trend away from strict mutuality versus those minority states still adhering to mutuality would find any compelling or persuasive reasons for retaining mutuality. One can only surmise that the states which still retain mutuality do so because the appropriate case presenting the opportunity for change has not yet presented itself. The same cannot be said for Florida based upon the compelling facts herein which mandate a relaxation of strict mutuality in the administrative-to-civil context when assessing a professional's negligence.

McQueen attempts to present four policy reasons for adhering to strict mutuality: 1) non-

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[2]State v. United Cook Inlet Drift Association, 868 P.2d 913 (Alaska 1994); Dyson v. California State Personnel Board, 213 Cal.App. 3d 711 (Cal. Ct. App. 1989); Maryland Gas Co. v. Messina, 874 P.2d 1058 (Colo. 1994); Aetna Casualty & Surety Co. v. Jones, 596 A.2d 414, 417 (Conn. 1991) ("numerous other jurisdictions have also eliminated the requirement, so that currently 'while mutuality might not be a dead letter yet, it is mortally wounded'."); State v. Machin, 642 A.2d 1235 (Del. Super. Ct. 1993); State v. Gusman, 874 P.2d 1112 (Idaho 1994); Fried v. Polk Bros. Inc., 546 N.E.2d 1160 (Ill. App. Ct. 1989); Kimberlin v. DeLong, 637 N.E.2d 121, (Ind. 1984); Harris v. Jones, 471 N.W.2d 818 (Ia. 1991); Board of Education of Covington v. Gray, 806 S.W.2d 400 (Ky. 1991); Leeds Federal Savings & Loan Association v. Metcalf, 630 A.2d 245 (Md. Ct. Spec. App. 1993); Aetna Casualty & Surety Co. v. Niziolek, 481 N.E.2d 1356 (Mass. 1985); Port Authority of City of St. Paul v. Austin/King Medical Office Enterprises; 1993 WL 79659 (Minn. App. Ct. 1993); Lindley's v. Goodover, 872 P.2d 764 (Mont. 1994); Peterson v. Nebraska Natural Gas Co., 281 N.W.2d 525 (Neb. 1979); Thompson v. City of North Las Vegas, 833 P.2d 1132 (Nev. 1992); Metropolitan Property and Liability Insurance Co. v. Martin, 574 A.2d 931 (N.H. 1989); Matter of Estate of Dawson, 641 A.2d 1026 (N.J. 1994); Weiss v. Manfredi, 1994 WL 287255 (N.Y. 1994); Ouelette v. State Farm Insurance Co., 1994 WL 285512 (Okla. 1994); Bahler v. Fletcher, 474 P.2d 329 (Or. 1970); Commonwealth Department of Transportation v. Martinelli, 563 A.2d 973 (Pa. Commw. Ct. 1989); State v. Wiggs, 635 A.2d 272 (R.I. 1993); Black Hills Novelty Co. v. South Dakota, 1994 WL 405962 (S.D. 1994); Phillips v. Allums, 1994 WL 377760 (Tex. Ct. App. 1994); Robertson v. Campbell, 674 P.2d 1226 (Utah 1983); Trepanier v. Getting Organized, Inc., 583 A.2d 583, 588 (Vt. 1990) ("We now join those courts that have abandoned an uncritical acceptance of the doctrine of mutuality. We refuse to ground the applicability of collateral estoppel on a mechanical use of the mutuality requirement. Rather the critical inquiry is whether the party to be bound has had a full and fair opportunity to contest an issue resolved in an earlier action so that it is fair and just to refuse to allow that party to relitigate the same issue."); Barr v. Day, 1994 WL 418992 (Wash. 1994); Conby v. Spillers, 301 S.E.2d 216 (W.Va. 1983); Adler v. Makowski, 486 N.W.2d 37 (Wis. Ct. App. 1992); and, Slavens v. Board of County Commissioners for Uinta County, 854 P.2d 683 (Wyo. 1993).

mutuality will not promote "judicial efficiency"; 2) non-mutuality is not "fair" to the defendant being estopped; 3) collateral estoppel based upon a prior administrative proceeding denies the defendant's right to a jury trial; and, 4) relaxation of mutuality should be accomplished by legislative enactment.

a. Stogniew Has Not Urged Judicial Economy as the Reason for Relaxing Mutuality.

McQueen argues that the "most frequently cited justification" for eliminating mutuality is the argument that judicial efficiency would be promoted (Answer Brief at 34). This, however, is not one of the reasons urged by Stogniew for relaxing mutuality. The most compelling reason to relax mutuality is to avoid the unfairness resulting from mechanistic approaches which inhibit the law's consistency and predictability. The archaic and inflexible mutuality doctrine, as applied to the facts of our case by the courts below, has resulted in that dreaded judicial aberration of dramatically inconsistent results when the identical issue was litigated between the same parties in two different proceedings where both concerned the same facts.

A relaxation of mutuality would promote an end to litigation which would have the salutory effect of promoting judicial economy and greater efficiency. That a defendant would have to litigate the first case "more intensively and extensively" is an insufficient reason to allow any litigant a second trial on the same issue he already lost. Moreover, following McQueen's approach, the "prudent litigant", if uninspired to fully litigate the issue in the prior proceeding, could simply not defend and allow a default to be taken or otherwise stipulate to the entry of a judgment. Under either scenario, it is quite unlikely that collateral estoppel would apply because the party against whom estoppel is sought must have **fully litigated** the precise issue in the prior proceeding. In any event, McQueen did—as would any other professional—intensively litigate the issue of his negligence before the DPR where his ability to practice his livelihood was at

stake.

No extra judicial effort would be needed if collateral estoppel were applied in this case. Even though, as suggested in Romano, some of the underlying facts may be relevant in the second proceeding on damages, comparative negligence, etc., this does not require another complete trial. If our trial court had properly provided issue preclusion on McQueen's negligence and the trial concerned only Stogniew's damages, there would have been little need to focus on the requisites for determining McQueen's standard of care as a marriage and family therapist, clearly the bulk of the proceedings and the only aspect of the case McQueen felt the need to present expert testimony on. Further, any matters relevant to the application of collateral estoppel could be heard in a preliminary motion hearing.

b. Maximum Fairness Will be Achieved Without Resort to the Mechanical Test of Mutuality.

McQueen may have misconstrued Stogniew's arguments. It has never been urged that mutuality should be relaxed so that offensive collateral estoppel could be applied against a non-party. Rather, Stogniew urges that only the party to be estopped must be the same in both proceedings, instead of her result where the lower courts required both the party to be estopped **and** the party urging estoppel to be identical in both proceedings. If the party to be estopped is the same party who already litigated and lost the same issue, how can it be deemed unfair to deny someone like McQueen another chance on the same facts?

McQueen's other argument is that all litigation involves a substantial risk of inaccuracy but that the jury system—as opposed to the results of an administrative proceeding—produces the fairest results. If McQueen felt the DPR Final Order was inaccurate, he had every right to pursue—yet chose not to—his appellate remedies under Florida's Administrative Procedure Act. § 120.68(2), Fla.Stat. (1993). Condoning reliance on the technicality that one's adversary in

the first proceeding was a professional licensing agency whereas his opponent in the second proceeding was his victim, does not promote a system for achieving the "right result" or "the truth" as urged by McQueen (Answer Brief at 37). To answer McQueen's question (Answer Brief at 39), the worst that can happen by continuing to follow strict mutuality is what occurred here: a professional's negligence can be determined in a prior administrative proceeding yet, through the mechanical doctrine of mutuality, the professional is afforded a second chance to prove he was not negligent with the same patient/client toward whom he was previously found negligent. This makes a mockery of the rule of law and is not only reprehensible but very wrong.

c. In Determining a Professional's Negligence, a Licensing Board is Tantamount to a Jury of One's Peers.

McQueen argues generally that the jury system is the most accurate and fair way to determine contested facts since the greater the number of fact finders the fairer the assessment of the overall controversy (Answer Brief at 37-39). McQueen also argues that an administrative proceeding can never be deemed the equivalent of a civil jury trial (Answer Brief at 39). In Florida, the findings of the trier of fact—be it a judge or hearing officer—are entitled to as much weight and respect as the verdict of a jury. Gruman v. Department of Revenue, 379 So.2d 1313, 1315 (Fla. 2d DCA 1980).

Ironically, had the issue of McQueen's negligence been determined in the first instance by a jury, his only remedy would have been an appeal. Conversely, under the added protections afforded a professional under the APA, McQueen had three opportunities to challenge the sufficiency of the findings of fact and conclusions of law determined by the assigned hearing officer. First, McQueen had the opportunity to and did, through counsel, submit his own findings of fact and conclusions of law at the conclusion of the two day evidentiary hearing

pursuant to Section 120.57(1)(b)4, Fla.Stat. (1993). After the Hearing Officer submitted his own recommended order which included findings of fact, conclusions of law and a recommended penalty, McQueen was given another opportunity to, and did, through counsel, file his written exceptions as permitted under Section 120.57(1)(b)9, Fla.Stat. (1993) (R.232-34).

Secondly, the overall propriety of the Hearing Officer's recommended order was considered by the full Board of Clinical Social Work, Marriage and Family Therapy and Mental Health Counseling ("Board") at a regularly scheduled public hearing attended by McQueen and his counsel. Pursuant to Section 120.57(1)(b)10, the Board had the options of either adopting the recommended order as its final order or rejecting or modifying the conclusions of law and recommended penalty. The Board even had the ability to reject or modify the findings of fact if, based upon a review of the complete record, it found that the findings were not based upon competent substantial evidence or that the proceedings did not comply with the essential requirements of law. § 120.57(1)(b)(10), Fla.Stat. (1993). McQueen, through counsel, argued in support of his exceptions to the Hearing Officer's Recommended Order at the public hearing.

Finally, pursuant to his right of judicial review of the Board's decision, McQueen had the ability to challenge the Board's Final Order based upon the traditional grounds of an erroneous interpretation of law, or facts not supported by competent substantial evidenc. He also could have had his case remanded for further proceedings if the district court of appeal found that the fairness of the proceedings or the correctness of the action itself may have been impaired by errors in procedure. § 120.68(8) Fla.Stat. (1993). While McQueen seeks to extoll the laudable virtues of a jury trial, his argument is unpersuasive that determinations by professional licensing boards are somehow less comprehensive or fair.

Despite his arguments, McQueen's administrative hearing did not favor speed over thoroughness (Answer Brief at 41). McQueen was afforded all the procedural and substantive

due process provisions contained within the APA including the right to counsel, to respond to the administrative complaint, take discovery, present evidence and argument on all issues at the administrative hearing, conduct cross-examination and submit rebuttal evidence. §§ 120.57(1)(b)4 and 120.57(1)(b), Fla.Stat. (1993). McQueen had more than adequate notice and time to prepare for the final evidentiary hearing. After a lengthy investigation which started with Stogniew's DPR complaint filed in February, 1989 (R.694), the DPR's administrative complaint was filed on January 12, 1990 (R.239). McQueen's formal administrative hearing was not held until September 20, 1990 (R.200) where the DPR was held to the task of proving its case by clear and convincing evidence. Ferris v. Turlington, 510 So.2d 292 (Fla. 1987).

As the hearing officer stated, the charges arose out of McQueen's relationship with Stogniew, the single complaining client who, along with a former DPR investigator, expert marriage and family therapist and four other witnesses testified on behalf of the DPR which introduced twenty-five exhibits into evidence. McQueen testified on his own behalf and elicited testimony of three fact witnesses and, by deposition, one expert marriage and family therapist and introduced twelve exhibits into evidence (R.202).

Finally, in his effort to contrast the composition of the jury as a "cross-section of the community" (Answer Brief at 38) versus the decision of a "lone administrative hearing officer" (Answer Brief at 18), McQueen has overlooked the fact that the Board gave finality to the hearing officer's decision. That Board is composed of nine members appointed by the Governor and confirmed by the Senate consisting of six professionals (two clinical social workers, two marriage and family therapists and two mental health counselors) and three citizens who have never been licensed in the mental health related profession and who are in no way connected with the practice of any such profession. § 491.004, Fla.Stat. (1993). In short, no persuasive or convincing argument has been advanced by McQueen that a professional licensing board's

determination of negligence is any less reliable than a jury's.

d. The Legislature Has Already Acted; it is Now Up to This Court to Clarify that Strict Mutuality is No Longer Required for Offensive Collateral Estoppel in the Administrative-to-Civil Context.

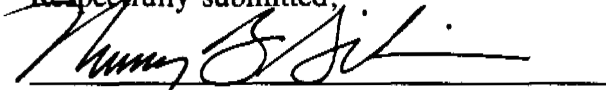
McQueen questions why the Florida legislature has not created statutory offensive collateral estoppel for administrative proceedings as it has done in criminal matters. As Stogniew pointed out (Initial Brief at 29), agency action under the APA is enforceable by any "substantially interested person" by filing a petition for enforcement in the Circuit Court and res judicata and collateral estoppel are deemed applicable. § 120.69(1)(b), Fla.Stat. (1993). By this enactment, the legislature has brought administrative proceedings within the ambit of subsequent enforcement by non-parties and thereby removed mutuality as an obstacle.

It is incomprehensible, as McQueen argues, that the legislature would prefer that the civil liability of a counselor, physician, broker or attorney be decided by a jury (Answer Brief at 43). If that professional's deviation from the applicable standard of care has previously been decided, it makes little sense that the professional's victim be put to the task of proving the same professional's negligence again. If non-parties can enforce agency action, it stands to reason that an agency's determination of negligence is no less worthy of reliance and enforcement by a non-party so long as all of the "fairness" considerations of Section 29 of the Restatement are applicable. *See*, Initial Brief at 44-47.

CONCLUSION

For all the foregoing reasons, Stogniew respectfully requests that this Court enter its opinion that offensive collateral estoppel is applicable in the administrative-to-civil context without regard to strict mutuality of the parties so long as the party to be estopped is the same in both proceedings and that party had a full and fair opportunity to fully litigate the precise issue in the prior proceeding. It is also respectfully requested that this Court remand this case to the trial court for entry of a final partial summary judgment on the issue of McQueen's negligence and order a new trial on the issue of damages, as aforesaid, and grant such other and further relief as this Court deems just and appropriate under the circumstances.

Respectfully submitted,



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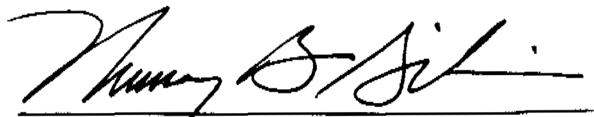
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and seven copies of the Reply Brief of Petitioner has been furnished by U.S. Mail to Sid J. White, Clerk of the Supreme Court of Florida, 500 S. Duval St., Tallahassee, Florida 32399-1927 and one copy to Charles W. Hall, Esquire, Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., P.O. Box 210, St. Petersburg, FL 33731 on this 20 day of September, 1994



Attorney