NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LOCKHEED LITIGATION CASES.

B262820

(Judicial Council Coordination Proceeding JCCP No. 2967)

APPEAL from a judgment of the Superior Court of Los Angeles County, John A. Torribio, Judge. Affirmed.

Law Offices of Martin N. Buchanan and Martin N. Buchanan; Girardi | Keese and Robert W. Finnerty for Plaintiffs and Appellants.

Horvitz & Levy, David M. Axelrad, Shane H. McKenzie; Steptoe & Johnson and Jason Levin for Defendants and Respondents.

INTRODUCTION

Between 1986 and 1994, more than 600 current and former employees of Lockheed Corporation filed dozens of lawsuits, alleging personal injuries caused by occupational exposure to chemicals at Lockheed's facilities. The Judicial Council coordinated the lawsuits into the *Lockheed Litigation Cases*, JCCP No. 2967 (*Lockheed Litigation*), and the trial court sought to manage the coordinated proceeding by separating the plaintiffs into groups for trial. Over the past two decades, the *Lockheed Litigation* has produced five trials, one retrial, and nine decisions by the Court of Appeal. The remaining plaintiffs are a group of 363 plaintiffs whose claims have yet to be finally adjudicated.

The remaining plaintiffs appeal from a summary judgment entered in favor of defendants Exxon Mobil Corporation and Union Oil Company of California doing business as Unocal.[1] Plaintiffs contend the trial court improperly applied collateral estoppel to preclude them from offering expert evidence demonstrating defendants' chemicals were capable of causing their alleged injuries. Specifically, plaintiffs challenge the court's determination that they were in privity with other plaintiffs in the coordinated litigation, whose claims were dismissed for lack of adequate scientific foundation supporting their expert's causation opinion.

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[1] Exxon and Unocal supplied certain of the allegedly harmful chemicals. All other defendants have settled out of the *Lockheed Litigation*.

We conclude the application of collateral estoppel complied with due process because all plaintiffs had notice that the trial court's causation rulings would be binding in future proceedings and the remaining plaintiffs were adequately represented by the plaintiffs whose claims were adjudicated to a final judgment. We affirm.

FACTS AND PROCEDURAL BACKGROUND

1. *The March 1992 Case Management Order*

In March 1992, after the Judicial Council coordinated the *Lockheed Litigation*, the trial court entered a case management order creating the Group 1 "pilot" group, consisting of 15 plaintiffs' claims. The order contemplated that resolution of the Group 1 claims would be binding on all parties to the coordinated litigation through the application of collateral estoppel. The order provided: "All defendants and non-pilot case plaintiffs shall be bound (collaterally estopped) in the non-pilot cases by factual determinations common to all claims which were actually and fully litigated by the parties in the pilot case trial and which findings were necessary to the final judgment entered following such trial."

The jury in the Group 1 pilot trial returned verdicts in favor of four plaintiffs and against certain defendants on the plaintiffs' inadequate warning claims. Division 5 of this Appellate District affirmed the judgment. (*Orozco v. Lockheed Corporation* (Aug. 27, 1996, B088512) [nonpub. opn.].)

Four more trials followed and resulted in plaintiffs' verdicts. (See *Comas v. Ashland Chemical Company* (Dec. 18, 1998, B109569) [nonpub. opn.] [Group 2]; *Patterson v. E.I. Dupont de Nemours & Company, Inc.* (Feb. 25, 1999, B113317) [nonpub. opn.] [Group 3] (*Patterson*); *Arnold v. Ashland Chemical*

Company (Feb. 18, 2000, B121434) [nonpub. opn.] [Group 4] (*Arnold*); *Aguilar v. Ashland Chemical Company* (Jun. 6, 2000, B128469) [nonpub. opn.] [Group 5] (*Aguilar*).) Division 5 affirmed the Group 2 and Group 3 judgments and reversed the Group 4 and Group 5 judgments.

The application of collateral estoppel was an issue in prior appeals. In *Patterson*, Division 5 concluded the 1992 case management order authorized the trial court to give binding effect to factual findings in the pilot trial, but did not control the binding effect of findings in nonpilot trials. (*Patterson, supra,* B113317, at [p. 62].) As for nonpilot trials, the *Patterson* court held, "[t]he application of a finding in a nonpilot trial to a subsequent trial turns on whether the parties have raised the issue in the subsequent trial and whether common law collateral estoppel principles apply." (*Id.* at [p. 65].) In *Arnold* and *Aguilar*, Division 5 adopted this construction in considering the binding effect of factual findings made in nonpilot cases under common law collateral estoppel principles. (*Arnold, supra,* B121434, at [pp. 15-21]; *Aguilar, supra,* B128469, at [pp. 10-15].)

2. *The December 2000 Case Management Order*

In December 2000, the trial court entered a new case management order in an express effort to achieve a "fair, speedy and just resolution of the remaining lawsuits." The order found that the delay in resolving the coordinated litigation had "passed 'scandalous proportions' into the realm of the surreal," observing that in the 14th year of litigation there remained "80% of the plaintiffs left to be tried and all discovery as to these plaintiffs left to be done."[2] (Boldface and underscoring omitted.)

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[2] Division 5 had criticized the slow pace of the litigation in the *Arnold* decision, observing that "[a]t the present rate, it will

To achieve its intended purpose, the December 2000 case management order established pretrial procedures that would apply to "ALL REMAINING CASES YET TO BE SET FOR TRIAL." Among other things, these provisions dictated that "any objection made by one party on a side shall be deemed an objection by all parties on that side" and "any pleading, motion, opposition, etc. filed by one party on a side shall be deemed to have been joined by all parties on that side." The provisions also addressed anticipated Evidence Code section 402 hearings[3] on the issue of "general causation."[4]

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take another 30 years for the Los Angeles Superior Court to conclude its constitutional duties to try these cases, something that should have been completed by now." (*Arnold, supra*, B12134, at [p. 28].)

[3] Statutory references are to the Evidence Code unless otherwise designated. Section 402 prescribes the procedures that must be observed by the court when making a preliminary factual determination upon which the admissibility of evidence depends. (See also § 310, subd. (a).) The statute provides: "When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided in this article"; and "The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury." (§ 402, subds. (a) & (b).)

[4] "General causation," as the parties and the trial court used the term, refers to a particular chemical's capacity to cause the type of adverse health effects allegedly suffered by the plaintiffs. The parties and court distinguished this from the concept of "specific causation," which refers to whether a particular chemical was a substantial factor in causing a specific plaintiff's alleged injury.

The case management order provided for "Evidence Code [section] 402 hearings on the issues of general causation regarding: (1) All wrongful death cases[; and] [¶] (2) All new chemicals which have not YET been adjudicated." As the "Basis" for holding these hearings, the order observed that "[t]he plaintiffs were unable to establish general causation with scientifically acceptable epidemiological studies regarding prostate cancer in the last trial." Shifting its focus to the wrongful death claims asserted by the Group 6B plaintiffs, the order added, "[t]he court wants established that there is admissible scientific data to support the wrongful death claims made by the heirs in the present group."

The case management order provided that, in conducting the section 402 hearings, the court "will not weigh the evidence, the court will only determine whether the proffered testimony meets California law for admission into evidence." The order instructed the parties to brief the standard of admissibility under California law for an expert opinion regarding general causation. The order stated "a full and complete discussion with briefing and argument should be conducted to ensure fairness to both sides," and directed "[e]ach side . . . to brief the issue as broadly as each side deems necessary," with "no limit on the length of briefs." Following the briefing, the parties were to submit expert declarations, together with the studies the experts relied upon, for the purpose of determining whether the proffered experts' claims "satisfy the standard of admissibility under California law."

The case management order stated that "[t]he orders and procedures set forth [herein] will NOT bar any party from bringing any and all applicable motions for Evidence Code section

402 hearings in the future before each trial. All parties will be permitted to move for [section] 402 hearings as they deem necessary."

3. *The Group 6B Section 402 Ruling, Summary Judgment, and Appeal*

The trial court consolidated all wrongful death claims as Group 6B, and held a section 402 hearing on the issue of general causation.[5] Plaintiffs identified a single expert, Dr. Daniel Teitelbaum, and one study as the basis for his opinion. Dr. Teitelbaum opined that the chemicals at issue were capable of causing cancer and had increased the Group 6B plaintiffs' risk of cancer by at least 20 to 40 percent.

The trial court excluded Dr. Teitelbaum's testimony, concluding the multiple-solvent study that he relied upon was inadequate to support his opinion. Defendants then moved for summary judgment on the ground that plaintiffs could not establish causation. The court granted the motion, and entered judgment against the Group 6B plaintiffs. This court affirmed the judgment, concluding the trial court properly excluded Dr. Teitelbaum's testimony because the multiple-solvent study, which involved more than 130 substances and thousands of chemical compounds, was insufficient to support his general causation testimony regarding defendants' chemicals. (*Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 564-565.)

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[5] The Group 6B plaintiffs died from various forms of cancer, to which defendants' products allegedly contributed.

4. *The Group 4/5 Section 402 Ruling, Summary Judgment, and Appeal*

In April 2002, the trial court issued a new case management order for the Group 4 and Group 5 retrials, following the reversals in *Arnold* and *Aguilar*. The order consolidated the plaintiffs into Group 4/5, and adopted and restated the terms of the December 2000 case management order regarding pretrial proceedings. The April 2002 case management order required the parties to submit "expert declarations regarding general causation [as to] each at-issue chemical and/or product and each at-issue disease and/or illness" and to lodge with the court "[a]ll medical and scientific literature upon which that expert relies in formulating his or her opinions." The order set a status conference to schedule future section 402 hearings.[6]

The plaintiffs submitted a new declaration by Dr. Teitelbaum, together with several multiple-solvent epidemiological studies, animal studies, case reports, toxics registry summaries, and other similar materials. Dr. Teitelbaum opined that exposure to defendants' chemicals caused or significantly contributed to the Group 4/5 plaintiffs' alleged injuries.

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[6] In January 2002, defendants filed a request for a section 402 hearing regarding the Group 4/5 plaintiffs' general causation expert evidence. New general causation evidence was necessary because the Group 4/5 plaintiffs alleged different injuries than the Group 6B plaintiffs. The trial court granted the requests prior to issuing the April 2002 case management order.

On August 8, 2002, the trial court issued a tentative ruling to exclude Dr. Teitelbaum's general causation testimony for lack of adequate foundation. In its notice to the parties, the court observed that its tentative ruling was "in effect a termination order for many plaintiffs equivalent to a non suit" and therefore plaintiffs would "be given every opportunity to supply evidence" to address the court's concerns regarding the scientific foundation for Dr. Teitelbaum's opinion. In addition to posing specific questions concerning the studies, the tentative ruling gave plaintiffs the opportunity to "make an offer of proof of additional evidence on general causation" to address those questions. Plaintiffs declined to supplement their expert evidence.

On September 12, 2002, the trial court issued its final ruling excluding Dr. Teitelbaum's general causation testimony. The court concluded "[t]he opinions expressed by the plaintiffs' expert are based on legally insufficient scientific data" and ordered Dr. Teitelbaum "barred from expressing any opinions" regarding the chemicals at issue in the Group 4/5 retrials "and insofar as they may arise in future trials."

On October 18, 2002, plaintiffs' counsel acknowledged that the Group 4/5 plaintiffs were unable to proceed with their claims in view of the ruling excluding Dr. Teitelbaum's testimony. Defendants made an oral motion to dismiss the Group 4/5 claims, which the trial court granted. In November 2002, the court entered an order and judgment of dismissal for all Group 4/5 plaintiffs.

The Group 4/5 plaintiffs appealed. This court affirmed the judgment, concluding the multiple-solvent studies did not provide adequate foundation for Dr. Teitelbaum's causation opinions. This court also found the rulings with respect to the animal studies, case reports, toxics registry summaries and other materials reflected a reasonable exercise of discretion. The Supreme Court granted review, but dismissed it two years later. (See *Lockheed Litigation Cases* (2005) 126 Cal.App.4th 271, review granted Apr. 13, 2005, review dism., Nov. 1, 2007.)

5. *The Collateral Estoppel Ruling and April 2013 Case Management Order*

In early 2009, after the Group 4/5 judgment became final, the parties briefed whether the general causation findings in the Group 6B and Group 4/5 proceedings had collateral estoppel effect on the remaining plaintiffs' claims. Defendants argued "general causation involved 'abstract', 'global' issues of equal interest to all of the Lockheed plaintiffs whose claims had not yet been adjudicated," the "Group 6B and Group 4/5 plaintiffs had exactly the same interest as the remaining plaintiffs in prevailing on the general causation issues," and, thus, there was "no question concerning the adequacy of plaintiffs' representation in the Group 6B and Group 4/5 proceedings." Additionally, defendants stressed that the court had provided procedural safeguards to ensure "plaintiffs were given every opportunity to submit all of their evidence on the general causation issues that were common to all of the remaining Lockheed Litigation plaintiffs." Under these circumstances, defendants maintained application of collateral estoppel satisfied the requirements of due process.

The remaining plaintiffs argued application of collateral estoppel violated due process because they were not before the court when the Group 6B and Group 4/5 plaintiffs' claims were adjudicated. They maintained they were not adequately represented by the Group 6B or Group 4/5 plaintiffs because the case was "not a class-action lawsuit and the former Lockheed plaintiffs were not acting as representatives of any other interest but their own personal interest in litigating the merits of their individual claims."

On August 26, 2009, the trial court ruled its prior general causation orders would be binding upon the remaining plaintiffs. The court found that its prior "ruling on the general causation issue was intended to be global and apply to all future Plaintiffs' claims," and the "purpose of the Section 402 ruling [on general causation] was to reach a consistent result that could be followed in future Lockheed trials." With respect to privity, the court found that "[t]he remaining Lockheed Plaintiffs previously received notice the court would hold Evidence Code Section 402 hearings on the issue of general causation," and "[t]he remaining Plaintiffs were aware the rulings in these hearings would be applied to all Lockheed Plaintiffs." In that regard, the court stressed that the same counsel represented all plaintiffs in the prior and current proceedings. Thus, the court found the remaining plaintiffs "should have expected to be bound by the court's decision on the general causation issues" and they were "adequately represented at the Section 402 hearings."

In April 2013, the trial court issued a new case management order to implement its collateral estoppel ruling. The order applied to "all plaintiffs in [the *Lockheed Litigation*] whose cases have not been reduced to judgment." It directed all remaining plaintiffs to identify the adverse health effects allegedly caused by the at-issue chemicals, and ordered the parties to exchange expert witness discovery and declarations concerning general causation. The order specified that "[i]f the general causation issue was previously addressed by this Court's earlier general causation orders, the expert declarations may only address scientific developments, if any, since January 2001."

6. *The Order Excluding the Remaining Plaintiffs' General Causation Experts and Summary Judgment*

The remaining plaintiffs submitted a list of adverse health effects and designated Dr. James R. Merikangas and Dr. Max Costa as their general causation experts. The list and designated experts' deposition testimony confirmed the remaining plaintiffs' claims involved the same chemicals and the same adverse health effects as were alleged by the Group 4/5 plaintiffs.[7]

In April 2014, defendants moved to exclude the experts' general causation testimony. The motion argued the at-issue adverse health effects were addressed in the court's prior general causation ruling, and neither Dr. Costa nor Dr. Merikangas purported to rely on science that was unavailable to Dr. Teitelbaum at the time the court excluded Dr. Teitelbaum's

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[7] Because the remaining plaintiffs acknowledge their claims involve the same chemicals and same adverse health effects as those alleged by the Group 4/5 plaintiffs, our collateral estoppel analysis will focus on whether there was privity between these two groups.

general causation opinion. Plaintiffs opposed the motion by arguing there was "no need to conduct any type of preliminary determination regarding the foundation of [their experts'] opinions," because the experts used "generally accepted scientific methods as opposed to new or novel methodologies." Plaintiffs did not attempt to demonstrate that their new experts relied upon scientific literature that was qualitatively different from the literature Dr. Teitelbaum relied upon.

On September 8, 2014, the trial court granted defendants' motion to exclude the experts' general causation testimony. The court explained, "[t]he plaintiffs' papers do not disclose what new and different scientific studies were relied on by the plaintiffs' new experts. Without this information, the court is only able to presume new scientific information has not been developed since the law of the case ruling and order made herein."[8]

Defendants moved for summary judgment against the remaining plaintiffs, arguing plaintiffs could not offer admissible evidence to establish general causation. The trial court granted the motion and, on January 16, 2015, entered judgment against the remaining plaintiffs. Plaintiffs filed a timely notice of appeal.

DISCUSSION

1. *Collateral Estoppel and Standard of Review*

We begin with the legal principles that govern the preclusive effect of final judgments under the collateral estoppel

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8 The trial court sometimes used the term "law of the case" to describe the preclusive effect of its rulings. In context it is clear that the court used the term in a loose and colloquial manner and not in the true sense of the appellate law of the case doctrine.

doctrine.[9] " 'Collateral estoppel is one of two aspects of the doctrine of res judicata. In its narrowest form, res judicata " 'precludes parties or their privies from relitigating a *cause of action* [finally resolved in a prior proceeding].' " [Citation.] But res judicata also includes a broader principle, commonly termed

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[9] Defendants maintain it is unnecessary to decide whether the trial court properly invoked collateral estoppel because, they argue, the exclusionary order was appropriate under the court's discretionary authority to manage coordinated proceedings. (See Cal. Rules of Court, rule 3.541(b); *Abelson v. National Union Fire Ins. Co.* (1994) 28 Cal.App.4th 776, 786.) Notwithstanding the court's express reliance on collateral estoppel, defendants argue "[t]he trial court simply found that the remaining plaintiffs had given the trial court no basis to reconsider its prior ruling," and the court's decision not to revisit that ruling was an acceptable exercise of discretion.

It is true, as our colleagues in Division 5 observed, that the coordination judge has discretion to give preclusive effect to prior determinations through a properly entered case management order. (See *Patterson, supra*, B113317, at [p. 62] [1992 case management order authorized the trial court to give binding effect to factual findings in the pilot trial].) However, in that circumstance, as when common law collateral estoppel is applied, the demands of due process must be met, including the requirement that absent parties receive reasonable notice that they will be bound by a ruling or factual determination. (See, e.g, *ibid.*; see also *Nein v. HostPro, Inc.* (2009) 174 Cal.App.4th 833, 845-846 (*Nein*).) Because the trial court expressly relied upon collateral estoppel, and resolution of this appeal ultimately depends on whether due process was satisfied (regardless of which procedural mechanism we consider), we confine our analysis to the common law principles governing collateral estoppel.

collateral estoppel, under which an *issue* " 'necessarily decided in [prior] litigation [may be] conclusively determined *as* [*against*] *the parties* [*thereto*] *or their privies* . . . in a subsequent lawsuit on a *different* cause of action.' " [Citation.] [¶] Thus, res judicata does not merely bar relitigation of identical claims or causes of action. Instead, in its collateral estoppel aspect, the doctrine may also preclude a party to prior litigation from redisputing *issues* therein decided against him, even when those issues bear on different claims raised in a later case.' " (*Smith v. ExxonMobil Oil Corp.* (2007) 153 Cal.App.4th 1407, 1413-1414 (*Smith*).) "Like res judicata, collateral estoppel '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.* at p. 1414.)

"Collateral estoppel applies when (1) the party against whom the plea is raised was a party or was in privity with a party to the prior adjudication, (2) there was a final judgment on the merits in the prior action and (3) the issue necessarily decided in the prior adjudication is identical to the one that is sought to be relitigated." (*Roos v. Red* (2005) 130 Cal.App.4th 870, 879.) The remaining plaintiffs do not dispute that the Group 6B and Group 4/5 proceedings resulted in a final judgment, nor do they challenge the trial court's conclusion that the identical general causation issue was necessarily decided in the prior adjudication.[10] Their appeal exclusively concerns the element of privity.

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[10] As discussed, the trial court's collateral estoppel ruling was expressly limited to those evidentiary issues decided with respect to Dr. Teitelbaum's general causation opinions in the Group 6B and Group 4/5 proceedings. Thus, the court's subsequent April

" ' "The concept of privity . . . refers 'to a mutual or successive relationship to the same rights of property, or to such an *identification in interest* of one person with another as to represent the same legal rights.' " ' " (*Roberson v. City of Rialto* (2014) 226 Cal.App.4th 1499, 1511 (*Roberson*).) " ' "In the final analysis, the determination of privity depends upon the fairness of binding [a party to the present proceeding] with the result obtained in earlier proceedings in which it did not participate. . . . ' "Whether someone is in privity with the actual parties requires close examination of the circumstances of each case." ' " ' " (*Ibid.*)

The privity element " " " ' "is a requirement of due process of law." ' " ' " (*Roberson, supra,* 226 Cal.App.4th at p. 1511.) " ' " 'In the context of collateral estoppel, due process requires that the party to be estopped must have had an identity or

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2013 case management order provided that the remaining plaintiffs were permitted to offer new scientific evidence that postdated the court's most recent general causation ruling. This included new scientific evidence reinterpreting data assessed in earlier studies that were rejected by the court's prior rulings. In their reply brief, plaintiffs summarize some of the purported "new materials" that they submitted in support of Dr. Costa's and Dr. Merikangas's general causation opinions. However, plaintiffs do not argue the court erred in determining that these materials failed to disclose "new scientific information." Rather, they focus on the purported prejudicial impact of the trial court's collateral estoppel ruling, and argue, "[i]f the trial court had considered the *totality* of the original foundational materials cited by Dr. Teitelbaum *along with* the additional materials cited by Dr. Costa and Dr. Merikangas, there is at least a reasonable probability of a different result." Because our resolution of this appeal is not dependent upon a finding of harmless error, we need not address these additional materials further.

community of interest with, and adequate representation by, the losing party in the first action as well as that the circumstances must have been such that the party to be estopped should reasonably have expected to be bound by the prior adjudication.' " [Citations.] " 'The "reasonable expectation" requirement is satisfied if the party to be estopped had a proprietary interest in and control of the prior action, or if the unsuccessful party in the first action might fairly be treated as acting in a representative capacity for the party to be estopped.' " ' " (*Nein, supra,* 174 Cal.App.4th at pp. 845-846; accord *Roberson,* at p. 1511.)

We review the trial court's application of collateral estoppel de novo. (*Smith, supra,* 153 Cal.App.4th at p. 1415.) In particular, the privity element is reviewed "de novo, . . . because the issue, which ultimately involves the requisites and limits of due process, is a legal one." (*Victa v. Merle Norman Cosmetics, Inc.* (1993) 19 Cal.App.4th 454, 464; *Mooney v. Caspari* (2006) 138 Cal.App.4th 704, 719 (*Mooney*).)

2. *The Trial Court Properly Applied Collateral Estoppel in Ruling on the Adequacy of Expert Evidence Regarding General Causation*

The remaining plaintiffs contend the trial court's collateral estoppel ruling violated their right to due process. They argue the privity aspect of the ruling was "legally and factually erroneous" because (1) it rested on "a theory of 'virtual representation' " that was disapproved by the United States Supreme Court in *Taylor v. Sturgell* (2008) 553 U.S. 880 (*Taylor*) and (2) it was not supported by any fact that would give the remaining plaintiffs reason to believe they would be bound by the evidentiary rulings in the Group 4/5 proceeding.

We begin with the *Taylor* decision.[11] *Taylor* involved successive actions by two different plaintiffs to compel disclosure of technical documents relating to a vintage airplane under the Freedom of Information Act. (*Taylor, supra,* 553 U.S. at pp. 885-886.) The plaintiffs were " 'close associate[s]' " and members of the same antique aircraft organization. (*Id.* at p. 889.) After the first plaintiff's action proved unsuccessful, the second plaintiff retained the same attorney and, with some assistance from the first plaintiff, filed a successive action seeking the same documents. (*Ibid.*) The Court of Appeals for the D.C. Circuit concluded these facts sufficed to establish "virtual representation" for purposes of precluding the second action under the res judicata doctrine. (*Id.* at pp. 890-891.)

The United States Supreme Court reversed. (*Taylor, supra,* 553 U.S. at pp. 885, 907.) In doing so, the high court "disapprove[d] the theory of virtual representation," and reaffirmed that, to comport with due process, the preclusive effect of a judgment should be "determined according to the established grounds for nonparty preclusion." (*Id.* at p. 904.) Those established grounds included circumstances in which "a nonparty may be bound by a judgment because she was 'adequately

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11 Though *Taylor* purports to address only the "preclusive effect of a federal-court judgment [as] determined by federal common law," the *Taylor* court's central holding concerned the "due process limitations" to which both the federal and California common law must adhere. (*Taylor, supra,* 553 U.S. at p. 891.) Inasmuch as the United States Supreme Court is the final word on the minimum requirements of due process, we conclude *Taylor* applies to the California common law of collateral estoppel as well. (See *Arias v. Superior Court* (2009) 46 Cal.4th 969, 986-987 [suggesting *Taylor* applies to state law claims and judgments].)

represented by someone with the same interests who [wa]s a party' to the suit." (*Id.* at p. 894.)[12] The court explained that "[a] party's representation of a nonparty is 'adequate' for preclusion purposes only if, at a minimum: (1) The interests of the nonparty and her representative are aligned [citation]; and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty [citation]." (*Id.* at p. 900.) Additionally, the court observed, "adequate representation sometimes requires (3) notice of the original suit to the persons alleged to have been represented." (*Ibid.*) Inasmuch as the D.C. Circuit's "expansive doctrine of virtual representation" did not recognize these

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12 The Supreme Court observed that some Circuits used "the label, but define[d] 'virtual representation' so that it [was] no broader than the recognized exception for adequate representation." (*Taylor, supra,* 553 U.S. at p. 896 [citing cases].). However, the court noted that other Circuits, including the D.C. Circuit, applied "multifactor tests for virtual representation that permit[ted] nonparty preclusion in cases that [did] not fit within any of the established exceptions." (*Ibid.*) The *Taylor* court rejected these multifactor tests for three reasons: (1) an "amorphous balancing test is at odds with the constrained approach to nonparty preclusion" that the high court's prior decisions established; (2) absent the procedural protections for adequate representation delineated in the court's prior opinions and the federal class action statute, an "expansive doctrine of virtual representation" could allow courts to " 'create *de facto* class actions at will' "; and (3) "a diffuse balancing approach to nonparty preclusion would likely create more headaches than it relieves" by "significantly complicat[ing] the task of district courts faced in the first instance with preclusion questions." (*Id.* at pp. 898-901.)

limitations, the Supreme Court held it failed to comport with due process. (*Id.* at p. 901.)

In challenging the trial court's ruling, the remaining plaintiffs emphasize that the "court cited California case law holding that a party in a prior action may be treated as the ' "virtual representative" ' of the party in the current action." Additionally, plaintiffs highlight the court's statement that "privity could be established if the relationship was ' "sufficiently close so as to justify the application of collateral estoppel." ' " Plaintiffs argue these statements are incompatible with the United States Supreme Court's decision in *Taylor*. The contention leans too heavily on what the trial court said, as opposed to the record upon which the trial court ruled. Because our review is de novo, the trial court's statements have less salience for our purposes than the factual record presented by the remaining plaintiffs to demonstrate error.[13] (See, e.g., *Philip*

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[13] Notably, the *Taylor* court observed that its opinion was "unlikely to occasion any great shift in actual practice," because many opinions used "the term 'virtual representation' in reaching results at least arguably defensible on established grounds." (*Taylor, supra,* 553 U.S. at p. 904.) In these cases, the court remarked, "dropping the 'virtual representation' label would lead to clearer analysis with little, if any, change in outcomes." (*Ibid.*) Consistent with this observation, prior to *Taylor*, California courts had analyzed privity according to criteria similar to those identified by the high court. (See, e.g., *Mooney, supra,* 138 Cal.App.4th at p. 720 [privity is established " ' "if the unsuccessful party in the first action might fairly be treated as acting in a representative capacity for the party to be stopped" ' "].) Since *Taylor*, California courts have continued to analyze privity for collateral estoppel purposes according to these

Chang & Sons Associates v. La Casa Novato (1986) 177 Cal.App.3d 159, 173 ["If the exclusion is proper upon any theory of law applicable to the instant case, the exclusion must be sustained regardless of the particular considerations which may have motivated the trial court to its decision"].)

We must determine whether the record demonstrates the remaining plaintiffs were adequately represented in the prior proceedings, in a manner consistent with due process. That is, whether the record shows "(1) [t]he interests of the [remaining plaintiffs] and [the Group 4/5 plaintiffs] [were] aligned;" and "(2) either the [Group 4/5 plaintiffs] understood [themselves] to be acting in a representative capacity or the original court took care to protect the interests of the [remaining plaintiffs]." (*Taylor, supra,* 553 U.S. at p. 900.)[14] We conclude these requirements were met.

a. *The remaining plaintiffs' and the Group 4/5 plaintiffs' interests were aligned*

The remaining plaintiffs do not dispute that their interests were aligned with those of the Group 4/5 plaintiffs, and there is

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criteria. (See, e.g., *Roberson, supra,* 226 Cal.App.4th at pp. 1511-1513.)

[14] There is no question that the third criteria—"notice of the original suit to the persons alleged to have been represented"—was met by this coordinated proceeding. (*Taylor, supra,* 553 U.S. at p. 900.)

ample support in the record for this conclusion.[15] First, the remaining plaintiffs acknowledged their claims concerned the same chemicals and same adverse health effects as were alleged by the Group 4/5 plaintiffs. Second, the section 402 hearing in the Group 4/5 proceeding addressed the abstract issue of general causation—that is, whether the chemicals were capable of causing the alleged injuries. That analysis, as Dr. Teitelbaum acknowledged, did not depend upon a particular plaintiff's job duties, length of exposure, severity of harm or any other fact or circumstance unique to the Group 4/5 plaintiffs. Finally, the remaining plaintiffs have never questioned the Group 4/5 plaintiffs' commitment or motivation to secure admission of the

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15 The remaining plaintiffs do stress that they "had no proprietary or financial interest" in the Group 4/5 case and that they did not "exercise[ ] any control over" the Group 4/5 proceedings. By plaintiffs' account, this brings the current case within the analysis of *Rodgers*, where the court ruled that the absent plaintiff's representation by the same counsel who represented the parties to the prior judgment was "not a factor that justifies imposition of collateral estoppel to preclude litigation of an issue by appellant as a non-party to the prior actions, at least without evidence that through his attorney he participated in or controlled the adjudication of the issue sought to be relitigated." (*Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal.App.4th 82, 93.) However, *Rodgers* recognized that in the absence of control, the adequacy of representation requirement would be met " ' "if the unsuccessful party in the first action might fairly be treated as acting in a representative capacity for the party to be estopped." ' " (*Id.* at p. 92.) We analyze whether the Group 4/5 plaintiffs had reason to know they were acting in a representative capacity in the next section.

proffered expert testimony, nor do they challenge the adequacy of the legal representation the Group 4/5 plaintiffs received.

In short, the record amply supports the conclusion that the remaining plaintiffs' and Group 4/5 plaintiffs' interests were aligned. (*Citizens for Open Access etc. Tide, Inc. v. Seadrift Assn* (1998) 60 Cal.App.4th 1053, 1072 [finding adequate representation where the rights of the party to be collaterally estopped were "zealously pursued" by a party in privity who seemed "to have been equally motivated to reach a successful conclusion of the litigation"]; accord *Mooney, supra,* 138 Cal.App.4th at p. 721.)

b. *The Group 4/5 Plaintiffs Had Reason to Understand They Were Acting in a Representative Capacity*

The record also demonstrates that the Group 4/5 plaintiffs had adequate notice and reason to understand they were acting in a representative capacity for all other plaintiffs whose claims had yet to be tried. In December 2000, the trial court entered a case management order finding that the delay in resolving the coordinated litigation had "passed 'scandalous proportions' into the realm of the surreal." (Boldface and underscoring omitted.) To remedy this delay, the order established pretrial procedures that applied to "**ALL REMAINING CASES YET TO BE SET FOR TRIAL**." Critically, those procedures included explicit terms for holding section 402 hearings to settle the admissibility of expert evidence regarding "All new chemicals which have not YET been adjudicated." The order stated "a full and complete discussion with briefing and argument should be conducted to ensure fairness to both sides," and instructed "[e]ach side . . . to brief the issue as broadly as each side deems necessary." And,

reinforcing the notion that the members of each side acted on behalf of all other members, the order stated that "any pleading, motion, opposition, etc. filed by one party on a side shall be deemed to have been joined by all parties on that side."

In view of the long history of the case, the court's "scandalous" delay finding, and the order's stated purpose to "ensure that there is a fair, speedy and just resolution of the remaining lawsuits," we conclude the December 2000 case management order gave the Group 4/5 plaintiffs adequate reason to understand, consistent with due process, that they would be acting in a representative capacity for all remaining plaintiffs with respect to the section 402 hearings. (See *Taylor, supra,* 553 U.S. at p. 900.) This is particularly true in the context of a coordinated judicial proceeding, in which the trial court had the express power to determine "preliminary legal questions that might serve to expedite the disposition of the coordinated actions." (Cal. Rules of Court, rule 3.541(a)(4).)

The remaining plaintiffs advance several arguments why the December 2000 case management order was insufficient to meet the minimum requirements of due process. First, they observe the "Group 4/5 plaintiffs were never appointed to represent them" and, citing *Taylor*, argue that "[w]ithout the procedural protections of a properly certified class action, it would violate due process to treat this as a '*de facto* class action.' " (See *Taylor, supra,* 553 U.S. at pp. 900-901.) This argument misapprehends the *Taylor* court's discussion of adequate representation. The *Taylor* court explained that, "[i]n the class-action context, [due process] limitations are implemented by the procedural safeguards contained in Federal Rule of Civil Procedure 23," but absent those safeguards,

adequate representation is also established where "(1) [t]he interests of the nonparty and her representative are aligned [citation]; and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty." (*Id.* at pp. 900-901.) Delineating these limitations would have been unnecessary if the *Taylor* court meant that appointment as a class representative was required in all instances to establish adequate representation for collateral estoppel purposes.

Second, the remaining plaintiffs stress that, unlike the March 1992 case management order, the December 2000 case management order did not explicitly state that determinations in the section 402 hearings would be given collateral estoppel effect. Thus, they contend the Group 4/5 plaintiffs had no reason to understand they would be acting in a representative capacity. We disagree. Though Division 5 held the March 1992 case management order authorized the trial court to give binding effect to only those findings made in the Group 1 pilot trial, the court also explicitly stated that "[t]he application of a finding in a *nonpilot trial* to a subsequent trial turns on whether the parties have raised the issue in the subsequent trial and whether common law collateral estoppel principles apply." (*Patterson, supra,* B113317, at [p. 65], italics added.) The court adhered to that construction in two subsequent appeals involving the Group 4 and Group 5 plaintiffs. (*Arnold, supra,* B121434, at [pp. 15-21]; *Aguilar, supra,* B128469, at [pp. 10-15].) In view of this history, the remaining plaintiffs cannot tenably argue the Group 4/5 plaintiffs had no reason to know they would be acting in a representative capacity simply because "collateral estoppel" was

not explicitly mentioned in the December 2000 case management order.

Third, the remaining plaintiffs argue the case management order did not put the Group 4/5 plaintiffs on notice of their representative role because it "explicitly stated it would *not* be a bar to later 402 hearings." In this regard, plaintiffs emphasize language in the order stating "[t]he orders and procedures set forth [herein] will NOT bar any party from bringing any and all applicable motions for Evidence Code section 402 hearings in the future before each trial." By our reading, this language merely assures the parties of their right to challenge the admissibility of future general causation evidence as necessary; it does not suggest that section 402 rulings under the case management order would not have binding effect on subsequent proceedings. This interpretation is consistent with the trial court's ruling that collateral estoppel would not preclude plaintiffs from submitting new science and expert evidence concerning general causation, which defendants were permitted to challenge at a section 402 hearing.

Lastly, plaintiffs highlight statements made by the trial court at hearings preceding its section 402 ruling that they contend demonstrate equivocation and ambiguity about whether collateral estoppel would apply. Our review of the hearing transcripts reveals that both sides have at times quoted the trial court out of context in ways that overstate their opposing positions. And in a case with such an extraordinary history, it is not hard to find supporting remarks somewhere in the voluminous transcripts. Nevertheless, the clear tenor of the court's statements, and the obvious objective of the court's discussions, was to establish a procedure that would, in the

court's words, address the adequacy of expert testimony concerning causation on a "global" basis. We conclude the December 2000 case management order established that procedure and gave the Group 4/5 plaintiffs sufficient reason to understand, consistent with due process, that they were acting in a representative capacity. (See *Taylor, supra,* 553 U.S. at p. 900; *Nein, supra,* 174 Cal.App.4th at pp. 845-846.)

c. *The trial court implemented adequate procedures to protect the remaining plaintiffs' interests*

Adequate representation for collateral estoppel purposes is also established where the trial court adopts procedures to protect absent parties' interests. (*Taylor, supra,* 553 U.S. at p. 900.) While endeavoring to bring about a "fair, speedy and just resolution of the remaining lawsuits" through its December 2000 case management order, the trial court was cognizant of the impact its section 402 rulings would have on the absent remaining plaintiffs. Thus, in setting out the terms for section 402 proceedings, the order stated "a full and complete discussion with briefing and argument should be conducted to ensure fairness to both sides," and authorized "[e]ach side . . . to brief the issue as broadly as each side deems necessary," with "no limit on the length of briefs." These provisions were reasonably calculated to ensure plaintiffs had a fair opportunity to present all evidence and every argument they could muster to establish a foundation for their expert's general causation opinion.

Further, prior to entering its final order excluding Dr. Teitelbaum's testimony, the court notified the parties of its tentative ruling. Critically, the court emphasized that the ruling was "in effect a termination order for many plaintiffs equivalent

to a non suit" and therefore plaintiffs would "be given every opportunity to supply evidence" to address the court's concerns regarding the foundation for Dr. Teitelbaum's opinion. In addition to posing specific questions concerning the studies, the court granted plaintiffs the opportunity to "make an offer of proof of additional evidence on general causation" to address those questions. We conclude these procedures were adequate to protect the interests of the remaining plaintiffs who were not before the court in the Group 4/5 proceedings.[16] (See *Taylor, supra,* 553 U.S. at p. 900.)

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[16] The remaining plaintiffs rely heavily on *In re TMI Litigation* (3d Cir. 1999) 193 F.3d 613, a decision in which the Third Circuit Court of Appeals commented that the application of a summary judgment ruling to a group of uninvolved plaintiffs in a multidistrict consolidated action would "improperly extend the doctrine of collateral estoppel/issue preclusion." (*Id.* at p. 726.) The decision is inapposite. *In re TMI* does not address whether the uninvolved plaintiffs received notice that the subject ruling could be given preclusive effect or whether the district court adopted procedures to protect those plaintiffs' interests. Its discussion of collateral estoppel is also very limited. The decision contains no analysis of due process, adequacy of representation, or other essential factors, and it focuses primarily on the circuit court's disagreement with a threshold for radiation exposure utilized by the district court. (*Id.* at pp. 726-727.)

DISPOSITION

The judgment is affirmed. Exxon Mobil Corporation and Union Oil Company of California are entitled to their costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JOHNSON (MICHAEL), J.*

We concur:

EDMON, P. J.

LAVIN, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.