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NO. A08-1730

State of Minnesota  
**In Supreme Court**

Katherine M. Rucker,

*Respondent,*

vs.

Steven B. Schmidt and  
Rider Bennett, LLP,*Appellants.***APPELLANTS' BRIEF AND ADDENDUM**

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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).

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iii-iv

STATEMENT OF LEGAL ISSUE..... 1

STATEMENT OF THE CASE..... 2

STATEMENT OF THE FACTS..... 4

A. The Parties..... 4

B. Attorney Schmidt Represents Robert Rucker In His Divorce From Katherine Rucker ..... 5

C. Valuation Of The Tile Shop..... 5

D. Two Years After The Rucker Divorce, Katherine Rucker Sues Robert Rucker For Fraud ..... 10

E. Katherine Rucker Voluntarily Compromises Her Judgment Against Robert Rucker And Files A Full Satisfaction Of Judgment ..... 11

F. Katherine Rucker Commences A Second Fraud Action Naming Attorney Schmidt and Rider Bennett As Defendants ..... 13

ARGUMENT ..... 15

A. Standard of Review..... 15

B. Res Judicata Is An Important Doctrine That Applies To The Facts Of This Case..... 15

C. Privity Between Attorney Schmidt And Robert Rucker Exists Based Upon Compelling Legal Authorities And The Facts Of This Case..... 19

1. Minnesota law does not require “strict privity”..... 20

2. Reasoned legal authorities across the nation strengthen the conclusion that privity exists between Appellants and their client based upon the facts of this case..... 22

3.	The split Court of Appeals’ privity analysis is fundamentally flawed because it confuses the differences between defensive and offensive application of res judicata and ignores the “merger” application of res judicata precluding subsequent litigation by a prevailing party .....	27
4.	Privity exists between Appellants and their clients based upon the facts and circumstances of this case .....	31
D.	The Record Demonstrates That No Injustice Will Occur By Application Of Res Judicata To Preclude Any Further Recovery By Katherine Rucker For Her Marital Estate .....	38
	CONCLUSION .....	42
	CERTIFICATION OF BRIEF LENGTH .....	44

## TABLE OF AUTHORITIES

### Cases

<i>Anderson v. Rayner</i> , No. W2004-00485-COA-R3-CV, 2005 WL 3543682 (Tenn. Ct. App. Dec. 28, 2005).....	37
<i>Anderson v. Werner Continental, Inc.</i> , 363 N.W.2d 332 (Minn. Ct. App. 1985).....	18
<i>Aufderhar, Jr. v. Data Dispatch, Inc.</i> , 452 N.W.2d 648 (Minn. 1990) .....	28, 30
<i>Barany-Snyder v. Weiner</i> , No. 1:06-cv-2111, 2007 WL 210411 (N.D. Ohio Jan. 24, 2007).....	26
<i>Beter v. Intrepid Holdings, Inc.</i> , No. A08-1257, 2009 WL 1444144 (Minn. Ct. App. May, 26 2009) .....	36
<i>Bogenholm by Bogenholm v. House</i> , 388 N.W.2d 402 (Minn. Ct. App. 1986).....	21
<i>Brecht v. Schramm</i> , 266 N.W.2d 514 (Minn. 1978).....	35
<i>Brown v. Felsen</i> , 442 U.S. 127, 132, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979).....	40
<i>Brown-Wilbert, Inc. v. Copeland Buhl &amp; Co., P.L.L.P.</i> , 732 N.W.2d 209 (Minn. 2007).....	15
<i>Brunsomman v. Seltz</i> , 414 N.W.2d 547 (Minn. Ct. App. 1987) .....	20
<i>Chaara v. Lander</i> , 45 P.3d 895 (N.M. Ct. App. 2002) .....	1, 23, 33
<i>Commissioner v. Banks</i> , 543 U.S. 426, 125 S.Ct. 826 (2005) .....	36
<i>Discon Inc. v. Nynex Corp.</i> , 86 F.Supp.2d 154 (W.D.N.Y. 2000).....	37
<i>Dollar Travel Agency, Inc. v. Northwest Airlines, Inc.</i> , 354 N.W.2d 880 (Minn. Ct. App. 1984) .....	17
<i>Downtown St. Paul Partners v. Holiday Inns, Inc.</i> , No. C2-92-1723, 1993 WL 140843 (Minn. Ct. App. May 4, 1993) .....	36
<i>Dunlap v. Wild</i> , 591 P.2d 834 (Wash. Ct. App. 1979).....	30
<i>El San Juan Hotel Corp. v. Kagan</i> , 841 F.2d 6 (1st Cir. 1988).....	37

<i>Fearing v. Lake St. Croix Villas Homeowner's Ass'n</i> , Civ No. 06-456 (JNE/JJG), 2006 WL 3231970 (D. Minn. Nov. 8, 2006).....	26, 34
<i>Frey v. Snelgrove</i> , 269 N.W.2d 918 (Minn. 1978) .....	12
<i>Gambocz v. Yelencsics</i> , 468 F.2d 837 (3rd Cir. 1972).....	37
<i>Gambrell v. Hess</i> , 777 F.Supp. 375 (D.N.J. 1991) .....	37
<i>Gammel v. Ernst &amp; Ernst</i> , 72 N.W.2d 364 (Minn. 1955).....	17, 28
<i>Geringer v. Union Electric Co.</i> , 731 S.W.2d 859 (Mo. Ct. App. 1987).....	24
<i>Gionfriddo v. Gartenhaus Café</i> , 546 A.2d 284 (Conn. Ct. App. 1988).....	30
<i>Hammann v. Schwan's Sales Enterprises, Inc.</i> , No. A04-778, 2004 WL 2453302 (Minn. Ct. App. Nov. 2, 2004).....	18
<i>Hauschildt v. Beckingham</i> , 686 N.W.2d 829 (Minn. 2004) .....	15, 18, 40
<i>Hentschel v. Smith</i> , 153 N.W.2d 199 (Minn. 1967).....	20, 25
<i>Hofmann v. Fermilab Nal/Ura</i> , 205 F.Supp.2d 900 (N.D. Ill. 2002) .....	26
<i>Hunziker v. German-American State Bank</i> , 908 F.2d 975 (7th Cir. 1990).....	26
<i>In re Dahl</i> , Civ. No. 09-1255 (DWF), 2009 WL 3164756 (D. Minn. Sept. 25, 2009).....	16, 31
<i>In re Teletronics</i> , 762 F.2d 185 (2d Cir.1984) .....	37
<i>Jayel Corp. v. Cochran</i> , 234 S.W.3d 278 (Ark. 2006) .....	24
<i>Jeffers v. Convoy Co.</i> , 636 F.Supp. 1337 (D. Minn. 1986).....	17
<i>Johnson v. Consolidated Freightways, Inc.</i> , 420 N.W.2d 608 (Minn. 1988).....	39
<i>Johnson v. U.S. Bank</i> , No. Civ. 04-4945JNE/SRN, 2005 WL 1421461 (D. Minn. June 17, 2005) .....	25, 33
<i>Jones v. Fisher Law Group, PLLC</i> , 334 F.Supp.2d 847 (D.Md. 2004).....	26

<i>Kochlin v. Norwest Mortgage, Inc.</i> , No. C3-01-136, 2001 WL 856206 (Minn. Ct. App. July 31, 2001).....	36
<i>Kozar v. Wolnik</i> , 1998 WL 865688 (Minn. Ct. App. Dec. 15, 1998).....	23, 36
<i>Kuntz v. Jensen &amp; Gordon</i> , 2005 WL 949119 (Minn. Ct. App. Apr. 26, 2005) .....	23, 36
<i>Lawlor v. Nat'l Screen Servs. Corp.</i> , 349 U.S.322, 75 S.Ct. 865 (1955) .....	37
<i>Lintz v. Credit Adjustments, Inc.</i> , No. 07-11357, 2008 WL 835824 (E.D. Mich. March 28, 2008) .....	26
<i>Lustik v. Rankila</i> , 131 N.W.2d 741 (Minn. 1964).....	28
<i>Margo-Kraft Distribs., Inc. v. Minneapolis Gas Co.</i> , 294 Minn. 274, 200 N.W.2d 45 (1972).....	20
<i>McBroom v. Al-Chroma, Inc.</i> , 386 N.W.2d 369 (Minn. Ct. App. 1986).....	18, 22, 30, 36
<i>McIver v. Jones</i> , 434 S.E.2d 504 (Ga. Ct. App. 1993) .....	37
<i>Merchants State Bank v. C.E. Light</i> , 458 N.W.2d 792 (S.D. 1990) .....	26
<i>Miller v. Northwestern Nat. Ins. Co.</i> , 354 N.W.2d 58 (Minn. Ct. App. 1984).....	28
<i>Montana v. U. S.</i> , 440 U.S. 147, 99 S.Ct. 970 (1979).....	16
<i>Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.</i> , 666 N.W.2d 320 (Minn. 2003).....	15
<i>Myhra v. Park</i> , 258 N.W. 515 (Minn. 1935) .....	36
<i>Nelson v. Butler</i> , 929 F.Supp. 1252 (D. Minn. 1996) .....	34
<i>Oldham v. Pritchett</i> , 599 F.2d 274 (8th Cir. 1979).....	39
<i>Omega Court v. Title Ins. Co. of Minn.</i> , No. CX-91-1264, 1992 WL 15574 (Minn. Ct. App. Feb. 4, 1992).....	18
<i>Parklane Hosiery Co., Inc.</i> , 439 U.S. 322, 99 S.Ct. 645 (1979).....	27, 28, 29
<i>Plotner v. AT&amp;T Corp.</i> , 224 F.3d 1161 (10th Cir. 2000) .....	18, 23
<i>Plymire v. Cahill</i> , 243 F.3d 549, 2000 WL 1838221 (9th Cir. 2000).....	26

<i>Porta-Mix Concrete, Inc. v. First Ins. E. Grand Forks</i> , 512 N.W.2d 119 (Minn. Ct. App. 1994) .....	17
<i>Press Publ'g v. Matol Botanical Int'l, Ltd.</i> , 37 P.3d 1121 (Utah 2001) .....	37
<i>Proctor v. Metropolitan Money Store Corp.</i> , --- F.Supp.2d ----, 2009 WL 2516361 (D. Md. Aug. 13, 2009).....	26
<i>Raatz v. Koerner</i> , No. C3-00-1194, 2001 WL 69473 (Minn. Ct. App. Jan. 30, 2001) ....	18
<i>Reads Landing Campers Ass'n v. Township of Pepin</i> , 546 N.W.2d 10 (Minn. 1996).....	15
<i>Roseberg v. Steen</i> , 363 N.W.2d 102 (Minn. Ct. App. 1985) .....	16, 30
<i>Rydberg Land, Inc. v. Pine City Bank</i> , No. C7-88-1373, 1989 WL 1551 (Minn. Ct. App. Jan 17, 1989) .....	23, 36
<i>Schumann v. Northtown Ins. Agency, Inc.</i> , 452 N.W.2d 482 (Minn. Ct. App. 1990) .....	36
<i>Scott-Peabody &amp; Assoc. v. Northern Leasing Corp.</i> , 140 N.W.2d 614 (Minn. 1966) .....	17
<i>Simpson v. Chicago Pneumatic Tool Co.</i> , 693 N.W.2d 612 (N.D. 2005) .....	passim
<i>SMA Services, Inc. v. Weaver</i> , 632 N.W.2d 770 (Minn. Ct. App. 2001).....	1, 16, 22, 36
<i>STAR Centers, Inc. v. Faegre &amp; Benson, L.L.P.</i> , 644 N.W.2d 72 (Minn. 2002).....	36
<i>State of Maryland v. Capital Airlines</i> , 267 F.Supp. 298 (D. Md. 1967).....	38
<i>Sundberg v. Abbott</i> , 423 N.W.2d 686 (Minn. Ct. App. 1988) .....	1, 16, 17, 30
<i>Towle v. Boeing Airplane Co.</i> , 364 F.2d 590 (8th Cir. 1966).....	18, 30
<i>Verhagen v. Arroyo</i> , 552 S.2d 1162 (Fla. Dist. Ct. App. 1989).....	18, 23, 30
<i>Verry v. Buratti</i> , No. CIV-05-1492-F, 2006 WL 752864 (W.D. Okla. March 21, 2006) .....	26
<i>Vincent v. Clean Water Action Project</i> , 939 P.2d 469 (Colo. Ct. App. 1997).....	30
<i>Weinberger v. Tucker</i> , 510 F.3d 486 (4th Cir. 2007).....	26
<i>Wilson v. Commissioner of Revenue</i> , 619 N.W.2d 194 (Minn. 2000).....	16, 17

*Zahran v. Frankenmuth Mut. Ins. Co.*, 114 F.3d 1192 (7th Cir. 1997) ..... 26

**Other Authorities**

Restatement (Second) of Judgments § 17(1) ..... 16

**Rules**

Minn. R. Civ. App. P. 128.05 ..... 35

Minn. R. Civ. P. 37.01 ..... 33

## STATEMENT OF LEGAL ISSUE

### Issue:

Is an attorney and his law firm in privity with their client under the res judicata doctrine when: (1) the unlawful conduct alleged by the opposing party arises out of attorney's actions on behalf of client in the discovery process; and (2) the party against whom res judicata is asserted had a full and fair opportunity to litigate her claims against client and received a judgment in the full amount of her damages against client?

### Resolution By The Court Of Appeals:

The majority opinion unnecessarily broadened the issue reviewed as whether an attorney and client are in privity for purposes of res judicata based "solely" on that relationship "alone." The Court then erroneously concluded that, despite the overwhelming legal authorities to the contrary, the attorney-client relationship "alone" does not establish privity. (Addendum ("ADD. \_\_") 1, 4, 6, 15-16.)

Based upon the factual circumstances in this case, the dissent concluded that because the alleged unlawful conduct by the attorney arose out of the attorney's representation of client during the course of litigation, privity existed between the attorney, client and law firm. Therefore, res judicata applied and Respondent could not relitigate claims that were already fully and fairly tried. (ADD. 18.)

### Resolution By The Trial Court:

After considering the undisputed facts and overwhelming authorities across the nation, the trial court granted summary judgment in favor of Appellants applying res judicata to preclude Respondent's claims where the allegations arose out of attorney's representation of client during the course of litigation. (ADD. 21-37.)

### Controlling Authorities:

1. *Sundberg v. Abbott*, 423 N.W.2d 686 (Minn. Ct. App. 1988);
2. *SMA Services, Inc. v. Weaver*, 632 N.W.2d 770 (Minn. Ct. App. 2001);
3. *Chaara v. Lander*, 45 P.3d 895 (N.M. Ct. App. 2002); and
4. *Simpson v. Chicago Pneumatic Tool Co.*, 693 N.W.2d 612 (N.D. 2005).

## STATEMENT OF THE CASE

This action arises out of divorce litigation between Katherine and Robert Rucker. Appellants Rider Bennett, LLP and Steven B. Schmidt (“Attorney Schmidt”) (collectively “Appellants”), a Minnesota family lawyer for more than 35 years, represented Robert Rucker in the divorce proceeding. Almost two years after voluntarily settling the divorce matter, with the advice and assistance of highly capable legal counsel, Respondent Katherine Rucker commenced a fraud action against her former husband based upon his discovery disclosures in the divorce litigation. After a trial on the merits of her fraud action against Robert Rucker, Katherine Rucker obtained a judgment in the full amount of the relief she requested. Thereafter, Katherine Rucker voluntarily elected to compromise her judgment by a settlement with Robert Rucker and executed a full satisfaction of judgment in order to avoid the risks associated with Robert Rucker’s appeal of the judgment against him. Ultimately, Katherine Rucker received a total of \$5,000,000 for her share of the marital estate from Robert Rucker.

Despite having litigated the value of her marital estate in two separate actions, Katherine Rucker sought more money, and therefore sued her former husband’s divorce lawyer, Attorney Schmidt, and his law firm, for the same alleged actions on which she prevailed in her lawsuit against Robert Rucker. Respondent admits that her claims against Appellants are based upon the same set of operative facts as those previously alleged and litigated against Robert Rucker; that she received a final judgment on the merits of her claims; that she had a full and fair opportunity to litigate her claims against

Robert Rucker; that she did not rely upon Appellants for any purpose in either the divorce action or the fraud action; and that she could have sued Appellants in the fraud lawsuit when she sued Robert Rucker, but chose not to. Moreover, it is undisputed that the sole basis for Katherine Rucker's lawsuit against Appellants is Attorney Schmidt's alleged actions as counsel to Robert Rucker in the divorce litigation and his participation in the discovery process on behalf of his client.

After extensive discovery, Appellants filed a motion for summary judgment to dismiss Katherine Rucker's Complaint on several grounds, including, but not limited to, the long-established and deeply rooted res judicata doctrine. The Honorable Denise D. Reilly authored a thorough 18-page memorandum, citing numerous state and federal decisions around the country supporting her legal conclusion that res judicata precludes Katherine Rucker's action against Appellants. (ADD. 21-38.) The Court of Appeals, in a split decision, that is shorter than Judge Reilly's memorandum, reversed. The split Court of Appeals held that Appellants and their client were not in privity. (ADD. 1-19.) The split Court of Appeals failed to cite a single legal authority supporting its opinion, instead confusing the context of this case in an effort to distinguish the numerous contrary authorities across the nation. The Honorable Heidi S. Schellhas dissented and agreed with the trial court's conclusion that privity exists between Appellants and Robert Rucker based upon the facts of this case. (*Id.*)

Thus, of the four highly-respected judges who considered the legal privity issue presented by the facts of this case, two judges found in Appellants' favor and two judges found in Respondent's favor. If the Court of Appeals' split-decision reversal of the trial

court stands, Minnesota will have dramatically changed course through the adoption of a very limited privity rule with statewide impact; a rule that is contrary to the conclusions of an overwhelming majority of courts across the nation that have considered the same issue and found in Appellants' favor. For the reasons that follow, the trial court should be affirmed and the Court of Appeals reversed.

### **STATEMENT OF THE FACTS**

#### **A. The Parties.**

Respondent Katherine M. Rucker is the former wife of Robert Rucker.

(Appellants' Appendix (hereinafter "A. \_\_") at 1, ¶¶ 1, 4.) Appellant Steven B. Schmidt, a Minnesota resident, is a Minnesota licensed attorney. (A.23; Schmidt Dep. at 8.) He was a second lieutenant in the United States Army and served in Vietnam. (A.23; Schmidt Dep. at 7-8.) After being honorably discharged, Attorney Schmidt went to law school and has practiced law in Minnesota since 1974. (A.23; Schmidt Dep. at 8.) Beginning in the late 1980s, Attorney Schmidt's legal practice predominantly focused on family law. (A.24; Schmidt Dep. at 10.) Since 2004, Attorney Schmidt has been self-employed at Steven B. Schmidt Mediation Services, LLC as a family law mediator. (A.23; Schmidt Dep. at 6.) Appellant Rider Bennett, LLP was a Minnesota law firm for almost 50 years, but is no longer operational. (See A.25; Schmidt Dep. at 13.) Attorney Schmidt was a partner at Rider Bennett during his representation of Robert Rucker. (*Id.*)

**B. Attorney Schmidt Represents Robert Rucker In His Divorce From Katherine Rucker.**

This case arises out Attorney Schmidt's representation of Robert Rucker in a divorce action that was filed in March 2000. (A.2 at ¶¶ 5, 6.) One of the marital assets in dispute in the divorce proceeding was the value of Robert Rucker's ownership interest in The Tile Shop, a tile business he founded in 1984. (A.1-2 at ¶¶ 4, 7.) In an effort to determine the value of The Tile Shop, the Ruckers jointly retained Howard Kaminsky ("Kaminsky") as a neutral business appraiser. As a neutral appraiser, it was Kaminsky's role to represent both parties by providing a fair appraisal of the marital asset. (A.52; Kaminsky Dep. at 13-14.) In addition to Kaminsky, Katherine Rucker retained a second financial advisor and appraiser, Dax Stoner, to exclusively represent her financial interests in the divorce action. (A.43; 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 financial information to Kaminsky. (A.45; R. Rucker Dep. at 39-40.) Attorney 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. (A.14 at ¶ 6.) Attorney Schmidt specifically instructed The Tile Shop employees that they should gather and produce any information that Kaminsky requested. (*Id.*) Kaminsky did not request that The Tile Shop provide draft financial records or projections. (*Id.*)

As part of the appraisal process, Robert Rucker, through Attorney 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 Attorney Schmidt's participation or involvement. (*Id.*)

In addition, Attorney Schmidt provided various Tile Shop business records to Kaminsky that he received from Robert Rucker or from The Tile Shop employees at Robert Rucker's direction. Attorney Schmidt provided Kaminsky with a copy of the financial projections that The Tile Shop had previously provided to The Tile Shop's bank in June 2000. In addition, when Attorney 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, Attorney Schmidt advised Kaminsky of these anticipated business changes. Ultimately, Kaminsky spoke directly with employees of The Tile Shop about these matters. (A.15 at ¶ 8; A.45; R. Rucker Dep. at 37-40.)

Attorney Schmidt did not require or request that management of The Tile Shop share information with him prior to disclosing information to Kaminsky. In fact, Kaminsky had several direct communications with The Tile Shop's controller, James Thompson, without Attorney Schmidt's knowledge or input. (A.15 at ¶ 9; A.207; Kaminsky Dep. at 21.) Attorney 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 so that he could prepare and complete a neutral appraisal according to his appraisal standards. (A.15 at ¶ 9.)

Attorney Schmidt did not prepare or provide input about 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. (A.15-16 at ¶ 10.) Robert Rucker, Rodney Sill (Mr. Rucker's Tile Shop business partner), Thomas Childs (The Tile Shop's sales manager) and James Thompson (The Tile Shop's controller) made the business decisions for The Tile Shop and determined the assumptions to use in preparing the projections that were provided to Kaminsky for the valuation of The Tile Shop. (*Id.*; A.34; R. Rucker Dep. at 125; A.56-57; Thompson Dep. at 142-43.) These facts are not disputed.

Katherine Rucker alleges, however, that based upon statements made by Robert Rucker's former business partner, Rodney Sill, at a meeting with The Tile Shop employees in May 2001, "Schmidt instructed the employees [of The Tile Shop] to portray a "doom and gloom" scenario to Kaminsky to make the condition and outlook of the company look as bad as possible and thereby artificially depress Kaminsky's valuation." (A.4 at ¶ 21.) When Rodney Sill testified during discovery in this matter about the meeting where the alleged "doom and gloom" statement was made by Attorney Schmidt, he stated:

Q. Okay. Based upon your recollection, was the purpose of that May 2001 meeting [where the alleged "doom and gloom" statement was made] to deceive the business evaluator?

.....

A. To the best of my knowledge, the meeting was, sir, to help a business partner, okay, my attendance there. And it was also to make sure that the business valuation came in at not an inflated value, okay, the thrust of the meeting.

.....

Q. Based on your recollection, was the purpose of the May 2001 meeting to mislead the business evaluator?

A. What I believed the meeting was and why I was invited was to assist my business partner, okay, and to make sure that the business valuation was not inflated.

(A.60, 62; Sill Dep. at 156:8-10, 17-21; A.62; 160:5-10). Mr. Sill further testified that “there were several people at the meeting [May 2001 meeting discussed above], of which they may have a better rec—recollection than I do.” (A.60; Sill Dep. at 33:2-4).

The remaining three participants in the May 2001 meeting have no recollection of Attorney Schmidt ever using the words “doom and gloom” or asking them to mislead Kaminsky about the value of The Tile Shop. (A.34; R. Rucker Dep. at 128; A.58; Thomson Dep. at 144; A.26-27; Schmidt Dep. at 80-84.) Rather, Attorney Schmidt advised The Tile Shop employees at the May 2001 meeting that they could use conservative numbers, but that the numbers to be included in the financial projections provided to Kaminsky had to be realistic. Attorney Schmidt further told The Tile Shop management not to “overstate your numbers, do not understate your numbers, you can be conservative; but look at all of the business factors taking place in the tile business, taking place in your company, taking place in the U.S. economy, taking place in the world economy that is going to impact your business, and it is fair to provide

conservative numbers; don't overstate them. That's what I told them." (A.26-27; Schmidt Dep. at 80-84.)

The business and financial decisions of The Tile Shop were made by Robert Rucker, Rodney Sill and Thomas Childs. (A.34; R. Rucker Dep. at 125; A.56-57; Thompson Dep. at 142-43.) Attorney Schmidt did not advise them with respect to opening new stores, closing down stores or discontinuing granite sales operations. Attorney 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. Attorney Schmidt left those business and financial decisions to management. (A.16 at ¶ 11; *see also* A.33-34; R. Rucker Dep. at 122-126.) Further, and perhaps most importantly, Kaminsky testified that he did not rely upon any information provided to him by Attorney Schmidt; he relied upon The Tile Shop management. (A.207, 210; Kaminsky Dep. at 52:21-25; 53:1-3; 21:8-11.)

Ultimately, Kaminsky's valuation of the parties' 50% interest in The Tile Shop served as a basis for a cash settlement between the Ruckers. Robert Rucker paid Katherine Rucker \$2,400,000 pursuant to the terms of a Marital Termination Agreement ("MTA"). (A.35; R. Rucker Dep. at 133:8-15.) The Ruckers waived the right to any formal dissolution proceeding and entered into the MTA on September 25, 2001. (A.82-107.) Katherine Rucker admits that she did not, for any purpose, rely upon Attorney Schmidt when she entered into the MTA. (A.45; K. Rucker Dep. at 39.) She relied exclusively upon her own lawyers. (*Id.* at 40.) Katherine Rucker believes the property settlement she received by the terms of the MTA was fair. (A.46; K. Rucker Dep. at 42.)

**D. Two Years After The Rucker Divorce, Katherine Rucker Sues Robert Rucker For Fraud.**

Almost two years after entering into the MTA, in August of 2003, Katherine Rucker commenced a civil fraud action against Robert Rucker in Hennepin County District Court naming only Robert Rucker as a defendant. *See Complaint Rucker v. Rucker, Hennepin County Court File No. MC 03-015036* (hereinafter “Rucker Fraud Action.”) When Respondent was asked why she chose not to sue Attorney Schmidt in that action, she stated that she relied upon her attorneys to make that decision. (A.42; K. Rucker Dep. at 25-26.)

Katherine Rucker’s Complaint against Robert Rucker alleged three claims: common law fraud, fraud upon the court, and breach of fiduciary duty. (9/4/2003 Complaint, Court File No. MC-03-015036.) Katherine Rucker’s common law fraud and breach of fiduciary duty claims were dismissed prior to trial. *See Rucker v. Rucker Order July 13, 2005.* (A.157.) A trial on the merits of Respondent’s fraud on the court claim was held before Judge Kaman in March 2005. The fraud on the court claim was based on the allegation that Robert Rucker, with the advice and assistance of Attorney Schmidt, gave false financial information to Kaminsky, the neutral business appraiser. After initially finding that Katherine Rucker had failed to meet her burden of establishing fraud on the court, Judge Kaman reversed herself on post-trial motions finding that Robert Rucker had committed fraud by misrepresenting and failing to disclose material information relating to the financial condition of The Tile Shop to Kaminsky during the divorce proceeding. (A.272.)

Judge Kaman granted Katherine Rucker full equitable relief by setting aside the judgment in the dissolution matter. (A.230, 272-73 at ¶¶ 10, 101-107; A.279; Order for Judgment ¶ 2.) Judge Kaman redistributed the value of The Tile Shop as a marital asset and awarded Katherine Rucker \$3,285,864 over and above the \$2,400,000 property settlement that she had previously received. The Judge arrived at her decision by awarding Katherine Rucker one half of the difference between what she had received in the property settlement and the value of The Tile Shop based upon the testimony of Katherine Rucker's valuation expert in the Rucker Fraud Action. Judge Kaman also awarded Katherine Rucker pre-judgment interest, costs and disbursements of an additional \$930,000. *See Rucker v. Rucker Order October 27, 2005.* (A.225-279.) Judgment was entered against Robert Rucker in the amount of \$4,215,673.49 on February 9, 2006. (A.112.)

**E. Katherine Rucker Voluntarily Compromises Her Judgment Against Robert Rucker And Files A Full Satisfaction Of Judgment.**

After judgment was entered, Robert Rucker filed a Notice of Appeal with the Minnesota Court of Appeals. (A.155.) Prior to the oral argument on appeal, on July 14, 2006, the Ruckers entered into a Settlement Agreement and Release. (A.113-118.) In exchange for Robert Rucker's release of his appeal rights, and in consideration of receiving immediate payment, Katherine Rucker voluntarily compromised her favorable judgment by accepting payment of \$2,600,000. (A.49; K. Rucker Dep. at 63.) That payment, together with the amount Katherine Rucker previously received by the terms of the MTA, totaled \$5,000,000.

When Katherine Rucker compromised her judgment against Robert Rucker, it was not because Robert Rucker could not pay the full amount of the fraud judgment. In fact, Katherine Rucker had no idea whether Robert Rucker was financially able to pay the full amount of the judgment. (A.49-50; K. Rucker Dep. 61-65.) The evidence shows that Robert Rucker did indeed have the financial wherewithal to satisfy the judgment if he did not prevail on his appeal. (A.35; R. Rucker Dep. at 135:9-136:14.) Katherine Rucker settled with Robert Rucker because it was “what seemed fair at the time.” (A.37; K. Rucker Dep. at 64:18-20.)

The Ruckers’ Settlement Agreement included 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--which was Katherine Rucker’s attempt to reserve claims, “if any,” that she had against Appellants. *See Frey v. Snelgrove*, 269 N.W.2d 918, 921 (Minn. 1978) (adopting *Pierringer* releases in Minnesota comparative fault jurisprudence). Katherine Rucker then filed a full Satisfaction of Judgment with the Hennepin County District Court in the amount of \$4,215,673.49 on July 14, 2006. (A.122.) Katherine Rucker did not rely upon Attorney Schmidt for any reason in the Rucker Fraud Action, including when she chose to compromise her judgment against her former husband for less than the full amount awarded to her. (A.42; K. Rucker Dep. at 26.)

**F. Katherine Rucker Commences A Second Fraud Action Naming Attorney Schmidt And Rider Bennett As Defendants.**

Two months after settling with Robert Rucker, in September 2006, Katherine Rucker commenced this lawsuit against Attorney Schmidt and Rider Bennett based upon the same facts and allegations of fraud that were alleged against Robert Rucker in the Rucker Fraud Action. In Katherine Rucker's words, she sued Attorney 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." (A.38; K. Rucker Dep. at 7-8.) That is the extent of Katherine Rucker's claims against Appellants.<sup>1</sup>

Katherine Rucker admits that the allegations against Appellants are derivative of her litigated claims against Robert Rucker. Katherine Rucker's allegations against Appellants, as stated in her Complaint, are inextricably intertwined with the actions of Robert Rucker, and are based upon Appellants' representation of Robert Rucker in the divorce action. For example, Respondent alleges that Attorney Schmidt and Robert Rucker "colluded and conspired" to deceive her (A.7-8 at ¶¶ 45, 53), and Appellants "substantially assisted" Robert Rucker in his commission of fraud. (A.9 at ¶ 61.) These are the same allegations that were made and tried in the Rucker Fraud Action. In

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<sup>1</sup> Katherine Rucker never had a relationship with Attorney Schmidt or any other lawyers or employees of Rider Bennett. She was represented by competent counsel of her own choosing that she exclusively relied upon to advise her with respect to all relevant legal and financial matters. (A.38-39; K. Rucker Dep. at 8, 11; A.44; K. Rucker Dep. at 34-35.)

addition, Katherine Rucker confirmed under oath the limited derivative basis of her claims against Attorney Schmidt:

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.

(A.38-39; K. Rucker Dep. at 8-9.) Similarly, in her interrogatory responses, Katherine Rucker admitted that all of the allegations in support of her claims against Attorney Schmidt were derived from the fraud committed against her by Robert Rucker. (A.72 at Resp. No. 9.)

Katherine Rucker further admits that the damages alleged against Appellants are the exact same damages she alleged in the Robert Rucker Fraud Action, which damages were ultimately satisfied as evidenced by the full Satisfaction of Judgment she authorized her attorney to file with the Hennepin County District Court on July 14, 2006. (A.25; K. Rucker Dep. at 14-15; A.67-68 at Resp. No. 4.) Based upon these undisputed facts, the

trial court's application of res judicata to preclude Katherine Rucker's claims against Appellants was proper and should be affirmed.

## ARGUMENT

### **A. Standard Of Review.**

The trial court granted summary judgment in favor of Appellants, and the Court of Appeals reversed and remanded the case for further proceedings. Thus, this Court's standard of review remains that applicable to a grant of summary judgment, which is reviewed de novo. *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 323 (Minn. 2003). This Court will determine whether there are any genuine issues of material fact and whether the trial court erred in its application of the res judicata doctrine. *Reads Landing Campers Ass'n v. Township of Pepin*, 546 N.W.2d 10, 13 (Minn. 1996); *Brown-Wilbert, Inc. v. Copeland Buhl & Co., P.L.L.P.*, 732 N.W.2d 209, 220 (Minn. 2007) ("The application of res judicata is a question of law that we review de novo.") In its review, this Court "need not defer to the lower courts when making its determination." *Reads Landing Campers Ass'n*, 546 N.W.2d at 13.

### **B. Res Judicata Is An Important Doctrine That Applies To The Facts Of This Case.**

Res judicata is a firmly rooted rule of fundamental and substantial justice that implicates important public policies concerning successive litigation. The application of res judicata protects courts, parties and their privies from multiple lawsuits and vexatious litigation and requires that litigation come to an end, which promotes judicial economy and efficiency. *Hauschildt v. Beckingham*, 686 N.W.2d 829, 837& 840 (Minn. 2004);

*Wilson v. Commissioner of Revenue*, 619 N.W.2d 194, 198 (Minn. 2000) (Res judicata reflects courts' disfavor with multiple lawsuits for the same claims and wasteful litigation). Its application also prevents double recovery by a party for the same alleged wrong and inconsistent judgments thereby maintaining and preserving the stability of court decisions and the sanctity of judgments. *See Montana v. U. S.*, 440 U.S. 147, 153-54, 99 S.Ct. 970, 973-74 (1979). Indeed, the United States Supreme Court has concluded that application of res judicata and collateral estoppel are "central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions." *Id.*

Res judicata may take the form of either merger or collateral estoppel. Merger or bar, also known as estoppel by judgment, operates to preclude a subsequent lawsuit on the same cause of action as to matters actually litigated and as to all other claims or defenses that could or might have been litigated, regardless if the plaintiff in the first action was successful or unsuccessful. *SMA Services, Inc. v. Weaver*, 632 N.W.2d 770, 773 (Minn. Ct. App. 2001); *Sundberg v. Abbott*, 423 N.W.2d 686, 690 (Minn. Ct. App. 1988); *Roseberg v. Steen*, 363 N.W.2d 102, 105 (Minn. Ct. App. 1985) ("If the judgment is favorable [in the first action], a subsequent identical claim merges into it."); *In re Dahl*, Civ. No. 09-1255 (DWF), 2009 WL 3164756, at \*3 (D. Minn. Sept. 25, 2009) (citing Restatement (Second) of Judgments § 17(1), which provides that a prevailing party may

proceed only on the judgment in a subsequent action, and not on the underlying facts or claims, which merge into the judgment.)<sup>2</sup>

Res judicata operates to preclude subsequent litigation regardless of whether a particular legal theory or issue was actually litigated in the prior action. *Wilson*, 619 N.W.2d at 198 (stating that res judicata applies to all claims that might 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. Ct. 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. Ct. App. 1984) (judgment in earlier contract action bars later tort action where plaintiff could have litigated both claims in first action). Res judicata and collateral estoppel will operate to preclude a subsequent action even if the claims asserted in the new action are for fraud or misrepresentation. *See, e.g., Gammel v. Ernst & Ernst*, 72 N.W.2d 364, 369 (Minn. 1955) (res judicata bars fraud claim against defendants even though defendants were not parties or privies to first action); *Scott-Peabody & Assoc. v. Northern Leasing Corp.*, 140 N.W.2d 614, 616-17 (Minn. 1966) (res judicata bars fraudulent conveyance action); *Sundberg*, 423 N.W.2d at 690-91 (fraud claim against privy is barred by res judicata); *McBroom v. Al-Chroma, Inc.*, 386 N.W.2d 369, 374

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<sup>2</sup> Federal law in Minnesota is persuasive when applying the doctrine of res judicata because the standards are the same. *See Jeffers v. Convoy Co.*, 636 F. Supp. 1337, 1340 (D. Minn. 1986) (“The court need not determine whether state or federal law governs the estoppel effect in this removal action because the federal and state standards are essentially the same.”)

(Minn. Ct. App. 1986) (same); *Anderson v. Werner Continental, Inc.*, 363 N.W.2d 332, 334-35 (Minn. Ct. App. 1985) (fraud claims barred by res judicata);<sup>3</sup> *Towle v. Boeing Airplane Co.*, 364 F.2d 590, 592-93 (8th Cir. 1966); see also *Simpson v. Chicago Pneumatic Tool Co.*, 693 N.W.2d 612, 616-17 (N.D. 2005) (fraud claim in attorney-client privity case); *Verhagen v. Arroyo*, 552 S.2d 1162 (Fla. Dist. Ct. App. 1989) (same); *Plotner v. AT&T Corp.*, 224 F.3d 1161, 1168-69 (10th Cir. 2000) (same).

Res judicata precludes 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. In this matter, Katherine Rucker concedes that: (1) her prior fraud claims against Robert Rucker involved the same set of factual circumstances as her current claims against Appellants; (2) there was a final judgment on the merits of her fraud claims against Robert Rucker; and (3) she had a full and fair opportunity to litigate her claims against Robert Rucker. (K. Rucker App. Brief at 30-36; ADD. 28-29.)

Katherine Rucker chose not to join Appellants in her fraud lawsuit against Robert Rucker. (A.42; K. Rucker Dep. at 25.) Thus, the only issue this Court must decide is whether Appellants were in privity with their client, Robert Rucker. If Robert Rucker and his lawyers, the Appellants, were in privity, then, under the doctrine of res judicata,

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<sup>3</sup> In several unpublished opinions, the Court of Appeals found it proper to apply res judicata to preclude fraud claims. See, e.g., *Hammann v. Schwan's Sales Enterprises, Inc.*, No. A04-778, 2004 WL 2453302 (Minn. Ct. App. Nov. 2, 2004); *Raatz v. Koerner*, No. C3-00-1194, 2001 WL 69473 (Minn. Ct. App. Jan. 30, 2001); *Omega Court v. Title Ins. Co. of Minn.*, No. CX-91-1264, 1992 WL 15574 (Minn. Ct. App. Feb. 4, 1992).

Katherine Rucker's claims are barred. Robert Rucker and the Appellants are in privity, not simply by virtue of the existence of the lawyer-client relationship, but as a result of the facts of this case. Where the exclusive basis for the wrongful acts complained of by Katherine Rucker arose out of and are derivative to Appellants' representation of Robert Rucker during the discovery process in the Rucker divorce action, Robert Rucker and the Appellants are in privity for purposes of the doctrine of res judicata.

**C. Privity Between Attorney Schmidt And Robert Rucker Exists Based Upon Compelling Legal Authorities And The Facts Of This Case.**

In reversing the trial court, and concluding that privity did not exist between Appellants and their client, Robert Rucker, the split Court of Appeals unnecessarily broadened the legal issue reviewed and the basis for the trial court's ruling. Throughout the opinion, the split Court of Appeals addresses the issue reviewed as whether the "mere existence" of the attorney-client relationship "alone" is enough to create privity. (ADD. 2, 4, 6, 8, 16.) Appellants' arguments, however, were not so limited. Appellants argued that privity existed with their client, not solely because they were in an attorney-client relationship, but because the alleged wrongful actions by Appellants undisputedly arose exclusively out of and were derivative to that attorney-client relationship. (Appellants' Court of Appeals Brief at 16.) Indeed, the allegations against Attorney Schmidt are based upon him "substantially assisting his client" in the discovery process in litigation. (A.7-9,

¶¶ 45, 53-55, 61.)<sup>4</sup> As is demonstrated below, it was error for the split Court of Appeals to unnecessarily broaden the issue reviewed to justify its reversal.

The split Court of Appeals ultimately based its reversal of the trial court's sound privity determination on: (1) its erroneous application of Minnesota law; (2) its view that the overwhelming number of other courts that have addressed this question did so with an "astounding lack of analysis;" and (3) a flawed "common-sense conclusion that the judgment that husband committed fraud on the court does not decisively demonstrate that attorney committed fraud." (ADD. 8.) A review of each conclusion demonstrates the material errors by the split Court of Appeals in reaching its conclusion.

1. **Minnesota law does not require "strict privity."**

In distinguishing cases across the nation that have found privity between an attorney and client in circumstances similar to those presented here, the split Court of Appeals concluded that Minnesota has not expressed a "relaxed privity concept," and because Appellants did not have an "active self-interest" in the Rucker divorce action, privity did not apply. Like almost all jurisdictions, however, Minnesota does not require an "active self interest" or a strict identity of parties. Minnesota courts recognize there is no specific definition of privity, and a finding of privity depends upon the relation of the parties to the subject matter at issue. *Hentschel v. Smith*, 153 N.W.2d 199, 206 (Minn. 1967); *Margo-Kraft Distribs., Inc. v. Minneapolis Gas Co.*, 294 Minn. 274, 278, 200 N.W.2d 45, 47 (1972); *Brunsomman v. Seltz*, 414 N.W.2d 547, 550 (Minn. Ct. App. 1987)

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<sup>4</sup> Discussed in more detail below, Appellants also referred the Court of Appeals to legal authorities supporting a finding of privity based upon a principal-agent relationship.

(“The concept of ‘privity’ has not been strictly defined, but it expresses the idea that certain non-parties may be so connected with the litigation that the judgment should also determine their interests.”); *Bogenholm by Bogenholm v. House*, 388 N.W.2d 402, 405 (Minn. Ct. App. 1986). In other words, in this case, privity must be determined on the basis of the relationship between Appellants and Robert Rucker with respect to the subject matter at issue, which, in this case, is their allegedly fraudulent conduct in the divorce action.

The trial court, unlike the split Court of Appeals, followed this Court’s direction and analyzed the relationship between Robert Rucker and Attorney Schmidt in the context of the facts of the case and concluded that Attorney Schmidt was in privity with his client because he was acting on behalf of his client in connection with responding to requests for information in litigation. The trial court further properly analyzed the relationship and context as it related to Katherine Rucker, the party against whom res judicata would apply. The trial court concluded that, as to Katherine Rucker, res judicata precluded her claims since she had already obtained a favorable judgment in the full amount of her damages on the same claims, and the same facts, as alleged in this action.

In short, Minnesota law does not require the existence of strict privity before collateral estoppel or res judicata will preclude subsequent litigation. The split appellate Court’s conclusion to the contrary, ostensibly based upon Minnesota law, is erroneous and therefore fundamentally undermines its reversal of the trial court. (*See* ADD. 8, 12 (“Our determination is based on Minnesota law. . .” and “Minnesota has not expressed a relaxed privity concept”).)

2. **Reasoned legal authorities across the nation strengthen the conclusion that privity exists between Appellants and their client based upon the facts of this case.**

The second reason the split Court of Appeals reversed the trial court's summary judgment order is, in large part, based upon its belief that the legal authorities across the nation, including the District of Minnesota and state and federal courts within and outside the Eighth Circuit, finding in Appellants' favor have an "astounding lack of analysis." (ADD. 8.) In reaching this conclusion, the split Court of Appeals did not cite a single authority contrary to Appellants' privity arguments or authorities, nor does the split Court of Appeals explain why a lengthy analysis is required. Instead, on an issue of first impression, the split Court of Appeals places Minnesota in direct conflict with the decisions of virtually every other court that has considered the question.

Courts analyzing the privity element of res judicata and collateral estoppel recognize that often times there is no need for a detailed analysis of privity, particularly when the allegations of wrongdoing arise exclusively out of a specific relationship such as principal-agent, husband-wife, attorney-client, or personal representative-beneficiary and the interests of the individuals in the relationship are aligned. Prior Court of Appeals' opinions even demonstrate that a lengthy or detailed analysis is commonly unnecessary in finding privity. *See e.g., SMA Services*, 632 N.W.2d at 774 (presuming on a conclusory basis that an individual who owned corporation and controls its affairs is in privity with the corporation); *McBroom*, 386 N.W.2d at 374 (concluding, on a summary basis, that president of company was in privity with company because he was the "president" and "the only witness at trial" in the first action); *Kozar v. Wolnik*, 1998

WL 865688, at \*4 (Minn. Ct. App. Dec. 15, 1998) (because defendant was vice-president of company, he was in privity with company); *Rydberg Land, Inc. v. Pine City Bank*, No. C7-88-1373, 1989 WL 1551, at \*2 (Minn. Ct. App. Jan 17, 1989) (concluding on a summary basis that agent acting within scope of authority is in privity with his principal); *Kuntz v. Jensen & Gordon*, 2005 WL 949119, at \*3 (Minn. Ct. App. Apr. 26, 2005) (finding privity between personal representative of estate and beneficiaries because personal representative is required to act in best interests of estate).

Moreover, several of the legal authorities across the nation that have considered whether the attorney-client relationship established privity provide a reasoned analysis. For example, in *Plotner v. AT&T Corp.*, 224 F.3d 1161, 1169 (10th Cir. 2000), one of the authorities criticized by the split Court of Appeals, the Tenth Circuit found privity between an attorney and client because the attorneys were named as defendants in subsequent litigation “by virtue of their activities” for their clients in the underlying litigation. *Id.*; see also *Verhagen v. Arroyo*, 552 So.2d 1162, 1164 (Fla. Dist. Ct. App. 1989) (finding privity between attorney and client because actions of attorney were taken on behalf of client and were the subject of prior litigation in which attorney represented client).

Other decisions criticized by the split Court of Appeals also find privity between an attorney and client because the allegations against the attorney arose out of his relationship with his client and related to the attorney’s actions, on behalf of his client, in the underlying litigation. For example, in *Chacara v. Lander*, 45 P.3d 895 (N.M. Ct. App. 2002), a case very similar to this case, the attorney, who represented his client in a

divorce action, was subsequently sued by client's ex-husband for damages caused by attorney's failure to provide ex-husband with the kids' passports during the divorce action after wife was ordered to do so. *Id.* at 895. The trial court denied attorney's motion to dismiss on the basis of res judicata, and the New Mexico Court of Appeals reversed finding that the trial court erred in not dismissing the action by ex-husband against attorney. *Id.* at 897. In finding privity between attorney and client on appeal, the *Chaara* court concluded that since the attorney acted as the wife's attorney in the divorce action and was being sued in that capacity for actions taken by attorney in that action, privity existed. *Id.* at 898.

Similarly, in *Simpson v. Chicago Pneumatic Tool Co.*, 693 N.W.2d 612 (N.D. 2005), when the plaintiff commenced an action for fraud, obstruction of justice and other claims against an attorney who represented his adversary in previous litigation, the North Dakota Supreme Court found privity between the attorney and his client because "the alleged wrongful conduct of the [attorneys] involves the attorneys' response on behalf of their client to discovery requests and orders. Under these circumstances, privity exists between [client] and its attorneys in the underlying action for purposes of res judicata and collateral estoppel." *Id.* at 617; *see also Geringer v. Union Electric Co.*, 731 S.W.2d 859, 860-61, 865 (Mo. Ct. App. 1987) (finding privity between client and attorney and law firm where attorney and law firm were sued concerning their actions in the representation of their client.)

The Arkansas Supreme Court in *Jayel Corp. v. Cochran*, 234 S.W.3d 278 (Ark. 2006) also provided a reasoned analysis in support of its privity conclusion as between

attorney and client. The Arkansas Supreme Court started its analysis by stating that privity exists “when two parties are so identified with one another that they represent the same legal right.” *Id.* at 281; *compare* ADD. 7 (“A privy is so identified with the party in interest as to be affected with the party by the litigation.”), citing *Hentschel, supra*. In considering the issue as one of first impression, the *Jayel* court looked to its jurisprudence in the principal-agent context by analogy. The *Jayel* court also considered the policies of res judicata and the practical reasons a more lenient approach to privity is sound in preventing a party who already has had its day in court from engaging in successive litigation. *Id.* at 181. Based upon its application of privity in the principal-agent context, the analogy between a principal and agent and attorney-client, the policies supporting application of res judicata, the fact that plaintiff already had its day in court, and the precedent across the nation finding privity between an attorney and his client, the Arkansas Supreme Court concluded that the attorney-client relationship created privity for purposes of res judicata. *Id.* at 182.

Similar to the reasoning used by these authorities, the United States District Court of Minnesota has twice concluded that an attorney and his client are in privity for purposes of res judicata when the attorney was sued for actions arising out of the representation of client. First, in *Johnson v. U.S. Bank*, No. Civ. 04-4945JNE/ SRN, 2005 WL 1421461, at \*2 (D. Minn. June 17, 2005), applying federal law, the Honorable Joan N. Erickson determined that the law firm, Dorsey & Whitney, and their client were in privity for purposes of res judicata because the law firm was named as a defendant based upon its representation of its client, U.S. Bank, and thus, the subsequent action was

precluded. *Id.* at \*2. Second, in *Fearing v. Lake St. Croix Villas Homeowner's Ass'n*, Civ No. 06-456 (JNE/JJG), 2006 WL 3231970, at \*9 (D. Minn. Nov. 8, 2006), applying Minnesota law, the Honorable Joan N. Erickson concluded again that an attorney and his client were in privity for purposes of res judicata because the claims against the attorney arose by virtue of the attorney's representation of his clients. *Id.* at \*9.

Several other courts across the nation that have considered this same issue have agreed with the above authorities and concluded that privity between an attorney and client exists for purposes of applying res judicata and/or collateral estoppel to preclude subsequent litigation.<sup>5</sup> In the end, the split Court of Appeals fails to explain why Minnesota would treat this issue differently than almost every other jurisdiction that has considered it. The split Court of Appeals also fails to explain why, given the facts in this case, privity does not exist. The authorities are reasoned, supported by sound policy, and

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<sup>5</sup> See e.g., *Proctor v. Metropolitan Money Store Corp.*, --- F.Supp.2d ----, 2009 WL 2516361, at \*20 (D. Md. Aug. 13, 2009); *Lintz v. Credit Adjustments, Inc.*, No. 07-11357, 2008 WL 835824, at \*4 (E.D. Mich. March 28, 2008) ("Attorneys are considered privies of their clients for the purposes of res judicata."); *Weinberger v. Tucker*, 510 F.3d 486, 493 (4th Cir. 2007); *Barany-Snyder v. Weiner*, No. 1:06-cv-2111, 2007 WL 210411, at \*4 (N.D. Ohio Jan. 24, 2007) ("All authority the Court has found holds that attorneys are treated as parties or privies for res judicata purposes."); *Verry v. Buratti*, No. CIV-05-1492-F, 2006 WL 752864, at \*2 (W.D.Okla. March 21, 2006); *Jones v. Fisher Law Group, PLLC*, 334 F.Supp.2d 847, 851 (D.Md. 2004); *Hofmann v. Fermilab Nal/Ura*, 205 F.Supp.2d 900, 903 (N.D. Ill. 2002) ("[T]he defense lawyers added to this lawsuit are in privity with the defendants there."); *Plymire v. Cahill*, 243 F.3d 549, 2000 WL 1838221, at \*1 (9th Cir. 2000); *Zahran v. Frankenmuth Mut. Ins. Co.*, 114 F.3d 1192 (7th Cir. 1997) ("For res judicata purposes, a company's ... attorneys ... are privies of the company that was a party in the prior suit."); *Hunziker v. German-American State Bank*, 908 F.2d 975 (7th Cir. 1990); *Merchants State Bank v. C.E. Light*, 458 N.W.2d 792 (S.D. 1990).

almost universally accepted. The split Court of Appeals' rejection of these authorities should accordingly be reversed.

3. **The split Court of Appeals' privity analysis is fundamentally flawed because it confuses the differences between defensive and offensive application of res judicata and ignores the "merger" application of res judicata precluding subsequent litigation by a prevailing party.**

The split Court of Appeals' analysis is fundamentally flawed for another important reason—it confuses the application of offensive and defensive res judicata. This confusion is demonstrated by the following split Court of Appeals' conclusion as to why privity does not exist: “a common-sense conclusion that the judgment that husband committed fraud on the court does not decisively demonstrate that attorney committed fraud.” (ADD. 8.) This “common sense conclusion” misses the mark by a wide margin. The issue before the Court of Appeals was not whether Katherine Rucker could use the Robert Rucker judgment *offensively* against Appellants. If that were the issue, the resolution would be simple—the answer would be “no”—because Appellants did not have a full and fair opportunity to defend themselves in the action against Robert Rucker—the most important element in applying res judicata. *See Parklane Hosiery Co., Inc.*, 439 U.S. 322, 329, 99 S.Ct. 645, 650 (1979) (“[T]he requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard.”)

The fact that Katherine Rucker cannot use the Robert Rucker judgment *offensively* against Attorney Schmidt does not mean that Attorney Schmidt cannot use the judgment *defensively* against Katherine Rucker. Since Minnesota does not require

strict mutuality in its application of res judicata and collateral estoppel, it is perfectly appropriate for Attorney Schmidt to use the judgment defensively against Respondent, while, at the same time, denying Respondent the right to use the same judgment against a non-party offensively. See *Aufderhar, Jr. v. Data Dispatch, Inc.*, 452 N.W.2d 648, 652 (Minn. 1990); *Lustik v. Rankila*, 131 N.W.2d 741, 744 (Minn. 1964); *Gammel*, 72 N.W.2d at 256-57.<sup>6</sup>

The split Court of Appeals' confusion of the issue and of the differences between offensive and defensive application of res judicata significantly undermines its holding because Minnesota has cautioned against the offensive use of res judicata and collateral estoppel.<sup>7</sup> *Aufderhar*, 452 N.W.2d at 652 n. 2; *Miller v. Northwestern Nat. Ins. Co.*, 354 N.W.2d 58, 61, n. 1 (Minn. Ct. App. 1984), citing *Parklane Hosiery Co., Inc.*, 439 U.S. 322, 99 S.Ct. 645 (1979). In *Parklane Hosiery*, the United States Supreme Court discussed the important differences between the two applications:

First, offensive use of collateral estoppel does not promote judicial economy in the same manner as defensive use does. Defensive use of collateral estoppel precludes a plaintiff from relitigating identical issues by merely "switching adversaries." Thus defensive collateral estoppel gives a plaintiff a strong incentive to join all potential defendants in the first action if possible. Offensive use of collateral estoppel, on the other hand, creates precisely the opposite incentive. Since a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a

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<sup>6</sup> In analyzing Minnesota's privity element of the res judicata doctrine, the Court of Appeals concluded that the analysis is the same whether collateral estoppel or res judicata applies because the privity prongs are "equivalent." (ADD. 5 at n. 1.)

<sup>7</sup> Offensive estoppel applies when a plaintiff seeks to invoke it on a matter for which it has the burden of proof based upon a finding against the defendant in a previous action. *Aufderhar*, 452 N.W.2d at 652 n. 2.

“wait and see” attitude, in the hope that the first action by another plaintiff will result in a favorable judgment. Thus offensive use of collateral estoppel will likely increase rather than decrease the total amount of litigation, since potential plaintiffs will have everything to gain and nothing to lose by not intervening in the first action. (citations and footnotes omitted.)

A second argument against offensive use of collateral estoppel is that it may be unfair to a defendant. If a defendant in the first action is sued for small or nominal damages, he may have little incentive to defend vigorously, particularly if future suits are not foreseeable. Allowing offensive collateral estoppel may also be unfair to a defendant if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant. Still another situation where it might be unfair to apply offensive estoppel is where the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result. (citations and footnotes omitted.)

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The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.

*Id.*, 439 U.S. at 330-331, 99 S. Ct. at 650-52. Because Appellants have not asked the Court to apply res judicata offensively against Katherine Rucker, the concerns addressed by the *Parklane* court are not at issue, and the split Court of Appeals’ “common sense” conclusion is irrelevant to the actual issues that were before it.

The split Court of Appeals’ confusion concerning offensive and defensive res judicata is demonstrated again when it considers, in passing, whether Appellants “controlled” the Rucker divorce action: “. . . to bind a nonparty to the results of a prior suit, the nonparty must have so control[led] an action in achieving her own interests that

the nonparty has had her day in court.” (ADD. 16.) Of course, Appellants do not ask to bind a nonparty to the results of a prior action—they ask to bind a party to the Rucker Fraud Action—Katherine Rucker—and Katherine Rucker had her day in court.

The split Court of Appeals’ confusion does not end there. The Court supports its holding by determining that compelling legal authorities do not apply because Robert Rucker did not prevail in the Rucker Fraud Action. For example, in distinguishing the *Verhagen* decision, the split Court states: “We do not find this case persuasive because ex-husband did not obtain a favorable judgment that attorney seeks to use defensively in this action.” (ADD. 11, citing *Verhagen*, 552 So.2d at 1164.) The split Court of Appeals reaches that same conclusion when attempting to distinguish the *Simpson* decision: “here attorney does not have a favorable judgment for ex-husband on which to base a defense.” (ADD. 14, citing *Simpson*, 693 N.W.2d at 617.)

In reaching these conclusions, the split Court of Appeals ignores the fact that res judicata applies whether the estopped party was successful or unsuccessful in the previous action, albeit sometimes referred to by different terms of art. *See Aufderhar*, 452 N.W.2d at 650.<sup>8</sup> If successful, the application of res judicata has been referred to as “merger” because the subsequent claims are deemed “merged” into the judgment. *Sundberg*, 423 N.W.2d at 690; *McBroom*, 386 N.W.2d at 372; *Roseberg*, 363 N.W.2d at

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<sup>8</sup> *See also Towle*, 364 F.2d at 592-93 (8th Cir. 1966); *Gionfriddo v. Gartenhaus Café*, 546 A.2d 284, 290-91 (Conn. Ct. App. 1988) (res judicata precludes plaintiff’s claims in second action after plaintiff succeeded in first action when the doctrine was asserted by defendants in the second action defensively); *Vincent v. Clean Water Action Project*, 939 P.2d 469, 473 (Colo. Ct. App. 1997); *Dunlap v. Wild*, 591 P.2d 834, 837 (Wash. Ct. App. 1979).

105; *In re Dahl*, 2009 WL 3164756, at \*3. If unsuccessful, the application of res judicata has been referred to as “bar” because the subsequent claims are barred. *Id.* Thus, the fact that Katherine Rucker was successful in the Rucker Fraud Action does not limit the preclusive effect of the judgment she obtained.

Justice compels that this Court address the split Court of Appeals’ fundamental legal errors, restore the res judicata and collateral estoppel doctrines to their intended scope and correct the detrimental impact of the errors on the conclusion that privity does not exist in this case.

**4. Privity exists between Appellants and their client based upon the facts and circumstances of this case.**

Despite the split Court of Appeals’ insistence that it could not rule in Appellants’ favor because it was not willing to hold that the “mere existence” of the attorney-client relationship “alone” creates privity, the facts of this case establish that privity exists between Appellants and their client, Robert Rucker. This case does not require this Court to conclude that privity exists between an attorney and a client in all cases and in all circumstances.

Katherine Rucker does not dispute that Appellants and Robert Rucker were in an attorney-client relationship or that this action arises exclusively out of Appellants’ alleged actions in the course of that legal representation. Katherine Rucker also does not suggest that Appellants benefited from any fraud inflicted upon her, or that Attorney Schmidt acted outside the scope of his role as Robert Rucker’s attorney or agent. Thus,

the split Court of Appeals' conclusion that this case involves a "separate fraud" by attorney and client (ADD. 15) is materially erroneous and not supported by the record.

To the contrary, Katherine Rucker's claims are based upon Attorney Schmidt's relationship with Robert Rucker as his legal counsel and his participation on behalf of his client in the discovery process in the divorce action:

Q. And how did [Attorney Schmidt] 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 [Attorney Schmidt] hid the value of The Tile Shop business from you?

A. Well, [Attorney Schmidt] gave Mr. Kaminsky false information and Mr. Kaminsky is the neutral evaluator.

Q. And what false information did [Attorney Schmidt] give to Mr. Kaminsky?

A. The documents that were given to [Attorney Schmidt] 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 [Attorney Schmidt] received the documents that he provided to Mr. Kaminsky?

A. He received those from [Robert].

Q. That's your understanding?

A. Yes.

Q. Any other claims you are making against [Attorney Schmidt] 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 [Attorney Schmidt] for fraud?

A. No.

(A.38; K. Rucker Dep. at 7-8).

Katherine Rucker's testimony undisputedly demonstrates that her claims are based solely on Attorney Schmidt's actions in discovery activities on behalf of his client. That being the case, Attorney Schmidt and his client's interests were aligned and he was acting to represent his client's interests. *See* Minn. R. Civ. P. 37.01(d) (concluding that sanctions can be awarded against party and/or attorney for discovery abuses); *see also Simpson*, 693 N.W.2d at 617 (holding 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"); *Chara*, 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."); *Johnson*, 2005 WL 1421461, at \*2 (law firm and client were in privity for purposes of res judicata because the law firm was named as a defendant based upon its representation of

its client); *Fearing*, 2006 WL 3231970, at \*9 (attorney and client are in privity because the claims against the attorney arose by virtue of attorney's representation of clients).<sup>9</sup>

Moreover, it is undisputed that Katherine Rucker cannot state a separate claim of fraud against Attorney Schmidt because she did not rely upon him for any reason. (A.45; K. Rucker Dep. at 39.) Thus, Katherine Rucker's fraud claim against Appellants boils down to their alleged actions on behalf of their client, Robert Rucker, in providing information to the neutral appraiser in the divorce litigation. In representing their client and acting on his behalf, the facts of this case are similar to those cases where the Court of Appeals has found privity in other contexts, including officer-corporation and personal representative-beneficiary. *See supra* at p. 22. The facts of this case are also very similar to the cases across the nation that have found privity between an attorney and client, including right here in the Federal District of Minnesota. *See supra* at pp. 23-26. There is no sound legal or policy reason why privity should not apply with equal force here.

Consistent with the record and the legal authorities cited above, the trial court and the Court of Appeals' dissent correctly concluded that privity exists between Appellants and Robert Rucker based upon the facts of this case, and specifically based upon Katherine Rucker's allegations of fraud based solely upon Appellants' actions in the representation of Robert Rucker in the divorce action. Judge Schellhas, in her dissenting opinion, concluded:

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<sup>9</sup> The privity element of *res judicata* applies equally to Attorney 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).

Under the narrow factual circumstances presented here, where the alleged fraud by respondent attorney arose only out of the attorney's representation of ex-husband, I agree with the district court that the attorney and his law firm were in privity with ex-husband, as a matter of law, such that appellant should be barred by res judicata from relitigating the fraud claim that was earlier fully and fairly tried.

(ADD. 18-19.) Similarly, the trial court based its privity conclusion on the fact that Katherine Rucker "brought this action based on the same set of operative facts as the fraud action against Rucker, and the alleged fraud arose out of Schmidt's representation of Rucker in the underlying divorce proceeding." (ADD. 37.) The fact that two of the four highly-respected judges that have considered the legal privity issue presented by the facts of this case and have found in Appellants' favor consistent with Minnesota authorities, the overwhelming authorities across the nation, and the record further establishes the appropriateness of a finding of privity here.

Finally, separate and apart from the attorney-client relationship, privity can also be found based upon the principal-agent relationship between Appellants and Robert Rucker.<sup>10</sup> Attorney Schmidt and Robert Rucker while, attorney-client, were also in a

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<sup>10</sup> While the split Court of Appeals suggests that Appellants did not argue privity on any ground other than the attorney-client relationship, that is simply not true. (ADD. 6, n. 2; ADD. 14.) Appellants cited principal-agent privity cases in their appellate brief (Appellants' Ct. App. Brief at p. 16), and at oral argument addressed the application of privity in the principal-agent context. After oral argument, given the number of questions posed by the Court of Appeals' panel concerning privity in the principal-agent context, Appellants submitted a letter to the appellate panel pursuant to Minn. R. Civ. App. P. 128.05 highlighting those authorities previously cited by Appellants in their appeal Brief. (A.280.) This Court can, and should, affirm the trial court's privity conclusion even if based upon a different privity theory than that applied by the trial court in order to finally put an end to Katherine Rucker's successive litigation. See *Brecht v. Schramm*, 266 N.W.2d 514, 520 (Minn. 1978) ("[i]f the trial court arrives at a correct decision, that decision should not be overturned regardless of the theory upon which it is based").

principal-agent relationship. See *Schumann v. Northtown Ins. Agency, Inc.*, 452 N.W.2d 482, 484 (Minn. Ct. App. 1990) (“The rules and principles of the law of principal and agent control the relation of attorney and client.”); *Beter v. Intrepid Holdings, Inc.*, No. A08-1257, 2009 WL 1444144, at \*7 (Minn. Ct. App. May, 26 2009), citing *Commissioner v. Banks*, 543 U.S. 426, 436, 125 S.Ct. 826, 832 (2005) (“The relationship between client and attorney, regardless of the variations in particular compensation agreements or the amount of skill and effort the attorney contributes, is a quintessential principal-agent relationship.”) As Robert Rucker’s attorney, Attorney Schmidt was obligated, consistent with the Rules of Professional Conduct, to act on his client’s behalf and in his client’s best interests. *STAR Centers, Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002) (“An attorney-client relationship gives rise to fiduciary duties: “The attorney is under a duty to represent the client with undivided loyalty, to preserve the client's confidences, and to disclose any material matters bearing upon the representation of these obligations.”) Minnesota courts have found privity in this context for purposes of res judicata.<sup>11</sup>

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<sup>11</sup> See *Kochlin v. Norwest Mortgage, Inc.*, No. C3-01-136, 2001 WL 856206, at \*5 (Minn. Ct. 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. Ct. App. May 4, 1993) (holding that parties are in privity because defendant was acting as agent), *review denied*, (Minn. July 15, 1993); *Rydberg*, 1989 WL 1551, at \*2; *SMA Services*, 632 N.W.2d at 774 (owner of corporation and corporation in privity); *McBroom*, 386 N.W.2d at 374 (president of company and company in privity); *Kozar*, 1998 WL 865688, at \*4 (vice-president of company and company in privity); *Kuntz*, 2005 WL 949119, at \*3 (personal representative of estate and beneficiaries in privity); *Myhra v. Park*, 258 N.W. 515, 518-19 (Minn. 1935) (Judgment in action against principal for servant’s alleged negligent act is bar to action against servant for same act).

In addition, in distinguishing the attorney-client privity cases, the split Court of Appeals found it “significant” that the First Circuit’s decision in *El San Juan Hotel Corp. v. Kagan*, 841 F.2d 6 (1st Cir. 1988) was based, in part, upon a finding that the complaint in the successive action against attorney was based upon joint action and allegations of a conspiracy. *Id.* at 10-11; *see also Gambocz v. Yelencsics*, 468 F.2d 837, 841-42 (3rd Cir. 1972); *Gambrell v. Hess*, 777 F.Supp. 375, 381 (D.N.J. 1991); *Anderson v. Rayner*, No. W2004-00485-COA-R3-CV, 2005 WL 3543682, at \*6 (Tenn. Ct. App. Dec. 28, 2005) (“[A]lleged co-conspirators are ‘in privity’ with one another for res judicata purposes.”), citing *Discon Inc. v. Nynex Corp.*, 86 F.Supp.2d 154, 166 (W.D.N.Y.2000); *McIver v. Jones*, 434 S.E.2d 504, 506 (Ga. Ct. App. 1993); *In re Teletronics*, 762 F.2d 185, 192 (2d Cir.1984); *Press Publ'g v. Matol Botanical Int'l, Ltd.*, 37 P.3d 1121, 1128 (Utah 2001). Similarly, in this case, Katherine Rucker’s allegations against Appellants are based upon an alleged conspiracy between Appellants and Robert Rucker. (ADD. 7-9 at ¶¶ 45, 53, 55, 61-62.) Thus, Katherine Rucker’s conspiracy theory would also support a finding of privity in this case.<sup>12</sup>

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<sup>12</sup> Katherine Rucker’s appeal of the trial court’s summary judgment order to the Court of Appeals was based upon her assertion that joint tortfeasors can be sued in separate actions and thus, she was not required to sue Appellants and Robert Rucker in the same proceeding. (K. Rucker Ct. App. Brief at 32-36.) By a footnote, the Court of Appeals rejected that argument concluding that joint tortfeasors must be sued in the same action when they are in privity. (ADD. 7 n. 4); *see also 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).

**D. The Record Demonstrates That No Injustice Will Occur By Application Of Res Judicata To Preclude Any Further Recovery By Katherine Rucker For Her Marital Estate.**

In reversing the trial court's privity conclusion, the split Court of Appeals determined, without any analysis, that even if privity existed, it would still reverse the trial court's decision and remand for a determination on whether res judicata would work an injustice on Katherine Rucker. (ADD. 16.) There is no reason to remand for this determination.

This case is not about an attorney asking the Court for a free pass to commit fraud. The application of res judicata does not insulate a lawyer who engages in fraudulent conduct or a lawyer who aids a client in his fraud. The question is not an "if," but a "when." Katherine Rucker was free to sue Robert Rucker and those in privity with him, including Appellants, in the same action, but having chosen not to, she is now precluded by res judicata from renewing the same lawsuit against those defendants in privity. The doctrine of res judicata, for many important public policy reasons, creates this procedural result and has nothing to do with insulating wrongdoers. Rather, it provides a clear blueprint that parties in privity must be sued at the same time.

The United States District Court for the District of Maryland in *State of Maryland v. Capital Airlines*, 267 F.Supp. 298 (D. Md. 1967) succinctly described the justiciable application of collateral estoppel that has particular meaning to the application of res judicata in this case:

Indeed, the philosophical basis for the doctrine of collateral estoppel is that a party should have a full and fair day in court to be heard on the issue but should not be able to litigate that issue ad nauseam. There must be an end to

litigation at some point. In view of the crowded dockets of the courts today, ancient principles must give way to principles based on today's realities so long as these new principles do not deprive a litigant of his day in court. In formulating a principle of law, a court does not sit in a vacuum. Rather, it must weigh the rights of an individual litigant with the rights of society. In coming to its conclusion, the court has taken into account not only the right of society to have its courts render justice as inexpensively as possible and the right of each litigant to have his day in court, but also the rights of other litigants who might have to wait to have their day in court because one litigant is allowed to litigate the same issue over and over again.

*Id.* at 303-04. Katherine Rucker has had her day in court and received a total of \$5,000,000. This case is exactly the kind of case that warrants the application of res judicata.

In considering any potential "injustice," this Court considers 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 other words, the question presented by the split Court of Appeals' secondary holding is whether Katherine Rucker would suffer an injustice if res judicata were applied to preclude her claims against Appellants. The answer to that question is unequivocally "no."

The injustice query is generally related to whether the estopped party had a full and fair opportunity to litigate her claims. *See Oldham v. Pritchett*, 599 F.2d 274, 279-80 (8th Cir. 1979) (finding that because plaintiffs enjoyed a full and fair opportunity to be heard on the issue of negligence in a prior admiralty proceeding, application of collateral estoppel would not be unjust). It is undisputed that Katherine Rucker had a full and fair opportunity to be heard on her claims in the Rucker Fraud Action, and she successfully

obtained an award of an additional \$4,200,000 as a result of her efforts. Moreover, Katherine Rucker could have named Appellants as defendants in the Rucker Fraud Action, but simply chose not to. (A.42; K. Rucker Dep. at 25.) That Katherine Rucker voluntarily chose, for strategic and other reasons, not to avail herself of the right to sue others in privity at the same time does not mean she was deprived of an opportunity to be heard. Thus, there is no basis to conclude that application of res judicata would be unjust when applied to Katherine Rucker based upon the facts of this case.

In addition, application of res judicata here will not serve as a “blockade” to “unexplored paths that may lead to the truth.” See *Brown v. Felsen*, 442 U.S. 127, 132, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979); *Hauschildt*, 686 N.W.2d at 837. Katherine Rucker fully explored her fraud claims in the Rucker Fraud Action. Nor is this a case where the plaintiff suffered injury and was not compensated for the injury. Katherine Rucker received a judgment in the full amount of her damages based upon her day in court. She should not be entitled to now have a second bite at the same apple to collect the difference between the full judgment awarded to her and the amount of her voluntary compromise.

By contrast, if res judicata is not applied, the ramifications will be significant. First, Appellants will suffer substantial injustice. Katherine Rucker has sued Appellants for aiding and abetting a fraud by their client. (A.9.) An element of that claim is a finding of fraud by the client. That finding has already been made and places Appellants at an extraordinary disadvantage in any trial of this case. Had Katherine Rucker named Appellants and their client as defendants in the Rucker Fraud Action, Appellants would

have been in a much better position to defend against any liability claims relating to the marital estate as well as defend themselves against a fraud claim. Appellants are saddled with a finding on an essential element of a claim against them that arose out of a proceeding in which they were not named as a party and had no opportunity to participate. That is one of the reasons for requiring parties in privity to be sued at the same time. It is to avoid a situation where the disposition of a claim against one party in privity might serve as the basis for claim against another party in privity when the party against whom the claim is subsequently made has been deprived of the opportunity to defend. By permitting Katherine Rucker to pursue parties in privity in a series of lawsuits encourages unnecessary litigation and places the subsequently sued party in privity in a decided disadvantage.

Second, Katherine Rucker seeks to force someone, other than her former husband to contribute to and fund the marital property settlement. It is undisputed that Robert Rucker had sufficient funds to satisfy the Rucker Fraud Judgment. Katherine Rucker chose not to require Robert Rucker to pay the full amount of that judgment. Instead she pursued claims against third parties that, at no time, possessed, controlled or had an interest in the marital assets that Katherine and Robert Rucker formerly owned and have now divided. Judge Kaman properly and equitably divided the marital estate between Katherine and Robert Rucker. As a matter of public policy, the courts should not encourage divorcing or divorced couples to renounce court awards that divide marital property and substitute lawsuits and hoped for judgments against the lawyers of the divorcing parties. Judge Kaman and the Hennepin County District Court properly

discharged their duties by awarding Katherine Rucker her fair share of the marital estate after a full and fair opportunity to be heard. Failing to preclude Katherine Rucker's claims would be to encourage unnecessary litigation and game playing.

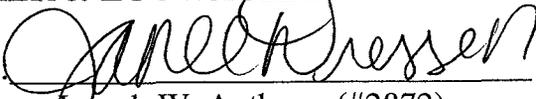
Res judicata is designed to discourage repetitious lawsuits against parties in privity over the same or similar matters. In this case, Katherine Rucker had a full and fair opportunity to pursue her claims against her former husband. She successfully prevailed in a fraud lawsuit against him, obtained full relief, and was awarded her full share of the marital estate. Any further claims against her former husband or those acting on his behalf and in privity with him to recover an additional award should be precluded by the doctrine of res judicata.

### **CONCLUSION**

Katherine Rucker had her day in court. By her choice, she received \$5,000,000 for her share of the Rucker marital estate. There is no legal or policy reason why she should have another day in court against another defendant in privity with her former husband. Appellants' relationship with Robert Rucker, their former client, together with Katherine Rucker's allegations against them arising out of Robert Rucker's actions in litigation, strongly supports a finding of privity in this case. The trial court's order granting summary judgment to Appellants on the basis of res judicata should therefore be affirmed, and the split Court of Appeals' decision to the contrary should be reversed.

**ANTHONY OSTLUND  
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Dated: October 29, 2009

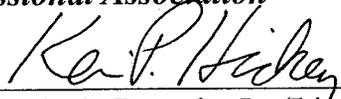
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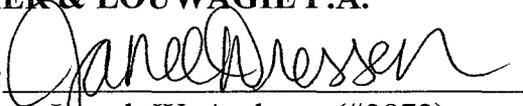
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**CERTIFICATION OF BRIEF LENGTH**

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 12,051 words. This brief was prepared using Microsoft Word 2003.

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