STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0204

Pang Nhia Thao and Ying Lo,
on behalf of themselves and all others similarly situated,
Appellants,

vs.

Central States Health & Life Company of Omaha,
Respondent.

Filed October 13, 2009
Reversed
Toussaint, Chief Judge

Hennepin County District Court
File No. 27-CV-07-26693

William H. Crowder, Vildan A. Teske, Marisa C. Katz, Crowder Teske, P.L.L.P., 222 South Ninth Street, Suite 3210, Minneapolis, MN 55402; and

Eric W. Valen, 305 East Roselawn Avenue, Suite 1000, St. Paul, MN 55117 (for appellants)

Lewis A. Remele Jr., Kevin P. Hickey, Bassford Remele, P.A., 33 South Sixth Street, Suite 3800, Minneapolis, MN 55402-3707 (for respondent)

Considered and decided by Toussaint, Chief Judge; Shumaker, Judge; and Hudson, Judge.

U N P U B L I S H E D O P I N I O N

TOUSSAINT, Chief Judge

Appellants Pang Nhia Thao and Ying Lo, on behalf of themselves and all others similarly situated, challenge the district court's dismissal of their class-action complaint based on a determination that the complaint was barred by a judgment in a previous class action. Because appellants were neither members of the settlement class nor in privity with the plaintiffs in the previous action, we reverse.

FACTS

Respondent Central States Health & Life Company of Omaha sells credit-insurance policies, which insure payment of loans in the event of an obligor's death or disability. In 1998, a group of plaintiffs initiated a class action asserting that respondent breached the credit-insurance policies by failing to refund unearned premiums upon early termination of the underlying loans. That case was captioned *Ballard v. Central States Health & Life Co. of Omaha*. The district court certified a class in *Ballard* under Minn. R. Civ. P. 23.02(c), broadly encompassing all purchasers of respondent's credit insurance who did not receive a refund upon early termination of their loans. The district court granted the class summary judgment on liability, and the *Ballard* case settled in 2004.

The *Ballard* settlement class was defined differently from the class that the district court had certified. Most relevant here, the *Ballard* settlement class was limited to individuals whose loans were paid off on or before December 31, 2001: The settlement provided a full refund of unearned premiums to each member of that class, plus interest but less attorney fees. The settlement also provided prospective/injunctive relief,

requiring respondent to (1) add to the language of its insurance certificates a toll-free number for questions about obtaining refunds; (2) initiate procedures to better capture customer information in its databases; (3) instruct sellers of the insurance to provide notice of early loan terminations; (4) instruct sellers to provide customers with copies of completed insurance certificates; and (5) instruct staff and sellers of insurance on the prospective relief requirements.

The district court granted the *Ballard* plaintiffs' motion for preliminary approval of the settlement and approved a Notice of Class Action and Proposed Cash Settlement and Settlement Hearing. The notice provided that recipients might be entitled to a refund if their loan was paid off early and provided them with three options: (1) participating in the settlement by submitting a claim form; (2) opting out of the class; or (3) remaining in the class (and submitting a claim form) but objecting to the settlement. The notice did not advise recipients that they were ineligible to participate if they paid off their loans after December 31, 2001.

Because respondent did not possess data sufficient to identify the members of the class (i.e., did not know who had paid off loans early), the settlement notice and claim form were sent to more than 320,000 individuals whose purchases of credit insurance made them potential class members. Claim forms were returned to a claims administrator, which determined whether claimants met the requisites for class membership. Individuals who paid off their loans after December 31, 2001, did not meet the requirements for class membership. The claims administrator sent these individuals a rejection notice, which instructed them to contact their lender or respondent for a direct

refund.

Appellants Thao and Lo purchased a credit-insurance policy from respondent in August 2000, and were among the more than 320,000 individuals who received notices of the *Ballard* settlement and claim forms in June 2003. In September 2003, appellants paid off their loan; they submitted a claim to the claims administrator. Because appellants' loan was repaid after December 31, 2001, the claims administrator sent them the rejection notice. Although the notice provided instructions for appellants to directly seek a refund, they did not do so. Instead, they retained the same counsel who had represented the *Ballard* plaintiffs and commenced this action in September 2007. Appellants refused respondent's post-litigation tender of a premium refund.

Respondent moved for summary judgment, asserting that appellants' claims were barred under the doctrine of res judicata. Appellants opposed respondent's motion and brought their own motions for partial summary judgment and class certification. The district court granted respondent's motion for summary judgment, denied appellants' motion for partial summary judgment, and denied the class-certification motion as moot.

D E C I S I O N

This court considers two questions on appeal from summary judgment: (1) whether there are any genuine issues of material fact, and (2) whether the district court erred in applying the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). The application of res judicata is a question of law reviewed de novo. *Brown-Wilbert, Inc. v. Copeland Buhl & Co., P.L.L.P.*, 732 N.W.2d 209, 220 (Minn. 2007).

I.

Although respondent's motion for summary judgment was based solely on the res judicata doctrine, the district court concluded that appellants' claims were barred under the doctrines of both res judicata and collateral estoppel. On appeal, respondent again raises only res judicata. Because respondent asserts that appellants' entire action is barred, rather than seeking to preclude relitigation of particular issues adjudicated in the *Ballard* litigation, res judicata is the correct doctrine to apply. *See Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004) (contrasting two doctrines).

"Res judicata is a finality doctrine that mandates that there be an end to litigation." *Id.* at 840. Res judicata is available if "(1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the same parties or their privies; (3) there was a final judgment on the merits; [and] (4) the estopped party had a full and fair opportunity to litigate the matter." *Id.* at 840. The parties agree that the first and third criteria are met in this case. Respondent does not contest that appellants, whose claims fell outside of the settlement class definition, were not parties to the *Ballard* settlement. Thus, in dispute are whether appellants are privies to the *Ballard* plaintiffs and whether there was a full and fair opportunity to litigate in *Ballard*.

"There is no prevailing definition of privity which can be automatically applied." *Margo-Kraft Distrib. Inc. v. Minneapolis Gas Co.*, 294 Minn. 274, 278, 200 N.W.2d 45, 47 (1972). Rather, privity "expresses the idea that as to certain matters and in certain circumstances persons who are not parties to an action but who are connected with it in their interests are affected by the judgment with reference to interests involved in the

action, as if they were parties." *Id.* (quotation omitted). Privity has generally been recognized in the following circumstances: (1) when an individual controls an action, (2) when an individual's interests are represented by a party to the action; and (3) when an individual is a successor in interest to a derivative claim. *Id.* at 278, 200 N.W.2d at 48. Determining whether privity exists requires a careful examination of the facts of each case. *Id.* at 278, 200 N.W.2d at 47.

The district court's order alludes to both the first and second bases for privity, with respect to each relying heavily on the fact that the *Ballard* class was represented by the same lead counsel who represents appellants in this action. Regarding control, the court reasoned that "*Ballard's* class counsel so controlled the *Ballard* action in advancing the prospective claimants' interests that they have essentially had their day in court." The dispositive issue, however, is whether *appellants* controlled the previous action, not whether their counsel did. *See Margo-Kraft*, 294 Minn. at 279-81, 200 N.W.2d at 48-49 (finding control by lessee based in part on lessee's retention of attorneys who brought litigation on behalf of lessor); *Brunsoman v. Seltz*, 414 N.W.2d 547, 550 (Minn. App. 1987) (finding control by general partner over litigation involving partnership), *review denied* (Minn. Jan. 15, 1988). Appellants had no such control over the *Ballard* litigation.

The pivotal issue, and the one upon which respondent urges this court to base its decision, is whether appellants are bound by the *Ballard* judgment because their interests were represented by the *Ballard* plaintiffs. This category of privity has been the subject of the most confusion in the caselaw. It is clear that a person may be in privity if his or her interests are represented by virtue of a legal relationship with a party, like the

relationship between trustor and trustee or, as relevant to this case, between the class representative(s) and class members. This is the traditional basis for this category of privity. *See* Restatement of Judgments § 83 cmt. a (1942) (referencing sections addressed to actions brought on behalf of others, class actions, actions relating to future interests in land, and actions by bailers and/or bailees).

Some courts, however, have expanded this category of privity to encompass the concept of "virtual representation." *See, e.g., Taylor v. Sturgell*, 128 S. Ct. 2161, 2173 (2008). This doctrine has been variously defined. *See id.* (noting inconsistencies in application of virtual-representation concept by federal courts of appeals). In some cases, it represents no more than a shorthand for traditional privity analysis. *See id.*; *Tice v. Am. Airlines, Inc.*, 162 F.3d 966, 971 (7th Cir. 1998) (condemning "lingo of virtual representation" as "cast[ing] more shadows than light on the problem to be decided"). But, in its broadest rendition, virtual representation can be understood to provide for preclusion based on the alignment of interests alone. *See, e.g., Aerojet-Gen. Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir. 1975) (explaining that "person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative"); *see also Taylor*, 128 S. Ct. at 2169 (summarizing different applications of virtual-representation concept by various circuits).

Taylor rejects the broad application of virtual representation. 128 S. Ct. at 2173-74. *Taylor* involved successive suits under the Freedom of Information Act by two friends who had no legal relationship but who were both interested in obtaining the same information from the Federal Aviation Administration. *Id.* at 2167. The court rejected an

argument that preclusion should be found where interests are aligned and the parties' relationship is "close enough." *Id.* at 2175-76. Rather, the court held that preclusion can be based on representation of interests only when the parties' interests are aligned and "either the party understood [him- or] herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty." *Id.* at 2176. In some cases, the court further held, notice of the original suit may be required. *Id.* at 2176. The court further explained:

> An expansive doctrine of virtual representation, however, would recogniz[e], in effect a common-law kind of class action. That is, virtual representation would authorize preclusion based on identity of interests and some kind of relationship between parties and nonparties, shorn of the procedural protections described in *Hansberry* [*v. Lee*, 311 U.S. 32, 61 S. Ct. 115 (1940)], *Richards* [*v. Jefferson County*, 517 U.S. 793, 116 S. Ct. 1761 (1996)], and [Fed. R. Civ. P.] 23. These protections, grounded in due process, could be circumvented were we to approve a virtual representation doctrine that allowed courts to create a *de facto* class at will.

Id. (quotations and citation omitted). Although *Taylor* was decided under the federal common law, we conclude that the same result is compelled under Minnesota law.

The Minnesota Supreme Court has not adopted the virtual-representation doctrine and has discussed the doctrine only in *Pirrotta v. Indep. Sch. District No. 347*, 396 N.W.2d 20, 22 (Minn. 1986) (citing *Aerojet*, 511 F.2d 710). Pirrotta, a teacher, was held not to be collaterally estopped from challenging a school-district decision to place him on unrequested leave by this court's decision arising out of a previous proceeding brought by another teacher, even though that decision had caused the district to put Pirrotta on unrequested leave. *Id.* at 22. Because Pirrotta was neither a party nor in privity with parties to the previous proceeding, he could not be bound by its result. *Id.* The court

rejected an argument that the school district represented Pirrotta's view (by asserting that it made the right decision in placing the other teacher, and not Pirrotta, on leave), reasoning that "the school district was pursuing its own interests in the [initial] litigation, acting in its own behalf and without any accountability to Pirrotta." *Id.*

The supreme court acknowledged the virtual representation doctrine, but concluded that the doctrine was not "helpful," because analysis under the doctrine "appears to be no different than traditional privity analysis of representation of a nonparty by a party." *Id.* n.1. We infer from the analysis in *Pirrotta* that the Minnesota Supreme Court, like the U.S. Supreme Court in *Taylor*, would reject a virtual representation doctrine broader than the traditional privity analysis.

We further conclude that the traditional requirements for privity based on adequate representation of a nonparty—as restated and reaffirmed in *Taylor*—are not met in this case. First, although the *Ballard* class plaintiffs understood themselves to be acting in a representative capacity, they were acting on behalf of the class, which by definition did not include appellants. Second, we are not persuaded that either the district court or class counsel took steps to protect appellants' interests. Respondent asserts that appellants' interests were protected by the prospective relief of the settlement, including letters sent to appellants advising them how to pursue a refund outside of the class-action settlement; respondent suggests that this would have been a better result because appellants would not have had attorney fees deducted from their recovery. We do not find this argument compelling. Rather, we believe that representing appellants' interests would have meant *including* them within the class, so that their recovery, albeit subject to deduction, would

be guaranteed.

Respondent relies heavily on the Eighth Circuit's decision in *Sondel v. Nw. Airlines, Inc.*, 56 F.3d 934 (8th Cir. 1995). *Sondel*, however, is a virtual representation case, *id.* at 939 & n.9, and the Eighth Circuit's application of the virtual representation doctrine was specifically rejected by the U.S. Supreme Court in *Taylor*, 128 S.Ct. at 2173, 2178. Moreover, *Sondel* is distinguishable on its facts because, in that case, the class representatives in a certified federal class action opted to dismiss their pendent state-law claims and separately pursue them in state court. *Id.* at 937. Following a judgment for the defendant in state court, the Eighth Circuit held that the class was in privity with the class representatives and thus that not just the representatives, but the class as whole, was precluded from pursuing the parallel federal claims. *Id.* at 940. Of course, in this case, appellants were not members of the *Ballard* class, much less class representatives.

The Minnesota cases on which respondent relies also are distinguishable. *See Carlson v. Indep. Sch. Distr. No. 623*, 392 N.W.2d 216, 222-23 (Minn. 1986) (concluding that res judicata would apply to *eligible class members* if adequate notice were given); *Balasuriya v. Bemel*, 617 N.W.2d 596, 600 (Minn. App. 2000) (finding privity between corporation and its president based on both alignment of interests and president's control over litigation), *review denied* (Minn. Nov. 21, 2000); *Reil v. Benjamin*, 584 N.W.2d 442, 445 (Minn. App. 1998) (finding privity based on stipulation between parties that issues in two cases were identical and appellant's initial intent to assert his claim in first suit), *review denied* (Minn. Nov. 17, 1998).

Because appellants were not in privity with the *Ballard* plaintiffs, we need not consider whether there was a full and fair opportunity to litigate that matter. Appellants' complaint is not barred under the doctrine of res judicata.

II.

Appellants assert that, in addition to reversing the district court's grant of summary judgment to respondent, this court should also reverse the district court's denial of appellants' motion for partial summary judgment. The district court did not reach the substantive basis for appellants' summary-judgment motion, and we decline to do so in the first instance. *See Wood v. Diamonds Sports Bar & Grill, Inc.*, 654 N.W.2d 704, 709 (Minn. App. 2002) (citing *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988), explaining that this court does not generally address issues raised in but not decided by district court), *review denied* (Minn. Feb. 26, 2003).

Reversed.