State of New Hapshire
Supreme Court

NO. 96-141

1997 TERM

OCTOBER SESSION

MARILYN MOSHER

v.

PORTSMOUTH MOBILE HOMES, INC.

RULE 7 APPEAL FROM FINAL DECISION OF DISTRICT COURT

REPLY BRIEF BY DEFENDANT/APPELLANT, PORTSMOUTH MOBILE HOMES, INC.

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SUMMARY OF ARGUMENT

The defendant first argues in this reply brief that because the issue of collateral estoppel was not preserved below, and was argued for the first time in the plaintiff's brief, it should not be considered by this court. The defendant then argues that collateral estoppel does not apply to appeals in subsequent cases, and therefore does not preclude this court from construing the statute which is the root of the dispute in this case. Finally, the defendant argues that if this court reaches the collateral estoppel issue, the plaintiff has not met her burden of showing that prior litigation should have preclusive effect over the matters pending in this case.

ARGUMENT

I. Collateral Estoppel was not Raised or Considered by the Court Below and is not Preserved for Appeal

A. Collateral Estopped was not Preserved by the Plaintiff

It is well established that a party cannot raise an affirmative defense for the first time in an appellate court – if the defense was not raised below, it is waived. *Town of Windham v. Alfond*, 129 N.H. 24 (1986) (claim of discriminatory enforcement of zoning ordinance cannot be raised for first time on appeal); *Wilson v. Goodnow*, 98 N.H. 110 (1953) (in civil trespass action, defendant cannot claim for first time on appeal that she had rights to property under statute); *Larkin v. Alley*, 86 N.H. 385 (1934) (verdict for plaintiff cannot be disturbed on grounds of a defense where it was not relied on at trial); *Hawes v. Chase*, 84 N.H. 170 (1929) (in negligence action by tenant, landlord cannot claim for first time on appeal defense that plan of construction was faulty); *State v. Town of Rye*, 35 N.H. 368 (1857); *North v. Crowell*, 11 N.H. 251 (1840) (party cannot claim lack of notice for first time on appeal); *Higgins v. Ledo*, 66 F.2d 265 (1st Cir. 1933) (construing New Hampshire law) (defense that statute in car crash case relieving defendant of liability cannot be claimed for first time on appeal).

Moreover, this court held just two years ago that collateral estoppel cannot be raised on appeal if the lower court did not rule on it. This Court wrote that one party

> "argues that the doctrines of res judicata and collateral estoppel should have precluded [the other party]'s claim. . . . This argument fist appeared in [the party's] motion for judgment notwithstanding the verdict or new trial. . . . Because [the party] first raised the issue after the jury trial had concluded, the trial court had the discretion to either not consider the issue or re-open the record and allow the parties to present evidence. . . . The trial court determined that the argument was inappropriate because [the party] had not raised it at trial, and we find no abuse of discretion."

Tsiatsios v. Tsiatsios, 140 N.H. 173 (1995) (internal cites and quotations omitted). Similarly, in *Maciejczyk v. Maciejczyk*, 134 N.H. 343 (1991), this court found that

> "There is no indication on the record that the defendant raised before the trial court the issues of res judicata . . . . We do not address [this] issue[], therefore, as [it] ha[s] not been properly preserved for appeal."

No party mentioned collateral estoppel in any pleading or anywhere in the trial court record, and therefore did not give the trial court an opportunity to consider it. Further, the plaintiff did not cross-appeal or otherwise bring the issue to the attention of this court. The issue first appears in the plaintiff's brief. Collateral estoppel is an equitable affirmative defense, *see Gephart v. Daigneault*, 137 N.H. 166 (1993), and not a jurisdictional issue that can be raised at any time. Accordingly, the matter was not preserved below or on appeal, and should not be considered by this court.

B. Collateral Estoppel was not Raised by the Trial Court *Sua Sponte*

Collateral estoppel is an issue that may be raised *sua sponte* by a trial court. *Hallisey v. Deca Corp.*, 140 N.H. 443, 444 (1995). The court's order in the present case says, in part, "This case is governed by the Court's opinion in #93-0610 and #94-SC-140." *Appendix* at 14. The plaintiff has made the orders to which the court refers a part of the record in this appeal. *Appendix* at 15, *Plaintiff/Appellee's Brief* at 25. Thus, the Portsmouth District Court was well aware of its prior decisions on similar cases, and explicitly relied on them. Its reliance, however, was not for purposes of collateral estoppel, but merely, it appears, to save the court from having to re-write what it had already written. In fact, in an effort to save judicial resources, the defendant requested that the cases be consolidated. *Transcript* at 2.

Thus the court had ample opportunity to raise collateral estoppel *sua sponte*. But it

didn't. If it were interested in doing so, it would have ruled that the defendant in the present case was barred from presenting its defense. But the defendant was not barred. The District Court allowed the defendant to go forward with its defense, to present evidence, and to make an argument. *Transcript passim.* At no time did the court indicate that it was raising or considering collateral estoppel, and it failed to take its *Hallisey* opportunity to raise the matter *sua sponte.* Because raising collateral estoppel *sua sponte* is discretionary, *Hallisey v. Deca*, 140 N.H. at 444, the plaintiff cannot claim the trial court's failure to raise it was error. Accordingly collateral estoppel was never before the trial court, was not preserved, and should not be considered on appeal.

C. Collateral Estoppel is Discretionary, and the District Court did not Abuse its Discretion

Application of the doctrine of collateral estoppel is entirely discretionary. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); *State v. Cassady*, 140 N.H. 46 (1995) (balancing undertaken in holding that collateral estoppel not a bar to subsequent criminal conviction following ALS proceeding indicates doctrine is matter of discretion, and not mandatory).

Thus, even if collateral estoppel is deemed to have been considered by the lower court, there is no indication that the court applied the doctrine or took any action to bar the defendant's presentation of its defense. It follows that the court must have acted in its discretion. There has been no allegation of abuse of discretion, and no evidence on which to ground such an allegation. Accordingly, this court has no basis on which to find that the District Court should have applied collateral estoppel.

II. Collateral Estoppel Does not Bar Appeals Concerning Statutory Construction in Subsequent Cases

When a party is attempting to preclude an appeal of a legal issue in a subsequent case, collateral estoppel should not apply. There is no estoppel when

> "[t]he issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based."

RESTATEMENT (SECOND) OF JUDGMENTS § 29(7).

> "This consideration is especially pertinent when there is a difference in the forums in which the two actions are to be determined, as when the issue was determined in the first action by a trial court and in the second action will probably be taken to an appellate court."

Id. comment i. *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 171 (1984) ("Our cases . . . recognize an exception to the applicability of the principles of collateral estoppel for unmixed questions of law arising in successive actions involving unrelated subject matter.") (quotations and citations omitted); *United States v. Moser*, 266 U.S. 236, 242 (1924) ("Where . . . a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases."); *Divine v. Commissioner of Internal Revenue*, 500 F.2d 1041, 1048-50 (2d Cir. 1974); *Glictronix Corp., v. American Tel. & Tel. Co.*, 603 F. Supp. 552, 571 (1984) *Dorsey v. Solomon*, 435 F. Supp. 725, 742 (D. Md. 1977) ("the issues involved here are purely legal issues as to which collateral estoppel effect is less often accorded"), *modified on other grounds*, 604 F.2d 271 (4th Cir. 1979); *Tankersley v. Durish*, 855 S.W.2d 241, 245 (Tex. App. Ct. 1993) ("Courts disfavor applying collateral estoppel in the context of a pure question of law."); *Antillon v. N.M. State Highway Dep't.*, 820 P.2d 436 (N.M. App. Ct. 1991).

Moreover, "[i]ssue preclusion is least favored where the pure question of law is one of statutory construction." *United States ex rel. Stinson, Lyons v. Blue Cross*, 755 F. Supp. 1040, 1046 (S.D. Ga. 1990).

The cases cited by the plaintiff in her brief indicate that a party may be precluded from re-litigating factual issues in the same court. But no known law prevents an appeal of legal issues in a subsequent case; indeed, substantial authority creates an exception to the doctrine of collateral estoppel for precisely that. To bar a party by collateral estoppel from appealing a matter of statutory law in a later case would force an erroneous decision of a lower court to set policy for the whole state. Since it is this court's role to determine the law, and uniquely this court's role to construe legislation, it should exercise its prerogative and reach the merits here.

III. The Plaintiff has Failed to Prove that Collateral Estoppel Should be Applied

The party asserting collateral estoppel has the burden of proving its elements. *Appeal of Hooker*, ___ N.H. ___, 694 A.2d 984 (1997); *Gephart v. Daigneault*, 137 N.H. 166, 172-73 (1993). Even if this court reaches the issue, the plaintiff did not sufficiently prove its application.

A. The Defendant Had No Incentive to Appeal the First Suit and Should not be Bound for Not Having Appealed

For collateral estoppel to apply, the party against whom estoppel is being asserted must have had an adequate opportunity to fully litigate the issue. *Daigle v. City of Portsmouth*, 129 N.H. 561 (1987). While Portsmouth Mobile Homes was not forcibly prevented from appealing prior District Court orders, *see Hopps v. Utica Mut. Ins. Co.*, 127 N.H. 508 (1985), it had no reason to do so.

The forseeabilty of future litigation is a factor in determining whether to apply collateral estoppel. *See Ezagui v. Dow Chem.Co.*, 598 F.2d 727 (2d Cir. 1979). Collateral estoppel does not apply when the party being estopped did not have reason or incentive to vigorously defend the prior suit. Collateral estoppel should not apply when

> "because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action."

RESTATEMENT (SECOND) OF JUDGMENTS § 28(5)(c). *United States v. Wallace & Tiernan Co.*, 336 U.S. 793, 800 (1949) (rejecting collateral estoppel as party had no incentive to appeal); *Mackris v. Murray*, 397 F.2d 74, 80 (6th Cir. 1968) (party excused, for collateral estoppel purposes, from fully litigating first suit when it had no reason to fear adverse decision would be

subsequently used by non-parties, when it could proceed in first suit with minimum expense, and when exposure to liability in first suit was minimal); *Murphy v. Andrews*, 465 F. Supp. 511 (E.D. Pa. 1979) (rejecting collateral estoppel as party had no incentive to appeal adverse finding); *Salida Sch. Dist. R-32-J v. Morrison*, 732 P.2d 1160 (Colo. 1987) (rejecting collateral estoppel upon finding that employers have little incentive to vigorously defend claims for unemployment benefits); *see also* RESTATEMENT (SECOND) OF JUDGMENTS, title E, introductory note.

> "Offensive collateral estoppel may . . . be criticized as extending the reach of some unreliable judgments in those cases where the losing party did not vigorously defend the first suit for a variety of logical reasons."

Warren Freedman, RES JUDICATA AND COLLATERAL ESTOPPEL: TOOLS FOR PLAINTIFFS AND DEFENDANTS 32 (1988); *see Berner v. British Commonwealth Pac. Airlines Ltd.*, 346 F.2d 532 (2d Cir. 1965) *cert denied* 382 US 983 (1966). More generally, collateral estoppel does not apply when it is not fair to do so. *See, e.g.*, *Parklane Hosiery*, 439 U.S. at 322; *State v. Cassady*, 140 N.H. 46 (1995); *Rachal v. Hill*, 435 F.2d 59, 62 (5th Cir. 1970), *cert denied* 403 US 904 (1971).

In this case, the defendant's damages in any single suit from a business point of view are *de minimus* – merely forgoing several hundred dollars of the entrance fee. A businessperson can calculate that the cost of litigating is greater than the forgone fee, and that settling or paying damages makes better business sense than appealing. It is not until the third or fourth suit that a businessperson realizes the stream of plaintiffs is endless and that it makes business sense to get an appellate determination of the issues. Similarly, a business person may not have the resources to litigate at the time of the first suit, may regard it as a mere distraction not likely to be repeated, or may feel that the adverse judgment was a one-time erroneous decision of an overly zealous judge. Accordingly, it is not fair to apply collateral estoppel and thereby burden the defendant

with the requirement that it litigate all the way to the Supreme Court in the very first suit.

B. Matters in First and Second Suit Were Not Identical

1. The Law Requires that the Issues be Identical, and not Merely Similar

For collateral estoppel to apply, the matters in the second suit which are sought to be precluded must be identical to the matters actually litigated in the first suit. "A fundamental requirement for the application of collateral estoppel is that the issue subject to estoppel be identical in each action." *Robertson's Case*, 137 N.H. 113, 117 (1993).

A review of New Hampshire's jurisprudence in this area shows that this court carefully scrutinizes whether the issues are identical. Mere similarity does not suffice. This court has repeatedly found that when the issues are distinguishable, collateral estoppel does not apply.

Simpson v. Calivas, 139 N.H. 1, 7-8 (1994), was a malpractice suit against a lawyer who drafted a will. This court held that collateral estoppel did not apply in the malpractice suit to issues that had allegedly been litigated during probate of the will. Even though the evidence in the probate court and the subsequent malpractice suit was the same, the probate court's role was to determine the intent expressed in the will while the malpractice suit involved the actual intent of the testator. The suits were closely similar because both required an inquiry into the intent of the testator, but the distinction between *expressed* intent and *actual* intent was sufficient to defeat a claim of collateral estoppel.

Similarly, in *Robertson's Case*, 137 N.H. 113 (1993), this court held that collateral estoppel did not apply where the issue in the first proceeding was what and when defense attorneys knew of discovery documents, the alleged withholding of which was misconduct. The issue in the second proceeding was what the attorney knew or reasonably believed about alleged discovery misconduct. Like in *Simpson v. Calivas*, the issues were very similar, but because they

were capable of distinction, they were different for collateral estoppel purposes.

Other New Hampshire cases also illustrate the close attention this court pays in collateral estoppel cases to differences between issues. *Appeal of Hooker*, ___ N.H. ___, 694 A.2d 984 (1997) (collateral estoppel not apply to proceeding where issue was effect of workplace injury upon history of disease while prior proceeding was limited to whether there was medical causation of the workplace injury); *Hartgers v. Town of Plaistow*, 141 N.H. 253 (1996) (collateral estoppel not apply in favor of plaintiff in suit claiming damages for unconstitutional arrest on charges ultimately dropped for lack of probable cause because information available to police at time of criminal case and time of civil case was different); *Petition of Gilpatric*, 138 N.H. 360 (1994) (issue of permanent impairment sufficiently different from issues of work capacity for purposes of temporary total disability compensation such that collateral estoppel not apply); *ERG, Inc. v. Barnes*, 137 N.H. 186 (1993) (action for malicious prosecution against attorney' client not collaterally estopped by prior suit against the attorney because the suits were based on different legal standards); *Sundell v. Town of New London*, 127 N.H. 752 (1986) (collateral estoppel does not apply in second suit for damages resulting from water under the defendant's control where first suit concerned damages from 1968 to 1977 and second suit concerned damages thereafter); *a.In re Alfred P.*, 126 N.H. 628 (1985); *Morgenroth & Assocs., Inc. v. State.*, 126 N.H. 266 (1985).

On the other hand, this court has applied collateral estoppel when issues in the first and second suits were identical. In *Metropolitan Property & Liab. Ins. Co. v. Martin*, 132 N.H. 593 (1989), this court applied collateral estoppel to a clause in an insurance policy where the exact same issue had been previously litigated. The second litigation concerned where an accident

victim lived for purposes of whether he was covered under his brother's insurance policy. The prior litigation concerned where the same person lived for purposes of whether he was covered under his mother's insurance policy. Thus, the precise fact that was allegedly disputed – where the victim lived – had been previously litigated and determined. This court properly applied collateral estoppel.

2. The Issues Here are not Identical

In the appeal at hand, the issues determined in the subsequent (present) suit are not identical to those determined in the prior case. In the court order, in fact, the court did not find that the issues are identical; instead it said: "The issues in this case are *similar* to the issues in Perkins vs. Portsmouth Mobile Homes, Inc." Appendix at 15 (emphasis added).

Regardless of the court's statement, it is apparent on the record that the issues are not identical. They apply to two different plaintiffs, two different mobile homes, two different pieces of land, two different sales, two different entrance fees, two different inspection processes, and two different transactions. *Perkins* was ruled on in December 1993; *Mosher* was ruled on over two years later.

Moreover, while some facts were present in both cases, many were not. The District Court ruled in both cases on the issues of a credit check,[1] a home inspection,[2] and setting up

[1] *Perkins*: Plaintiff's Brief at 25. *Mosher*: Appendix at 8 ¶ 9, Appendix at 16.

[2] *Perkins*: Plaintiff's Brief at 26. *Mosher*: Appendix at 9, ¶¶ 12, 17, Appendix at 16.

tenancy records.[3] But regarding reviewing of deeds,[4] notary costs,[5] and other miscellaneous expenses,[6] the court reached these issues only in the *Perkins* case, and not in *Mosher*. On the flip side, the court reached several factual issues in *Mosher*'s case only, and not in *Perkins*, including: lot inspection,[7] aesthetic inspection,[8] meeting the tenant,[9] checking tenant references,[10] signing deeds of transfer,[11] signing loan instruments,[12] and inspection of hookups for electric, water, and sewer.[13]

Most important is the central legal issue of whether the statute requires a cost relationship between the service rendered and the fee charged. The District Court assumed the issue in *Perkins*, but did not explicitly rule on it[14]. The issue is explicitly ruled on in *Mosher*.[15] Because there was no ruling on the issue in *Perkins*, this court cannot conclude that the matter was

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[3] *Perkins*: Plaintiff's Brief at 26. *Mosher*: Appendix at 9, ¶ 22.

[4] *Perkins*: Plaintiff's Brief at 26.

[5] *Perkins*: Plaintiff's Brief at 26.

[6] *Perkins*: Plaintiff's Brief at 26.

[7] *Mosher*: Appendix at 9, ¶ 12.

[8] *Mosher*: Appendix at 9, ¶ 13.

[9] *Mosher*: Appendix at 8, ¶ 11.

[10] *Mosher*: Appendix at 8, ¶ 10.

[11] *Mosher*: Appendix at 10, ¶ 24; Appendix at 16.

[12] *Mosher*: Appendix at 10, ¶ 24.

[13] *Mosher*: Appendix at 9, ¶ 17.

[14] *Perkins*: Plaintiff's Brief at 25, 26.

[15] *Mosher*: Appendix at 11, ¶ 7,8,9; Appendix at15.

"actually litigated" and "directly in issue," as required for the application of collateral estoppel. *Ainsworth v. Claremont*, 108 N.H. 55, 56 (1967).

CONCLUSION

Based on the forgoing, the defendant requests that this court ignore the issue of collateral estoppel because it was not preserved below or properly brought before this court and because it does not apply in subsequent appeals of statutory construction, and that if this court considers the issue it rule that collateral estoppel does not preclude the legal questions raised in this appeal.

Respectfully submitted,

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Dated: December 27, 2000

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CERTIFICATION

I hereby certify that on December 27, 2000, a copy of the foregoing will be forwarded to Thomas Bunnell, N.H. Legal Assistance.

Dated: December 27, 2000

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