

NO. A08-1730

State of Minnesota
In Court of Appeals

Katherine M. Rucker,

Appellant,

v.

Steven B. Schmidt and
Rider Bennett, LLP,

Respondents.

RESPONDENT STEVEN B. SCHMIDT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii-iv
STATEMENT OF THE ISSUE	1
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS.....	3
A. The Parties.....	3
B. Schmidt Represents Robert Rucker in his Divorce from Katherine Rucker	3
C. Valuation of The Tile Shop.....	4
D. Katherine Rucker Sues Her Former Husband, Robert Rucker, for Fraud	7
E. Katherine Rucker Sues Schmidt and Rider Bennett for Fraud	10
ARGUMENT	12
A. Standard of Review	12
B. Appellant’s Claims Are Barred By <i>Res Judicata</i>	13
1. Respondents Were in Privity with Robert Rucker for Purposes of <i>Res Judicata</i>	14
C. Contrary to Appellant’s Conclusory Arguments, Joint Tortfeasors Can Be In Privity With One Another Based Upon Their Relationship	18
CONCLUSION.....	21

TABLE OF AUTHORITIES

Cases

<i>Ammon v. McCloskey</i> , 655 A.2d 549 (Pa. 1995)	17
<i>Balasuriya v. Bemel</i> , 617 N.W.2d 596 (Minn. App. 2000)	14
<i>Bob Useldinger & Sons, Inc. v. Hangsleben</i> , 505 N.W.2d 323 (Minn. 1993).....	12
<i>Chaara v. Lander</i> , 45 P.3d 895 (N.M. App. 2002).....	1, 15, 17
<i>Composite Modules, Inc. v. Thalheimer Bros., Inc.</i> , 526 F.Supp.2d 160 (D. Mass. 2007).....	19
<i>DLH, Inc. v. Russ</i> , 566 N.W.2d 60 (Minn. 1997)	12
<i>Dollar Travel Agency, Inc. v. Northwest Airlines, Inc.</i> , 354 N.W.2d 880 (Minn. App. 1984)	13
<i>Downtown St. Paul Partners v. Holiday Inns, Inc.</i> , No. C2-92-1723, 1993 WL 140843 (Minn. App. May 4, 1993)	16
<i>Fearing v. Lake St. Croix Villas Homeowner's Ass'n</i> , 2006 WL 3231970 (D. Minn. Nov. 8, 2006).....	1, 15
<i>Frey v. Snelgrove</i> , 269 N.W.2d 918 (Minn. 1978)	9
<i>Geringer v. Union Elec. Co.</i> , 731 S.W.2d 859 (Mo. App. 1987)	15
<i>Hauschildt v. Beckingham</i> , 686 N.W.2d 829 (Minn. 2004)	1, 13
<i>Hentschel v. Smith</i> , 278 Minn. 86, 153 N.W.2d 199 (1967).....	20
<i>In re El San Juan Hotel Corp.</i> , 841 F.2d 6 (1st Cir. 1988).....	15
<i>Jayel Corp. v. Cochran</i> , 234 S.W.3d 278 (Ark. 2006)	15
<i>Johnson v. U.S. Bank, N.A.</i> , 2005 WL 1421461 (D. Minn. June 17, 2005)	1, 15
<i>Kochlin v. Norwest Mortgage, Inc.</i> , No. C3-01-136, 2001 WL 856206 (Minn. App. July 31, 2001).....	16

<i>Lawlor v. Nat'l Screen Servs. Corp.</i> , 349 U.S.322, 75 S.Ct. 865 (1955)	19
<i>Manicki v. Zeilmann</i> , 443 F.3d 922 (7th Cir. 2006)	19
<i>Margo-Kraft Distributors, Inc. v. Minneapolis Gas Co.</i> , 294 Minn. 274, 200 N.W.2d 45 (1972).....	14
<i>Merchants State Bank v. Light</i> , 458 N.W.2d 792 (S.D. 1990).....	15
<i>Miller v. Nw. Nat. Ins. Co.</i> , 354 N.W.2d 58 (Minn. App. 1984)	19, 20, 21
<i>Muhammad v. Oliver</i> , 547 F.3d 874 (7th Cir. 2008)	16
<i>N. Assur. Co. of Am. V. Square D. Co.</i> , 201 F.3d 84 (2d Cir. 2000) ...	19
<i>Nelson v. Butler</i> , 929 F.Supp. 1252 (D. Minn. 1996)	18
<i>Plotner v. AT & T Corp.</i> , 224 F.3d 1161 (10th Cir. 2000)	15
<i>Porta-Mix Concrete, Inc. v. First Ins. E. Grand Forks</i> , 512 N.W.2d 119 (Minn. App. 1994)	13
<i>Reads Landing Campers Ass'n v. Township of Pepin</i> , 546 N.W.2d 10 (Minn. 1996)	12
<i>Rydberg Land, Inc. v. Pine City Bank</i> , No. C7-88-1373, 1989 WL 1551 (Minn. App. Jan 17, 1989)	16
<i>Simpson v. Chicago Pneumatic Tool Co.</i> , 693 N.W.2d 612 (N.D. 2005)	15, 17
<i>SMA Services, Inc v. Weaver</i> , 632 N.W.2d 770 (Minn. App. 2001)	14
<i>Thiele v. Stitch</i> , 425 N.W.2d 580 (Minn. 1988).....	12
<i>Verhagen v. Arroyo</i> , 552 So.2d 1162 (Fla. Dist. Ct. App. 1989).....	15
<i>Wilson v. Commissioner of Revenue</i> , 619 N.W.2d 194 (Minn. 2000).....	13

Statutes

Minn. Stat. § 548.14.....	8
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Other Authorities

47 A. Jur.2d Judgments § 593 14

Restatement of Judgments § 83, Comment a..... 14

Rules

Minn. R. Civ. P. 56.05 12

STATEMENT OF THE ISSUE

Whether an attorney and his client are in privity for purposes of res judicata.

Resolution by the Trial Court:

The only element of the res judicata doctrine contested by Appellant before the trial court was whether the attorney-client relationship was sufficient to constitute privity. After considering the undisputed facts and cases around the nation that have decided this legal issue in favor of Respondents, the trial court granted summary judgment to Respondents concluding that they were in privity with their client for purposes of res judicata.

Controlling Authorities:

- (1) *Hauschildt v. Beckingham*, 686 N.W.2d 829 (Minn. 2004);
- (2) *Fearing v. Lake St. Croix Villas Homeowner's Ass'n*, 2006 WL 3231970 (D. Minn. Nov. 8, 2006);
- (3) *Johnson v. U.S. Bank, N.A.*, 2005 WL 1421461 (D. Minn. June 17, 2005); and
- (4) *Chaara v. Lander*, 45 P.3d 895 (N.M. App. 2002).

STATEMENT OF THE CASE

This is the second district court case commenced by Appellant arising out of alleged fraud in her marital dissolution. Almost two years after voluntarily entering into a Marital Termination Agreement with the advice and assistance of highly capable legal counsel, Appellant commenced a fraud action against her former husband, Robert Rucker, in August 2003. In that action, Appellant obtained full and complete equitable relief and judgment was entered in her favor in the full amount of her claimed damages on February 9, 2006. Appellant then voluntarily elected to compromise the full amount of her judgment by a settlement and thereafter executed a satisfaction of the entire judgment reflecting her fraud damages in order to avoid the risks associated with Robert

Rucker's appeal. Ultimately, Appellant ended up receiving millions of dollars from her former husband.

After receiving a judgment in the amount of her full damages against her former husband, Appellant filed this second lawsuit against her former husband's divorce lawyer, Steven Schmidt, and his former law firm, Rider Bennett, for the same alleged fraud for which she had previously sued. In this action, Appellant admits that her claims are based upon the same set of operative facts as those alleged against her former husband in the prior litigation; that she received a final judgment on the merits of her fraud claims against her former husband; that she had a full and fair opportunity to litigate her fraud claims against her former husband; that she did not rely upon Schmidt or Rider Bennett for any purpose in either her divorce action or the fraud action against Robert Rucker; and, that she could have sued Respondents in the fraud lawsuit against her former husband, but chose not to.

Based upon the undisputed facts and admissions of Appellant, on June 25, 2008, Respondents filed a motion for summary judgment supported by several independent legal grounds seeking judgment in Respondents' favor. By Order dated August 22, 2008, The Honorable Denise D. Reilly granted summary judgment to Respondents solely on the basis of just one of the grounds argued—application of the res judicata doctrine. On or about October 6, 2008, Appellant filed a Notice of Appeal of the trial court's Order granting Respondents' motion for summary judgment. For the reasons that follow, the trial court should be affirmed.

STATEMENT OF THE FACTS

A. The Parties.

Appellant Katherine M. Rucker is the ex-wife of Robert Rucker and is a Wisconsin resident. (Appellant's Appendix (hereinafter "A.") at 1, ¶¶ 1, 4.) Respondent Steven B. Schmidt is a Minnesota citizen and an attorney licensed to practice law in Minnesota. (Respondent's Appendix (hereinafter "R-") at 11; Schmidt Dep. at 8.) He was a second lieutenant in the United States Army and served in Vietnam. (R-11; Schmidt Dep. at 7-8.) After being honorably discharged, Schmidt went to law school and has practiced law in Minnesota since 1974. (R-11; Schmidt Dep. at 8.) Since the late 1980s, Schmidt's legal practice predominantly focused on family law. (R-12; Schmidt Dep at 10.) Since 2004, Schmidt has been self-employed at Steven B. Schmidt Mediation Services, LLC as a family law mediator. (R-11; Schmidt Dep at 6.) Respondent Rider Bennett, LLP, is a Minnesota limited liability partnership that is no longer operational. (See R-13; Schmidt Dep. at 13.) Schmidt was a partner at Rider Bennett during his representation of Robert Rucker in the Rucker divorce proceeding. (*Id.*)

B. Schmidt Represents Robert Rucker in his Divorce from Katherine Rucker.

This case arises out of the representation of Robert Rucker by former Rider Bennett attorney Steven Schmidt in Mr. Rucker's divorce action from Katherine Rucker. (A.2 at ¶¶ 5, 6.) Not surprisingly, there were various issues in dispute between the parties in the divorce proceeding, including but not limited to child custody, child support, and the division of marital assets. Robert Rucker was, at the time, and continues to be, a

small business owner. His ownership interest in his small business, The Tile Shop, a company he founded in 1984, was one of the significant assets at issue in the divorce.

In an effort to dissolve their marriage upon amicable terms, the parties, through their counsel, agreed to engage a neutral business appraiser to value Robert Rucker's 50% interest in The Tile Shop. Mr. Howard Kaminsky ("Kaminsky") agreed to serve as a neutral appraiser, whose role was to represent both parties by providing a fair appraisal of the marital asset. (R-40, 117, 131; Kaminsky Dep. at 13-14.) In addition to the neutral appraiser retained by both Mr. and Mrs. Rucker, Katherine Rucker also retained another financial advisor and appraiser, Dax Stoner, to exclusively represent her financial interests in the divorce proceeding. (R-31, 62-66; K. Rucker Dep. at 31-32.)

C. Valuation of The Tile Shop.

Robert Rucker and others associated with The Tile Shop, including The Tile Shop's controller James Thompson ("Thompson"), gathered and provided certain financial information to Kaminsky in the divorce proceeding. (R-20; R. Rucker Dep. at 39-40.) Schmidt's participation in the valuation of The Tile Shop involved advising Robert Rucker and the employees of The Tile Shop about the valuation process and instructing them to provide Kaminsky the documents he requested. (R-2 at ¶ 6.) Schmidt specifically instructed The Tile Shop employees that they should gather and produce any information that Kaminsky requested. Kaminsky did not request that The Tile Shop provide draft financial records or projections. (*Id.*)

As part of the appraisal process, Robert Rucker and Schmidt provided Kaminsky with complete access to The Tile Shop's auditors and accountants, RSM McGladrey, The

Tile Shop's bank, Wells Fargo f/k/a Norwest Bank, and the management team of The Tile Shop. (*Id.* at ¶ 7.) Kaminsky was free to speak directly with each of these sources and obtain documents from each source as he deemed necessary without Schmidt's participation. (*Id.*; R-111-19.)

In addition, Schmidt provided various business records of The Tile Shop to Kaminsky as they were provided to him by Robert Rucker or at Robert Rucker's direction. Schmidt specifically provided Kaminsky with a copy of the financial projections that The Tile Shop had previously provided to its banker in June of 2000. In addition, when Schmidt was advised by employees of The Tile Shop that changes were being considered to their business structure while the divorce was pending, including closing down stores and closing their granite division, Schmidt advised Kaminsky of these anticipated business changes. Ultimately, Kaminsky spoke directly with employees of The Tile Shop about these expected business changes. (R-2 at ¶ 8; R-20; A.136.)

Schmidt did not require or request that management of The Tile Shop share information with him prior to disclosing information to Kaminsky. Kaminsky had several direct communications with the Tile Shop's controller, James Thompson, without Schmidt's knowledge or input. (R.2 at ¶ 9; R-286; Kaminsky Dep. at 21.) Schmidt relied upon Kaminsky to request the information he needed and follow-up directly with the employees of The Tile Shop and/or third parties to assure himself he had everything he needed in order to prepare and complete his appraisal of The Tile Shop on a neutral basis. (R-2 at ¶ 9.)

Schmidt did not prepare nor provide input into the financial records provided by The Tile Shop to Kaminsky. He did not advise The Tile Shop employees, including Robert Rucker, with regard to the assumptions upon which they should base any projections to be provided to Kaminsky. (R-3-4 at ¶ 10.) Robert Rucker, Rodney Sill (Rucker's business partner at the time), Thomas Childs (The Tile Shop's sales manager at the time) and James Thompson (the Tile Shop's controller at the time) were the individuals that made the business decisions for The Tile Shop and determined the assumptions that should be used in preparing the projections that were provided to Kaminsky during the divorce appraisal process. (*Id.*; R-22, 44-46; R. Rucker Dep. at 125; Thompson Dep. at 142-43.) Further, Mr. Kaminsky did not rely upon any information provided to him by Schmidt; he relied upon The Tile Shop management. (R-286, 289; Kaminsky Dep. at 52:21-25; 53:1-3; 21:8-11.)

The business and financial decisions of The Tile Shop, including business and financial decisions during Robert Rucker's divorce proceeding, were made by Robert Rucker, Rodney Sill and Thomas Childs. (*Id.*) Schmidt did not advise them with respect to opening new stores, closing down stores or discontinuing their granite sales operations. Schmidt also did not provide The Tile Shop with any legal, financial or business advice with respect to the market conditions for the tile business, gross margins or net profits. Schmidt left those decisions to the employees of the business. (R-4 at ¶ 11; *see also* R-21; R. Rucker Dep. at 122-126.)

Ultimately, Kaminsky's valuation of the parties' 50% interest in The Tile Shop served as a basis for a stipulation and cash settlement between the Ruckers. Robert

Rucker paid Katherine Rucker \$2.4 million as part of the September, 2001 Agreement. (R-23; R. Rucker Dep. at 133:8-15.) The Ruckers waived the right to any formal dissolution proceeding and entered into a Marital Termination Agreement (“MTA”) on September 25, 2001. (R-70-96.) Katherine Rucker admits that she did not, for any purpose, rely upon Schmidt when she entered into the MTA. (R-33; K. Rucker Dep. at 39.) Rather, she relied exclusively upon her own lawyers. (*Id.* at 40.) Katherine Rucker also testified that the property settlement she received in her divorce was fair. (R-34; K. Rucker Dep. at 42.)

D. Katherine Rucker Sues Her Former Husband, Robert Rucker, for Fraud.

Almost two years after entering into the MTA, in August of 2003, Appellant commenced a civil action against Robert Rucker in Hennepin County District Court for fraud. *See Complaint Rucker v. Rucker, Hennepin County Court File No. MC 03-015036.* Appellant voluntarily chose to sue Robert Rucker only. When Appellant was asked in her deposition why she chose not to sue Schmidt when she sued her former husband for fraud, she replied that she completely relied upon her attorneys to make that decision. (R-30; K. Rucker Dep. at 25-26.)

Appellant’s Complaint against Robert Rucker asserted three claims: common law fraud, fraud upon the court, and breach of fiduciary duty. (9/4/2003 Complaint, Court File No. MC-03-015036.) Appellant’s common law fraud and breach of fiduciary duty claims were dismissed prior to trial. *See Rucker v. Rucker Order July 25, 2006.* (R-178.) A trial on the merits of Appellant’s claim against Robert Rucker for fraud upon the court was held before Judge Kaman in March, 2005. After initially finding that Appellant had

failed to meet her burden of establishing fraud, the Court reversed itself on post-trial motions finding that Robert Rucker had committed fraud by misrepresenting or failing to disclose information relating to the financial condition of The Tile Shop to Kaminsky. (*Id.* at ¶¶ 27, 28.)

Based on the finding of fraud upon the court against Robert Rucker under Minn. Stat. § 548.14, Judge Kaman granted Katherine Rucker full equitable relief by setting aside the judgment in the dissolution matter. (*Id.* at ¶¶ 10, 101-107, Order for Judgment ¶ 2.) Judge Kaman thereafter redistributed the value of The Tile Shop as a marital asset and awarded Katherine Rucker an additional \$3,285,000, which consisted of the difference between the \$2,400,000 she received as the property settlement in the divorce action, and her half of the value of The Tile Shop based upon her expert's appraisal at the Robert Rucker fraud trial. Judge Kaman also awarded Katherine Rucker pre-judgment interest, costs and disbursements. *See Rucker v. Rucker Order October 27, 2005* (located at Shiff Summary Judgment Affidavit Ex. S). Judgment was entered against Robert Rucker in the amount of \$4,215,673.49 on February 9, 2006. (*Id.* at ¶ 107.)

After judgment was entered, Robert Rucker filed a Notice of Appeal with the Minnesota Court of Appeals disputing his liability to Appellant. (R-176.) Prior to the appeal being heard, on July 14, 2006, the parties entered into a Settlement Agreement and Release. (R-101-09.) In exchange for Robert Rucker's release of his right to appeal, and in consideration of receiving immediate payment, Appellant accepted payment of less than the full amount of the judgment and a signed a release of all claims against her former husband. (*Id.*)

When Appellant agreed to compromise her claims against her former husband in exchange for releasing her right to a judgment in excess of \$4,000,000, Appellant did not inquire and ultimately did not know whether he was financially capable of paying the full amount of the judgment. (R-37; K. Rucker Dep. 61-65.) Had Appellant investigated whether Robert Rucker could have fully satisfied the entire judgment, she would have learned that he had the financial wherewithal to do so. (R-23; R. Rucker Dep. at 135:9-136:14.) Appellant ultimately settled with her former husband because it is “what seemed fair at the time.” (R-37; K. Rucker Dep. at 64:18-20.)

In connection with her settlement with Robert Rucker, Appellant released the following claims:

[C]laims for actual, compensatory, consequential, punitive, exemplary, contractual or extra-contractual damages, and claims for injuries of any kind, and all derivative claims, and include claims for attorney’s fees, expenses, interest and costs and disbursements.

(R-102.)

By the terms of the Settlement Agreement, Appellant attempted to maintain any potential claims, “if any,” she had against Schmidt and/or Rider Bennett through the attempted use of a purported *Pierringer* release -- a release used in comparative fault cases to release settling parties and maintain the right to seek additional recovery against non-settling parties. *See Frey v. Snelgrove*, 269 N.W.2d 918, 921 (Minn. 1978) (adopting *Pierringer* releases in Minnesota comparative fault jurisprudence). Appellant then filed a full Satisfaction of Judgment with the Court in the amount of \$4,215,673.00 on July 14, 2006. (R-110.) Appellant did not rely upon Schmidt for any reason in her fraud action

against Robert Rucker, including when she chose to settle her judgment against Robert Rucker for less than the full amount awarded to her. (R-30; K. Rucker Dep. at 26.)

E. Katherine Rucker Sues Schmidt and Rider Bennett for Fraud.

Shortly after she filed a full Satisfaction of Judgment in the Robert Rucker fraud action, in September 2006, Appellant commenced a second lawsuit against Schmidt and Rider Bennett arising out of the same alleged fraud as alleged against Robert Rucker in the first case. In Appellant's words, she sued Schmidt because he "has been actively involved in committing a fraud with my former husband on the divorce" by "helping hide the value of the business and documents that were pertaining to the business The Tile Shop" and giving "Mr. Kaminsky false information." (R-26; K. Rucker Dep. at 7-8.) Appellant was unable to provide any more detail than this when asked about the basis for her claims against Schmidt and Rider Bennett. (R-26-27, K. Rucker Dep. at 8, 11.) That is not surprising, however, since she has never had a relationship with Schmidt or any other lawyers or employees of Rider Bennett and, at all times relevant, was represented by counsel of her own choosing that she exclusively relied upon to advise her with respect to all matters relevant herein. (R-32; K. Rucker Dep. at 34-35.)

Despite the complete lack of specificity of Appellant's fraud allegations against Respondents (R-26-27; K. Rucker Dep. at 8-11), it is undisputed, and in fact admitted, that Appellant's allegations against Schmidt and Rider Bennett are based upon the same set of operative facts that formed the basis for her claims against Robert Rucker that she litigated to completion:

Q: How did you learn that Mr. Schmidt provided false documents to Mr. Kaminsky?

A: That was delivered at the trial by Mr. Rucker, Mr. Rucker gave Mr. Schmidt the documents and Mr. Schmidt gave them to Kaminsky.

Q: Okay. And you learned that in the underlying fraud action against Mr. Rucker?

A: Yes.

Q: And did you learn that from any other source?

A: No.

Q: Other than the documents pertaining to the value of The Tile Shop, are you aware of any other documents in support of your claim for fraud against Mr. Schmidt?

A: No.

(R-26-27; K. Rucker Dep. at 8-9.)

Similarly, in her interrogatory responses, Appellant admitted that all of the information supplied in support of her claims against Schmidt was derived from the fraud case against Robert Rucker. (R-60 at Resp. No. 9.) Even in Appellant's appeal herein, she does not attempt to contest the fact that the action against her former husband and this current action arise out of the same set of facts.

Appellant further admits that the damages alleged in this case are the exact same damages she alleged in her lawsuit against Robert Rucker, which damages were ultimately disposed of by the Satisfaction of Judgment she authorized her attorney to file with the Court on July 14, 2006. (R-13; K. Rucker Dep. at 14-15; R-Resp. No. 4.) Appellant's only argument against the application of res judicata to bar this action is that

Robert Rucker and his divorce lawyer, Schmidt, are not in privity for purposes of res judicata.

ARGUMENT

A. Standard of Review.

On appeal from summary judgment, where neither party alleges that the district court impermissibly decided an issue of material fact, this court reviews de novo whether the district court erred in the application of the law. *Reads Landing Campers Ass'n v. Township of Pepin*, 546 N.W.2d 10, 13 (Minn. 1996). The Minnesota Supreme Court has emphasized that summary judgment is an integral part of the procedural rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). A party cannot avoid summary judgment by expressing metaphysical doubt as to a material fact. *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993), review denied (Minn. Oct. 7, 1993); see Minn. R. Civ. P. 56.05. If the non-moving party does not meet its burden of producing facts in the form of admissible evidence that creates a genuine issue for trial, summary judgment “shall be entered.” Minn. R. Civ. P. 56.05; see also, *Thiele v. Stitch*, 425 N.W.2d 580, 583 (Minn. 1988).

Appellant does not argue that any material facts are in dispute. Moreover, Judge Reilly’s summary judgment order is supported by compelling legal authorities nationwide, which authorities Appellant fails to distinguish or even address. The trial court’s summary judgment order in Respondents’ favor should accordingly be affirmed.

B. Appellant's Claims Are Barred By *Res Judicata*.

Res judicata, or claim preclusion, is a doctrine that mandates an end to litigation. *Hauschildt v. Beckingham*, 686 N.W.2d 829, 837, 840 (Minn. 2004). Res judicata reflects courts' disfavor with multiple lawsuits for the same cause of action and wasteful litigation. *Wilson v. Commissioner of Revenue*, 619 N.W.2d 194, 198 (Minn. 2000). Res judicata applies as an absolute bar to a claim when: (1) a prior claim involved the same set of factual circumstances; (2) a prior claim involved the same parties or their privies; (3) a prior claim resulted in final judgment on the merits; and (4) the estopped party had a full and fair opportunity to litigate the matter. *Hauschildt*, 686 N.W.2d at 840. The doctrine operates to preclude subsequent litigation regardless of whether a particular legal theory or issue was actually litigated in the prior action. *Id.* (stating that *res judicata* applies to all claims that could have been litigated in the prior action); *Porta-Mix Concrete, Inc. v. First Ins. E. Grand Forks*, 512 N.W.2d 119, 121-22 (Minn. App. 1994), *review denied* (Minn. Apr. 28, 1994) (a party cannot avoid the application of *res judicata* by changing its theory of liability in a subsequent action); *Dollar Travel Agency, Inc. v. Northwest Airlines, Inc.*, 354 N.W.2d 880, 882-83 (Minn. App. 1984) (judgment in earlier contract action bars later tort action where plaintiff could have litigated both claims in first action).

Appellant concedes that: (1) the prior claim against her former husband involved the same set of factual circumstances; (2) there was a final judgment on the merits; and (3) she had a full and fair opportunity to litigate the matter. (App. Br. at 30-36; Order at 9-10). The only issue this Court must decide is whether Respondents are in privity with

their client, Robert Rucker, as to matters arising out of the legal representation in the Rucker divorce proceeding.

1. **Respondents Were in Privity with Robert Rucker for Purposes of Res Judicata.**

A nonparty is considered to be in privity with the party to a prior action when the nonparty's interests relevant to the action are affected by a judgment in the prior action as if he or she was a party. Restatement of Judgments § 83, Comment a; *see also SMA Services, Inc. v. Weaver*, 632 N.W.2d 770, 774 (Minn. App. 2001) (stating that “[p]rivities are those so connected with one another in law as to be identified with each other in interest” and determining that sole owner of corporation who also controlled corporation was in privity with corporation (quotation omitted)); *Balasuriya v. Bemel*, 617 N.W.2d 596, 600 (Minn. App. 2000) (privity found, and collateral attack precluded, when nonparties to action are so connected with an action that a judgment affects its interests); 47 A. Jur.2d Judgments § 593; *cf. Margo-Kraft Distributors, Inc. v. Minneapolis Gas Co.*, 294 Minn. 274, 278-79, 200 N.W.2d 45, 47-48 (1972) (stating that although there is no prevailing definition of “privity,” it expresses the idea that nonparties whose interests are connected to an action may be affected or bound by the resulting judgment as if they are parties).

Parties in privity have been held to include attorneys and their clients. While a Minnesota appellate court has not ruled upon whether an attorney is in privity with his or her client, courts across the nation, including courts in the Eighth Circuit, have, on a summary judgment basis, concluded that an attorney and client are in privity with one

another, including in relationships arising out of the representation of a client in a divorce proceeding. *See Chaara v. Lander*, 45 P.3d 895, 897 (N.M. App. 2002) (holding that wife's divorce attorney was in privity with wife, thus res judicata barred husband's subsequent suit against attorney); *Fearing v. Lake St. Croix Villas Homeowner's Ass'n*, Civ No. 06-456 (JNE/JJG), 2006 WL3231970 at *9 (D. Minn. Nov. 8, 2006) (applying Minnesota law and determining that because the claims against the attorney arose by virtue of the attorney's representation of certain co-defendants, a subsequent action against the attorney was barred by res judicata because the attorney was in privity with those co-defendants); *Johnson v. U.S. Bank*, No. Civ. 04-4945JNE/ SRN, 2005 WL 1421461 at *2 (D. Minn. June 17, 2005) (applying federal law and determining that subsequent suit against attorneys was barred by res judicata; attorneys were in privity with their prior client for the purposes of a suit brought against them based on their prior representation); *Simpson v. Chicago Pneumatic Tool Co.*, 693 N.W.2d 612, 617 (N.D. 2005) (same); *Merchants State Bank v. Light*, 458 N.W.2d 792, 794 (S.D. 1990) (same); *Jayel Corp. v. Cochran*, 234 S.W.3d 278, 281 (Ark. 2006) (same); *Verhagen v. Arroyo*, 552 So.2d 1162, 1164 (Fla. Dist. Ct. App. 1989) (same); *Plotner v. AT & T Corp.*, 224 F.3d 1161, 1169 (10th Cir. 2000) (finding privity between law firm and client for purposes of res judicata because the law firm defendants "appear by virtue of their activities as representatives" of the prior defendant, which creates privity); *In re El San Juan Hotel Corp.*, 841 F.2d 6, 10-11 (1st Cir. 1988) (same); *Geringer v. Union Elec. Co.*, 731 S.W.2d 859, 866 (Mo. App. 1987) (finding privity between law firm and client and applying collateral estoppel regarding issues resolved in prior lawsuit); *see also*

Muhammad v. Oliver, 547 F.3d 874, 789 (7th Cir. 2008) (recognizing that a principal and his agent are in privity).¹

Appellant does not dispute that Schmidt and Robert Rucker were in an attorney-client relationship or that this action arises out of Schmidt's alleged actions in the course of that legal representation. Appellant also does not suggest that Respondents benefited from any fraud Robert Rucker inflicted upon her, or that Schmidt acted outside the scope of his role as Robert Rucker's attorney or agent. Instead, Appellant's claims arise directly from Schmidt's position as Robert Rucker's attorney and his participation in discovery:

- Q. And how did [Respondent] commit a fraud against you?
- A. He was helping hide the value of the business and documents pertaining to the business The Tile Shop.
- Q. Okay. And what's your understanding, first of all, as to how [Respondent] hid the value of The Tile Shop business from you?
- A. Well, [Respondent] gave Mr. Kaminsky false information and Mr. Kaminsky is the neutral evaluator.
- Q. And what false information did [Respondent] give to Mr. Kaminsky?
- A. The documents that were given to [Respondent] were given to Mr. Kaminsky, documents pertaining to The Tile Shop's Value.
- Q. Do you know any specific title of document or can you describe them in any more detail than what you've described?
- A. [N]o.
- Q. Thanks. Do you know where [Respondent] received the documents that he provided to Mr. Kaminsky?

¹ This "privity based on agency" concept has been recognized in Minnesota. See *Kochlin v. Norwest Mortgage, Inc.*, No. C3-01-136, 2001 WL 856206 at *5 (Minn. App. July 31, 2001) (holding that there is privity between the parties because of the agency relationship between them); *Downtown St. Paul Partners v. Holiday Inns, Inc.*, No. C2-92-1723, 1993 WL 140843 at * 2 (Minn. App. May 4, 1993) (holding that parties are in privity because defendant was acting as agent) *review denied*, (Minn. July 15, 1993); *Rydberg Land, Inc. v. Pine City Bank*, No. C7-88-1373, 1989 WL 1551 at *2 (Minn. App. Jan 17, 1989) (holding that parties were in privity because defendant acted at all relevant times within the scope of his agency).

- A. He received those from [Robert].
Q. That's your understanding?
A. Yes.
Q. Any other claims you are making against [Respondent] in this case?
A. No.
Q. Okay. Other than the facts that you've described about hiding the value of the business and providing some documents to Mr. Kaminsky, are there any other facts upon which you base your claim against [Respondent] for fraud?
A. No.

(R-26; K. Rucker Dep. at 7-8). Appellant's testimony undisputedly demonstrates that her claims are based solely on Schmidt's compliance with ordinary discovery activities. *See Simpson*, 693 N.W.2d at 617 (determining that parties are in privity because "the alleged wrongful conduct of the defendants involves the attorney's response on behalf of their client to discovery requests"); *Chaara*, 45 P.3d at 897 (determining that divorce attorney is in privity with client in prior action because "Wife's Attorney acted as Wife's Counsel in the first domestic relations action and was being sued in that capacity in this action.")

Appellant cites only one case for the proposition that an attorney and his or her client are not in privity for purposes a later suit arising out of the prior representation. (*See App. Br.* at 33 (citing *Ammon v. McCloskey*, 655 A.2d 549, 554 (Pa. 1995)). In *Ammon*, the plaintiff sought to employ offensive collateral estoppel or issue preclusion. The Court considered whether the district court had erred in a legal malpractice case by concluding that the attorney was collaterally estopped from showing that he had asserted certain defenses on behalf of his client in the prior action. *Id.* at 260. The court determined that collateral estoppel did not apply because the attorney did not have the opportunity to litigate or defend himself in the prior action. *Id.* at 262. Conversely, it is

undisputed in this case that Appellant had a full and fair opportunity to litigate her claims in the fraud action against her former husband.

Moreover, as compared to the numerous authorities cited by Respondents in support of their position and by Judge Reilly in support of her summary judgment order, Appellant fails to cite any compelling legal authorities in support of her position that privity does not exist under such circumstances.² Based upon the undisputed facts and the compelling legal authorities from across the nation, Appellant should be barred from re-litigating the issues already resolved (or that could have been resolved) by the prior judgment against her former husband based upon the same set of operative facts.³ This case is exactly the kind of case that cries out for the application of the res judicata doctrine.

C. Contrary to Appellant's Conclusory Arguments, Joint Tortfeasors Can Be In Privity With One Another Based Upon Their Relationship.

Instead of addressing the overwhelming legal authorities contrary to Appellant's res judicata arguments, Appellant suggests that this Court adopt an unsupported rule of law that joint tortfeasors cannot be in privity with one another for purposes of res judicata under any circumstances. Appellant's argument—that a plaintiff may sue joint tortfeasors in separate or consecutive suits—misunderstands the law. As Appellant acknowledges, whether two parties are in privity with one another depends on the facts

² The privity element of res judicata applies equally to Schmidt as it does to Rider Bennett. A law firm and its attorneys are in privity. *Nelson v. Butler*, 929 F.Supp. 1252, 1259 (D. Minn. 1996).

³ Appellant does not dispute that she could have brought claims against Respondent in the prior action.

and circumstances of the particular case. (App. Br. at 31 (citing *Miller v. Nw. Nat. Ins. Co.*, 354 N.W.2d 58, 62 (Minn. App. 1984))). Nonetheless, Appellant is apparently suggesting to this Court that the facts and circumstances should not be considered if the alleged privities also happen to be alleged joint tortfeasors. Though Appellant asserts that allowing the application of res judicata unfairly favors attorney-tortfeasors, this argument ignores the fact that should Appellant's interpretation of the law prevail, res judicata would never apply whenever the plaintiff made the mere assertion of joint tortfeasorship. That is not the law.

Even if two lawsuits involve joint tortfeasors, the second suit is barred by res judicata where the joint tortfeasors are in privity. *Lawlor v. Nat'l Screen Servs. Corp.*, 349 U.S.322, 330, 75 S.Ct. 865, 869 (1955) (recognizing that there is no need to join joint tortfeasors in initial suit unless they are in privity with party to initial suit) *cited for this proposition in Manicki v. Zeilmann*, 443 F.3d 922, 926 (7th Cir. 2006) (“[I]f a plaintiff's right to relief arises from what is realistically viewed as a single episode, it is a right against . . . joint tortfeasors . . . he needn't join them in one suit unless there is privity among those parties, for in that event separate suits against them are treated as the equivalent of separate suits against the same party.” (citations omitted)); *N. Assur. Co. of Am. V. Square D. Co.*, 201 F.3d 84, 88-89 & n.4 (2d Cir. 2000) (recognizing that joint tortfeasors were not in privity and that there was therefore no need to name them in the same suit); *Composite Modules, Inc. v. Thalheimer Bros., Inc.*, 526 F.Supp.2d 160, 162 (D. Mass. 2007) (determining that even though joint tortfeasors may be named in separate suits, unnamed defendant was necessary to the proceedings because it was in

privity with named defendants and court must necessarily consider unnamed defendants' role in the underlying dispute). In this case, Schmidt has not even suggested that privity exists because he is an alleged joint tortfeasor with Robert Rucker. Rather, he has demonstrated privity resulting from his attorney-client relationship with Robert Rucker and the fact that he has been sued in a second action arising out of his legal representation of Robert Rucker (all of which is undisputed). This independent privity basis required Appellant to bring her claims against Robert Rucker and Respondents in one action.

Appellant's supporting authorities--*Hentschel v. Smith*, 278 Minn. 86, 153 N.W.2d 199 (1967) and *Miller v. Nw. Nat'l Ins. Co.*, 354 N.W.2d 58 (Minn. App. 1984)--simply do not address the issue before this Court. In *Hentschel*, the court considered whether a consent judgment between Smith, an injured automobile passenger, and the city, whose agent was also involved in the accident, precluded a suit by the city against the driver of Smith's vehicle, Rev. Leary. *Hentschel*, 278 Minn. at 88-89, 153 N.W.2d at 202. The city claimed that Rev. Leary's negligence caused the accident and sought indemnity for its various liabilities related to the suit. *Id.* The court stated that the relationship of joint tortfeasors, **in and of itself**, does not establish privity for res judicata purposes. *Id.* at 95, 153 N.W.2d at 206. Instead, "[p]rivacy depends upon the relation of the parties to the subject matter rather than their activity in a suit relating to it after the event." *Id.* The Court ultimately found that the parties were not in privity, not because the parties were alleged joint tortfeasors, but because the relation of the parties did not support a finding of privity. Similarly, in *Miller*, the Minnesota Court of Appeals held that "Miller Construction's participation as a joint tortfeasor does not, *in itself*, create a privity

relationship.” *Id.* at 62 (emphasis added). Contrary to Appellant’s suggestion, the *Miller* court never went as far as to conclude or even imply that joint tortfeasors could not be in privity, rather, the Court simply concluded that the relationship at issue did not constitute privity. *See id.*

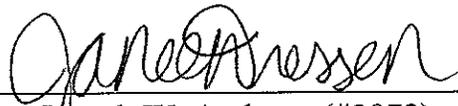
Appellant has not cited any Minnesota law, and Respondent has not found any, that concludes that there cannot be privity between parties based upon their relationship just because they also happen to be alleged joint tortfeasors. The facts and circumstances in this case, together with the legal authorities cited by Schmidt, demonstrate that Schmidt was sued in successive and duplicative litigation based upon the representation of his client. Based upon these undisputed facts, privity exists and res judicata should be applied.

CONCLUSION

Res judicata bars Appellant’s claims in this case based upon the compelling legal authorities cited by Schmidt, including Minnesota law governing res judicata, and the undisputed facts that (a) this case and the case against Robert Rucker arise out of the same set of factual circumstances; (b) Schmidt and Robert Rucker were in an attorney-client relationship and Schmidt is being sued for alleged actions arising out of that attorney-client relationship; (c) there was a final judgment in the Robert Rucker case; and (d) Appellant had a full and fair opportunity to litigate the matters alleged herein in her case against Robert Rucker. For these reasons, Schmidt respectfully requests that the trial court be affirmed.

**ANTHONY OSTLUND BAER
LOUWAGIE & ROSS P.A.**

Dated: January 27, 2009

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