

CASE NO. A05-1372

State of Minnesota
In Court of Appeals

CONNIE CROSSMAN, as Trustee for the Next-of-Kin of:

RICHARD CROSSMAN, Deceased,

Respondent,

vs.

MICHAEL S. LOCKWOOD AND SIMONSON CONSTRUCTION, INC.,

Appellants.

APPELLANTS' BRIEF AND APPENDIX

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TABLE OF CONTENTS

TABLE OF AUTHORITIES i

STATEMENT OF THE ISSUE iii

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 4

STANDARD OF REVIEW AND APPLICABLE LEGAL STANDARDS 8

 I. STANDARD OF REVIEW FOR CERTIFIED QUESTION 8

 II. SUMMARY JUDGMENT STANDARD 9

 III. STANDARD FOR APPLICATION OF THE DOCTRINE
 OF COLLATERAL ESTOPPEL 10

ARGUMENT:

 I. THE DISTRICT COURT ERRED IN CONCLUDING THAT
 THERE WAS NO PRIVACY BETWEEN RESPONDENT
 AND THE AUTOMOBILE INSURER OF RESPONDENT'S
 DECEDENT 11

CONCLUSION 18

APPENDIX AND INDEX AA 1-AA 289

TABLE OF AUTHORITIES

MINNESOTA DECISIONS:

<u>Foley v. Honeywell, Inc.</u> , 488 N.W.2d 268, 270 (Minn. 1992)	8
<u>Molloy v. Meier</u> , 660 N.W.2d 444, 450 (Minn. Ct. App. 2003)	8
<u>Zimmerman v. Safeco Ins. Co. of America</u> , 605 N.W.2d 727, 729 (Minn. 2000)	9
<u>Cummings v. Koehnen</u> , 568 N.W.2d 418, 420 (Minn. 1997)	9
<u>Carlisle v. City of Minneapolis</u> , 437 N.W.2d 712, 715 (Minn. Ct. App. 1989)	9
<u>Johnson v. Van Blaricom</u> , 480 N.W.2d 853, 855 (Minn. Ct. App. 1992)	9, 10
<u>Hunt v. IBM Mid-Am. Employees Fed. Cred. Union</u> , 384 N.W.2d 853, 855 (Minn. 1986)	10
<u>Holiday Acres No. 3 v. Midwest Federal Savings & Loan Association of Minneapolis</u> , 308 N.W.2d 471, 480 (Minn. 1981)	10
<u>Regents of Univ. of Minnesota Medical Inc.</u> , 382 N.W.2d 201, 207 (Minn. Ct. App. (1986)	10
<u>Ellis v. Minneapolis Comm'n on Civil Rights</u> , 319 N.W.2d 702, 704 (Minn. 1982)	10
<u>Bronsoman v. Seltz</u> , 414 N.W.2d 547, 550 (Minn. Ct. App. 1987)	11
<u>Margo-Kraft Distribs, Inc. v. Minneapolis Gas Co.</u> , 274, 278, 200 N.W.2d 45, 48 (1972)	11
<u>Reil v. Benjamin</u> , 584 N.W.2d 442 (Minn. Ct. App. 1998)	12

St. Paul Fire & Marine Ins. Co. v. Perl, 415 N.W.2d 663, 665 (Minn. 1987) 13

Bogenholm by Bogenholm v. House, 388 N.W.2d 402, 407-08 n.6
(Minn. Ct. App. 1986) 15

Johansen v. Production Credit Ass'n of Marshall-Ivanhoe, 378 N.W.2d 59, 61
(Minn. Ct. App. 1985) 17

State v. Victorsen, 627 N.W.2d 655 (Minn. Ct. App. 2001) 17

FEDERAL DECISIONS:

Celotex Corp. v. Catrett, 477 U.S. 361 (1985) 9

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 9

Matsushita Electric Indus. Corp. v. Zenith Radio Corp., 475 U.S.
474 (1986) 9

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 9

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986) 9

Park Lane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 99 S.Ct. 645 (1979) 15

Hoag v. New Jersey, 356 U.S. 464, 470, 78 S.Ct. 829, 834, 2 L.Ed.2d 913
(1958) 17

Park Lane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326, 99 S.Ct. 645,
649, 58 L.Ed.2d 552 (1979) 17

STATEMENT OF THE ISSUE

1. Whether privity exists between the Plaintiff in the instant action and the Plaintiff, Auto-Owners Insurance Co., in a prior action involving the same operative facts such that the application of the doctrine of collateral estoppel is appropriate.

The District Court certified this as an important and doubtful question pursuant to Minn. R. Civ. App. P. 103.03(i).

Margo-Kraft Distribs, Inc. v. Minneapolis Gas Co., 294 Minn. 274, 278, 200 N.W.2d 45, 48 (1972); *Reil v. Benjamin*, 584 N.W.2d 442 (Minn. Ct. App. 1998), *rev. denied* (Minn. Nov. 17, 1998); *Bronson v. Seltz*, 414 N.W.2d 547, 550 (Minn. Ct. App. 1987), *rev. denied* (Minn. Jan. 15, 1988).

STATEMENT OF THE CASE

This case is a wrongful death action arising from a motor vehicle accident between Respondent's Decedent and Appellant Michael Lockwood that occurred on July 26, 1999 on 470th Street in East Side Township, Mille Lacs County, Minnesota. Respondent claims that her husband, Decedent Richard Crossman, Sr., suffered injuries in the accident which resulted some months later in his death. Appellants have denied that the death of Richard Crossman, Sr. was a direct and proximate result of the subject motor vehicle accident.

Richard Crossman, Sr. passed away on July 20, 2000. On or about August 25, 2000, Richard Crossman, Sr.'s automobile insurer, Auto-Owners Insurance Co., commenced a subrogation action against Appellants in its own name and in the name of Richard Crossman, Sr. The subrogation action sought as damages all amounts Auto-Owners Insurance Co. had paid to the Crossman family for damage to the involved motor vehicle along with the amount of Richard Crossman, Sr.'s deductible. The Complaint in the subrogation action alleged that the negligence of Michael Lockwood was the proximate cause of the damage to the Crossman vehicle. Richard Crossman, Sr. was later dismissed from the subrogation action without prejudice.

The subrogation action then proceeded to a jury trial which commenced on May 8, 2002. The jury returned a verdict by special verdict form finding that the negligence of

Richard Crossman, Sr. had been the sole proximate cause of the July 26, 1999 accident. Based upon the jury's answers to the special verdict form questions, the district Court ordered that judgment be entered in favor of the defendants (the Appellants in the instant matter) and that the claims of Auto-Owners Insurance Co. be dismissed with prejudice.

On or about March 17, 2003, Respondent commenced the instant action against Appellants. Like the Complaint in the prior Auto-Owners Insurance Co. subrogation action, Respondent's Complaint alleged that Michael Lockwood negligently collided with the vehicle operated by Richard Crossman, Sr. Appellants filed a motion for summary judgment in the Mille Lacs County District Court, the Honorable Steven P. Ruble presiding. In their summary judgment motion, Appellants argued that the doctrine of collateral estoppel should be applied to bar Respondent's claims as the jury in the prior subrogation action had found that the negligence of Richard Crossman, Sr. was the sole proximate cause of the subject motor vehicle accident. By Order dated June 23, 2004, the District Court denied Appellant's motion. The District Court found that Respondent was not in privity with Auto-Owners Insurance Co. in the prior subrogation action and that application of collateral estoppel would be inequitable under the circumstances. The District Court also certified the matter for immediate appeal pursuant to Minn. R. Civ. App. P. 103.03(i).

On August 23, 2004, Appellants served and filed a Notice of Appeal to the Court of Appeals seeking review based upon the District Court's certification of the matter for immediate appeal. The matter was assigned Appellate Court Case No. A04-1571. By Order dated August 27, 2004, this Court directed the parties to submit informal briefs addressing

whether the question sought to be appealed had been properly certified and whether the question was important and doubtful. By Order dated September 14, 2004, this Court dismissed the appeal.

On February 21, 2005, Appellants brought a Motion for Amended Findings before the District Court seeking clarification of the District Court's prior order certifying the matter for immediate appeal. By Order dated June 6, 2005, the District Court, the Honorable Steven P. Ruble again presiding, reaffirmed its prior Order denying Appellants' Motion for Summary Judgment and also made specific findings that the question of whether Respondent was in privity with the Plaintiff in the prior Subrogation Action was appropriate for certification for immediate appeal because it is important and doubtful.

On June 30, 2005, Appellants served Respondent with a Notice of Filing Order enclosing the District Court's June 6, 2005 Order. Appellants filed a Notice of Appeal with this Court on July 12, 2005.

STATEMENT OF FACTS

On July 26, 1999, Respondent's decedent, Richard Crossman, Sr., was involved in a motor vehicle accident with Appellant Michael Lockwood near the Crossman home on 470th Street in East Side Township, Mille Lacs County, Minnesota. (AA1-3). Mr. Lockwood was operating a dump truck owned by his employer, Appellant Simonson Construction, Inc., and was in the course and scope of his employment at the time of the Subject Accident. Other than the drivers of the involved vehicles, there were no witnesses to the Subject Accident. Respondent Connie Crossman and her son, Richard Crossman, Jr., were the only witnesses to the immediate aftermath of the Accident. (AA34-35; AA59-60).

Richard Crossman, Sr. passed away on July 20, 2000, almost one year after the subject accident. (AA1-3). Prior to his death, the Crossman family had retained Daniel Froehlich of the law firm of Miller O'Brien to represent their interests. Mr. Froehlich retained the services of accident reconstructionist Roger Burgmeier to analyze the accident relative to a potential personal injury claim allegedly arising from the Accident, and to render opinions regarding negligence and causation. Mr. Burgmeier issued a report addressed to Daniel Froehlich in May, 2000. (AA71-73). On or about August 25, 2000, Richard Crossman Sr.'s automobile insurer, Auto-Owners Insurance Co., commenced a subrogation action, in its own name and in the name of Richard Crossman Sr., against Michael S. Lockwood and David Simonson. (AA87-88). The Complaint in the subrogation action sought recovery of Richard Crossman, Sr.'s automobile insurance deductible along with the amount paid by Auto-Owners Insurance Co. to the Crossman family for damage to the Crossman vehicle. (AA 87-

88). The Complaint in the Subrogation Action alleged that Michael Lockwood negligently caused the collision between the two vehicles and the resulting property damage to the Crossman vehicle. (AA 87-88).

Upon learning of the subrogation action, Mr. Froehlich communicated to counsel of record his wish to be actively involved in the action on behalf of the Crossman family, stating in correspondence dated October 6, 2000 that “[o]bviously, I should be made aware and potentially involved in all discovery in this case, be apprised of all developments, and receive copies of all pleadings.” (AA89). In his October 6, 2000 correspondence, Mr. Froehlich also requested that the parties forego filing the case until such time as he was prepared to file a wrongful death action on behalf of the heirs and next of kin of Richard Crossman, Sr. (AA89). The parties later stipulated to dismissal of Richard Crossman Sr.’s claim for his deductible in the subrogation action.¹ (AA94-96). Nonetheless, when the Court in the subrogation action set a scheduling conference, Mr. Froehlich, as counsel for the Trustee for the heirs and next of kin of Richard Crossman, Sr., again sought to participate directly in the proceedings.² (AA97-98).

Connie Crossman, Richard Crossman, Jr., and their attorney also remained actively involved in the subrogation action. Most notably, the law firm of Miller O’Brien provided counsel for Auto- Owners with a copy of the accident reconstruction report of Roger

¹ During the same time frame, Mr. Froehlich made a demand for settlement of the wrongful death claim to the insurer for the defendants. (AA90-93).

² Mr. Froehlich subsequently left the Miller O’Brien law firm and Kelly Jeanetta, another Miller O’Brien attorney, took over handling of the file on behalf of the Crossman family.

Burgmeier. (AA99-117). Auto-Owners sought, and over the objection of the Defendants, obtained leave of the court to introduce the expert testimony of Mr. Burgmeier at the trial of the subrogation action.³ (AA120-122). In addition, Miller O'Brien attorney Kelly Jeanetta represented Connie Crossman and Richard Crossman, Jr. at their depositions in the subrogation action. During these depositions, Ms. Jeanetta took part in several conferences with counsel for Auto-Owners, which excluded counsel for the defendants. (AA124-126). Auto-Owners also complied with requests from counsel for the heirs and next of kin of Richard Crossman, Sr. for information, documents and status updates in the subrogation action to the full extent of those requests. (AA214-215). Connie Crossman, Richard Crossman, Jr. and their attorney, Ms. Jeanetta, also attended the trial of the subrogation action, and both Connie Crossman and Richard Crossman, Jr. testified at the trial. (AA-124-126).

The subrogation action proceeded to trial on May 8, 2002. The jury returned a verdict by special verdict form. (AA127-128). The jury found that Mr. Lockwood had been negligent but that his negligence was not a direct cause of the July 22, 1999 accident. (AA127-128). The jury also found that Richard Crossman, Sr. had been negligent and that

³ Despite obtaining leave of the Court to do so, Auto-Owners did not introduce the testimony of Mr. Burgmeier at the trial of the subrogation action. Auto-Owners served a deposition notice for the videotaped for trial deposition of Mr. Burgmeier. (AA123). However, Auto-Owners cancelled the deposition at the last minute without explanation. (AA124-126). At trial, counsel for Auto-Owners then sought to utilize Mr. Burgmeier's Report to cross examine the Defendants' accident reconstructionist, but was precluded from doing so by the Court, which held, in sustaining the objection of Defendants' counsel, that Burgmeier's opinions could only be introduced through his own testimony. (AA124-126). Counsel for Auto-Owners elected not to call Mr. Burgmeier.

his negligence was a direct cause of July 22, 1999 accident. (AA127-128). Based upon the jury's answers to the special verdict form questions, the Court ordered that judgment be entered in favor of the defendants, dismissing with prejudice Auto-Owners' claims. (AA129-131). Judgment was entered on May 17, 2002. (AA129-131). Auto-Owners did not appeal the judgment. (AA124-126).

On or about March 17, 2003, Respondent Connie Crossman, individually and as Trustee for the Next of Kin of Richard Crossman, commenced the instant action against Michael S. Lockwood and Simonson Construction, Inc. (AA1-3). Like the Complaint in the prior subrogation action, Respondent's Complaint herein alleges that Michael Lockwood negligently collided with the Richard Crossman Sr. vehicle. (AA1-3).

Appellants filed a motion for summary judgment in the Mille Lacs County District Court, the honorable Steven P. Ruble presiding. (AA4). In their summary judgment motion, Appellants argued that the doctrine of collateral estoppel should be applied to bar Respondent's claims as the jury in the prior subrogation action had found that the negligence of Richard Crossman, Sr. was the sole proximate cause of the subject motor vehicle accident. (AA5-19; 229-239). By Order dated June 23, 2004, the District Court denied Appellant's motion. (AA240-244). The District Court found that Respondent was not in privity with Auto-Owners Insurance Co. in the prior subrogation action and that application of collateral estoppel would be inequitable under the circumstances. (AA 240-244). The District Court also certified the matter for immediate appeal. (AA 244). On August 23, 2004, Appellants served and filed a Notice of Appeal to the Court of Appeals seeking review based upon the

district court's certification of the matter for immediate appeal. (AA245-247). The matter was assigned Appellate Court Case No. A04-1571. By Order dated August 27, 2004, this Court directed the parties to submit informal briefs addressing whether the question sought to be appealed had been properly certified and whether the question was important and doubtful. (AA248-250). By Order dated September 14, 2004, this Court dismissed the appeal. (AA267-268).

On February 21, 2005, Appellants brought a Motion for Amended Findings before the District Court seeking clarification of the District Court's prior order certifying the matter for immediate appeal. (AA269-271). By Order dated June 6, 2005, the District Court, the Honorable Steven P. Ruble again presiding, reaffirmed its prior Order denying Appellants' Motion for Summary Judgment and also made specific findings that the question of whether Respondent was in privity with the plaintiff in the prior subrogation action was appropriate for certification for immediate appeal because it is important and doubtful. (AA286-289).

Appellants appeal the District Court's denial of their summary judgment motion and the question certified to this Court.

STANDARD OF REVIEW AND APPLICABLE LEGAL STANDARDS

I. STANDARD OF REVIEW FOR CERTIFIED QUESTION.

Because a certified question presents a matter of law, this court reviews it independently. See *Foley v. Honeywell, Inc.*, 488 N.W.2d 268, 270, (Minn.1992). When a certified question arises from a denial of summary judgment, the summary judgment standard applies and the appellate court's review is de novo. See *Molloy v. Meier*, 660 N.W.2d 444,

450 (Minn. Ct. App. 2003); Zimmerman v. Safeco Ins. Co. of America, 605 N.W.2d 727, 729 (Minn. 2000). In reviewing a summary judgment decision, this Court must determine whether any genuine issues of material fact exist and whether the district court erred in applying the law. See Cummings v. Koehnen, 568 N.W.2d 418, 420 (Minn. 1997).

II. SUMMARY JUDGMENT STANDARD.

Minn. R. Civ. P. 56 provides that summary judgment is appropriate where there is no genuine issue of material fact and one party is entitled to judgment as a matter of law. The United States Supreme Court has emphasized that courts should look favorably upon motions for summary judgment to further the just, speedy and inexpensive resolution of civil litigation. See Celotex Corp. v. Catrett, 477 U.S. 361 (1985); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Electric Indus. Corp. v. Zenith Radio Corp., 475 U.S. 474 (1986). The moving party bears the burden of showing that there are no genuine issues of material fact. The non-moving party has the burden of producing sufficient evidence from which a jury could find in its favor on each of the elements necessary to sustain its cause of action. See Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. Ct. App. 1989) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986)). The non-moving party's burden is not insubstantial and it must produce "significant probative evidence tending to support" its claim. See Carlisle, 437 N.W.2d at 715 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986)).

The non-moving party cannot rely upon mere denials or general assertions, but must demonstrate that specific facts exist which create a genuine issue for trial. See Johnson v.

Van Blaricom, 480 N.W.2d 138, 140 (Minn. Ct. App. 1992) (citing Hunt v. IBM Mid-Am. Employees Fed. Credit Union, 384 N.W.2d 853, 855 (Minn. 1986)). Summary judgment is also proper where no factual disputes are raised, where the parties are concerned only with the meaning or the legal consequences of the facts, and where determination of the applicable law will resolve the controversy. See Holiday Acres No. 3 v. Midwest Federal Savings & Loan Association of Minneapolis, 308 N.W.2d 471, 480 (Minn.1981).

III. STANDARD FOR APPLICATION OF THE DOCTRINE OF COLLATERAL ESTOPPEL.

The application of collateral estoppel is a mixed question of law and fact. See Regents of Univ. of Minnesota v. Medical Inc., 382 N.W.2d 201, 207 (Minn. Ct. App. 1986), *rev. denied* (Minn. Apr. 8, 1986). Once it is determined that collateral estoppel is available, the decision to apply the doctrine is left to the discretion of the trial court. *Id.* Collateral estoppel, or issue preclusion, prevents parties from relitigating issues which are identical to issues previously litigated, and which were necessary and essential to the former resulting judgment. See Ellis v. Minneapolis Comm'n on Civil Rights, 319 N.W.2d 702, 704 (Minn. 1982). The application of collateral estoppel is appropriate where:

- (1) the issue was identical to one in a prior adjudication;
- (2) there was a final adjudication on the merits;
- (3) the estopped party was a party or in privity with a party to the prior adjudication; and
- (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

Id. (multiple citations omitted). In the case at bar, only the privity element is disputed. With regard to the issue of privity, the District Court certified the following question for review by this Court:

Whether privity exists between the Plaintiff in the instant action and the Plaintiff, Auto-Owners Insurance Co., in a prior action involving the same operative facts such that the application of the doctrine of collateral estoppel is appropriate.

(AA 286-289).

ARGUMENT

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT THERE WAS NO PRIVACY BETWEEN RESPONDENT AND THE AUTOMOBILE INSURER OF RESPONDENT'S DECEDENT.

Privity in the context of collateral estoppel analysis does not follow one specific definition, but rather expresses the idea that a judgment should also determine the interests of certain non-parties closely connected with the litigation. See *Bronson v. Seltz*, 414 N.W.2d 547, 550 (Minn. Ct. App. 1987), *rev. denied* (Minn. Jan. 15, 1988). The basic requirement for a finding of privity is that the estopped party's interests have been sufficiently represented in the first action so that the application of collateral estoppel is not inequitable. Id. Privies include non-parties who control an action and those whose interests are adequately represented by a party to the action. See *Margo-Kraft Distribs, Inc. v. Minneapolis Gas Co.*, 294 Minn. 274, 278, 200 N.W.2d 45, 48 (1972) (citation omitted).

The District Court based its finding of no privity largely on the facts that Respondent was not an actual party to the prior subrogation action and that her counsel did not directly

participate in the trial of that case. However, these factors relied upon by the District Court are not prerequisites to a finding of privity. In Reil v. Benjamin, 584 N.W.2d 442 (Minn. Ct. App. 1998), *rev. denied* (Minn. Nov. 17, 1998), this Court found privity where an injured employee failed to intervene in his employer's subrogation action against the alleged tortfeasor. In that case, the employee was involved in a car accident in the course of his employment. Id. at 443. His employer commenced a negligence action against the other involved driver seeking subrogation and indemnity for workers' compensation benefits paid to the employee. Id. All parties to the action and counsel for the injured employee stipulated to consolidation of the employer's and employee's claims should the employee commence suit. Id. at 444. For whatever reason, the employee neither joined the employer's action nor brought a separate lawsuit while the employer's action was pending. Id. The jury in the employer's action returned a verdict finding that the alleged tortfeasor was not negligent. Id.

The employee then commenced a separate action against the other driver, who moved for summary judgment based upon collateral estoppel. Id. The district court granted summary judgment, and the employee appealed. This Court affirmed the application of collateral estoppel, holding that the employee was in privity with his employer, as follows:

Reil was aware of the prior trial and the summary judgment motion. He recognized and stipulated to the fact that the legal issues, witnesses and evidence in both cases were virtually identical. Reil took the witness stand in the subrogation case and gave sworn testimony regarding the facts surrounding the accident. Furthermore, Reil did not simply fail to intervene. The stipulation attests to the fact that he took steps towards

consolidating his case with All American's case, even though at the last minute he decided not to follow through. Finally, Reil and All American were operating under the same legal theory - negligence - on which issue the jury made a determination.

Considering all of the facts, we conclude that Reil was in privity with All American in the initial suit. Reil's objectives regarding Benjamin's liability were identical to All American's. He makes claim that All American was not adequately represented at the trial. Reil is barred from bringing this action.

Id. at 445.

The facts of the instant matter are strikingly similar to *Reil* and compel the same result. Here, instead of stipulating to consolidation, Richard Crossman, Sr. was initially made a party to the prior subrogation action. Like *Reil*, the prior lawsuit was a subrogation action commenced by a party that had made payments to and stepped into the shoes of the allegedly injured person. See *St. Paul Fire & Marine Ins. Co. v. Perl*, 415 N.W.2d 663, 665 (Minn.1987)), *rev. denied* (Minn. Mar. 30, 1993) (holding an insurer asserting a subrogation right merely "steps into the shoes" of its insured). Mr. Froehlich, original counsel for the Crossman family, actively participated in the early stages of the prior subrogation action, receiving copies of the pleadings and early discovery, and seeking to participate in conferences with the Court. It was also clearly evident that the legal issues, witnesses and evidence regarding liability in the subrogation action were identical to the issues, witnesses and evidence in any claim Richard Crossman Sr.'s heirs and next of kin may have had with respect to the same accident.

Both Richard Crossman Sr.'s wife (the Respondent in the instant action as Trustee of the heirs and next of kin of Richard Crossman, Sr.) and his son also gave sworn deposition testimony and testified at the trial of the subrogation action. Indeed, Respondent and her son, Richard Crossman, Jr., are the only living witnesses to the accident and its immediate aftermath. And Auto-Owners and the Respondent herein asserted the same legal theory - causal negligence by Michael Lockwood - on which the jury in the prior subrogation action made a final determination on the merits in Appellants' favor.

Under these circumstances, the Respondent was clearly in privity with Auto-Owners in the prior subrogation action. Respondent and her son, Richard Crossman, Jr., knew of the prior subrogation action in its early stages through the participation of Mr. Froehlich. Respondent and her son also participated in the action as witnesses. Moreover, while Respondent was not consulted directly during the pendency of the prior subrogation action, Auto-Owners complied with all requests from Respondent's counsel for information, pleadings and documents concerning the status of the subrogation action. Respondent's objectives in this case regarding the Defendants' liability are also identical to the objectives of Auto-Owners in the prior subrogation action.

Furthermore, Auto-Owners received competent representation at the trial of the subrogation action, which also sufficiently represented the interests of Respondent with respect to the threshold determination of liability for the subject motor vehicle accident. Accordingly, application of collateral estoppel in this instance would not be inequitable and Respondent's claims in the instant matter should be barred.

The Crossmans and their counsel had an active, behind-the-scenes role in the prosecution of the prior subrogation action. Counsel for the Crossmans, Mr. Froelich, with the presumed approval of his clients, provided Auto-Owners with the accident reconstruction report of their retained expert, Roger Burgmeier. Auto-Owners actively sought and obtained leave of the court to utilize the opinions of Mr. Burgmeier at trial. The Crossmans and their counsel also attended the trial, and Respondent and her son testified in pretrial depositions and at trial.

The Respondent, represented by Counsel at all material times, made a calculated decision to delay filing suit to await the outcome of the subrogation action. Respondent's clear intention was to utilize an anticipated verdict in favor of Auto-Owners in the subrogation action for offensive collateral estoppel purposes on the liability issue; which would have left only the wrongful death causation issue for trial in the instant wrongful death matter had the jury found in favor of Auto-Owners.⁴

In *Margo-Kraft Distributors, Inc. v. Minneapolis Gas Co.*, 294 Minn. 274, 200

⁴ Offensive collateral estoppel arises where a plaintiff seeks to estop a defendant from relitigating an issue that the defendant previously litigated and lost against another plaintiff. See *Bogenholm by Bogenholm v. House*, 388 N.W.2d 402, 407-08 n. 6 (Minn. Ct. App.1986), pet. for rev. denied (Minn. Aug. 13, 1986). As noted by the United States Supreme Court in discussing non-mutual offensive collateral estoppel, "since a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a "wait and see" attitude, in the hope that the first action by another plaintiff will result in a favorable judgment. *Park Lane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 99 S.Ct. 645 (1979) (citations omitted). Of course, because privity existed between Respondent and Auto-Owners, Respondent should be bound by the jury's verdict in favor of Appellants in the prior subrogation action.

N.W.2d 45 (1972), the Supreme Court applied collateral estoppel in a similar circumstance. In that case, Margo-Kraft was made a third-party defendant in an action involving an explosion and fire which destroyed a building in which Margo Kraft was a tenant. Margo-Kraft did not counterclaim against the direct defendants, but did arrange counsel for and otherwise cooperate with the plaintiffs in their claims against the direct defendants. After a verdict in favor of the direct defendants, Margo-Kraft commenced a separate action against them for its property damages. In affirming the trial court's summary judgment in favor of the defendants based on collateral estoppel, the Supreme Court noted:

The objective of this multiplicity of actions was astute and calculated: Margo-Kraft anticipated that a result favorable to the owners would inure to the benefit of its own claims against the same defendants. It had, in all these circumstances, . . . the real incentive and full opportunity to have defendant's negligence determined, and the sole basis for its own claim - that the explosion and fire resulted from the negligence of these defendants in the installation and service of gas to a particular unit heater - was determined. As the trial court observed, it gambled and lost. We are persuaded that one who individually or in cooperation with others so controls an action in advancing his own interests has had his day in court and, in justice, should be bound by the adjudication. *See*, Restatement, Judgments, § 84; Note, 65 Harv.L. Rev. 818, 856.

Id. a 280-281, 49.

Like Margo-Kraft, the Respondent in the instant action made a calculated gamble that Auto-Owners would prevail in the subrogation action. And like Margo-Kraft, Respondent hedged her bets by providing the Burgmeier expert report and otherwise assisting in development of Auto-Owners' case. In this way, Respondent so advanced the interests of

the future wrongful death claim in the subrogation action that she has already had her day in court.

Application of collateral estoppel to bar Respondent's claims in the instant action would also eliminate the potential for inconsistent results. One of the primary policies underlying the application of issue and claim preclusion is maintaining the integrity of the judiciary through avoidance of "the expense, vexation, waste, and possible inconsistent results of duplicatory litigation." See Johansen v. Production Credit Ass'n of Marshall-Ivanhoe, 378 N.W.2d 59, 61 (Minn. Ct. App. 1985) (citing Hoag v. New Jersey, 356 U.S. 464, 470, 78 S.Ct. 829, 834, 2 L.Ed.2d 913 (1958)); Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326, 99 S.Ct. 645, 649, 58 L.Ed.2d 552 (1979) (recognizing that collateral estoppel limits the burden of relitigating issues and promotes judicial economy). As noted by this Court in State v. Victorsen, 627 N.W.2d 655 (Minn. Ct. App. 2001) when considering application of collateral estoppel to DWI and implied consent proceedings:

[D]oes not justice presume the consistent application of the law? The potential for inconsistency, realized in this case, is among the most objectionable results of the present system. Multiple hearings on the same record and for the determination of the same question unnecessarily burden the parties and provide no justifiable benefit.

Id. at 662. In this case, there is potential for a result directly contrary to the verdict reached by the jury in the prior subrogation action on identical facts. Such a result would necessarily erode public confidence in the certainty of judicial proceedings. A jury has already determined that the negligence of Respondent's Decedent was the sole proximate cause of

the subject motor vehicle accident. In light of Respondent's close connection to, awareness of, and participation in the prior subrogation action, she and the Decedent's other heirs and next of should be bound by that determination.

CONCLUSION

Respondent's interests in the instant action are so closely related to the interests of the insurer in the prior subrogation case that application of collateral estoppel is equitable and appropriate. Respondent was aware of and participated in the prior subrogation action by providing the Burgmeier Accident Reconstruction Report and giving both deposition and trial testimony. Respondent's counsel also requested and received information, documents and status updates regarding the subrogation action. Moreover, the liability issues, witnesses and evidence in the two actions are identical. And counsel for Auto-Owners in the prior subrogation sufficiently represented Respondent's interests concerning the liability issues. Finally, application of collateral estoppel in this case would eliminate the potential for inconsistent judicial results. For all of these reasons, Appellants respectfully request that this Court answer the certified question in the affirmative, reverse the holding of the District Court, and grant summary judgment in Appellants' favor, dismissing Respondent's claims with prejudice.

Respectfully submitted.

Dated: 8/10, 2005

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).