

A05-340

NO. A05-1952

State of Minnesota
In Supreme Court

Brown-Wilbert, Inc., a Minnesota corporation, and
Christopher Chandler Brown, an individual,
Respondents,

v.

Copeland Buhl & Company, P.L.L.P., and
Lee Harren, an individual,
Appellants.

APPELLANTS' BRIEF AND APPENDIX

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STATEMENT OF THE ISSUES

1. Whether the doctrine of res judicata precludes a claimant whose initial lawsuit has been dismissed from commencing and pursuing a new action against the same defendants based upon the same facts while simultaneously appealing the judgment of dismissal?

Court of Appeals held in the negative, concluding that a judgment is not final (and cannot be given res judicata effect) until after the appellate process is exhausted.

State ex rel. Spratt v. Spratt, 150 Minn. 5, 184 N.W. 31 (1921)

Hauser v. Mealey, 263 N.W.2d 803 (Minn. 1978)

Hauschildt v. Beckingham, 686 N.W.2d 829 (Minn. 2004)

State v. Joseph, 636 N.W.2d 322 (Minn. 2001)

2. Whether the rule against splitting a cause of action precludes a claimant whose initial lawsuit has been dismissed from commencing and pursuing a new action against the same defendants based upon the same facts while simultaneously appealing the judgment of dismissal?

Court of Appeals held in the negative, concluding that the rule against splitting a cause of action has no vitality separate from the doctrine of res judicata.

Boland v. Morrill, 275 Minn. 496, 148 N.W.2d 143 (1967)

Hamilton v. Asbestos Corp., Ltd., 998 P.2d 403 (Cal. 2000)

State ex rel. Minnesota Nat'l Bank v. District Court,
195 Minn. 169, 262 N.W. 155 (1935)

STATEMENT OF THE CASE

This is the second lawsuit that Plaintiffs Brown-Wilbert, Inc. (“Brown-Wilbert”) and Christopher Brown (“Chris”) have brought against Brown-Wilbert’s former accountants, Defendants Copeland Buhl & Company, PLLP (“Copeland Buhl”) and Lee Harren. Plaintiffs’ previous lawsuit, which was commenced and pursued by Plaintiffs without serving either of the expert affidavits required by Minn. Stat. § 544.42, is the subject of a separate appeal to this Court (App. Ct. Case No. A05-0340).

Based upon Plaintiffs’ failure to provide the required affidavits, the district court dismissed the previous action pursuant to Minn. Stat. § 544.42, subd. 6. A.A. 10. Judgment was entered and Plaintiffs appealed. A.A. 97.

Not content to rely solely upon the appeal, however, Plaintiffs commenced the present action against Copeland Buhl and Harren, based upon exactly the same factual allegations. A.A. 20. Defendants responded by moving to dismiss based upon res judicata and the prohibition on splitting a cause of action. A.A. 43.

The new district court judge to whom the second case was assigned (Hon. George F. McGunnigle, Hennepin County) granted Defendants’ dismissal motion (A.A. 10) and Plaintiffs again appealed.

The Court of Appeals reversed the judgment of dismissal. A.A. 1.

Defendants then petitioned this Court for review and, by order dated August 23, 2006, this Court granted review in this matter and consolidated the case for oral argument with the separate appeal in the first lawsuit. A.A. 18.

STATEMENT OF FACTS

This matter and the nearly identical action with which it has now been consolidated for oral argument before this Court represent the latest chapters in the story of the meltdown of Brown-Wilbert, the family business that Chris and his father Jerry had operated together for a number of years before Chris was ousted from management for using company funds to pay expenses that, in no way, could be attributable to the business of the company. Chris commenced a shareholder rights lawsuit against Jerry after being ousted, and eventually obtained control of the company as part of the settlement of that action.

After resolving the shareholder rights lawsuit, Chris sued the company's accountants (Defendants), who had investigated and documented Chris' extensive misuse of company funds and who had provided evidence in that regard during the shareholder rights lawsuit. In the lawsuit against the accountants, Chris alleged professional malpractice, breach of contract, and breach of fiduciary duty. As noted above in the Statement of Case, when that lawsuit was dismissed, Chris commenced the present action against Defendants, based upon exactly the same factual allegations.

A brief summary of the facts underlying Plaintiffs' various lawsuits is set forth below.¹

¹ Because this matter comes before the Court on appeal from Defendants' motion to dismiss under Rule 12.02, the Court (and Defendants) must accept the facts contained in the complaint. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). However, Defendants wish to stress that the true facts are far different than Plaintiffs would have the Court believe and that Chris is out for revenge because Defendants called attention to his embezzling.

A. The Acquisition

In 1995, Jerry Brown and his son, Chris, bought Brown-Wilbert, a manufacturer of funeral vaults. (A.A. 21 and 23.)² Lee Harren, a certified public accountant with Copeland Buhl, provided advice with regard to the transaction. (A.A. 23.) As a result of the transaction, Jerry owned 51% of the voting shares of the company and Chris owned 49% of the voting shares, but Chris owned 80% of the equity. (A.A. 23-24.)

B. Defendants Provide Accounting Services

Following the completion of the acquisition of *Brown-Wilbert*, Copeland Buhl and Lee Harren provided accounting and tax services to the company from 1995-2003. (A.A. 24.) In that capacity, they investigated and cataloged extensive personal expenses for which Chris paid using company funds. (A.A. 25 and 27.)

C. Jerry Proposes a Buy-Out of Chris' Interest

The business relationship between Jerry and Chris deteriorated over time and Jerry eventually excluded Chris from the company premises and offered to buy out his son's interest in Brown-Wilbert. (A.A. 25-29.) During these negotiations, Lee Harren facilitated communications between the embattled relatives. (A.A. 20-24.)

² References to Appellants' Appendix shall be in the form "A.A. ___."

D. The Shareholder Lawsuit

Rather than sell his interest in Brown-Wilbert to his father, Chris commenced a shareholder rights lawsuit against Jerry and *Brown-Wilbert* ("Shareholder Lawsuit"). (A.A. 31.) In connection with that lawsuit, Lee Harren signed an affidavit that stated that Chris had bilked Brown-Wilbert out of more than \$900,000 for personal expenses fraudulently portrayed as business expenses. (A.A. 34.) That affidavit also contained Lee Harren's computation under the valuation formula in Jerry and Chris' buy-sell agreement. (*Id.*)

E. Chris and Brown-Wilbert Sue the CPAs

After settling the Shareholder Lawsuit, Chris and Brown-Wilbert filed the lawsuit referred to in this brief as *Brown-Wilbert I* against Lee Harren and Copeland Buhl, alleging various acts or omissions in the rendering of professional services and seeking relief under the legal theories of breach of contract, breach of fiduciary duty, accounting malpractice and restitution. (A.A. 48.) That action was brought in Hennepin County and was assigned to the Hon. Allen Oleisky.

When Plaintiffs filed *Brown-Wilbert I*, they failed to file an affidavit of expert review, certifying that the case had been reviewed by an expert who had concluded that Defendants deviated from the applicable standard of care and that this deviation caused Plaintiffs' injury, as is required by Minn. Stat. § 544.42. (A.A. 87.) Later, Plaintiffs failed to file the second affidavit required by Minn. Stat. § 544.42, which is supposed to disclose the identity of any expert, the substance of the expert's opinions, and a summary of the grounds for those opinions. (*Id.*)

Based on Plaintiffs' failure to file these two affidavits, Judge Oleisky dismissed *Brown-Wilbert I* – in its entirety – on December 23, 2004. (A.A. 87.) Judgment was entered and Plaintiffs perfected an appeal of the Court's decision to the Minnesota Court of Appeals. (A.A. 97.)

F. The Instant Action

Shortly after perfecting their appeal in *Brown-Wilbert I*, Plaintiffs commenced a second action against Defendants (referred to in this brief as *Brown-Wilbert II*). (A.A. 20.) The complaint in that second action contains the same basic allegations as did the complaint in *Brown-Wilbert I*, but purports to assert new legal theories of recovery for intentional and negligent misrepresentation and aiding and abetting liability. (*Id.*)

STANDARD OF REVIEW

This Court must apply a *de novo* standard of review on appeal from a judgment of dismissal following a motion to dismiss under Rule 12.02, since such an appeal presents a purely legal question – *i.e.*, whether the complaint sets forth a legally sufficient claim for relief. *See Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). No deference is given to a lower court on questions of law. *Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003) (citing *Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984)).

ARGUMENT

By ignoring longstanding Minnesota law in the area of res judicata and treating the rule against splitting a cause of action as a nullity, the Court of Appeals opened the courthouse doors to the filing of multiple, identical lawsuits for tactical reasons or to simply harass a defendant. To avoid those consequences, this Court must reverse the decision of the Court of Appeals and reinstate the District Court's decision that Plaintiffs cannot dodge the result of their previous lawsuit against Defendants by commencing a new lawsuit against Defendants. Specifically, the Court should hold that, to the extent that Plaintiffs want relief from the result in *Brown-Wilbert I*, Plaintiffs must seek that relief in *Brown-Wilbert I*.

I. RES JUDICATA APPLIES TO BAR PLAINTIFFS' CLAIMS.

Res judicata (also known as claim preclusion) prevents "relitigation of a claim on grounds that were raised or could have been raised in [a] prior suit." *Lane v. Peterson*, 899 F.2d 737, 741 (8th Cir. 1999). The doctrine bars a subsequent claim when (1) the earlier claim involved the same cause of action; (2) the earlier claim involved the same parties or those in privity with them; (3) there was a final judgment on the merits; and (4) the estopped party had a full and fair opportunity to litigate the matter. *State v. Joseph*, 636 N.W.2d 322, 327 (Minn. 2001).

In the present action, the District Court properly concluded that res judicata applies to bar Plaintiffs' claims. As set forth in the following sections of this brief, all of the required elements of res judicata were present at the time of the District Court's ruling and nothing that has occurred during the appeal in *Brown-Wilbert I* mandates a

different result. Accordingly, this Court should reverse the decision of the Court of Appeals and reinstate the judgment of dismissal that was entered by the District Court.

A. There was a Final Judgment in *Brown-Wilbert I.*

In reversing the dismissal of Plaintiffs' duplicative second lawsuit against Defendants, the Court of Appeals relied exclusively upon the "final judgment" requirement of res judicata. A.A. 7. However, as set forth below, the Court of Appeals erred in its analysis of what constitutes a final judgment under Minnesota law.

1. The Court Should Reverse the Court of Appeals' Unwarranted (and Possibly Unintended) Change to the Law of Res Judicata.

In overturning the District Court's entirely appropriate res judicata ruling, the Court of Appeals incorrectly concluded that "[r]es judicata requires the expiration of the appellate process before a judgment is considered final." A.A. 7. By reaching that conclusion, the Court of Appeals effectively overturned – *sub silentio* – several decisions of this Court to the effect that an appeal *does not* alter the status of a final judgment for purposes of applying the doctrine of res judicata. Moreover, if that particular ruling is allowed to stand, it will put Minnesota at odds with the majority of other jurisdictions that have addressed the question of the effect that an appeal has upon the doctrines of res judicata and collateral estoppel.

In *State ex rel. Spratt v. Spratt*, this Court expressly stated that "[a]n appeal with a supersedeas bond does not vacate or annul the judgment appealed from, and the matters determined by [the judgment] remain res judicata until it is reversed." 150 Minn. 5, 7, 184 N.W. 31, 32 (1921) (emphasis added). A subsequent line of Minnesota decisions all

reach the same conclusion. See *Wegge v. Wegge*, 252 Minn. 236, 238, 89 N.W.2d 891, 892 (1958); *Manemann v. West*, 218 Minn. 602, 605-06, 17 N.W.2d 74, 75 (1944); *Bolsta v. Bremer*, 212 Minn. 269, 271, 3 N.W.2d 430, 431 (1942); *Wilcox Trux, Inc. v. Rosenberger*, 169 Minn. 39, 43-44, 209 N.W. 308, 310 (1926); *American Druggists Ins. v. Thompson Lumber Co*, 349 N.W.2d 569, 572 (Minn. Ct. App. 1984).

In adopting and following the rule stated in *Spratt*, this Court took the same approach as the vast majority of other jurisdictions and has adhered to what the Second Restatement of Judgments describes as “the better view.” See *Smith v. Malouf*, 597 So.2d 1299, 1301-02 (Miss. 1992) (“The various states have ruled with virtual unanimity that a judgment is ‘final’ for *res judicata* and collateral estoppel purposes even though pending on appeal.”) (citations omitted); 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4433 (2d ed. 2002) (noting established rule in federal courts that a final judgment retains its preclusive effects during appeal). See also Restatement (Second) of Judgments § 13, cmt. f (1982) (“The better view is that a judgment otherwise final remains so despite the taking of an appeal unless what is called an appeal consists of a trial de novo.”).

The Court of Appeals provides no reason for discarding longstanding Minnesota law at this juncture and adopting a distinctly minority position. In fact, it appears that the Court of Appeals was oblivious to the fact that it was making new law, since elsewhere in its opinion the Court of Appeals expressly noted that making changes in the law is the prerogative of this Court or the legislature, not the Court of Appeals. A.A. 9.

The Court of Appeals was plainly confused by *dicta* contained in a pair of Minnesota appellate decisions that are cited on pages 6 and 7 of the Court of Appeals decision. See *State Farm Mut. Auto. Ins. Co. v. Spartz*, 588 N.W.2d 173, 175 (Minn. Ct. App. 1999) and *Joseph*, 636 N.W.2d at 328. While those cases refer to judgments being final when no more appeals can be had, neither case actually involved the issue of the status of a judgment while under appeal. *Spartz*, 588 N.W.2d at 174; *Joseph*, 636 N.W.2d at 325. To the contrary, all appeal rights had been exhausted in *Spartz* and all appeal rights had expired in *Joseph*. *Id.* Moreover, the court in *Spartz* ultimately concluded that the prior judgment did not preclude the claimant from pursuing different claims in a subsequent action. *Spartz*, 588 N.W.2d at 177.

Under the circumstances, the Court of Appeals' res judicata ruling should not be permitted to stand. That ruling is based upon what plainly appears to be a misunderstanding of Minnesota law. Rather than endorsing a wholly unwarranted and unsupported change in Minnesota law, this Court should reverse the res judicata ruling of the Court of Appeals and reaffirm the majority rule set forth in *Spratt* and its progeny.

2. Unless this Court Reverses the Judgment of Dismissal in *Brown-Wilbert I*, Plaintiff's Claims are Barred by Res Judicata.

As discussed in the previous section of this brief, the Court of Appeals based its decision upon the ill-founded conclusion that a judgment that is the subject of a pending appeal is not a final judgment. The Court of Appeals made a passing reference to the fact that some of the claims in *Brown-Wilbert I* were remanded to the District Court for additional findings (A.A. 7), but that ruling in *Brown-Wilbert I* was plainly not the basis

for the Court of Appeals' decision to reverse the judgment of dismissal in the present case. Indeed, the Court of Appeals made a point of stating that "there was no final judgment on the merits in the first lawsuit at the time the district court ordered dismissal of the second lawsuit" and that "the district court erred by dismissing the second lawsuit." A.A. 7.

Largely overlooked in all of this is the fact that, in *Brown-Wilbert I*, the Court of Appeals affirmed the judgment of dismissal with respect to Plaintiffs' purported accounting malpractice claims against Defendants in that action. In that sense, there is still a final judgment in *Brown-Wilbert I* to support a dismissal of the present case on res judicata grounds. Only if this Court overturns that judgment will there no longer be a final judgment for res judicata purposes. For all of the reasons set forth in the briefs that Defendants have submitted to the Court in *Brown-Wilbert I*, the Court should reaffirm the judgment in of dismissal in that action and, thereby, preserve the final judgment that is essential to any dismissal of the present action on the basis of res judicata.

B. In Addition to a Final Judgment, All of the Other Res Judicata Requirements are Met in this Case.

In light of its mistaken conclusion that no final judgment existed, the Court of Appeals did not discuss any of the other three res judicata requirements. However, each of those other requirements is satisfied in this case.

1. *Brown-Wilbert I* is the Same Cause of Action as *Brown-Wilbert II*.

The test that Minnesota courts use to determine whether a former judgment bars a subsequent action "is to inquire whether the same evidence will sustain both actions."

Bifulk v. Evans, 353 N.W.2d 258, 260 (Minn. Ct. App. 1984) (citing *McMenomy v. Ryden*, 276 Minn. 55, 148 N.W.2d 804 (1967)). As a redlined comparison of the complaints clearly demonstrates, Plaintiffs have pled no new factual circumstances in *Brown-Wilbert II*. See A.A. 65. Instead, they have simply grafted counts for misrepresentation and aiding and abetting onto the same factual allegations that they made in *Brown-Wilbert I* – contending that Defendants’ alleged failure to disclose the very same underlying breaches of professional duty amounted to misrepresentation and aiding and abetting. *Id.*

A plaintiff cannot avoid the preclusive effect of a prior judgment by simply re-casting his allegations under various alternative theories of recovery. “Once there is an adjudication of a dispute between parties, *res judicata* prevents either party from relitigating claims arising from the original circumstances, even under new legal theories.” *Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004) (emphasis supplied). Minnesota law is clear that a “judgment on the merits constitutes an absolute bar to a second suit . . . not only as to every matter which was actually litigated, but also as to every matter which might have been litigated therein.” *Hauser v. Mealey*, 263 N.W.2d 803, 805 (Minn. 1978) (emphasis in original) (quoting *The Youngstown Mines Corp. v. Prout*, 266 Minn. 460, 466, 124 N.W.2d 328, 340 (1963)).

The Minnesota Supreme Court has identified a “claim” for the purposes of *res judicata* as “a group of operative facts giving rise to one or more bases for suing.” *Id.* (quoting *Martin ex rel. Hoff v. City of Rochester*, 642 N.W.2d 1, 9 (Minn. 2002)). Factors that may help to determine whether the same operative facts are in place include:

“whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties’ expectations.” *Banks v. Int’l Union Elec.*, 390 F.3d 1049 (8th Cir. 2004) (citing Restatement (Second) of Judgments § 24).

Brown-Wilbert I and *Brown-Wilbert II* contain identical time frames, allegations of action, allegations of motivation, and allegations of the underlying transactions and parties involved. Both suits allege that Lee Harren breached professional duties of care in rendering the very same professional services. Even the damages are the same. The only difference is the legal theories advanced by Plaintiffs; but “reliance [in a second action] on different substantive law and new legal theories does not preclude the operation of res judicata.” *Lane*, 899 F.2d at 744.

2. *Brown-Wilbert I* Involved the Same Parties as *Brown-Wilbert II*.

The res judicata requirement that the same parties are involved in both matters is plainly satisfied in the present case. The parties to *Brown-Wilbert I* and *Brown-Wilbert II* are precisely the same. In fact, the captions of the two cases are absolutely identical. (A.A. 20 and 48.)

3. Plaintiffs Had A Full and Fair Opportunity To Litigate *Brown-Wilbert I*.

Plaintiffs had ample opportunity to comply with the statutory requirements applicable to their claims in *Brown-Wilbert I*. In fact, Plaintiffs had over nine months to serve either of the two required affidavits and failed to do so. In the meantime, Plaintiffs consulted with one or more experts and engaged in written discovery with Defendants.

Plaintiffs also had ample opportunity to pursue any and all claims that they might have wished to assert against Defendants in *Brown-Wilbert I*. Nevertheless, at no time prior to the dismissal of that action did Plaintiffs ever make a formal motion to amend their complaint to assert the causes of action that they subsequently sought to assert in *Brown-Wilbert II*. During the hearing on the motion to dismiss *Brown-Wilbert I*, Plaintiffs' counsel indicated to the Court that he had considered including a fraud count in *Brown-Wilbert I*, but he never sought leave to do so:

THE COURT: But isn't most of your counts more on fraud and breach of fiduciary duty by these accountants?

MR. ANTRIM: I appreciate that as well, Your Honor . . . But you're absolutely right, Your Honor, there's a fraud count. And I'm sorry to say at this point in time but there probably will be a motion for punitive damages, as well. The Court can expect that in the future.

* * *

THE COURT: Mr. Antrim, any last thoughts?

MR. ANTRIM: Last thoughts, Your Honor? Mr. Shroyer is correct. There is no fraud count at this point in time. I anticipate there may be in the future.

3/15/05 Affidavit of Thomas J. Shroyer, Ex. I, p. 23, l. 17 to p. 18, l. 6; p. 28, ll. 19-25.³

³ Because the transcript containing the above-quoted passages has already been submitted to the Court in connection with the *Brown-Wilbert I* appeal and is also available to the Court (as an exhibit to the affidavit of Mr. Shroyer) in record that was transmitted by the District Court in the present case, Appellants have not included another copy in the Appendix.

It is because Plaintiffs failed to adhere to what the law requires that they did not get to test their claims at a trial. Plaintiffs had a full and fair opportunity to avoid dismissal by complying with Minn. Stat. § 544.42, but they completely failed to follow the statutory directives. If the statute is to have any teeth, Plaintiffs cannot be allowed to avoid the operation of the statute by using an amended version of the original complaint to commence a new action.

II. PLAINTIFFS SHOULD NOT BE PERMITTED TO SPLIT THEIR CAUSE OF ACTION.

Even if the Court somehow concludes that each of the requirements essential to applying the doctrine of res judicata have not been met in this case, the Court should still hold that the judgment of dismissal was proper, since it is clear that Plaintiffs are impermissibly splitting their claims against Defendants.

A. Plaintiffs Have Blatantly Ignored the Rule Against Claim Splitting.

As this Court noted long ago, “it has long been settled in this state that all claims of a party for relief arising out of an occurrence giving rise to any one claim must be joined in one lawsuit.” *Boland v. Morrill*, 275 Minn. 496, 502, 148 N.W.2d 143, 148 (1967). That rule, which is usually referred to as “the rule against splitting a cause of action,” is widely accepted. See 1A C.J.S. *Actions* § 224 (2005) (“The splitting of a cause of action . . . is prohibited, or at least disfavored, in most jurisdictions”) (citing case law from 35 different jurisdictions); 1 Am. Jur. 2d *Actions* § 103 (2005) (stating the rule against splitting a cause of action); see also 1 Am. Jur. 2d *Abatement, Survival, and Revival* § 32 (2005) (reciting rule and explaining that, “[i]f a plaintiff does institute a suit

on part of his or her claim, the pendency of that suit may be pleaded in abatement of a second suit commenced for the part of the claim omitted from the first suit or for the whole demand”).

The rule against splitting a cause of action protects defendants and the courts alike from the burdens of piecemeal litigation:

The rule serves to protect a defendant against vexatious litigation; but, more important in these times of congested court calendars, its proper application also serves the public interest in judicial economy by preventing needless delay and the expense of trying cases piecemeal.

Boland, 275 Minn. at 502-03, 148 N.W.2d at 148. See also 1A C.J.S. *Actions* § 226 (2005) (discussing dual purposes of protecting defendants from harassment and avoiding “undue clogging of court dockets”).

Although the prohibition on splitting a cause of action has much in common with the doctrine of res judicata and is frequently discussed in cases that involve res judicata issues, it is actually a separate concept and, as such, provides a separate basis for affirming the dismissal of the present action.

Several decisions from around the country (including this Court’s decision in *Boland*) discuss the rule against splitting a cause of action without ever suggesting that the rule is merely a subpart of the res judicata doctrine. See, e.g., *Boland*, 275 Minn. at 502, 148 N.W.2d at 148; *Travelers Ins. Co. v. O’Hara*, 84 S.W.3d 419 (Ark. 2002); *McDowell v. State*, 23 P.3d 1165, 1167 (Alaska 2001); *Coniglio v. Wyoming Valley Fire Ins. Co.*, 59 N.W.2d 74, 78-79 (Mich. 1953); *Wilner v. White*, 929 So.2d 315 (Miss. 2006). Moreover, the leading legal encyclopedias treat res judicata and the rule against

splitting claims as two distinct concepts. While those encyclopedias address *res judicata* under the topic of “Judgments,” they address the rule against splitting a cause of action under the separate topics of “Actions” and “Abatement.” See 50 C.J.S. *Judgments* § 697 *et seq.* (2005) and 47 Am. Jur. 2d *Judgments* § 463 *et seq.* (2005); see also 1A C.J.S. *Actions* §§ 224-233 (2005); 1 Am. Jur. 2d *Actions* §§ 103-108 (2005); 1 Am. Jur. 2d *Abatement, Survival, and Revival* §§ 6 and 32 (2005).

In the present case, it is clear that Plaintiffs have split their claims against Defendants. *Brown-Wilbert I* and *Brown-Wilbert II* involve precisely the same set of factual circumstances. A review of a redlined comparison of the two complaints reveals that Plaintiffs simply cloned the *Brown-Wilbert I* complaint in preparing the *Brown-Wilbert II* complaint. See A.A. 65. The two complaints concern the same parties, the same time frame, the same business disputes, and the same transactions, as well as the same alleged breaches of professional duties. As the above-cited legal authorities explain, Plaintiffs may not split legal theories of recovery in this fashion.

A plaintiff is obliged to plead all causes of action that arise from a set of factual circumstances in which the plaintiff holds the good faith belief that he is entitled to recovery. See *Bifulk*, 353 N.W.2d at 260. If Plaintiffs believed that the potential for recovery lay in fraud, negligent misrepresentation or aiding and abetting, they were obliged to plead those causes of action in *Brown-Wilbert I*, either initially or by way of amendment. As noted above, Plaintiffs’ counsel thought he had included a fraud claim in the first complaint and represented to the District Court that he was actively

contemplating amending to include a misrepresentation theory in *Brown-Wilbert I*. The fact is, however, he simply neglected to do so.

If the rule against splitting a cause of action has any vitality, it is entirely inappropriate for Plaintiffs to attempt to use a separate lawsuit to present claims that they made or could have made in their previous lawsuit. Unless this Court is prepared to deem that rule a mere synonym for res judicata, as the Court of Appeals did, the Court should hold that the rule against to splitting a cause of action provides an alternative basis for dismissing the present lawsuit.

B. The Court of Appeals has Made the Rule Against Splitting a Cause of Action a Nullity.

The Court of Appeals decision cites a number of Minnesota cases in which this Court or the Court of Appeals has noted that the doctrine of res judicata prevents claimants from splitting their claims and bringing successive lawsuits involving the same set of facts. A.A. 7. Based on those cases (all but one of which involved pure res judicata issues),⁴ the Court of Appeals erroneously concludes that the rule against splitting a cause of action is not a rule at all, but rather is nothing more than a statement of one of the effects of res judicata.

⁴ The one case that did not involve the res judicata doctrine was also the only Supreme Court case in the group. See *Loo v. Loo*, 520 N.W.2d 740, 744 n.1 (Minn. 1994). That case actually involved the “law of the case doctrine.” *Id.* Accordingly, the background statements (contained in a footnote) on which the Court of Appeals is relying were of no consequence to the ultimate decision and do not represent binding legal precedent.

The Court of Appeals ignored the cases like *Boland*, which discuss the rule against claim splitting without suggesting that the rule is just another name for res judicata. *See* Argument, *supra*, at 16. The Court of Appeals similarly ignored the other legal authorities that treat that rule as a separate rule rather than as a subpart of res judicata. *Id.*

Under the Court of Appeals' view, there is no prohibition on pursuing a series of repetitive lawsuits, so long as a judgment has not been entered yet in any of the separate actions. Thus, for tactical reasons or to simply vex the opposition, a party can pursue essentially identical actions before multiple courts. Of course, due to the doctrine of res judicata, the party will only be able to obtain a single judgment. Prior to entry of judgment, however, a party will be able to use a multiplicity of actions to (a) "forum shop," (b) "judge shop," (c) avoid discovery limitations, or (d) increase costs and harass the defendants.

In addition to opening the door to wasteful and harassing litigation tactics, the Court of Appeals' decision creates a potential trap for Defendants who find themselves faced with a series of duplicative lawsuits. Raising the rule against splitting claims will not protect the defendant from having to defend the separate lawsuits prior to any judgment, but failing to assert the rule will likely preclude the defendant from using the judgment in one lawsuit to bar the separate lawsuits. *See* Joseph E. Edwards, Annotation, *Waiver of, By Failing to Promptly Raise, Objection to Splitting Cause of Action*, 40 A.L.R.3d 108 (1971).

To avoid the foregoing problems, the rule against splitting claims should be treated as more than a mere synonym for res judicata. In that regard, this Court should join the California Supreme Court in recognizing that the prohibition against claim splitting functions as a rule of *abatement* as well as a rule of res judicata. See *Hamilton v. Asbestos Corp., Ltd.*, 998 P.2d 403, 414 (Cal. 2000). That is not to say that this Court should advocate a return to the use demurrers, pleas in abatement, or other such defenses. Defendants are merely asking this Court to recognize that abatement under “prior pending action” principles is a viable legal remedy and provides a portion of the underpinnings for the rule against splitting a cause of action.

The “prior pending action” or “prior jurisdiction” rule has recently been explained as follows:

It is fundamental that a plaintiff is not authorized simply to ignore a prior action and bring a second, independent action on the same state of facts while the original action is pending. Hence a second action based on the same cause will generally be abated where there is a prior action pending in a court of competent jurisdiction within the same state or jurisdictional territory, between the same parties, involving the same or substantially the same subject matter and cause of action, and in which prior action the rights of the parties may be determined and adjudged.

Smith v. Holmes, 921 So.2d 283, ¶ 10 (Miss. 2006) (emphasis added; citations omitted). See also 1 Am. Jur. 2d *Abatement, Survival, and Revival* § 6 (2005). This Court long ago recognized that rule of priority in *State ex rel. Minnesota Nat'l Bank v. District Court*, 195 Minn. 169, 173, 262 N.W. 155, 157 (1935).

Since the appropriate remedy when multiple actions between the same parties are pending is abatement of the second action, this Court should recognize that the rule against splitting a cause of action functions partly as a rule of abatement and should utilize that rule as an alternative basis for reinstating the judgment of dismissal in the present action.

CONCLUSION

As set forth above, principles of res judicata and the prohibition on splitting a cause of action preclude Plaintiffs from commencing a new action against Defendants based upon the same facts that were the subject of Plaintiffs' previously dismissed action against Defendants. Accordingly, Defendants respectfully request that the Court reverse the decision of the Court of Appeals and reinstate the judgment of dismissal that was entered by the District Court in this matter.

Respectfully submitted,

MOSS & BARNETT
A Professional Association

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word, in Times New Roman font, 13 point, and according to the word processing system's word count, is no more than 5499 words, exclusive of the cover page, table of contents, table of authorities, signature block and appendix, and complies with the typeface requirements of Minn. R. Civ. App. P. 132.01.

Dated: September 13, 2006.



Peter A. Koller

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).