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Tuz v. Chadbourne, Inc., 310 So. 2d 8 (Fla. 1975)

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Judgments—ISSUE PRECLUSION—FORMAL ADVERSENESS BETWEEN CODEFENDANTS IS NOT PREREQUISITE TO APPLICATION OF ESTOPPEL BY JUDGMENT; SINGLE ACCIDENT INJURING MORE THAN ONE PERSON MAY PRODUCE SINGLE ISSUE FOR PURPOSES OF ESTOPPEL BY JUDGMENT.—*Tuz v. Chadbourne, Inc.*, 310 So. 2d 8 (Fla. 1975).

While driving down a dead-end street Samuel M. Tuz collided with a road grader owned by Edward M. Chadbourne, Inc. Tuz was injured and his passenger was killed. The passenger's widow brought suit against Tuz and Chadbourne in the Escambia County Court of Record for the wrongful death of her husband. A verdict of $126,000 was rendered against the defendants. Both defendants appealed. In *Tuz v. Burmeister*,[1] the First District Court of Appeal reversed in part, stating that as a matter of law Chadbourne could not have been expected "to anticipate . . . that the death of the decedent would probably have occurred as a result of parking the roadgrading equipment on the edge of a dead-end street."[2]

Defendant Tuz subsequently became plaintiff Tuz in a suit against Chadbourne to recover for personal injuries. He claimed that Chadbourne had been negligent in leaving the grader unattended and unlighted. The trial court granted defendant Chadbourne summary judgment. The court reasoned that Tuz was estopped from raising the issue of Chadbourne's negligence by the finding on that issue rendered by the appellate court in *Burmeister*. The First District Court of Appeal affirmed.[3] It agreed with the lower court that the issue of Chadbourne's negligence had already been fully explored by both parties and determined in *Burmeister*.[4] The appellate court noted: "It was strenuously contended in that prior suit [*Burmeister*] that Tuz was not guilty of gross negligence and that the cause of the collision was the negligence of Chadbourne."[5]

The Supreme Court of Florida then granted certiorari[6] based on alleged conflict with *Youngblood v. Taylor*.[7] Finding no conflict between *Tuz* and *Youngblood*, the court subsequently discharged the writ of certiorari as improvidently issued and rendered an opinion effectively adopting the lower court's reasoning.[8] The court dis-

1. 254 So. 2d 569 (Fla. 1st Dist. Ct. App. 1971).
2. *Id.* at 571-72.
3. Tuz v. Chadbourne, Inc., 290 So. 2d 547 (Fla. 1st Dist. Ct. App. 1974).
4. *Id.* at 548-49.
5. *Id.* at 548.
6. No. 45,216 (Fla. July 12, 1974).
7. 89 So. 2d 503 (Fla. 1956).
8. Tuz v. Chadbourne, Inc., 310 So. 2d 8 (Fla. 1975).

tinguished *Tuz* from *Youngblood* by finding that the parties and issues in *Tuz* were identical with those in *Burmeister*.[9] Estoppel by judgment was therefore applied. The doctrine did not apply in *Youngblood* because the parties in the first suit were different from those in the subsequent suit.[10]

The holdings of the lower courts, culminating in the supreme court's approval, subtly altered the elements of estoppel by judgment. *Tuz* implies that estoppel by judgment is applicable to parties who did not formally oppose each other in a former suit,[11] and that injury of more than one party does not necessarily result in more than one issue.[12] The holding alters Florida civil procedure by imposing the equivalent of a mandatory cross-claim rule on certain codefendants.[13]

Estoppel by judgment[14] is an aspect of res judicata that prevents litigation of issues already adjudicated between the same parties in a different cause of action.[15] Florida courts use the term res judicata only when discussing bar and merger. Estoppel by judgment is treated as a distinct concept. The difference between the terms is expressed in *Gordon v. Gordon*:[16]

> [U]nder res adjudicata a final decree or judgment bars a subsequent suit between the same parties based upon the same cause of action and is conclusive as to all matters germane thereto that were or could have been raised, while the principle of estoppel by judgment is applicable where the two causes of action are different, in which case the judgment in the first suit only estops the parties from litigating in the second suit issues—that is to say points and questions—common to both causes of action and which were actually adjudicated in the prior litigation.[17]

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9. *See* pages 662-63 *infra*.

10. *See id.*

11. Under the traditional view of estoppel by judgment, the doctrine is applicable only if the parties involved in the later litigation were formal adversaries in the initial litigation. *See* note 21 *infra*.

12. *See* pages 665-69 *infra*.

13. *See* notes 53-58 and accompanying text *infra*.

14. A victim of varying terminology, the concept of estoppel by judgment has been applied under the aliases "issue preclusion," "collateral estoppel," "estoppel by record," and "estoppel by verdict." *See* RESTATEMENT (SECOND) OF JUDGMENTS § 45, Comment on Clause (c) at 21-22. (Tent. Draft No. 1, 1973); Polasky, *Collateral Estoppel—Effects of Prior Litigation*, 39 IOWA L. REV. 217 (1954).

15. Field v. Field, 68 So. 2d 376, 379 (Fla. 1953); Gordon v. Gordon, 59 So. 2d 40, 43 (Fla.), *cert. denied*, 344 U.S. 878 (1952); Epps v. Railway Express Agency, Inc., 40 So. 2d 131 (Fla. 1949); Hohweiler v. Hohweiler, 167 So. 2d 73, 75 (Fla. 2d Dist. Ct. App. 1964); RESTATEMENT OF JUDGMENTS § 68(1) (1942).

16. 59 So. 2d 40 (Fla.), *cert. denied*, 344 U.S. 878 (1952).

17. *Id.* at 44. *See* Cromwell v. County of Sac, 94 U.S. 351 (1876); RESTATEMENT OF

Traditionally, the following three requirements must be satisfied before estoppel by judgment applies: (1) the initial litigation must result in a final judgment on the merits;[18] (2) the issue decided in the initial litigation must be identical to the issue presented in the later action;[19] and (3) the parties to the later suit must be the same parties, litigating in the same capacities, as those in the prior suit, or be in privity with such parties.[20] The third requirement has usually been interpreted to require that parties in the later suit were formal adversaries in the first suit.[21] The doctrine of estoppel by judgment is founded on the proposition that it is in the interest of the parties and the state to settle every justiciable controversy in one action and thereby avoid interminable litigation.[22]

The supreme court granted certiorari in *Tuz* based on alleged conflict with *Youngblood*. In *Youngblood* a father brought suit on his own behalf for damages that he sustained as a result of his son's injuries. The father, suing as next friend of his son, had lost a prior action against the same defendant. The Florida Supreme Court held that neither res judicata nor estoppel by judgment applied because the adversaries were different in each suit. Because the father's legal capacity as his son's next friend differed from the father's own legal identity, the court held that the parties to the two suits were not

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JUDGMENTS, ch. 3, Introductory Note (1942); Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1 (1942).

18. Gordon v. Gordon, 59 So. 2d 40 (Fla.), *cert. denied*, 344 U.S. 878 (1952).

19. *In re* Yarn Processing Patent Validity Litigation, 498 F.2d 271 (5th Cir. 1974); Shearn v. Orlando Funeral Home, Inc., 88 So. 2d 591 (Fla. 1956); McGregor v. Provident Trust Co., 162 So. 323, 329 (Fla. 1935); Vestal, *Preclusion/Res Judicata Variables: Nature of the Controversy*, 1965 WASH. U.L.Q. 158, 164.

20. Ford v. Dania Lumber & Supply Co., 7 So. 2d 594 (Fla. 1942); McGregor v. Provident Trust Co., 162 So. 323 (Fla. 1935); Martin v. Arrow Cabs, Inc., 107 So. 2d 394 (Fla. 3d Dist. Ct. App. 1958).

21. Though worded in terms of res judicata, RESTATEMENT OF JUDGMENTS § 82 (1942) applies to estoppel by judgment. *See id.*, ch. 3, Introductory Note, at 160-61. Section 82 states:

> The rendition of a judgment in an action does not conclude parties to the action who are not adversaries under the pleadings as to their rights inter se upon matters which they did not litigate, or have an opportunity to litigate, between themselves.

Illustration 1 of § 82 supports Tuz' action against Chadbourne:

> A and B are driving automobiles, which collide. C, a passenger in B's car, sues A and B. Whether the judgment is in favor of or against C as to either or both A and B, the issues as to negligence or other element of the cause of action are not res judicata in a subsequent action by A against B for damage to his car.

See id. § 106, comment *c* at 506-07. *But see* RESTATEMENT (SECOND) OF JUDGMENTS § 82 & Reporter's Note at 42-43 (Tent. Draft No. 2, 1975); note 36 *infra*.

22. Gordon v. Gordon, 59 So. 2d 40, 43 (Fla.), *cert. denied*, 344 U.S. 878 (1952); RESTATEMENT OF JUDGMENTS § 1, comment *a* (1942); Note, *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 841 (1952).

identical. Therefore the third requirement for the application of estoppel by judgment was not met.

Tuz presented a factual situation akin to *Youngblood*. Neither Youngblood nor Tuz sought to recover for his own injuries in the initial action; neither had formally opposed the defendant prior to the second suit. Moreover, the *Youngblood* court had stated in dicta:

> [I]f two persons wholly unrelated are passengers in a motorcar that becomes involved in an accident, only one set of circumstances arises as a basis for recovery. But it does not follow that there is but one cause of action[,] for each of the injured persons has the right to sue and *the action of one is not determined by the adjudication of the action of the other*.[23]

The supreme court distinguished the two cases, stressing that in *Tuz*, unlike *Youngblood*, identical parties had participated in both suits.[24] The *Tuz* court asserted that the *Youngblood* dicta remains good law "so long as the person was not a party to an earlier action that involved points and questions common to both causes of action and which were actually adjudicated."[25]

Tuz was a party to the initial suit, but did not file a formal cross-claim. Since he was not formally adverse to his codefendant in the initial suit, and was not in privity with the plaintiff,[26] collateral estoppel could not be invoked against him under the traditional interpretation of the party identity requirement.[27] The supreme court's extremely broad language in *Tuz* indicates that identity of parties may be found whenever parties to the later suit were parties to the initial suit—even if those parties were not formal adversaries in the first action.

With *Tuz*, Florida joins those jurisdictions that, in certain situations, do not treat adverse pleadings between codefendants in the initial suit as a prerequisite to application of estoppel by judgment in subsequent litigation between those parties. Jurisdictions that recognize an exception to the formal adverseness requirement do not agree on the proper scope of the exception. Exceptions recognized by various jurisdictions, set forth in order of increasing breadth, are: (1) plaintiff

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23. 89 So. 2d at 505 (emphasis added).

24. 310 So. 2d at 10.

25. *Id.*

26. Osburn v. Stickel, 187 So. 2d 89 (Fla. 3d Dist. Ct. App. 1966) (no privity exists between a passenger and his driver).

27. *See* 310 So. 2d at 11-12 (Ervin, J., dissenting); note 21 *supra*.

seeking indemnity[28] or contribution[29] from a former codefendant; (2) plaintiff suing former codefendant where an element necessary for his recovery was actually or necessarily litigated by the plaintiff;[30] and (3) plaintiff suing former codefendant where both had full opportunity and incentive to oppose each other in the prior suit but failed to do so.[31] The *Tuz* language goes beyond these exceptions, however, by

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28. *E.g.,* Freightliner Corp. v. Rockwell-Standard Corp., 82 Cal. Rptr. 439 (Ct. App. 1969); Vaughn's Adm'r v. Louisville & N.R.R., 179 S.W.2d 441 (Ky. Ct. App. 1944); Miraglia v. Miraglia, 255 A.2d 762 (N.J. Ct. App. 1969). *See* Uniform Contribution Among Tortfeasors Act; RESTATEMENT OF JUDGMENTS § 106 (1942); Vestal, *Preclusion/Res Judicata Variables: Parties,* 50 IOWA L. REV. 27, 32-33 (1964); Annot., 24 A.L.R.3d 318 (1969). *See also* RESTATEMENT (SECOND) OF JUDGMENTS § 82, Reporter's Note at 42-43 (Tent. Draft No. 2, 1975); notes 30-31 *infra.*

29. *E.g.,* Continental Cas. Co. v. Westinghouse Elec. Corp., 327 F. Supp. 723 (E.D. Mich. 1970); Berry v. City of Santa Barbara, 56 Cal. Rptr. 553 (Ct. App. 1967); Colon v. Automatic Retailers Ass'n Service, Inc., 343 N.Y.S.2d 874 (Civ. Ct. 1972). *See* RESTATEMENT OF JUDGMENTS § 106 (1942); Annot., *supra* note 28; Vestal, *supra* note 28. *See also* RESTATEMENT (SECOND) OF JUDGMENTS § 82, Reporter's Note at 42-43 (Tent. Draft No. 2, 1975); notes 30-31 *infra.*

30. Fidelity & Cas. Co. v. Federal Express, 136 F.2d 35 (6th Cir. 1943); Flagstaff v. Walsh, 9 F.2d 590 (9th Cir. 1925), *cert. denied,* 273 U.S. 695 (1926); Nickert v. Puget Sound Tug & Barge Co., 335 F. Supp. 1162 (W.D. Wash. 1971); Continental Cas. Co. v. Westinghouse Elec. Corp., 327 F. Supp. 723 (E.D. Mich. 1970); Mobile v. George, 45 So. 2d 778 (Ala. 1950); Creeco Co. v. Northern Ill. Gas Co., 219 N.E.2d 257 (Ill. Ct. App. 1966); Employers' Liab. Assurance Corp. v. Post & McCord, Inc., 36 N.E.2d 135 (N.Y. Ct. App. 1941). This situation frequently arises in the context of contributory negligence. For example, in Franciscy v. Jordan, 193 N.E.2d 219 (Ill. Ct. App. 1963), a guest passenger injured in an accident had sued the drivers of the two vehicles involved. One driver was found negligent, the other was not. In a second suit, the negligent driver's administrator attempted to sue the administrator of the other driver. The court held that he was estopped by the prior action. The court reasoned that to prosecute the second action successfully the administrator would have to allege that the driver had not been contributorily negligent, an issue that had been asserted unsuccessfully in the prior suit.

Actual litigation of an issue underlies the exception for contribution and indemnity actions. *See* RESTATEMENT OF JUDGMENTS § 106, comments *b-c* (1942). The drafters of the first *Restatement* were reluctant to extend this rationale to other situations. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 82, Reporter's Note at 42-43 (Tent. Draft No. 2, 1975).

Similarly, Minnesota has applied collateral estoppel in suits for contribution from a former codefendant, American Motorists Ins. Co. v. Vigen, 5 N.W.2d 397 (Minn. 1942), but refused to foreclose relitigation of negligence where one codefendant brings an action to recover for his own injuries, Bunge v. Yager, 52 N.W.2d 446 (Minn. 1952). In the latter situation, the *Bunge* court held, codefendants must have been formally adverse in the initial action for collateral estoppel to apply.

RESTATEMENT (SECOND) OF JUDGMENTS § 82 (Tent. Draft No. 2, 1975), *see* note 36 *infra,* substantially expands the "actual litigation" exception to the adversity requirement. For discussion of factors that determine whether an issue has actually been litigated, see RESTATEMENT (SECOND) OF JUDGMENTS §68, comments *d-f* (Tent. Draft No. 1, 1973). For exceptions to the general rule of § 68, see *id.* § 68.1.

31. Schwartz v. Public Adm'r, 246 N.E.2d 725 (N.Y. 1969). *See* Livesay Indus. v. Livesay Window Co., 202 F.2d 378, 382 (5th Cir. 1953); Boston & M.R.R. v. Sargent, 57 A. 688, 690 (N.H. 1904); Lloyd v. Barr, 11 Pa. 41, 52 (1849); Vestal, *supra* note 28, at 32-33. RESTATEMENT OF JUDGMENTS § 82 (1942), *see* note 21 *supra,* indicates adversity between

suggesting that mere participation in a prior suit involving identical issues subjects a party to estoppel by judgment. Consequently, a former codefendant could be estopped from litigating an issue on the basis of a judgment in a prior proceeding that gave him no real opportunity to contest that issue.[32] This would violate procedural due process.[33]

The supreme court probably did not intend so broad a reading, although the language permits it. By joining Tuz and Chadbourne as codefendants, Burmeister's widow may have intended to force them to fight out between themselves the issue of whose negligence caused the passenger's death. In the initial suit, the extent of each codefendant's liability turned on the amount of blame each could cast upon the other. Because the codefendants may have been compelled to introduce all relevant evidence of negligence, they may have behaved adversely without filing cross-claims. *Actual* adversity—irrespective of formal pleadings—was probably the unspoken basis for the *Tuz* decision.[34] If so, Florida goes no further in this area than some other jurisdictions[35] or the *Restatement (Second) of Judgments*.[36]

The *Tuz* decision also helps to clarify the second requirement for the application of estoppel by judgment—identity of issue. Two pairs of Florida cases have followed opposed rationales in determining whether this requirement has been met. The first pair of cases holds that the number of issues can never be less than the number of injured

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codefendants in the initial suit is not required for application of collateral estoppel to issues those codefendants actually litigated or had an opportunity to litigate. But the *Restatement* viewed "opportunity" narrowly. *See id.*, comments *a-d; id.* § 106, comment *d;* RESTATEMENT (SECOND) OF JUDGMENTS § 82, Reporter's Note at 42-43 (Tent. Draft No. 2, 1975). *Cf. id.* § 88.

32. *Cf.* RESTATEMENT (SECOND) OF JUDGMENTS § 68, comment *e* at 152 (Tent. Draft No. 1, 1973):

> Sometimes the party against whom preclusion is asserted is covered by an insurance policy and represented by insurance company counsel in the prior action but not in the subsequent action. In such instances, preclusion with respect to unlitigated issues seems particularly unfair.

33. Courts have often suggested that binding a person through the judgment in an action that gave him no opportunity to have his claim heard denies due process. *E.g.*, Hansberry v. Lee, 311 U.S. 32, 40 (1940); Old Wayne Mut. Life Ass'n v. McDonough, 204 U.S. 8, 17 (1907). However, estoppel of such persons may in certain situations be consistent with a flexible approach to due process. *See* Note, *Collateral Estoppel of Nonparties,* 87 HARV. L. REV. 1485, 1496–1504 (1974).

34. *See* text accompanying note 5 *supra.*

35. *See* note 30 and accompanying text *supra.*

36. RESTATEMENT (SECOND) OF JUDGMENTS § 82 (Tent. Draft No. 2, 1975) states:

> Parties who are not adversaries to each other under the pleadings in an action involving them and a third party are bound by and entitled to the benefits of issue preclusion with respect to issues they actually litigate as adversaries to each other and which are essential to the judgment rendered.

parties. The cases rely on the *Youngblood* statement[37] that suit by one party can never foreclose the subsequent suit of another party injured in the same accident. In *Culloden v. Music*[38] the two minor sons of Music had been killed in the same accident. He first brought successful wrongful death and survival actions as father and administrator of one son. He then filed wrongful death and survival actions based on the death of the other son and won a judgment in the trial court on the theory that "the defendant was estopped to deny liability because of the judgment against defendant in the prior action . . . ."[39] The Second District Court of Appeal reversed the trial court. Though it found the parties to the two suits were identical,[40]

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37. *See* text accompanying note 23 *supra.*

38. 226 So. 2d 240 (Fla. 2d Dist. Ct. App. 1969), *overruled,* Seaboard Coastline R.R. v. Cox, 308 So. 2d 154 (Fla. 2d Dist. Ct. App. 1975). Even though *Culloden* was overruled in the second district, it remains sound law in the first district as adopted in Seaboard Coastline R.R. v. Arnett, 303 So. 2d 653 (Fla. 1st Dist. Ct. App. 1974). However, noting the conflict between the first and second districts, the Florida Supreme Court has granted conflict certiorari in *Cox. See* note 48 *infra.*

39. 226 So. 2d at 240-41.

40. In Colonial Enterprises v. Hill, 227 So. 2d 481 (Fla. 1969), the supreme court had adopted the view that an individual is a party to two suits, despite formal assumption of different capacities in those suits, if he is the real party in interest in all litigation. Thus, a widow who lost an action for the wrongful death of her husband was estopped from relitigating defendant's negligence in a survival action brought as administratrix of his estate. Epps v. Railway Express Agency, 40 So. 2d 131 (Fla. 1949). But a husband's unsuccessful suit for the wrongful death of his wife did not estop his daughter, acting as her mother's personal representative, from relitigating the issue of defendant's negligence in a survival action. Colonial Enterprises v. Hill, *supra.*

The *Culloden* court reasoned that because both sons of the plaintiff had died, he was the real party in interest in both suits. The court rejected defendant's claim that *Youngblood* compelled a finding that the parties to the suits in *Culloden* were not identical. Noting that in *Youngblood* the son had not died, the court stated:

> If the injuries of the minor son in Youngblood had resulted in death, then any benefits inuring would have gone to the father, not to his injured son, and the father would then have been the real party in interest in both instances and having lost one case would be barred from recovery in the other. . . .
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> . . . .
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> In the causes of action prosecuted in the prior suit for the death of *Chester* Music, there is no question that Amos Music, as father and plaintiff was the real party in interest in both his suit for the wrongful death of his minor son Chester and his suit as administrator of Chester's estate. . . .
>
> In the causes of action prosecuted herein for the death of *Roger* Music, there is likewise no question that Amos Music is the real party in interest in both his suit for the wrongful death of his other minor son Roger and his suit as administrator of Roger's estate. . . .
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> It is not contested that Kenneth Culloden . . . was the defendant in both the prior and instant suits.
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> Therefore, the parties are identical both in the prior and in the instant actions for the purpose of the application of the doctrine of res adjudicata.

226 So. 2d at 242-43 (citations omitted).

it held that the defendant was not collaterally estopped from relitigating the negligence issue. The district court, relying on the *Youngblood* dicta, reasoned that the deaths of different persons necessarily raised separate issues.[41]

A similar result was reached by the First District Court of Appeal in *Seaboard Coastline R.R. v. Arnett.*[42] The court there held that collateral estoppel did not apply where a father sought to recover in separate suits for the deaths of two of his children killed in the same collision. Although the father failed to recover against the railroad in the suit for his daughter's death, he was not estopped from relitigating the negligence issue in the suit for his son's death. The court justified this result by following *Culloden.* It stated: "No matter how similar the points of law and questions may be, the points and questions herein revolve around the death of Paul Joe Arnett, the minor child of the plaintiff, and not of Carol Arnett, who was the other minor child lost in [the] collision."[43]

The second pair of cases holds by implication that multiple injuries do not necessarily result in more than one justiciable issue. In *Shearn v. Orlando Funeral Home, Inc.,*[44] decided the same year as *Youngblood,* plaintiff first sued successfully for the pain and suffering of the deceased. Plaintiff then instituted a suit to recover for her own injuries. Res judicata was held not to apply since the causes of action were different in each suit.[45] But collateral estoppel did apply against the defendant because, the supreme court said, the parties were the same in both suits[46] and the pleadings raised no negligence issue that had not been determined in the prior suit.

> In each of the cases . . . the allegation of the complaint as to liability of the defendant is the same, viz.: that the driver of defendant's ambulance 'negligently and carelessly drove said ambulance of the Orlando Funeral Home, Inc., into and against the automobile.'[47]

Although the *Shearn* court did not explicitly examine the question, by implication it rejected the view that every injury gives rise to a separate issue. For estoppel by judgment to apply all three requirements must be satisfied, including that of identity of issue. Since the *Shearn* court applied that doctrine even though each suit involved an

41. 226 So. 2d at 244.
42. 303 So. 2d 653 (Fla. 1st Dist. Ct. App. 1974).
43. *Id.* at 653-54.
44. 88 So. 2d 591 (Fla. 1956).
45. *Id.* at 594.
46. *Id. Cf.* note 40 *supra.*
47. 88 So. 2d at 594.

injury to a different person, the court must have been satisfied that the requirement was met.

In *Seaboard Coastline R.R. v. Cox*,[48] the plaintiff had previously brought a successful suit against the railroad for the wrongful death of his mother. He then sued the railroad for the wrongful death of his father, who was killed in the same collision that killed his mother. The Second District Court of Appeal applied estoppel by judgment to preclude the railroad from further litigating the issue of its negligence. The court rejected *Culloden* on the ground that it directly conflicted with *Shearn*. The *Cox* court stated that "the negligence of the defendant which was an issue in the second suit had already been adjudicated in the first suit."[49]

Although it did not mention *Shearn* or *Cox*,[50] the *Tuz* court implicitly adopted the rationale of those cases. The *Shearn* and *Cox* courts found that the initial suit settled the issue of defendant's negligence toward all victims of a single accident. The *Culloden* and *Arnett* courts, by contrast, took the view that the initial suit settled only the issue of a defendant's negligence toward a specific accident victim. In *Tuz*, the initial litigation produced a narrow holding; the district court determined only that Chadbourne had not breached a duty to Tuz's passenger.[51] Nonetheless, the supreme court treated that litigation as resolving the issue of Chadbourne's negligence toward another victim of the accident—Tuz. The supreme court stated that "the issue of respondent Chadbourne's negligence, having been litigated and determined in a prior case [need] not be litigated again . . . ."[52] The court

48. 308 So. 2d 154 (Fla. 2d Dist. Ct. App.), *cert. granted*, No. 47,137 (Fla., July 7, 1975). The Florida Supreme Court granted certiorari to resolve conflict between *Arnett* and *Cox*.

49. 308 So. 2d at 156. *Cox* is similar in one respect to Seaboard Coastline R.R. v. Arnett, 303 So. 2d 653 (Fla. 1st. Dist. Ct. App. 1974), *see* notes 42-43 and accompanying text *supra*. Though *Cox* and *Arnett* rest on different legal theories, in each case the court applied collateral estoppel to the detriment of the railroad.

Until 1967, a statutory presumption operated against railroads in negligence cases. Though that statute has been declared unconstitutional, Florida East Coast Ry. v. Edwards, 197 So. 2d 293 (Fla. 1967), it remains on the books, FLA. STAT. § 768.05 (1973).

50. The supreme court discharged the writ of certiorari in *Tuz* on February 12, 1975, the same day *Cox* was decided by the Second District Court of Appeal.

51. The *Burmeister* court stated:

> In the present cause, even if it could be said that Chadbourne, Inc. was negligent in parking its heavy equipment upon the edge of a dead-end street, under the circumstances as shown by the evidence, it appears without dispute that the negligence, if any, was not the proximate cause *of the decedent's death.*

254 So. 2d at 571 (emphasis added). *See* text accompanying note 2 *supra*.

52. 310 So. 2d at 10. RESTATEMENT (SECOND) OF JUDGMENTS § 68, comment *c* at 147 (Tent. Draft No. 1, 1973), indicates that a broad reading of "issue" is a necessary consequence of loosening the formal adversity requirement in new causes of action involving different plaintiffs.

thus seems to have adopted the *Shearn* and *Cox* view that the issue in the initial suit is who caused a specific accident, rather than who caused injury to a specific person.

The Florida Supreme Court's decision in *Tuz* amounts to imposition of a mandatory cross-claim rule on codefendants in negligence actions. Florida has a permissive cross-claim rule; the pleading of a cross-claim is never mandatory.[53] Tuz, acting within his rights under the present rules, chose in *Burmeister* to remain in a nonadversary position with Chadbourne. Faced with a similar situation in *Kimmel v. Yankee Lines*,[54] the United States Court of Appeals for the Third Circuit stated:

> Plaintiff, acting within her rights, chose to remain in a non-adversary position with her co-defendant in the first suit. To preclude her now from litigating her cause of action would in effect superimpose a mandatory cross-claim rule on Pennsylvania practice.[55]

One commentator has questioned the *Kimmel* logic. He points out that a mandatory cross-claim rule would prevent all codefendants from later asserting a claim against their coparties.[56] Application of collateral estoppel, however, only prevents relitigation by those codefendants who fail to prevail in the initial suit. The *Tuz* opinion, for instance, would not prevent Chadbourne from suing Tuz for damage to the road grader. Indeed, estoppel by judgment would aid Chadbourne in such a suit.

The difficulty with the above analysis is that it is based on hindsight. At the outset of a suit, codefendants have no way of knowing whether the plaintiff will prevail or whether some codefendants will be exonerated. Since the initial action may foreclose later litigation of a codefendant's negligence, codefendants will be forced into adversary positions. While individual codefendants might make tactical decisions not to file formal cross-claims,[57] the behavior of codefendants after *Tuz* will be virtually identical to behavior of codefendants faced with a mandatory cross-claim rule. Though *Tuz* may rest on a determination that the parties chose to become adversaries in fact,[58] the broad language of *Tuz* withdraws that choice from future codefendants. Like a manda-

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53. FLA. R. CIV. P. 1.170(g).

54. 224 F.2d 644 (3d Cir. 1955), *aff'g* 125 F. Supp. 702 (W.D. Pa. 1954).

55. *Id.* at 646.

56. Vestal, *supra* note 28, at 32.

57. A codefendant might choose not to file a cross-claim, for instance, because he wished to bifurcate determinations of liability and of damages.

58. *See* page 665 *supra*.

tory cross-claim rule, the *Tuz* decision gives codefendants overpowering incentive to become adversaries in the initial suit.

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