AFFIRMATIVE DEFENSES:

RES JUDICATA AND COLLATERAL ESTOPPEL

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I. INTRODUCTION

"Res judicata" -- literally "a thing decided" -- and its companion, "collateral estoppel," are rooted in public policy favoring stability of judgments. See Thomas M. McInnis & Assoc., Inc. v. Hall, 318 N.C. 421, 427, 349 S.E.2d 552, 556 (1986) (McInnis) That policy not only protects the legal system from waste of limited judicial resources caused by duplicative litigation, but also litigants against the trouble and expense of prosecuting or defending the same matters multiple times. "The companion doctrines of res judicata and collateral estoppel have been developed by the courts of our legal system during their march down the corridors of time to serve the present-day dual purpose of protecting litigants from the burden of relitigating previously decided matters and of promoting judicial economy by preventing needless litigation." Id., citing Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326, 99 S.Ct. 645, 58 L.Ed. 2d 552, 559 (1979).

These rules are rules of preclusion, and when applied, prohibit re-litigation of matters previously decided. A panoply of interests converges in the interpretation and application of these rules -- efficient use of limited public resources and avoidance of vexatious litigation, as previously mentioned, but also such important concepts as due process and the opportunity to be heard. For those who seek the protection of preclusion, success is quite valuable, because it usually occurs early in the litigation and reduces the time and expense of that litigation. For those against whom the

relief is sought, an adverse result is catastrophic, usually meaning the end of the case.

Res judicata operates to preclude claims and collateral estoppel operates to preclude issues. Neither is quite that simple.

Res judicata and collateral estoppel were considered firmly established in common law by a time early in American jurisprudence. In Hopkins v. Lee, 19 U.S. 109, 113, 5 L.Ed. 218, 219 (1821), the Supreme Court said that:

> [A]s a general rule, . . . a fact which has been directly tried, and decided by a Court of competent jurisdiction, cannot be contested again between the same parties, in the same or any other Court. Hence a verdict and judgment of a Court of record, or a decree in Chancery, although not binding on strangers, puts an end to all further controversy concerning the points thus decided between the parties to such suit.

A clear and often-cited exposition of res judicata and collateral estoppel, and the differences between them, appears in Cromwell v. County of Sac, 94 U.S. 351, 24 L.Ed. 195 (1876).[1] Discussing res judicata, the Court said:

> [T]he judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to

[1] Collateral estoppel, which is also referred to as "estoppel by record," was apparently considered and rejected in United States v. Lane, 75 U.S. 185, 200-01, 19 L.Ed. 445, 449 (1868), on grounds that the record of the prior proceeding was not offered in evidence and the Court could not determine whether the issue -- whether the contract was authorized by law -- had been litigated and determined. The case might be of interest to Civil War buffs and our colleagues in the far northeastern reaches of the State. It involved a claim by a cotton speculator who contracted to sell cotton to the United States during the War. The contract was entered into in Norfolk and the cotton was located on the Chowan River. Despite having obtained a "military safe-conduct" to take a vessel into rebel territory to get the cargo and return it to Norfolk, the vessel was stopped twice by Union naval forces, and seized the second time, for "trading with the enemy." The owner of the vessel was permitted to retrieve it, but the cotton was retained long enough for the value to drop. The claim for the diminution in value was rejected, the Court finding that the contract was illegal. Id.

> any other admissible matter which might have been offered for that purpose.

Id. at 352, 24 L.Ed. at 197.

For collateral estoppel, identity of claim is unnecessary, but the preclusive effect is more limited: Only those issues litigated and determined in the prior judgment are precluded.

> [W]here the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.

Id. at 353, 24 L.Ed. at 198.

Our own Supreme Court mentions res judicata in Horton v. Hagler's Executor, 8 N.C. 48 (1820), but the reference has questionable relation to the matter decided. In Redmond v. Coffin, 17 N.C. 437 (1833), however, the Court discussed the elements of res judicata, particularly the requirement that there be identity of parties. Res judicata was not the basis of the holding in the case, however, and it appears that the judgment urged to be a bar in that case was actually a dismissal reciting a settlement, not a judgment after trial "on the merits." In any event, North Carolina is firmly entrenched in the "traditional" application of both rules. See McInnis, at 429, 349 S.E.2d at 557.

II. THE NEW TERMINOLOGY

The terms "res judicata" and "collateral estoppel" may be passé. In the Second Restatement of Judgments, the American Law Institute

recommended replacement of "res judicata" with "claim preclusion," and of "collateral estoppel" with "issue preclusion." See Restatement (Second) of Judgments, §§ 18 and 27; McInnis, at 428, 349 S.E.2d at 556, n.1. The Restatement's official notes and a rather lengthy exposition in Wright, Miller & Cooper, Federal Practice and Procedure, § 4401 et seq., explain the reasons why the changes were adopted. The federal courts, in particular, tend to use the Restatement terminology. Our courts recognize the "trend," see McInnis, at 428, n.1, 349 S.E.2d at 556, but persist in the use of the older terms. See Whitacre Partnership v. BioSignia, Inc., 358 N.C. 1, 591 S.E.2d 870 (2004); Wilder v. Hill, ___ N.C.App. ___, 625 S.E.2d 572 (2006).

III. CONFUSION OF THE RULES IS THE RULE.

The jurisprudence of res judicata and collateral estoppel has not been a model of clarity, mainly because courts have not always distinguished the one from the other. See State v. Lewis, 63 N.C.App. 98, 101, 303 S.E.2d 627, 630 (1983). For example, in Crosland-Cullen Co. v. Crosland, 249 N.C. 167, 105 S.E.2d 655 (1958), the plaintiff corporation sued an insurer on an insurance policy on the life of its president, alleging that an assignment from the corporation to the president's wife as part of a domestic settlement was ultra vires. A judgment on the merits was entered against the plaintiff. The corporation then sued the president's wife for recovery of the insurance proceeds paid to her, again alleging that the change of beneficiary was ultra vires. The wife pleaded the judgment in the first case as a bar, and under the procedural rules then applicable, the corporation demurred to the defense. The trial court sustained the demurrer. Id. at 169, 105 S.E.2d at 656. The Supreme Court reversed, holding that the prior judgment could be a bar, referring repeatedly to res judicata, and not once to collateral estoppel. Clearly, however, the claims in the two suits were different: On the insurance contract in the first, and what appears to be unjust enrichment

in the latter. The Court observed that the issue of the validity of the assignment was central in both cases. Id. at 173, 105 S.E.2d at 659.[2] Thus, if "traditional" rules were applied, the Court would use "collateral estoppel" to describe the basis of its holding.

IV. WHEN AND HOW APPLIED.

A. Defensive and offensive. Res judicata and collateral estoppel are most familiar as defensive tools, but they may also be used offensively. See Sawyers v. Farm Bureau Ins. Co., 170 N.C.App. 17, 612 S.E.2d 184, aff'd per curiam on basis of dissenting opinion, 360 N.C. 158, 622 S.E.2d 490 (2005), where the plaintiff in an action in North Carolina against an uninsured motorist insurer sought to assert as res judicata and binding a judgment against the uninsured motorist in Florida. In his dissent, which was adopted by the Supreme Court, Judge Steelman recognized the propriety of offensive use of res judicata, but determined that the elements of the rule were not satisfied. 170 N.C.App. at 31, 612 S.E.2d at 194.

However, if used offensively, courts have recognized that the policy of discouraging duplicative litigation is not as strong; indeed, offensive use may encourage it. See Rymer v. Estate of Sorrells, 127 N.C.App. 266, 488 S.E.2d 838 (1997). If under the circumstances it would be inequitable to give a judgment preclusive effect, then it may be denied. Id. at 270, 488 S.E.2d at 841. If, for example, the defendant had little incentive to defend vigorously in the first action, or the judgment relied upon as the basis for the estoppel is inconsistent with previous judgments, or the second action affords the defendant procedural opportunities unavailable in the first action, or a plaintiff in the second action could have easily joined in the earlier suit,

[2] Note that the element of identity of parties seems to be missing. The defendants in the two actions were different and no "privity" appears to exist between them. The Court dealt with this apparent problem by equating identity of parties with "mutuality," and cited cases in which mutuality had been removed as a requirement when collateral estoppel is used defensively. Mutuality is discussed, infra, at pp. 8, 15.

or where the application of offensive estoppel would be unfair to a defendant for any valid reason, then preclusive effect should be denied. Id.

B. Criminal and civil. The rules of preclusion are also more often associated with civil matters, but they applicable in criminal cases, as well. For example, in State v. Summers, 132 N.C.App. 636, 639, 513 S.E.2d 575, 577 (1999), aff'd, 351 N.C. 620, 528 S.E.2d 17 (2000), a judgment in an appeal from a driver's license revocation for willful refusal to submit to an Intoxilyzer that the defendant did not willfully refuse was held to bar the State from presenting evidence of refusal in a subsequent prosecution for driving while impaired.

C. Administrative adjudication. A "judgment" entered by an administrative agency acting in a quasi-judicial role is afforded preclusive effect if the requirements are met. See Foster v. U. S. Airways, Inc., 149 N.C.App. 913, 920, 563 S.E.2d 235, 240 (2002).

D. Arbitration. In North Carolina, an arbitration award that has not been confirmed by a court of competent jurisdiction is apparently not given preclusive effect. See Smith v. Bruton, 137 N.C. 79, 49 S.E.2d 64 (1904). However, if so confirmed, the award is considered preclusive. See Moody v. Able Outdoor, Inc., 169 N.C.App. 80, 609 S.E.2d 259 (2005).

E. Breadth of application -- a distinction. A very important difference between res judicata and collateral estoppel is the breadth of effect. When it applies, res judicata bars not only matters actually litigated in respect to a claim, but also those that could have been litigated with respect to the claim. See McInnis, at 427, 349 S.E.2d at 556 (1986), quoting Cromwell v. County of Sac, supra. ("[A] judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered

and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. . .").

Thus, where a final judgment has been entered in an action on an indivisible contract, the judgment is res judicata on all bases for recovery on the contract, whether or not all bases were actually litigated. See Gaither Corp. v. Skinner, 241 N.C. 532, 535-36, 85 S.E.2d 909, 911 (1955). In that case, the plaintiff entered into a consent judgment to settle the first action, and then brought a second action alleging a new basis for breach and damages which were not included in the consent judgment. The plea of res judicata was sustained. The Court said:

> It is to be noted that the phase of the doctrine of res judicata which precludes relitigation of the same cause of action is broader in its application than a mere determination of the questions involved in the prior action. The bar of the judgment in such cases extends not only to matters actually determined but also to other matters which in the exercise of due diligence could have been presented for determination in the prior action . . .
>
> And under application of the rule precluding subsequent litigation of the same cause of action, a party defendant who interposes only a part of a claim by way of recoupment, setoff, or counterclaim is ordinarily barred from recovering the balance in a subsequent action. . . Ordinarily, for the breach of an entire and indivisible contract only one action for damages will lie. . .

Id. (Citations omitted.).

This rule does not apply, however, when the failure to address an element of the claim is procured by fraud or deception of the opposing party, or when in the exercise of due care, the existence of the element could not be discovered. Id.

E. Claims and defenses barred. Res judicata bars re-litigation not only of claims, but also of defenses. See, e.g., Culler v. Hamlett, 148 N.C. 372, 559 S.E.2d 195 (2002). In that case, a directed verdict in favor of one defendant on the basis of the plaintiff's contributory negligence precluded

the plaintiff from re-litigation of her contributory negligence which was alleged by a second defendant).

F. Issues of fact and law. With respect to collateral estoppel, strict identity of issues applies, but the precluded issue may be one of fact or of law. See Doyle v. Doyle, __ N.C.App. __, 626 S.E.2d 845, 848 (2006).

[GO TO CASE STUDY NO. 1]

V. THE TRADITIONAL ELEMENTS

A. Res judicata. The cases usually list the requirements of res judicata as:

1. A final judgment on the merits;
2. Identity of parties; and
3. Identity of claim.

See McInnis at 428, 349 S.E.2d at 556.

B. Collateral estoppel. As traditionally applied, collateral estoppel required a final judgment on the merits, identity of parties and identity of issue. Id. at 428, 349 S.E.2d at 557. Identity of parties, sometimes equated with "mutuality," is no longer required if issue identity exists and the party against whom the estoppel is sought, or his privy, had full and fair opportunity to litigate the issue. State v. Summers, 351 N.C. 620, 528 S.E.2d 17 (2000). The elements of collateral estoppel are now listed as:

1. A final judgment on the merits;
2. Identity of issue;
3. The issue was necessary to the judgment;
4. The issue was actually litigated in the prior action;
5. The issue was actually determined; and
6. The party against whom the estoppel is sought, or his privy, had full and fair opportunity to litigate the issue.

See Youse v. Duke Energy Corp., 171 N.C.App. 187, __, 614 S.E.2d 396, 401 (2005).

VI. RES JUDICATA

A. Final judgment on the merits.

The requirement of a final judgment on the merits is common to both res judicata and collateral estoppel. But what is a "final judgment" and what does "on the merits" mean?

1. Final judgment. Questions whether a judgment is final for preclusive purposes arise in predictable ways. Is an interlocutory order "final"? What is the effect of an appeal? What if the judgment is wrong?

a. Interlocutory orders. Broadly, an interlocutory order is not a final judgment. See Branch v. Carolina Shoe Co., 172 N.C.App. 511, 518, 616 S.E.2d 378, 383 (2005) ("'An interlocutory order or decree is provisional or preliminary only. It does not determine the issues joined in the suit, but merely directs some further proceedings preparatory to the final decree.'" (citations omitted.)); Plummer v. Kearney, 108 N.C. App. 310, 312, 423 S.E.2d 526, 528 (1992) ("An order is not final, and therefore interlocutory, if it fails to determine the entire controversy between all the parties."). In N.C. Farm Partnership v. PIG Improvement Co., Inc., 163 N.C.App. 318, 593 S.E.2d 126 (2004), the Court of Appeals denied preclusive effect to a preliminary injunction issued in another state's courts.

An exception appears to exist for a dispositive motion based on the preclusive effect of a prior judgment. In McCallum v. N.C. Coop. Extension Serv., 142 N.C. App. 48, 51, 542 S.E.2d 227, 231, rev. denied and appeal dismissed, 353 N.C. 452, 548 S.E.2d 527 (2001), the Court of Appeals held that denial of a motion for summary judgment based on collateral estoppel affects a substantial right, and is immediately appealable under N.C.G.S. §§ 1-277(a) and 7A-27(d)(1).

In addition, it is logical that once a judgment is final, interlocutory rulings which are necessary to the outcome are merged into that final judgment.

b. Effect of appeal. A judgment as to which no appeal is taken and the time for appeal has expired is final. See McInnis at 434, 349 S.E.2d at 560. There does not appear to be uniformity on whether a judgment pending appeal will be given preclusive effect. The federal courts seem to give preclusive effects to judgments until they are reversed or modified on appeal, or set aside or modified in post-judgment motion practice. See Deposit Bank v. Frankfort, 191 U.S. 499, 24 S.Ct. 154, 48 L.Ed. 276 (1903). In that case, the judgment of a state trial level court was successfully pleaded in bar of a subsequent action, but after the second action was dismissed, the first judgment was reversed by the highest appellate court in that state. The Supreme Court said that while the first judgment was in effect, it was to be afforded preclusive effect; if the rule were otherwise:

> It would undermine the foundation of the principle upon which it is based if the court might inquire into and revise the reasons which led the court to make the judgment. In such case, nothing would be set at rest by the decree; but the matter supposed to be finally adjudicated, and concerning which the parties had had their day in court, could be reopened and examined, and if the reasons stated were in the judgment of the court before which the estoppel is pleaded insufficient, a new judgment could be rendered because of these divergent views and the whole matter would be at large. In other words, nothing would be settled, and the judgment, unreversed, instead of having the effect of forever settling the rights of the parties, would be but an idle ceremony.

Id. at 510-11, 48 L.Ed. at 280-81.

The rule may not be the same in North Carolina. In Hampton v. North Carolina Pulp Co., 223 N.C. 535, 539, 27 S.E.2d 538, 541 (1943), the Court seemed to indicate that a judgment pending appeal would not be given

preclusive effect, but that was not the holding.[3] If faced with the question directly, our courts, which have often described our res judicata and collateral estoppel jurisprudence as "traditional," would likely follow the federal approach. As a practical matter, if the judgment is on appeal, it may be prudent to defer ruling until the appeal the final.

It is fairly clear that a judgment as to which the time for appeal has not expired is not preclusive. See Young v. Young, 21 N.C.App. 424, 425, 204 S.E.2d 711, 712 (1974).

c. What if the judgment is wrong? That the decision of the court rendering the judgment is wrong does not affect its preclusive effect. See McInnis, at 431, 349 S.E.2d at 558 ("[T]he 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."); King v. Grindstaff, 284 N.C. 348, 360, 200 S.E.2d 799, 808 (1973) ("Normally no matter how erroneous a final valid judgment may be on either the facts or the law, it has binding res judicata and collateral estoppel effect in all courts, Federal and State, on the parties and their privies.")

d. What if the judgment is void? A void judgment does not have preclusive effect. See, e.g., Sawyers v. N.C. Farm Bureau Ins. Co., 170 N.C.App. 17, 27-28, 612 S.E.2d 184, 193 (Steelman, J., dissenting), rev'd on basis of dissenting opinion, 360 N.C. 158, 622 S.E.2d 490 (2005). A void judgment is one which lacks an essential element that authorizes the court to render the judgment. See Monroe v. Niven, 221 N.C. 362, 364, 20 S.E. 2d 311, 312 (1942) ("When a court has no authority to act[,] its acts are void."). "Void" usually refers to a judgment rendered by a court having no authority to do so, such as in a case of lack of personal jurisdiction, which was the case in Sawyers.

[3] "[T]he trial judge, finding the facts, noted that the case in the Federal Court referred to by the defendant was still pending on appeal in that Court, [and] he found, [] correctly, we think, that a different subject matter was involved. This is sufficient to dispose of the plea of res judicata also." (Emphasis added.)

A judgment obtained by "extrinsic" fraud is considered void. See Stokely v. Stokely, 30 N.C.App. 351, 354, 227 S.E.2d 131, 134 (1976) ("Fraud is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court. If an unsuccessful party to an action has been prevented from fully participating therein there has been no true adversary proceeding, and the judgment is open to attack at any time.").

As for judgments that are merely voidable, the general rule is that they are considered "valid" until set aside, and may be used for preclusive purposes. See, e.g., Metts v. B. B. Realty Co., 108 R.I 55, 58-59, 271 A.2d 811, 812 (1970) ("If, however, on the other hand, it was merely erroneous and voidable, it would be valid until set aside, and, having never been set aside, it was a valid subsisting judgment . . .).

A judgment obtained by intrinsic fraud is considered voidable. Stokely, at 354-55, 227 S.E.2d at 134 ("A party who has been given proper notice of an action, however, and who has not been prevented from full participation, has had an opportunity to present his case to the court and to protect himself from any fraud attempted by his adversary. Fraud perpetrated under such circumstances is intrinsic, even though the unsuccessful party does not avail himself of his opportunity to appear before the court.").

2. On the merits.

Most "involuntary" dispositions are considered "on the merits." In civil cases, Rule 41(b),[4] N.C.R.Civ.P., includes such dismissals, except for those based on lack of personal jurisdiction, improper venue and failure to join a necessary party.[5] The excluded dispositions do not decide issues based on

[4] Inter alia, "[u]nless the court in its order for dismissal otherwise specifies, a dismissal under this section and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a necessary party, operates as an adjudication upon the merits."

[5] Exceptions exist, however. See, e.g., Beam v. Almond, 271 N.C. 509, 515, 157 S.E.2d 215, 221 (1967), in which the first action was dismissed for failure to prosecute, and the

facts disclosed in the pleadings, or the evidence, or both, and on which the right of recovery depends, without regard to formal or technical objections. A dismissal for failure to state a claim on which relief can be granted is, however, generally considered to be "on the merits" for claim and issue preclusion purposes. See, e.g., May v. Transworld Drilling Co., 786 F.2d 1261, 1263 (5th Cir. 1986) ("'[A] judgment of dismissal for failure to state a claim is a judgment on the merits, with preclusive effect.'" (citation omitted)).

Rule 41(a) denies preclusive effect to a first voluntary dismissal without prejudice, but a second such dismissal is considered to be "on the merits" even though no "merits" were actually litigated. A judgment on the pleadings, a directed verdict, a judgment notwithstanding the verdict and summary judgment are considered "on the merits."

The party asserting a prior judgment as res judicata or collateral estoppel has the burden to showing the existence of the necessary elements. The burden includes proof that the claim or issue was litigated. If the reason for the judgment is not clear and the reason cannot be clearly established by other proof, then the judgment may not be considered "on the merits." See S.M.B. v. A.T.W., 810 S.W.2d 601, 605 (Mo.App. 1991) ("Before res judicata bars a claim, the previous determination must have been on the merits of the claim. . . Where there is a question whether the previous decision went to the merits of the case, no preclusive effect is given to the earlier decision.").

B. Identity of parties.

The term "party" includes a named party and anyone in privity with a named party. A named party is obvious; whether one is in privity with a named party often presents more difficulty. One reason is that courts have struggled with the meaning of "privity." See Settle v. Beasley, 309 N.C.

Court held that the dismissal should not have precluded a second action. Quaere, whether this result would follow under present Rule 41(b)?

616, 620, 308 S.E.2d 288, 290 (1983). "[T]here is no definition of the word 'privity' which can be applied in all cases." See Masters v. Dunstan, 256 N.C. 520, 524, 124 S.E.2d 574, 577 (1962). In some cases, defining privity in the context of claim and issue preclusion has borrowed from the law of property and contracts, such that "'privity' for purposes of res judicata and collateral estoppel 'denotes a mutual or successive relationship to the same rights of property.'" See Settle, 309 N.C. at 620, 308 S.E.2d at 290. In others, the inquiry has focused on who was the "real party in interest." See Summers, 351 N.C. at 623-24, 528 S.E.2d at 21 ("[C]ourts will look beyond the nominal party whose name appears on the record as plaintiff and consider the legal questions raised as they may affect the real party or parties in interest.").

One may acquire the required interest by purchase, succession or inheritance. See Masters v. Dunstan, 256 N.C. 520, 525, 124 S.E.2d 574, 577-78 (1962). The interest may exist at the time of the judgment asserted in bar, or it may be acquired after that judgment. Id.

Smith v. Smith, 334 N.C. 81, 431 S.E.2d 196 (1993), illustrates how privity exists by "purchase" and by inheritance. In that case, a party to a prior equitable distribution action in which a consent judgment was entered sought later to attack the judgment collaterally on grounds of intrinsic fraud. The consent judgment provided, inter alia, for division of certain real property. The Court held that the defendants in the second action, who acquired an interest in the real property as a result of the execution of the terms of the consent judgment, were in privity with the original parties and could assert res judicata in bar of the second action. In addition, an heir of one of the original parties was in privity with his ancestor. Id. at 85, 431 S.E.2d at 198. The plea of res judicata was sustained, and no collateral attack on the first judgment was permitted by subsequent action. The

plaintiff was relegated to direct attack on the consent judgment through Rule 60.[6]

[GO TO CASE STUDY NO. 2]

The older cases also refer at times to a requirement of "mutuality." The references may be to "mutuality of parties" or "mutuality of estoppel." The underlying premise is that a party seeking to assert an estoppel by judgment must also be estopped by that judgment. Mutuality, then, is an equitable notion, but one which is also served by the requirement of identity of parties. Even if a difference exists academically between identity of parties and mutuality, the difference has little practical significance. Mutuality has been abandoned as a requirement for defensive use of collateral estoppel. See discussion in McInnis, at 432-35, 349 S.E.2d at 559-60. The Court of Appeals has stated in dictum that mutuality is no longer required for offensive use of collateral estoppel. See Rymer v. Estate of Sorrells, 127 N.C.App. 266, 269, 488 S.E.2d 838, 840 (1997) ("[M]utuality of parties is no longer required when invoking either offensive or defensive collateral estoppel.")

C. Identity of claim.

At the risk of offending the sensibilities of Martin Louis disciples, "claim" is just another word for "cause of action." The Black's definition(s) of "cause of action" include reference to a "state of facts" that entitle one to a judicial remedy. See Black's Law Dictionary, 6th ed. In Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 321, 47 S.Ct. 600, 71 L.Ed. 1069, 1072 (1927), the Supreme Court said that a cause of action "does not consist of facts, but of the unlawful violation of a right which the facts show." (Emphasis added.) The North Carolina Supreme Court has defined "cause of action" as "a legal

[6] The Court noted that res judicata would not bar collateral attack in case of extrinsic fraud. See id. at 86,

wrong threatened or committed against the complaining party . . ." See Daniels v. Baxter, 120 N.C. 14, 17, 26 S.E. 635, 636 (1897).

Placing the focus on the violation, rather than the right or the remedy is consistent with the policy against claim-splitting, and North Carolina is in the mainstream on that policy. See Bockweg v. Anderson, 333 N.C. 486, 493, 428 S.E.2d 157, 162 (1993) ("We [] note that the common law rule against claim-splitting is based on the principle that all damages incurred as the result of a single wrong must be recovered in one lawsuit. . . ."). It is important to understand whether "identity" is to be considered narrowly or broadly.

The Restatement approach to what is a "claim" for purposes of preclusive rules, referred to as "transactional," is broad:

> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Restatement 2d of Judgments, § 24. (Emphasis added.)

The North Carolina appellate courts have not expressly adopted the transactional approach. See Skinner v. Quintiles Transnational Corp., 167 N.C.App. 478, 483, 606 S.E.2d 191, 194 (1993) ("Our courts have not adopted the 'transactional approach' to res judicata in which all issues arising out of a single transaction or series of transactions must be tried together as one claim." [citing Bockweg v. Anderson, 333 N.C. 486, 493-94,

428 S.E.2d 157, 162-63 (1993)]); cf. Davenport v. N.C. Dept. of Trans., 3 F.3d 89, 95 (4th Cir. 1983) (North Carolina courts appear to endorse a transactional approach, but in a "most cautious and flexible" manner.) However, mere differences in legal theories of claim or defense are not sufficient to destroy identity. See Rodgers Builders, Inc. v. McQueen, 76 N.C. App. 16, 22-23, 331 S.E.2d 726, 730-31 (1985), rev. denied, 315 N.C. 590, 341 S.E.2d 29 (1986). Neither is a difference in the remedy sought. See North Carolina State Ports Auth'y. v. Fry Roofing Co., 32 N.C. App. 400, 404-05, 232 S.E.2d 846, 850 (1977), aff'd., 294 N.C. 73, 240 S.E.2d 345 (1978). Dependence on different evidence to support the claim does not distinguish the claim. See Gaither Corp. v. Skinner, 241 N.C. 532, 85 S.E.2d 909, 912 (1955).

In the Quintiles case, the Court of Appeals held that a prior federal court judgment dismissing her claim under the Americans with Disabilities Act (ADA) barred her subsequent state court claim under the Retaliatory Employment Discrimination Act (REDA), in part because the claims allegedly arose out of the same operative facts. That holding seems consistent with the Restatement approach.

Even where it appears that a transactional approach is considered, our courts would not likely extend that approach to bar a claim when the party whose claim would be precluded did not have a fair opportunity to litigate the issue in the prior action. "[T]he transaction test produces a broad [preclusive] effect [and] . . . is appropriately applied only when the procedural rules afford parties ample opportunity to litigate in a single lawsuit, all claims[7] arising from a transaction or series of transactions." See Ballance v. Dunn, 96 N.C. App. 286, 290, 385 S.E.2d 522, 525 (1989). The rule "is not without limits [and] is to be applied in particular situations as justice and fairness require." See Shelton v. Fairley, 72 N.C. App. 1, 5, 323

[7] The Court probably meant "issues."

S.E.2d 410, 414 (1984), rev. denied, 313 N.C. 509, 329 S.E.2d 394 (1985). The North Carolina Supreme Court regards the Restatement approach more as guide for the process of determining if a claim is identical, rather than an "absolute concept." See Bockweg v. Anderson, 333 N.C. 486, 494, 428 S.E.2d 157, 163 (1983).

The focus of transactional approach is on the relationship of the claim to the circumstances out of which it arises, not on the label attached to the claim. Thus, a tort claim in negligence may be precluded by a judgment in a prior action alleging an intentional tort arising out of the same facts. A judgment on one basis for a breach of contract claim would preclude litigation of a claim of breach on another basis. A claim in tort and contract may arise out of the same circumstances, and the transactional approach would result in identity of claim. See Rodgers Builders, Inc. v. McQueen, 76 N.C.App. 16, 25, 331 S.E.2d 726, 732 (1985), rev. denied, 315 N.C. 590, 341 S.E.2d 29 (1986) ("[T]he language of the arbitration clause here is sufficiently broad to include any claims which arise out of or are related to the contract or its breach, regardless of the characterization of the claims as tort or contract. The claims asserted here all concern alleged tortious conduct on the part of defendants which occurred in connection with, or as a part of, the formation of, performance under, or breach of the contract between plaintiff and McQueen Properties." (Emphasis added.)).

VII. COLLATERAL ESTOPPEL.

The requirement of a final judgment on the merits has already been discussed and the law is the same. The remaining elements are identity of issue; whether the issue was necessary to the judgment; whether the issue was actually litigated and determined in the prior action; and whether the party against whom the estoppel is sought, or his privy, had full and fair opportunity to litigate the issue.

A. Identity of issue.

The preclusive effect of collateral estoppel is less broad than res judicata. If the requirements for res judicata, including identity of claim, are established, then re-litigation of all matters that were or could have been litigated are precluded. Not so with collateral estoppel; only particular issues actually litigated are precluded. In addition, the requirement of identity of issue is more complicated than identity of claim.

[GO TO CASE STUDY NO. 3]

If an issue is submitted to a jury and actually answered, and in a subsequent action, the identically worded issue is proffered, few would argue that it was not actually litigated. Sometimes, however, whether an issue was litigated is not clear on the face of the judgment.

B. Was the issue actually litigated?

The party asserting collateral estoppel has the burden of persuasion that an issue was litigated in the prior action, and may "drill down" into the case to carry its burden. See Burgess v. First Union Nat'l Bank, 150 N.C.App. 67, 75, 563 S.E.2d 14, 20 (2002). In that case, the plaintiffs brought suit against the executor of an estate in his individual capacity, alleging that he had fraudulently induced them to renounce their interests in the estate. The defendant alleged that a prior judgment in an action between him, as executor, and the plaintiffs, in which the issue whether the renunciations were void for the same fraud was decided against the plaintiffs, barred re-litigation of the fraud issue. The Court of Appeals said that the issues were identical, and that collateral estoppel barred re-litigation. Id. at 76, 563 S.E.2d at 20 ("Their claim is that defendant, as a fiduciary, fraudulently induced plaintiffs to renounce their interests as beneficiaries under the will to the benefit of the residuary beneficiaries. This is the same fraud theory that failed in the previous case. Defendant has

thus met its 'burden of showing that the issues underlying the present claims were in fact identical with the issues raised in the plaintiff's previous [counterclaims].'").

Courts are permitted to look beyond the judgment itself to determine if an issue was actually litigated. See Miller Building Corp. v. NBBJ North Carolina, Inc., 129 N.C. App. 97, 100, 497 S.E.2d 433, 435 (1998) (In determining what issues were actually litigated or decided by the earlier judgment, the court in the second proceeding is "'free to go beyond the judgment roll, and may examine the pleadings and the evidence [if any] in the prior action.'").

That procedure is also permitted (indeed, required, because the verdicts are typically general) in a criminal case. The U.S. Supreme Court's decision in Ashe v. Swenson, 397 U.S. 436, 443, 25 L. Ed. 2d 469, 475 (1970), is a good illustration. There, the defendant had been charged with armed robbery of several individuals. He was tried on one charge, and found not guilty. The Court said that the record revealed that the jury could only have found him not guilty by concluding that the prosecution had not proved that he was the robber. Therefore, collateral estoppel barred re-litigation of that issue in a subsequent trial of another charge. The North Carolina Court of Appeals applied the same approach in State v. Whiteley, 172 N.C.App. 772, 616 S.E.2d 576 (2005), involving the question whether acquittal on charges of second degree rape and sex offense precluded a conviction of crime against nature arising out of the same facts.

[GO TO CASE STUDY NO. 4]

C. Was the issue necessary to the judgment? This element avoids preclusion of issues which may have been litigated, but were not required to be litigated for resolution of the claim covered in the judgment. See Templeton v. Apex Homes, Inc., 164 N.C. App. 373, 378, 595 S.E.2d 769,

772 (2004) (in dictum, stating that, because plaintiffs won on one of their breach of contract issues and were awarded the only remedy plaintiffs sought, trial court's ancillary determinations that plaintiffs lost on two other breach of contract issues were not "necessary" to the judgment).

[GO TO CASE STUDY NO. 5]

D. Was there fair opportunity to litigate the issue? Ordinarily the burden is on the party urging the estoppel to show that the requirements are met. With respect to this requirement, however, a burden-shifting occurs: The party opposing issue preclusion has the burden of showing that there was no full and fair opportunity to litigate the issue in the prior litigation. See Miller Bldg. Corp. v. NBBJ North Carolina, Inc., 129 N.C. App. 97, 100, 497 S.E.2d 433, 435 (1998). The term "full and fair opportunity" embodies elements of procedural due process, at the least. The "easy" cases on this point are those in which the party against whom the estoppel is sought was a party in the prior litigation, but what if he was not? If he is in privity with a party, he may still be bound by the determination of the issue, but only if his privy had full and fair opportunity to litigate the issue. In State v. Summers, 351 N.C. 620, 528 S.E.2d 17 (2000), one of the questions was whether a determination by the trial court in an appeal from a DMV revocation for willful refusal to blow, that the failure to blow was not a willful refusal, precluded the State from arguing in the DWI prosecution that the defendant willfully refused. The privity rule discussed in connection with res judicata bears in this question. The Court of Appeals held that collateral estoppel did apply, and the holding implies that that the DMV, in defending the civil revocation, was in privity with the State, as prosecutor of criminal charges. The Court found that the interests of the State were co-terminus with those of the DMV, and that the issue had been fully and fairly litigated.

[GO TO CASE STUDY NO. 6]

CONCLUSION

The basis framework of the modern application or res judicata and collateral estoppel is set out in this presentation. The "rules" are fairly simple; application of them is not. And results are not always predictable. That means, one can suppose, that the need for greater clarity in the application of the rules remains, and the development of the jurisprudence on these defenses is a work in progress.