St. John's Law Review

Volume 43
Number 3 *Volume 43, January 1969, Number 3*

Article 30

December 2012

Collateral Estoppel: Glaser Doctrine Retained in Second Department

St. John's Law Review

established his negligence as a cause of the accident. Special term, relying on *Glaser*, held that D-1's cause of action was *not* barred by the prior adjudication. The appellate division reversed, holding that

> the *Glaser* case should no longer be blindly followed as a controlling precedent. Recent decisions in the Court of Appeals give clear indication that *Glaser* may not be accepted as an authority under the present day application of the principles of res judicata and collateral estoppel.[105]

It was found that the prior action included a determination of whether or not D-1 caused or contributed to the collision, and that implicit in the jury's verdict was a finding that D-1 was negligent. Under these circumstances, the court felt that the defensive application of collateral estoppel was fair and just.

Where the issues involved in an action were previously fully litigated, and the parties are the same, there is no reason to relitigate those issues. In light of recent Court of Appeals activity in the field of collateral estoppel, the holding in *Schwartz* is not surprising.

Collateral Estoppel: Glaser *doctrine retained in second department.*

The rule of *Glaser v. Huette* [106] will continue to be applied in the second department. In a recent case, *Higginbothom v. Rath*,[107] D-1 and D-2 (owner and operator of car 1) were awarded a verdict for property damage and personal injuries against D-3 and D-4 (owner and operator of car 2), in a prior action. In the instant action, plaintiff (passenger in car 1) sued all four defendants for personal injuries. D-1 and D-2 moved for leave to serve an amended answer setting up the affirmative defense of res judicata, on the ground that, in the prior action, the issue of negligence on the part of the drivers had been decided. The motion was granted, but the merits of the defense were left for adjudication in the trial court.

Subsequently, D-3 and D-4 moved to strike out the affirmative defense, but special term denied the motion on the ground that movants had no standing to question the sufficiency of a defense in their co-defendants' answer addressed to the complaint.

As stated by the appellate division, here, the general rule in cases involving joint tortfeasors is that, prior to judgment and prior to the time when the issue of contribution becomes directly relevant, one defendant is not aggrieved by a determination in favor

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[105] 30 App. Div. 2d at 195, 291 N.Y.S.2d at 153.
[106] 232 App. Div. 119, 249 N.Y.S. 374 (1st Dep't), *aff'd mem.*, 256 N.Y. 686, 177 N.E. 193 (1931).
[107] 30 App. Div. 2d 93, 289 N.Y.S.2d 899 (2d Dep't 1968).

of a co-defendant against the plaintiff.[108] However, it was held that D-3 and D-4 were aggrieved parties and did have standing to question the merits of the affirmative defense because:

1. A holding that the defense is valid, as a matter of law, would mean that D-1 and D-2 were free from negligence, and, therefore, D-3 and D-4 alone were negligent.
2. Such a holding might be detrimental to plaintiff, depending on his injuries, the financial standing of D-3 and D-4, and the extent of their insurance coverage. Thus, the motion to strike out the defense was granted.

As additional authority, the court cited the holdings in *Glaser* and *Bartalone v. Niagara Car & Truck Rentals, Inc.*,[109] for the proposition that res judicata is not a valid defense. Thus, a conflict has developed with the first department's recent holding that *Glaser* no longer has any precedential value and can no longer be followed.[110]

Collateral Estoppel: DeWitt *principle held inapplicable in driver-passenger situation.*

In *B.R. DeWitt, Inc. v. Hall*,[111] the Court of Appeals posited two requirements for the offensive utilization of collateral estoppel. First, it must be unquestioned that the initial action has been vigorously defended and second, the later cause of action must be derivative of the first.[112]

While the derivative relationship necessary for use of the doctrine was not defined by the Court, the editors of the *Survey* have assumed that the owner-operator relationship was intended.[113]

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[108] *See generally* 7 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶5511.08 (1966).

[109] 29 App. Div. 2d 689, 288 N.Y.S.2d 312 (2d Dep't 1968). For a further discussion of this case, see *The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 302, 334 (1968).

[110] Schwartz v. Public Administrator, 30 App. Div. 2d 193, 291 N.Y.S.2d 151 (1st Dep't 1968).

[111] 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).

[112] The *DeWitt* holding, its requirements, and its effect on litigation is discussed in *The Quarterly Survey of New York Practice*, 42 ST. JOHN'S L. REV. 128, 150 (1967); 43 ST. JOHN'S L. REV. 436, 463 (1968); 43 ST. JOHN'S L. REV. 302, 336 (1968). *See also* 5 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶5011.27 (1967).

[113] Case law, however, manifests a conflict as to what relationship is requisite to a "derivative" action. *Compare* Cobbs v. Thomas, 55 Misc. 2d 800, 286 N.Y.S.2d 943 (Sup. Ct. Dutchess County 1968) (discussed in *The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 302, 336-38 (1968)) *with* Quick v. O'Connell, 53 Misc. 2d 1091, 281 N.Y.S.2d 120 (Sup. Ct. Jefferson County 1967). (Criticized in *The Quarterly Survey of New York Practice*, 42 ST. JOHN'S L. REV. 436, 463-64 (1968)).