

**CASE NOTE: CIVIL PROCEDURE—THE FOREST FOR  
THE TREES: THE MINNESOTA SUPREME COURT  
CONSIDERS THE COLLATERAL ESTOPPEL EFFECT OF  
CRIMINAL CONVICTIONS IN *ILLINOIS FARMERS  
INSURANCE CO. V. REED***

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## I. INTRODUCTION

The venerable doctrine of collateral estoppel<sup>1</sup> is currently in a state of flux.<sup>2</sup> The ever-increasing expense of operating the judicial system<sup>3</sup> urges expanded use of the doctrine, while due process concerns remain a limiting factor.<sup>4</sup> The recent Minnesota Supreme Court case of *Illinois Farmers Insurance Co. v. Reed*<sup>5</sup> dealt with two different aspects of collateral estoppel: who may be considered to be in privity with a criminal defendant and whether a criminal conviction will generally be given estoppel effect.<sup>6</sup> *Reed* held that a criminal conviction cannot be used by an insurance company to collaterally estop a civil plaintiff from proving that the criminal defendant's act was unintentional.<sup>7</sup> Thus, the civil plaintiff is allowed to prove the convicted criminal defendant's lack of intent, and thereby escape the intentional-act exclusion in the defendant's insurance policy.<sup>8</sup>

This Note first examines the goals and history of the doctrine of collateral estoppel, including the great changes the doctrine has undergone of late.<sup>9</sup> It then examines the facts of the *Reed* case, details the procedural history of the case, and outlines the analysis of the courts in deciding the case.<sup>10</sup> This Note then analyzes both the successes and the failures of the Minnesota Supreme Court in the *Reed* opinion.<sup>11</sup> Finally, this Note concludes that the *Reed* decision is correct in its privity and due process analyses, but falls

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1. Collateral estoppel is defined as "[t]he binding effect of a judgment as to matters actually litigated and determined in one action on later controversies between the parties involving a different claim from that on which the original judgment was based." BLACK'S LAW DICTIONARY 279 (8th ed. 2004).

2. See generally *Ill. Farmers Ins. Co. v. Reed*, 647 N.W.2d 553 (Minn. Ct. App. 2002), *rev'd*, 662 N.W.2d 529 (Minn. 2003) (discussing the widening scope of the use of criminal convictions for collateral estoppel).

3. The February 2004 Minnesota budget forecast estimates that the state trial courts will cost \$371,920,000 to run in 2004. Minn. Dep't of Fin., *February 2004 General Fund Statement-Detail* 15 (Feb. 27, 2004), at <http://www.budget.state.mn.us/budget/summary/index.shtml>.

4. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who . . . has never had an opportunity to be heard.").

5. 662 N.W.2d 529 (Minn. 2003).

6. *Id.* at 533-34.

7. *Id.* at 534.

8. See *id.*

9. See *infra* Part II.

10. See *infra* Part III.

11. See *infra* Part IV.

short by failing to clarify what collateral estoppel effect a criminal conviction has in general.<sup>12</sup>

## II. BACKGROUND

### A. *Collateral Estoppel and Related Doctrines*

The doctrine of collateral estoppel has long been a part of both English and United States common law.<sup>13</sup> Courts in the U.S. recognized this doctrine at least as early as 1876.<sup>14</sup> During the late twentieth century, the doctrine of collateral estoppel has seen major changes.<sup>15</sup> Generally, these changes have increased the scope of situations in which collateral estoppel can be applied.<sup>16</sup>

Collateral estoppel, as with the related doctrines of *res judicata*,<sup>17</sup> law of the case,<sup>18</sup> and *stare decisis*,<sup>19</sup> has as its goal the promotion of stability, predictability, and consistency.<sup>20</sup> These

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12. See *infra* Part V.

13. *Ill. Farmers Ins. Co. v. Reed*, 647 N.W.2d 553, 561 (Minn. Ct. App. 2002).

14. *Cromwell v. County of Sac*, 94 U.S. 351 (1877) (differentiating between the doctrines of *res judicata* and collateral estoppel).

15. RICHARD L. MARCUS ET AL., *CIVIL PROCEDURE: A MODERN APPROACH* 1116 (3d ed. 2000).

16. *Id.* Today, Minnesota courts allow the use of collateral estoppel when four conditions are met: (1) the issue to be collaterally estopped is identical to one previously adjudicated, (2) there was a final judgment on the merits, (3) the party to be estopped was a party or is in privity with a party in the prior adjudication, and (4) the estopped party had opportunity to be heard. *Ill. Farmers Ins. Co. v. Reed*, 662 N.W.2d 529, 531-32 (Minn. 2003).

17. Literally, “a thing adjudicated,” “*res judicata*” refers to “[a]n affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit.” BLACK’S, *supra* note 1, at 1336-37.

18. Law of the case refers to “[t]he doctrine holding that a decision rendered in a former appeal of a case is binding in a later appeal.” *Id.* at 903.

19. Literally “to stand by things decided,” *stare decisis* is “[t]he doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation.” *Id.* at 1443.

20. See ROGER C. PARK & DOUGLAS D. MCFARLAND, *COMPUTER-AIDED EXERCISES ON CIVIL PROCEDURE* 214-15 (4th ed. 1995). In addition, *res judicata* and collateral estoppel are both based on several policies protecting both public and private interests. *Id.* By preventing re-litigation of claims and issues, these doctrines protect the prevailing party’s interest in the judgment, and at the same time prevent the additional emotional and financial burden of litigation. *Id.* at 215. In the public sphere, the doctrines of *res judicata* and collateral estoppel are necessary to prevent a court’s judgment from becoming a mere “empty gesture.” *Id.* They also promote judicial efficiency and open up the courts to those with new

doctrines differ, however, in how they seek to promote these goals. Collateral estoppel seeks to prevent parties and their privities from re-litigating an issue that has already been actually litigated and that was necessary to the prior judgment, though the prior *claim* was different.<sup>21</sup> Res judicata, as opposed to the narrower collateral estoppel, is a “broad sword that has more capability to prevent litigation.”<sup>22</sup> It prevents parties and their privities from re-litigating an entire claim, including all issues within that claim that were or should have been litigated in the prior suit.<sup>23</sup> Law of the case, unlike both res judicata and collateral estoppel, works within a single case rather than in two cases.<sup>24</sup> It provides that appellate court decisions are binding on lower courts, as well as on the appellate courts themselves, by self-restraint, if the case returns on another appeal.<sup>25</sup> Finally, stare decisis applies to different parties than those in the original litigation.<sup>26</sup> It uses results from one case to aid in determining the outcome of another case.<sup>27</sup> Stare decisis is persuasive rather than binding like the other doctrines.<sup>28</sup>

The terminology used to refer to the doctrines of res judicata and collateral estoppel is far from uniform in the law.<sup>29</sup> Therefore, a note about vocabulary is in order. The term “res judicata” may refer to preclusion of issues as well as to preclusion of entire claims.<sup>30</sup> Other times “res judicata” refers only to preclusion of claims.<sup>31</sup> Thus, “res judicata” can be synonymous with “claim

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claims and issues to litigate. *Id.* Finally, these doctrines are concerned with preserving the integrity of the judicial system by preventing inconsistent results from case to case. *Ill. Farmers Ins. Co. v. Reed*, 647 N.W.2d 553, 560 (Minn. Ct. App. 2002), *rev'd*, 662 N.W.2d 529 (Minn. 2003). These benefits do come at a cost, however. The primary cost of these policy considerations is that the claims and issues are precluded regardless of their merits. PARK & MCFARLAND, *supra*, at 215. Thus, these doctrines reflect the policy that “sometimes it is more important that a judgment be stable than that it be correct.” FRIEDENTHAL ET AL., CIVIL PROCEDURE § 14.3 at 619 (2d ed. 1993).

21. PARK & MCFARLAND, *supra* note 20, at 214.

22. Ryan R. Dreyer, Case Note, *Discouraging Declaratory Actions in Minnesota: The Res Judicata Effect of Declaratory Judgments in Light of State v. Joseph*, 29 WM. MITCHELL L. REV. 613, 618 (2002).

23. PARK & MCFARLAND, *supra* note 20, at 214.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 215.

29. *Id.* at 213.

30. MARCUS ET AL., *supra* note 15, at 1114.

31. Dreyer, *supra* note 22, at 618-19. The fact that the term “merger and bar”

preclusion,” and “collateral estoppel” can be synonymous with “issue preclusion.”<sup>32</sup> As used in this note, “res judicata” will refer only to preclusion of entire claims, and “collateral estoppel” will refer to preclusion of issues.

*B. Changes in Collateral Estoppel Law*

*1. The Collateral Estoppel Effect of Criminal Judgments Generally*

Traditionally, courts have not afforded criminal judgments the same collateral estoppel effect as civil judgments.<sup>33</sup> Indeed, the historical practice was to give criminal judgments no collateral estoppel effect whatsoever.<sup>34</sup> But in the last thirty years, courts have been increasingly willing to use prior criminal convictions to collaterally estop issues in subsequent civil litigation.<sup>35</sup> This shift was caused by the erosion of several historical objections to this type of collateral estoppel.<sup>36</sup> In addition, several other factors weigh strongly in favor of granting criminal convictions general collateral estoppel effect.<sup>37</sup>

*a. Historical Objections to Giving Criminal Judgments Collateral Estoppel Effect*

One traditional objection to the use of criminal convictions for collateral estoppel purposes was the now-defunct evidentiary rule that an interested person could not testify in a civil case.<sup>38</sup> Therefore, if the victim of a crime testified in the criminal trial, and the perpetrator of the crime was convicted, then that conviction

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is often used interchangeably with “res judicata” or “claim preclusion” further complicates the issue. MARCUS ET AL., *supra* note 15, at 1114-15.

32. “Courts tend to use res judicata and collateral estoppel, while the Restatement and some academics use claim and issue preclusion, respectively.” Dreyer, *supra* note 22, at 617 n.31.

33. See generally *Ill. Farmers Ins. Co. v. Reed*, 647 N.W.2d 553, 560 (Minn. Ct. App. 2002).

34. *Id.*

35. See generally Beth Boggs & Dan McLaughlin, *Criminal Convictions Do Not Equal Intentional Acts: A Review of Illinois Law on the Collateral Effects of Criminal Convictions in Civil Proceedings*, 25 S. ILL. U. L.J. 281 (2001) (surveying various jurisdictions’ treatment of the use of collateral estoppel in civil proceedings based on prior criminal convictions).

36. See *Reed*, 647 N.W.2d at 560-63.

37. *Id.* at 562.

38. *Id.* at 560.

could not be used in a subsequent civil trial brought by the victim.<sup>39</sup> If it were used, the victim would essentially be testifying in the civil trial because his testimony contributed to the prior conviction, and the conviction would be used in the civil trial.<sup>40</sup> Though this evidentiary rule has not been in effect for some 150 years,<sup>41</sup> the rule against using criminal convictions for collateral estoppel purposes continued long thereafter.<sup>42</sup>

Historically, the courts have also objected to the use of criminal convictions for collateral estoppel purposes because of the mutuality requirement.<sup>43</sup> Early courts considering the doctrine of collateral estoppel insisted that the parties in the first suit be identical to those in the second suit.<sup>44</sup> This requirement was based on principles of fairness: it would be unfair to allow a party to use collateral estoppel against his opponent if he himself would not have been bound by the judgment had the judgment come out differently.<sup>45</sup> A criminal defendant cannot use the fact of his acquittal in a later civil action “because an acquittal is a finding that the fact was not proved beyond a reasonable doubt and the civil burden of proof requires only a fair preponderance of the evidence.”<sup>46</sup> Therefore, mutuality dictated that a criminal defendant that is convicted cannot be estopped in a subsequent civil trial. Thus, the mutuality requirement served to prevent criminal convictions from being granted collateral estoppel effect.<sup>47</sup>

The courts and the legal community frequently criticized the mutuality requirement.<sup>48</sup> On the strength of this criticism, the U.S. Supreme Court abandoned the requirement of mutuality in 1971.<sup>49</sup>

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39. *See id.* at 560-61.

40. *See id.*

41. This evidentiary rule was done away with by the Evidentiary Act of 1843. *Id.* at 560.

42. *Id.* at 560-61.

43. *Id.* at 561.

44. *See generally* E.H. Schopler, Annotation, *Comment Note – Mutuality of Estoppel as Prerequisite of Availability of Doctrine of Collateral Estoppel to a Stranger to the Judgment*, 31 A.L.R.3d 1044 (1970).

45. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 (1979).

46. *Reed*, 647 N.W.2d at 561.

47. *Id.*

48. *Parklane Hosiery*, 439 U.S. at 327; *see also* *Bernhard v. Bank of Am. Nat. Trust & Sav. Ass'n*, 122 P.2d 892, 895 (Cal. 1942) (“No satisfactory rationalization has been advanced for the requirement of mutuality. Just why a party who was not bound by a previous action should be precluded from asserting it as *res judicata* against a party who was bound by it is difficult to comprehend.”).

49. *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313 (1971).

The Minnesota Supreme Court abandoned the mutuality requirement, at least for a limited class of cases, as early as 1955.<sup>50</sup> Today, the mutuality requirement is effectively a dead letter.<sup>51</sup> Of course, though courts no longer require mutuality, due process mandates that the party to be bound by the prior judgment must have been a party (or in privity with a party) in the prior action.<sup>52</sup> Thus, at the time *Reed* was decided, the mutuality requirement had already been abandoned in Minnesota, as it had been in almost every other jurisdiction.<sup>53</sup>

A third objection to using criminal convictions for collateral estoppel purposes was the notion that a criminal verdict was nothing more than the opinion of the jurors, and was therefore hearsay.<sup>54</sup> This objection is invalid for two reasons.<sup>55</sup> First, whether or not evidence is hearsay is germane to its admissibility, rather than to its collateral estoppel effect.<sup>56</sup> Second, if this objection was heeded, no judgment could be given collateral estoppel effect because all judgments are simply the opinion of another court or jury.<sup>57</sup>

A final historical objection to giving criminal convictions collateral estoppel effect is simple obedience to stare decisis.<sup>58</sup> Some courts continued to deny criminal convictions collateral estoppel effect simply because precedent called for it.<sup>59</sup> This is likely the reason that this rule continued for so long after the

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50. *Gammel v. Ernst & Ernst*, 245 Minn. 249, 72 N.W.2d 364 (1955).

51. *B.R. DeWitt, Inc. v. Hall*, 225 N.E.2d 195, 198 (N.Y. 1967). *See generally* Schopler, *supra* note 44. With the abandonment of the mutuality requirement, most courts have accepted the use of both defensive and offensive non-mutual collateral estoppel. *Reed*, 647 N.W.2d at 563. Defensive collateral estoppel would apply, for example, if “A sues B for patent infringement. Following full litigation, the court adjudges the patent invalid. A then sues C for infringement of the same patent. C pleads collateral estoppel against A on the issue of the validity of the patent. C is using collateral estoppel defensively . . . .” PARK & MCFARLAND, *supra* note 20, at 222. Offensive collateral estoppel, on the other hand, might occur where A, B, and C all live on property abutting a lake. A sues X for dumping toxins in the lake; A is successful. Then B and C sue X for the same incident, and assert collateral estoppel to prevent X from re-litigating the dumping. *See id.* at 222-23.

52. *Parklane Hosiery*, 439 U.S. at 327.

53. *Reed*, 647 N.W.2d at 561, 565.

54. *Id.* at 563.

55. *See id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *See, e.g., Schindler v. Royal Ins. Co.*, 179 N.E. 711, 712 (N.Y. 1932).

original reasons for it were no longer viable. Of course, once a legal rule becomes anachronistic and unnecessary, stare decisis should not dictate the continued practice of that rule. Thus, by the time of the *Reed* decision, the historical reasons that criminal convictions could not be used for collateral estoppel had all ceased to be present in the law.<sup>60</sup>

*b. Additional Arguments in Favor of Giving Criminal Judgments Collateral Estoppel Effect*

The historical objections to using criminal convictions for collateral estoppel are no longer defensible.<sup>61</sup> In addition, a number of other factors have convinced many courts to abandon the traditional rule and liberalize collateral estoppel law to include criminal convictions.<sup>62</sup> These factors are generally of a procedural nature,<sup>63</sup> and chief among these is the higher burden of proof in criminal trials over that in civil trials.<sup>64</sup> Because criminal convictions require proof beyond a reasonable doubt rather than merely a fair preponderance of the evidence, courts can be more assured that estopping a civil litigant based on an issue in a criminal conviction is proper.<sup>65</sup> Other procedural safeguards that are unique to criminal trials include “the requirement[] of . . . a unanimous verdict, the right to counsel, and a record paid for by the state on appeal.”<sup>66</sup> Thus, “[s]tability of judgments and expeditious trials are served and no injustice done, when criminal defendants are estopped from relitigating issues determined in conformity with these safeguards.”<sup>67</sup> These procedural factors, the interest in promoting judicial economy, and the waning of the historical objections enumerated above all combine to convince many courts that using criminal convictions for collateral estoppel purposes is to be encouraged.<sup>68</sup>

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60. *Reed*, 647 N.W.2d at 560-63.

61. *See id.* at 560-63; *supra* notes 38-60 and accompanying text.

62. *See Teitelbaum Furs, Inc. v. Dominion Ins. Co.*, 375 P.2d 439, 441 (Cal. 1962) (stating that it is more fair to estop a civil litigant based on a prior criminal conviction than it is to estop him based on a prior civil judgment because of the increased safeguards present in criminal trials); *Reed*, 647 N.W.2d at 562.

63. *See Reed*, 647 N.W.2d at 562.

64. *See id.*

65. *Teitelbaum Furs*, 375 P.2d at 441.

66. *Id.*

67. *Id.*

68. *See, e.g., Teitelbaum Furs*, 375 P.2d at 441; *Reed*, 647 N.W.2d at 560-63.

On the strength of these factors, the traditional rule has been eroded to the degree that it is now the exception, rather than the rule.<sup>69</sup> The erosion of the traditional rule began in a landmark Virginia Supreme Court case in 1927.<sup>70</sup> This case, *Eagle, Star, & British Dominions Insurance Co. v. Heller*, held that a criminal conviction can be given collateral estoppel effect, but only when the convicted party later attempts to profit from his crime in a civil suit.<sup>71</sup> This exception to the traditional rule is now widely accepted, including in Minnesota.<sup>72</sup> Indeed, this exception paved the way for the practice of giving criminal convictions collateral estoppel effect even when the convicted criminal does not seek to profit from his crime, an approach now followed by a majority of jurisdictions<sup>73</sup> and by the Restatement.<sup>74</sup> Thus, before *Reed*, Minnesota recognized the “profit-from-the-crime” exception,<sup>75</sup> but had not recognized the general collateral estoppel effect of a criminal conviction.<sup>76</sup>

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69. *Reed*, 647 N.W.2d at 561.

70. *Eagle, Star, & British Dominions Ins. Co. v. Heller*, 140 S.E. 314 (Va. 1927).

71. *Id.* at 321. Max Heller was convicted of burning a stock of goods with the intent to injure the insurer of the goods. He then collected the proceeds of the insurance policy on the goods. The court went against the traditional rule and gave the criminal conviction collateral estoppel effect. *Id.*

72. *See Travelers Ins. Co. v. Thompson*, 281 Minn. 547, 163 N.W.2d 289 (1968). *See also* *Wehling v. Columbia Broad. Sys.*, 721 F.2d 506, 508-09 (5th Cir. 1983) (discussing Texas’ use of criminal convictions for collateral estoppel purposes); *United States v. Frank*, 494 F.2d 145, 160 (2d Cir. 1974) (discussing collateral estoppel in both criminal and civil contexts); *Breeland v. Sec. Ins. Co. of New Haven, Conn.*, 421 F.2d 918, 922 (5th Cir. 1969) (“[t]he number of jurisdictions holding that a criminal conviction precludes litigation of the same issue in a civil suit is ever increasing”); *May v. Oldfield*, 698 F. Supp. 124, 126 (E.D. Ky. 1988) (noting recent cases allowing this type of collateral estoppel use); *Aetna Cas. & Sur. Co. v. Niziolek*, 481 N.E.2d 1356, 1359 (Mass. 1985) (overturning the traditional rule in Massachusetts); *Hopps v. Utica Mut. Ins. Co.*, 506 A.2d 294, 297 (N.H. 1985) (“there is a stronger rationale for applying collateral estoppel against a former criminal defendant than for applying it against a party to a prior civil case, since the criminal defendant has had the benefit of the presumption of innocence and the State’s obligation to prove any fact essential to the conviction beyond a reasonable doubt”); *Seattle-First Nat’l Bank v. Cannon*, 615 P.2d 1316, 1319 (Wash. Ct. App. 1980) (noting the procedural safeguards present in criminal trials and adopting the exception).

73. *Reed*, 647 N.W.2d at 561.

74. RESTATEMENT (SECOND) OF JUDGMENTS § 85 (1982).

75. *See Thompson*, 281 Minn. 547, 558-59, 163 N.W.2d 289, 296.

76. *See Reed*, 647 N.W.2d at 568.

2. *The Collateral Estoppel Effect of Criminal Judgments: Reed's Privity Problem*

It is clear that the trend in collateral estoppel law is to give criminal convictions collateral estoppel effect on the same basis as any other judgment.<sup>77</sup> What is less clear, however, is how courts deal with the other problem in *Reed*: namely, whether or not a civil plaintiff that is the victim of a crime is in privity with the convicted perpetrator of that crime for collateral estoppel purposes. It is illustrative to consider some of the reasons courts have cited for either finding privity or not finding privity in such cases.

a. *Courts Finding Privity*

Not all courts have faced the privity question presented by *Reed*. It appears, however, that of those jurisdictions that have considered the issue, the majority have concluded that for insurance purposes, there is privity between a criminal defendant and the plaintiff that seeks to recover from the defendant in a subsequent civil trial.<sup>78</sup> Courts that so hold focus primarily on the fact that the civil plaintiff's right to the insurance proceeds derives from the same right of the insured criminal.<sup>79</sup> These courts also emphasize that if the state had a direct-action statute,<sup>80</sup> the

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77. *Id.* at 560; see also *supra* note 69 and accompanying text.

78. *State Farm Fire & Cas. Co. v. Fullerton*, 118 F.3d 374, 385 (5th Cir. 1997); see also *Aetna Cas. & Sur. Co. v. Jones*, 596 A.2d 414, 421, 425 (Conn. 1991) (holding that privity is established when "the victim of an insured defendant derives her rights to collect insurance proceeds directly from the rights of the insured defendant"); *Safeco Ins. Co. of Am. v. Yon*, 796 P.2d 1040, 1044 (Idaho Ct. App. 1990) ("[T]he wrongful-death claimants' rights are only as good as the rights that [the convicted insured] can assert against Safeco under the insurance contract"); *State Mut. Ins. Co. v. Bragg*, 589 A.2d 35, 38 (Me. 1991) (finding privity in such circumstances, at least for murder, attempted murder, and sexual abuse of a child convictions); *Aetna Life & Cas. Ins. Co. v. Johnson*, 673 P.2d 1277, 1280-81 (Mont. 1984) (finding that a criminal conviction has preclusive effects against a third party where the rights of the third party derived from those of the convict); *New Jersey Mfrs. Ins. Co. v. Brower*, 391 A.2d 923, 926 (N.J. Super. Ct. App. Div. 1978) (stating that because the victim "stood in the shoes" of the insured, there was privity); *In re Nassau Ins. Co.*, 577 N.E.2d 1039, 1040 (N.Y. 1991) (holding that a conviction for manslaughter collaterally estopped the executor of the victim from claiming insurance proceeds under the theory that the killer did not act intentionally); *State Farm Fire & Cas. Co. v. Reuter*, 700 P.2d 236, 241 (Or. 1985) (finding privity between a sexual assault victim and the perpetrator of the crime).

79. *Fullerton*, 118 F.3d at 384.

80. BLACK'S, *supra* note 1, at 491 (defining "direct-action statute" as "[a] statute that grants an injured party direct standing to sue an insurer instead of the insured tortfeasor").

assertion of privity between the civil plaintiff and the criminal defendant would fail.<sup>81</sup> This is because the rights of the victim to the insurance proceeds would then not derive from the same right of the insured criminal.<sup>82</sup>

*b. Courts Finding No Privity*

Though they are a minority, several courts refuse to find privity between the insured criminal and the civil plaintiff seeking insurance proceeds from the criminal.<sup>83</sup> These courts recognize that the right of the injured party to the insurance proceeds derives from the right of the insured to those proceeds.<sup>84</sup> Nevertheless, in the interest of fairness, these courts rule that the civil plaintiff should not be precluded from showing a lack of intent.<sup>85</sup>

Therefore, at the time *Reed* was decided, a majority of courts recognized that, in general, criminal convictions could have collateral estoppel effect.<sup>86</sup> In addition, a majority of courts that had considered the issue had ruled that an insured criminal defendant is in privity with a subsequent civil plaintiff that seeks to recover from the defendant's insurance policy.<sup>87</sup> Before *Reed*, Minnesota had never considered the latter issue,<sup>88</sup> and had not

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81. See *Fullerton*, 118 F.3d at 384.

82. See *id.*

83. Ill. Farmers Ins. Co. v. Reed, 662 N.W.2d 529 (Minn. 2003); Mass. Prop. Ins. Underwriting Ass'n v. Norrington, 481 N.E.2d 1364, 1367-68 (Mass. 1985) ("Allowing the application of [collateral estoppel] against the insured, but not against the injured person, does no violence to the substantive principle that an injured party succeeds only to the insured's rights against the insurer."); see also *Clemmer v. Hartford Ins. Co.*, 587 P.2d 1098, 1103 (Cal. 1978) (refusing to apply collateral estoppel to a wrongful death judgment); *Aid Ins. Co. (Mut.) v. Chrest*, 336 N.W.2d 437, 440-41 (Iowa 1983) (refusing to give a guilty plea in a criminal trial collateral estoppel effect despite the Iowa law that gives guilty pleas collateral estoppel effect against the criminal defendant); *Burd v. Sussex Mut. Ins. Co.*, 267 A.2d 7, 14-15 (N.J. 1970); *Prudential Property & Cas. Ins. Co. v. Kollar*, 578 A.2d 1238, 1241 (N.J. Super. Ct. App. Div. 1990) ("An innocent third-party victim . . . should not be estopped from effectively recovering against a defendant and his insurer when the defendant and his insurer when the defendant, for whatever reason, elects to enter a plea of guilty.").

84. See, e.g., *Norrington*, 481 N.E.2d at 1367.

85. *Id.* "At [the] criminal trial, [the criminal defendant] in no sense represented the interests of [the civil plaintiff] . . . . Furthermore, [the civil plaintiff] had no opportunity to participate in the criminal case." *Id.*

86. See *supra* Part II.B.1. and accompanying notes.

87. See *supra* Part II.B.2. and accompanying notes.

88. See Ill. Farmers Ins. Co. v. Reed, 647 N.W.2d 553, 566-68 (Minn. Ct. App. 2002).

considered the former in thirty years.<sup>89</sup>

### III. THE *REED* DECISION

#### A. *Facts and Procedural History*

On May 25, 1999, Jordan Peschong, a one-year-old child, suffered a severe, life-threatening brain injury.<sup>90</sup> At the time of his injury, Jordan was under the care of Janet Dawn Reed, who ran a daycare out of her home.<sup>91</sup> Reed claimed that Jordan was injured when he fell in her kitchen while attempting to walk, and hit his head on the hard kitchen floor.<sup>92</sup> Reed was charged with first-degree assault<sup>93</sup> and malicious punishment of a child.<sup>94</sup> The state accused Reed of causing Jordan's injuries by shaking him,<sup>95</sup> whereas Reed continued to maintain that Jordan was injured in a fall.<sup>96</sup> Reed argued in the alternative that if shaking did in fact cause Jordan's injuries, then she was nevertheless not guilty because she lacked intent to injure: she claimed that she shook Jordan in an attempt to revive him after his fall.<sup>97</sup> During Reed's criminal trial, the state presented testimony from seven experts showing that Jordan's injuries were consistent with shaken baby syndrome, rather than a fall.<sup>98</sup> The district court found that Reed did in fact

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89. See *Travelers Ins. Co. v. Thompson*, 281 Minn. 547, 163 N.W.2d 289 (1968).

90. *Ill. Farmers Ins. Co. v. Reed*, 662 N.W.2d 529, 530 (Minn. 2003).

91. *Id.*

92. *Reed*, 647 N.W.2d at 556.

93. *Reed*, 662 N.W.2d at 530. The assault charge was made pursuant to MINN. STAT. § 609.221(1) (2002). This statute provides that "[w]hoever assaults another and inflicts great bodily harm may be sentenced to imprisonment for not more than 20 years or to payment of a fine of not more than \$30,000, or both." *Id.*

94. *Reed*, 662 N.W.2d at 530. The malicious punishment charge was made pursuant to Minnesota Statutes section 609.377(6) (2002), which provides that "[a] parent, legal guardian, or caretaker who, by an intentional act or series of intentional acts with respect to a child, evidences unreasonable force or cruel discipline that is excessive under the circumstances is guilty of malicious punishment of a child . . ." *Id.* § 609.377(1). If this punishment results in great bodily harm, "the person may be sentenced to imprisonment for not more than ten years or to payment of a fine of not more than \$20,000, or both." *Id.* § 609.377(6).

95. *Reed*, 662 N.W.2d at 530.

96. *Reed*, 647 N.W.2d at 556.

97. *Id.*

98. *Id.* Shaken baby syndrome is brain damage caused by the shaking, slamming, or throwing of a baby against an object. WebMD Health, *Shaken Baby Syndrome: Topic Overview*, at [http://my.webmd.com/hw/raising\\_a\\_family/](http://my.webmd.com/hw/raising_a_family/)

shake Jordan, and that she did intend to injure him.<sup>99</sup> Thus, Reed was found guilty of both the assault and malicious punishment charges at her criminal trial.<sup>100</sup>

After the criminal trial, Jordan and his parents, Richard and Kimberly Peschong, filed a negligence suit in district court against Reed, seeking to recover for the injuries Jordan sustained at the hands of Reed.<sup>101</sup> Reed turned the defense of this action over to her insurer, Illinois Farmers Insurance Company (Illinois Farmers).<sup>102</sup> Illinois Farmers then initiated a declaratory judgment action in which Reed, the Peschongs, and Jordan's doctors were all defendants.<sup>103</sup>

The homeowner liability insurance policy at issue in the declaratory judgment action contained an intentional-acts exclusion clause.<sup>104</sup> This clause excluded coverage for any bodily injury that is (a) "caused intentionally by or at the direction of an insured," or (b) "results from any occurrence caused by an intentional act of any insured where the results are reasonably foreseeable."<sup>105</sup> In the policy, "occurrence" was defined as an accident that results in bodily injury.<sup>106</sup> Illinois Farmers, on the strength of this clause, argued that it had no obligation to defend or indemnify Reed for Jordan's injuries in the civil suit.<sup>107</sup> Illinois Farmers asserted that because the question of whether or not Reed acted intentionally was answered in the affirmative in her criminal trial, the intentional-act exclusion applied, and the Peschongs were collaterally estopped from showing that Jordan's injuries were

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hw169817.asp (last updated April 10, 2003). This type of violent movement causes the baby's brain to hit his skull, which tears blood vessels in the brain, causing hemorrhaging and swelling. *Id.* Young babies (one year and under) are more likely to be affected by the condition because of their large heads, weak necks, and developing brains. *Id.* Twenty to twenty-five percent of the time, shaking causes death; short of this, shaken babies can suffer life-long problems with seizures, spasticity, mental retardation, blindness, learning disabilities, and physical or emotional growth delays. *Id.*

99. *Reed*, 647 N.W.2d at 556.

100. *Reed*, 662 N.W.2d at 530. The decision was handed down by the district court following a bench trial. *Id.*

101. *Reed*, 647 N.W.2d at 556.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

caused by a negligent act.<sup>108</sup>

Illinois Farmers then moved for summary judgment in the declaratory action based on the intentional-act exclusion in Reed's policy.<sup>109</sup> The district court denied the summary judgment motion and certified a question to the appellate courts.<sup>110</sup> The question was: "[w]hen interpreting an intentional act exclusion of a common liability policy, does Minnesota law permit criminal convictions to be used for collateral estoppel purposes in a subsequent civil case in situations other than those . . . where the criminal defendant seeks to profit from [the] crime in a subsequent civil proceeding?"<sup>111</sup>

*B. The Minnesota Court of Appeals Decision*

The court of appeals considered several issues in answering the certified question.<sup>112</sup> First, the court decided that the certified question was properly before it pursuant to Minnesota Rule of Civil Appellate Procedure 103.03.<sup>113</sup> Secondly, the court analyzed the *Thompson* decision,<sup>114</sup> which established the precedent in Minnesota of allowing criminal convictions to estop issues in subsequent civil litigation where the criminal seeks to profit from the crime in the civil litigation.<sup>115</sup> After noting several major changes in the law of collateral estoppel since the time *Thompson* was decided, the court of appeals decided that the estoppel effects of criminal convictions are not limited to situations in which the criminal seeks to profit from the crime, but rather should be determined on the same basis

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108. *Id.*

109. *Id.*

110. Ill. Farmers Ins. Co. v. Reed, 662 N.W.2d 529, 531 (Minn. 2003).

111. *Id.* The district court found that all other requirements of collateral estoppel were met. *Id.* Therefore, the district court believed that if the certified question were answered in the affirmative, then Illinois Farmers would be entitled to summary judgment. *Id.*

112. *Reed*, 647 N.W.2d at 557-65.

113. *Id.* at 557. The court may hear an interlocutory appeal from a denial of summary judgment only if the question certified by the district court is "important and doubtful." Minn. R. Civ. App. P. 103.03(i) (2001). A question is "important" if it "will have a statewide impact," "it is likely to be reversed," "it will terminate lengthy proceedings," and "the harm inflicted on the parties by a wrong ruling . . . is substantial." *Jostens, Inc. v. Federated Mut. Ins. Co.*, 612 N.W.2d 878, 884 (Minn. 2000). A question is "doubtful" if there is no controlling precedent and there is ground for a difference of opinion. *Id.* at 884-85.

114. *Reed*, 647 N.W.2d at 558-59. The certified question from the district court made specific reference to *Thompson*. *Id.* at 557.

115. *Travelers Ins. Co. v. Thompson*, 281 Minn. 547, 163 N.W.2d 289 (1968).

as any other type of judgment.<sup>116</sup> Thus, the court answered the certified question in the affirmative.<sup>117</sup>

However, the Minnesota Court of Appeals did not end its analysis with answering the certified question.<sup>118</sup> After deciding that criminal convictions have the same collateral estoppel effect as any other judgment, the court went on to apply the normal collateral estoppel analysis to determine whether or not the Peschongs were precluded from re-litigating the issue of Reed's intent.<sup>119</sup> This analysis required that four criteria be met before the judgment was given collateral estoppel effect: (1) the issue to be estopped must have been identical to one in a prior judgment; (2) there must have been a final judgment on the merits; (3) the estopped party must have been a party to, or in privity with a party to, the prior adjudication; and (4) the estopped party must have been given a full and fair opportunity to be heard on the adjudicated issue.<sup>120</sup> After considering these requirements, the court of appeals ruled that each was met, and the Peschongs were precluded from re-litigating the issue of Reed's intent.<sup>121</sup> Having decided both that criminal convictions should be given collateral estoppel effect, and that all of the elements of collateral estoppel were met, the court of appeals reversed the denial of Illinois

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116. *Reed*, 647 N.W.2d at 560-65.

117. *Id.* at 565.

118. *Id.* The court noted that "[t]he general policies that might otherwise persuade us to limit our review to the certified question (to avoid piece-meal litigation, to conserve judicial resources, and to expedite trial proceedings) would not be served by remanding the matter to the district court . . . ." *Id.*

119. *Id.* at 565-68.

120. *Id.* at 566 (quoting *Aufderhar v. Data Dispatch, Inc.*, 452 N.W.2d 648, 650 (Minn. 1990)).

121. *Id.* at 565-68. The court of appeals first noted that the criminal conviction was, without doubt, a final judgment for collateral estoppel purposes. *Id.* at 566. The Peschongs challenged the other three elements. *Id.* First, the Peschongs argued that the issue to be estopped was not the identical issue litigated in the criminal trial, because in the criminal trial the state proved that Reed intentionally *shook* Jordan, not that Reed intentionally caused Jordan's injuries. *Id.* Both the district court and the court of appeals found this argument unconvincing. *Id.* at 566-67. The Peschongs also argued that they were neither a party to, nor in privity with a party to, the criminal trial, and as such could not be estopped by it. *Id.* at 567. The court of appeals ruled that because the Peschongs' right to the insurance proceeds derived from Reed's right to them, the Peschongs were in privity with Reed. *Id.* Finally, the Peschongs argued that they had not had a full and fair opportunity to be heard, and therefore could not be estopped. *Id.* Again, the court of appeals focused on Reed instead: because Reed had an opportunity to be heard, and the Peschongs were in privity with Reed, the Peschongs were estopped from re-litigating intent. *Id.* at 568.

Farmers' summary judgment motion and remanded for entry of judgment in favor of Illinois Farmers.<sup>122</sup>

C. *The Minnesota Supreme Court Decision*

On appeal, the Minnesota Supreme Court reversed the appellate court and held that Reed's criminal conviction did not collaterally estop the Peschongs from attempting to show that her act was negligent, rather than intentional.<sup>123</sup> In reaching this conclusion, the *Reed* court began its analysis where the court of appeals ended: by considering whether the four elements necessary for a judgment to be given collateral estoppel effect were met.<sup>124</sup> In this analysis, the court used persuasive Massachusetts precedent: *Massachusetts Property Insurance Underwriting Ass'n v. Norrington*.<sup>125</sup>

In its decision, the court emphasized the fact that the Peschongs had not been given a "full and fair opportunity to be heard."<sup>126</sup> Thus, the supreme court's reversal was based on the finding that two of the requirements for collateral estoppel were not met: the party to be estopped by the prior judgment (the Peschong family) was not given a full and fair opportunity to be heard, and therefore, by implication,<sup>127</sup> the Peschong family was neither a party to the criminal trial<sup>128</sup> nor in privity with a party to that trial.<sup>129</sup> The *Reed* court did recognize that "the right of the injured party to have recourse to the indemnity promised by the insurer rises no higher than the right of the insured."<sup>130</sup> Thus, the Peschongs' right to proceeds of the Illinois Farmers policy derived from Reed's right to those proceeds.<sup>131</sup> Nevertheless, the *Reed* court

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122. *Id.* at 568.

123. *Ill. Farmers Ins. Co. v. Reed*, 662 N.W.2d 529, 534 (Minn. 2003). The court also noted that certified questions are subject to de novo review. *Id.* at 531.

124. *Id.* at 531-32.

125. 481 N.E.2d 1364 (Mass. 1985).

126. *Reed*, 662 N.W.2d at 534 (quoting *Ellis v. Minneapolis Comm'n on Civil Rights*, 319 N.W.2d 702, 704 (Minn. 1982)).

127. The "party or privity" requirement and the "full and fair opportunity to be heard" requirement are closely analogous, and are likely to succeed or fail en masse. Indeed, the Massachusetts court in *Norrington* combined the two into one element, and enumerated only three elements. *See* *Mass. Prop. Ins. Underwriting Ass'n v. Norrington*, 481 N.E.2d 1364, 1366 (Mass. 1985).

128. *See Reed*, 662 N.W.2d at 533. The parties to the criminal trial were the State of Minnesota and Reed. *Id.*

129. *See id.*

130. *Id.* (quoting *Norrington*, 481 N.E.2d at 1367).

131. The Minnesota Court of Appeals reached the same conclusion as to this point. *See Ill. Farmers Ins. Co. v. Reed*, 647 N.W.2d 553, 567 (Minn. Ct. App.

held that this did not constitute privity between the Peschongs and Reed.<sup>132</sup> It was on this basis that the *Reed* court reversed the court of appeals and remanded the matter to the district court for further proceedings.<sup>133</sup>

The supreme court did not, however, answer the certified question: whether a criminal conviction can *generally* be used for collateral estoppel purposes.<sup>134</sup> Thus, there are two important factors to the *Reed* decision: the analysis of what constitutes privity<sup>135</sup> and the failure to address the court of appeals' holding that criminal trials may be used for collateral estoppel purposes.<sup>136</sup>

#### IV. ANALYSIS OF THE *REED* DECISION

The *Reed* decision is important to the development of Minnesota collateral estoppel law both in its correct interpretation of how privity should be defined as well as its lack of clarity on the issue of the general collateral estoppel effect of a criminal conviction.

##### A. *The Privity Issue*

The Minnesota Supreme Court correctly ruled on the privity issue in *Reed*, finding that the Peschongs were not in privity with Janet Reed, despite the fact that the Peschongs' right to the insurance proceeds derived from Reed's right to those proceeds.<sup>137</sup> This result appears to place Minnesota among the minority of courts that have considered the issue.<sup>138</sup> The *Reed* court followed

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2002).

132. *Reed*, 662 N.W.2d at 533. It is this conclusion that constitutes the chief disagreement between the Minnesota Supreme Court's opinion and that of the Minnesota Court of Appeals. *See Reed*, 647 N.W.2d at 567-68.

133. *Reed*, 662 N.W.2d at 533-34.

134. *See id.*

135. *Id.* at 533-34.

136. *Id.* *See Reed*, 647 N.W.2d at 561 (stating that it is now commonly accepted in many jurisdictions that dispositions of criminal cases may be used for collateral estoppel purposes in subsequent civil litigation).

137. *Reed*, 662 N.W.2d at 530.

138. *State Farm Fire & Cas. Co. v. Fullerton*, 118 F.3d 374, 386 (5th Cir. 1997) (stating that decisions finding no privity in situations like those in *Reed* are both less numerous and less recent than those finding privity). *Fullerton* went one step further in the liberal application of collateral estoppel: it found that a *guilty plea* in a criminal case could be given preclusive effect because it was sufficient to meet the "actually litigated" requirement of collateral estoppel. *Id.* This approach may be gaining adherents. *See id.* at 378-81. Nonetheless, this approach calls into

persuasive Massachusetts precedent in deciding the privity issue.<sup>139</sup> The Massachusetts court, in dealing with facts similar to those in *Reed*, correctly focused on the fact that the party to be estopped had no opportunity to participate in the criminal case.<sup>140</sup> In addition to the Massachusetts case, persuasive precedent provided by the Restatement also informed the *Reed* decision on the privity issue.<sup>141</sup>

1. *Policy Concerns Supporting the Reed Decision*

“The term ‘privity’ is one of those conclusory words that provides little insight into the underlying policies.”<sup>142</sup> Therefore, an analysis of whether privity exists in cases such as *Reed* requires more than a simple survey of persuasive precedent; it is necessary to consider the underlying policy ramifications as well. Of primary importance are due process concerns. Though *Reed*, at her criminal trial, and the *Peschongs*, at their civil trial, were both interested in showing a lack of intent by *Reed*, “it create[ed] no privity between two parties that, as litigants in two different suits, they happen[ed] to be interested in proving or disproving the same facts.”<sup>143</sup> Thus, unless the *Peschongs*’ interests were actually litigated at the criminal trial, to deny them the right to litigate *Reed*’s intent at the civil trial would be a violation of due process.<sup>144</sup>

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question both the “actually litigated” requirement of collateral estoppel as well as the “party or in privity” requirement.

139. *Mass. Prop. Ins. Underwriting Ass’n v. Norrington*, 481 N.E.2d 1364 (Mass. 1985) (finding no privity between a convicted murderer and the next of kin of the murder victim).

140. *Id.* at 1366-68.

141. *Id.* at 1367.

D inflicts a blow on X as a result of which X dies. D is convicted of intentional homicide. P, administrator of X’s estate, brings an action against D for wrongful death, alleging D’s act was negligent. I had previously issued a policy of liability insurance to D, insuring liability for D’s negligent acts but excluding intentional acts. In P’s action against D, P is not precluded by the criminal conviction from showing that D’s act was negligent rather than intentional.

RESTATEMENT (SECOND) OF JUDGMENTS § 85 cmt. F, illus. 10 (1982) (emphasis added). The Restatement also defines privity in several other ways: as it relates to wrongful death statutes; between family members with separate causes of action derived from one injury; and between members of a partnership based on a single injury. *Id.* §§ 46, 48, 60. None of these examples of privity apply to the instant situation.

142. *MARCUS ET AL.*, *supra* note 15, at 1174.

143. *Norrington*, 481 N.E.2d at 1367 (quoting *Sturbridge v. Franklin*, 35 N.E. 669 (Mass. 1893)).

144. “It is a violation of due process for a judgment to be binding on a litigant

Another policy concern worthy of note is the fact that no undue burden will be placed on the insurer by not allowing it to use collateral estoppel because it has not previously had to litigate the issue of the insured's intent.<sup>145</sup> Therefore, Illinois Farmers is not prejudiced in any way by having to litigate Reed's intent at the civil trial.

Finally, several fairness issues would be raised by not allowing the Peschongs to litigate the issue of Reed's intent. For example, though both Janet Reed and the Peschongs were interested in showing Reed's lack of intent, it is quite possible that Reed would have expended more effort attempting to prove that she did not shake Jordan to begin with than in attempting to prove that she did so unintentionally.<sup>146</sup> Thus, it is possible that Reed's intent was not litigated fully. Another fairness concern is the possibility that Reed may have been represented by less able counsel than the Peschongs.<sup>147</sup> If this were the case, it would be unfair to saddle the Peschongs with the results of Reed's less-than-adequate counsel. In addition, the Peschongs did not have the opportunity either to cross-examine Reed or to present their own evidence and experts.<sup>148</sup> Finally, the Fifth Amendment right of a criminal defendant to not testify, as contrasted against the negative inference that can be drawn from the refusal of a defendant to testify in a civil case, may have a large effect on the result.<sup>149</sup> These issues all dictate the conclusion that the *Reed* court was correct in its definition of privity.

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who . . . has never had an opportunity to be heard." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979) (citing *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971); *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)).

145. See *Norrington*, 481 N.E.2d at 1368. The state had to litigate the issue of intent at the criminal trial; the insurance company did not. *Id.*

146. An illustration from the field of tort law may be helpful in clarifying this point. The elements of battery are (a) acting with the intent to cause a harmful or offensive contact with another, and (b) a harmful or offensive contact occurs. RESTATEMENT (SECOND) OF TORTS § 13 (1965). Both elements are necessary in order for there to have been a battery. *Id.* Therefore, both elements would be said to have been "fully litigated" at a criminal trial. However, it is probable that the defendant would focus more energy on disproving one element or the other. Therefore, it seems unfair to hold a third party to the result of the prior litigation when perhaps a more vigorous litigation of the intent issue would have yielded a contrary result.

147. See *Travelers Ins. Co. v. Thompson*, 281 Minn. 547, 552, 163 N.W.2d 289, 292 (1968).

148. *Ill. Farmers Ins. Co. v. Reed*, 662 N.W.2d 529, 533 (Minn. 2003).

149. *Id.*

## 2. *Policy Concerns Arguing Against the Reed Decision*

Weighed against the factors enumerated above<sup>150</sup> are policies concerned with reducing the needless expenditure of resources.<sup>151</sup> While it is true that more of the judicial system's resources will be expended by not applying collateral estoppel in cases like *Reed*, the due process considerations must take precedent over judicial economy concerns.

Another policy issue that argues against the *Reed* decision is the possibility that if the Peschongs are successful in proving that Reed acted negligently, that result would be inconsistent with the criminal trial and would reflect poorly on the judicial system.<sup>152</sup> This concern should not be overstated, however. As noted above, it is quite possible that Reed did not focus on proving her lack of intent during her criminal trial, but rather on proving that she did not shake Jordan.<sup>153</sup> Therefore, a negligence finding in the civil trial would not be altogether inconsistent with the result of the criminal trial.

Because there are only a few minor policy concerns arguing against its decision, the *Reed* court was correct in protecting the Peschongs' right to due process by finding that they were not in privity with Reed.

### B. *The General Collateral Estoppel Effect of Criminal Convictions*

The second important aspect of *Reed*, and the one which the court failed to discuss, is its treatment of the general issue of whether a criminal conviction can operate as an estoppel to subsequent civil litigation. In reversing the court of appeals based on the lack of privity, the Minnesota Supreme Court left the collateral estoppel effect of a criminal conviction murky.<sup>154</sup>

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150. See *supra* Part IV.A.1.

151. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979). "Collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Id.*

152. See *Travelers Ins. Co.*, 281 Minn. at 555, 163 N.W.2d at 294 ("[T]o permit a retrial of the facts and issues already determined in the criminal proceeding would be an imposition on the courts and only tend to embarrass or bring into disrepute the judicial process.").

153. See *supra* note 149 and accompanying text.

154. See generally *supra* text accompanying notes 33-76 (discussing the traditional approach to, and historical development of, the collateral estoppel

Without a clear directive on this issue, practitioners are left in the dark as to whether a criminal conviction will be given full collateral estoppel effect (where the other requirements of collateral estoppel are met) or whether the effect is limited to the “profit-from-the-crime” exception.<sup>155</sup> Thus, the *Reed* court should have taken a position on this issue, even though it was not necessary to the decision. To do so would not have been inappropriate, as the certified question from the district court asked exactly this question.<sup>156</sup>

Had the Minnesota Supreme Court made a ruling on the general collateral estoppel effect of a criminal conviction, that ruling would not have been necessary to the result, and would therefore have been dictum.<sup>157</sup> However, it is important to note the difference between “obiter dictum” and “judicial dictum.”<sup>158</sup> The latter is “an expression of opinion on a question directly involved and argued by counsel though not entirely necessary to the decision.”<sup>159</sup> Such an expression is “entitled to much greater weight than mere obiter dictum and should not be lightly disregarded.”<sup>160</sup> The question of whether criminal convictions can be used for collateral estoppel purposes was certainly argued by counsel, and the court of appeals considered this question very carefully.<sup>161</sup> Therefore, if the *Reed* court had expressed an opinion on the issue, that opinion would have been judicial dictum, and collateral estoppel law in Minnesota would be clearer than it is now.<sup>162</sup>

The Minnesota Supreme Court did not make an expression of its opinion on the matter, however, so we are left with the court of

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effect of criminal judgments in civil cases).

155. See *Travelers Ins. Co.*, 281 Minn. at 552, 163 N.W.2d at 292 (recognizing the “profit-from-the-crime” exception as one instance in which a criminal conviction is given collateral estoppel effect).

156. Ill. Farmers Ins. Co. v. Reed, 662 N.W.2d 529, 531 (Minn. 2003).

157. More properly called “obiter dictum,” dictum is defined as “[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive).” BLACK’S, *supra* note 1, at 1102.

158. See 43 DUNNELL MINN. DIGEST *Stare Decisis* § 1.03 (4th ed. 1999).

159. *Id.*

160. *Id.*

161. Ill. Farmers Ins. Co. v. Reed, 647 N.W.2d 553, 560-64 (Minn. Ct. App. 2002).

162. See 43 DUNNELL MINN. DIGEST *Stare Decisis* § 1.03 (4th ed. 1999); see also *State v. Rainer*, 258 Minn. 168, 177, 103 N.W.2d 389, 396 (1960) (stating that judicial dictum is the “expression of the court . . . and as such is entitled to much greater weight than mere obiter dictum and should not be lightly disregarded”).

appeals' opinion. For this reason, it is important to consider the value of this opinion after being reversed by the supreme court. Though its reversal certainly relegates the court of appeals' opinion to the status of dubious precedent, it probably does retain some degree of precedential value.<sup>163</sup> Indeed, because the supreme court reversed the court of appeals on the privity issue rather than on the issue of the general collateral estoppel effect of criminal convictions, the appellate opinion on this point may be the law in Minnesota. Of course, this will not be certain until a Minnesota court again rules on the issue.

## V. CONCLUSION

In *Reed*, the Minnesota Supreme Court ruled that there is no privity between an insured criminal and a litigant who sues the criminal in a civil suit.<sup>164</sup> This decision allows the civil plaintiff to re-litigate the criminal's intent, or lack of intent, and thereby seek to collect from the criminal's liability insurer despite an intentional act exemption clause.<sup>165</sup> Though this places Minnesota among the minority of jurisdictions that have considered the issue,<sup>166</sup> it is the correct decision. The *Reed* court correctly places the right to due process above judicial economy concerns.

The court is not as successful, however, in its treatment of the question of whether a criminal conviction will generally be given collateral estoppel effect. In short, the court gives this issue no treatment at all, despite the fact that it was discussed at length in the court of appeals opinion that the court reversed. Though taking a stance on this issue would have been dicta,<sup>167</sup> it nonetheless would have been dicta that cleared up what is currently a murky area in Minnesota procedural law.

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163. See *Wells Fargo & Co. v. Comm'r of Revenue*, No. 7429R, 2002 WL 1077735, at \*6 (Minn. Tax Ct. May 15, 2002) (citing *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) for the proposition that "an issue neither raised in briefs or argument nor discussed in the opinion is not binding precedent on that legal point"). Because the supreme court did not discuss the general issue of whether collateral estoppel effect should be given to criminal convictions, it can at least be said that its opinion is not binding on that point, and therefore did not reverse that portion of the court of appeals' decision.

164. *Reed*, 662 N.W.2d at 531.

165. *Id.*

166. See *State Farm Fire & Cas. Co. v. Fullerton*, 118 F.3d 374, 386 (5th Cir. 1997) (stating that decisions finding no privity in situations like those in *Reed* are both less numerous and less recent than those finding privity).

167. See *Reed*, 662 N.W.2d 529.

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The Minnesota Supreme Court has inaugurated a successful rule of law for a very specific class of cases: those in which a convicted criminal with an insurance policy containing an intentional-acts exclusion clause is subsequently sued for harm resulting from his or her crime.<sup>168</sup> However, the court has failed to rule on the broader issue of whether a criminal conviction can generally serve to collaterally estop subsequent civil litigation.<sup>169</sup> Thus, in *Reed*, the Minnesota Supreme Court has lost sight of the forest for the trees.

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168. *See id.*

169. *See id.*