ISSUE PRECLUSION AND THE CONCEPT OF PRIVITY

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INTRODUCTION

The Nebraska Supreme Court has recently abolished the requirement of mutuality of parties in the application of collateral estoppel. This change in Nebraska law signals a greater focus on the requirements of identity of the issues and a full and fair opportunity to litigate. However, the doctrine of collateral estoppel still requires that the person being estopped is a party or in privity with a party to the prior action. Thus, the court's interpretation of "privity" has become instrumental in the application of collateral estoppel. This article discusses the background to this change in Nebraska law and possible further expansion of collateral estoppel.

RECENT NEBRASKA DECISIONS

The recent decisions of the Nebraska Supreme Court in *Peterson v. Nebraska Natural Gas Co.*[1] and *JED Construction Co., Inc. v. Lilly*[2] clearly evidence a change in Nebraska law with respect to the doctrine of collateral estoppel or, as it is more commonly called today, issue preclusion. Prior to these decisions collateral estoppel, although not clearly defined,[3] required that there be mutuality of estoppel.[4] However, the Nebraska Supreme Court, in *Peterson* and *Lilly*, abolished the requirement of mutuality.[5]

In *Peterson*, the court allowed the offensive use of collateral

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1. 204 Neb. 136, 281 N.W.2d 525 (1979).

2. 208 Neb. 607, 305 N.W.2d 1 (1981).

3. 47 NEB. L. REV. 640, 640-51 (1968); *see* 45 NEB. L. REV. 613, 617-18 (1966) for a discussion of the mutuality doctrine in Nebraska prior to Peterson v. Nebraska Natural Gas Co., 204 Neb. 136, 281 N.W.2d 525 (1979) and JED Construction Co. v. Lilly, 208 Neb. 607, 305 N.W.2d 1 (1981).

4. Bank of Mead v. St. Paul Fire & Marine Ins. Co., 202 Neb. 403, 406, 275 N.W.2d 822, 824 (1979); Midwest Franchise Corp. v. Wakin, 201 Neb. 450, 454, 268 N.W.2d 737, 740 (1978); Wischmann v. Raikes, 168 Neb. 728, 738, 97 N.W.2d 551, 559 (1959).

5. 204 Neb. at 139, 281 N.W.2d at 527; 208 Neb. at 611, 305 N.W.2d at 3.

estoppel by a non-party to the first action.[6] An explosion in the Pathfinder Hotel had caused extensive glass damage to Peterson's business building. The explosion and fire in the Pathfinder Hotel were caused by natural gas which escaped from a main owned by the defendant Nebraska Natural Gas Co.[7] Peterson brought this action to recover the damages to his building caused by the explosion. In a prior decision, *Hammond v. Nebraska Natural Gas Co.*,[8] a judgment against the gas company for damages to the Pathfinder Hotel was affirmed. The court held the gas company liable since the duty of the gas company was a continuing one and was nondelegable.[9] In the subsequent action, Peterson sought to use this judgment to collaterally estop the gas company from relitigating the negligence issue.[10]

The Nebraska Supreme Court, in holding that the gas company was collaterally estopped, adopted a four-part test that abolished the requirement of mutuality.[11] Collateral estoppel can now be applied if: (1) The identical issue was decided in a prior action; (2) there was a judgment on the merits which was final; (3) the party against whom the rule is to be applied was a party or in privity[12] with a party to the prior action; and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.[13]

In *JED Construction Co., Inc. v. Lilly*,[14] an action was brought to recover damages claimed to have been suffered by JED because Lilly, its alleged agent, failed to act in accordance with JED's instructions in completing applications for an indemnity agreement and contractor's bond.[15] The beneficiary of the indemnity agreement was Universal Surety Co., who in reliance on the indemnity issued a performance bond to Erik Hansen Construction Company.[16] In a prior action, *Universal Surety Co. v. JED Construction Co., Inc.*,[17] the Nebraska Supreme Court held for Universal Surety against JED on the indemnity agreement.[18] In this subsequent ac-

6. 204 Neb. at 138-40, 281 N.W.2d at 526-27.
7. 204 Neb. at 137, 281 N.W.2d at 526.
8. 204 Neb. 80, 281 N.W.2d 520 (1979).
9. *Id.* at 83, 86, 281 N.W.2d at 522, 524.
10. 204 Neb. at 137-38, 281 N.W.2d at 526.
11. *See* 204 Neb. at 139, 281 N.W.2d at 527.
12. For a discussion of the definition of privity, see Cortell, *The Expanding Scope of the Res Judicata Bar*, 54 TEX. L. REV. 527, 529-35 (1976).
13. 204 Neb. at 139, 281 N.W.2d at 527.
14. 208 Neb. 607, 305 N.W.2d 1 (1981).
15. *Id.* at 608-09, 305 N.W.2d at 1-2.
16. *Id.* at 608, 305 N.W.2d at 2.
17. 200 Neb. 712, 265 N.W.2d 219 (1978).
18. 208 Neb. at 608, 305 N.W.2d at 2. For a detailed explanation of the facts sur-

tion, JED sought to recover from Lilly the amount it was required to pay to Universal Surety in the prior action.

The issues involved in this case were submitted to a jury and a judgment was rendered for Lilly.[19] JED appealed this decision to the Nebraska Supreme Court assigning various errors. In his answer Lilly pleaded that the action was estopped by the principles of collateral estoppel because all issues raised had been concluded by the judgment in *Universal*.[20]

The Nebraska Supreme Court noted that in *Universal* the trial court decided: (1) What the actual agreement was, and (2) the nature and extent of Lilly's authority and instruction.[21] The court then determined that the issue of Lilly's authority and whether he acted in accordance with instructions from JED was an issue in both cases and was decided against JED in the prior action (*Universal*).[22] The court held that JED had had a full and fair opportunity to litigate these issues in *Universal* and was, therefore, estopped from litigating further in *Lilly*.[23] The court clearly stated that identity of parties was no longer necessary to give validity to a claim of issue preclusion in affirming the judgment for Lilly.[24]

BACKGROUND

By abolishing the mutuality requirement, Nebraska is following a trend that was begun by Justice Traynor in 1942, in *Bernhard v. Bank of America National Trust & Savings Association*.[25] The defendant asserting the plea had not been a party or in privity with a party in the prior action.[26] In *Bernhard*, Justice Traynor stated that there was no reason for limiting collateral estoppel by retaining the mutuality requirement.[27] He concluded that in determining the validity of a plea of collateral estoppel only three questions are pertinent: (1) Was the issue decided in the prior litigation identical with the issue presented in the action in question; (2) was there a final judgment on the merits; and (3) was the

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rounding this transaction, see Universal Surety Co. v. JED Construction Co., Inc., 200 Neb. at 712-13, 265 N.W.2d at 220-21.

19. 208 Neb. at 608, 305 N.W.2d at 2.

20. *Id.* at 609, 305 N.W.2d at 2. At the trial after both parties had rested, Lilly asked the trial court for a directed verdict on the ground of issue preclusion. The trial court reserved judgment on this motion and found the issue moot after the jury verdict for Lilly. *Id.*

21. *Id.*

22. *Id.* at 609-10, 305 N.W.2d at 2.

23. *Id.* at 610, 305 N.W.2d at 2.

24. *Id.* at 612, 305 N.W.2d at 3-4.

25. 19 Cal. 2d 807, 122 P.2d 892 (1942).

26. *Id.* at —, 122 P.2d at 894.

27. *Id.*

party against whom the plea is asserted a party or in privity with a party to the prior litigation.[28]

The United States Supreme Court, in 1971, in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*,[29] approved of Traynor's analysis in *Bernhard*.[30] The Court found that allowing defensive collateral estoppel helped achieve the goal of limiting relitigation of issues where that can be achieved without compromising fairness in particular cases.[31] The Court in *Blonder-Tongue* also noted that offensive[32] use of collateral estoppel had been invoked in lower court cases but refrained from discussing this aspect of collateral estoppel.[33] However, the process begun in *Blonder-Tongue* culminated in *Parklane Hosiery Co., Inc. v. Shore*,[34] which dispensed with the mutuality requirement in the offensive use of collateral estoppel.

Parklane involved a stockholder class action against a corporation.[35] The plaintiffs alleged that Parklane had issued a materially false and misleading proxy statement in violation of the Securities Exchange Act of 1934.[36] Before this action came to trial the SEC instituted an injunction action against the same defendants in the federal district court, making essentially the same allegations as had the stockholders.[37] The district court found that the proxy

28. *Id.* This decision sparked off considerable debate among legal writers. *Compare* Currie, *Civil Procedure: The Tempest Brews*, 53 CAL. L. REV. 25, 25-26 (1965) *and* Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 281-85 (1957) *and* Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301, 329-30, (1961) *with* Semmell, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457, 1457-59 (1968) *and* Vestal, *Res Judicata/Preclusion: Expansion*, 47 S. CAL. L. REV. 357, 379-81 (1974) *and* Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010, 1012-18 (1967).

29. 402 U.S. 313 (1971).

30. *Id.* at 324-27.

31. *See id.* at 328. Defensive collateral estoppel occurs when a defendant seeks to prevent a plaintiff from asserting a claim, which the plaintiff has previously litigated and lost, against another defendant. Parklane Hoisery Co. v. Shore, 439 U.S. 322, 326 n.4 (1979).

32. Offensive collateral estoppel occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated in an action with another party. Parklane Hoisery Co. v. Shore, 439 U.S. 322, 326 n.4 (1979). For further discussion on the offensive-defensive distinction, see Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 IOWA L. REV. 27, 43-76 (1964); Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010, 1010-14, 1054-55 (1967); 68 COLUM. L. REV. 1590, 1596-98 (1968); 52 CORNELL L.Q. 724, 724-30 (1967).

33. 402 U.S. at 329-30.

34. 439 U.S. 322 (1979).

35. *Id.* at 324.

36. *Id.*

37. *Id.*

statement was materially misleading and false as alleged and entered judgment for the SEC.[38] Thereafter, the plaintiff stockholders in this action moved for a partial summary judgment against the defendants.[39] The stockholders asserted that the defendants were collaterally estopped from relitigating the issues that had been resolved against them in the SEC action.[40] This motion was denied by the district court on the ground that application of collateral estoppel in this situation would violate the defendants' seventh amendment right to a jury trial.[41]

The Court of Appeals for the Second Circuit reversed, and the United States Supreme Court granted certiorari.[42] In affirming the decision of the Second Circuit, the Supreme Court considered two questions: (1) Whether a litigant, who was not a party to a prior judgment, may use that judgment offensively to prevent a defendant from relitigating issues resolved in the earlier proceeding; and (2) whether the use of offensive collateral estoppel would violate the petitioner's seventh amendment right to a jury trial.[43]

In deciding the first issue, the Supreme Court discussed the various reservations concerning the application of offensive collateral estoppel,[44] and concluded that "the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied."[45] The Court stated the general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, for some specific reason, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.[46]

The Court went on to delineate specific instances where application of collateral estoppel would be unfair to a defendant. Some of these instances were: (1) When the party against whom estoppel is urged had insufficient incentive to defend vigorously in the prior action, particularly if future suits are not foreseeable;

38. *Id.* at 324-25. SEC v. Parklane Hoisery Co., 422 F. Supp. 477, 480 (S.D.N.Y. 1976), *aff'd*, 588 F.2d 1083, 1086 (2nd Cir. 1977) (SEC decision).

39. 439 U.S. at 325.

40. *Id.*

41. *Id.*

42. *Id.*

43. *See id.* at 326.

44. *Id.* at 329-31.

45. *Id.* at 331. For a discussion of the ramifications of this discretion, *see* Holland, *Modernizing Res Judicata: Reflections on the Parklane Doctrine*, 55 IND. L.J. 615, 633-44 (1980) [hereinafter cited as Holland].

46. 439 U.S. at 331.

(2) when the judgment relied upon as a basis for the estoppel is cast in doubt by inconsistent determinations on the same issues in other actions; and (3) when the second action affords the defendant procedural opportunities unavailable in the first action that could cause a different result in the second action.[47]

In deciding the seventh amendment issue the Court held that Parklane could be constitutionally deprived of a jury trial on the liability issues previously adjudicated.[48] This was determined by inquiring whether a given claim is sufficiently similar to what was comprehended in the phrase "suits at common law" so as to require the seventh amendment guarantee.[49] The Court, in reaching its conclusion, stated that the seventh amendment was designed to preserve the basic institution of a jury trial in only its most "fundamental elements" and not "the great mass of procedural form and details. . . ."[50]

ANALYSIS

The abolishment of the doctrine of mutuality in federal courts and by Nebraska is a positive step towards refocusing the application of issue preclusion on the identity of issues and the assurance of full and fair litigation. However, such an expansion of the concept of issue preclusion may be denying parties due process guarantees especially when one considers the notice requirements of a class action suit under Federal Rule of Civil Procedure 23(3)(b). This rule requires notice to all parties before they are bound by a class action. The rule further provides that an affirmative act must be taken in order to avoid the binding effect of the rule. The abolishment of privity appears to negate this notice requirement and allows parties to be bound without prior notice. We do not attempt to analyze these aspects of the *Parklane* decision and instead address the question of when collateral estoppel may be asserted against a non-party. Given the *Parklane* decision and its disregard of these factors this seems to be the next logical step.

This problem is commonly presented in the context of common disaster litigation such as mid-air collisions between passenger aircraft or, more recently, the tragic disaster at the Hyatt Regency in Kansas City. Assuming a multiplicity of suits by injured persons or by personal representatives of deceased persons

47. *Id.* at 330-31.
48. *Id.* at 337.
49. *Id.* at 333-39. *See* Holland, *supra* note 45, at 622-33.
50. 439 U.S. at 337 (*quoting* Galloway v. United States, 319 U.S. 372, 390, 392 (1943)).

against several defendants, does a determination in one of those actions that one or more of the defendants are not liable inure to the benefit of those defendants as to the other actions which have been brought so that collateral estoppel or issue preclusion may act as a bar to those claims? Obviously, the question presented is whether collateral estoppel can be asserted against a non-party. Because courts still require that collateral estoppel be asserted against another only if that person is a party or in some way is in privity with that party, the focus of this requirement centers on what constitutes "privity."

There are many illustrations of privity which pose no problem. The Restatement (Second) of Judgments, 1975 Tentative Draft, sets out four categories. These categories encompass persons who: "(1) share a substantial identity of interest with parties to the prior suit; (2) exercised control over the original action; (3) were represented as part of a class; or (4) have a successive interest in the litigated property right."[51] The Nebraska court did not address this issue of privity in *Peterson* and *Lilly*. However, in *Midwest Franchise Corp. v. Wakin*,[52] decided in 1978, the Nebraska Supreme Court held that privity depended upon a relation of parties to the subject matter of the action and implied a relationship by succession or representation between the party to the second action and the party to the prior action in respect to a right which was adjudicated in the first action.[53]

We believe that privity, used in connection with the application of collateral estoppel, should have a sufficiently broad meaning so as to include application against a non-party in situations where a multiplicity of suits against co-defendants is imminent.[54] There are a few existing cases which have attempted to estop non-parties. These cases have based their decisions on an expanded

51. *Cortell, The Expanding Scope of the Res Judicata Bar*, 54 TEX. L. REV. 527, 529-30 (1976) (*citing* RESTATEMENT (SECOND) OF JUDGMENTS §§ 82-85 (Tentative Draft No. 2, 1975)).

52. 201 Neb. 450, 268 N.W.2d 737 (1978).

53. *Id.* at 454, 268 N.W.2d at 740 (*quoting* Schurman v. Pegaw, 136 Neb. 628, 286 N.W.2d 921 (1939)). The court held in this case that, as a general rule, a stockholder is in privity with and represented by a corporation so that he would be bound by a judgment for or against the corporation insofar as it deals with corporate rights and liabilities and affects stockholders as a body, but that he was not bound with respect to individual rights and liabilities or rights and liabilities which are not common to all stockholders. *Id.*

54. For example, a more practical definition of privity was enunciated by Judge Goodrich, concurring in Bruszewski v. United States, 181 F.2d 419, 423 (3rd Cir. 1950). He stated that "[p]rivity states no reason for including or excluding one from the estoppel of a judgment. It is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the res judicata." *Id.*

definition of privity, judicial estoppel (essentially collateral estoppel minus any identification of parties or a person in privity with a party), or by focusing on offending the fundamental fairness guaranteed by due process.[55]

The Eighth Circuit has directly addressed this question in a lucid opinion by Judge Bright. In *Gerrard v. Larsen*,[56] Judge Bright carefully analyzed the concept of privity and concluded that fair and adequate participation in the prior adjudication, or "functional privity," is sufficient to bind a non-party.[57]

Gerrard arose out of a head-on collision between two automobiles.[58] The driver, Driver B, of one of the automobiles was killed.[59] The passenger in the automobile being driven by Driver B brought suit against the driver of the other automobile, Driver A, who had previously pled guilty in state court to a charge of aggravated reckless driving arising out of this accident.[60] The passsenger contended that Driver A's negligence had caused the accident and resultant injuries to himself.[61] Following the filing and service of that complaint, Driver A brought a third party action for contribution against the special administrator of the estate of Driver B, alleging that Driver B's negligence had caused or contributed to the accident.[62] The administrator filed an action denying liability and, in addition, brought a wrongful death counterclaim against the third party plaintiff, Driver A, seeking to recover damages for Driver B's pain and suffering prior to death and for the benefit of his parents by reason of his wrongful death.[63]

At the time of trial the counterclaim was severed for trial purposes; the principal case went ahead, resulting in a judgment for the original plaintiff (passenger) against the defendant and third party plaintiff (Driver A), and further resulting in a judgment in favor of the third party plaintiff (Driver A) against the third party defendant (Driver B) for contribution.[64] Subsequently, the trial court dismissed the third party defendant's counterclaim on the basis that the doctrine of issue preclusion or collateral estoppel

55. Cortell, *The Expanding Scope of the Res Judicata Bar*, 54 TEX. L. REV. 527, 535-37 (1976). For analyses of these cases, see 87 HARV. L. REV. 1485, 1485-1504 (1974).

56. 517 F.2d 1127 (8th Cir. 1975).

57. *See id.* at 1134-35; see note 69 and accompanying text *infra*.

58. 517 F.2d at 1128.

59. *Id.*

60. *Id.*

61. *Id.* at 1128-29.

62. *Id.* at 1129.

63. *Id.*

64. *Id.*

barred that recovery.[65] The issue presented was whether the parents of Driver B, since they were the real parties in interest, were precluded from litigating the issue of the third party plaintiff's negligence.[66]

The Eighth Circuit pointed out that estoppel may be asserted against the decedent's parents on the wrongful death claim only if they were a party or in privity with a party to the prior action.[67] The court concluded that the parents were not parties to that action and, therefore, the question was whether they were in privity with the special administrator of the estate and thus bound by the judgment in the contribution action.[68] It was in the context of "functional privity" that the court found that the parents may be so bound. However, the court found the record was so incomplete as to prevent the court from determining whether the litigation relationship, if any existed, between the parents and the special administrator of the estate should preclude the parents from bringing the wrongful death action and, accordingly, remanded the case to the trial court for a determination on that issue.[69] This idea of "functional privity" assures the same protections that the Supreme Court set out in *Parklane*.

CONCLUSION

It is evident that the concept of privity is being extended by judicial decision in order to obviate the relitigation of issues which, in the opinion of the court, have been fully and fairly litigated. In part this move has been made to help resolve the congestion which our judicial system faces today. Thus, if a court is satisfied that the identical issue has been litigated and fairly and fully so, we can expect the courts to find the necessary nexus to establish that privity which will make the judgment binding on a non-party. The issues we will face in the future will be whether the issue is an identical one and whether it has been fully and fairly litigated. We would expect that defensive use of issue preclusion by a defendant against a non-party arising out of the common disaster type litigation is a step which the courts will take.

65. *Id.*
66. *Id.*
67. *Id.* at 1133.
68. *Id.*
69. *Id.* at 1135.