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Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WESTERN UNITED MINES, INC., SYNDICATORS, INC., J. REX and STEVEN D. MARTENS,	)	
Plaintiffs/Appellants,	)	**APPELLANT'S REPLY BRIEF**
vs.	)	Appellate Case No. 20041009 CA
DEL-RIO RESOURCES, INC., DEL-RIO DRILLING PROGRAMS, INC., DAN K. SHAW, AND DOES I-XXXXX,	)	District Court No. 030800426
Defendants/Appellees	)	

Appeal from the Eighth District Court, Uintah County, State of Utah
The Honorable John R. Anderson

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PLAINTIFFS/APPELLANTS HEREBY REQUEST ORAL ARGUMENT AND ISSUANCE OF A PUBLISHED DECISION

IN THE UTAH COURT OF APPEALS

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Rules

Plaintiff and Appellant[1] Energy Management Services, LLC ("Plaintiffs") respectfully submits this Reply Brief.

I. ARGUMENT

A. This Court's Recent Reversal Of The Order Granting Summary Judgment In The Third District Action Requires That The Trial Court's Grant Of Summary Judgment In This Action Be Summarily Reversed.

It is undisputed that (1) the Trial Court's grant of summary judgment in this matter was based solely on the Trial Court's conclusion that Plaintiffs' claims in this matter were barred by *res judicata* as a result of the order granting summary judgment that previously had been entered in the Third District Action; and (2) after the Trial Court entered its order granting Defendants' Motion for Summary Judgment in this action, this Court reversed the judgment previously entered in the Third District Action (*see Energy Management Services, LLC v. Shaw*, 2005 UT App 90, 110 P.3d 158). Under these circumstances, the Trial Court's decision must be summarily reversed and the case should be remanded for trial. *See e.g., Ron Shepherd Ins. v. Mayer*, 883 P.2d 1358 (Utah 1994); *Sandy City v. Salt Lake County*, 827 P.2d 227, 230-31 (Utah 1992).

In its Opposition Brief, Del Rio does not contest the above-referenced facts and does not address the above-referenced case law. Instead, Del Rio provides only a cursory

[1] On July 2, 2004, the Trial Court granted a Motion to Substitute Energy Management Services, LLC for the Plaintiffs in this case. The Motion for Summary Judgment and Memorandum in Support thereof refer to "Plaintiffs" in the plural and Defendants' argument requires comparisons between this action and an earlier action in which there were Plaintiffs. To avoid confusion, therefore, this brief also refers to appellant EMS as "Plaintiffs" and to Defendants Del Rio Resources, Inc. and Del Rio Drilling Programs, Inc. collectively as Del Rio. Defendant Dan K. Shaw will be referred to as "Shaw."

response to Plaintiffs' argument concerning the effect of the reversal of the judgment in the Third District Action. *See*, Defs.' Opp'n Br. at pp. 11-12.

Del Rio's cursory argument attempts to trivialize this Court's reversal of the summary judgment in the Third District Action. Del Rio's claim that "the District Court's ruling that the Plaintiffs' claim to the Leases fails as a matter of law remains intact" (Opp'n Br. at 12) is simply incorrect. In reversing the entry of summary judgment in the Third District Action, this Court did **not** endorse or affirm the Trial Court's ruling on the merits. Rather, this Court expressly stated that it "need not address the substance of the parties' summary judgment arguments as we conclude that EMS is entitled to have the Trial Court consider and rule on its request for additional discovery." *Energy Management Services*, 110 P.3d at 160.

By definition, the reversal of the summary judgment in the Third District Action rendered that judgment of no further force or effect and eliminated the basis for the Trial Court's finding of *res judicata* in this action. *See Phebus v. Dunford*, 114 Utah 292, 198 P.2d 973, 974 (Utah 1948) (A reversal of a judgment or decision of a lower court such as this places the case in the position it was in before the lower court rendered that judgment or decision, and vacates all proceedings and orders dependent upon the decision which was reversed). As a result, the Trial Court's judgment in this case also must be reversed and the case must be remanded to the Trial Court for further proceedings. *Ron Shepherd*, 883 P.2d at 1358; *Sandy City*, 827 P.2d at 230-31; *see also*, RESTATEMENT (SECOND) OF JUDGMENTS, § 16, cmt. C (1982) ("If, when the earlier judgment is set aside or reversed, . . . an appeal has been taken and remains undecided, a party may inform the trial or

appellate court of the nullification of the earlier judgment and the consequent elimination of the basis for the later judgment. The court should then normally set aside the later judgment.").

The mere fact that the Third District Action was remanded to the Trial Court for further proceedings consistent with this Court's opinion does not limit the impact of the reversal on this case. In both the *Ron Shepherd* case and the *Sandy City* case, the fact that the earlier judgment had been reversed and remanded to the Trial Court for further proceedings consistent with this Court's decisions did not prevent this Court from reversing the second judgment which was based on the *res judicata* or collateral estoppel effect of the first judgment. Plaintiffs believe that they will prevail on remand in the Third District Action. Obviously, Del Rio disagrees. However, until the Court has ruled once again on the merits in the Third District Action, there simply is no viable judgment on the merits upon which a finding of *res judicata* can be based.

Del Rio's suggestion that this Court should not give any effect to the reversal of the judgment in the Third District Action because Del Rio anticipates that "the proceedings on the Rule 56(f) affidavit will be completed, and the Third District Court judgment reinstated, well before proceedings on this appeal are completed" (Opp'n Br. at 12) is based entirely on unfounded speculation.[2] Plaintiffs have renewed their Rule 56(f) Motion.[3] Additionally, on July 20, 2005, Plaintiffs filed a new Motion to Amend their

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[2] Del Rio's use of the term "reinstated" shows that Del Rio recognizes that the reversed judgment in the Third District Action has no present validity or effect.

[3] The judgment in the Third District Action was reversed on February 25, 2005, with the remittur being issued on May 5, 2005. The Trial Court granted Plaintiffs' Rule 56(f)

Complaint with the Trial Court.[4] Del Rio apparently believes that the trial court will deny Plaintiffs' Rule 56(f) Motion and then reinstate its Order granting summary judgment. Plaintiffs, on the other hand, believe that the trial court will grant the Rule 56(f) Motion and the Motion to Amend[5] and that Plaintiffs ultimately will prevail at trial. At this point in these proceedings, there simply is no way to predict with certainty how the trial court will rule in the Third District Action. Under these circumstances, Plaintiffs respectfully submit that the above-cited case law requires that the Trial Court's judgment in this action be reversed and that the case be remanded to the Trial Court for further proceedings. At a minimum, Plaintiffs respectfully submit that the proceedings in this appeal must be stayed pending issuance of a final judgment in the Third District Action. *See* RESTATEMENT (SECOND) OF JUDGMENTS, § 16, cmt. B (suggesting that it may be advisable for the court that is being asked to apply an earlier judgment as *res judicata* to

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Motion by Minute Order dated July 12, 2005. However, because as a result of a clerical error, counsel for Del Rio never received a copy of Plaintiffs' renewed Rule 56(f) Motion, the parties have stipulated that the Trial Court should vacate its July 12, 2005 Order and rule again on the Rule 56(f) Motion after it is fully briefed and submitted for decision by the parties.

[4] On November 12, 2002, Plaintiffs filed a Motion to File a First Amended Complaint in the Third District Action. Judge Livingston did not address or rule on the Motion to Amend. Instead, on November 14, 2002, Judge Livingston issued his order granting summary judgment in the Third District Action. Plaintiffs appealed that Order. Thereafter, by Minute Order dated March 29, 2003, a copy of which is attached hereto as Exhibit A and is incorporated herein by reference, Judge Hilder denied Plaintiffs' Motion to Amend on the grounds that Plaintiffs' appeal of the Order granting summary judgment deprived the Court of jurisdiction to rule on the Motion to Amend. In his Order, Judge Hilder stated, among other things, that if Plaintiffs "prevail on appeal and the matter is returned to this Court, amendment is likely available."

[5] If Plaintiffs' Motion to Amend their Complaint in the Third District Action is granted, it should render the issues raised in this case moot.

stay its own proceedings while awaiting the ultimate disposition of the earlier case, either in the trial court or on appeal.)[6]

B. Del-Rio Did Not Establish At Trial The Elements Necessary To Invoke The Doctrine Of *Res Judicata*.

For the reasons set forth above, Plaintiffs do not believe that it is necessary for this Court to address or determine at this time "whether the trial judge was correct in holding that the criteria for [*res judicata*] were met, since the decision relied upon for the finding of [*res judicata*] has been overturned in the [Third District Action]." *See Sandy City*, 827 P.2d at 230. Nevertheless, in the event that this Court believes it is necessary or appropriate to address this issue at this time, Plaintiffs respectfully submit the following argument.

The parties seem to agree, and the law is clear, that the claim preclusion branch of *res judicata* bars a subsequent claim only if the movant demonstrates the existence of the following three factors: (1) both cases involve the same parties or their privy; (2) the first suit resulted in a final judgment on the merits; and (3) the claim was either (a) presented in the first suit, or (b) could have **and** should have been presented in the first suit. *See*

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[6] Comment B to RESTATEMENT (SECOND) OF JUDGMENTS, § 16 states that "This course commends itself if the disposition will not be long delayed and especially if there is substantial doubt whether the judgment will be upheld." In this case, there certainly is substantial doubt concerning whether the reversed judgment in the Third District Action ever will be reinstated. There is no assurance, however, that resolution of the Third District Action on remand "will not be long delayed." As a result, Plaintiffs respectfully submit that reversal of the judgment in this action is the better course. Nevertheless, simultaneously with the filing of this Reply Brief, Plaintiffs have filed a Motion to Stay these proceedings in the event that this Court believes that it is more appropriate to stay the proceedings, rather than to simply reverse the judgment, pending a final judgment in the Third District Action.

e.g., Macris & Assoc. v. Neways, Inc., 2000 UT 93, ¶20, 16 P.3d 1214. Plaintiffs conceded the existence of the first two factors in the Trial Court.[7] Thus, the focus of the argument is whether Del Rio properly established the existence of the third factor before the Trial Court. Plaintiffs respectfully submit that the Del Rio did not, and cannot, establish the existence of the third factor.

1. Plaintiffs' Current Claims Were Not Presented In The Third District Action.

Contrary to Del Rio's argument, all of Plaintiffs' claims in this action were **not** presented in the Third District Action. The Complaint in the Third District Action presented a single claim for declaratory judgment. R. 289-293. The Complaint in this case presented three different claims – quiet title, constructive trust, and breach of joint venture partnership -- and did not reassert the declaratory judgment claim already determined in the Third District Action. R. 2-9. Although it is true that the quiet title claim and the constructive trust claim in the Complaint in this action sought an interest in the same Leases in which Plaintiffs sought an interest in the Third District Action, Plaintiffs' alternative claim for breach of joint venture partnership in this case sought only damages – which is different from the relief that had been sought in the Third District Action.[8] Thus, contrary to Del Rio's argument, Plaintiffs have not sought the

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[7] Plaintiffs' concession of the existence of a final judgment on the merits in the first action was subject to Plaintiffs' noting that the judgment in the Third District Action was on appeal. For the reasons set forth above, the reversal of the judgment in the Third District Action by this Court has changed things so that there now no longer is a final judgment on the merits that can serve as the basis for *res judicata*.

[8] The Complaint in the Third District Action also included a request for "money damages", R. 293, but this simply was a reference to the same res which was the subject

same relief in this action that they sought in the prior Third District Action, and Plaintiffs cannot be viewed as having actually presented the same claims in this action as were presented in the Third District Action.

2. Although Plaintiffs Could Have Presented All Of The Claims Asserted In This Action In The Third District Action, They Were Not Required To Do So.

Del Rio argues at length that all of Plaintiffs' claims in this action should be barred by *res judicata* because all of these claims supposedly could have and should have been raised in the Third District Action. Del Rio's arguments cannot withstand analysis.

a. Del Rio's Reliance On The *AEM* And *Wheadon* Cases Ignores The Utah Supreme Court's More Recent Decision In *Macris*.

Del Rio relies heavily in this Court's 1999 decision in *American Estate Management v. Int'l Investment & Development Corp.*, 1999 UT App. 232, 986 P.2d 765 ("*AEM*") and the Utah Supreme Court's 1962 decision in *Wheadon v. Pearson*, 14 Utah.2d 45, 376 P.2d 946 (1962). These cases did involve the application of *res judicata* principles. However, after these cases were decided, the Utah Supreme Court issued its decision in *Macris*. Thus, it is *Macris*, and not *AEM* or *Wheadon*, which provides the

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of Plaintiffs' declaratory judgment claim, i.e. the monetary proceeds recovered in the Claims Court Litigation. The claim for breach of joint venture partnership in this action does not seek a declaratory judgment or damages relating to the Claims Court Litigation proceeds. Rather, through the alternative claim for breach of joint venture partnership in this case Plaintiffs seek an accounting in damages relating to their interest in all assets of the joint venture.

most recent guidance to this Court from the Utah Supreme Court concerning *res judicata* principles.[9]

As noted in Plaintiffs' Opening Brief, *Macris* specifically holds that claim preclusion applies only where there is an identity of facts and evidence between the claims presented in the two actions. *Macris*, 2000 UT at ¶ 28, 16 P.3d at 1221 (". . . the cause of action in the present suit must be *identical* to the one brought in the prior suit."). In determining whether claims are identical for *res judicata* purposes, the focus is upon whether the two causes of action rest on a different state of facts and evidence of a different kind or character is necessary to sustain the two causes of action. *Id.* Moreover, even if a plaintiff is aware of the factual basis of a suit at the time of filing another suit, he or she is not required to bring all claims together if there is no identity of facts and evidence between the two claims. *Id.*

Del Rio seems to acknowledge, as it must, that the claims asserted by Plaintiffs in this case contain different elements and require different proof than the declaratory relief

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[9] Del Rio attempts to chastise Plaintiffs for not addressing *AEM* in their opening brief. Plaintiffs did not address *AEM* because Plaintiffs thought it was more appropriate to focus on the Utah Supreme Court's more recent decision in *Macris*.

claim asserted by Plaintiffs in the Third District Action.[10] Thus, under the rules set forth in *Macris*, application of *res judicata* in this case was inappropriate.[11]

b. The Mere Fact That Macris Did Not Involve Claims To Interests In Real Property Does Not Render Its Holding Inapplicable To This Case.

Del Rio attempts to distinguish *Macris* on the grounds that it did not involve claims to interests in real property. This effort fails because, although the facts in *Macris* did not involve an interest in real property, the case primarily relied upon in *Macris*, *Schaer v. State*, 657 P.2d 1337 (Utah 1983), did involve claims to interests in real property. The Utah Supreme Court's reliance on its holding in *Schaer* in its decision in *Macris* shows that the Utah Supreme Court believes that the same principles governing *res judicata* apply regardless of whether a case involves interest in real property or some other interests.

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[10] The focus of the Third District Action was the parties' rights and obligations under the 1995 Agreement and the relating funding agreement subsequently entered into between Plaintiffs Dan Shaw and Del-Rio Resources, Inc. The claims in this action arise out of a joint venture agreement which predated the 1995 Agreement and the related funding agreement. Thus, the proof required in this case will be fundamentally different from that which was (and will be) submitted in the Third District Action.

[11] Del Rio argues that this Court should ignore the Utah Supreme Court's statements in *Macris* because these statements supposedly are mere dicta. This is not the case. Rather, the Utah Supreme Court presented two alternative explanations in *Macris* for why *res judicata* did not apply. Each of the alternative explanations offered by the Utah Supreme Court is equally viable, and each of these explanations is binding on this Court. *See Utah Fuel Co. v. Industrial Comm'n of Utah*, 73 Utah 199, 273 P. 306, 309 (Utah 1928) (Where an appellate court bases its decision on two or more distinct grounds, each is as much an authoritative determination as the other, and neither can be disregarded as dictum); *Jones v. Mutual Creamery Co.*, 81 Utah 223, 17 P.2d 256, 258 (Utah 1932) (Where two grounds are argued, presented, and involved, on either of which court's decision can be rested, and both are sustained, ruling on neither is "dictum").

In *Schaer*, the Utah Supreme Court held that *res judicata* did not apply where the two causes of action rested on a different state facts and evidence of a different kind or character would be necessary to sustain them, and where the two causes of action related to the status of property in two different time periods. *Schaer*, 657 P.2d at 1340. This case presents a similar situation. As noted above, the causes of action in the Third District Action and in this case are based on completely different facts and circumstances, which occurred during completely different time periods.[12] Given the similarities between this case and *Schaer*, the rule adopted by the Utah Supreme Court in *Schaer*, which has been recently reaffirmed by the Utah Supreme Court's reliance on *Schaer* in *Macris*, should apply in this case.

c. Even If This Court Concluded That Plaintiffs' Claims To An Interest In The Leases Were Barred By *Res Judicata*, This Would Not Bar Plaintiffs' Damages Claim.

For the reasons set forth above, Plaintiffs respectfully submit that the rule set forth in *Macris* applies to this case. However, even if this Court somehow were to conclude that different, broader rules for *res judicata* were to apply to claims for interests in real property,[13] *res judicata* still would not bar all of Plaintiffs' claims in this case. As noted above, Plaintiffs' alternative claim for breach of joint venture agreement in this case seeks monetary damages, not a specific interest in the Leases. Accordingly, even if this Court somehow concluded that Plaintiffs' claims for quiet title and constructive trust (to

[12] As a result, the facts in this case are much more similar to the facts in *Schaer* than the facts presented in either *AEM* or *Wheadon*.

[13] For example, if this Court were to conclude that *AEM* establishes different, broader rules for *res judicata* in cases involving claims to interests in real property than are set forth in *Macris*.

the extent that the constructive trust claim seeks an interest in the Leases in question) were barred by *res judicata*, this would not justify barring Plaintiffs' alternative claim for damages on the basis of *res judicata*. Indeed, Del Rio seems to acknowledge in its Opposition Brief that a claim for damages should and will be treated differently from a claim to an interest in real property for *res judicata* purposes. *See*, Opp'n Br. at p. 21. Thus, at the very most, *res judicata* could only apply to bar Plaintiffs' claims in this action for an interest in the Leases in question, and not Plaintiffs' alternative claim for damages for breach of the joint venture agreement.

II. CONCLUSION

For the reasons set forth above, and in Plaintiffs' Opening Brief, the Trial Court's entry of summary judgment against Plaintiffs should be reversed and this case should be remanded for trial.

Respectfully submitted this 4th day of August, 2005.

SNOW, CHRISTENSEN & MARTINEAU

By: _____

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Attorneys for Plaintiff/Appellant Energy Management Services, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of August, 2005, a true and correct copy of this Appellant's Reply Brief was placed in the U.S. mail, postage prepaid, addressed to the following:

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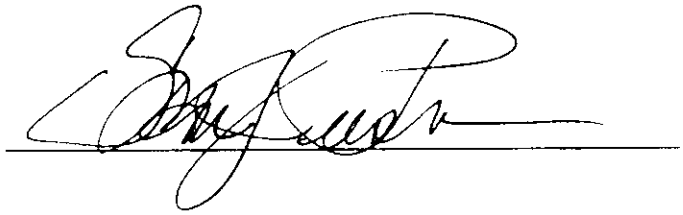

ADDENDUM

EXHIBITS

A. Minute Entry and Order

B. *Macris & Associates, Inc. v. Neways, Inc.*, 16 P.3d 1214, 2000 UT 93

ADDENDUM

EXHIBIT A

3RD DISTRICT COURT - SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

WESTERN UNITED MINES INC, Plaintiff,	:	MINUTE ENTRY AND ORDER
vs.	:	Case No: 010906368
DAN K SHAW, Defendant.	:	Judge: ROBERT K HILDER Date: 03/29/2003

Clerk: rhilder

Plaintiffs' Motion to Amend their Complaint to assert a new claim against defendant Del-Rio Resources is before the court for decision. This case is in an unusual posture, because the predecessor court, Judge Livingston, granted summary judgment, dismissing all claims against Del-Rio (Order signed November 14, 2002), and that dismissal is now the subject of plaintiffs' appeal. Judge Livingston did give plaintiffs leave to amend their Complaint and add a new claim against defendant Dan K. Shaw, but that has no effect on any claim against Del-Rio. This court does not believe that it has the ability to grant the Motion. Contrary to plaintiffs' argument, a final Order of dismissal, on the merits and disposing of all claims against that defendant, which is now on appeal, is not subject to revision by the trial court, unbless the matter is somehow remanded to the trial court and made the subject of an appropriate "post-trial" motion. That is simply not the posture of this case. Plaintiffs are probably right on two points they urge: First, if they prevail on appeal and the matter is returned to this court, amendment is likely available. Second, if the statute of limitations has not run, they can file an independent action, if their new claim does, in fact, have an independent basis. What they cannot do is amend their claim against Del-Rio in this action at this time. The Motion be and hereby is DENIED. This signed Minute Entry shall be the ORDER of the court and no further Order is required.

Judge ROBERT K HILDER

STATE OF UTAH
3RD DISTRICT COURT
SALT LAKE CITY

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CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following pecple for case 010906368 by the method and on the date specified.

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Dated this 1 day of April, 2005.

Bryan Peterson
Deputy Court Clerk

ADDENDUM

EXHIBIT B

Briefs and Other Related Documents

Supreme Court of Utah.
MACRIS & ASSOCIATES, INC., Plaintiff and Respondent,
v.
NEWAYS, INC., Thomas E. Mower, and Leslie D. Mower, Defendants and Petitioners.
No. 990859.

Dec. 5, 2000.

Marketing company brought action against successor health and beauty company for fraudulent transfer, successor liability, and alter ego. The Fourth District Court, Provo Department, Howard Maetani, J., granted summary judgment to health and beauty company. Marketing company appealed. The Court of Appeals, 986 P.2d 748, reversed. Corporation sought certiorari review. The Supreme Court, Russon, Associate C.J., held that: (1) action was not barred by doctrine of res judicata, but (2) claims for additional contract damages were barred by doctrine of issue preclusion.

Affirmed in part and reversed in part.

West Headnotes

[1] **Certiorari** 64(1)
73k64(1) Most Cited Cases
When exercising its certiorari jurisdiction, Supreme Court reviews the decision of the court of appeals, not of the trial court.

[2] **Certiorari** 64(1)
73k64(1) Most Cited Cases
When reviewing questions of law while exercising certiorari jurisdiction, Supreme Court accords no particular deference to the conclusions of law made by the court of appeals but reviews them for correctness.

[3] **Judgment** 540
228k540 Most Cited Cases
Claim preclusion involves the same parties or their privies and also the same cause of action, and this precludes the relitigation of all issues that could have been litigated as well as those that were, in fact, litigated in the prior action.

[4] **Judgment** 634
228k634 Most Cited Cases
Issue preclusion arises from a different cause of action and prevents parties or their privies from relitigating facts and issues in the second suit that were fully litigated in the first suit.

[5] **Judgment** 540
228k540 Most Cited Cases
In order for claim preclusion to bar a subsequent cause of action, a plaintiff must satisfy three requirements: first, both cases must involve the same parties or their privies; second, the claim that is alleged to be barred must have been presented in the first suit or must be one that could and should have been raised in the first action; third, the first suit must have resulted in a final judgment on the merits.

[6] **Judgment** 713(2)
228k713(2) Most Cited Cases
Party is required to include claims in action, for res judicata purposes, only if those claims arose before filing of complaint in first action.

[7] **Judgment** 713(2)
228k713(2) Most Cited Cases
Res judicata did not bar claims against successor corporation for fraudulent transfer, successor liability, and alter ego; facts giving rise to plaintiff's claims, which included predecessor's transfer of its assets to successor and successor's subsequent takeover of predecessor's business, did not arise until after filing of complaint in first action against successor, and claims in second action rested upon different set of facts than breach of contract litigation that was the subject of the first action.

[8] **Judgment** 585(1)
228k585(1) Most Cited Cases

[8] **Judgment** 713(1)
228k713(1) Most Cited Cases
For the doctrine of res judicata to preclude a subsequent cause of action, not only must the plaintiff have been aware of the cause of action at the time the first suit was commenced, but the cause of action in the present suit must be identical to the one brought in the prior suit.

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[9] **Action** 53(1)
13k53(1) Most Cited Cases
Even if a plaintiff is aware of the factual basis of a suit at the filing of another suit, he or she is not obligated to bring all claims together if there is no identity of facts and evidence between the two claims.

[10] **Judgment** 744
228k744 Most Cited Cases
Determination that plaintiff's claims in second action were not barred by claim preclusion did not preclude determination that plaintiff was prevented by doctrine of issue preclusion or collateral estoppel from seeking additional contract damages arising from first action.

[11] **Judgment** 634
228k634 Most Cited Cases
Four-part test is applied to determine whether doctrine of issue preclusion is applicable: first, the issue challenged must be identical in the previous action and in the case at hand; second, the issue must have been decided in a final judgment on the merits in the previous action; third, the issue must have been competently, fully, and fairly litigated in the previous action; and fourth, the party against whom collateral estoppel is invoked in the current action must have been either a party or privy to a party in the previous action.

[12] **Judgment** 651
228k651 Most Cited Cases

[12] **Judgment** 744
228k744 Most Cited Cases
In action against corporation for fraudulent transfer, successor liability, and alter ego, plaintiff was precluded, under doctrine of collateral estoppel, from seeking contract damages in addition to those sought in prior breach of contract action, even though issue of contract damages was decided by stipulation in first action; issue of damages resulting from breach was decided in first action, that award of damages was final, plaintiff had full opportunity to develop its claim in first action, and plaintiff was a party to both actions.

[13] **Judgment** 720
228k720 Most Cited Cases
The general rule precluding the relitigation of material facts or questions which were in issue and adjudicated in a former action extends to questions necessarily involved in an issue although no specific finding may have been made in reference to that matter, and although such matters were not directly referred to in the pleadings.

[14] **Judgment** 713(2)
228k713(2) Most Cited Cases

[14] **Judgment** 720
228k720 Most Cited Cases
If the second action involves an issue as to which the judgment in a prior action is a conclusive adjudication, the estoppel, so far as that issue is concerned, extends to every matter which was or might have been urged to sustain or defeat the determination actually made.

[15] **Stipulations** 16
363k16 Most Cited Cases
An issue determined by stipulation rather than judicial resolution is binding in a subsequent action if the parties manifested an intention to that effect.

[16] **Judgment** 668(1)
228k668(1) Most Cited Cases

[16] **Judgment** 678(1)
228k678(1) Most Cited Cases
Issue preclusion does not require that both cases involve the same parties or their privies; rather, issue preclusion applies even if only the party against whom the doctrine is asserted was a party or in privity with a party to the prior adjudication.

***1215** D. Frank Wilkins, Chris R. Hogle, Salt Lake City, for plaintiff.

Allen K. Davis, Christopher S. Crump, Wade S. Winegar, Scott T. Temby, Salem, for defendants.

ON CERTIORARI TO THE UTAH COURT OF APPEALS

RUSSON, Associate Chief Justice:

****1** On writ of certiorari, Neways, Inc., Thomas E. Mower, and Leslie D. Mower (collectively, "Neways") seek reversal of the Utah Court of Appeals' determination that Macris & Associates' ("Macris") claims for fraudulent transfer, successor liability, and alter ego are not barred by res judicata. Neways also claims that the court of appeals erred in not considering whether Macris is precluded by the doctrine of res judicata from pursuing additional contract damages in the present action.

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BACKGROUND [FN1]

FN1. The facts of the litigation and appeal that led to this case can be found in *Macris & Associates v. Images & Attitude, Inc.* 941 P.2d 636 (Utah Ct.App.1997).

**2 In August 1989, Macris entered into a distributorship agreement (the "Agreement") with Images & Attitude ("Images"). Pursuant to the Agreement, Macris was to use its time and marketing expertise to build a *1216 "downline organization" [FN2] within Images's multilevel marketing program. The Agreement specified that Macris was "autoqualified," which, the Agreement stated, meant that the usual distributor requirements of the Images marketing plan were waived and Macris was to be paid at the highest level provided for in the operation's marketing plan for product sales made by the distributors in Macris's downline. The term of the Agreement was to continue "throughout the life of Images," as long as Macris was "active in promoting Images and Images's products."

FN2. The trial court described a "downline" as follows:
Multilevel marketing is promoted as an opportunity to bring other people into a business by "sponsoring" them and sharing in the profits that those people bring in by sponsoring other people creating what is called a "downline." More people create a greater volume of sales upon which the earlier sponsors receive a percentage as compensation. There is an incentive to build an organization (downline) so that future income will be at a much greater amount because of the volume created by the organization.

**3 Subsequently, on March 7, 1991, Macris received a letter from Images informing Macris that its autoqualification status was being suspended for lack of activity. Shortly thereafter, in a letter dated March 29, 1991, Images informed Macris that it was terminating the Macris distributorship entirely. The reasons given for termination were Macris's testing of products after warnings not to do so, lack of activity under the Agreement, and damaging activity to Images and its distributor force.

**4 On April 17, 1991, Macris commenced an action against Images for breach of contract ("*Macris I*"). Macris alleged in that action that Images breached the distributorship agreement by wrongfully suspending Macris's autoqualification status and terminating its distributorship, and that Macris was entitled to damages as a result of that breach. Macris sought to recover as breach of contract damages ("contract damages") the payments it would have received as Images's distributor but for Images's wrongful termination of its distributorship. The matter was set for trial on September 28, 1992.

**5 Approximately one month prior to trial, in August 1992, Neways, Inc. was incorporated, with Thomas Mower as its president. It appears from the record that Thomas Mower was the president of Images up to the date on which Neways was created, whereupon he became the president of Neways. [FN3] Like Images, Neways is a multilevel marketing company engaged in the multilevel sale of various health and beauty products. On September 1, 1992, Images ceased doing business as a multilevel marketing company and transferred most of its assets to Neways. The newly formed Neways then took over the multilevel marketing operations of Images.

FN3. In its findings of fact, the trial court in *Macris I* stated: "Thomas E. Mower founded [Images] and served as its president at least through August 31, 1992."

**6 The trial scheduled for September 28, 1992, in *Macris I*, was continued by the trial court and finally went to trial without a jury on February 16, 1995, over three years after Images transferred its assets to Neways. [FN4] The trial court held that Images had materially breached its contract with Macris by wrongfully suspending Macris's autoqualification status and terminating its distributorship for lack of activity, and that Macris was entitled to damages for that breach. Images stipulated that it owed Macris $360,681.20 in contract damages for subsequent months, from March 1991 through August 31, 1992, the date on which Images ceased doing business as a multilevel marketing company. The trial court awarded Macris all the contract damages contained in the stipulation.

FN4. The original trial date of September 28, 1992, was continued by the trial court, as a result of a conflicting trial calendar, to January 25, 1993. On January 3, 1993, the parties stipulated to a continuance of the trial date because Judge Burningham was taking over the case from Judge Christensen. After an additional continuance of the trial date by the court because of its criminal

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calendar, trial was scheduled for February 16, 1995.

7 Just two days prior to the above-mentioned trial in *Macris I*-- February 14, 1995--Macris filed the present action against Neways and its president and vice president, Thomas and Leslie Mower ("*Macris II*"). It ***1217 is this case, *Macris II*, that is presently before us on certiorari. In *Macris II*, Macris asserted three claims in its complaint. First, Macris asserted a claim for fraudulent transfer, under which Macris alleged that Images's transfer of its assets to Neways was fraudulent pursuant to the Utah Fraudulent Transfer Act, *see* Utah Code Ann. § 25-6-5 (1998), because it was made with actual intent to limit the damages available to Macris and to hinder Macris from collecting the obligation owed by Images. Second, Macris asserted a successor liability claim, under which Macris claimed that because Neways is the successor corporation of Images, Macris is entitled to have Neways held liable for all amounts due as contract damages from Images to Macris awarded in *Macris I*. Finally, Macris asserted an alter ego claim, under which Macris claimed that there is no corporate distinction between Images and Neways and that the corporations have used the corporate shield of Neways to avoid liability to Macris.

**8 Through the above-named claims, Macris sought to recover the following damages against Neways: first, Macris sought payment by Neways of the contract damages awarded against Images in *Macris I*; second, Macris sought additional contract damages not awarded in *Macris I*, consisting of its share of the profits from its downlines accruing *after* September 1, 1992--the date on which Images transferred its assets to Neways; and third, Macris sought punitive damages for the alleged fraudulent transfer of Images's assets to Neways.

**9 On October 19, 1995, Neways moved for summary judgment, arguing that Macris's claims for fraudulent transfer, successor liability, and alter ego were barred by res judicata. Specifically, Neways argued that because Macris knew of its claims against Neways years before the trial against Images began, Macris could and should have included its claims against Neways in that action. Neways also argued that the doctrine of res judicata precluded Macris from pursuing additional contract damages in *Macris II*, because the issue of contract damages arising out of Images's 1991 breach of the distributorship agreement had already been fully litigated and decided in *Macris I*.

**10 In response, Macris argued that res judicata was inapplicable to its claims to the extent they sought to bind Neways to the judgment rendered against Images in *Macris I* and to the extent they sought additional contract damages. Macris argued that its claims against Neways arose after Macris filed its complaint in *Macris I* and that res judicata was therefore inapplicable.

**11 On November 14, 1995, Macris filed its own motion for summary judgment, arguing that because Neways admitted that it was the privy of Images for res judicata purposes in its motion for summary judgment, Macris should be granted a summary judgment on its successor liability claim. In response, Neways argued that although it admitted it was the privy of Images for res judicata purposes, it did not admit that it was the successor to Images's liabilities to Macris and that genuine issues of material fact precluded summary judgment on this issue.

**12 On September 19, 1997, the trial court issued its memorandum decision on both motions for summary judgment. [FN5] The court granted Neways summary judgment on its claim that res judicata barred Macris's fraudulent transfer, successor liability, and alter ego claims to the extent they sought "further damages from Neways as a result of the breached contract with Images." The trial court, however, refused to hold that res judicata precluded Macris's claims to the extent they sought to bind Neways to the judgment rendered against Images in *Macris I*. The court also granted Macris summary judgment on its claim that Neways was Images's successor and was therefore liable for the previous judgment against Images.

FN5. The memorandum decision contained statements of fact and reached conclusions of law.

13 Neways appealed, [FN6] arguing to the court of appeals that while the trial court correctly held that res judicata precluded Macris from pursuing additional contract ***1218 damages in *Macris II*, it erred by failing to apply the doctrine of res judicata to bar Macris's claims to the extent they sought to make Neways liable for the previous judgment against Images. Neways argued that all of Macris's claims, including its successor liability claim, could and should have been included in the previous action against Images. Neways further argued that the trial court erred in granting Macris a summary judgment on its claim that Neways was Images's successor and

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was therefore responsible to pay the damages awarded Macris in the previous lawsuit against Images.

FN6. Neways appealed to this court, which poured the case over to the court of appeals pursuant to section 78-2-2(4). *See* Utah Code Ann. § 78-2-2(4) (1996); Utah R.App.P. 42(a).

**14 Macris cross-appealed, arguing that the trial court erred in its determination that res judicata precluded Macris from pursuing further contract damages in *Macris II*. Macris reasoned that because its claims against Neways arose after it filed its complaint against Images in *Macris I*, res judicata was inapplicable to its claims to the extent they sought to enforce the judgment entered in *Macris I* and to the extent they sought additional contract damages.

**15 The court of appeals reversed both summary judgments. *See Macris & Assocs. v. Neways, Inc.*, 1999 UT App. 230, ¶ ¶ 14, 15, 986 P.2d 748. In reversing the trial court's grant of summary judgment in favor of Neways, the court of appeals held that res judicata did not bar Macris's claims for fraudulent transfer, successor liability, and alter ego. The court reasoned that because the facts giving rise to Macris's claims arose after Macris filed its amended complaint in *Macris I*, the doctrine of res judicata was inapplicable. In so holding, the court of appeals expressly adopted the rule, citing several courts in other jurisdictions, that a party need only include later claims in an action for res judicata purposes if the party was aware of the facts upon which the later claims were based *at the time the complaint was filed*. The court of appeals, however, did not address the issue of whether res judicata bars Macris from recovering additional contract damages in the present action. In addition, the court of appeals reversed the trial court's grant of summary judgment in favor of Macris, holding that material issues of fact precluded summary judgment on Macris's claim that Neways was Images's successor in liability.

**16 Neways filed a petition for a writ of certiorari with this court, seeking review of the decision of the court of appeals. We granted the petition. Neways argues that the court of appeals erred in its determination that the doctrine of res judicata does not bar Macris's claims for fraudulent transfer, successor liability, and alter ego. In this regard, Neways raises two arguments. First, Neways argues that the court of appeals erred by adopting the res judicata test that a party need include later claims in an action only if the party was aware of the facts upon which the later claims were based at the time the complaint was filed. Second, Neways argues that the court of appeals erred on review of the trial court's decision by failing to address whether the doctrine of res judicata precludes Macris from pursuing additional contract damages--beyond those awarded in *Macris I*--in the present action.

STANDARD OF REVIEW

[1][2] **17 When exercising our certiorari jurisdiction, "we review the decision of the court of appeals, not of the trial court." *Carrier v. Pro-Tech Restoration*, 944 P.2d 346, 350 (Utah 1997) (citing *Butterfield v. Okubo*, 831 P.2d 97, 101 n. 2 (Utah 1992)). The court of appeals' determination of whether res judicata bars an action presents a question of law. "When reviewing questions of law, we accord no particular deference to the conclusions of law made by the court of appeals but review them for correctness." *State v. Christensen*, 866 P.2d 533, 535 (Utah 1993) (citing *Allen v. Utah Dep't of Health*, 850 P.2d 1267, 1269 (Utah 1993); *Landes v. Capital City Bank*, 795 P.2d 1127, 1129 (Utah 1990)).

ANALYSIS

I. MACRIS'S FRAUDULENT TRANSFER, SUCCESSOR LIABILITY, AND ALTER EGO CLAIMS

**18 We first address Neways's argument that the court of appeals erred in its determination that Macris's claims for fraudulent *1219 transfer, successor liability, and alter ego are not barred by res judicata.

[3][4] **19 The doctrine of res judicata embraces two distinct branches: claim preclusion and issue preclusion. *See Swainston v. Intermountain Health Care*, 766 P.2d 1059, 1061 (Utah 1988). Claim preclusion involves the same parties or their privies and also the same cause of action. " 'and this precludes the relitigation of all issues that could have been litigated as well as those that were, in fact, litigated in the prior action.' " *Schaer v. State*, 657 P.2d 1337, 1340 (Utah 1983) (quoting *Searle Bros. v. Searle*, 588 P.2d 689, 690 (Utah 1978)). Issue preclusion, on the other hand, " '*arises from a different cause of action* and prevents parties or their privies from relitigating facts and issues in the second suit that were fully litigated in the first suit.' " *Id.* Therefore, while both branches of res judicata "serve[ ] the important policy of preventing previously litigated issues from being relitigated," different rules

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govern each branch. *Salt Lake City v. Silver Fork Pipeline Corp.*, 913 P.2d 731, 733 (Utah 1995) (citing *Penrod v. Nu Creation Creme, Inc.*, 669 P.2d 873, 874-75 (Utah 1983)). Neways relies upon claim preclusion in arguing that Macris's *claims* in *Macris II* are barred by res judicata because they could and should have been included in the action against Images in *Macris I*.

[5] **20 In order for claim preclusion to bar a subsequent cause of action, a plaintiff must satisfy three requirements:

> First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or must be one that could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment on the merits.

Madsen v. Borthick, 769 P.2d 245, 247 (Utah 1988) (citing *Penrod*, 669 P.2d at 875; *Bradshaw v. Kershaw*, 627 P.2d 528, 531 (Utah 1981); *Int'l Res. v. Dunfield*, 599 P.2d 515, 516-17 (Utah 1979); *Krofcheck v. Downey State Bank*, 580 P.2d 243, 244 (Utah 1978); *Belliston v. Texaco, Inc.*, 521 P.2d 379, 380 (Utah 1974); *Nat'l Fin. Co. v. Daley*, 14 Utah 2d 263, 265-66, 382 P.2d 405, 407 (1963); *Wheadon v. Pearson*, 14 Utah 2d 45, 47, 376 P.2d 946, 947-48 (1962)). All three elements must be present for claim preclusion to apply. *See Madsen*, 769 P.2d at 247.

**21 In reference to the second element of the test outlined above, Neways argued before the court of appeals that Macris's claims for fraudulent transfer, successor liability, and alter ego "should have been raised" in *Macris I* because Macris knew of its claims against Neways *before the trial* in *Macris I* began and should therefore have amended its complaint in that action and asserted the claims now pursued in the present action.

[6] **22 The court of appeals rejected Neways's argument and held that the doctrine of claim preclusion did not require Macris to litigate its claims against Neways in *Macris I* because "the facts giving rise to Macris's claims against Neways ... arose after Macris filed its amended complaint against Images." *Macris & Assocs. v. Neways, Inc.*, 1999 UT App. 230, ¶ 14, 986 P.2d 748. In so holding, the court of appeals adopted the rule that a party is required to include claims in an action for res judicata purposes only if "those claims ... arose before the filing of the complaint in the first action." *Id.* at ¶ 9.

**23 Neways now argues before this court that the court of appeals erred in adopting the above-mentioned test, and contends that this court should adopt an alternate res judicata test requiring joinder of all claims arising before entry of judgment where the plaintiff has sufficient notice and opportunity to join such claims. Neways contends that the res judicata test adopted by the court of appeals is inconsistent with this court's decision in *Badger v. Badger*, 69 Utah 293, 254 P. 784 (1927), and the Utah Rules of Civil Procedure.

24 Neways's reliance on *Badger* is misplaced. In *Badger*, the defendant twice petitioned the trial court for modification of a divorce decree. *See Badger*, 69 Utah at 296-97, 254 P. at 785-86. The defendant's first petition sought modification on the ground that the property settlement on which the decree was based was induced by the plaintiff's misrepresentations and omissions concerning ***1220 his assets. *See* 69 Utah at 296-97, 254 P. at 785. The trial court modified the decree and ordered the plaintiff to pay the defendant an additional amount. *See* 69 Utah at 296, 254 P. at 785-86. Two weeks later, the defendant filed a second petition, alleging other misrepresentations that the plaintiff had originally made. *See* 69 Utah at 296-97, 254 P. at 786. The plaintiff moved to strike the second petition on res judicata grounds, claiming that the court's decision concerning the first petition barred relief on the second. *See* 69 Utah at 298-99, 254 P. at 786. The trial court granted the motion. *See* 69 Utah at 299, 254 P. at 786. On appeal, this court affirmed the trial court's dismissal of the defendant's second petition on res judicata grounds. In so holding, this court stated:

> It affirmatively is made to appear that *at the time the first petition was filed* for a modification of the decree of divorce the defendant knew the contents of said decree and that she was to receive no property except that actually awarded to her.... [T]he appellant had as much knowledge about the plaintiff's property and income *at the time she filed her first petition* as she had at the time she filed the [second] petition which was stricken.

69 Utah at 301, 254 P. at 787 (emphasis added). Accordingly, *Badger* is consistent with the rule that a plaintiff need only include claims in a suit for res judicata purposes if the plaintiff was aware of the facts upon which the later claims were based at the time the first suit was filed.

**25 Equally misplaced is Neways's argument that the court of appeals' decision creates confusion between the Utah Rules of Civil Procedure and the doctrine of res judicata. According to Neways, the

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Utah Rules of Civil Procedure "clearly establish an intent that pleadings ... should be amended as additional facts and claims are discovered" and a rule requiring amendment for res judicata purposes should therefore be adopted. While the Utah Rules of Civil Procedure do allow for the amendment of pleadings to add additional parties or claims for relief, they do not require it. *See* Utah R.Civ.P. 15(a) ("A party *may* amend his pleading ...." (emphasis added)); Utah R.Civ.P. 20(a) ("All persons *may* be joined in one action as defendants ...." (emphasis added)). Therefore, it is clear that the rule espoused by Neways, requiring that pleadings be amended for res judicata purposes as additional facts and claims are discovered, would be inconsistent with the Utah Rules of Civil Procedure. Accordingly, we affirm the court of appeals' adoption of the rule that a party is required to include claims in an action for res judicata purposes only if those claims arose before the filing of the complaint in the first action.

**26 A number of states and federal courts in other jurisdictions addressing this issue have come to a similar conclusion, holding that parties are required to include claims in an action for res judicata purposes only if those claims arose before the filing of the complaint in the earlier action. *See Mainard v. Bankamerica Corp.*, 128 F.3d 94, 97 (2d Cir.1997); *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 126 F.3d 365, 369-70 (2d Cir.1997); *Doe v. Allied Signal, Inc.*, 985 F.2d 908, 915 (7th Cir.1993); *Manning v. City of Auburn*, 953 F.2d 1355, 1360 (11th Cir.1992); *Dillard v. Security Pacific Brokers, Inc.*, 835 F.2d 607, 609 (5th Cir.1988); *Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist.*, 750 F.2d 731, 739 (9th Cir.1984); *Andrews v. Wade & Dewsnup, Inc.*, 950 P.2d 574, 576 (Alaska 1997); *Bolte v. Aits, Inc.*, 60 Haw. 58, 587 P.2d 830, 813-14 (1978); *Durrant v. Quality First Mktg., Inc.*, 127 Idaho 558, 903 P.2d 147, 149-50 (Ct.App.1995); *Ben C. Jones & Co. v. Gammel Statesman Publ'g Co.*, 100 Tex. 320, 99 S.W. 701, 703 (1907).

[7] **27 Applying the test to the facts of this case, the court of appeals was correct in concluding that res judicata does not bar Macris's claims against Neways for fraudulent transfer, successor liability, and alter ego. The facts giving rise to Macris's claims--Images's transfer of its assets to Neways and Neways's subsequent takeover of Images's business--did not arise until after the filing of the complaint in *Macris I*. Thus, Macris was not obligated to amend its complaint in *Macris I* to include the claims now pursued in the present action against Neways.

*1221 [8][9] **28 Moreover, for the doctrine of res judicata to preclude a subsequent cause of action, not only must the plaintiff have been aware of the cause of action at the time the first suit was commenced, but the cause of action in the present suit must be identical to the one brought in the prior suit. *See Schaer*, 657 P.2d at 1340 ("'*In order for res judicata to apply, both suits must involve* the same parties or their privies and also *the same cause of action* ....' "(quoting *Searle Bros. v. Searle*, 588 P.2d 689, 690 (Utah 1978))). In determining whether claims are identical for res judicata purposes, this court has focused on whether "[t]he two causes of action rest on a different state of facts and evidence of a different kind or character is necessary to sustain the two causes of action." *Schaer*, 657 P.2d at 1340; *see also* 46 Am.Jur.2d *Judgments* § 534 (1994) (describing identity of facts or evidence test). Therefore, even if a plaintiff is aware of the factual basis of a suit at the filing of another suit, he or she is not obligated to bring all claims together if there is no identity of facts and evidence between the two claims.

**29 *Macris I* arose out of the formation of a distributorship agreement between Macris and Images in August 1989 and Images's 1991 breach of that agreement. In *Macris I* Macris and Images litigated whether an enforceable agreement existed between the parties, whether Images breached that Agreement, and the amount of damages that should be awarded for that breach.

**30 In contrast, *Macris II* arose out of the formation of Neways in August 1992, the transfer by Images of its assets to Neways on September 1, 1992, three days before the original trial date in *Macris I*, and Neways's subsequent takeover of Images's multilevel marketing business. Macris based its claims in *Macris II* on the Utah Fraudulent Transfer Act and similar common law doctrines designed to protect creditors from the evasions of debtors. Specifically, Macris claimed that Images's transfer of its assets to Neways three days before the trial in *Macris I* was scheduled to begin was fraudulent and accomplished to limit the amount of damages available to Macris and to hinder Macris from collecting the obligation owed by Images.

**31 Accordingly, it is clear that Macris's claims against Neways in *Macris II* rest upon a different set of facts, and evidence of a different kind or character is necessary to sustain the claims, than the breach of contract litigation that was the subject of *Macris I*. Therefore, even if Macris had known of the relevant

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facts of *Macris II* at the filing of *Macris I*--and it did not--it still would have been justified in not including its fraudulent transfer, successor liability, and alter ego claims in the first lawsuit.

II. ADDITIONAL CONTRACT DAMAGES

**32 We next address Neways's argument that the court of appeals erred by failing to address the issue raised on appeal of whether "res judicata" prevents Macris from pursuing additional contract damages in the present action--*Macris II*.

**33 In the proceeding below, the court of appeals determined that the claim preclusion branch of the doctrine of res judicata did not bar Macris's claims for fraudulent transfer, successor liability, and alter ego. The court of appeals, however, did not address the issue of whether res judicata prevents Macris from pursuing additional contract damages not recovered in *Macris I* through the above-named claims. Resolution of the first issue does not resolve the second.

34 As noted above, there are two branches of res judicata, claim preclusion and issue preclusion--also known as collateral estoppel. *See Swanston v. Intermountain Health Care*, 766 P.2d 1059, 1061 (Utah 1988). The basic difference between the two branches of res judicata is simply put: while "claim preclusion applies to *whole claims*, whether litigated or not," and prevents parties from relitigating the same claim in a second suit, 18 James Wm. Moore, *Moore's Federal Practice* § 131.13[1] (Matthew Bender, 3d ed.2000) (emphasis added), issue preclusion, or collateral estoppel, arises from a different cause of action and prevents parties or their privies from relitigating "particular *issues* that have been contested and resolved." *Id.; see also* ***1222*Schaer v. State*, 657 P.2d 1337, 1340 (Utah 1983); *Searle Bros. v. Searle*, 588 P.2d 689, 690 (Utah 1978). "Thus, it is important to recognize that although the doctrines of [claim preclusion] and [issue preclusion] are closely related, they are usually mutually exclusive." *Schaer*, 657 P.2d at 1340.

[10] **35 Accordingly, the court of appeals' determination that Macris's *claims* are not barred by claim preclusion does not preclude a determination that Macris is prevented by the doctrine of issue preclusion or collateral estoppel from seeking additional contract damages arising out of *Macris I* through its claims for fraudulent transfer, successor liability, and alter ego. We agree with Neways, therefore, that the court of appeals did err in failing to decide whether res judicata prevents Macris from seeking additional contract damages in *Macris II*.

**36 Because the court of appeals did not address this issue, we could remand the matter to the court of appeals for consideration. However, the issue has been argued and briefed by both parties on certiorari, and therefore, we are able to dispose of this issue ourselves, and we elect to do so. *See State v. Brooks*, 908 P.2d 856, 861 (Utah 1995). We thus turn our attention to the merits of Neways's argument that Macris is precluded by res judicata, more specifically the issue preclusion branch of res judicata, [EN7] from pursuing additional contract damages in this case.

EN7. Despite Neways's imprecise use of the term "res judicata," its argument concerning additional contract damages, as explained above, is properly analyzed under the issue preclusion branch of the doctrine of res judicata. In any event, the claim preclusion branch of the doctrine of res judicata is inapplicable to Neways's argument. This court has previously stated that "[i]n order for [claim preclusion] to apply, both suits must involve ... the *same cause of action*." *Searle Bros.*, 588 P.2d at 690 (emphasis added). In contrast, issue preclusion "*arises from a different cause of action* and prevents parties ... from relitigating ... issues in the second suit that were fully litigated in the first suit." *Id.* (emphasis added) (citing *Ray v. Consol. Freightways*, 4 Utah 2d 137, 141, 289 P.2d 196, 199 (1955)); *see also Schaer*, 657 P.2d at 1340 ("Where the claim ... is the same in both cases, claim preclusion] applies. But where the claim ... is different in the two cases, then [issue preclusion] is applicable."). We have already determined that Macris's claims for fraudulent transfer, successor liability, and alter ego are different than its breach of contract claim raised in *Macris I*, *see* discussion *supra* part I, in that the two causes of action rest on a different state of facts and evidence of a different kind or character is necessary to sustain the two causes of action. Thus, claim preclusion is inapplicable to Neways's argument that Macris is barred from seeking additional contract damages through the above-named claims.

[11][12] **37 We apply a four-part test to determine whether the doctrine of issue preclusion is

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applicable:

> First, the issue challenged must be identical in the previous action and in the case at hand. Second, the issue must have been decided in a final judgment on the merits in the previous action. Third, the issue must have been competently, fully, and fairly litigated in the previous action. Fourth, the party against whom collateral estoppel is invoked in the current action must have been either a party or privy to a party in the previous action.

Jones, Waldo, Holbrook & McDonough v. Dawson, 923 P.2d 1366, 1370 (Utah 1996); *see also Swainston*, 766 P.2d at 1061. All four elements must be present for issue preclusion to apply. *See Jones, Waldo, Holbrook & McDonough*, 923 P.2d at 1370. Macris does not argue that there is no "identity of issues" for collateral estoppel purposes. Therefore, our analysis focuses on the second, third, and fourth elements. We address each element in turn.

A. Actually Litigated and Decided

**38 The second element outlined above requires that the issue sought to be litigated in the present action must have been *decided* in a *final judgment on the merits* in the previous action. *See id.* Macris does not argue that the judgment entered in *Macris I* was not a final judgment on the merits. Therefore, our analysis, with respect to the second element outlined above, focuses on whether the issue raised in the present case was "actually asserted and tried" in the prior proceeding. *Int'l Res. v. Dunfield*, 599 P.2d 515, 517 (Utah 1979).

*1223 **39 In *Macris I*, the trial court determined that a valid distributorship agreement existed between Macris and Images, that Images breached the Agreement, *and that Macris was entitled to damages as a result of that breach.* Accordingly, the trial court awarded Macris damages in the amounts Images stipulated that it should have paid Macris for subsequent months, from March 1991 through August 31, 1992, the date on which Images ceased doing business as a multilevel marketing company. In *Macris II*, Macris sought to litigate whether it was entitled to additional contract damages not recovered in *Macris I* arising after the date Images transferred its assets to Neways.

[13][14] **40 Macris argues that because the trial court limited its award of damages to August 31, 1992, the issue of Macris's entitlement to damages accruing after August 31, 1992, was never actually litigated or decided in *Macris I*. Clearly, if an issue is actually raised by proper pleadings and treated as an issue in a case, it is conclusively determined by the first judgment. *See Int'l Res.*, 599 P.2d at 517. However, the preclusive effects of the doctrine of collateral estoppel go further.

> The general rule precluding the relitigation of material facts or questions which were in issue and adjudicated in a former action is applicable to all matters essentially connected with the subject matter of the litigation. This application of the general rule extends to questions necessarily involved in an issue ... although no specific finding may have been made in reference to that matter, and although such matters were not directly referred to in the pleadings.

46 Am.Jur.2d *Judgments* § 545. It follows, therefore, that a party cannot by negligence or design withhold issues and litigate them in separate actions. If the second action involves an issue as to which the judgment in a prior action is a conclusive adjudication, the estoppel, so far as that issue is concerned, extends to every matter which was or might have been urged to sustain or defeat the determination actually made. *See id.*

**41 The issue of damages resulting from Images's 1991 breach of contract was decided in *Macris I*. Moreover, the effect of the trial court's award of damages in *Macris I* embodied all damages: past, present, and prospective. The Restatement supports this view, reasoning:

> Typically, even when the injury caused by an actionable wrong extends into the future and will be felt beyond the date of judgment, the damages awarded by the judgment are nevertheless supposed to embody the money equivalent of the entire injury. Accordingly, if a plaintiff who has recovered a judgment against a defendant in a certain amount becomes dissatisfied with his recovery and commences a second action to obtain increased damages, the court will hold him precluded; his claim has been merged in the judgment and may not be split. *It is immaterial that in trying the first action he was not in possession of enough information about the damages, past or prospective, or that the damages turned out in fact to be unexpectedly large and in excess of the judgment.*

Restatement (Second) of Judgments § 25 cmt. c (1982) (emphasis added). Moreover, the trial court made no finding that its award of damages in *Macris I* was not final. Therefore, because the trial court's award of damages in *Macris I* was a conclusive adjudication on the issue of damages resulting from Images's 1991 breach of the autoqualification agreement, the issue of damages accruing after August 1992 was connected to the subject matter and

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necessarily decided in *Macris I.*

**42 Macris further argues that because the issue of contract damages was decided by stipulation, it was not actually litigated and decided for collateral estoppel purposes.

[15] **43 An issue determined by stipulation rather than judicial resolution is binding in a subsequent action if the parties manifested an intention to that effect. *See, e.g.,* 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4443, at 382 (1981) ("Issue preclusion does not attach unless it is clearly shown that the parties intended that the issue be foreclosed in other litigation."); 18 James Wm. Moore, *Moore's Federal Practice* ***1224** § 132.03[2][b][ii] (Matthew Bender, 3d ed. 2000) ("[S tipulation may be binding in a subsequent action ... if the parties ... manifested an intention to that effect."). In this case, Macris does not argue that the stipulation concerning contract damages was not binding in general; rather, Macris argues that the stipulation was not binding as to damages accruing *after* August 31, 1992, the date on which Images transferred its assets to Neways. However, if the stipulation is meant to be final as to some damages but not final as to other damages, it must say so. Our review of the record in this case, however, evidences no such intention. Moreover, the trial court made no finding that its damages award--which was based on the parties stipulation--was not final as to all damages. Therefore, we find that the stipulation in this case has res judicata effect.

B. Full and Fair Opportunity to Litigate

**44 In reference to the third element outlined above, we must determine whether "the issue in the first case [was] competently, fully, and fairly litigated." *See* Swainston, 766 P.2d at 1061 (citations omitted). Macris argues that the issue of contract damages accruing after August 31, 1992, was not "competently, fully and fairly litigated" because Neways's fraudulent takeover of Images's business prevented Macris from litigating such damages. However, the record clearly establishes that Macris was aware of Images's transfer of its assets to Neways almost a year before Macris filed its last pleading in *Macris I* and two and one-half years before the trial. During this two- and one-half-year period, Macris enjoyed ample opportunity to conduct unimpeded discovery and to fully develop its claim for damages by examining Neways's financial records. Had Macris conducted discovery concerning future damages, it surely could have included that evidence in the figures presented to the trial court. Thus, it seems fair to state that Macris had a full and fair opportunity to litigate the issue of damages accruing after August 31, 1992, in the prior adjudication.

C. Privity

[16] **45 Finally, the fourth element of the test outlined above also permits the application of collateral estoppel in this case. Unlike the doctrine of claim preclusion, issue preclusion does not require that "*both cases* ... involve the *same parties* or their privies." Madsen, 769 P.2d 245, 247 (Utah 1988) (emphasis added). Rather, issue preclusion applies even if only "the party *against* whom the [doctrine] is asserted [was] a party or in privity with a party to the prior adjudication." Swainston, 766 P.2d at 1061; *see also* Wilde v. Mid-Century Ins. Co., 635 P.2d 417, 419 (Utah 1981) ("[m]utuality of parties is no longer essential" for collateral estoppel purposes). In this case, although Neways was a nonparty to *Macris I,* the party *against* whom the doctrine of collateral estoppel is asserted is Macris. It is clear that Macris & Associates, the plaintiff herein, is the same party as Macris & Associates, the plaintiff in *Macris I.* Therefore, the party *against* whom the doctrine is asserted--Macris--was a party to the prior adjudication.

**46 On the basis of the foregoing, it is clear that all of the requirements of collateral estoppel have been satisfied. Consequently, Macris is precluded from relitigating the issue of damages arising from Images's breach of the distributorship agreement in this case.

CONCLUSION

**47 We conclude that the court of appeals correctly determined that Macris's claims for fraudulent transfer, successor liability, and alter ego are not barred by the doctrine of res judicata. In so holding, we affirm the court of appeals' adoption of the res judicata test that a plaintiff need only include later claims in an action for res judicata purposes if the plaintiff was aware of the facts upon which the later claims are based at the time the complaint was filed. We further conclude, however, that Macris is precluded by the issue preclusion branch of the doctrine of res judicata from seeking additional contract damages through the above-named claims.

**48 Chief Justice HOWE, Justice DURHAM, Justice DURRANT, and Justice WILKINS concur in Associate Chief Justice RUSSON'S opinion.

16 P.3d 1214, 410 Utah Adv. Rep. 11, 2000 UT 93

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• 2000 WL 34475420 (Appellate Brief) Brief of Appellant (Mar. 01, 2000)Original Image of this Document with Appendix (PDF)

• 1999 WL 33920016 (Appellate Brief) Brief of Respondent (Mar. 31, 1999)Original Image of this Document with Appendix (PDF)

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