No. 83-6428

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BARTOLOMEO AGUILAR and ROSA AGUILAR, husband and wife, suing pursuant to C.C.P. § 376, and suing individually,

Plaintiffs-Appellants,

vs.

COUNTY OF LOS ANGELES, etc., *et al.*,

Defendant-Appellee.

Appeal From the United States District Court
Central District of California.
Hon. Terry J. Hatter, Jr., Judge.

BRIEF OF APPELLEE COUNTY OF LOS ANGELES.

GOLMAN AND VON BOLSCHWING,
BONNE, JONES, BRIDGES, MUELLER & O'KEEFE,
GREINES, MARTIN, STEIN & RICHLAND,
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Certification Required by Ninth Circuit Court of Appeals Rule 13(b)(3).

The undersigned, counsel of record for Appellee, certifies that he knows of no additional parties other than those listed by Appellants, who have an interest in the outcome of this case. These representations are made to enable judges of this Court to evaluate possible disqualifications or recusal.

GOLMAN AND VON BOLSCHWING,
BONNE, JONES, BRIDGES, MUELLER & O'KEEFE,
GREINES, MARTIN, STEIN & RICHLAND,
By MARTIN STEIN,

Attorneys for Defendant and Appellee County of Los Angeles.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Page

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BRIEF OF APPELLEE COUNTY OF LOS ANGELES.

QUESTION PRESENTED.

In a medical malpractice action brought by the parents of a minor child to recover for medical expenses and lost services resulting from alleged prenatal injuries suffered by the child, the following issue is presented:

Whether the District Court correctly exercised its discretion in ordering the parents' action dismissed, pursuant to Rule 19, Federal Rules of Civil Procedure, upon determining that the child was an indispensable party whose joinder would defeat federal diversity jurisdiction?

INTRODUCTION.

By their Complaint filed in the District Court, Plaintiffs Bardomiano and Rosa Aguilar sought damages for alleged medical malpractice from Defendants County of Los Angeles and its employees. Plaintiffs invoked the District Court's jurisdiction *solely* on the basis of alleged diversity of citizenship claimed to exist between themselves and Defendants. However, there was no true basis for diversity jurisdiction in this case because Plaintiffs failed to include an indispensable party, Jaime Aguilar, as a plaintiff in this action. It is on the basis of this fatal omission that the District Court correctly dismissed the action.

Plaintiffs have appealed. But their appeal is utterly without merit. It fails to discuss any of the essential criteria governing the District Court's finding of indispensability under Rule 19, and fails to cite even a single applicable authority which would support a reversal.

As we explain in detail below, dismissal was entirely correct for several reasons, including the following:

1. At all material times, the issues before the District Court were fully capable of being litigated in state court. In fact, there is now pending and, at the time Defendant's motion in the instant case was heard, there was pending a state court action entitled *Jaime Aguilar v. Los Angeles County, etc., et al.*, Los Angeles Superior Court Case No. C 462798. That case involves factual and legal issues identical to those in the instant action: Both actions are based on the injuries allegedly suffered by Jaime Aguilar; one of the named Plaintiffs is the same in both proceedings;[1] and the County of Los Angeles and its employees are the Defendants in both matters.

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[1]Rosa Aguilar is suing in an individual capacity in this federal action and in a representative capacity in the state proceedings.

2. Had the instant action proceeded without joinder of Jaime Aguilar, Defendants would unfairly have been exposed to the prospect of unnecessary multiple litigation and to the risk of inconsistent adjudications. If Plaintiffs had prevailed in the federal action, the judgment might have been given collateral estoppel effect against Defendants in the state court action brought on behalf of the minor, yet the converse, while very probable, is not necessarily true, *i.e.*, if Defendants prevailed in this action, the minor might not be bound by the judgment and conceivably could prevail in the state court litigation of the same issues, thereby unfairly exposing Defendants to the potential of inconsistent adjudication.

3. Absent the minor, comprehensive relief could not be afforded the present parties in the federal action, since all potential damage claims could not be resolved in whole in this litigation. To decide the rights and liabilities of the parties herein without simultaneously litigating the rights of the minor whose alleged injuries served as the very predicate to the maintenance of *both* the federal and the state actions would serve no rational purpose and would be unfair, unnecessarily involving two court systems when one is perfectly adequate and improperly subjecting the parties to the wasteful expense of multiple litigation.

4. Aside from plain common sense, equity and good conscience unquestionably require that Plaintiffs present their claim in state court, rather than attempt to manipulate jurisdiction by omitting an indispensable party-plaintiff for the sole purpose of fabricating jurisdiction in a federal forum. At no time have Plaintiffs explained, or even purported to explain, the rationale, if any, supportive of their puzzling decision to bring this straightforward personal injury action in two different forums.

In sum, when the facts of this case are considered in light of the governing law, the conclusion is inescapable that the District Court properly ordered dismissal.

STATEMENT OF THE CASE.

A. Jurisdictional Summary.

1. *Jurisdiction of the District Court:* The District Court's subject matter jurisdiction was based on diversity of citizenship. (28 U.S.C. § 1332(a)(2).) Plaintiffs alleged in their Complaint that they were citizens of Mexico and El Salvador and that Defendants were citizens of the State of California. (C.R. 1, 5, pp. 1:24-2:2.) The amount in controversy was alleged to be in excess of $10,000, exclusive of interest and costs. (C.R. 1, p. 1:26-27.)

2. *Jurisdiction of United States Court of Appeals:* This Court's jurisdiction is based on 28 U.S.C. § 1291.

3. *The District Court Judgment is Properly Appealable:* The judgment of the District Court is appealable because it finally disposes of all claims involving all parties in this case. (C.R. 12.)

4. *Timeliness of Appeal:* The judgment of the District Court was entered on November 15, 1983. (C.R. 12.) Within thirty days thereafter, on November 23, 1983, Plaintiffs timely filed their notice of appeal (C.R. 13), pursuant to Rule 4, subdivision (a)(1), Federal Rules of Appellate Procedure.

B. Statement of Relevant Facts.

1. The Federal Action.

On August 2, 1983, Rosa and Bardomiano Aguilar instituted a medical malpractice action against the County of Los Angeles and various of its employees. (C.R. 1.) As permitted by California Code of Civil Procedure section 376, Plaintiffs sought recovery of pre-majority special damages (medical expenses and lost services) for

the injuries suffered by their minor child, Jaime Aguilar, who was not named as a plaintiff in the Complaint. (C.R. 1, p. 5:1-5.)[2] Plaintiffs alleged that Defendants were negligent in rendering medical care to their child and, as a proximate cause thereof, he sustained injuries. (C.R. 1, pp. 4:19-5:5.)

2. The State Action.

On August 3, 1983, Jaime Aguilar, through his guardian ad litem, Rosa Aguilar, instituted his own suit in the Los Angeles Superior Court to recover damages for his injuries.[3] Except for the type of damages sought, the minor's Complaint essentially tracks the Complaint filed in the United States District Court.

3. Defendant's Motion to Dismiss the Complaint and the District Court Ruling.

Defendant moved to dismiss the Complaint pursuant to Rules 12(b)(6) and (b)(7), Federal Rules of Civil Procedure.[4] The motion was based on a number of grounds, including, *inter alia,* that Plaintiffs had failed to join an indispensable party (Jaime Aguilar), whose joinder would defeat the District Court's diversity jurisdiction. (C.R. 5, p. 3.)

On October 24, 1983, the District Court granted the motion to dismiss and ordered the action dismissed. (C.R.

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[2]California Code of Civil Procedure § 376 provides in pertinent part that the parents of an injured minor child may recover "such damages . . . as under all of the circumstances of the case may be just." This statute has been construed to permit an action by the parents to recover for certain forms of detriment occasioned by the minor's injury, such as medical expenses, earning capacity loss and lost services. The parents' action is alternative to recovery by the minor, who may also sue to recover damages for all the forms of detriment resulting from his injury. (See *Faitz v. Ruegg* (1981) 114 Cal.App.3d 967, 971-972, and cases cited therein.)

[3]The minor seeks recovery of general damages and special post-majority special damages for medical expenses and lost earnings. (C.R. 4.)

[4]Alternatively, Defendant also moved to strike portions of the Complaint. (C.R. 3.)

12.) On November 15, 1983, in conformity with this Court's decision in *Bakia v. County of Los Angeles* (9th Cir. 1982) 687 F.2d 299, 301, the District Court issued its statement of reasons in support of and order of dismissal. (C.R. 12.) The District Court's ruling was premised in substantial part on the then recent decision of Judge Edward Rafeedie of that Court in *Lopez, et al. v. Martin Luther King, Jr. Hospital, et al.* (C.D. Cal. 1983) 97 F.R.D. 24.[5] Incorporating the reasoning of the Court in *Lopez, supra,* the District Court ruled as follows:

> "As in *Lopez,* the Court orders the actions and the complaint herein dismissed on the grounds that Plaintiffs have failed to join an indispensable party, namely, the minor Jaime Aguilar, whose joinder would defeat diversity jurisdiction of this Court, pursuant to Rule 19, Federal Rules of Civil Procedure. The Court finds that the minor claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may, as a practical matter, impair or impede his ability to protect that interest under the California law of collateral estoppel (Rule 19, subdivision (a)(1)) and Defendant would be subject to a substantial risk of incurring inconsistent obligations by reason of his claimed interest, should the action continue without his joinder. (Rule 19, subdivision (a)(ii).)
>
> "The Court further finds, pursuant to the equity and good conscience test of Rule 19, subdivision (b), Federal Rules of Civil Procedure, that the actions and Complaint should be dismissed for each of the reasons expressed by the Court in *Lopez, supra,* 97 F.R.D. at pp. 32-33, i.e., Plaintiffs have available to

[5]The *Lopez* decision is wholly ignored by Appellants in their brief to this Court.

them an alternative and adequate forum to pursue their suit, namely, in the pending state action brought by their minor child; if this action were not ordered dismissed, Defendant would potentially be subject to multiple litigation or inconsistent judgments; the absent minor, Jaime Aguilar, has an interest which may be prejudiced if this action were not ordered dismissed; and the interests of the courts and the public in complete, consistent and efficient settlement of controversies are best served by dismissal of the complaint." (C.R. 12, pp. 2-3.)

As we now explain, this ruling was absolutely correct.

LEGAL DISCUSSION.

THE DISTRICT COURT PROPERLY ORDERED DISMISSAL OF THE ACTION BECAUSE PLAINTIFFS FAILED TO JOIN AN INDISPENSABLE PARTY WHOSE JOINDER WOULD HAVE DEFEATED DIVERSITY JURISDICTION.

A. The Applicable Standard of Review Is Whether the District Court Abused Its Discretion.

The governing standard for determining the propriety of a dismissal pursuant to Rule 19, Federal Rules of Civil Procedure, is whether the District Court abused its discretion. (*Bakia v. County of Los Angeles, supra,* 687 F.2d 299, 301 ["The standard of review in Rule 19 cases is abuse of discretion"]; *Walsh v. Centeio* (9th Cir. 1982) 692 F.2d 1239, 1242 [recognizing that the outcome of the case turned on the standard of review, this Court, consistent with its *Bakia* decision, concluded once again that "we are convinced that the abuse of discretion standard should apply"]; see also *Cloverleaf Standardbred Owners v. National Bank* (D.C. Cir. 1983) 699 F.2d 1274, 1276].)[6]

[6]Plaintiffs' assertion (AOB, p. 3) that the proper standard of review is that applicable to the grant of summary judgment pur-

(footnote continued on following page)

B. The District Court Correctly Exercised Its Discretion in Dismissing Plaintiffs' Action Based on Their Failure to Join an Indispensable Party.

When tested by the governing standard, the District Court's order of dismissal was clearly correct; it most certainly was *not* an abuse of discretion. Indeed, Plaintiffs have not even argued (let alone established) that the order constituted an abuse of discretion and thus, they have failed to address the only pertinent issue in the case. This alone strongly suggests that summary affirmance is in order. (*Page v. United States* (9th Cir. 1966) 356 F.2d 337, 339.) However, as we now explain, there are other substantial reasons which also justify affirmance of the District Court's order.

But wholly aside from Plaintiffs' failure to confront the real issue, it is undeniable that the District Court's ruling was absolutely correct on the merits. Specifically, the District Court properly exercised its discretion in ordering dismissal because it correctly determined (1) Jaime Aguilar claimed an interest relating to the subject of the action and was so situated that the disposition of the action in his absence may have, as a practical matter, impaired or impeded his ability to protect that interest under the California law of collateral estoppel; (2) Defendant would have been subject to a substantial risk of incurring inconsistent obligations by reasons of his claimed interest, should the action have continued without his joinder; (3) Jaime Aguilar appeared to be a California citizen whose joinder as a plaintiff would have destroyed diversity of citizenship between Plaintiffs and Defendants, who were also citizens of California; (4) joinder of Jaime Aguilar as a plaintiff would have de-

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suant to Rule 56(c), Federal Rules of Civil Procedure, is wrong. Not only is it unsupported by any of the authorities Plaintiffs cite, but it also contradicts the express holdings of *Bakia* and *Walsh*.

prived the District Court of subject matter jurisdiction; and (5) under the "equity and good conscience" test of Rule 19(b), Federal Rules of Civil Procedure, the action was properly dismissed since (a) a judgment rendered in the minor's absence might have been prejudicial to him and/or Defendant; (b) Plaintiffs had an adequate state remedy; and (c) the interests of the courts and the public in complete, consistent and efficient settlement of controversies were best served by dismissal of the complaint. We will now explain.

1. Under Rule 19(a), Federal Rules of Civil Procedure, the Minor Jaime Aguilar Was a Necessary Party Who Should Have Been Joined if Feasible.

In the landmark decision of *Shields v. Barrow* (1854) 58 U.S. (17 How.) 130, 139, 15 L.Ed. 158, indispensable parties were defined as

> "[p]ersons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."[7]

Rule 19(a) defines the persons who are needed for a just adjudication of an action as follows:

> "A person . . . whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so

[7]As Mr. Justice Harlan more recently declared in *Provident Tradesmens Bank & Trust Co. v. Patterson* (1968) 390 U.S. 102, 124, 19 L.Ed.2d 936, the generalizations of *Shields* "are still valid today, and they are consistent with the requirements of Rule 19 . . . Indeed, the . . . *Shields* definition states, in rather different fashion, the criteria for decision announced in Rule 19(b)."

> situated that the disposition of the action may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. . . ."

As recently explained by the Court in *Lopez, et al. v. Martin Luther King, Jr. Hospital, et al., supra*, 97 F.R.D. 24, 28:

> "Rule 19 provides an analytical framework for the Court in considering the necessity of joinder, and is subdivided into two parts. Subdivision (a) defines those persons who should be joined if at all feasible. If joinder is not feasible, then subdivision (b) is applied to resolve the question of whether the action should proceed without that party. This is a two-step analysis — the issues involved in the subdivision (b) determination are not reached until the Court determines first whether non-joinder would, under (a)(1) prevent the Court from according complete relief to the parties present, or under (a)(2), impair the absentee's interest or prejudice the persons already parties by subjecting them to a risk of double or inconsistent obligations. *Bakia v. County of Los Angeles*, 687 F.2d 299, 301 (9th Cir. 1982)."

As we now demonstrate, whether tested by the principles articulated in *Shields* or the criteria set forth in Rule 19(a), the District Court correctly determined that Jaime Aguilar was a person who should have been joined since (a) he had an interest relating to the subject of this action; (b) disposition of the action in his absence may, as a practical matter, have impeded or impaired his ability to protect his interest; and (c) disposition of this action in his absence would have subjected Defendants to a substantial risk of incurring double, multiple or other-

wise inconsistent obligations by reason of the minor's interest.

a. *The Minor Jaime Aguilar Has an Interest Relating to the Subject of the Action.*

It is beyond dispute that Jaime Aguilar, the person who suffered the personal injuries which furnish the underlying basis for this suit, had a direct interest in Plaintiffs' claim against Defendant for the damages sought for alleged medical malpractice. (*Faitz v. Ruegg, supra,* 114 Cal.App.3d 967.)

Notwithstanding the minor's obvious interest in this suit, Plaintiffs contend the interest is somehow negated because the parents and the minor have entirely distinct and separate causes of action, thus permitting each to be separately pursued without impeding the claim of the other. (See AOB, pp. 9-12.) This argument is dead wrong and should be summarily rejected for at least two reasons:

1. Contrary to Plaintiffs' assertion, the actions are not distinct, but are alternative, *i.e.*, the cause may be brought by the minor *or* the parent, but not by both. In particular, California Code of Civil Procedure section 376 does not permit both the child and parents to plead the right to recover the same elements of pecuniary loss. The obvious reason for this rule is to prevent double recovery. (*See, e.g., Girard v. Irvine* (1929) 97 Cal.App. 377, 386 and cases cited therein [held: where parent brings action as guardian claiming pecuniary losses on behalf of minor daughter, parent is estopped from attempting to recover same in action on his own behalf]; accord: *Mattox v. Isley* (1952) 111 Cal.App.2d 774, 780 and cases cited therein [held: where parents of child sue as guardians to recover for injuries sustained by child, they waive their own right to recover these damages in favor of the child]; *Bauman v. San Francisco* (1940) 42 Cal.App.2d 144, 162-

163; Continuing Education of the Bar, *California Attorneys Damages Guide,* Appendix: Personal Injury, § 5 (CEB, 1974) ["The parents of a minor may recover damages for certain forms of detriment as an alternative to recovery by the minor. . . ."].)

As recently explained in *Faitz v. Ruegg, supra,* 114 Cal.App.3d 967, 971:

> " 'The right to recover for loss of the child's earnings and for medical expenses incurred in treating its injuries belongs to the parent. . . . [But] where the parent has . . . in the child's action, by pleading or testimony, waived his right or estopped himself from subsequently asserting it, the child is permitted to recover these items. . . .' "

These authorities conclusively contradict Plaintiffs' unsupportable claim that the parents' and minor's actions are separate and distinct. Plaintiffs' reliance on cases from other jurisdictions involving loss-of-consortium actions (*i.e., Wright v. Schebeler Co.* (S.D. Iowa 1965) 37 F.R.D. 319; *Sove v. Smith* (6th Cir. 1962) 311 F.2d 5) is totally misplaced because a wife's cause of action for loss-of-consortium has been specifically held to be separate and distinct from her spouse's cause of action for personal injuries, *i.e.,* the wife sues for her separate injuries and the husband sues for his. Here, on the other hand, the cause of action, whether brought by the parents or by the child, is to recover damages for detriment suffered by the minor.[8]

2. But even if Plaintiffs were correct in arguing the parents' and minor's actions are separate and distinct

[8]Plaintiffs' analogy to loss of consortium actions also begs the question because, as will be developed above, even though the wife's action for loss of consortium is deemed to be separate and distinct from the action brought by the injured spouse, still, under principles of collateral estoppel, she may be bound by an adverse judgment on the identical issue of liability determined in the first action.

(they aren't), it does not follow that each could be separately pursued without impeding the claim of the other. Indeed, the law in California is precisely to the contrary. (See, *e.g.*, *Zaragosa v. Craven* (1949) 33 Cal.2d 315, 321 ["The fact that the cause of action for injuries to the wife is different from the cause of action for injuries to the husband is here immaterial."].)[9]

In sum, there can be no legitimate question that the District Court correctly determined that the minor had an interest in the proceeding which required his joinder if feasible, since Plaintiffs were seeking recovery of pre-majority special damages incurred by the minor under circumstances where the minor was alternatively entitled to recover such damages, but where *both* could not have recovered the same award.

b. *Disposition of This Action in the Absence of Jaime Aguilar May, as a Practical Matter, Have Impeded or Impaired His Ability to Protect His Interests.*

Even if Plaintiffs were correct in their assertion that their minor child had an *independent* substantive right

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[9]If Plaintiffs obtained a judgment against Defendant, it clearly would have diminished or prejudiced, Jaime Aguilar's own right to obtain a judgment based on a claim for the same consequential damages, *(Cf. Morrison v. New Orleans Public Service, Inc.* (5th Cir. 1969) 415 F.2d 419, 423 [" . . . the Morrison children who were not parties to this action have a direct interest in plaintiffs' claim against Public Service for the damages to which Morrison would have been entitled had he survived. . . . Litigation of this claim in federal court would deprive the absent children of a share in the recovery. . . . Under Rule 19(a), therefore, the absent Morrison children were 'persons to be joined if feasible.' "]; *Bixby v. Bixby* (S.D. Ill. 1970) 50 F.R.D. 277, 280 [". . . The omitted legatees are considered to be indispensable parties. Though the effect of a judgment here might, or might not, be pecuniarily prejudicial to them, this litigation must necessarily affect substantial rights and interests of the omitted legatees. [¶] If a judgment for defendants here were ultimately necessary, the consequences of such judgment would be the substantial reduction of the potential residuary estate in which the absent parties might otherwise share. Such judgment would, patently, prejudice their rights and interests."].)

to recover post-majority pecuniary losses, a further claim that their child had no interest which may be impaired in this litigation should be rejected for the reasons expressed by the Court in *Lopez, et al. v. Martin Luther King, Jr. Hospital, supra,* 97 F.R.D. 24, 29-30:

> "Plaintiffs construe the 'interest' permitted under rule 19(a)(2) much too narrowly. The Court recognizes that the alleged interest must be something more than a financial interest or an interest of convenience. However, the Rule does not require a 'legal' interest; it merely requires 'an interest relating to the subject of the action.' Whether this interest exists must be determined from a practical perspective, not through the adoption of strict legal definitions and technicalities. To be sure, the parents' and the child's substantive legal rights differ. However, 'the concept of substantive severability is no longer the guiding star of the joinder problem.' . . . Instead, the Court must consider all the relevant circumstances in classifying the interest at stake.
>
> "Plaintiffs' construction of the interest requirement in this case ignores the practical consequences to the child if the judgment in the federal action is adverse to the parents. Plaintiffs assert that since the child has no legal interest in this litigation, there is no danger that any issues resolved herein will be decided for purposes of the child's state court action. This analysis places the cart before the horse. The relevant inquiry is, if there is a possibility that collateral estoppel will be applied by the California court, then it is axiomatic that the child has an interest in this action. . . ."

As recognized by the Court in *Lopez, supra,* and the District Court here, Jamie Aguilar's absence from the instant action subjected him to potential prejudice if the

expanding concept of collateral estoppel were applied to defeat his claim in state court.

The doctrine of collateral estoppel is a component of the doctrine of res judicata. *Todhunter v. Smith* (1934) 219 Cal. 690, 695, explains:

> "The doctrine of *res judicata* has a double aspect. A former judgment operates as a bar against a second action upon the same cause, but in a later action upon a different claim or cause of action, it operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action." (Emphasis in original.)[10]

Collateral estoppel may properly be invoked when it appears in a later proceeding that there was a former proceeding in which the identical issues were raised and decided, that there was a final judgment on the merits in the first proceeding, and that the party against whom the plea of collateral estoppel is asserted was a party, or in privity with a party, to the prior adjudication. (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 874; *Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 813.)

Since identical issues of fact and law were presented in both the federal and state actions and since a final judgment might eventually have been entered in this action had the District Court permitted the present parties to continue with the lawsuit, the doctrine of collateral estoppel would unquestionably have applied to any judgment entered in this action if it could be said that the plaintiff parents herein and their minor son

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[10]The doctrine of collateral estoppel serves important public policies pertinent to the application of Rule 19. "It seeks to curtail multiple litigation causing vexation and expense to the parties and wasted effort and expense in *judicial administration.*" (*Wood v. Herson* (1974) 39 Cal.App.3d 737, 745; original emphasis.)

were in privity. The law in California could clearly so provide, as we now explain.

In its traditional sense, privity denotes a mutual or successive relationship to the same rights of property or such an identification in interest of one person with another as to represent the same legal rights. (*Clemmer v. Hartford Insurance Co., supra,* 22 Cal.3d 865, 876; *Teitelbaum Furs, Inc. v. Dominion Ins. Co.* (1962) 58 Cal.2d 601, 604.) Here, in suing for the personal injuries sustained by their child, the parents necessarily represented their own and their child's mutual interests — financial, familial and otherwise. That this is so is strongly suggested by the following decisions.

1. In *Armstrong v. Armstrong* (1976) 15 Cal.3d 942, the California Supreme Court held that children were collaterally estopped to relitigate issues settled in a suit involving their mother. In that case, two children sued their father for past child support and misappropriation of their trust assets; they complained of a property settlement agreement, executed by their parents and incorporated into an interlocutory decree of divorce, which provided for child support of $125 per month, to be offset by payments made to the children from a trust previously established for them by a grandparent.

Agreeing it was improper for the father to reduce his support obligation by resorting to the children's trust fund, the Supreme Court nevertheless denied the children's right to collaterally attack the judgment. Holding that the children were bound by the divorce judgment, the Court stated (at pp. 951-952):

> "The doctrinal reach of the res judicata bar extends ... to those persons 'in privity with' parties [citation]. As has been said, in considering application of the doctrine, courts examine the practicalities of the

situation and attempt to determine whether plaintiffs are 'sufficiently close to the original case to afford application of the principle of preclusion' [citation]. We have previously held that privity exists where the person involved is . . . 'so identified in interest with another that he represents the same legal right.' [Citations.] In the present case, plaintiffs' mother was entrusted with their care and custody and was a proper representative of their intersets. . . . For this reason, we conclude that plaintiffs are bound by the judgment in the divorce action to which their mother was a party."

2. In *Borer v. American Airlines, Inc.* (1977) 19 Cal.3d 441, the California Supreme Court established that, in suing for medical expenses and lost services resulting from injury to their minor offspring, the parents effectively acted as a representative of their child. The California Supreme Court explained (*id.* at 452):

"While the parent lives, however, the tangible aspects of the child's loss can be compensated in the parent's *own* cause of action. As put by Stainback, J., in *Halberg v. Young, supra*, 41 Hawaii 634, 640 . . ., 'where a parent has been injured by the negligent act of another the parent will recover from the other full damage which he has sustained, including such inability, if any, to properly care for his children, and thus the parent's ability to carry out his duty to support and maintain the child has not, in a legal sense, been destroyed or impaired by the injury to him.' (*Suter v. Leonard, supra,* 45 Cal.App.3d 744, 748.)"

3. The identity of interests (*i.e.*, privity) between an injured plaintiff-spouse-parent and his or her heirs was authoritatively established in *Sea-Land Services v. Gau-*

det (1974) 414 U.S. 573, 39 L.Ed.2d 9. There, plaintiff's husband won a personal injury action, collected on his judgment and then died. Plaintiff then brought a wrongful death action. While the Supreme Court held the former recovery did not bar suit by decedent's wife, the doctrine of collateral estoppel was applied to preclude relitigation of those matters previously decided: "[N]onparties may be collaterally estopped from relitigating issues necessarily decided in a suit brought by a party who acts as a fiduciary representative for the beneficial interest of the nonparties." (414 U.S. at p. 593; fn. omitted.) And "when a decedent brings his own personal-injury action during his lifetime and recovers damages for his lost wages he acts in a fiduciary capacity to the extent that he represents his dependents' interests in that portion of his prospective earnings which, but for his wrongful death, they had a reasonable expectation of his providing for their support." (414 U.S. at p. 594; fn. omitted.)

With respect to the identical liability issue to be tried in the second lawsuit, the *Sea-Land* Court observed (*id.* at pp. 594-595):

> "Since the decedent's recovery of any future wages will normally be dependent upon his fully litigating that issue, we need not fear that applying principles of collateral estoppel to preclude decedent's dependents' claim for a portion of those future wages will deprive the dependents of their day in court."

4. *Secrest v. Pacific Electric Ry. Co.* (1943) 60 Cal. App.2d 746, first established the California rule. In a comprehensive exposition of the governing law, the Court explained (at p. 750):

> "'If a judgment in favor of the injured party would have the effect of barring the cause of action

> for wrongful death, it seems obvious that a judgment adverse to him would a fortiori have the same effect. . . .' "

After discussing the pertinent policy considerations, the Court adopted the view, represented by the weight of authority, that collateral estoppel would apply, holding as follows (at p. 751):

> "[W]hen the identical issues joined by the pleadings in the action for wrongful death were determined adversely to plaintiffs in the prior personal injury action . . . the defense of estoppel by judgment must be sustained. Because, the decision of the court in the prior action 'negatives the existence of conditions which would charge the defendant with responsibility for the death.' "

The reason the Court adopted this rule was as follows (at p. 750):

> "'. . . *such a judgment, if rendered on the issues raised in the death action, strikes at the very foundation of the cause of action, since it negatives the existence of conditions which would charge the defendant with responsibility for the death.*' " (Court's emphasis.)

5. Finally, based on decisions such as those discussed above, the Court in *Lopez, et al. v. Martin Luther King, Jr. Hospital, supra,* 97 F.R.D. 24, expressly determined that the California doctrine of collateral estoppel might indeed preclude the minor child from relitigating the issue of a defendant's negligence in the state court action. In terms dispositive of the issue presented here, Judge Edward Rafeedie stated (at p. 31):

> "In light of the expanded application of privity for purposes of collateral estoppel, it is clear that the child might be barred from relitigating the issue

> of defendants' negligence in the state court action. Certainly the child is 'sufficiently close' to the present proceeding to justify application of the doctrine. The same attorney is litigating both actions. The mother, a party to this action, is the child's guardian ad litem in the state court action. Plaintiffs' claim that the liability issues in the two cases differ is not well founded. For successful recoveries, both actions require the proof of defendants' negligence in connection with the perinatal care of the child. . . ."

In response to these highly persuasive (indeed controlling) cases, Plaintiffs primarily rely on inapplicable decisions of other jurisdictions whose law is not controlling here. The only California decisions cited by Plaintiffs (*i.e.*, *Kaiser Foundation Hospitals v. Superior Court* (1967) 254 Cal.App.2d 327; *Ruddock v. Ohls* (1979) 91 Cal.App.3d 271; and *Cortez v. County of Los Angeles* (C.D. Cal. 1983) 96 F.R.D. 427) furnish them no support as we now explain.

The *Kaiser* case held that a decedent's child is not collaterally estopped by a judgment adverse to the decedent because the child's cause of action for wrongful death is a separate cause of action, not derivative from the decedent's cause of action. The holding in *Kaiser* is wrong and should not be followed for at least three reasons:

(a) *Kaiser* is directly contrary to the California Supreme Court decision in *Zaragosa v. Craven, supra*, 33 Cal.2d 315, which it fails to cite. In *Zaragosa*, the Court categorically rejected the rationale employed by *Kaiser*, holding that even separate and independent causes of action are subject to a collateral estoppel defense. On this point, the Court categorically stated (*id.* at 321):

> "The fact that the cause of action for injuries to the wife is different from the cause of action for injuries to the husband is here immaterial."

(b) *Kaiser* is also contrary to the principles enunciated in *Armstrong, Borer* and *Sea-Land.*

(c) Finally, *Kaiser* should be ignored because it utterly fails to distinguish *Secrest.*[11] Specifically, *Kaiser's* only reference to *Secrest* is in a footnote stating that *Secrest* "is distinguishable ... on the facts." (*Id.* at 334 fn. 2.) However, *Secrest* cannot be dealt with so simply and it is no wonder that three justices of the California Supreme Court voted to grant a hearing in *Kaiser.*

Plaintiffs' reliance on the Court of Appeal decision *Ruddock v. Ohls, supra,* 91 Cal.App.3d 271, is also misplaced because it is distinguishable on public policy grounds. In *Ruddock,* the Court held that, in the absence of joinder, the right of a minor child to establish the parent-child relationship was not foreclosed under the doctrine of res judicata or collateral estoppel by a prior judgment between the mother and alleged father in a marital dissolution action. The Court noted that, in "contrast to enforcement of a child's right of a present or past support obligation, the establishment of the parent-child relationship is the *most fundamental right* a child possesses to be equated in importance with personal liberty and the most basic of constitutional rights." (*Id.* at 277-278; emphasis added.) Evidencing concern that these fundamental rights of the minor might be jeopardized by broad application of the bar of collateral estoppel, the Court concluded the doctrine was inapplicable

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[11]It will be recalled that the theoretical basis for *Kaiser* was squarely rejected in *Secrest* (60 Cal.App.2d at 751): "[W]hen the identical issues joined by the pleadings in the action for wrongful death were determined adversely to plaintiffs in the prior personal injury action, . . . the defense of estoppel by judgment must be sustained."

because the minor's interests might not have been properly *protected* by the mother in the prior litigation, *i.e.*, the Court held that, where paternity rights are concerned, a parent is not necessarily in "privity" with his or her child. The Court explained (*id.* at 278):

> "Considering present-day realities, not every question of paternity raised and decided in a marital dissolution action involves a full adversary hearing on the subject. It is not uncommon for such an issue raised in the pleadings to be decided pro forma because the mother is reticent to be subjected to scrutiny about past dalliances. The emotional experience and psychological trauma of having one's personal life unveiled can act as a deterrent. Guilt feelings over the dissolution, favorable concessions on support or property can influence the vigor with which the paternity question is presented to the court. (See *Everett v. Everett* (1976) 57 Cal.App.3d 65, 71 [129 Cal.Rptr. 81].) The availability of aid to families with dependent children (AFDC) may relieve the financial motivation for energetic pursuit of the responsible father. Lastly, the mother may have ambivalent feelings about having the child tied to a past relationship or about having to deal with the father on visitation and support. These considerations would require a review of the record to determine whether the mother acted in a proper representative capacity, and while not requiring a reweighing of the evidence, would nevertheless be a form of collateral attack."

In contrast to *Ruddock,* Plaintiffs herein cannot establish that a personal-injury cause of action equates to a fundamental right, nor have Plaintiffs shown the existence of any public policy consideration which might have caused the California courts to refuse to apply the doctrine of collateral estoppel to the child's action, had

the instant federal action been decided adversely to Plaintiffs' interests. Nor have Plaintiffs referred to a single fact suggesting that the minor's interests would not have been fully and forcefully represented in the federal action.

The Court in *Cortez,* relying substantially on both *Kaiser* and *Ruddock,* held that a minor could not be collaterally estopped by his parents' litigation of a cause of action brought pursuant to California Code of Civil Procedure section 376. But, as we have shown those decisions are not in conformity with controlling California authority. Thus, for a similar reason, *Cortez* should be rejected by this Court, as it was by the Court below.[12]

In light of compelling decisions such as *Armstrong, Borer, Sea-Land, Secrest* and *Lopez,* there was at the very least, a clear potential that, should this lawsuit have proceeded in the absence of Jaime Aguilar and an adverse judgment entered against his Plaintiff parents, prejudice to his interests in the state litigation would likely have resulted. The point is that, in pursuing this federal action, Plaintiffs, in effect, represented the minor's interest in attempting to establish Defendant's liability; therefore, any adjudication of liability may well have been binding on the minor in his state court action and, thus, his action could potentially have been effectively barred.[13]

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[12]It would also be proper for this Court to pay greater deference to Judge Rafeedie's determination of the applicable law of collateral estoppel in *Lopez* as did the Court below, since he is a former California state judge. (See *Summers v. Interstate Tractor and Equipment Co.* (9th Cir. 1972) 466 F.2d 42, 47 n. 2.)

[13]In determining whether a person should be joined under Rule 19(a), it is not necessary that the District Court determine to a certainty that disposition of the federal action will impair or impede the person's ability to protect his interests. Instead, all that is necessary is that it be determined that "... disposition of

(footnote continued on following page)

c. *Disposition of This Action in the Absence of the Unjoined Minor Would Have Subjected Defendant to a Substantial Risk of Incurring Double, Multiple or Otherwise Inconsistent Obligations by Reason of the Minor's Interest Should the Doctrine of Collateral Estoppel Not Have Otherwise Barred His State Action.*

As demonstrated in Section 1.b., *supra*, there was a clear potential that the doctrine of collateral estoppel would have barred Jaime Aguilar's state action, should his parents have suffered an adverse judgment in this federal action. However, as we now explain, if his action was not held to be barred by the California courts, then disposition of this action in his absence would clearly have subjected Defendant to a substantial risk of incurring inconsistent obligations by reason of the minor's interest. This factor furnished an alternative basis for the District Court's determination that Jaime Aguilar was indeed a party who should have been joined, if feasible, under Rule 19(a).

Although the absent Jaime Aguilar undeniably had an interest in the instant suit, he was not a party to this action and might not have been bound by any judgment of the District Court, even if Defendants had prevailed. Thus, if Defendants prevailed, they might still be forced to defend the action brought on behalf of the minor in state court. On the other hand, if Plaintiffs prevailed in this action, there is no doubt that Jaime Aguilar would claim collateral estoppel based on the federal judgment.

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the action *may* . . . as a practical matter impair or impede his ability to protect that interest . . ." (Rule 19(a)(2)(i), Federal Rules of Civil Procedure; emphasis added.) As observed by the Court in *Lopez, supra*, 97 F.R.D. 24, 31, "The existing potential that the child will be estopped from relitigating important issues critical to his action in the state court satisfies the impairment requirement."

Unless application of the concept of collateral estoppel to a defense judgment in the instant action would bar the minor's cause of action in state court, there was a clear potential for diametrically opposed judgments predicated on identical facts and the same issue of liability. Such a result was properly avoided by the District Court's correct application of Rule 19(a).

Clearly, the District Court had more than ample reason to determine that Jaime Aguilar was a party who should have been joined, if feasible, under both of the criteria articulated in Rule 19(a)(2), Federal Rules of Civil Procedure. Accordingly, the judgment should be affirmed.

d. *Joinder of Jaime Aguilar as a Party Plaintiff Would Have Destroyed the District Court's Diversity Jurisdiction.*

Having correctly concluded that joinder was required under Rule 19(a), the District Court also properly determined that such joinder would effectively have destroyed federal diversity jurisdiction.

A plaintiff in federal court has the burden of establishing diversity jurisdiction by affirmative allegations in his complaint. If he fails to do so, the federal court has no jurisdiction and the action must be dismissed. (*Carlsberg Resources Corp. v. Cambria Savings & Loan* (3rd Cir. 1977) 554 F.2d 1254, 1259 ["access to the federal courts on the ground of diversity should be denied absent a clear entitlement to such access"]; see also *Martin Hodas, East Coast Cinematics v. Lindsay* (S.D.N.Y. 1977) 431 F. Supp. 637, 640; *Attwell v. City of Chicago* (E.D. Wisc. 1973) 358 F.Supp. 1248, 1249.)

A person born in the United States is a citizen of the United States and of the state in which he resides. (Fourteenth Amendment, United States Constitution ["All persons born or naturalized in the United States . . . are citizens of the United States *and of the state wherein they*

reside." (Emphasis added.)]; *Factor v. Curson, Pirie Scott & Co.* (7th Cir. 1968) 393 F.2d 141, 149; *Butler v. Penix* (5th Cir. 1949) 171 F.2d 761, 762.)

Here, Plaintiffs alleged in their Complaint that Jaime Aguilar was born in California. (C.R. 1, p. 4:5-6.) On its face, Plaintiffs' allegation of the minor's birth in California suggested he was a citizen of this State. Plaintiffs did not allege that, after Jaime Aguilar's birth and before the filing of the instant action, the minor changed his domicile. Moreover, and significantly, Plaintiffs have never suggested, either in the District Court or now, that diversity jurisdiction would have been preserved upon joinder of their son as a party to this suit. Since there has never been an allegation or assertion that Jaime Aguilar was a citizen of a state other than California, the District Court rightly concluded that Plaintiffs had not established the requisite diversity necessary to permit proper joinder of Jaime Aguilar as a party-plaintiff.

Clearly, the District Court was correct in refusing to permit Plaintiffs to manipulate jurisdiction by merely omitting Jaime Aguilar as a named plaintiff in their Complaint without offering any explanation. (Rule 19(c), Federal Rules of Civil Procedure.) As one federal court noted in a virtually identical factual context:

> "... plaintiffs drew their complaint with all three real parties in interest named as a plaintiff or as use plaintiffs. [fn. omitted.] When defendants called attention to the fact that there was incomplete diversity of citizenship, plaintiffs hastened to drop two of the parties under Rule 21 to correct the jurisdictional defect. It seems inappropriate under general principles of equity that plaintiffs should be permitted to pick and choose which necessary parties they will name for the purpose of conferring federal jurisdiction on this Court. If indispensability is a

benefit which can be waived by a party for the purpose of securing diversity jurisdiction, federal courts would lose control over their jurisdictional boundaries. *Equity and good conscience would seem to require that under circumstances such as those present here, parties should present their claims in a state court rather than attempt to manipulate jurisdiction by dropipng plaintiffs with a substantial interest in the claim solely for the purpose of retaining jurisdiction in the federal court.*" (*Potomac Electric Power Co. v. Babcock & Wilcox Co.* (D. Maryland 1972) 54 F.R.D. 486, 492; emphasis added.)

2. The District Court Also Properly Exercised Its Discretion in Ordering the Action Dismissed Under the Equity and Good Conscience Test of Rule 19(b).

Having determined that joinder of Jaime Aguilar was desirable under the criteria articulated in Rule 19(a)(2), the District Court was required to order joinder unless joinder would have deprived it of subject matter jurisdiction. Since, here, joinder would have defeated the District Court's subject matter jurisdiction, it was required to apply the equity and good conscience test of Rule 19(b) to determine whether the action could proceed in the absence of the minor or whether dismissal should be ordered. (*Prestenback v. Employers' Ins. Co.* (D.C. La. 1969) 47 F.R.D. 163, 165-166.)

Rule 19(b) required the District Court to balance equitable considerations in determining if the action could fairly proceed without the joinder of the absent person alleged to be an indispensable party.[14] As ex-

[14]Rule 19(b) sets forth the following factors to be considered by the Court in determining whether the action should proceed in the absence of the person determined to be an indispensable party, or should be dismissed:

"... First, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties;

(footnote continued on following page)

plained by Mr. Justice Harlan speaking for a unanimous Court in *Provident Tradesmens Bank & Trust Co. v. Patterson, supra,* 390 U.S. 102, 109-111, 19 L.Ed.2d 936, Rule 19(b) sugegsts four interests that must be examined in each case:

> "First, the Plaintiffs have an interest in having a forum. Before the trial, the strength of this interest obviously depends upon whether a satisfactory alternative forum exists ... Second, the defendant may properly wish to avoid multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another ... [¶] Third, there is the interest of the outsider whom it would have been desirable to join.... [¶] Fourth, there remains the interest of the courts and the public in complete, consistent, and efficient settlement of controversies."

Analysis of these four factors, as applicable in the context of this case, provides overwhelming support for the District Court's determination that this action should not properly proceed absent the joinder of Jaime Aguilar. We now explain.

a. *All Issues Presented in the Instant Action Were Fully Capable of Litigation in (Indeed, Were More Properly Litigable in) a State Forum.*

The issues presented to the District Court in this medical malpractice action were fully litigable in a state forum, particularly in that action currently pending in

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second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder."

Since the first and third factors set forth in Rule 19(b), track the elements articulated in Rule 19(a)(1), 2(i) and (2)(ii), fully discussed in sections 1.b. and 1.c., *supra,* we treat these duplicative Rule 19(b) factors summarily in the discussion which follows.

the Los Angeles Superior Court, No. C 462798, as *Jaime Aguilar v. County of Los Angeles, etc., et al.* The issues in that action, with the exception of the type of damages sought, are identical to those in the instant case: Both actions involve the alleged malpractice committed on Jaime Aguilar; one of the named plaintiffs is the same in both proceedings, *i.e.*, Rosa Aguilar suing in an individual capacity in District Court and in a representative capacity in the state proceeding; and the County of Los Angeles and its employees were the named defendants in both matters.

The availability of a state forum has been properly a decisive factor in cases where dismissal was ordered pursuant to Rule 19(b). In *Potomac Electric Power Co. v. Babcock & Wilcox Co., supra,* 54 F.R.D. 486, 491, the Court observed:

> "Of all the pragmatic considerations to be weighed by this Court, the one that stands out most strikingly in this case is the fact that the plaintiffs have available to them, and in fact have already filed suit in another forum. If the motions to dismiss are granted because of a lack of complete diversity of citizenship, plaintiffs are not left without a remedy. They may in such event proceed with the suit that has been brought in the Circuit Court for Baltimore County and which presents the same claims against the same defendants. . . ."

(See also *Haas v. Jefferson National Bank of Miami Beach* (5th Cir. 1971) 442 F.2d 394, 399-400 [same as *Potomac*]; *Schutten v. Shell Oil Company* (5th Cir. 1970) 421 F.2d 869, 875 [same]; *Jamison v. Memphis Transit*

Management Company (6th Cir. 1967) 381 F.2d 670, 676 [same]; *Lopez, supra*, 97 F.R.D. 24, 32 [same].)[15]

By pursuing their remedy in a state forum, Plaintiffs will be able to join all interested parties without suffering an iota of prejudice. (*Block v. Sun Oil Corporation* (W.D. Okla. 1971) 335 F.Supp. 190, 196; *Bixby v. Bixby, supra*, 50 F.R.D. 277, 281.) Accordingly, the District Court properly dismissed the instant action.

b. *Failure to Join Jaime Aguilar Would Have Exposed Defendant to the Threat of Multiple Litigation and the Risk of Inconsistent Relief.*

To the extent it might ultimately have been held that a determination in Defendant's favor in the federal action was not binding on the minor, Defendant might have been forced to relitigate the same issue of liability in the state forum, notwithstanding a victory in federal court. (See *Block v. Sun Oil Corporation, supra,* 335 F.Supp. 190, 196 ["A multiplicity of litigation may result and, thus, the efforts of more than one court may be devoted to what at present appears to be a single controversy."].) Under these circumstances, it would also be possible that even if Defendant obtained a favorable judgment in the present action, it could still suffer an adverse judgment in the pending state court action. The potential inequity of such inconsistent adjudications was properly avoided by the District Court's order. In *Potomac Electric Power Co. v. Babcock & Wilcox Co., supra,* 54 F.R.D. 486, 492, the Court noted:

> "[T]here is at the present time a risk that the insurers could re-litigate the issues presented here, or at a very minimum, require the defendants to come into another court and prove that principles of *res judi-*

[15]Plaintiffs, one of whom represents the minor in the state action, cannot even claim any inconvenience by being required to walk a few blocks from the federal to the state courthouse in Los Angeles.

cata or collateral estoppel did apply in any subsequent action. If the action were to proceed with all parties named as plaintiffs, this possibility would be effectively removed. Therefore, the first factor in [Rule 19] subdivision (b) also indicates that Royal [insurance company] should be regarded as indispensable here, and that the action should be dismissed." (Emphasis in original.)

See also:

Lopez, et al. v. Martin Luther King, Jr. Hospital, et al., supra, 97 F.R.D. 24, 32 ["The risk that the defendants herein would be subjected to multiple litigation or inconsistent judgments is not only great, but in fact is a reality. Defendants are presently engaged in two lawsuits which derive from the same exact set of facts and require consideration of the same legal issues. Thus, multiple litigation already exists. The defendants have a strong interest in being involved in one action rather than two, and would be better off in a single action where the liability issues will be decided consistently as to all plaintiffs."].

c. *The Absent Jaime Aguilar Had an Interest Which Might Have Been Prejudiced if He Was Not Joined in This Proceeding.*

In *Provident Tradesmens Bank & Trust Co. v. Patterson, supra,* 390 U.S. 102, 110, 19 L.Ed 2d 936, the Supreme Court explained the factor of prejudice to the absent party in the following terms:

"Of course, since the outsider is not before the court he cannot be bound by the judgment rendered. This means, however, only that a judgment is not res judicata as to, or legally enforceable against, a nonparty. (Fn. omitted.) It obviously does not mean

> either (a) that a court may never issue a judgment that, in practice, affects a nonparty or (b) that (to the contrary) a court may always proceed without considering the potential effect on nonparties simply because they are not 'bound' in the technical sense. (Fn. omitted.) Instead, as Rule 19(a) expresses it, *the court must consider the extent to which the judgment may 'as a practical matter impair or impede his ability to protect' his interest in the subject matter. . . .*" (Emphasis added.)

Under the formulation given this factor by the Supreme Court in *Provident Tradesmens Bank & Trust Co.,* it is readily apparent that, even if a determination in the present action might not have been binding against Jaime Aguilar through application of the principles of res judicata, as a practical matter, an adverse judgment would still have severely prejudiced his interest, particularly if the doctrine of collateral estoppel were applied against him in the state action brought in his behalf. (See *Lopez, supra,* 97 F.R.D. 24, 33.) This potential result was properly avoided by the District Court's order.

d. *The Interests of the Courts and the Public in Complete, Consistent and Efficient Settlement of Controversies Are Best Served by Dismissal of the Action.*

One of the most compelling reasons justifying the District Court's dismissal in favor of the state court action was to settle this controversy in a single proceeding. This overwhelmingly serves the interests of the litigants, absent parties, the judiciary and the public. It also provides a means for settling this controversy consistently, efficiently and sensibly. In *Provident Tradesmens Bank & Trust Co., supra,* 390 U.S. 102, 111, 19 L.Ed.2d 936, the Court observed:

> "[T]here remains the interest of the courts and the public in complete, consistent, and efficient settle-

ment of controversies. We read the Rule's third criterion, whether the judgment issued in the absence of the non-joined person will be 'adequate,' to refer to this public stake in settling disputes by wholes, whenever possible, for clearly the plaintiff, who himself chose both the forum and the parties defendant, will not be heard to complain about the sufficiency of the relief obtainable against them. . . ."

This interest was also recognized in *Fouke v. Schenewerk* (5th Cir. 1952) 197 F.2d 234, 236, where the Court stated:

"There is no reason in this case for a court of equity to strain hard to find a way to adjudicate the merits of this controversy in the absence of interested parties whose presence was readily obtainable. . . . The decision of this controversy is governed by the local law of Texas; and the courts of Texas are open to the plaintiffs and fully competent to acquire jurisdiction in rem if not in personam."

See also:

Haas v. Jefferson National Bank of Miami Beach, supra, 442 F.2d 394, 399 ["It seems evident to us that the absence of Glueck in this litigation would, of necessity, result in less than a complete settlement of this controversy. . . . [T]here is no semblance of a guarantee that a judgment on Haas' terms would settle the whole dispute generated by the facts here."].

Broussard v. Columbia Gulf Transmission Company (5th Cir. 1968) 398 F.2d 885, 888 ["If the district court were to hear this case on the merits, its decision would merely begin rather than conclude litigation. . . . By any combination or permutation, . . . a reversal of the district court's dismissal

would engender further litigation, i.e., multiplicity of suits."].

In the instant case, it is undeniable that all the damage claims based on Jaime Aguilar's alleged injury could not have been litigated in this federal action. This is so because Jaime Aguilar's parents are only authorized (Code of Civ. Proc. § 376) to recover a portion of the damages which might ultimately be recoverable if liability is established; Jaime sought the remainder in the state court proceeding. Thus, it was absolutely impossible for complete relief to be afforded in the present lawsuit. In marked contrast, the entire controversy can be litigated among all interested parties in a single state court proceeding. Thus, it would have made no sense to allow Plaintiffs' unexplained and unexplainable choice of an entirely unsatisfactory federal forum to take precedence over the rights of all interested parties to participate and be heard in a single, dispositive suit.

CONCLUSION.

For all the reasons stated above, the absent minor, Jaime Aguilar, was unquestionably a party to be joined if feasible under Rule 19(a). The District Court properly recognized the strong public policy interests in resolving disputes entirely (rather than piecemeal) and avoiding repeated, potentially inconsistent lawsuits on identical issues. Here, except for the damages recoverable, the rights of the minor were essentially co-extensive with those of Plaintiffs and failure to join him could, as a practical matter, have prejudiced his ability to protect his own interests and, at the same time, have subjected Defendant to the potential threat of multiple litigation and inconsistent adjudications. Yet, joinder of Jaime Aguilar in the federal action would have destroyed diversity jurisdiction.

Under the "equity and good conscience test" of Rule 19(b), the District Court also correctly determined that Jaime Aguilar was an indispensable party. At all pertinent times, Plaintiffs had an adequate remedy because all the issues pending before the District Court could properly have been litigated in the state forum.

The District Court correctly exercised its discretion (and most certainly cannot be said to have abused its discretion) in ordering the instant action dismissed.

> "[W]hen a district judge adverts to the relevant considerations and engages in a careful, pragmatically-oriented analysis to determine whether a person who cannot be joined as a party is 'needed for just adjudication,' an appellate panel should generally respect the 'judgmental discretion' exercised by the court of first instance." *Cloverleaf Standardbred Owners v. National Bank, supra,* 699 F.2d 1274, 1280.

For all of the foregoing reasons, the order of dismissal should be affirmed.

Respectfully submitted,

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