

STATE OF MINNESOTA
SUPREME COURT
No. A08-1730

Katherine M. Rucker,

Respondent,

vs.

Steven B. Schmidt and

Rider Bennett, LLP,

Petitioners.

OFFICE OF
APPELLATE COURTS

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PETITION FOR REHEARING IN SUPREME COURT

Minnesota Supreme Court Decision, filed January 5, 2011
Court of Appeals Decision, filed July 21, 2009
Appellate Court File No. A08-1730

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TO: THE SUPREME COURT OF THE STATE OF MINNESOTA

Petitioners Steven B. Schmidt (“Schmidt”) and Rider Bennett, LLP (collectively “Petitioners”) respectfully request that the Minnesota Supreme Court rehear their appeal and reverse its January 5, 2011 decision. This Petition for Rehearing is made pursuant to Minn. R. Civ. App. P. 140.01. A copy of the Court's decision is included as the Appendix.

REASONS FOR REHEARING

Rehearing is called for under Rule 140.01 because the Court’s decision overlooked, failed to consider, misapplied, and misconceived material principles of law concerning res judicata. When the Supreme Court departs from a rule of law that has been adopted and accepted by virtually every other jurisdiction that has considered the issue, the citizens of this State are entitled to a thorough recitation of the reasons for the departure. The Court’s decision fails to provide this explanation and fails to provide meaningful standards to be applied going forward.

The Court’s decision also raised and decided issues not argued by any party to the appeal, which have statewide significance beyond the remand of this case to the trial court for further proceedings. Petitioners should be afforded the opportunity to address these issues before a final decision is rendered.

A. The Court Failed To Consider And Apply The Applicable Privity Standard.

In determining privity as between Robert Rucker and Schmidt, the Court relied upon the privity standard set forth in *Margo-Kraft Distributors, Inc. v. Minneapolis Gas Co.*, 294 Minn. 274, 278-79, 200 N.W.2d 45, 47-48 (1972), which is a collateral estoppel

case. The distinction between collateral estoppel and res judicata privity is important; nonetheless, the Court's opinion overlooked and failed to consider that distinction.

Instead, at footnote 4 of the decision, the Court concludes that the analysis of privity "is identical" for purposes of collateral estoppel and res judicata. Footnote 4 continues:

Appellants argue that the privity prong as applied to collateral estoppel is different than when applied to res judicata in that privity for collateral estoppel only applies to the estopped party. Appellants have not, however, identified any substantive difference in the test to be applied for determining what constitutes privity in the context of collateral estoppel and what constitutes privity in the context of res judicata. Nor have appellants explained why any difference between collateral estoppel and res judicata in the application of privity requires a different test for determining whether privity exists.

Under long-standing Minnesota law, the privity elements of collateral estoppel and res judicata *are* different. In concluding that the analysis is identical, the Court's opinion misapplies and misconceives a fundamental legal principle. Petitioner did in fact discuss at length in its underlying briefing to the Court the importance of distinguishing the privity test as applied to the estopped party and estopping party, which necessarily requires analyzing whether the privity at issue concerns collateral estoppel or res judicata. (Appellants' Reply Brief at 10-14.)

In a collateral estoppel case, only privity of the estopped party is required. *Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004). Thus, in all collateral estoppel cases in which privity is at issue, it is only the estopped party's privity that is considered. By contrast, for res judicata to apply, privity must exist for both the estopped

party and the estopping party. *Id.* at 840.¹ In this case, the Court was not required to analyze whether Katherine Rucker – the estopped party – was in privity with Robert Rucker because she was a party to the prior fraud action. The only privity at issue in this lawsuit is the privity of Schmidt – the estopping party. The Court’s reliance upon collateral estoppel cases to analyze privity is a misconception and a material misapplication of the privity requirement.

This distinction is critical to an understanding of the rationale that underlies the concepts of collateral estoppel and res judicata. These judicially created doctrines have the potential effect of closing the courthouse doors to a litigant. Before a court will take such action, it justifiably wants to assure that fundamental notions of due process have been satisfied and that the party to be estopped was given the opportunity to have his or her rights adjudicated. See *Richardson v. Jefferson County, Ala.*, 517 U.S. 793, 797-99 & n.4 (1996); *Bernhard v. Bank of Am. Nat. Trust & Sav. Ass'n*, 122 P.2d 892, 894-95 (Cal. 1942) (res judicata must “conform to the mandate of due process of law that no person be deprived of personal or property rights by a judgment without notice and an opportunity to be heard”), cited as authoritative in *Gammel v. Ernst & Ernst*, 245 Minn. 249, 72 N.W.2d 364 (1955); *Schwartz v. First Trust Co. of St. Paul*, 236 Minn. 165, 170, 52 N.W.2d 290, 294 (1952). The same due process concerns are not at issue when analyzing whether the estopping party was in privity with a party in the prior lawsuit.

¹ Because being a party to the first action or in privity with a party to the first action is required for plaintiff and defendant before res judicata will apply to the second action, res judicata cases may consider privity as applied to the estopped party, the estopping party or both.

For these fundamental and important reasons, the privity tests should be different as to the estopped party and estopping party. Where the **estopped party's** privity is at issue, courts should reasonably inquire whether the estopped party was "directly interested in the subject matter, and had a right to make defense, or to control the proceeding, and to appeal from the judgment" in the prior litigation in order to determine whether it would be fair to bind that party to the results of the prior litigation. *Bernhard*, 122 P.2d at 894; *see Margo-Kraft*, 294 Minn. at 278, 200 N.W.2d at 47-48. In order to be certain that the estopped party had the opportunity and motivation to fully participate in the prior action, courts require that he or she had an active self interest in that litigation. *Ramsey County v. Stevens*, 283 N.W.2d 918, 924 (Minn. 1979) ("Since appellant was only acting in a representative capacity in the first action, as we found, he cannot be deemed to have prosecuted his own interests fully. Thus, he is not now estopped from raising the issues in his individual capacity in this action."); *Balasuriya v. Bemel*, 617 N.W.2d 596, 600 (Minn. Ct. App. 2000) ("[P]rivies are nonparties who are so connected with the litigation that the judgment should determine their interests as well as those of the actual parties."); *Reil v. Benjamin*, 584 N.W.2d 442, 445 (Minn. Ct. App. 1998) ("In general, privity requires that the **estopped party's** interests have been sufficiently represented in the first action so that the application of collateral estoppel is not inequitable." (emphasis added)). For due process reasons, this test makes sense in the context of being applied to an estopped party.

Because the same due process concerns do not arise with a defending party, i.e., the estopping party, seeking to invoke res judicata, the standards to be applied are

necessarily and properly different. *Bernhard*, 122 P.2d at 894 (“The criteria for determining who may assert a plea of res judicata differ fundamentally from the criteria for determining against whom a plea of res judicata may be asserted.”). In analyzing privity of the estopping party, courts should not be concerned with whether their self-interest was represented in the first action because due process is not at issue. Instead, courts should analyze whether the estopping party had an identity of interest with a party to the prior action. See, e.g., *Beutz v. A.O. Smith Harvestore Prods., Inc.*, 431 N.W.2d 528, 533 (Minn. 1988) (stating in a res judicata case concerning the privity of the estopping party that “[p]rivity requires a person so identified in interest with another that he represents the same legal right.”); *Wessling v. Johnson*, 424 N.W.2d 795, 798 (Minn. Ct. App. 1988) (same); *Hanson v. N. J&B Enter., Inc.*, No. A08-0413, 2009 WL 234104, at * 3 (Minn. Ct. App. Feb. 3, 2009). Thus, the proper test here is whether Schmidt had an identity of interest with his client in the first action rather than whether *his* personal interests were represented. The Court’s decision disregards these important distinctions and erroneously cites to cases that incorrectly describe the test as requiring a personal stake or outcome in the prior action.

While the Court’s decision appears to recognize an “identity of interest” privity test, it actually applies a “personal interest” privity test. When the Court analyzes whether Schmidt had an “identity of interest” with his client Robert Rucker arising out of their alleged unlawful actions in the Rucker divorce matter, the conclusion that must be reached is yes. As Robert Rucker’s attorney, Schmidt represented Robert Rucker’s legal rights and only his legal rights. All of the alleged fraudulent actions arose out of

Schmidt's relationship with his client and out of his actions as Robert Rucker's attorney, agent and representative – that *is* an identity of interest that Courts across the nation have found to be more than sufficient to satisfy the privity requirement as applied to the estopping party.

The Court's decision provides no analysis as to why the relationship between Schmidt and his client in the divorce action is insufficient to establish privity as applied to Schmidt – the estopping party – other than to state that “something more than a common objective of attorney and client in obtaining an outcome favorable to the client is necessary to establish privity.” (Decision at 11.) Importantly, in reaching this conclusion, the Court relies upon the *State v. Lemmer*, 736 N.W.2d 650, 660-61 (Minn. 2007) case. The *Lemmer* case is a collateral estoppel case and thus analyzes privity of the “estopped party.” In other words, due process concerns were at issue and thus, it was necessary for the Court to assure that the estopped party's personal interests were represented in the prior action. Such personal interests should not have been required in this case to establish an identity of interest.

By misapplying the identity of interest test in the context of this case, i.e., to an estopping party, the Court significantly undermined the important policies of res judicata. The doctrine was intended to protect courts, parties and their privies from multiple lawsuits, vexatious litigation and require that litigation come to an end promoting judicial economy and efficiency. The doctrine is also intended to prevent double recovery by a party for the same alleged wrong and inconsistent judgments thereby maintaining and preserving the stability of court decisions and the sanctity of judgments. Here, the

Court's decision unquestionably allows a litigant, Katherine Rucker, two bites at the apple after having prevailed once on the same theories and same facts and after obtaining a full and complete judgment in her favor for her marital estate. This case is exactly the type of case in which res judicata was intended to apply. The Court's privity analysis should reflect this result.

B. The Court Summarily Overlooked Substantial Legal Authorities Across The Nation Without Adequate Explanation.

Courts across the nation have agreed with Petitioners. The Court overlooked these extensive legal authorities. The Court's decision provides no explanation as to why these legal authorities are wrong, or why the Court's decision, standing virtually alone, constitutes the proper rule of law. If the Court is going to go out on a limb on such an important principle of law, it should analyze and explain why its rule of law is different than in virtually every other jurisdiction. Justice compels the Court to conduct this analysis and provide a reasoned explanation.

C. The Court, In Practice, Adopted A Per Se Rule.

The Court's decision makes another fundamental error that will be sure to cause confusion until corrected. After concluding that Schmidt was not in privity with his client Robert Rucker because they did not have a "mutuality of legal interest," the Court states at footnote 6 that ". . . we do not mean to suggest that an attorney representing a client can never be in privity with the client. (citations omitted) We only conclude that on the facts of this case privity has not been established." (Decision at 11,

fn. 6.) Nonetheless, given the limited reasoning of the Court, it appears privity could never be found between an attorney and his client on the basis of that relationship.

Despite the content of footnote 6, the Court effectively adopted a per se rule that the attorney client relationship cannot establish privity. According to the decision, in order for privity to exist as between an attorney and his client, “[s]omething more than the common objective of attorney and client in obtaining an outcome favorable to this client is necessary. . .”. (*Id.*) While the Court does not identify what that “something more” is or could be, the Minnesota Rules of Professional Conduct would prohibit that “something more.” Indeed, the Professional Rules of Conduct prohibit a lawyer from representing a client when the lawyer has a personal interest involved. Minn. R. Prof. Conduct 1.7(a). The Professional Rules of Conduct also prohibit a lawyer from acting as both the lawyer and a necessary witness at trial. *Id.* at Rule 3.7. In other words, a lawyer, if in compliance with the Rules of Professional Conduct, could not have the personal interest at stake in the underlying litigation that the Court’s decision would require to establish that “something more” for a finding of privity. If that “something more” existed, the Court would undoubtedly conclude that the lawyer’s personal interest constituted a conflict in violation of the governing Rules of Professional Conduct. Thus, by its decision, the Court has effectively adopted a per se rule that the attorney-client relationship is insufficient to establish privity. If that was not the Court’s intention as stated in footnote 6 of the decision, at a minimum, its decision must be modified to explain the “something more” required and analyze whether that “something more” existed on the facts of this case.

D. The Court Decided Issues Not Raised By Any Party To The Appeal, Which Will Have Statewide Significance Not Addressed By The Court.

Finally, the impact of the Court's decision in analyzing legal authorities and important issues not addressed or argued by the parties must be considered. The Court's decision rests in large part upon its conclusion that the attorney-client relationship "is not tantamount to an agent-principal relationship" because attorneys are "quasi-judicial officers of the court...". (Decision at 12.) The Court cites the *Hoppe v. Klapperich*, 224 Minn. 224, 240, 28 N.W.2d 780, 791 (1947) case in support of this sweeping conclusion that will be sure to have implications far beyond application in this case. The parties did not cite the *Hoppe* case in their briefing or at oral argument and thus its application to the legal issue before the Court was not properly briefed or argued. That opportunity should now be provided to Petitioners.

Moreover, the parties did not brief or argue the differences, if any, between the attorney-client relationship and other traditional agency relationships or how such differences, if any, should impact the privity analysis. These overriding issues will have far reaching implications (and possible unintended consequences) to the litigants of this State absent further explanation by the Court. For example, the Court's decision provides no direction or meaningful guidance as to what it means to be a "quasi-judicial officer" as applied to litigation. It is very common for a litigator to rely upon his business and/or experienced client to make decisions about preparation and disclosure of information, such as information that involves significant financial and accounting matters that are outside the scope of a lawyer's knowledge or expertise. It is entirely unclear whether, to

fulfill the duty of being a “quasi-judicial officer,” a litigator is now required to question the financial and accounting information before disclosing it to the opposing party. Is the lawyer required to vouch for the accounting and financial information before it is disclosed? Is the lawyer required to verify the accuracy of each piece of information provided to him by his client? Is the lawyer required to disclose information that, the client, in his discretion, has concluded is inaccurate, speculative or not responsive for business-related reasons? The Court’s decision leaves these, and other important and practical matters unanswered.

Moreover, while the attorney-client relationship may differ from the traditional principal-agent relationship, an attorney and his client are nonetheless an agency and should be recognized as such for purposes of determining privity. *See Schumann v. Northtown Ins. Agency, Inc.*, 452 N.W.2d 482, 484 (Minn. Ct. App. 1990) (“The rules and principles of the law of principal and agent control the relation of attorney and client.”); *Beter v. Intrepid Holdings, Inc.*, No. A08-1257, 2009 WL 1444144, at *7 (Minn. Ct. App. May, 26 2009), citing *Commissioner v. Banks*, 543 U.S. 426, 436, 125 S.Ct. 826, 832 (2005) (“The relationship between client and attorney, regardless of the variations in particular compensation agreements or the amount of skill and effort the attorney contributes, is a quintessential principal-agent relationship.”); *STAR Centers, Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002) (“An attorney-client relationship gives rise to fiduciary duties: “The attorney is under a duty to represent the client with undivided loyalty, to preserve the client's confidences, and to disclose any material matters bearing upon the representation of these obligations.”) The Court’s

decision fails to address these authorities, and more importantly, fails to explain why any differences between the attorney-client relationship and a traditional agency relationship should impact the privity analysis – particularly when viewed in the context of being applied to the estopping party.

CONCLUSION

The Court’s decision should be reconsidered and a rehearing granted so that the parties can address the important issues summarized herein, including issues that were not addressed by the parties in their briefing or at oral argument. Petitioners respectfully request that their Petition for a Rehearing be granted.

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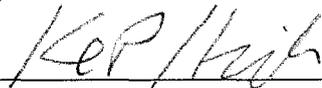
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