

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' REPLY BRIEF

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INTRODUCTION

Appellants, by and through the undersigned counsel, submit this Reply Brief. The decisions cited by Respondent in support of a finding against privity in this matter are inapposite to the facts of this case. Moreover, Respondent's arguments ignore the perfect synthesis of legal interests between the insurer-subrogee in the prior action and Respondent in the instant matter. This mutuality of legal interests and the fact that the insurer-subrogee adequately represented them in the prior action compels a finding of privity such that the application of collateral estoppel is appropriate. Accordingly, this Court must answer the certified question the affirmative.

ARGUMENT

I. PRIVACY EXISTED BETWEEN RESPONDENT AND THE AUTOMOBILE INSURER IN THE PRIOR ACTION BECAUSE RESPONDENT'S INTEREST WERE SUFFICIENTLY REPRESENTED, SHE WAS AWARE OF THE PRIOR ACTION AND CHOSE NOT TO PARTICIPATE.

Respondent erroneously relies on *Johnson v. Consolidated Freightways*, 420 N.W.2d 608 (Minn. 1988) in arguing against a finding of privity in this matter. However, the facts of that case are clearly distinguishable from the case at bar. In *Consolidated Freightways*, the plaintiff's decedent was killed and her husband injured when the vehicle driven by her husband collided with a large tire and wheel rim in the roadway. *Id.* at 610. The husband commenced an arbitration action against his automobile insurer to collect uninsured motorist benefits. *Id.* At the time of the arbitration, the identity of the owner of the tire and wheel rim were unknown. The arbitrators found that the husband was 20% at fault for the accident and

attributed the remaining 80% of fault to the unidentified owner of the tire and rim. *Id.* The plaintiff, as trustee for the next of kin of the decedent, subsequently commenced a wrongful death action against Consolidated Freightways, which had been identified as the owner of the tire and rim. *Id.* Thus, neither party to the wrongful death case at issue had been a party in the prior arbitration proceeding upon which the collateral estoppel defense was based. Under these facts, the supreme court properly held that application of collateral estoppel would be inappropriate.

In *Aufderhar v. Data Dispatch, Inc.*, 452 N.W.2d 648 (Minn. 1990), the supreme court made clear that its decision in *Consolidated Freightways* was based primarily on the absence of the responsible party, not the absence of the plaintiff, in the prior proceeding, as follows:

The basis of our decision in *Consolidated Freightways* was that the decedent-plaintiff had not been afforded a “full and fair opportunity to be heard on the adjudicated issue” - the crucial fourth prong of the Ellis test - due primarily to the fact that the comparative fault allocation in the arbitration proceeding was based upon only a part of the facts pertinent to a resolution of that issue.

* * *

Had the responsible party been present at the arbitration in *Consolidated Freightways* (the trucking company), it could, and probably would have presented relevant evidence on the comparative fault issue.

Id. at 651. In the instant matter, all of the then surviving parties and witnesses were present and testified at the trial of the prior subrogation action. That Respondent and her son did not

testify voluntarily at the trial of the prior action is irrelevant. Presumably, their sworn testimony in depositions and at trial was truthful even though it was obtained pursuant to subpoena. The record was complete with respect to the facts necessary for a jury determination of fault as between Respondent's decedent and the Appellants. Accordingly, the concerns raised by the court in declining to apply collateral estoppel in Consolidated Freightways are not present here and the holding in that case is inapposite.

As noted in Appellant's Brief, Reil v. Benjamin, 584 N.W.2d 442 (Minn. Ct. App. 1998) *review denied* (Minn. Nov. 17, 1998) controls the resolution of the certified question raised by this appeal. In the instant matter, Respondent's automobile insurer stepped into the shoes of the decedent to assert a subrogation claim in the prior action that only existed by virtue of its insurance contract with the decedent. Like the plaintiff in Reil, Respondent was fully aware of the trial in the prior action, testified concerning the facts surrounding the motor vehicle accident giving rise to the claim, and is now pursuing the same theory - negligence - on which the jury made its determination in the prior action. There can also be no reasonable dispute that the legal issues, witnesses and evidence in both cases are virtually identical. As in Reil, these facts compel a finding that Respondent was in privity with the insurer-subrogee in the prior action.

Absent statutory provisions to the contrary, courts in other jurisdictions have also consistently found privity between an insured and its insurer-subrogee. See e.g. Lemieux v. American Universal Ins. Co., 360 A.2d 540, 545 (R.I. 1976) (finding sufficient identity of interest to support privity since the insurer had advanced no independent rights of its own but

rather asserted a claim solely by subrogation to the rights of the insured); *John Hancock Mutual Life Ins. Co. v. Bird*, 590 N.E.2d 336, 338 (Ohio Ct. App. 1990) (holding insured was in privity with insurer who was party to prior adjudication); *In re Armstrong*, 201 B.R. 526, 532 (Bankr. D. Nebr. 1996) (finding privity based on fact that interests of insurer and insured were so closely aligned and that estopped party was aware of prior action and refused to participate); *Stoverink v. Morgan*, 660 S.W.2d 743, 745 (Mo. Ct. App. 1983) (finding sufficient privity between insured and insurer to apply principles of res judicata and collateral estoppel).¹

Respondent's reliance on *Kaiser v. Northern States Power Co.* is also misplaced. As noted by the court of appeals in *Reil*, the most important consideration of the supreme court in declining to find privity in *Kaiser* was that application of collateral estoppel would have been unfair because the trial court in the original action failed to make a determination on the issue of liability. See *Reil*, 584 N.W.2d at 444. Here, the issue of negligence and fault of the respective drivers was fully adjudicated and decided by a jury. Further, the firefighters in *Kaiser* were not aware that a summary judgment motion concerning application of the "firefighters rule" had been brought and decided adversely in the prior action. By contrast, Respondent was fully aware of the prior action and gave both deposition and trial testimony.

¹ Other cases finding privity between insurer and insured include: *Reid v. Pyle*, 51 P.3d 1064, 1068 (Colo. Ct. App. 2002) rehearing denied; *Sunbelt Cranes Construction and Hauling, Inc. v. Gulf Coast Erectors, Inc.*, 189 F.Supp.2d 1341, 1345 (M.D. Fla. 2002); *Fernandez v. Standard Fire Ins. Co.*, 688 A.2d 349, 351-52 (Conn. Ct. App. 1997).

Respondent's claim that she did not intervene in the prior action because of a delay in obtaining a medical opinion supporting a wrongful death claim is also of no relevance with respect to the issue of privity. Respondent's decedent passed away in July, 2000. Auto-Owners commenced its subrogation action in the name and as subrogee of Respondent's decedent on August 25, 2000. If Respondent had any intention of joining the prior action, she could have solicited a medical opinion at or near the time the prior action was commenced. After all, Respondent's decedent was already a party to the prior action. Instead, Respondent and her counsel obtained a dismissal of the decedent from the prior action and waited until October 2, 2001 to even request a report from the decedent's doctor. (AA170.) In truth, Respondent and her counsel made a conscious decision to await the outcome of the prior action with the intention of applying offensive collateral estoppel against Appellants if the jury decided the liability case against them. Like the plaintiffs in *Reil* and *Margo-Kraft*, Respondent was in privity with the plaintiff in the prior action but gambled and lost. Accordingly, this Court should answer the certified question in the affirmative.

CONCLUSION

Privity existed between Respondent and the automobile insurer-subrogee in the prior action. The interests of Respondent and the insurer-subrogee in the prior action were so closely aligned that application of collateral estoppel to bar the instant action is both justified and equitable. The prior action involved the same facts and determined the precise liability issues in controversy in the case at bar. The automobile insurer adequately represented

Respondent's interests in that case. For all of these reasons, and for the reasons enumerated in Appellants' Brief, Appellants respectfully submit that this Court must answer the certified question raised by this appeal in the affirmative.

Respectfully submitted.

Dated: 9/16, 2005

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