

NO. A08-1730

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State of Minnesota  
**In Court of Appeals**

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Katherine M. Rucker,

*Appellant,*

v.

Steven B. Schmidt and  
Rider Bennett, LLP,

*Respondents.*

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**APPELLANT'S REPLY BRIEF**

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## ARGUMENT

### **I. RESPONDENTS ARE NOT IN PRIVACY WITH BOB RUCKER AND, THEREFORE, THE DISTRICT COURT ERRED IN CONCLUDING THAT RES JUDICATA BARS APPELLANT'S CLAIMS AGAINST RESPONDENTS.**

#### A. Introduction.

Respondents acknowledge that no Minnesota appellate court case has held that an attorney and client are in privity for purposes of res judicata. (Schmidt Br., p. 14). Thus, Respondents resort to cases from other jurisdictions that have held, in circumstances not present or analogous here, that attorneys can be in privity with their client for res judicata. (Schmidt Br., p. 15). However, these cases are not analogous to the facts in the present case, contain little or no detailed analysis on attorney-client privity and generally involve situations where the plaintiff lost in the prior court action.<sup>1</sup> Moreover, they do not trump the holdings of Minnesota appellate courts that joint tortfeasors are not in privity, that joint tortfeasors may be sued in separate actions, that a party may settle with one party and reserve claims against other joint tortfeasors, and that res judicata should not be applied where it works an injustice on the party against whom the doctrine is urged. See Miller v. Northwestern Nat'l Ins. Co., 354 N.W.2d 58, 62 (Minn. Ct. App. 1984) (privity); Kisch v. Skow, 305 Minn. 328, 332, 233 N.W.2d 732, 734 (1975) (sue jointfeors separately); Schneider v. Buckman, 433 N.W.2d 98, 101 (Minn. 1988) (same); Gronquist v. Olson, 242 Minn. 119, 126, 64 N.W.2d 159, 164 (1954) (settling

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<sup>1</sup> In essence, Respondents' cases are more about a plaintiff losing and getting a second chance to prevail – which is not the case here, since Appellant prevailed in the first fraud case (the “Rucker Fraud Case”) – than about the compulsory joinder of joint tortfeasors.

with one joint tortfeasor and preserving rights against the others); Frey v. Snelgrove, 269 N.W.2d 918, 921 (Minn.1978) (same); Johnson v. Consolidated Freightways, Inc., 420 N.W.2d 608, 613-14 (Minn. 1988) (res judicata not to be rigidly applied and not to work an injustice).

Perhaps more importantly, Respondents fail to mention, let alone analyze, how they fit into one of the three recognized categories of nonparties under Minnesota law who will be bound by a prior adjudication. See Margo-Kraft Distributors, Inc. v. Minneapolis Gas Co., 200 N.W.2d 45, 47-48 (Minn. 1972) (holding that the three categories are (1) a nonparty who controls the original action; (2) a nonparty whose interests are represented by a party to the original action; and (3) a successor-in-interest to a party). Respondents argue instead for an application of res judicata that depends solely on a rote determination of privity based upon the mere existence of an attorney-client relationship, without regard to the circumstances.

B. Respondents' Cases From Other Jurisdictions Are Not Controlling Or Instructive.

Schmidt's citation to Chara v. Lander, 45 P.3d 895 (N.M. Ct. App. 2002) is not instructive, even if it had taken the principles of the foregoing Minnesota cases into consideration. In Chara, the husband sued his ex-wife's divorce attorney but did not make any allegations of collusion, fraud, or joint wrongdoing involving the wife and her attorney. Id. Moreover, the gravamen of the suit involved an issue that arose and should have been dealt with in the underlying divorce proceeding – the alleged failure to timely turn over passports. Id. It did not involve the principle that an injured party can sue joint

tortfeasors in separate actions. Id. Therefore, this case is not analogous. In addition, the divorce court in Chara had the power to resolve the passport issue in the first case. In the Rucker Fraud Case, the court had no authority to award damages against Respondents.

In Fearing v. Lake St. Croix Villas Homeowner's Ass'n, 2006 WL 3231970 (D. Minn.), an unpublished case, a pro se plaintiff brought a federal suit alleging violations of the Fair Housing Act, naming as a defendant an attorney who represented an adverse party in a prior lawsuit where the court issued a declaratory judgment that no violation occurred. Id. The attorney had acted as an attorney but was accused, along with others, of retaliating against the pro se plaintiff. However, there was no allegation that he was somehow involved with his client in the alleged underlying "misconduct." Id. The existence of attorney-client privity there was merely stated without any rationale or explanation, in either the decision itself or in any of the authority cited. Id. Therefore, this case is not instructive.

Similarly, in Johnson v. U.S. Bank, N.A., 2005 WL 1421461 (D. Minn.), another unpublished case, a pro se plaintiff sued several parties and lost in district court. He then sued the same parties and their attorney, Dorsey & Whitney, not because Dorsey engaged in any conduct that gave rise to the substantive claims, but only because it represented an adverse party in the first lawsuit. Id. The case did not involve a joint tortfeasor issue, and there is again no analysis of the privity issue in the decision or the cases cited from other jurisdictions. Id. Moreover, the plaintiff lost in the first suit and was trying to obtain a different result the second time. Therefore, this case is not instructive.

The case of Simpson v. Chicago Pneumatic Tool Co., 693 N.W.2d 612 (N.D. 2005) involved a personal injury claim arising out of products liability. The jury found in favor of the defendant manufacturer. The plaintiff then commenced a second action against the defendant and its attorney who represented it in the first action. The attorney was not alleged to have been involved in the underlying tort. The second suit was based on an alleged spoliation-type issue that directly implicated the attorneys; however, the first court had considered this issue and specifically resolved it against the plaintiff. Therefore, Simpson is not comparable to the facts in the present case and is not instructive.

Merchants State Bank v. Light, 458 N.W.2d 792 (S.D. 1990) is also inapplicable to the circumstances in this case. There, the attorney wanted to relitigate an issue regarding an asset that had been used, in part, to pay his retainer. The court had ruled in a suit by the client that the asset was subject to the bank's security agreement. The attorney was in effect a successor-in-interest to his client's interest in the asset (proceeds from a sale) to the extent it had been used to pay his fees. The attorney was not allowed to relitigate that issue when the bank sued to recover the retainer. This case is not instructive, as it is so dissimilar.

In Jayel Corp. v. Cochran, 234 S.W.2d 278 (Ark. 2006), the plaintiff was sued in a previous case by a neighbor, whose attorney filed a lis pendens on the plaintiff's property. In response, the plaintiff filed a counterclaim against the neighbor, alleging that the lis pendens was improper. After the parties settled, the plaintiff sued the attorney who filed the lis pendens. However, the court specifically found that the attorney and

client were not joint tortfeasors. 234 S.W. 3d at 282. Therefore, this case is not helpful to Respondents.

In Verhagen v. Arroyo, 552 So.2d 1162 (Dist. Ct. App. Florida, 3<sup>rd</sup> Dist. 1989), the court held that where the plaintiff sued a party and lost, the plaintiff was barred by collateral estoppel from suing that party's attorney. However, there was no analysis or reasoned explanation for the application of privity. Nonetheless, Appellant in the present case prevailed in her fraud case against Bob Rucker, so there would be no basis to apply collateral estoppel against her, in any event.

The case of Plotner v. AT&T Corporation, 224 F.3d 1161 (10<sup>th</sup> Cir. 2000) involved a plaintiff who filed bankruptcy and objected to the sale of her property. When that action was determined adversely to her, she filed a federal court action against various parties and their attorney arising out of the sale, alleging fraud, negligence, and breach of fiduciary duty. The federal court found that the plaintiff failed to allege any affirmative misrepresentations or a duty to disclose, any harm that occurred to the bankruptcy estate, or that the plaintiff could not have obtained an adequate remedy in the bankruptcy case. That ruling was affirmed on appeal. The plaintiff then filed a third case against the same defendants, alleging fraud, tortious interference, and breach of fiduciary duty, all arising from the sale of her property. The court held that res judicata barred the plaintiff's claims against all parties, including the attorneys. However, the plaintiff lost in the first case and was trying to obtain a different result in a subsequent suit. Moreover, the court found privity to exist because the attorneys were named "by virtue of their activities as representatives of [their clients]," 224 F.3d at 1169, not because the attorneys

were involved as joint tortfeasors in the underlying transaction.

In re El San Juan Hotel Corp., 841 F.2d 6 (1<sup>st</sup> Cir. 1988) did not involve a finding of privity based on the attorney-client relationship, as Respondents suggest. Rather, the court analyzed cases from other jurisdictions where one conspirator was not joined in a prior case against other conspirators. Id. at 10. The court held that because the attorney was “a co-perpetrator,” he shared a significant relationship with his client who was sued in the first action and, therefore, should have been named as a defendant in that first action. Id. at 11. However, this case is not instructive here in light of the Minnesota Supreme Court’s holding that a plaintiff may sue joint tortfeasors in separate actions. Kisch v. Skow, 305 Minn. 328, 332, 233 N.W.2d 732, 734 (1975); Schneider v. Buckman, 433 N.W.2d 98, 101 (Minn. 1988).

Lastly, in Geringer v. Union Electric Co., 731 S.W.2d 859 (Mo. Ct. App. 1987), the plaintiff, who was sued by the defendant and defaulted in a prior action, commenced a second action against the defendant alleging malicious prosecution. The plaintiff sought to amend his complaint to add the attorneys who represented the defendant in the first action, but that amendment was denied. The court also dismissed on summary judgment the claims against the defendant. The plaintiff then commenced a third action against the defendant and the attorneys, alleging claims arising from the same circumstances that formed the basis of the first action. The court granted the attorneys’ motion to dismiss on the basis of collateral estoppel, not res judicata, because the plaintiff’s claims against the defendant were previously dismissed and the plaintiff was seeking to relitigate an issue on which he lost in the first case and obtain a different

result. Appellant is not trying to do that here, since she prevailed in the Rucker Fraud Case.

In summary, the foregoing foreign cases cited by Respondent Schmidt do not support the erroneous decision of the District Court. They do not analyze Minnesota law – or in most cases, any law – on the issue of privity and a plaintiff’s right to sue joint tortfeasors in separate cases.<sup>2</sup> Respondents’ decisions are readily distinguishable either because the attorney was not a joint tortfeasor, the plaintiff lost in the underlying case against the attorney’s client and was trying to relitigate to obtain a different result, or they apply res judicata based on privity without rationale or explanation.

In addition, rigid application of privity merely because of the existence of an attorney-client relationship would run contrary to the Minnesota Supreme Court’s dictate that the focus should instead be on whether the application of res judicata would work an injustice on the party against whom the doctrine is urged. Johnson v. Consolidated Freightways, Inc., 420 N.W.2d 608, 613-14 (Minn. 1988). In this case, the rigid

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<sup>2</sup> Indeed, courts in other jurisdictions have held that privity does not exist between an attorney and his or her client. See Ammon v. McCloskey, 655 A.2d 549, 554 (Pa. 1995) (holding no privity to exist between an attorney and his client for purposes of res judicata because the attorney owed complete allegiance to the client and represented the client’s interests, not the attorney’s own interests); Marshall v. Fenstermacher, 388 F.Supp.2d 536, 563-64 (E.D. Penn. 2005) (holding that attorneys who conspired with their client to defraud the plaintiff were not considered to be in privity); Boyles v. Smith, 759 P.2d 518 (Alaska 1988) (holding that attorneys were not in privity with client for purposes of collateral estoppel); Branning v. Morgan Guaranty Trust Co. of New York, 739 F.Supp. 1056, 1063-64 (D. South Carolina 1990) (citing Roberts v. Porter, Davis, Saunders & Churchill, 389 S.E.2d 361 (Ga. 1989)); Continental Savings Assoc. v. Collins, 814 S.W.2d 829, 832 (Tex. Ct. App. 1991) (holding that attorney not in privity with client for purposes of res judicata); In the Matter of Curry, 113 B.R. 546, 551 (D. Neb. 1990) (holding that attorneys were not in such close relationship bordering on near identity so as to render them in privity thereby invoking the doctrine of res judicata).

application employed by the District Court leaves Appellant only partially compensated for her damages and allows a party – an attorney, no less – who knowingly participated in a fraud to escape liability (including for treble damages mandated by statute) simply because he was not joined as a defendant in the first fraud lawsuit. This is especially repugnant since our courts allow joint tortfeasors to be sued separately.

C. Respondents Fail to Establish Privity With Bob Rucker

Finally, the relationship between Respondents and Bob Rucker does not fit into any of the categories of parties-in-privity recognized in Minnesota law for purposes of res judicata. See Margo-Kraft Distributors, Inc. v. Minneapolis Gas Co., 200 N.W.2d 45, 47-48 (Minn. 1972) (holding that the three categories are (1) a nonparty who controls the original action; (2) a nonparty whose interests are represented by a party to the original action; and (3) a successor-in-interest to a party). Respondents did not control the underlying litigation, and their interests were not represented by their client in the underlying litigation.<sup>3</sup>

Accordingly, this Court should reverse the District Court's ruling granting summary judgment in favor of Respondents.

**II. ATTORNEYS ARE NOT IMMUNE FROM CLAIMS BY THE OPPOSING PARTY WHERE THE ATTORNEY COMMITS FRAUD, CONSPIRES TO COMMIT FRAUD, OR AIDS AND ABETS FRAUD.**

Rider Bennett argues that because Schmidt was the opposing attorney in the underlying divorce case, he is immune from Appellant's claim for fraud. (Rider Br., pp.

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<sup>3</sup> The third category is not relevant to this appeal, since it is undisputed that Respondents were not successors-in-interest to their client.

3-8). This is not the law in Minnesota. To the contrary, Minnesota has long recognized that an attorney who actively participates in his or her client's fraud, or who colludes or consents to the fraud, may be liable. See e.g., Minn. Stat. §§ 481.07 and 481.071 (an attorney who deceives a court or a party, or who consents to any deceit or collusion, shall pay treble damages to the injured party); Witzman v. Lehrman, Lehrman & Flom, 601 N.W.2d 179, 186-87 (Minn. 1999) (recognizing that professionals, including attorneys, can be held liable to non-clients for fraud); L & H Airco, Inc. v. Rapistan Corp., 446 N.W.2d 372, 380 (Minn. 1989) ("An attorney who makes affirmative misrepresentations to an adversary or conspires with his or her client or takes other active steps to conceal the client's fraud from the adversary may be liable for fraud."); McDonald v. Stewart, 289 Minn. 35, 40, 182 N.W.2d 437, 440 (1970) (holding that an attorney can be liable for knowingly participating with client in perpetrating fraud); Hoppe v. Klapperich, 224 Minn. 224, 241, 28 N.W.2d 780, 791 (1947) (holding that an attorney forfeits his immunity and may be liable by becoming an instrumentality of his or her client's perpetration of fraud).

In fact, Rider Bennett acknowledges that an attorney can be held liable for fraud where he or she 'makes affirmative misrepresentations to an adversary, or conspires with his or her client, or takes other active steps to conceal the client's fraud from the adversary.'" (Rider Br., p. 6). However, Rider Bennett argues that the fraud exception to attorney immunity only applies where the attorney was acting "for his own 'personal gain.'" (Rider Br., p. 7). This ignores the holding by the Minnesota Supreme Court in McDonald that an attorney is not immune if he "is dominated by his own personal

interest or knowingly participates with his client in the perpetration of a fraudulent or unlawful act.” 289 Minn. at 40, 182 N.W.2d at 440 (citing Hoppe, 224 Minn. 224, 28 N.W.2d 780) (emphasis added). The Court’s phrasing in the alternative defeats Rider Bennett’s argument that both events – personal gain and knowing participation in fraud – must occur to impose liability. Thus, as a matter of law, an attorney can be held liable for knowingly participating in the client’s fraud irrespective of whether the attorney is deriving a personal gain.

Accordingly, Respondents are not immune from liability for knowingly and actively participating with Bob Rucker in the perpetration of fraud in the Rucker divorce.

### **III. THE ELECTION OF REMEDIES DOCTRINE DOES NOT BAR APPELLANT’S CLAIM FOR DAMAGES AGAINST RESPONDENTS.**

Even if the election of remedies doctrine was somehow relevant to this case, it still would not apply because the circumstances that call for its application are not present. In their brief, through all the cases they cite, Respondents are trying to make this case conform to the fact that election of remedies is a doctrine “frequently seen in situations where the claimant is faced with the choice of affirming the contract or, if the remedy of rescission exists, disaffirming the contract.” Popp Telecom v. American Sharecom, Inc., 210 F.3d 928, 934 (8th Cir. 2000) (applying Minnesota law). The purpose of the doctrine is to prevent a person from collecting twice for a single wrong. Id. “Unfortunately, the breadth implied by its name can cause parties to attempt to apply the doctrine in situations where it does not fit.” Id. As discussed below, the remedy of rescission did not exist for Appellant, so Respondents’ election of remedies argument “does not fit” the

facts of this case and it fails at the threshold level.

Respondents ignore a critical distinguishing fact – that the fraud at issue occurred in the context of a divorce (and that the settlement occurred in the context of an appeal). Consequently, Respondents mistakenly portray Appellant’s earlier case against her ex-husband as a run-of-the-mill contract claim where she was faced with a choice between disaffirming and rescinding the Marital Termination Agreement (“MTA”) or affirming it and suing for damages. However, Appellant had no such choice. Her procedural options were limited by laws that are uniquely applicable to marriage dissolution proceedings, the most significant of which is that there was no contract that could be rescinded.

Rescission of an MTA is a legal impossibility once a judgment and decree is entered. See Shirk v. Shirk, 561 N.W.2d 519, 522 (Minn. 1997) (holding that once a judgment and decree of divorce is entered based on a marital termination agreement, “the stipulation is merged into the judgment and decree, and the stipulation cannot thereafter be attacked by a party seeking relief from the judgment and decree. *The sole relief from the judgment and decree lies in meeting the requirements of Minn. Stat. § 518.145.*”) (emphasis added). Appellant’s options against her ex-husband were further limited by the fact that the divorce judgment was more than one year old, so she had to bring an independent action for relief from the judgment, as permitted by Minn. Stat. § 518.145, subd. 2.

In other words, Appellant never had an “election” of remedies. Although she was in truth seeking damages from her ex-husband, she was forced to pursue her remedy against him by obtaining monetary relief in the form of a modified property division. This technical distinction should not and does not shield Respondents from liability for

colluding with their client to defraud Appellant. Since Shirk requires all defrauded spouses to seek relief from a divorce judgment under § 518.145, Respondents' theory would mean that any attorney who conspires to defraud the opposing party in a divorce automatically escapes liability by arguing that an election of remedies occurred. Such an upside-down result would directly contradict long-standing Minnesota law that attorneys are liable for conspiring with their clients to commit fraud. See Minn. Stat. §§ 481.07 and 481.071; Witzman, 601 N.W.2d 179; L & H Airco, 446 N.W.2d 372; McDonald, 182 N.W.2d 437; Hoppe, 28 N.W.2d 780.

The doctrine of election of remedies is also inapplicable to this case because it requires a party to adopt one of two or more inconsistent remedies which the law affords the same set of facts. Vesta State Bank v. Independent State Bank of Minnesota, 518 N.W.2d 850, 855 (Minn. 1994). A second claim is barred if a party has pursued one of the inconsistent remedies "to a determinative conclusion." Id. Thus, for the doctrine to apply, a remedy must be (1) inconsistent and (2) pursued to a determinative conclusion. Neither of these requirements is met in the present case.

Appellant's pursuit of redress for fraud from her ex-husband and his attorneys in separate actions is not the impermissible pursuit of inconsistent remedies. It is instead the permissible pursuit of joint tortfeasors in successive lawsuits, as stated earlier, and the remedies are consistent. In Vesta, the Court held that it was logically and legally inconsistent to recover on a guaranty in one action and then seek to rescind that guaranty in a subsequent action. Here, however, there is nothing comparably inconsistent in Appellant's decision to sue Respondents separately from her ex-husband.

Likewise, this case is conceptually distinct from the authority cited by Respondents because of the fact that Appellant's choice of remedies against her ex-husband was constricted, precluding an election within the meaning of the election of remedies doctrine. In addition, she has a separate, distinct claim against these Respondents for treble damages, a remedy that was unavailable from her ex-husband but which she is authorized by statute to recover "in a civil action" against attorneys who knowingly assist their client in the perpetration of a fraud. Minn. Stat. §§ 481.07, 481.071.

Finally, Appellant did not pursue her remedy against her ex-husband to a determinative conclusion for purposes of the election of remedies doctrine. She settled her claim for substantially less than the amount of her damages in exchange for his dismissal of an appeal and a reservation of her claims against the attorneys. In due course, if Appellant prevails at trial, Respondents will receive an offset for the settlement payment, so there is no possibility of double recovery, the avoidance of which is the very reason for the election of remedies doctrine. Viewing the satisfaction of Appellant's judgment against her ex-husband as a "definitive conclusion" which discharged Respondents would contradict the facts and the law and represent the "resort to artificial reasoning and mere technicalities" that the Supreme Court cautioned courts to avoid in Gronquist v. Olson, 242 Minn. 119, 126, 64 N.W.2d 159, 164 (1954).

Accordingly, the election of remedies doctrine does not bar Appellant's claim for damages against Respondents.

**IV. APPELLANT'S FILING OF A SATISFACTION OF HER JUDGMENT AGAINST BOB RUCKER DOES NOT BAR HER CLAIMS AGAINST RESPONDENTS.**

Rider Bennett fails to cite a single applicable case for the proposition that by settling and satisfying her judgment against Bob Rucker, Appellant is barred from recovering damages against Respondents in this case. More importantly, Rider Bennett ignores a Minnesota Supreme Court decision directly on point which rejected the same argument.

In Wall v. Fairview Hospital and Healthcare Services, the plaintiffs brought an action against their psychiatrist for abuse and against their nurse for negligence for their failure to report the abuse. 584 N.W.2d 395, 398 (Minn. 1998). After a trial, the district court entered judgment against the psychiatrist for approximately \$5 million but granted a directed verdict on the claims against the nurse. Id. at 402. While the case against the nurse was on appeal, the plaintiffs settled with the psychiatrist's estate and executed a satisfaction of judgment of those claims. Id. at 403. The settlement agreement clearly stated that the plaintiffs did not release the nurse and expressly reserved all claims against the nurse. Id. Nonetheless, like Respondents here, the nurse argued that the satisfaction of the judgment against the psychiatrist satisfied all claims against her, too. Id.

The Minnesota Supreme Court rejected the nurse's argument and held that the execution of a satisfaction against one joint tortfeasor does not extinguish claims against other joint tortfeasors. Id. (citing Gronquist v. Olson, 242 Minn. 119, 128-29, 64 N.W.2d 159, 166 (1954)). The Court also held that the "intent of the parties to a release must be considered in determining whether the release discharges all of the claims against all of

the defendants.” Id. (citing Couillard v. Charles T. Miller Hosp., Inc., 253 Minn. 418, 424, 92 N.W.2d 96, 100 (1958)). Since the satisfaction of judgment applied only to the psychiatrist, and since the parties intended to reserve all claims against the nurse, the plaintiffs’ claims against the nurse were not barred. Id. “To hold otherwise,” said the Court, “would also contradict our strong public policy of encouraging settlement.” Id. (citing Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197, 205 (Minn. 1986); Johnson v. St. Paul Ins. Co., 305 N.W.2d 571, 573 (Minn. 1981)).

In the present case, Appellant’s satisfaction of judgment pertained only to Bob Rucker, not to Respondents. (R-110, Dressen Aff. dated June 25, 2008, Ex. 14). Similarly, the Ruckers’ settlement agreement, which Rider Bennett negotiated on behalf of Bob Rucker, expressly reserved all claims against Schmidt and Rider Bennett, and it expressly acknowledged that the payment from Bob Rucker to Appellant would only partially satisfy Plaintiff’s damages. (R-102-03, Dressen Aff. dated June 25, 2008, Ex. 13, pp. 2-3, ¶¶ 1(B) and 1(C)). Therefore, under Wall, Appellant’s satisfaction of the judgment against Bob Rucker does not bar her claims against Respondents.

In addition, none of the cases cited by Rider Bennett are on point, especially not in the face of Wall. The first case, Herubin v. Finn, 603 N.W.2d 133, 136-38 (Minn. Ct. App. 1999), only held that where the judgment against one of two jointly and severally liable defendants was satisfied, the defendant who paid the judgment in full could not use the summary procedure under Minn. Stat. § 548.19 to obtain contribution from his co-defendant, but instead had to bring a separate contribution action. The next two cases cited, Dorso Trailer Sales, Inc. v. American Body and Trailer, Inc., 482 N.W.2d 771, 773

(Minn. 1992) and Hanson v. Woolston, 701 N.W.2d 257, 263 (Minn. Ct. App. 2005), only recognized the general rule that satisfaction of a judgment precludes a party from vacating it because there is no longer anything to vacate. The fourth case cited, Vesta State Bank v. Independent State Bank of Minnesota, 518 N.W.2d 850 (Minn. 1994), involved a settlement with a personal guarantor in a prior lawsuit, and the Minnesota Supreme Court held that the settlement was not a bar to a second suit against other parties where the remedies sought were not inconsistent and there was no risk of double recovery. Id. at 855-56. Neither Herubin, Dorso, Hanson, nor Vesta speaks to the issue in this case of whether a satisfaction of a judgment against one party waives or otherwise bars specifically-preserved and uncompensated claims against separate parties, and Wall conclusively holds it does not.

Accordingly, Appellant's satisfaction of her judgment against Bob Rucker does not bar her claims against Respondents.

**V. APPELLANT'S DECISION TO SETTLE WITH BOB RUCKER FOR LESS THAN THE FULL AMOUNT OF HER JUDGMENT AGAINST HIM DOES NOT BAR HER CLAIMS AGAINST RESPONDENTS.**

Rider Bennett argues that Appellant's decision to settle with Bob Rucker for less than the amount of the judgment precludes her from seeking damages from Respondents in this case. (Rider Br., pp. 13-15). Rider Bennett relies on Dairyland Ins. Co. v. Starkey, 535 N.W.2d 363 (Minn. 1995), but that case is easily distinguishable and does not bar the present action against Respondents. As with much of the law involved in this appeal, the rationale of Starkey was to prevent the plaintiff from obtaining an "impermissible double recovery." Id. at 364. The plaintiff's damages at trial were found by the jury to be

approximately \$50,000; the defendant was 60% at fault and her uninsured father-in-law was 40% at fault. Id. at 363-64. The plaintiff settled with the defendant for \$48,400 and then sought an additional \$20,360 (40% of the jury award) from her underinsured motorist (UM) policy. The Minnesota Supreme Court held that the purpose of UM coverage was to “relieve the economic distress of *uncompensated* victims of automobile accidents.” Id. at 365 (emphasis in original; citations omitted). The no-fault act was designed to prevent overcompensation and provide offsets to avoid duplicative recovery. Id. (citations omitted). Since the plaintiff was seeking an amount exceeding 100% of the jury award, that “amounted to a double recovery – a result not intended by Minnesota’s UM scheme.” Id.

In the present case, Appellant is not seeking a double recovery of her damages. She is seeking only that portion of her damages which were not paid to her in the settlement of her fraud case against Bob Rucker (plus the statutory penalty against attorneys). Thus, contrary to Rider Bennett’s argument, the legal principles underpinning the Starkey decision are not applicable to the present case, nor do they bar Appellant’s claim for damages.

Accordingly, Appellant’s decision to settle with Bob Rucker for less than the full amount of her judgment against him does not bar her claims against Respondents.

**CONCLUSION**

For the reasons set forth above, Plaintiff respectfully requests that the Court reverse the District Court's ruling granting summary judgment in favor of Respondents.

**SKOLNICK & SHIFF, P.A.**

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STATE OF MINNESOTA  
IN COURT OF APPEALS

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Katherine M. Rucker,

Appellant,

vs.

**CERTIFICATE OF  
BRIEF LENGTH**

Steven B. Schmidt and Rider  
Bennett, LLP,

Respondents.

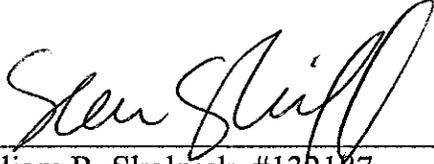
**Appellate Court  
Case No.: A08-1730**

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I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01. subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 4,824 words, and the font size is 13 point. This brief was prepared using Microsoft Word 2003 software.

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