STATE OF MICHIGAN

COURT OF APPEALS

REBECCA BAHAR, TODD COOK, DEMITRIOUS ECONOMIDES, SHERRY KAYE, DOROTHY OWEN, JAMES RAMEY, RYCUS FLOOR COVERING, INC., STEVE SPIEGEL, AND SUMMIT HOSPITALITY, INC.,

Plaintiff-Appellees,

v

AMERITECH MICHIGAN,

Defendant-Appellant.

UNPUBLISHED
January 4, 2005

No. 249263
Ingham County Circuit Court
LC No. 03-000122-CB

Before: Cooper, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Defendant Ameritech Michigan[1] appeals by leave granted the order of the trial court denying its motion for summary disposition. We hold that defendant is entitled to summary disposition because previous litigation in federal court between defendant and then-Governor Engler and as members of the Michigan Public Service Commission (MPSC) that was concluded by entry of a consent judgment requires dismissal of this action on grounds of res judicata. Accordingly, we reverse and remand.

The essential underlying facts of the case are undisputed. MCL 484.2310(7) (section 310(7)) forbids telephone service providers, including defendant, from imposing interstate end-user common line (EUCL) charges, which defendant admits it includes on subscribers' bills. After enactment of section 310(7), defendant sued then-Governor Engler and members of the MPSC, all in their official capacities, in the United States District Court for the Eastern District of Michigan. *Michigan Bell Telephone Co v Engler et al,* Case No. 00-CV-73207 DT. Defendant alleged that section 310(7) was facially unconstitutional, in violation of the Fourteenth Amendment's Due Process Clause, because it "does not provide a mechanism through which telephone service providers may ensure that they receive a just and reasonable

[1] Defendant revealed in its brief that previously it did business as Ameritech Michigan, but now goes by the name SBC Michigan.

rate of return on their investment." The Federal District Court denied defendant's request to preliminarily enjoin enforcement of section 310(7), but that decision was reversed on appeal to the Sixth Circuit, which held that defendant had shown a "substantial likelihood" of establishing that section 310(7) is unconstitutional. *Michigan Bell Telephone Co v Engler*, 257 F3d 587, 600 (CA 6, 2001). Subsequently, the parties to the federal suit entered into a settlement agreement that allowed defendant to impose the charge, albeit at a lowered rate. After the parties reached their settlement, then-Attorney General Granholm moved to intervene on behalf of the rate payers and asserted that any settlement that permitted any EUCL charge other than the one provided by section 310(7) was illegal. Although the Attorney General was allowed to intervene, the Federal District Court ruled that the parties could settle for less than full enforcement. Subsequently, a consent judgment was entered based on the settlement agreement. No appeal of the federal action was pursued.

After the entry of the final order disposing of the prior federal litigation, plaintiffs filed the present suit seeking private enforcement of the statute and return of all charges collected by defendant in ostensible violation of section 310(7). Defendant moved for summary disposition under MCR 2.116(C)(7) and (8) on the grounds that the matter was res judicata because of the prior federal suit, that plaintiffs were required to bring the suit in an administrative proceeding before the MPSC, and that the courts could not grant plaintiffs' requested relief because doing so would violate the constitutional separation of powers. The trial court rejected all three arguments, and defendant sought leave to appeal. The trial court stayed the proceedings below pending appeal. This Court granted leave to appeal.

On appeal defendant argues that the trial court erred by failing to grant its motion for summary disposition of this suit for private enforcement of MCL 484.2310(7) on grounds of res judicata. We review de novo a trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(7). *Stoudemire v Stoudemire*, 248 Mich App 325, 332; 639 NW2d 274 (2001). Similarly, the applicability of the doctrine of res judicata constitutes a question of law that we review de novo. *Id.*

The parties to this appeal agree that this Court must apply federal law in deciding whether the doctrine of res judicata requires dismissal of this case. See *Pierson Sand and Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380-381; 596 NW2d 153 (1999). Under federal law, to establish res judicata requires four elements: "(1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their 'privies'; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action." *Becherer v Merrill Lynch, Pierce, Fenner, and Smith, Inc*, 193 F3d 415, 422 (CA 6, 1999), quoting *Bittinger v Tecumseh Products Co*, 123 F3d 877, 880 (CA 6, 1997). The parties do not dispute that elements (1), (3) and (4) are satisfied. Thus, we focus only on whether the parties in this case and the parties to the prior federal action that resulted in the entry of a consent judgment are the same parties or their "privies."

Plaintiffs in the instant litigation, a group of private individuals and businesses, claim to represent two putative classes, one of residential telephone users and a second comprised of defendant's commercial customers. Because plaintiffs are not the same parties as the defendants in the prior litigation, resolution of the instant case rests on whether plaintiffs are in "privity" with the governmental officials bound by the earlier consent judgment.

In *Richards v Jefferson County, Ala*, 517 US 793, 798; 116 S Ct 1761; 135 L Ed 2d 76 (1996), the United States Supreme Court stated that a litigant need not always "have been a party to a judgment in order to be bound by it." The most notable exception to the general rule occurs "when it can be said that there is 'privity' between a party to the second case and a party who is bound by an earlier judgment." *Id.* The Court further explained that although the exception has some constitutional limits, "the term 'privity' is now used to describe various relationships between litigants that would not have come within the traditional definition of that term." To provide examples of the expansive nature of the term, the Court referenced Restatement Judgments, 2d, (1980), Ch 4. *Id.*

The pertinent portion of the chapter cited in *Richards*, Restatement, § 41, states as follows.

> (1) A person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of a judgment as though he were a party. A person is represented by a party who is:
>
> > (d) An official or agency invested by law with authority to represent the person's interests;

The Restatement's comment regarding "representation by public officials" explains that in situations where individual members of the public have a "legally enforceable right permitting them to bring or defend an action concerning an interest," a public official or agency may also seek to protect that interest through litigation. The comment further states:

> Where this is so, a further question presented is whether the exercise of the official or agency's authority to maintain or defend litigation concerning the interest should be construed as preempting the otherwise available opportunity of the individual or members of the public to prosecute or defend litigation in the matter. Where the exercise of that authority is regarded as preemptive, the public official or agency represents such other persons for the purposes of litigation concerning the interests in question and the judgment is binding on them.

The Fifth Circuit Court of appeals applied these principles in *Southwest Airlines Co v Texas Intern Airlines, Inc*, 546 F 2d 84, 95 (CA 5, 1977). Several years before the litigation commenced, the city of Dallas brought suit against the airline seeking a declaratory judgment of their right to exclude it from a particular airport, Love Field, based on a bond ordinance funding the creation of Dallas/Fort Worth Regional Airport. *Id.* at 87. Southwest counterclaimed and obtained an injunction preventing the city from interfering with its use of Love Field. *Id.* at 88. In the subsequent litigation, a group of airlines, assuming the role of private attorneys-general, similarly filed suit seeking to have Southwest excluded from Love Field based on the ordinance. *Id.* at 97. The Fifth Circuit, noting that the "relationship between the city as public enforcer of the ordinance and the airlines as private enforcers is close enough to preclude relitigation," dismissed the suit as res judicata.

In reaching this decision, the Fifth Circuit applied the reasoning expressed in the comment to Restatement, §41(d).[2] It noted that in certain situations, an agency's authority to maintain or defend a suit should be construed as preempting the otherwise available opportunity of individuals to litigate the matter. *Id.* at 99. The Court then found that (1) the other carries did not allege that Southwest breached a legal duty apart from the general duty to obey valid ordinances, (2) that they requested the same remedy denied the City of Dallas, the enforcement of the ordinance, and (3) that the ordinance did not establish a "statutory scheme looking toward private enforcement of its requirements." *Id.* at 100. Because the legal interest of the other carriers did not differ from those of Dallas in the initial suit, the Court held that "they received adequate representation in the earlier litigation and should be bound by the judgment in that litigation." *Id.*

The Fifth Circuit further stated that, because application of the doctrine of res judicata denies a non-party his day in court, the due process clause prevents preclusion when the relationship between the party and non-party becomes too attenuated. *Southwest*, *supra*, at 95, citing *Hansberry v Lee*, 311 US 32; 61 S Ct 115; 85 L Ed 22 (1940). But it noted that in *Hansberry*, the property owners in the initial suit sought to enforce a racially restrictive covenant while the defendants in the subsequent suit tried to invalidate it. *Id.*, at 101. Because the initial class represented interests in direct opposition to the position of the defendants, the Supreme Court held that preclusion would violate due process. *Id.* Unlike the situation in *Hansberry*, the Fifth Circuit found that the legal interests of the plaintiff airlines in *Southwest* precisely coincided with those of the city in the first suit and that the city vigorously and skillfully litigated the matter. *Id* at 102. Consequently, the preclusion of plaintiffs' claim did not violate their right to due process.

Plaintiffs' suit in the instant case must similarly fail as res judicata.[3] Like the plaintiff airlines in *Southwest*, plaintiffs here do not allege that defendant breached a legal duty other than the general duty to obey valid statutory provisions. Further, they request the same result sought by the governor and the members of the MPSC in the initial litigation, namely enforcement of the prohibition of EUCL charges set forth in section 310(7). And this provision did not establish a statutory scheme looking towards private enforcement of its requirements. Because plaintiffs'

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[2] We note that at the time the Fifth Circuit decided *Southwest*, the current edition of the Restatement was not yet available. Rather, the Court referenced the comment to section 85(d) of a draft recently completed by the American Law Institute, Restatement Judgments, 2d, § 85 (tentative draft No. 2, 1975). Nevertheless, it is apparent from the language quoted in *Southwest*, *supra*, 99, that the draft comment cited is the equivalent, in all material respects, of the present comment to Restatement, § 41(d).

[3] Plaintiffs argue that in deciding this issue, we should rely on the analysis of what constitutes adequate representation presented in *Becherer*, *supra*, 423-425. But *Becherer* dealt with whether a private litigant could be considered the "virtual" representative of another private litigant in a subsequent litigation based on whether the first was accountable to the later. Because the instant case concerns whether litigation by a governmental official precludes subsequent private actions regarding the same issue, we find the analytical framework expressed in the Restatement and applied in *Southwest* better fits the question before us.

legal interests do not differ from those of the defendants in the initial suit, they received adequate representation. Thus, the consent judgment entered in the prior litigation, allowing some EUCL charges, bars plaintiffs' attempt to enforce section 310(7) in the instant litigation.

Furthermore, preclusion of plaintiffs' claim does not violate plaintiffs' right to due process. Contrary to plaintiffs' arguments, *Richards*, *supra*, provides no support for a different conclusion. In *Richards*, a state court held that the resolution of a suit brought by a city official and three individual county taxpayers on state law grounds precluded subsequent litigation by a class representing all county taxpayers and based on both state law and federal constitutional grounds. *Id.* at 795-797, 801-802. The Supreme Court found this violated the class' right to due process because its interests were not adequately represented in the initial litigation. *Id.* at 802. But in the instant case, as in *Southwest*, there exists an identity of interests between plaintiffs and the defendants in the earlier litigation and there is no indication that those defendants failed to zealously assert their interests. Plaintiffs were adequately represented and the finding that their claim is precluded as res judicata does not violate their rights under the constitution.

In sum, plaintiffs are bound by the consent judgment entered in *Michigan Bell Telephone Co v Engler et al*, and are therefore barred by the doctrine of res judicata from seeking private enforcement of section 310(7). Because this finding requires dismissal of the instant litigation, we need not address the remainder of defendant's claims on appeal.

Reversed and remanded for entry of an order granting defendant summary disposition pursuant to MCR 2.116(C)(7). We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra