UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 66 | Number 4 Article 5

4-1-1988

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North Carolina Abandons the Mutuality Requirement for Defensive Collateral Estoppel

The law of collateral estoppel in North Carolina has been in disarray for the past thirty years.[1] The North Carolina Supreme Court's 1986 decision in *Thomas M. McInnis & Associates., Inc. v. Hall*[2] has done much to clarify things, because it states unequivocally for the first time that North Carolina no longer requires a party defensively asserting collateral estoppel to have been a party or a privy to the prior action. In doing away with the mutuality requirement, the decision aligns North Carolina with the majority of jurisdictions in the country.[3] But the case raises as many questions as it answers—questions about the fundamental nature of collateral estoppel—and these portend a new round of litigation.

This Note will sketch the development of the doctrine of collateral estoppel in North Carolina and in other jurisdictions to show both the historical and conceptual background of *McInnis*. It will then discuss how *McInnis* changes North Carolina law, arguing that although the decision clarifies the black-letter law of mutuality, the facts of the case provide an inappropriate vehicle for such clarification. As a result, the decision in *McInnis* threatens to allow defendants to assert collateral estoppel defensively in situations in which the plaintiff has had little or no opportunity to litigate the issue in an earlier action.

McInnis began as an action for breach of contract between plaintiff, Thomas M. McInnis & Associates (McInnis), and Janet and Bobby Hall. The Halls hired McInnis to sell their poultry farm at auction, and McInnis was to earn a commission based on the sale price.[4] McInnis conducted the auction and collected a deposit of $9,750 from the highest bidder for the farm. Because of a dispute between the Halls and the bidder, the sale never closed. In the meantime McInnis retained the deposit it had collected from the bidder at the auction. In December 1980, Bobby Hall filed a lawsuit against McInnis for the amount of the deposit. McInnis counterclaimed against Bobby Hall alone for damages totalling $7,800 for breach of the auction contract.[5] Because it had performed its part of the contract by conducting the auction, McInnis demanded its commission.

At a jury trial, McInnis won on the counterclaim. After the verdict was returned, McInnis requested that the judge award damages based on the amount determined from the contract plus interest calculated from the date of the sale.

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1. Note, *Civil Procedure—Offensive Assertion of a Prior Judgment as Collateral Estoppel—A Sword in the Hands of the Plaintiff?*, 52 N.C.L. REV. 836, 836 (1974); Note, *Civil Procedure—Broadening the Use of Collateral Estoppel—The Requirement of Mutuality of Parties*, 47 N.C.L. REV. 690, 691-92 (1969).

2. 318 N.C. 421, 349 S.E.2d 552 (1986).

3. 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4464 (1981).

4. *McInnis*, 318 N.C. at 423, 349 S.E.2d at 553.

5. *Id.* The action against Bobby Hall was in Richmond Co. Dist. Ct., No. 83CVD281.

The judge refused this request, ruling that the issue was properly one for the jury.[6] Because McInnis had not requested a jury instruction on the issue, it waived any rights to the interest. The judge therefore awarded a judgment including interest accruing from the date of the judgment rather than the date of the sale.[7]

Shortly before Bobby Hall paid the judgment in the case, McInnis instituted an action against Janet Hall (Hall) to recover the prejudgment interest the judge had denied in the first action. Hall assumed that McInnis was attempting to collect the judgment from the first action, and when her husband informed her that he had just paid the judgment, she ignored the summons. Since she failed to respond, the court awarded McInnis a default judgment in July 1983.[8] Hall then moved to set aside the default judgment. This motion required her to show that her failure to answer the complaint constituted "excusable neglect," and also that she had "a meritorious defense."[9] The trial court denied Hall's motion, finding that although her failure to answer was excusable, she did not have a meritorious defense.[10] The court of appeals affirmed.[11]

The North Carolina Supreme Court reversed, agreeing with the lower courts that Hall's neglect was excusable,[12] but holding, contrary to the lower courts, that she had a meritorious defense of collateral estoppel.[13] The court began its analysis of Hall's position by noting three requirements for collateral estoppel:

> For Mrs. Hall to assert a plea of collateral estoppel under North Carolina law as traditionally applied, she would need to show that the earlier suit resulted in a final judgment on the merits, that the issue in question was identical to an issue actually litigated and necessary to the judgment, and that both she and McInnis were either parties to the earlier suit or were in privity with parties.[14]

The court proceeded to analyze Hall's argument, concluding that she met the first two requirements, but not the last.

Concerning the first requirement, the court was succinct: "The prior suit resulted in a judgment on the merits."[15] The second requirement elicited a more detailed analysis. The court noted that the issue of prejudgment interest was identical to that raised by McInnis after the verdict in the first action. Further, McInnis had "actually litigated" the issue in the first action by including in the

6. *McInnis*, 318 N.C. at 423, 349 S.E.2d at 553.

7. *Id.* at 423, 349 S.E.2d at 553-54.

8. *Id.* at 423-24, 349 S.E.2d at 554.

9. *Id.* at 424, 349 S.E.2d at 554. "Excusable neglect" includes, the court said, "what, under all the surrounding circumstances, may be reasonably expected of a party in paying proper attention to his case." *Id.* at 425, 349 S.E.2d at 555.

10. *Id.* at 424, 349 S.E.2d at 554.

11. Thomas M. McInnis & Assocs. v. Hall, 76 N.C. App. 486, 489-90, 333 S.E.2d 544, 546-47 (1985).

12. *McInnis*, 318 N.C at 424-26, 349 S.E.2d at 555. This Note will not discuss the court's analysis of the issue of excusable neglect.

13. *Id.* at 435, 349 S.E.2d at 560.

14. *Id.* at 429, 349 S.E.2d at 557.

15. *Id.*

original pleading a request for interest calculated from the date of sale and arguing the issue to the judge.[16] Not only had McInnis litigated the issue, the court concluded, it had been "actually determined" when the judge declined to grant the interest as requested.[17] The judge's determination was "necessary to the resulting judgment," because the award would have been different if the judge had allowed recovery of the interest.

Although Hall met the first two requirements for collateral estoppel, she did not meet the requirement of privity.[18] But after making that determination, the supreme court reviewed the "modern trend" toward abandonment of the requirement.[19] After reviewing most of the cases, the opinion concluded, "We are presented in the instant case with a proposed defensive use of the doctrine of collateral estoppel, and we see no good reason for continuing to require mutuality of estoppel in cases like this case."[20] With this conclusion, the mutuality requirement made its exit from the North Carolina law of defensive collateral estoppel, and in its place came the much less demanding requirement that the other party have had "a full and fair opportunity to litigate" the issue in the prior action.[21]

The discussion of collateral estoppel must begin with the companion doctrine of res judicata,[22] which provides that a party has only one chance to litigate, through trial and appeal, a cause of action against a defendant.[23] If the plaintiff wins, his cause of action is said to be "merged" in the judgment. If he loses, any further attempt to prosecute the cause of action is "barred."[24] Collateral estoppel is a defense that invokes a "bar" like that in res judicata, but the bar derives from the adjudication of a particular *issue* in a prior action. The Second Restatement of Judgments defines collateral estoppel in this way: "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the

16. *Id.* at 430, 349 S.E.2d at 557.

17. *Id.*

18. It is worth noting that when the supreme court first sketched out the requirements, it stated the third requirement in terms of parties and privities. Then, when it discussed the facts of the case, the court spoke entirely in terms of mutuality, as if the two terms were interchangeable. *McInnis*, 318 N.C. at 429, 432, 349 S.E.2d at 557, 558.

19. *McInnis*, 318 N.C. at 432, 349 S.E.2d at 559.

20. *Id.* at 434, 349 S.E.2d at 560. The court's procedure in reaching this decision is reminiscent of Blonder-Tongue Laboratories v. Univ. of Ill. Found., 402 U.S. 313 (1971). *See infra* note 39. As in the United States Supreme Court case, the parties did not request that the court overturn the mutuality requirement. Hall had argued that she was in privity with her husband, so the mutuality requirement was met. The court justified its ruling under these circumstances by pointing to a passage in Hall's brief "requesting in essence that this Court adopt an expansive application of collateral estoppel." *McInnis*, 318 N.C. at 435, 349 S.E.2d at 560.

21. *Id.*

22. *McInnis*, 318 N.C. at 427, 349 S.E.2d at 556; *see also* Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010, 1012-14 (1967) (exploring the conceptual relationships between res judicata and collateral estoppel).

23. Bernhard v. Bank of America Nat'l Trust & Sav. Assoc., 19 Cal. 2d 807, 810, 122 P.2d 892, 894 (1942).

24. RESTATEMENT (SECOND) OF JUDGMENTS §§ 18, 19 (1980).

same or a different claim."[25]

The language in the Second Restatement that a determination in a prior action is conclusive in a subsequent action between the parties is a recognition that the assertion of collateral estoppel against a nonparty "would deprive the nonparty of his day in court, a violation of due process."[26] An exception has developed, however, for an individual who was a privy to the party in the prior action. A nonparty may be considered in privity with a party if she is a successor in interest to property that was the subject of the prior litigation, if her interests were represented by the party, or if she controlled the prior action despite the fact she was not a party.[27] Because of this connection to the prior action, the privy party's interests were represented. Her due process rights are protected even if she is estopped from subsequently litigating, as a party, an issue determined in the action to which she was not a party.[28]

Closely related to the privity requirement is the requirement of mutuality. The mutuality principle states that a party cannot assert collateral estoppel unless the earlier judgment could have been used against him had the outcome been different. The earlier action must have been equally binding on both parties to the subsequent action.[29] The relation between the mutuality and privity requirements is such that a strict interpretation of privity is in effect a requirement of mutuality. The North Carolina Court of Appeals has recognized this connection,[30] and the North Carolina Supreme Court has enforced mutuality effectively through the privity requirement.[31] In *McInnis* the court substituted the terminology of mutuality for that of privity without so much as a comment.[32]

The requirement of mutuality was for many years a largely unexamined principle.[33] In 1942, however, Justice Roger J. Traynor authored a California

25. *Id.* § 27. The Restatement prefers the terms "claim preclusion" and "issue preclusion" to res judicata and collateral estoppel. The North Carolina Supreme Court took note of this terminological preference but continued to rely on the traditional labels. *McInnis*, 318 N.C. at 428 n.1, 349 S.E.2d at 556 n.1.

26. Note, *supra* note 22, at 1014. "Parties" in the prior action need not have been plaintiff and defendant. A judgment on a crossclaim is res judicata for a subsequent action by one party to the crossclaim against the other. Stansel v. McIntyre, 237 N.C. 148, 154, 74 S.E.2d 345, 350 (1953).

27. Note, *supra* note 22, at 1014. The application of the privity exception is not always as broad as these general rules might suggest. *See, e.g.*, Rabil v. Farris, 213 N.C. 414, 196 S.E. 321 (1938) (privity limited to succession in interest to property rights).

28. The principle is embodied in the Federal Rules of Civil Procedure's provisions for class actions, Rule 23(b)(3). If a member of the class fails to opt out of the action, he is bound by its outcome.

29. Queen City Coach Co. v. Burrell, 241 N.C. 432, 435, 85 S.E.2d 688, 691 (1955). The mutuality and privity requirements are so closely related as to be almost indistinguishable. Professor Semmel indicated as much in his suggestion that the expansion of the concept of privity has "corroded" the mutuality rule. Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457, 1458 (1968).

30. Girard Trust Bank v. Belk, 41 N.C. App. 328, 342, 255 S.E.2d 430, 439, *cert. denied*, 298 N.C. 293, 259 S.E.2d 299 (1979).

31. National Mortgage Corp. v. American Title Ins. Co., 299 N.C. 369, 261 S.E.2d 844 (1980).

32. *McInnis*, 318 N.C. at 329, 332, 349 S.E.2d at 557, 558.

33. The United States Supreme Court, for example, could say in 1911, "It is a principle of general elementary law that the estoppel of a judgment must be mutual." Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 127 (1911). The principle was indeed so elementary

Supreme Court decision, *Bernhard v. Bank of America National Trust & Savings Assoc.*,[34] rejecting mutuality in unmistakable terms. In this case, plaintiff sought to recover money withdrawn from defendant bank by the executor of plaintiff's decedent. In an earlier action against the executor plaintiff along with other parties, attempted to establish that the money belonged to the estate. The court ruled that the money had been given to the executor as a gift. In the subsequent action against the bank, the bank argued that the issue of ownership of the money had been litigated by plaintiff in the earlier action against the executor and that plaintiff therefore should be estopped from relitigating the issue against the bank. The mutuality requirement would have precluded the bank from making this argument because the bank was neither a party nor privy to the earlier action. Justice Traynor disposed of this objection summarily: "No satisfactory rationalization has been advanced for the requirement of mutuality. Just why a party who was not bound by a previous action should be precluded from asserting it as res judicata against a party who was bound by it is difficult to comprehend."[35]

Although Justice Traynor repudiated the mutuality requirement, he did not leave a vacuum in its place. He said that three questions would be "pertinent":

> Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?[36]

If the circumstances satisfy these criteria, a defendant may plead collateral estoppel without infringing on the due process rights of the plaintiff, even in the absence of mutuality.

Bernhard did not have a strong immediate effect.[37] Not until 1971 did the United States Supreme Court adopt its position in *Blonder-Tongue Laboratories Inc. v. University of Illinois Foundation*.[38] Plaintiff earlier had brought a patent infringement action and ended up not only losing, but having its own patent declared invalid. In *Blonder-Tongue* the Court held defendant, who was not a party to the earlier action, to have a valid defense of collateral estoppel.[39] The

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that Justice Lurton deemed further comment unnecessary. Even though the principle had been unexamined by the courts, it had been under attack for over a century, most notably by Jeremy Bentham, in a passage more recent courts are fond of quoting. Mutuality was, he wrote, "a maxim which one would suppose to have found its way from the gaming-table to the bench." J. BENTHAM, *Rationale of Judicial Evidence*, in 7 WORKS OF JEREMY BENTHAM 171 (J. Bowing ed. 1843). Bentham is quoted not only in *McInnis*, 318 N.C. at 432-33, 349 S.E.2d at 559, but by the United States Supreme Court in Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 322-23 (1971). The mutuality requirement has not, however, been without its defenders. *See, e.g.*, Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301 (1961); Semmel, *supra* note 29.

34. 19 Cal. 2d 807, 122 P.2d 892 (1942).

35. *Id.* at 812, 122 P.2d at 895.

36. *Id.*

37. *See* Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25, 27 (1965).

38. 402 U.S. 313 (1971).

39. *Id.* at 350. Defendant did not in fact litigate the issue of collateral estoppel or even raise the issue on appeal. The Court went to great lengths to encourage the parties to argue the issue, but neither party would press for abandonment of the mutuality requirement. Since the Court could not

Court's opinion explored the mutuality requirement only with respect to patent cases and indicated that its holding was meant to apply to patent cases alone,[40] but the case soon came to stand for a broad rejection of mutuality for defensive collateral estoppel.[41] The federal courts now unequivocally reject the mutuality requirement, and "a continually increasing majority of state courts" are doing the same.[42] A student commentator has predicted that "the requirement inevitably will become the 'dead letter' that one court already has labelled it."[43]

The abrogation of the mutuality requirement has forced courts to determine whether a plaintiff has had a full and fair opportunity to litigate an issue. Such a determination provides "a most significant safeguard," in the words of the *Blonder-Tongue* Court, of the fairness of applying nonmutual estoppel.[44] *Blonder-Tongue* indicates several relevant factors,[45] and the United States Court of Appeals for the Seventh Circuit has organized them into a five-part test.[46] The elements of the test are (1) who chose the forum,[47] (2) whether the party against whom the estoppel is asserted had an incentive to litigate vigorously in the prior action,[48] (3) whether the subject matter of the prior case was so arcane and difficult that the court failed to understand it,[49] (4) whether the party "was deprived of crucial evidence or witnesses in the prior case,"[50] and (5) whether "the trial court's sense of justice and equity" is satisfied.[51]

Since *Blonder-Tongue* the Supreme Court has gone further and cautiously relaxed the mutuality requirement for offensive uses of collateral estoppel. In

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address the mutuality issue if it had not been raised by the parties, it finally inveigled the counsel for *Blonder-Tongue* at oral argument to agree it might have reason to reconsider the mutuality requirement "in a case such as this." *Id.* at 319. This was enough for the Court, and it considered that it had been asked by counsel to address the issue. *Id.* at 319-20.

40. *Id.* at 327.

41. 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 3, at § 4464.

42. 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 3, at § 4464. Not everyone, however, agrees on the state of the scorecard. In 1980 commentators said "[s]ome doubt remains as to whether the *[Bernhard]* rationale is accepted in a majority of states. There is no question, however, that a substantial minority still clings to the mutuality requirement." Callen & Kadue, *To Bury Mutuality, Not to Praise It: An Analysis of Collateral Estoppel After* Parklane Hosiery Co. v. Shore, 31 HASTINGS L.J. 755, 757 (1980).

43. Note, *Collateral Estoppel Without Mutuality: Accepting the* Bernhard *Doctrine*, 35 VAND. L. REV. 1423, 1424 (1982) (quoting B. R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 147, 225 N.E.2d 195, 198, 278 N.Y.S.2d 596, 601 (1967)).

44. *Blonder-Tongue*, 402 U.S. at 329.

45. *Id.* at 333-34.

46. Miller Brewing Co. v. Joseph Schlitz Brewing Co., 605 F.2d 990, 992-95 (7th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980). *Miller Brewing* involved a claim by Miller that Schlitz was infringing its rights to the trademark, LITE. After initiating the action, Miller sought a preliminary injunction against Heileman Brewing Company for the same alleged infringement. When the court refused to allow the injunction against Heileman, holding that Miller could not claim trademark rights to the word "light" based on its LITE trademark, Schlitz asserted the judgment in estoppel against Miller. Under the circumstances, it was clear that Miller had controlled the litigation and had had a full opportunity to present its case. Thus, the court's sense of justice and equity was easily satisfied.

47. *Id.* at 992-93.

48. *Id.* at 993.

49. *Id.* at 993-94.

50. *Id.* at 994-95.

51. *Id.* at 995 (quoting *Blonder-Tongue*, 402 U.S. at 334).

the leading case, *Parklane Hosiery Co. v. Shore*,[52] the Court allowed plaintiff in a shareholder derivative suit to estop defendant from relitigating an issue that had been decided against it in an earlier action brought by the Securities Exchange Commission. The offensive use of collateral estoppel by a party who was not involved in an earlier action has troubling implications,[53] and the Court has carefully hedged the circumstances in which parties may invoke the tactic.[54]

In North Carolina the state of the law of collateral estoppel has been unclear because of a combination of contradictory holdings by the supreme court. The prevailing approach has been to require mutuality, and the court's rhetoric has consistently affirmed the mutuality requirement. But a small handful of decisions forecasts the court's developing inclination to abandon mutuality, and if these holdings can constitute a "tradition" of some sort, it never has been reconciled with the dominant line of decisions.

The North Carolina Supreme Court long ago adopted the mutuality requirement for collateral estoppel.[55] The court has in fact applied the principle with remarkable rigor. In *Rabil v. Farris*[56] a father brought an action as next friend for personal injuries to his daughter arising out of an auto accident. He failed to establish defendant's negligence in the first action, but proceeded to file another action on his own behalf for medical expenses and loss of his daughter's services. Because the issues of negligence were the same in both actions, defendant attempted to raise a collateral estoppel defense. He succeeded at the trial level, but the supreme court held that the father had been neither a party[57] nor privy in the first action because he had no relation to the property rights at issue there. No privity to the earlier action meant no mutuality, so the court held that collateral estoppel was unavailable.[58]

Despite the court's sometimes rigid adherence to the mutuality requirement, the cases recognize two limited exceptions. The first is mechanical: if an individual controls the litigation in a prior case, she can be considered bound by the outcome of that case for purposes of mutuality even if she was not technically a party or privy.[59] The second exception is based on status: if a plaintiff fails to establish a claim against an employee, the judgment in that action will bar a subsequent action against the employer, assuming that the action against

52. 439 U.S. 322 (1979).

53. In *Parklane Hosiery* an additional complication was that the estoppel worked to deny defendant a jury trial to which he would have been entitled had the second case been tried first. *Id.* at 333-37.

54. "[I]n cases where a plaintiff could easily have joined in the earlier action or where . . . the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel." *Parklane Hosiery*, 439 U.S. at 331.

55. Queen City Coach Co. v. Burrell, 241 N.C. 432, 85 S.E.2d 688 (1955); Rabil v. Farris, 213 N.C. 414, 196 S.E. 321 (1938); Leroy v. Pasquotank & N. River Steamboat Co., 165 N.C. 109, 80 S.E. 984 (1914).

56. 213 N.C. 414, 196 S.E. 321 (1938).

57. *Id.* at 415-16, 196 S.E. at 322 (since he acted as next friend to his daughter).

58. *Id.* at 416, 196 S.E. at 322. Justice Barnhill dissented from the court's narrow conception of privity. *Id.* at 417-19, 196 S.E. at 322-24 (Barnhill, J., dissenting).

59. Smoky Mountain Enters., Inc. v. Rose, 283 N.C. 373, 377-78, 196 S.E.2d 189, 192 (1973).

the employer is founded on the doctrine of *respondeat superior*.[60]

Even as the court was imposing the mutuality requirement[61] and recognizing two narrow exceptions,[62] it handed down two decisions that, standing by themselves, could be interpreted as a wholesale rejection of mutuality. The most important for the law of defensive collateral estoppel is *Crosland-Cullen Co. v. Crosland*,[63] an action by an employer to recover an insurance payment made to the wife of the deceased. In an earlier action, the employer made a claim for payment against the insurance company and argued that an assignment of the policy by the deceased to his wife was invalid. The employer lost the first action, but then sued the wife, hoping to relitigate the validity of the assignment. The supreme court went through the formality of reasserting North Carolina's adherence to the mutuality requirement, but added that "[these] rules are subject to exception."[64] The *Crosland-Cullen* exception, the court wrote, was based on "public policy,"[65] and the court cited *Bernhard* in support of its holding. What is remarkable about *Crosland-Cullen* is that any public policy explanation for the holding is almost necessarily a rationale for abandoning mutuality altogether, and the citation of *Bernhard* reinforces this impression. There is nothing special about the relation between the wife of the deceased and the insurance company that would justify merely a limited exception to the mutuality requirement.[66]

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60. Taylor v. Denton Hatchery, Inc., 251 N.C. 689, 691, 111 S.E.2d 864, 865-66 (1960). The court noted two possible policy explanations for this special rule. The rule might be explained by an assumption that the employer and employee are in privity. Leary v. Virginia-Carolina Joint Stock Land Bank, 215 N.C. 501, 506, 2 S.E.2d 570, 573 (1939). But the court found "other authorities . . . [who] hold that in such cases the technical rule is, upon grounds of public policy, expanded so as to embrace within the estoppel of a judgment persons who are not, strictly speaking, either parties or privies." *Id.* In *Taylor* the court held that the proper explanation for the rule is the latter, an abrogation of mutuality, rather than the expansion of privity. *Taylor*, 251 N.C. at 692, 111 S.E.2d at 866. This small distinction in policy explanations is worth noting because it shows that the court was capable of contemplating public policy reasons for abandoning mutuality—even if the public policy aims were not articulated—at the very time it was insisting, without any discussion, that mutuality was the law.

61. *See supra* text accompanying notes 55-58.

62. *See supra* text accompanying notes 59-60.

63. 249 N.C. 167, 105 S.E.2d 655 (1958).

64. *Id.* at 169-70, 105 S.E.2d at 656 (quoting Carolina Power & Light Co. v. Merrimack Mut. Fire Ins. Co., 238 N.C. 679, 691, 79 S.E.2d 167, 175 (1953)).

65. *Id.* at 170, 105 S.E.2d at 657.

66. *See* Note, *Civil Procedure—Broadening the Use of Collateral Estoppel—The Requirement of Mutuality of Parties*, 47 N.C.L. REV. 690, 695-96 (1969) ("*Crosland* is virtually the same case as *Bernhard* . . . .").

Fifteen years later the North Carolina Court of Appeals applied the "exception" established in *Crosland-Cullen*, and again the holding was an effective abandonment of the mutuality requirement even though the court's rhetoric indicated differently. In Gillispie v. Thomasville Coca-Cola Bottling Co., 17 N.C. App. 545, 195 S.E.2d 45, *cert. denied*, 283 N.C. 393, 196 S.E.2d 275 (1973), plaintiff first sued a grocer for injuries sustained as a result of a soda bottle explosion. After the grocer won a jury verdict, plaintiff brought suit against the bottling company, alleging breach of warranty. The court allowed the bottling company to plead collateral estoppel, because the issues in the two cases were identical. *Id.* at 549, 195 S.E.2d at 48. The court could have allowed the collateral estoppel claim under another theory. The defendant grocer in the first case had impleaded the bottling company and filed a cross-claim for indemnification. *Id.* at 546, 195 S.E.2d at 46. As a result, the bottler could have been understood to be a privy to the first action and therefore entitled to assert collateral estoppel. But instead the court chose to ground its holding on the *Crosland-Cullen* "exception" to the mutuality requirement. What moved the court was not the relation be-

The second supreme court case that seemingly overturned mutuality was the most radical, arguably negating the requirement when collateral estoppel is asserted offensively. *King v. Grindstaff*[67] was a wrongful death action brought by the administrator of the estates of a husband and wife killed in an automobile accident. Plaintiff argued that defendant should be estopped from defending the issue of his negligence, since he had lost on that issue in an earlier case brought by the daughters of the deceased for their permanent injuries, pain and suffering, and medical expenses.[68] The court decided that, although the administrator brought the action in the second case, the parties in the two cases were identical because the daughters would be the beneficiaries of the administrator's action.[69]

A student commentator has argued that the *King* court's holding that the beneficiaries were the real parties in interest was wrong, and that in fact the identity of parties requirement was not met.[70] The author noted, "because the requirement of the traditional identity of parties rule was not met, it appears that *King* created another ad hoc exception to the mutuality-identity rule by allowing a non-party to the prior action to assert the prior action offensively as collateral estoppel."[71] This proposition is certainly debatable, because the case could be understood to say more about the law of real parties in interest than about mutuality. Nevertheless, it seems clear that the court went to great lengths to find an argument for identity of parties because of its appreciation for the policy concerns that prompted the decisions in *Crosland-Cullen*, *Blonder-Tongue*, *Parklane Hosiery*, *Bernhard*, and now, *McInnis*.

The *McInnis* holding not only brings North Carolina law into line with the federal courts and the majority of state courts, but clarifies the black-letter law in this state regarding the requirement of mutuality as well. Litigants examining prior decisions faced a consistent rhetoric paying homage to the mutuality requirement, but also a series of holdings hinting that mutuality could be passed over in circumstances left largely undefined. But *McInnis* has further implications not so quickly appreciated. First, it reaffirms an established tradition that a judgment of a court will have estoppel effect even if it is in error. Second, it establishes what the North Carolina courts will consider to be a party's full and fair opportunity to litigate in a prior action. Last, and most significantly, the decision implicitly rejects a well-established tradition in North Carolina concerning what constitutes a judgment on the merits.

The judge in McInnis's action against Bobby Hall ruled that the calculation of interest on a judgment was properly a jury issue. This ruling was the basis for the judge's refusal to rule at all on how the interest would be calculated. The

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tween the defendant parties in the two cases but the identity of issues litigated. This approach is the *Bernhard* approach, and its policy implications clearly call for the abandonment of the mutuality requirement, not merely its circumscription for limited cases.

67. 284 N.C. 348, 200 S.E.2d 799 (1973).

68. Sharpe v. Grindstaff, 329 F.Supp. 405 (M.D.N.C. 1970), *rev'd sub nom.* Sharpe v. Bradley Lumber Co., 446 F.2d 152 (4th Cir. 1971), *cert. denied*, 405 U.S. 919 (1972).

69. 284 N.C. at 357, 200 S.E.2d at 806.

70. Note, *Civil Procedure—Offensive Assertion of a Prior Judgment as Collateral Estoppel—A Sword in the Hands of the Plaintiff?*, 52 N.C.L. REV. 836 (1974).

71. *Id.* at 848-49.

supreme court said in *McInnis*, "In fact, the judge in the earlier action erred."[72] Not only is interest properly calculated from the date of a breach, but the issue is one for the court, not the jury, to determine. The court stated further: "Nevertheless, the fact that a prior judgment was based on an erroneous determination of law or fact does not as a general rule prevent its use for purposes of collateral estoppel."[73] McInnis's proper response to the judge's error was to appeal the judgment, not to bring an action against another party on the same issue.[74]

McInnis also forecasts how the court will apply the requirement that a party against whom collateral estoppel is asserted has had a full and fair opportunity to litigate in the prior action. The full opportunity to litigate is the requirement that essentially replaces mutuality,[75] so the breadth of the court's understanding of its meaning is central to the new law developed in this case. At first glance, the requirement of an opportunity to litigate seems almost meaningless if the first *McInnis* case fulfills it. Since the judge refused not merely to award the judgment McInnis requested but even to rule on his motion, one wonders whether McInnis had any opportunity at all to litigate the issue. On the other hand, a strict application of the test developed in cases in other jurisdictions would have produced the result at which the *McInnis* court arrives.

The United States Court of Appeals for the Seventh Circuit in *Miller Brewing Co. v. Joseph Schlitz Brewing Co.*[76] read *Blonder-Tongue* as proposing a five-part test to determine whether a party had a full and fair opportunity to litigate.[77] According to the *Miller Brewing* test, the court should ask first who chose the forum in the first case. If the party against whom the estoppel is being asserted chose the forum, that fact will weigh in favor of a finding that the party had a full opportunity to litigate.[78] In *McInnis* plaintiff chose the forum in its action against Bobby Hall. Second, the court should ask whether the party had incentive to litigate in the first action. If the stakes were trivial in the first action, the party might have had little incentive and so may not be required retrospectively to have proceeded with greater energy than she reasonably thought was warranted at the time.[79] McInnis had every incentive to litigate the issues

72. 318 N.C. at 431, 349 S.E.2d at 558.

73. *Id.*

74. This principle is well established in North Carolina law. Karros v. Triantis, 263 N.C. 79, 138 S.E.2d 795 (1964); *In re* Steele, 220 N.C. 685, 18 S.E.2d 132, *cert. denied sub nom.* Steele v. North Carolina, 316 U.S. 686 (1942); Cameron v. McDonald, 216 N.C. 712, 6 S.E.2d 497 (1940); North Carolina R.R. Co. v. Story, 187 N.C. 184, 121 S.E.2d 433 (1924), *cert. denied*, 264 U.S. 579, *rev'd on other grounds*, 268 U.S. 288 (1925).

75. Miller Brewing Co. v. Joseph Schlitz Brewing Co., 605 F.2d 990, 992 (7th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980).

76. 605 F.2d 990 (7th Cir. 1979).

77. *Id.* at 992.

78. *Id.* at 992-93.

79. *Id.* at 993. In Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966), a case involving an offensive assertion of collateral estoppel, defendant had lost in an earlier action, but the judgment had been comparatively small. *Berner*, 346 F.2d at 539 (quoting Halmos v. British Commonwealth Pacific Airlines, Ltd., No. 34123 (N.D. Cal. Mar. 9, 1954)). The court noted that if defendant had sought a new trial, "it had to weigh victory against a much larger judgment." *Id.* Given defendant's incentive *not* to litigate the earlier action through the full appeals process, he could not be held to have had a full and fair opportunity to litigate. *Id.*

against Bobby Hall in the first case, and the decision gives no indication that McInnis proceeded with anything less than its full energy to make its case.

Third, the court should ask whether the court in the first case grasped the technical subject matter. This question does not put in issue whether the court reached the correct result. The test derives from *Blonder-Tongue*, a patent case, and will only present a real issue "when a court is faced with esoteric and complex subject matter beyond its experience and comprehension."[80] *McInnis* presented no such problem to the court. Fourth, the court should ask whether the party was deprived of crucial evidence or witnesses in the prior case.[81] McInnis apparently suffered no such deprivation in its first action.

Last, the *Miller Brewing* court suggested rather vaguely that the court must use its "sense of justice and equity" to determine whether the issue was fully litigated.[82] Did McInnis have an opportunity to litigate when the judge essentially refused to listen to its argument? That the supreme court held that McInnis had a full opportunity to litigate in spite of the clear problem with the equities suggests that the court will impose a fairly mechanical test on this issue, giving little play to considerations of equity. If this is so, the *McInnis* result is comparatively extreme. Whereas the landmark cases emphasized the importance of the court's sense of the equities, which they could easily do, since the equities in those cases presented no problems, *McInnis* includes no cautionary language addressed to the lower courts that will be asked to apply the new law. The court hardly could be cautionary, as its decision on this issue was not particularly cautious. The result is that the North Carolina courts have little guidance on the limits of the new law.

McInnis is most significant, however, for its determination of what constitutes a judgment on the merits in a prior action. The majority opinion addressed this issue in a single sentence, which merely asserted that "the prior suit resulted in a judgment on the merits."[83] In what the court *said*, it gave no clue as to how it understood the requirement of a judgment on the merits. But in what it *held*, the decision may have overruled a long line of cases defining what constitutes a judgment on the merits.

When the court ruled that the earlier action had been decided on the merits, it could not have meant that the action as a whole for contract damages was decided on the merits. Since the issue in the second *McInnis* was collateral estoppel, the court was not concerned with the earlier case as a whole, but rather the specific issue in common between the two cases. The ruling must have been that the issue of prejudgment interest was decided on the merits.

In a concurring opinion, Chief Justice Billings argued that the trial court made no judgment on the merits in the first action. Her argument concentrated on the judge's ruling that McInnis had waived the issue of prejudgment interest

80. *Miller Brewing*, 605 F.2d at 993.

81. *Id.* at 994-95.

82. *Id.* at 995 (citing *Blonder-Tongue*, 402 U.S. at 334).

83. *McInnis*, 318 N.C. at 429, 349 S.E.2d at 557.

by failing to request a jury instruction.[84] Reviewing the trial judge's findings of fact, Justice Billings stated:

> Neither he nor the jury determined that McInnis was not entitled under its contract to prejudgment interest; the judge determined that as against Mr. Hall in the action McInnis had waived its right to recover the interest by not requesting that an issue regarding prejudgment interest be submitted to the jury. . . . Because the waiver applied only to the conduct of the action against Mr. Hall, it was not a determination that McInnis could not recover the interest against other obligors on the contract.[85]

Billings cited no North Carolina cases, but quoted from a Hawaii case considering the precise issue: " 'A judgment is not res judicata as to issues raised in a previous case which were . . . matters which a court expressly refused to determine.' "[86]

Although no North Carolina cases before *McInnis* decided whether an issue was decided on the merits when the judge declined to make any determination, many North Carolina cases have defined when a judgment is said to be on the merits. The leading case, more important for its dicta than for its holding, is *Hayes v. Ricard*.[87] The supreme court declared, " 'A judgment on the merits is said to be one which is based on legal rights as distinguished from mere matters of practice, procedure, jurisdiction, or form, or is a judgment that determines, on an issue either of law or fact, which party is right.' "[88]

The issue in *McInnis*, then, is whether the judge's refusal to determine McInnis's right to prejudgment interest was a matter of procedure, or a judgment determining which party was right. The question answers itself. The judge refused to decide which party was right, that is, whether McInnis had the right to the interest or whether Bobby Hall had the right to retain that amount. The judge's determination was entirely a matter of form: McInnis had failed to act at the proper time, therefore it had forfeited its right to any ruling on his motion. The principle set out in *Hayes* and many subsequent cases indicates that the issue of prejudgment interest in the first action was not decided on the merits.

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84. *Id.* at 439, 349 S.E.2d at 563 (Billings J., concurring) (Justice Meyer joined in this concurring opinion).

85. *Id.* at 438, 349 S.E.2d at 562 (Billings J., concurring).

86. *Id.* at 439, 349 S.E.2d at 563 (Billings J., concurring) (quoting Solarana v. Industrial Elec., Inc., 50 Haw. 22, 28, 428 P.2d 411, 416 (1967)).

87. 251 N.C. 485, 112 S.E.2d 123 (1960) (holding that a judgment of nonsuit in earlier case, in which plaintiffs used an opportunity to present evidence, was a judgment on the merits).

88. *Id.* at 491, 112 S.E.2d at 127 (quoting 30A AM. JUR. Judgments § 348 (1958)). The revised edition of American Jurisprudence now cites *Hayes* in support of the proposition that a judgment on the merits is one that "determines which party is right as to the cause of action in dispute." 46 AM. JUR. 2D *Judgments* § 478 (1969); *see also* Beam v. Almond, 271 N.C. 509, 157 S.E.2d 215 (1967) (dismissal of prior action for failure to join necessary parties not a judgment on the merits); Moore v. WOOW, Inc., 250 N.C. 695, 110 S.E.2d 311 (1959) (denial of motion to set aside default judgment because of failure to allege a meritorious defense is not a judgment on the merits because it is based on a technical defect and not on the merits); McDevitt v. Chandler, 241 N.C. 677, 86 S.E.2d 438 (1955) (ruling that plaintiffs had failed to produce evidence sufficient to sustain cause of action was not judgment on the merits); Kirby v. Kirby, 26 N.C. App. 322, 215 S.E.2d 798 (1975) (dismissal of action for support under Uniform Reciprocal Enforcement of Support Act for procedural reasons is not a judgment on the merits).

For some reason not articulated in the opinion, the *McInnis* court decided otherwise.

The court's decision may be explained in two ways. The first possibility is that the court meant to do what it did and that the meaning of a decision on the merits is changing. If this explanation is correct, the court is setting a very high value on judicial economy, allowing a plaintiff to be estopped from litigating under circumstances when prior law would have permitted him to go forward. Judicial economy would thus be valorized to the detriment of a party's due process access to the courts.

The second explanation for the court's apparent undermining of the *Hayes* principle is that it intended its ruling to have no effect on the application of that principle, and that it proceeded as it did because it was eager to take advantage of an opportunity to abandon mutuality. This explanation does not mean, however, that the state did not realize the significance of its ruling, because Chief Justice Billings' criticism brought the issue into sharp focus. Given Justice Billings' opinion, the majority's disposal of the "merits" question in a single conclusory sentence leaves the reader with little more than speculations. Did the majority believe Billings to be so wrongheaded in her objection that she was undeserving of a response? Or did the court, in its eagerness to abandon mutuality, refuse to open a question that would so seriously have interfered with its intention?

These questions open a realm of speculation, but it is relevant to consider whether the court had any other option open to it, assuming it wanted to find for Mrs. Hall. Absent another option, it may have opted for overturning the mutuality requirement in order to achieve what it believed to be a just result. If another option existed, however, then one may assume the court acted with greater deliberation, abandoning mutuality in this case rather than another because the facts here were appropriate for establishing the new law of collateral estoppel in the state.

Justice Billings pointed to such an alternative option when she argued Hall had a meritorious defense under existing law. She noted the basis of the action against Hall was the breach of contract, and that Bobby Hall had satisfied a judgment on that action. Justice Billings continued:

> The general rule in this country is that, although res judicata does not prevent the prosecution of separate actions and the obtaining of separate judgments against persons jointly and severally liable on the same obligation, the satisfaction of a judgment against one such obligor satisfies all debts or judgments based upon the joint and several obligation, even if the judgments are for different amounts.[89]

Justice Billings concluded that Bobby Hall's satisfaction of the judgment in the first action constituted "a defense to an action against Mrs. Hall upon the same obligation."[90] The supreme court had another option if it wanted to find

89. *McInnis*, 318 N.C. at 440, 349 S.E.2d at 563 (Billings J., concurring).

90. *Id.* (Billings J., concurring). Billings cited no North Carolina cases in support of her argument, and indeed she had reason to look elsewhere, because when the supreme court considered just

in favor of Hall.[91] The court could have introduced an exception to the mutuality requirement allowing an obligor on a joint and several contract to plead a prior judgment on the contract as collateral estoppel. Although this is not a generally recognized exception, the Missouri Court of Appeals argued powerfully for it in a 1908 case, *Taylor v. Sartorious*.[92] The court found that defendant could not properly plead collateral estoppel, since she was not a party to the earlier action, and she did not fall into any of the established exceptions.[93] However, the court went on to add an exception for this kind of case. The court's concern was not so much for this particular defendant as for the defendants who prevailed in the earlier action. If the later case was allowed to go forward, and if defendant was found liable, she would have been entitled to seek contribution from the other obligors:

> If respondent recovers from appellant, the latter might recover contribution from her co-signers, thereby nullifying the verdict given in their favor in respondent's suit against them. We are of the opinion that the statutes making contracts joint and several were not intended to cause such a result. . . . It was not the purpose [of the statutes] to give the promisee as many trials of an issue going to the merits of liability on the obligation as there are promisors, while denying the latter the benefit of verdicts given for them, unless every possible verdict on the contract is in their favor.[94]

The North Carolina Supreme Court might have applied the *Taylor* limited ex-

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this issue shortly after the Civil War, it held that a prior judgment for only part of a claim does not preclude a subsequent action against another liable party for the remainder. In *Hix v. Davis*, 68 N.C. 231 (1873), plaintiff sued on a note signed by defendant. Defendant answered that plaintiff had already sued in South Carolina on the same note, had received a judgment, and it had been satisfied. *Id.* at 231. The court noted, however, that it was the custom in South Carolina at the time to award judgment for only half the amount of a debt. *Id.* at 231-32. The court said,

> We think his Honor erred in not taking the distinction between the satisfaction of the judgment and the satisfaction of the debt. Here the judgment was satisfied; but the one half of the debt excluded by the judgment was not satisfied, and as to that there was no bar to the plaintiff's right of action . . . .

Id. at 234. Like *Hix*, McInnis claimed that the judgment it received against Bobby Hall, and which Bobby Hall satisfied, was not for the entire amount of the debt. There remained the prejudgment interest, to which the court agreed McInnis was entitled. *McInnis*, 318 N.C. at 431, 349 S.E.2d at 558. Because just this amount of the debt remained unsatisfied, McInnis would not be barred from an action against Hall under the *Hix* principle. On this analysis, the majority in *McInnis* could not have taken the alternative course proposed by Billings unless it was prepared to overrule *Hix*.

91. It is unclear, however, why the court would have any inclination to find for Hall, since it agreed with McInnis that it was entitled to the interest sought.

92. 130 Mo. App. 23, 108 S.W. 1089 (1908). In this case the action was against a joint and several obligor on a contract, and the plaintiff had already proceeded against the other obligors unsuccessfully. The trial court had excluded evidence of the earlier proceeding because of the rule that a plaintiff's action against one joint and several obligor does not bar an action against the other. *Id.* at 37-38, 108 S.W. at 1093.

93. *Id.*

94. *Id.* at 38-39, 108 S.W. at 1094. The court added that the exception it created could only be used defensively:

> It would not, of course, be contended that a judgment in favor of respondent and against one of the signers of the power of attorney would be conclusive against the other signers. The reason is that the other signers would have had no opportunity to present their case; would not have had their day in court and a chance to examine and cross-examine the witnesses, or appeal.

Id. at 39, 108 S.W. at 1094.

ception to *McInnis*. If, as the *McInnis* court said, Bobby Hall had already won on the issue of prejudgment interest, he should not have been subjected to a possible action for contribution by his wife if she lost.

This theory would have allowed the supreme court to reach the result it did without using the *McInnis* case to establish an important change in the law of collateral estoppel. The availability of a less drastic method of reaching a decision in favor of Hall may indicate that the court was comfortable with the implications of the decision on the facts of the case. If so, the law of collateral estoppel in North Carolina has gone from being relatively restrictive—requiring mutuality—to being extremely broad in potential application. Even if a prior action has been decided on narrowly technical grounds, it may serve as the basis for a collateral estoppel defense. In addition, lower courts are not encouraged to be cautious in their consideration of the defense when it is asserted by someone not a party or privy to the earlier action. If the defense satisfies technical requirements, the lower courts will have to allow it unless they adopt their own cautionary guidelines.[95]

The irresistible question is whether the supreme court meant to establish the North Carolina law of collateral estoppel on the principles *McInnis* suggests. If it did intend such an extreme result, one must question the fairness of a principle that assumes a party received due process rights to adjudication when a judge refused to rule on the issue. This result not only conflicts with prior North Carolina law,[96] but it conflicts with any reasonable sense of justice as well.

Aside from the implications of the decision for the law of collateral estoppel, the decision is puzzling because it exacted a price from the plaintiff when the court seemed to agree McInnis was right on the merits. The effect of the decision was to deny McInnis any recourse, since the time limit for filing a notice of appeal in the action against Bobby Hall had elapsed.[97] This result was not necessary even if the court wanted to abandon the mutuality requirement for collateral estoppel. The ruling on mutuality could have been made only prospectively, allowing McInnis to continue as it reasonably expected under established principles of law. Surveying the cases on nonmutual collateral estoppel, Wright, Miller, and Cooper noted that a "special concern . . . arises when preclusion rests on litigation that occurred before a particular jurisdiction abandoned mutuality."[98]

This concern entered into the United States Court of Appeals for the Seventh Circuit's decision in *Grantham v. McGraw-Edison Co.*,[99] a patent infringement suit in which defendants argued that a judge's dismissal of an earlier action involving the same issue entitled them to a nonmutual collateral estoppel defense

95. *See supra* notes 78-83 and accompanying text.

96. *See supra* notes 87-88 and accompanying text.

97. N.C. R. APP. P. 3(c).

98. C. WRIGHT, A. MILLER & E. COOPER, *supra* note 3, § 4465. The authors noted, "Most decisions seem regrettably insensitive to this particular problem," though "[o]ther courts have laudably shown a greater sensitivity." *Id.*

99. 444 F.2d 210 (7th Cir. 1971).

based on *Blonder-Tongue*.[100] The court held that the judge in the earlier action had "made a clear error of law" in dismissing the case and that plaintiffs should not be expected to have foreseen the change in law effected by *Blonder-Tongue*:

> Had the Granthams been aware of the impending partial abrogation of the mutuality requirement and the possibility that the judgment adverse to them in the earlier litigation might be asserted against them by other alleged infringers not parties to that action, they would undoubtedly have been more diligent in prosecuting their appeal from that judgment.[101]

Similarly in *McInnis*, if plaintiff had foreseen the change the supreme court worked on the law in this case, McInnis probably would have appealed the judge's order in the first case rather than instituting a new action against Hall. Because the supreme court recognized that McInnis was correct, a proper sensitivity to the situation should have led the court to deny Hall's defense, laying down the new rule of nonmutual collateral estoppel for future cases only.

The supreme court's eagerness to abandon the mutuality requirement for defensive collateral estoppel is understandable. When the party against whom the estoppel is asserted has had a full and fair opportunity to litigate an issue and it has been decided on the merits in one action, that party's rights are not infringed by the estoppel. On the other side, moreover, the defendant is protected from litigation of issues already decided. Finally, the change in the law is in the interests of judicial economy. When a principle can serve judicial economy while at the same time protecting the rights of all parties, the principle is much to be desired.

It is not clear, however, that the principle of nonmutual collateral estoppel as established in North Carolina under *McInnis* protects the rights of plaintiffs. Aside from the particular injustice worked against McInnis in this case, the decision sets a precedent for the assertion of defensive collateral estoppel when a party has not had the access to the courts guaranteed by her rights to due process. In all likelihood, the supreme court did not intend such an extreme result, but in bringing all the advantages of nonmutual defensive collateral estoppel to North Carolina, the court also succeeded in raising questions about fairness and due process it should have resolved as well.

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100. *Id.* at 216. For a discussion of *Blonder-Tongue*, see *supra* notes 38-51 and accompanying text.

101. *Grantham*, 444 F. 2d at 217; *see also* Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965) (attempted offensive use of nonmutual collateral estoppel shortly after law of jurisdiction had changed), *cert. denied*, 382 U.S. 983 (1966).