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Florida's Position on Nonmutual Collateral Estoppel After *Stogniew*

I. INTRODUCTION

Since the influential decisions of *Bernhard v. Bank of America National Trust & Savings Association*,[1] *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*,[2] and *Parklane Hosiery Company, Inc. v. Shore*,[3] in which the California Supreme Court and United States Supreme Court sanctioned both offensive and defensive uses of nonmutual collateral estoppel, the national trend among states has been to permit both doctrines.[4] Despite this trend, however, the Florida Supreme Court, in *Stogniew v. McQueen*,[5] not only refused to allow the use of nonmutual offensive collateral estoppel, it also limited the use of nonmutual defensive collateral estoppel.[6]

This Comment examines the mutuality requirement for offensive and defensive uses of collateral estoppel in Florida after the state supreme court's *Stogniew* decision. Part II begins by defining the doctrine of collateral estoppel and discusses the historical application of the mutuality requirement to that doctrine. Part II then discusses the *Bernhard*, *Blonder-Tongue*, and *Parklane* cases and their collective influence on most jurisdictions. Part III examines Florida's conservative response to those decisions through a series of cases. Finally, Part IV concludes with the suggestion that Florida reconsider its current position on non-

1. 122 P.2d 892 (Cal. 1942).

2. 402 U.S. 313 (1971).

3. 439 U.S. 322 (1979).

4. *See* 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4463 (1981); RESTATEMENT (SECOND) OF JUDGMENTS § 29 Reporter's Note at 298-300 (1982).

5. 656 So. 2d 917 (Fla. 1995).

6. The court limited the use of nonmutual collteral estoppel to ineffective assistance of counsel claims and subsequent malpractice claims in a criminal-to-civil context. *See id.* at 919-20.

mutual collateral estoppel and adopt a case-by-case approach, in light of all relevant factors, to determine whether mutuality should be required.

II. COLLATERAL ESTOPPEL & THE MUTUALITY REQUIREMENT

A. *The Definition and Requirements of Collateral Estoppel*

Collateral estoppel, also known as estoppel by judgment or issue preclusion, is a judicial doctrine that prevents identical parties from relitigating issues that have previously been decided between them.[7] Although collateral estoppel is generally asserted to prevent relitigation of issues judicially determined in a prior, separate case, it also applies to all final adjudications within the same action.[8]

The principle behind collateral estoppel is that a final judgment between adversaries determines, for all time, questions of law and fact that have been fully and fairly litigated between the parties, regardless of whether the claim, demand, purpose, or subject matter of the two suits are the same.[9] The goals of collateral estoppel are finality, protection from harassment, elimination of inconsistent judgments, and the conservation of judicial and litigant resources.[10]

In Florida, a party who asserts the doctrine of collateral estoppel has the burden to sufficiently establish that:[11] (1) the issue being litigated is identical to the issue previously litigated between the same parties as adversaries in a prior action (also known as the mutuality requirement);[12] (2) the issue was fully litigated and determined in that

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7. *See* Florida Bar v. Clement, 662 So. 2d 690, 697 (Fla. 1995), *cert. denied*, 116 S. Ct. 1829 (1996).

8. *See* Utterback v. Starkey, 669 So. 2d 304 (Fla. 3d DCA 1996) (citing 46 AM. JUR. 2D *Judgments* § 596 (1994) for the proposition that the issue-preclusive effect of an earlier adjudication applies not only to subsequent independent proceedings, but also applies to all collateral proceedings in the same action).

9. *See* Trucking Employees of North Jersey Welfare Fund, Inc. v. Romano, 450 So. 2d 843, 845 (Fla. 1984); Southeastern Fidelity Ins. Co. v. Rice, 515 So. 2d 240, 242 (Fla. 4th DCA 1987). The difference between collateral estoppel and the related doctrine of res judicata is that, under res judicata, a final judgment bars a subsequent suit between identical parties based upon the same cause of action. Collateral estoppel, on the other hand, applies where the two causes of action are different, in which case the judgment in the first suit only precludes parties from relitigating issues in the second suit that are common to both causes of action and which were actually decided in the prior suit. *See Romano*, 450 So. 2d at 845; Gordon v. Gordon, 59 So. 2d 40, 44 (Fla. 1952), *cert. denied*, 344 U.S. 878 (1952); Gray v. Gray, 107 So. 261, 262 (Fla. 1926).

10. *See* Bailey v. Board of County Comm'rs., 659 So. 2d 295, 307 (Fla. 1st DCA 1994), *dismissed*, 651 So. 2d 1192 (Fla. 1995).

11. *See* Mobil Oil Corp. v. Shevin, 354 So. 2d 372, 374 (Fla. 1977); Nationwide Mutual Fire Ins. Co. v. Race, 508 So. 2d 1276, 1278 (Fla. 3d DCA 1987); Krug v. Meros, 468 So. 2d 299, 301-02 (Fla. 2d DCA 1985); Husky Industries, Inc. v. Griffith, 422 So. 2d 996, 999 (Fla. 5th DCA 1982).

12. *See Mobil*, 354 So. 2d at 374; Gonzalez v. Gonzalez, 413 So. 2d 97, 98 (Fla. 3d DCA 1982); *Husky*, 422 So. 2d at 999. Florida courts, however, have broadly interpreted the term

prior action;[13] and (3) a final decision was rendered in a court of competent jurisdiction.[14] Notwithstanding certain narrow exceptions,[15] failure to satisfy the mutuality requirement, or any other element of collateral estoppel, precludes application of the doctrine.[16]

"parties" to include more than just record parties in order to satisfy the mutuality of parties requirement. *See* Seaboard Coast Line R. Co. v. Industrial Contracting Co., Inc., 260 So. 2d 860, 863 (Fla. 4th DCA 1972). For instance, persons in privity with a record party, persons who control a record party for their own interest, and persons virtually represented by the record party, may successfully invoke the doctrine of collateral estoppel. *See* Progressive American Ins. Co. v. McKinnie, 513 So. 2d 748, 749 (Fla. 4th DCA 1987). *See also* Lathan Construction Corp. v. McDaniel Grading, Inc., 695 So. 2d 354 (Fla. 5th DCA 1996), in which the Fifth District Court of Appeal stated, in dicta, that defensive collateral estoppel could be used against a surety for issues decided against the principal. *Cf.* Khan v. Simkins Indus., Inc., 687 So. 2d 16 (Fla. 3d DCA 1996) (personal guarantors of a corporation's debt were not in privity with the corporation because, in the prior suit, the guarantors were sued as corporate officers, and thus, were not personally liable for the judgment of foreclosure issued against the corporation). Privity is defined "as mutual or successive relationships to the same right of property, or such and identification of interest of one person with another as to represent the same legal right." *Rice*, 515 So. 2d at 242 (quoting BLACK'S LAW DICTIONARY 1079 (5th ed. 1979)). A party who is in privity with a record party will be bound by the final judgment as if she were a party. *See Stogniew*, 656 So. 2d at 920; Zeidwig v. Ward, 548 So. 2d 209, 214 (Fla. 1989); *Rice*, 515 So. 2d at 242; Rhyne v. Miami-Dade Water and Sewer Auth., 402 So. 2d 54, 55 (Fla. 3d DCA 1981).

13. *See Mobil*, 354 So. 2d at 374; *Husky*, 422 So. 2d at 999.

14. *See Mobil*, 354 So. 2d at 374; *Husky*, 422 So. 2d at 999.

15. Sections 775.089(8) and 772.14 of the Florida Statutes give collateral estoppel effect to criminal convictions in subsequent civil proceedings brought by the victim of the crime, despite lack of mutuality of parties. *See Stogniew*, 656 So. 2d at 920. Additionally, a criminal defendant who unsuccessfully brings an ineffective assistance of counsel claim during his or her post-conviction proceeding is collaterally estopped from raising the same claim in a legal malpractice suit against his or her former lawyer despite the lack of mutuality of parties. *See Zeidwig*, 548 So. 2d at 214-15. Florida's Second and Third District Courts of Appeal also have recognized an exception in product liability cases when the plaintiff fails to join all the appropriate parties in his or her product liability suit. *See, e.g.*, West v. Kawasaki Motors Mfg. Corp., U.S.A., 595 So. 2d 92, 95 (Fla. 3d DCA 1992) (explaining that fairness and policy considerations dictate an exception to the mutuality requirement in product liability cases and holding that plaintiffs were precluded from pursuing their products liability action against the manufacturer and retailer of an alleged defective motorcycle after suffering an adverse judgment in a prior suit against the wholesale distributor of the allegedly defective motorcycle); Billman v. Nova Products, Inc., 328 So. 2d 244, 246 (Fla. 1st DCA 1976) (holding that a plaintiff was barred by collateral estoppel from pursuing a breach of implied warranty claim against the manufacturer of an allegedly defective product after successfully securing a judgment based on the same claim against the retailer of the same allegedly defective product for the same injury, even though the mutuality requirement was not satisfied). Note, however, that in light of *Stogniew*, the legal validity of *West* and *Billman* is doubtful. *See Stogniew*, 656 So. 2d at 919-20.

16. *See, e.g.*, Sun Chevrolet, Inc. v. Crespo, 613 So. 2d 105, 107 (Fla. 3d DCA 1993) (holding that plaintiff could not offensively use a driver's guilty plea to vehicular homicide to conclusively establish in a subsequent civil suit that the defendant was vicariously liable for the driver's negligent acts, because the defendant was not a party nor in privity with a record party to the prior criminal proceeding); Keramati v. Schackow, 553 So. 2d 741, 744 (Fla. 5th DCA 1989) (holding that plaintiffs were not collaterally estopped from bringing their legal malpractice action against attorneys who represented them in an earlier medical malpractice suit because there was a lack of mutuality of parties); Prudential Ins. Co. of America v. Turkal, 528 So. 2d 487, 488 (Fla. 3d DCA 1988) (holding that collateral estoppel was inapplicable to preclude insurer from relitigating issues

B. *The Emergence of Nonmutual Collateral Estoppel in Federal and Most State Courts*

The erosion of the mutuality requirement for successful assertion of collateral estoppel began with the landmark decision of *Bernhard v. Bank of America*.[17] *Bernhard* arose out of a probate accounting where several beneficiaries to a will filed objections to the account because the executor failed to include a money transfer from the decedent to the executor before the decedent died.[18] After a hearing on the objections, the probate court settled the account and declared that the disputed money transfer represented a lifetime gift to the executor.[19]

Thereafter, one of the objectors, Helen Bernhard, was appointed administratrix with the will annexed.[20] On behalf of the estate, she sued the bank to recover the deposit that represented the money transfer, alleging that the bank was indebted to the estate for this amount since the decedent never authorized its withdrawal to the executor.[21] Even though mutuality was lacking, the trial court allowed the bank to invoke defensive collateral estoppel against Bernhard since the probate court already decided the "issue as to ownership of the money."[22]

Affirming the trial court's decision, the California Supreme Court abandoned mutuality altogether, instead of bringing the holding within one of the established exceptions to the mutuality rule.[23] In straightfor-

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determined in a prior probate action since the insurer was neither a party to the probate action nor in privity with a record party to the probate action); Keesee v. Estate of Neely, 498 So. 2d 1026, 1027 (Fla. 2d DCA 1986) (holding that a prior judgment in favor of the personal representative could not collaterally estop a co-beneficiary under a life insurance policy from litigating the issue of whether she was entitled to a refund for the amount of federal estate tax paid, since there was no identity of parties); Demoya v. Lorenzo, 468 So. 2d 358, 360 (Fla. 3d DCA 1985) (holding that collateral estoppel was inapplicable to prevent a defendant from relitigating comparative negligence issues, since there was a lack of mutuality, even though a court in a prior case ruled that the defendant was the sole and proximate cause of the accident).

17. 122 P.2d 892 (Cal. 1942). See WRIGHT, *supra* note 4, § 4464, at 571. Collateral estoppel is used either offensively against a defendant or defensively against a plaintiff. Nonmutual defensive collateral estoppel occurs when the defendant seeks to prevent a plaintiff from asserting a claim that the plaintiff has previously litigated unsuccessfully against another defendant. In contrast, nonmutual offensive collateral estoppel occurs when the plaintiff seeks to preclude the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party. *See Parklane Hosiery*, 439 U.S. at 326.

18. *See Bernhard*, 122 P.2d at 893-94.

19. *See id.*

20. *See id.*

21. *See id.*

22. *Bernhard*, 122 P.2d at 895.

23. *See id. See also Blonder-Tongue*, 402 U.S. at 324; WRIGHT *supra* note 4, § 4464, at 571. For instance, indemnification relationships provide one of the most widely recognized exceptions to the mutuality doctrine in that collateral estoppel is available to anyone who, "if defeated in the second action, would be entitled to demand indemnification from the party who won the first action." WRIGHT, *supra* note 4, § 4463, at 562. *See also Bernhard*, 122 P.2d at 895.

ward fashion, the court first discussed the benefits of collateral estoppel and the various exceptions to the mutuality requirement. The court determined that "it would be unjust to permit one who has had his day in court to reopen identical issues by merely switching adversaries" and that "[n]o satisfactory rationalization" for requiring mutuality existed.[24] The court concluded that three questions must be answered in evaluating a claim of collateral estoppel: (1) is the issue decided in the prior action identical to the one in the present action, (2) was that prior issue resolved by final judgment, and (3) is the party against whom collateral estoppel is asserted a party or in privity with a party to the prior action.[25] Having answered these questions affirmatively in this case, the bank was allowed to assert nonmutual defensive collateral estoppel against Bernhard.

The *Bernhard* decision persuaded several lower federal courts to abandon the mutuality requirement.[26] Eventually, the opinion influenced the U.S. Supreme Court in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*[27] to abandon a strict mutuality requirement and embrace the use of nonmutual defensive collateral estoppel in patent litigation.[28]

In *Blonder-Tongue*, the University of Illinois ("University"), an antenna patentee, brought a patent infringement suit against a customer of Blonder-Tongue in federal district court.[29] In defense of its customer, Blonder-Tongue argued that the University's patent was invalid.[30] Although the court noted that another federal district court had previously held the patent invalid, it nonetheless ruled that based on *Triplett v. Lowell*,[31] it was free to decide the issue of patent validity despite the prior holding, because mutuality was lacking. Thereafter, the district court held that the patent was indeed valid and infringed upon, and the Seventh Circuit Court of Appeals affirmed.[32]

Recognizing the growing hostility toward the mutuality rule in the academic and legal communities, the Supreme Court granted *certiorari* and focused on the validity of *Triplett*.[33] Blonder-Tongue argued that

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24. *Id.*

25. *See id.*

26. *See* WRIGHT, *supra* note 4, § 4464, at 573.

27. *Blonder-Tongue*, 402 U.S. at 313.

28. *See* WRIGHT, *supra* note 4, § 4464, at 573.

29. *See Blonder-Tongue*, 402 U.S. at 315.

30. *See id.* at 315-16.

31. 297 U.S. 638, 642 (1936). In *Triplett*, the Court held that a previous judgment declaring a patent invalid did not preclude the patentee from reasserting the same patent against a different defendant. *See id.* at 642.

32. *See Blonder-Tongue*, 402 U.S. at 316-17.

33. *See id.* at 317-27.

the mutuality rule should be modified to its benefit. Thereafter, the Court examined arguments for and against the abrogation of the mutuality requirement, and overruled *Triplett*'s requirement of mutuality in the defensive use of collateral estoppel in patent litigation.[34] The Court held that Blonder-Tongue could collaterally estop the University from relitigating the issue of validity, provided that the University was afforded the opportunity to show that it did not have a full and fair opportunity to litigate the issue of validity in the prior suit.[35]

To bolster its decision, the Court noted several benefits that nonmutual defensive collateral estoppel provides to litigants and the judiciary. First, the Court pointed out that limiting relitigation of decided issues improves judicial economy. It allows courts to quickly narrow issues in pending cases and dispose of cases in situations where courts are satisfied that permitting nonmutual collateral estoppel will not compromise the parties' rights to due process.[36] Moreover, permitting nonmutual defensive collateral estoppel prevents misallocation of the litigants' economic resources.[37] For instance, strict adherence to the mutuality rule forces a defendant to divert time and money from other productive uses in order to relitigate issues that have already been fully decided.[38]

Further, assuming that the issue was resolved correctly in the first suit, the plaintiff is arguably misallocating resources as well.[39] Instead of directing time and money to other productive endeavors, the plaintiff is encouraged, under the mutuality doctrine, to pound away against a continuous line of potential defendants over issues in which he or she most likely had every incentive to fully litigate before.[40] This creates an aura of a gaming table, because the plaintiff is allowed to repeat litigation of the same issue as long as there is a supply of unrelated defendants.[41]

The Court considered and dismissed the argument that, in light of the technical and difficult nature of patent litigation, the mutuality requirement is essential to safeguard against erroneous judgments of invalidity.[42] While conceding the "extreme intricacy of some patent cases," the Court felt that the risk of improvident judgments of patent

34. *See id.* at 328-50.
35. *See id.* at 329, 350.
36. *See id.* at 328-29, 348-49.
37. *See id.* at 329, 348-49.
38. *See id.* at 329, 338.
39. *See id.* at 329.
40. *See id.*
41. *See id.* at 328-29.
42. *See id.* at 330-34.

invalidity was low, given the presumption that the plaintiff, as patentee, "was prepared to litigate and to litigate to the finish against the defendant" in the prior suit.[43]

Furthermore, the Court also disagreed that a plaintiff would encounter unusual difficulty or surprise in gathering evidence for the first trial in light of "the avenues for discovery available under the present rules of procedure."[44] In addition, the Court believed that the ultimate safeguard against prior defective proceedings is the requirement that the plaintiff against whom nonmutual collateral estoppel is asserted be given an opportunity to demonstrate that he or she "did not have a fair opportunity procedurally, substantively, and evidentially" to pursue claims the first time.[45] Finally, the Court addressed the concern that the "full and fair opportunity" question would spawn costly litigation at the expense of any judicial efficiency produced by nonmutual defensive collateral estoppel.[46] In response, the Court noted that once it was determined that the issue in both cases was identical, it would "be easier to decide whether there was a full opportunity to determine that issue in the first action than it would be to relitigate" the merits of the issue.[47] Additionally, the Court observed that this fear "does not in fact seem to have been a problem in other contexts, where strict mutuality of estoppel has been abandoned."[48] In the end, the Court concluded that the decision to allow nonmutual defensive collateral estoppel in patent litigation rests "on the trial court's sense of justice and equity."[49]

Although the *Blonder-Tongue* Court noted that nonmutual collateral estoppel was not "before [the Court] for wholesale approval or rejection,"[50] lower federal courts quickly applied nonmutual defensive collateral estoppel in all types of cases.[51] Subsequently, just eight years later, the Court, in *Parklane Hosiery Company, Inc. v. Shore*,[52] officially sanctioned the availability of nonmutual defensive and offensive collateral estoppel in all settings.

The *Parklane* case began with a shareholder class action suit brought against Parklane Hosiery Company ("Parklane"), and thirteen of its officers, directors, and stockholders. The complaint alleged that Parklane issued a materially false and misleading proxy statement in

43. *Id.* at 332.
44. *Id.*
45. *Id.* at 333 (citing Eisel v. Columbia Packing Co., 181 F. Supp. 289, 301 (D. Mass. 1960)).
46. *See Blonder-Tongue*, 402 U.S. at 347.
47. *Id.*
48. *Id.*
49. *Id.* at 334.
50. *Id.* at 327.
51. *See* WRIGHT, *supra* note 4, § 4464, at 575.
52. 439 U.S. 322 (1979).

connection with a merger, thus violating the Securities Exchange Act, various federal statutes, and several rules and regulations of the Securities and Exchange Commission ("SEC").[53]

Prior to the trial in the class action, the SEC filed its own suit against Parklane, alleging essentially the same violations that were alleged in the shareholder complaint.[54] After a four-day trial, the district court held for the SEC, and found that the proxy statement was materially false and misleading and entered a declaratory judgment to that effect.[55] The Second Circuit Court of Appeals affirmed the decision.[56]

The shareholders in the class action suit then moved for partial summary judgment against Parklane, arguing that Parklane was collaterally estopped from relitigating the issues that had been resolved against it in the SEC action.[57] The district court denied the motion, but the Second Circuit reversed.[58] Parklane appealed.[59]

After reviewing the same arguments the *Blonder-Tongue* Court considered when it allowed nonmutual defensive collateral estoppel, the Court addressed several arguments as to why it should not allow nonmutual offensive collateral estoppel.[60] First, it examined the argument that nonmutual offensive collateral estoppel does not promote judicial economy in the same way that defensive use does, because it increases the total amount of litigation.[61] While nonmutual defensive collateral estoppel gives a plaintiff strong incentive to join all potential defendants in the first action, nonmutual offensive collateral estoppel creates the opposite effect, since the plaintiff can rely on a previous judgment against a defendant and yet, not be bound by it.[62] Therefore, the plaintiff has incentive to adopt a "wait and see" attitude, in the hope that the first action by another plaintiff will result in a favorable judgment.[63]

The Court also considered the argument that it was unfair to preclude a defendant from relitigating an issue that was adversely decided against him or her in a previous suit when that party had little incentive to defend.[64] "If a defendant in the first action is sued for small or nominal damages, he may have little incentive to defend vigorously, particu-

53. *See id.* at 324.
54. *See id.*
55. *See id* at 324-25.
56. *See id* at 325.
57. *See id.*
58. *See id.*
59. *See id.*
60. *See id.* at 327-31.
61. *See id.* at 329-30.
62. *See id.* at 330.
63. *Id.*
64. *See id.*

larly if future suits are not foreseeable."[65] Otherwise, the goal of economic and judicial efficiency would be futile, since the defendant would be forced to vigorously defend each and every issue in a lawsuit for fear of forever losing the chance to litigate the claim in the future when the stakes may be higher.

Nonmutual offensive collateral estoppel may also be unfair to the defendant "if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant."[66] It may also be unfair when "the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result."[67]

Despite these arguments, the Court reasoned that the best way to address these separate concerns was to permit nonmutual offensive collateral estoppel and grant trial courts broad discretion to determine when it should be applied.[68] The general rule for guiding the trial court's discretion, is that nonmutual offensive collateral estoppel should not be allowed when the plaintiff could have easily joined in the earlier action,[69] or when other factors exist which would render its application to the defendant unfair or unwise.[70] The Court further noted that although there is no intrinsic difference between offensive and defensive collateral estoppel, since, in either case, the party against whom estoppel is asserted had a prior opportunity to litigate, a stronger showing that the previous opportunity to litigate was adequate may be required for nonmutual offensive collateral estoppel.[71] In applying nonmutual offensive

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65. *Id.*

66. *Id.* at 330.

67. *Id.* at 331.

68. *See id.* at 331.

69. The Restatement (Second) of Judgments offers a different analysis from *Parklane* in deciding when a party has failed to join. Janet Schmitt Ellis, *Nonmutuality: Taking the Fairness Out of Collateral Estoppel*, 13 IND. L. REV. 563, 585 (1980). Arguably, the *Parklane* rule is too lenient in permitting nonmutual offensive collateral estoppel because defendants, who have the burden of proving that estoppel should not apply, must show that a subsequent plaintiff could easily have joined in the first suit. *See id.* On the other hand, defendants under the Restatement rule of joinder, face a lighter burden, because they only have to show that the subsequent plaintiff "*could have* effected joinder in the first action between himself and his present adversary." RESTATEMENT (SECOND) OF JUDGMENTS, *supra* note 4, § 29(3), at 291 (emphasis added). *See also* Ellis, *supra*, at 585.

70. *Parklane*, 439 U.S. at 331.

71. *See id.* n.16. The reason for a stronger showing that the prior opportunity to litigate was fair under nonmutual offensive collateral estoppel analysis is based on the notion that defendants face greater hardship when estopped by nonparty plaintiffs than plaintiffs face when estopped by nonparty defendants. *See* Ellis, *supra* note 52, at 595. When a plaintiff loses in the first suit, he or she is denied the relief requested in the present and future suits. *See id.* The defendant, on the other hand, who loses in the first suit is obligated by a decision of liability to pay damages proven in all subsequent suits. *See id.*

collateral estoppel, the Court held that the shareholders could preclude Parklane from relitigating the issue whether the proxy statement was materially false and misleading since Parklane already received a "full and fair" opportunity to litigate its defenses in the prior SEC action.[72] Furthermore, none of the considerations justifying refusal to allow offensive collateral estoppel were present.[73]

Most state courts have also embraced nonmutual collateral estoppel.[74] The predominant rationale for this acceptance is similar to the Supreme Court's rationale in *Blonder-Tongue* and *Parklane.*[75] Once a party, either as a defendant or plaintiff, has had a full and fair opportunity to litigate an issue, that party has been afforded the required benefits of due process. In the absence of circumstances rendering it unfair for that party to relitigate the issue, there is no good reason not to treat the issue as settled just because that party substituted opponents.[76]

Thus, assuming a party would be collaterally estopped from relitigating an issue with his or her former opponent, the next step in nonmutual collateral estoppel analysis is to determine whether circumstances exist which would justify relitigation against another party.[77] If those circumstances are absent, the trial court should have discretion to allow nonmutual collateral estoppel when the party against whom estoppel is asserted had a compelling motive to fully litigate, and extensive litigation in fact occurred. This case-by-case approach to collateral estoppel accommodates the interests of fairness, efficiency, and finality for both the judiciary and the litigants, as opposed to requiring strict mutuality, which only satisfies the interest of fairness.[78]

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72. *See Parklane*, 439 U.S. at 332-33.

73. *See id.* at 333.

74. *See* WRIGHT, *supra* note 4, § 4463, at 560-61; RESTATEMENT (SECOND) OF JUDGMENTS, *supra* note 4, § 29 Reporter's Notes at 298-300.

75. *See* RESTATEMENT (SECOND) OF JUDGMENTS, *supra* note 4, § 29 Reporter's Note at 298-300.

76. *See id.*

77. *See id.* at 300.

78. *See generally* Gary R. Cunningham, *Collateral Estoppel: The Changing Role of the Rule of Mutuality*, 41 MO. L. REV. 521, 529 (1976) (arguing that courts should proceed on a case-by-case basis and consider the particular facts of each case in determining whether to require mutuality); Gary R. Cunningham, *Collateral Estoppel in Virginia After Bailey Lumber*, 68 VA. L. REV. 671, 690-91 (1982) (concluding that the case-by-case approach best accommodates the interests of fairness and finality); Lisa L. Glow, *Offensive Collateral Estoppel in Arizona: Fair Litigation vs. Judicial Economy*, 30 ARIZ. L. REV. 535, 550 (concluding that limiting nonmutual offensive collateral estoppel under a case-by-case approach is more reasonable than to completely deny its use under strict mutuality).

III. THE MUTUALITY REQUIREMENT IN FLORIDA

A. *The Early Case Law on Nonmutual Collateral Estoppel and the Apparent Repudiation of Mutuality in the Defensive Use of Collateral Estoppel*

Despite the rationale articulated in *Blonder-Tongue* and *Parklane* for the complete abandonment of the antiquated mutuality doctrine for both offensive and defensive uses of collateral estoppel, Florida courts continue to cling to the mutuality doctrine. The paradigm case illustrating Florida's position is *Trucking Employees of North Jersey Welfare Fund, Inc. v. Romano*.[79] Although the facts of that case provided the court with a compelling opportunity to abandon the doctrine, the court re-affirmed the requirement of mutuality in both the offensive and defensive uses of collateral estoppel.[80]

Romano began after partners in a Florida limited partnership filed a complaint against the general partner and business managers of the partnership. The complaint alleged breach of fiduciary duty, conspiracy to defraud, breach of the limited partnership contract, and violation of the federal RICO statute.[81] Several months after the complaint, a federal criminal indictment charged the same defendants with several counts of fraud and misrepresentation.[82] The plaintiffs were named in the indictments as victims of the specific acts alleged in the complaint, and the defendants were eventually found guilty on all counts.[83]

Thereafter, the limited partners filed a motion for summary judgment to collaterally estop the defendants from relitigating the factual allegations contained in their complaint. The limited partners argued that the criminal conviction conclusively established all of their factual allegations for purposes of collateral estoppel, since the federal government proved, beyond a reasonable doubt, that the defendants committed the alleged acts.[84]

The trial court granted summary judgment, but the Fourth District Court of Appeal reversed, determining, in part, that the lack of mutuality barred the use of collateral estoppel.[85] The court, however, certified the question whether a litigant, who was not a party to a prior criminal proceeding that resulted in a conviction, may use a judgment of conviction offensively in a civil proceeding to prevent the same defendant from

79. *See Romano*, 450 So. 2d at 843.
80. *See id.* at 845-46.
81. *See id.* at 844.
82. *See id.*
83. *See id.*
84. *See id.*
85. *See id.* at 845.

relitigating issues resolved in the criminal proceeding.[86]

Recognizing that federal courts and other jurisdictions had abandoned the mutuality requirement as a prerequisite for asserting the doctrine of collateral estoppel, the Florida Supreme Court, nonetheless, refused to permit nonmutual collateral estoppel.[87] It held 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."[88]

The Florida Supreme Court's reasoning addressed the same arguments used by the *Blonder-Tongue* and *Parklane* Courts. First, the court rejected the judicial economy argument, stating that the trial court's broad discretion under a rule permitting nonmutual collateral estoppel would create "a fertile ground for appeal."[89] Thus, any savings of judicial resources "to the trial court would be at the expense of the district courts of appeal."[90]

The court further reasoned that evidence to prove liability may also be necessary to prove other issues that may not be eligible for preclusion, such as comparative negligence and damages.[91] Therefore, little judicial economy would be gained when it might be necessary for the jury to hear much of the same evidence to make determinations regarding these other issues.[92] Finally, the court believed that any burden the plaintiff may suffer in relitigating previously decided issues was insufficient to risk the possibility of essentially compromising the defendant's rights to due process.[93]

Although the Florida legislature essentially overruled the *Romano* holding as applied to the facts of the *Romano* case,[94] the holding remained valid in all other situations. However, the Florida Supreme Court altered its stance toward nonmutual defensive collateral estoppel five years later in *Zeidwig v. Ward*.[95]

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86. *See id.* at 845.

87. *See id.*

88. *Id.*

89. *Id.* at 845-46.

90. *Id.* at 845-46.

91. *See id.* at 846.

92. *See id.*

93. *See id.* In fact, the fallibility of the litigation process is the strongest justification for the mutuality requirement. *See* Edwin H. Greenebaum, *In Defense of the Doctrine of Mutuality of Estoppel*, 45 IND. L.J. 1, 2 (1969).

94. Sections 775.089(8) and 772.14 of the Florida Statutes "give collateral estoppel effect to criminal convictions in subsequent civil proceedings brought by the victim of the crime." *Stogniew*, 656 So. 2d at 920. *See also* Starr Tyme, Inc. v. Cohen, 659 So. 2d 1064, 1067 (Fla. 1995) (stating that "section 772.14 abrogates the requirement of mutuality of parties in the context of civil actions brought by crime victims").

95. 548 So. 2d 209 (Fla.1989).

In *Zeidwig*, the plaintiff ("Ward") was a criminal defendant represented in a prior federal criminal trial by the defendant ("Zeidwig").[96] After Ward's federal conviction was affirmed on appeal, Ward filed a motion in federal district court to vacate his sentence on the grounds that he had received ineffective assistance of counsel.[97] After a full hearing, the federal district court denied Ward's motion.[98]

Ward subsequently filed a civil malpractice action in state court, based on the claim of ineffective assistance of counsel in the criminal case.[99] Ziedwig contended that Ward was collaterally estopped from maintaining this malpractice claim, based upon the previous federal district court order denying Ward's motion to vacate.[100] In response, Ward argued that collateral estoppel was inapplicable because mutuality was lacking.[101]

The trial court granted summary judgment in favor of Zeidwig, but the Fourth District Court of Appeal reversed, citing *Romano*.[102] Uncomfortable with the outcome, however, the district court certified to the Florida Supreme Court the question whether mutuality of parties continues to be a prerequisite in the application of collateral estoppel in Florida.[103]

The Florida Supreme Court accepted jurisdiction and narrowed the district court's certified question to "whether identity or mutuality of the parties or their privies is a prerequisite in Florida to the defensive application of the doctrine of collateral estoppel in the criminal-to-civil context."[104] Answering the question in the negative, the court reversed the order denying summary judgment. In doing so, it approved the "use of collateral estoppel to prevent a criminal defendant, as a plaintiff, from relitigating the same issue which has been litigated in prior criminal proceedings."[105]

In support of its holding, the court first emphasized that its holding in no way modified the bar against nonmutual offensive collateral estoppel.[106] The court then reasoned that it was "neither logical nor reasonable" to approve a policy that would allow a convicted defendant to collect civil damages from his criminal defense counsel for ineffective

96. *See id.* at 209-10.
97. *See id.* at 210.
98. *See id.* at 211.
99. *See id.* at 210.
100. *See id.* at 212.
101. *See id.*
102. *See id.* at 212.
103. *See id.*
104. *Id.*
105. *Id.* at 214.
106. *See id.* at 212-13.

representation, especially after a judicial determination that the convicted defendant in fact received proper representation in the previous criminal case.[107] As further support for its conclusion, the court quoted a frequently cited justification for allowing nonmutual collateral estoppel, stating that "it would undermine the effective administration of the judicial system to ignore completely a prior decision of a court of competent jurisdiction in this state on the same issue which plaintiff seeks to relitigate in a subsequent action."[108]

After *Zeidwig*, the courts wasted little time in extending the holding of *Zeidwig* from a criminal-to-civil context to a civil-to-civil context. Florida's Third District Court of Appeal led the charge when it abandoned the mutuality requirement as a perquisite in the defensive use of collateral estoppel in *Verhagen v. Arroyo*.[109]

Verhagen began in Collier County, where the plaintiff ("Verhagen"), an investor, brought suit against the principals of Soft-Art, Inc., alleging breach of an oral contract and fraud. Verhagen claimed that the principals failed to uphold their end of the contract by failing to provide Verhagen with an equity interest in Soft-Art in return for Verhagen's funding and services.[110] The principals denied these allegations and filed a counterclaim for civil theft and fraud.[111]

At the close of the evidence, the trial judge directed a verdict against Verhagen on all counts, but allowed the counterclaim to go to the jury, which returned a verdict in favor of the principals.[112] The trial court then entered a final judgment based on the court's and the jury's findings.[113]

However, shortly before Verhagen's suit went to trial, Verhagen filed a separate action against Enrique Arroyo.[114] Arroyo was the principals' counsel in the first action until he was sued by Verhagen.[115] This complaint alleged the existence of the same oral contract and breach of that oral agreement as alleged in the Collier County complaint. [116] It further alleged that Arroyo, as attorney for the principals, assisted the principals in perpetrating the fraud against Verhagen, thereby committing civil theft himself.[117] In his defense, Arroyo argued that Verhagen

107. *Id.* at 214.
108. *Id.* (quoting Johnson v. Raban, 702 S.W.2d 134 (Mo. Ct. App. 1985)).
109. 552 So. 2d 1162, 1164 (Fla. 3d DCA 1989).
110. *See id.* at 1162-63.
111. *See id.* at 1163.
112. *See id.* at 1163-64.
113. *See id.*
114. *See id.* at 1163.
115. *See id.*
116. *See id.*
117. *See id.*

was collaterally estopped from relitigating the same issues of breach of oral contract and fraud that were fully litigated and decided in the Collier County action.[118]

Agreeing with Arroyo, the trial court granted Arroyo's motion for summary judgment, finding that "strict mutuality of parties [was] not necessary where, as here, the defendants [sought] to use the doctrine of collateral estoppel defensively."[119] Alternatively, the trial court held that for collateral estoppel purposes, Arroyo, as attorney for the principals when the alleged wrongful acts were committed, was in privity with the principals.[120] Thus, he could defensively use that first judgment in favor of the principals against Verhagen.

Verhagen appealed this judgment, and in a *per curiam* opinion, the Third District Court of Appeal affirmed the decision. In doing so, the appellate court found "that the trial court was *fully justified* in entering the final summary judgment under the applicable law."[121] In support of its holding, the court cited several cases including *Zeidwig* and *Blonder-Tongue*.[122] Thus, the Third District took the first step in extending the holding of *Zeidwig* to allow nonmutual defensive collateral estoppel in the civil-to-civil context.[123]

The Second District Court of Appeal continued the attack on the mutuality doctrine in *Dixie Auto Transport Company, Inc. v. Louttit*.[124] Unfortunately, the *Dixie Auto* opinion contains no recitation of the facts giving rise to the action. Instead, the appellate court summarily stated that it did not agree with appellant's position that the defensive use of collateral estoppel is inappropriate where there is no mutuality of parties even in the civil-to-civil context.[125] Affirming the trial court's summary judgment in favor of the appellee, the Second District cited *Zeidwig* and *Verhagen* in support of its decision.[126]

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118. *See id.* at 1164.

119. *Id.*

120. *See id.*

121. *Id.* (emphasis added).

122. *See id.*

123. *See* Hochstadt v. Orange Broadcast, 588 So. 2d 51, 53 (Fla. 3d DCA 1991) (although the Third District Court of Appeal was bound to use federal principles of collateral estoppel and affirmed a motion allowing defendants to defensively preclude a plaintiff from relitigating issues fully explored in a prior bankruptcy proceeding, the court noted that "even if Florida principles of collateral estoppel were to control the outcome of this appeal, the same result would obtain. Mutuality of parties is no longer required when collateral estoppel is used defensively, as it was in this case."). *Id.* at 53 n.3.

124. 588 So. 2d 68 (Fla. 2d DCA 1991).

125. *See id. See also* Donald A. Blackwell, *The Silent Demise of the Mutuality Requirement in the Defensive Use of Collateral Estoppel*, FLA. B.J., Apr. 1992, at 18, 21 (containing a recitation of the facts of the case based on the litigant's briefs).

126. *See Dixie Auto*, 588 So. 2d at 68.

In light of the language in *Zeidwig* and the subsequent holdings in *Verhagen* and *Dixie Auto*, Donald Blackwell predicted that:

> when it finally confronts the issue [mutuality] in the civil-to-civil context, the Florida Supreme Court will and, for the reasons stated in *Blonder-Tongue* and its progeny, *should* abolish the now archaic requirement that there be strict mutuality of the parties before a defendant can assert the doctrine of collateral estoppel against a person who was a party or in privity with a party to a prior judgment.[127]

Blackwell further noted that:

> because the court specifically limited its holding in *Zeidwig* to the seldom-encountered criminal-to-civil application of the doctrine, and because the courts in *Verhagen* and *Dixie Auto* chose to give the issue summary treatment, as if it already had been resolved, it is likely that many litigants and jurists will not realize that this fundamental change in Florida law has occurred until the day the court makes it formal pronouncement.[128]

B. *The* Stogniew *Opinion and Its Progeny*

Six years after *Zeidwig*, the Florida Supreme Court, in *Stogniew v. McQueen*,[129] again addressed the issue, as it had in *Romano*, whether mutuality should continue to remain a prerequisite in the offensive use of collateral estoppel. Unfortunately, not only did the court decline to allow nonmutual offensive collateral estoppel, it also narrowed the *Zeidwig* opinion to its facts.

In *Stogniew*, the plaintiff ("Stogniew") sought counseling from the defendant ("McQueen"), a licensed marriage and family therapist, to help deal with the unexpected death of her twenty-one-year-old son.[130] Dissatisfied with the counseling sessions, Stogniew filed a complaint against McQueen with the Department of Professional Regulation (DPR).[131] Stogniew also brought a civil action against McQueen for negligence.[132] While the civil action was pending, the DPR concluded that McQueen violated Florida law governing his profession by failing to meet the minimum standards of performance in his professional relationship with Stogniew.[133]

Stogniew subsequently moved for partial summary judgment on the basis of nonmutual offensive collateral estoppel, claiming that the facts

127. Blackwell, *supra* note 110, at 21.
128. *Id.*
129. 656 So. 2d 917 (Fla. 1995).
130. *See id.* at 918.
131. *See id.*
132. *See id.*
133. *See id.* at 918-19.

underlying the DPR determination were the same facts underlying her action for negligence against McQueen.[134] The trial court denied Stogniew's motion, and the case proceeded to trial resulting in a jury verdict in favor of McQueen.[135]

Relying on *Romano* and *Zeidwig*, the Second District Court of Appeal affirmed the judgment against Stogniew.[136] Recognizing the strength of Stogniew's arguments, however, the court certified, to the Florida Supreme Court, the question whether "an administrative determination of a professional's misconduct [can] be used as conclusive proof of the facts underlying that determination in a suit against the professional for negligence based on the same facts?"[137]

Answering the certified question in the negative, the Florida Supreme Court began its analysis by reviewing Florida's longstanding adherence to the mutuality requirement, and reaffirmed its decision in *Romano*.[138] The court then noted that the only time in which it did not strictly adhere to the requirement of mutuality of parties was in *Zeidwig*.[139] Rejecting Stogniew's argument that, as a result of *Zeidwig* there was no longer a same-party requirement for purposes of collateral estoppel, the court narrowed the *Zeidwig* decision to its facts, stating that "*Zeidwig* constituted a *narrow exception* in which collateral estoppel was permitted in a defensive context *and then only under the compelling facts of that case*."[140]

The court further stated that "we are unwilling to follow the lead of certain other states and of the federal courts in abandoning the requirements of mutuality in the application of collateral estoppel."[141] Repeating the same rationale used in *Romano*, the court asserted that "we are not convinced that any judicial economies which might be achieved by eliminating mutuality would be sufficient to affect our concerns over fairness for the litigants."[142]

The court also rejected Stogniew's argument that the "legislature effectively abolished the doctrine of mutuality altogether when it

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134. *See id.* at 919.

135. *See id.*

136. *See id.*

137. *Id.* at 918.

138. *See id.* at 919-20.

139. *See id.* at 919.

140. *Id.* at 919 (emphasis added). *See also* Lee v. Gadasa Corporation, 680 So. 2d 1107, 1108-09 (Fla. 1st DCA 1996) (emphasizing that *Zeidwig* constituted a narrow exception to the mutuality requirement); Jones v. Upjohn Company, 661 So. 2d 356, 357-58 (Fla. 2d DCA 1995) (finding that the *Stogniew* court narrowed *Zeidwig* to its facts).

141. *Stogniew*, 656 So. 2d at 919-20.

142. *Id.* at 920.

enacted sections 775.089(8) and 772.14."[143] Finally, the court rejected the notion that Stogniew was in privity with the Department of Professional Regulation.[144]

Then, just five months later, the Second District Court of Appeal reversed its initial position in *Dixie Auto* and followed the Florida Supreme Court's cue by refusing to allow a defendant to assert nonmutual defensive collateral estoppel against a plaintiff in a criminal-to-civil context in *Jones v. Upjohn Company*.[145] The *Jones* case began in 1990, when the plaintiff ("Jones"), was convicted on two counts of first-degree murder.[146] For several years before the murders, Jones allegedly took a sedative called Halcion, which the Upjohn Company ("Upjohn") manufactured.[147]

In 1993, Jones filed a civil suit against Upjohn, alleging that Upjohn falsified test results to obtain FDA approval, thereby failing to provide adequate warnings about Halcion's side effects.[148] Jones claimed that as a result of these side effects, the drug caused him to commit murder.[149] Upjohn moved to dismiss the complaint, arguing that Jones was collaterally estopped from litigating whether the drug caused him to commit murder, since the jury found that Jones formed a premeditated intent to commit murder and was thus guilty of first-degree murder.[150]

Relying, in part, on *Zeidwig*, the trial court granted the motion to dismiss, since Upjohn was defensively asserting nonmutual collateral estoppel against Jones.[151] Jones appealed.

The Second District Court of Appeal began its analysis by reviewing the holding of *Zeidwig* in light of the recent *Stogniew* opinion.[152] After concluding that the *Zeidwig* court allowed nonmutual defensive collateral estoppel in a criminal-to-civil context, the appellate court then determined that the *Stogniew* court limited *Zeidwig* to its facts.[153] In doing so, the court focused on the portion of the *Stogniew* opinion which stated that *Zeidwig* provided a "narrow exception in which collateral estoppel was permitted in a defensive context and then only under the

143. *See id. See also* discussion *supra* note 94.

144. The court found that Stogniew did not "have an interest in the action such that she would have been bound by the final judgment as if she were a party." *Id.*

145. *See Jones*, 661 So. 2d at 356.

146. *See id.* at 351.

147. *See id.*

148. *See id.*

149. *See id.*

150. *See id.*

151. *See id.*

152. *See id.*

153. *See id.*

compelling facts of that case."[154]

Relying on *Stogniew*, the Second District completely rejected Upjohn's argument that the Florida Supreme Court intended to eliminate the requirement of mutuality in all defensive uses of collateral estoppel.[155] Specifically, the court stated that "*Zeidwig* [was] limited to ineffective assistance of counsel claims and subsequent legal malpractice claims."[156] Therefore, the court held that, since Upjohn was neither a party nor in privity with a party in Jones' criminal proceeding, it could not defensively "assert collateral estoppel as a bar to Jones' civil suit."[157]

IV. CONCLUSION

Instead of adopting the case-by-case discretionary approach of most jurisdictions in deciding whether to permit nonmutual collateral estoppel, the Florida Supreme Court rejects nonmutual offensive collateral estoppel and limits the availability of nonmutual defensive collateral estoppel to the rarely encountered situation of ineffective assistance of counsel claims and subsequent legal malpractice claims in a criminal-to-civil context. This is an unfortunate decision because, as *Bernard, Blonder-Tongue*, and *Parklane* point out, there is no valid reason to deny nonmutual collateral estoppel and to force a trial court to relitigate issues when the party against whom estoppel is asserted had a compelling motive to fully litigate, and when extensive litigation had occurred. The case-by-case approach accommodates the interests of fairness, efficiency, and finality. Thus, it is more reasonable to permit nonmutual collateral estoppel under the proper circumstances than to abolish the doctrine altogether.[158]

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154. *Id.* at 357 (quoting Stogniew v. McQueen, 656 So. 2d 917, 919 (Fla. 1995)).

155. *See id.* at 357-58.

156. *Id.* at 358. *See also* Lee v. Gadasa Corp., 680 So. 2d 1107, 1108 (Fla. 1st DCA 1996) (emphasizing that *Zeidwig* constituted a narrow exception to the mutuality requirement).

157. *Id.*

158. *Id.*