

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.

RESPONDENT'S BRIEF

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STATEMENT OF THE ISSUE

The District Court certified the following question for review by this Court:

- I. 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.

Apposite Cases:

Johnson v. Consolidated Freightways, Inc., 420 N.W.2d 608 (Minn. 1988)

Kaiser v. Northern States Power Company, 353 N.W.2d 899 (Minn. 1984)

Bogenholm v. House, 388 N.W.2d 402 (Minn. Ct. App. 1986)

STATEMENT OF THE FACTS

On July 26, 1999, Appellant Michael Lockwood collided a 40 ton dump truck he was driving (owned by his employer, Appellant Simonson Construction, Inc.) with the vehicle driven by Richard Crossman, Sr., the Respondent's decedent. AA 133-134. Mr. Crossman suffered significant injuries that ultimately resulted in his death one year later on July 20, 2000. AA 134.

On August 25, 2000, one month after Mr. Crossman died, his no-fault insurance carrier, Auto-Owners, commenced a subrogation claim against Appellants, seeking \$4,438.00 in property damage reimbursement. AA 134. The amount of the claim was later stipulated to be \$3,937.86. AA 134. The subrogation action was commenced by Auto Owners without any consultation with Respondent or its decedent. AA 134. Indeed, Auto Owners brought the action in Mr. Crossman's name without even knowing that he had already passed away. AA 135. Auto Owners named Mr. Crossman as a party without his knowledge or permission, without the prior knowledge or permission of his family, and without the prior knowledge or permission of his counsel. AA 134-135.

Respondent learned about the subrogation action through Appellant's counsel. AA 134. At that time, on or about January 17, 2001, Respondent learned that a scheduling conference in the subrogation action had been set for January 19, 2001. AA 135. Respondent's counsel requested an opportunity to attend the scheduling conference, but Appellants opposed the participation, stating

This particular lawsuit does not involve any personal injury or wrongful death claims, and I would object to any attempt to either amend the Complaint, or otherwise transform a very basic property damage claim into a wrongful death action. In the event Attorney Froehlich is unable to resolve the wrongful death claim on a pre-suit basis, and wants to commence a wrongful death action on behalf of the Heirs and Next of Kin, that will be his choice at some hypothetical future date.

AA 135. Appellants also stated that if Respondent wished to make a motion to intervene in the action, Appellants would oppose the motion. AA 135.

Auto Owners and Appellants agreed to dismiss Mr. Crossman from the subrogation action without prejudice. AA 135.

Respondent had no control over the subrogation action as it proceeded. AA 135. Auto Owners did not consult with Respondent regarding the case, did not share with Respondent the positions of the parties, the discovery gleaned, or discuss with Respondent legal strategies and theories. AA 135-138. After Mr. Crossman was dismissed without prejudice early on from the case, Respondent was not provided any information unless Respondent specifically asked for it. AA 135-136. Respondent was not served with notice or copies of the pleadings, the motions, discovery, or briefs. AA 136-137. Mrs. Crossman and her son, Richard Crossman, Jr., provided deposition testimony in the subrogation action, but only pursuant to Notice of Taking Deposition served by Appellants. AA 136. They each testified briefly at trial, but only in response to subpoena. AA 136.

Respondent did not even know until after Appellants filed a motion in limine to exclude the accident reconstructionist's report that briefing and a hearing on the issue had taken place. AA 136. In support of its motion in limine,

Appellant argued that “[t]he Crossman family *is not a party* to the instant action, and should not be allowed to *informally participate* by the sharing, loaning or otherwise making their liability expert Burgmeier available to plaintiff.” AA 136.

On or about December 3, 2001, Respondent received a report from one of Mr. Crossman’s treating doctors who opined that he had sustained a traumatic brain injury as a result of the July 26, 1999 motor vehicle accident; that the accident materially worsened an existing subdural hematoma condition; and that the motor vehicle accident was a substantial contributing factor in his subsequent decline in health and death. AA 137. At that time, the no-fault carrier’s subrogation action was scheduled as trial ready. AA 137. Respondent did not make a “calculated decision to delay filing suit.” AA 137.

Respondent’s counsel attended *parts of* the no-fault carrier’s trial and sat in the audience. AA 137. Respondent’s counsel did not (nor would she have been permitted to) participate in any pretrial trial motions, participate in voir dire, or sit at counsel table. AA 137. Counsel for the Respondent had no opportunity to direct any testimony or to cross-examine witnesses, or have input on the witnesses to be called. AA 138.

The no-fault carrier decide not to introduce the accident reconstructionist’s opinion, and decided not to call Mrs. Crossman or her son to testify. AA 138. They went home but then were subpoenaed to return by Appellants. AA 138. Mrs. Crossman and her son testified but only under subpoena and as adverse

witnesses. AA 138. They were not able to present their side of the story, or advance their own interests, or given an opportunity to be heard. AA 138.

The District Court concluded on the basis of these facts that privity between Respondent and the no-fault carrier did not exist and that it would be inequitable to apply collateral estoppel. AA 243 – AA 244.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED PRIVITY DID NOT EXIST BETWEEN RESPONDENT AND THE DECEDENT'S AUTOMOBILE INSURER AND THAT COLLATERAL ESTOPPEL SHOULD NOT BE APPLIED.

Neither collateral estoppel nor res judicata is to be rigidly applied. Johnson v. Consolidated Freightways, Inc., 420 N.W.2d 608, 613 (Minn. 1988) (citing AFSCME Council 96 v. Arrowhead Regional Corrections Board, 356 N.W.2d 295, 299 (Minn. 1984)). Collateral estoppel is a flexible doctrine with its focus being whether application would work an injustice on the party against whom the estoppel is urged. Consolidated Freightways, 420 N.W.2d at 613 (citing Jeffers v. Convoy Co., 636 F. Supp. 1337, 1339 (D. Minn. 1986)).

To apply collateral estoppel, four factors must be met: 1) The issues in the two actions must be identical; 2) there must have been final judgment on the merits in the first action; 3) the party against whom collateral estoppel is sought must have been a party or in privity with a party in the earlier action; 4) the party to be estopped must have had a full and fair opportunity to be heard on the issue. Ellis v. Minneapolis Com'n on Civil Rights, 319 N.W.2d 702 (Minn. 1982).

“The rationale behind the requirement of privity is closely associated with the fourth requirement of [full and fair opportunity to be heard on the adjudicated issue] thus effectively merging consideration of the two.” Miller v. Northwestern National Insurance Company, 354 N.W.2d 58, 61 (Minn. Ct. App. 1984).

Privity is a question of fact requiring a case-by case determination. Miller, 354 N.W.2d at 62; Margo-Kraft Distributors, Inc. v. Minneapolis Gas Company, 294 Minn. 274, 200 N.W.2d 45, 47 (Minn. 1972) (“There is no prevailing definition of privity which can be automatically applied . . . so we must carefully examine the circumstances of each case.”) (internal citations omitted)

The burden of proof is on the party seeking to invoke the defense of collateral estoppel. Virsen v. Rosso, Beutel, Johnson, Rosso & Ebersold, 356 N.W.2d 333, 337 (Minn. Ct. App. 1984). Moreover, “Minnesota courts have traditionally required a strong showing that the requisites of the doctrine have been met.” Regents of University of Minnesota v. Medical Inc., 382 N.W.2d 201, 208 (Minn. Ct. App. 1986).

Here, in order to find privity, the Court would have to conclude that Respondent exercised sufficient control over the no-fault carrier’s subrogation action such that she was able to advance her own interests and have her day in court. Brunson v. Seltz, 414 N.W.2d 547, 550 (Minn. Ct. App. 1987) (“Privity exists where the record demonstrates controlling participation and active self-interest in the litigation.”) Respondent, however, had no control over the no-fault carrier’s subrogation action and was therefore unable to advance her own interests, and has not had her day in court.

Had Respondent been in control of the earlier subrogation action, she would have provided the jury with a full and complete presentation of evidence on the issue of comparative fault. She would have cross-examined the witnesses and

would have provided direct testimony, not the least of which is the expert accident reconstructionist's opinion that Appellants' version of the accident is simply not possible. AA137-138.

That Respondent had no control over the facts that were presented and which resulted in an adverse comparative fault verdict is precisely the reason why the Court precluded collateral estoppel in Consolidated Freightways.

In that case, an arbitrator determined Robert Lundquist, the driver of the automobile that killed his wife and caused his injuries, 20 percent at fault with the other 80 percent of the fault attributable to the unknown person or company who owned the wheel that was lying on the highway that caused the accident.

Consolidated Freightways, 420 N.W.2d at 613. Thereafter, when Consolidated Freightways was identified as the owner of the wheel and Arlene Johnson, trustee for the estate of Lundquist's wife, filed a wrongful death action against the company, it invoked collateral estoppel. Consolidated Freightways, 420 N.W.2d at 614. The Court declined, however, to apply collateral estoppel because "Plaintiff could conceivably produce evidence that would allow the fact-finder to conclude defendant's causal negligence exceeded 80 percent . . ." and the earlier arbitration proceeding did not afford the Plaintiff a full and fair opportunity to litigate comparative fault "based as it was on only part of the pertinent facts and parties." Id.

Unlike Consolidated who, "for reasons of its own [was] content to be bound by an 80-percent fault assignment," Appellants were a party to the earlier

action and had the benefit of controlling its evidence and advancing its own interests. Respondent did not have that same benefit. She had no control over the action and was unable to produce evidence that could have resulted in a different attribution of comparative fault.

Appellants asserts in their brief that the facts of this case are strikingly similar to the facts in Reil v. Benjamin, 584 N.W.2d 442 (Minn. Ct. App. 1998), a case where the Court found privity and invoked collateral estoppel. On the contrary, there are significant material differences between the facts in Reil and the facts in this case.

Reil actively sought to consolidate his claims with his employer's claims, even though at the last minute he decided not to follow through. Id. On the other hand, Respondent's decedent was involuntarily named a party to the no-fault carrier's subrogation action. The no-fault carrier named decedent without his knowledge or the knowledge or permission of his family. In fact, at the time he was named as a party plaintiff, Respondent's decedent had already passed away.

In addition, Appellants dismissed Respondent's decedent early on *without prejudice* from the case. By stipulating to the dismissal without prejudice, Appellants expressly agreed that no negative consequence would attach to the dismissal.¹

¹ In addition, Appellants could have, but did not, seek to make Respondent an involuntary plaintiff under Minn. R. Civ. P. 19.01. See, e.g., Mendez v. Vatican Shrimp Co., Inc., 43 F.R.D. 294 (S.D. Texas 1966).

Other differences exist between the facts in Reil and the facts in this case. Reil took the witness stand and gave sworn testimony. Reil, 584 N.W.2d at 445. Respondent testified, but only as an *involuntary*, subpoenaed witness. Reil stipulated that the legal issues, witnesses, *and evidence* in his case were the same as in his employer's case. Id. Respondent stipulated to nothing. Moreover, Respondent's witnesses and evidence are not the same. For example, and as already indicated, Respondent will provide expert testimony refuting Appellants' version of events.

Kaiser v. Northern States Power Company, 353 N.W.2d 899 (Minn. 1984), is apposite, not Reil. In fact, the Reil Court noted the Kaiser facts were "markedly different." Reil, 584 N.W.2d at 445.

In Kaiser, the City of St. Paul brought a subrogation action against NSP seeking to recover workers' compensation benefits paid on behalf of firefighter employees injured by a natural gas explosion. Kaiser, 353 N.W.2d at 902. NSP moved for summary judgment arguing the "fireman's rule" barred the claim. Id. The trial court agreed and there was no appeal. Id.

In a subsequent action, the firefighters sought damages broader than those that had been sought by the City in its subrogation action. Kaiser, 353 N.W.2d at 903. In denying NSP's motion for summary judgment in the firefighters' action, the trial court ruled the firefighters were not barred by collateral estoppel from pursuing their action. Kaiser, 353 N.W.2d at 902. On appeal the Minnesota

Supreme Court agreed, concluding that privity did not exist between the firefighters and the City in the earlier subrogation action for the following reasons:

- The first action was not brought on behalf of the party sought to be precluded,
- The party to be precluded did not have a direct financial interest in the prior lawsuit;
- The party to be precluded did not control the first action;
- The party to be precluded did not have the right to appeal from the prior judgment.

Kaiser, 353 N.W.2d at 904 (citing, e.g., Summers v. Penn Central Transportation Co., 518 F. Supp. 864, 867 (S.D. Ohio 1981)). In addition, the Court noted the firefighters had no notice of the summary judgment motion and no right to be heard at oral argument. Kaiser, 353 N.W.2d at 904.

The reasons that precluded application of collateral estoppel in Kaiser hold true for this case as well:

- The no-fault carrier's action was not brought on behalf of Respondent; it sought to recover its \$5,000.00 property damage payment.
- The Respondent was involuntarily named as a party to the subrogation action and had no direct financial interest in no-fault carrier's claim.
- Respondent did not control the no-fault carrier's action.

- Respondent was not provided notice of pretrial matters or the trial schedule,² and had no right to be heard at any of the proceedings. Respondent was not even called to testify by the no-fault carrier and only testified as an adverse witness in response to Appellants' subpoena.
- Respondent had no right to appeal the outcome.

It is axiomatic that for collateral estoppel to apply, it must be determined that the party against whom collateral estoppel is invoked must have had its interests sufficiently represented in the first action so that the use of collateral estoppel is not inequitable. Miller, 354 N.W.2d at 61-62 (citing Parklane Hosiery Co. v. Shore, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979)). Nevertheless, Appellants suggest that privity existed between Respondent and the no-fault carrier in the earlier action merely because:

- Respondent's counsel sought permission to attend the initial scheduling conference once he learned his client had been involuntarily named as a party in the no-fault carrier's subrogation case. App. Brief, p. 13.
- Respondent gave testimony under subpoena in the no-fault carrier's subrogation action. App. Brief, p. 14.
- The no-fault carrier gave Respondent's counsel information when she specifically requested it. App. Brief, p. 14; AA 136.

² Respondent only became aware of the date of trial because it contacted the court and asked whether a trial had been scheduled.

- Respondent's objective in this case and the no fault carrier's objective in the earlier case (proving liability) are identical. App. Brief, p. 14.
- The no-fault carrier sought leave of court to introduce the accident reconstructionist's report. App. Brief, p. 15.

These facts do not support a finding of privity. Indeed, "[i]t is not sufficient that the person merely contributed advice in support of the party, testified as a witness or participated in consolidated pretrial proceedings. Bogenholm v. House, 388 N.W.2d 402, 406 (Minn. Ct. App. 1986) (citing Restatement (Second) of Judgments § 39 comment c. at 384 (1982)). Instead, a nonparty to a prior suit can only be bound to the results of that suit where the nonparty "so controls an action in advancing her own interests that the nonparty has had her day in court." Denzer v. Frisch, 430 N.W.2d 471, 473 (Minn. Ct. App. 1988) (quoting Bogenholm, 388 N.W.2d at 406). Moreover, "[t]o have control of litigation, a person must have an effective choice as to legal theories to be advanced on behalf of the party and have control over the opportunity to obtain review." Id.

Contrary to Appellants' assertion, Respondent's counsel did not have a "behind-the-scenes role" in the subrogation action. App. Brief, p. 15. Auto Owners did not consult with Respondent regarding the case, did not share with Respondent the parties' positions, or discuss strategies for proceeding. Nor did Respondent make a "calculated gamble" like Margo-Kraft. See, Margo-Kraft, 200 N.W.2d at 49. Respondent did not intervene in the subrogation action because it

was not until December 3, 2001 that Respondent obtained a medical opinion supporting a wrongful death claim. At that point, the no-fault carrier's case was already scheduled for trial.

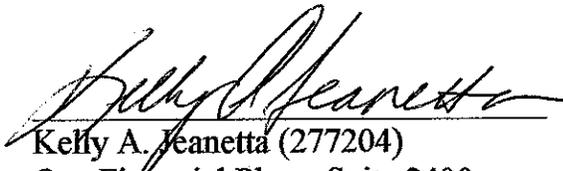
CONCLUSION

Respondent had no choice about the legal theories to advance, the evidence to present, or any control whatsoever over the subrogation action. As such, Respondent did not have the opportunity to advance her own interests, and has not yet had her day in court. Therefore, Respondent was not in privity with the no-fault carrier in its earlier subrogation action against Appellants, and the application of collateral estoppel would be inequitable. Respondent respectfully requests that this Court affirm the holding of the District Court, denying Appellants' motion for summary judgment.

Dated: September 9, 2005.

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**CERTIFICATION OF
BRIEF LENGTH**

Appellate Court File No.
A05-1372

I hereby certify that this brief conforms to the requirements of Minn.R.Civ.App.P.
132.01, Subds. 1 and 3, for a brief produced with a proportional font. The length of this
brief is 2,921 words. This brief was prepared using MS Word.

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