

A05-340  
NO. A05-1952

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State of Minnesota  
**In Court of Appeals**

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Brown-Wilbert, Inc. and  
Christopher Chandler Brown,

*Appellants,*

v.

Copeland Buhl & Company, P.L.L.P.  
and Lee Harren,

*Respondents.*

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**RESPONDENTS' BRIEF AND APPENDIX**

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**STATEMENT OF THE ISSUE**

Whether a claimant whose lawsuit against a professional has been dismissed as a result of the claimant's failure to comply with the expert affidavit requirements set forth in Minn. Stat. § 544.42 can avoid the effect of that dismissal by commencing a new action against the professional based upon the same facts?

**District Court held in the negative.**

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

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

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

*Myhra v. Park*, 193 Minn. 290, 258 N.W. 515 (1935)

Minn. Stat. § 544.42

## STATEMENT OF THE CASE

This is the second lawsuit that Plaintiffs Brown-Wilbert, Inc. (“B-W”) and Christopher Brown (“Chris”) have brought against B-W’s former accountants, 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, was 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 issued a judgment of dismissal in that action pursuant to Minn. Stat. § 544.42, subd. 6. This Court affirmed that judgment of dismissal as to Plaintiffs’ accounting malpractice claim, but remanded for further analysis of Plaintiffs’ other claims and of Defendants’ alternative request for summary judgment based upon releases that Plaintiffs’ previously executed.

Following the dismissal of the prior lawsuit, Plaintiffs commenced the present action based upon the same alleged facts and circumstances. Defendants responded by moving to dismiss based upon *res judicata* and the prohibition on splitting a cause of action. The Hennepin County District Court (the Honorable George McGunnigle presiding) granted Defendants’ motion to dismiss. Plaintiffs now appeal from the resulting judgment of dismissal.

Defendants remain confident of their position in the separate action, but concede the possibility that further proceedings in that action could render the issues in the present matter moot.

## STATEMENT OF FACTS

This matter represents the latest chapter in a series of events stemming from the meltdown of B-W, 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 responded by commencing a shareholder rights lawsuit against Jerry 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 Copeland Buhl and Lee Harren), 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 action 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 Copeland Buhl and Harren, based upon exactly the same factual allegations.

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

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<sup>1</sup> 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 B-W, a manufacturer of funeral vaults. (A.A. 10 and 12.)<sup>2</sup> Lee Harren, a certified public accountant with Copeland Buhl, provided advice with regard to the transaction. (A.A. 12.) 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. 12-13.)

### **B. Defendants Provide Accounting Services**

Following the completion of the acquisition of B-W, Copeland Buhl and Lee Harren provided accounting and tax services to the company from 1995-2003. (A.A. 13.) In that capacity, they investigated and cataloged extensive personal expenses for which Chris paid using company funds. (A.A. 6 and 8.)

### **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 B-W. (A.A. 6-10.) During these negotiations, Lee Harren facilitated communications between the embattled relatives. (A.A. 8-13.)

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<sup>2</sup> References to Appellants' Appendix shall be in the form "A.A. \_\_\_." References to Respondents' Appendix shall be in the form "R.A. \_\_\_."

#### **D. The Shareholder Lawsuit**

Rather than sell his interest in B-W to his father, Chris commenced a shareholder rights lawsuit against Jerry and B-W (“Shareholder Lawsuit”). (A.A. 20.) In connection with that lawsuit, Lee Harren signed an affidavit that stated that Chris had bilked B-W out of more than \$900,000 for personal expenses fraudulently portrayed as business expenses. (A.A. 23.) That affidavit also contained Lee Harren’s computation under the valuation formula in Jerry and Chris’ buy-sell agreement. (*Id.*)

#### **E. Chris and B-W Sue the CPAs**

After settling the Shareholder Lawsuit, Chris and B-W filed the lawsuit referred to in this brief as *Chris 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. (Shroyer Aff., Ex. B.)<sup>3</sup>

When Plaintiffs filed *Chris I*, however, 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. Later, Plaintiffs failed to file the second affidavit required by Minn. Stat. §544.42,

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<sup>3</sup> References to “Shroyer Aff.” refer to the March 15, 2005 Affidavit of Thomas J. Shroyer that is part of the District Court record in this matter.

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.

Based on Plaintiffs' failure to file these two affidavits, Judge Oleisky dismissed *Chris I* – in its entirety – on December 23, 2004. (Shroyer Aff., Ex. D.) Judgment was entered and Plaintiffs perfected an appeal of the Court's decision to the Minnesota Court of Appeals. In their Statement of the Case to the Court of Appeals, Plaintiffs certified that the “judgment or order to be reviewed dispose[d] of all claims by and against all parties.” (Shroyer Aff., Ex. H, p. 2.)

#### **F. The Instant Action**

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

## INTRODUCTION TO ARGUMENT

### A. 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).

### B. Minn. Stat. § 544.42

Because Plaintiffs' previous lawsuit against Defendants was dismissed pursuant to Minn. Stat. § 544.42, a brief discussion of that statute is in order.

The Minnesota Legislature enacted Section 544.42 in an attempt to eliminate frivolous lawsuits against professionals. *Meyer v. Dygert*, 156 F. Supp. 2d 1081, 1090 (D. Minn. 2001). The statute requires a plaintiff in a malpractice actions against a non-medical professional to serve two separate affidavits.

First, to show that he has engaged in a minimal amount of investigation of the merits of his claim before commencing suit, the malpractice plaintiff is required to serve with the complaint an affidavit, drafted by his attorney, certifying that the facts have been reviewed in consultation with an expert whose opinions would be admissible at trial and that “in the opinion of the expert, the defendant deviated from the applicable standard of care and by that action caused injury to the plaintiff.” Minn. Stat. § 544.42, subd. 3(a)(1). Second, within 180 days of

filing suit, the malpractice plaintiff must serve an affidavit, signed by his attorney, that identifies any experts the attorney expects to call at trial and provides the substance and basis of the experts' opinions. Minn. Stat. § 544.42, subd.4.

Failure to file the required affidavits renders a plaintiff's malpractice action "frivolous *per se*" and results in "mandatory dismissal of each cause of action with prejudice as to which expert testimony is necessary to establish a prima facie case." *House v. Kelbel*, 105 F. Supp. 2d 1045, 1055 (D. Minn. 2000) (internal citation omitted); Minn. Stat. § 544.42, subd. 6(c). Minnesota courts have not hesitated to enforce that stern penalty against parties who fail to comply with the expert affidavit requirements of Section 544.42 and its sister statute pertaining to claims against medical professionals. *See, e.g., Middle River-Snake River Watershed District v. Dennis Drewes, Inc.*, 692 N.W.2d 87, 90-91 (Minn. Ct. App. 2005) (dismissal pursuant to § 544.42); *Meyer*, 156 F. Supp. 2d at 1090-91 (same); *House*, 105 F. Supp. 2d at 1054 (same); *see also Anderson v. Rengachary*, 608 N.W.2d 843, 847-48 (Minn. 2000) (dismissal pursuant to Minn. Stat. § 145.682).<sup>4</sup>

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<sup>4</sup> Plaintiffs attempt to create an exception to § 544.42 for "claims grounded on a professional's intentional acts." In doing so, Plaintiffs overlook the fact that the statute applies to claims for "negligence or malpractice in rendering a professional service where expert testimony is to be used by a party to establish a prima facie case." Minn. Stat. § 544.42, subd. 2 (emphasis added). Plaintiffs' proposed exception improperly reads the underscored language right out of the statute. *See* Minn. Stat. 645.17 (2). By its terms, the statute governs any claim against a professional where expert testimony is needed to establish the claim, regardless of whether the claim is based on negligence or on some other theory. Plaintiffs' misleading citation of a New York case in which it was conceded that expert testimony was unnecessary shows the weakness of Plaintiffs' argument. *See Serhofer v. Groman & Wolf, P.C.*, 610 N.Y.S.2d 294, 295 (A.D. 1994).

## ARGUMENT

The District Court properly concluded that Plaintiffs cannot avoid the result of their previous lawsuit against Defendants by commencing a new lawsuit against Defendants. Minnesota law does not permit such repetitive litigation. Specifically, principles of *res judicata* and the prohibition on splitting a cause of action preclude Plaintiffs from pursuing their vexatious litigation strategy. If Plaintiffs want relief from the result in *Chris I*, they must seek it in *Chris I*.

### **I. THE DISMISSAL OF *CHRIS I* BARS *CHRIS II*.**

The doctrine of *res judicata* 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). That doctrine applies to bar Plaintiffs’ claims in the present action, because Plaintiffs’ claims in the present action were raised or could have been raised in Plaintiffs’ previous suit against Defendants (*i.e.*, in *Chris I*).

*Res judicata* (also known as claim preclusion) applies and 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). Since each of those elements is satisfied in the present case, the District Court properly concluded that the dismissal of *Chris I* bars Plaintiffs from pursuing the present lawsuit. Furthermore, the recent decision of this Court in *Chris I* does not mandate a different result.

A. *Chris I is the Same Cause of Action as Chris 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 *Chris II*. (Shroyer Aff., Ex. C.) Instead, they have simply grafted counts for misrepresentation and aiding and abetting onto the same factual allegations – contending that Defendants’ alleged failure to disclose the very same underlying breaches of professional duty amounted to misrepresentation and aiding and abetting.

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).

In this matter, *Chris I* and *Chris 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 on different substantive law and new legal theories does not preclude the operation of *res judicata*.” *Lane*, 899 F.2d at 744.

Plaintiffs try to make the unconvincing argument that their allegations against Defendants in *Chris II* are not in the nature of professional malpractice claims and that those allegations therefore (a) do not trigger the expert affidavit requirements of Minn. Stat. § 544.42 and (b) are not subject to dismissal on *res judicata* grounds by virtue of the dismissal of *Chris I*. The Court should reject that argument for several reasons.

First, as noted above, *res judicata* is not limited to matters that were actually litigated in the first lawsuit; it also applies “to every matter which might have been litigated therein.” *Hauser*, 263 N.W.2d at 805 (emphasis in original). Plaintiffs have not articulated any reason why the claims in this lawsuit could not have been made in the first lawsuit.<sup>5</sup>

Second, all of Plaintiffs’ claims are either directly based upon the idea that Lee Harren breached professional duties or relate back to that idea. This Court has previously held that where a plaintiff’s non-malpractice claims against a professional “relate back” to the claimant’s malpractice claim against the professional, all claims are properly dismissed if the plaintiff fails to file the expert affidavits required by Minn. Stat. § 544.42. *See Albert v. Binsfeld*, 2003 WL 139529 at \*2 (Minn. Ct. App.) (unpublished decision) (copy attached at R.A. 1). In *Albert*, this Court ruled that the lower court properly dismissed six other claims (including misrepresentation), along with the plaintiff’s malpractice claim, due to the plaintiff’s failure to file an affidavit of expert review. 2003 WL 139529 at \* 2. This Court reasoned that, because all of the claims challenged the defendant’s professional representation of his client, all of the claims related back to the malpractice claim and were subject to dismissal for failure to comply with Section 544.42. *Id.* at \* 2.

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<sup>5</sup> There is no reason why all of the claims in the present action could not have been made in *Chris I.* Indeed, in all but name, the claims in the present action were made in *Chris I.*

Third, Plaintiffs' argument ignores the fact that the central theme of the complaints in both *Chris I* and *Chris II* is that Lee Harren breached professional duties to Plaintiffs by siding with Jerry against Chris rather than remaining neutral. Expert testimony will plainly be required to sort out Defendants' competing obligations to Jerry and Plaintiffs. *Meyer*, 156 F. Supp. 2d at 1091 (explaining that claims related to conflicts of interest "involve[ ] information that is not within the common knowledge of the jury" and that expert testimony is therefore necessary with regard to such claims).

Fourth, the one allegation that Plaintiffs contend supports a claim for intentional fraud does nothing of the sort. Plaintiffs point in their brief to their simple allegation that Lee Harren "accepted money from Jerry under the table without the knowledge of Chris." Even if this allegation were true (which it is not), it does not state a claim for fraud or anything else. Fraud claims must be stated with particularity. Minn. R. Civ. P. 9.02. Plaintiffs' claim lacks particularity and, more importantly, does not reflect any damage to Plaintiffs. The fact that Jerry paid money to Lee Harren does not mean that any fraud occurred, as it is undisputed that Lee Harren provided services to Jerry and B-W.<sup>6</sup>

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<sup>6</sup> Reading between the lines, it seems as if Plaintiffs may be alleging that money paid to Lee Harren should have properly been paid to Copeland Buhl. No such personal payments were made. Even if they had been, however, Chris would not have any standing to complain. The claim would belong to Copeland Buhl.

**B. Chris I Involved the Same Parties as Chris II.**

The *res judicata* requirement that the same parties are involved in both matters is plainly satisfied in the present case. The parties to *Chris I* and *Chris II* are precisely the same. In fact, the captions of the two cases are absolutely identical. (*Compare* Shroyer Aff., Exs. A and B.)

**C. There was a Final Judgment on the Merits in Chris I.**

The District Court “summarily dismissed each cause of action with prejudice” in *Chris I*, by its order of December 23, 2004. (Shroyer Aff., Ex. D.) Plaintiffs themselves admitted the effect of the resulting judgment, by certifying in their Statement of the Case to the Minnesota Court of Appeals in *Chris I* that the judgment “dispose[d] of all claims by and against all parties.” (Shroyer Aff., Ex. H, p. 2.) Thus, there has been a final judgment on the merits in that case.

The Minnesota Court of Appeals has affirmed the judgment in *Chris I* with regard to Plaintiffs’ purported accounting malpractice claims and has remanded for further analysis and findings with regard to the remaining counts in *Chris I*. Only if the Minnesota Supreme Court grants review in *Chris I* and overturns the entire judgment will there no longer be a final judgment.

**D. Plaintiffs Had A Full and Fair Opportunity To Litigate Chris I.**

Plaintiffs had ample opportunity to comply with the statutory requirements applicable to their claims in *Chris 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 *Chris 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 *Chris II*. During the hearing on the motion to dismiss *Chris I*, Plaintiffs' counsel indicated to the Court that he had considered including a fraud count in *Chris 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.

(Shroyer Aff., Ex. I, p. 23, l. 17 to p. 18, l. 6; p. 28, ll. 19-25.)

It is because Plaintiffs failed to adhere to what the law requires that they did not get to present their claims at trial. They had a full and fair opportunity to

avoid dismissal by complying with Minn. Stat. § 544.42. They simply cannot avoid the operation of that statute by, in effect, seeking to amend the original complaint to assert new theories of recovery.

Moreover, as the District Court expressly noted, even if Plaintiffs had amended their complaint in *Chris I* to include their purported new claims for relief, those claims would have been dismissed along with all of Plaintiffs other claims because, just like all of Plaintiffs' other claims, those claims relate back to Plaintiffs' professional malpractice claim. (A.A. 6.) As explained earlier, when a plaintiff's non-malpractice claims against a professional "relate back" to the claimant's malpractice claim against the professional, all claims are properly dismissed if the plaintiff fails to file the expert affidavits required by Minn. Stat. § 544.42. *See Albert*, 2003 WL 139529 at \*2 (R.A. 2).

## II. PLAINTIFFS CANNOT SPLIT THEIR CAUSE OF ACTION.

As the Minnesota Supreme 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). "[A] plaintiff may not split his cause of action and bring successive suits involving the same set of factual circumstances." *Hauser*, 263 N.W.2d at 807 (Minn. 1978). This longstanding rule has been described as "elementary" and is widely accepted. *See Myhra v. Park*, 193 Minn. 290, 295, 258 N.W. 515, 518 (1935) (quoting *Vineseck v. Great Northern Ry. Co.*, 136 Minn. 96, 100, 161 N.W. 494, 496 (1917)); *see also Allied Mut. Ins. Co. v.*

*Heiken*, 675 N.W.2d 820, 828 (Iowa 2004); *Mars Inc. v. Nippon Conlux Kabushiki-Kaisha*, 58 F.3d 616, 619 (Fed. Cir. 1995); *Sodak Distrib Co. v. Wayne*, 93 N.W.2d 791, 793 (S.D. 1958); *Farmers Ins. Exch. v. Arlt*, 61 N.W.2d 429, 434-35 (N.D. 1953).

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. That dual rationale was also noted in *Hauser*, where the court explained that “[i]t is well established in Minnesota that a party ‘should not be twice vexed for the same cause, and that it is for the public good that there be an end to litigation.’” 263 N.W.2d at 807 (quoting *Shimp v. Sederstrom*, 305 Minn. 267, 270, 233 N.W.2d 292, 294 (1975)).

Although the prohibition on splitting a cause of action has much in common with the doctrine of *res judicata*, it is a separate concept and provides a separate basis for affirming the dismissal of the present action. That is, 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 affirm the District Court’s judgment of dismissal, since it is clear that Plaintiffs are impermissibly splitting their claims against Defendants.

*Chris I* and *Chris 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 *Chris I* complaint in preparing the *Chris II* complaint. (Shroyer Aff., Ex. C.) 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 *Chris 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 *Chris I*. The fact is, however, he simply neglected to do so.

It is entirely inappropriate for Plaintiffs to attempt to use a separate lawsuit to revive claims that they made or could have made in their previous lawsuit. The proper course for Plaintiffs to follow is to seek relief on appeal in the first lawsuit, not to split their cause of action by pursuing the present lawsuit.

### III. THE COURT SHOULD DISREGARD THE *BIELKE* CASE.

Without ever coming out and saying so, Plaintiffs incorrectly imply that their unorthodox second lawsuit strategy was tacitly approved by the Minnesota Court of Appeals in the *Bielke* case that they discuss at page 12 of their brief. See *Bielke v. Fairview-University Medical Center*, 2003 WL 22234892 (Minn. Ct. App.) (unpublished); *Bielke v. Sestero*, Court of Appeals Case No. A03-858 (Minn. Ct. App. 2004) (unpublished and non-precedential order opinion). This Court should not fall for Plaintiffs' deception.

Before any further discussion of *Bielke*, it should be noted that the "issue" as to which Plaintiffs purport to cite *Bielke* is not even in dispute and never was. That is, Defendants have never disputed that a reversal of the judgment in *Chris I* would eliminate *res judicata* as a legal basis for the dismissal of *Chris II* (although Defendants vigorously dispute that such a reversal would be sufficient to overcome their "splitting of a cause of action" basis for dismissal). Nevertheless, Plaintiffs list the continuing vitality of *res judicata* in the event of a reversal of the judgment in the initial case as one of the issues on appeal, so as to justify their discussion of *Bielke*.

Of course, there has been no reversal of the judgment in *Chris I*. On the contrary, the judgment in *Chris I* has been affirmed with regard to the accounting malpractice claim. Thus, *Bielke* can be readily distinguished on that basis. In *Bielke*, the judgment in the initial case was reversed.

*Bielke* can be readily distinguished on another ground as well. Unlike the present case, where Plaintiffs have sued the very same parties that they sued in *Chris I*, the plaintiff in *Bielke* did not sue the same defendants in the two separate lawsuits. In the first lawsuit, *Bielke* sued the hospital and related entities that had treated her. (A.A. 108.) In the second lawsuit, *Bielke* sued one of her doctors. (A.A. 105.) Thus, while *Bielke* involved issues of *res judicata*, it did not involve the blatant splitting of a cause of action against a defendant.

Finally, pursuant to Minn. R. Civ. App. P. 136.01, subd. 1 (b), Minn. Stat § 480A.08 and the express language of the second *Bielke* decision itself, neither of the unpublished decisions of the court of appeals in that case has any precedential value. Accordingly, it is inappropriate for Plaintiffs to try to use those decisions to try to justify the filing of the second lawsuit in the present case.

#### **IV. EQUITABLE CONCERNS OF JUDICIAL EFFICIENCY, FAIRNESS AND AVOIDANCE OF CONFUSION COMPEL DISMISSAL.**

While it is true that *res judicata* is an equitable doctrine and that its application turns on the particular facts and circumstances of each case, *R.W. v. T.F.*, 528 N.W.2d 869, 872 n.3 (Minn. 1995) (citing *Johnson v. Consol. Freightways, Inc.*, 420 N.W.2d 608, 613-14 (Minn. 1988)), equity compels a dismissal of this action. Plaintiffs failed to amend their complaint in *Chris I* to assert their misrepresentation claims and they have nobody to blame but themselves for not having done so. Nevertheless, Plaintiffs are not without recourse. They have already pursued an appeal of *Chris I* and are free to pursue

relief from the Minnesota Supreme Court in that action. In short, Plaintiffs still have the opportunity in *Chris I* to contend that none of their claims should be barred under Minn. Stat. § 544.42 or to contend that only some of their claims should be barred under that statute. If they are successful in that regard, they can then seek to amend their complaint in that action to assert the claims they have inappropriately tried to pursue in the present action.

Because Plaintiffs retain the opportunity to obtain relief in *Chris I*, there is nothing unfair about foreclosing the present lawsuit. On the contrary, it would be unfair to Defendants and the public to let Plaintiff pursue the present action. This attempt by Plaintiffs to simultaneously reinstate their case at the district court level while their prior case arising out of the identical facts is still pending is an abuse of the legal system and a source of vexation for Defendants. The *res judicata* doctrine exists “to avoid repetitious trials, to end litigation, to make a final determination of controversies and to avoid conflicting adjudications.” *Wittenberg v. United States*, 403 F. Supp. 744, 746 (D. Minn. 1969). Similarly, the prohibition on splitting a cause of action exists to protect defendants against vexatious litigation and to protect the public against the delay and expense of piecemeal litigation. *Boland*, 275 Minn. at 502-03, 148 N.W.2d at 148.

In order to respect the prior decisions of the District Court and this Court in *Chris I*, and to avoid the potential for an unjust and burdensome extension of a controversy that was deemed frivolous *per se* in *Chris I*, this Court should affirm the dismissal of 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 affirm the judgment of the District Court in all respects.

Respectfully submitted,

MOSS & BARNETT  
A Professional Association

Dated: December 5, 2005.

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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 5,309 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: December 5, 2005



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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).