

NO. A08-1730

State of Minnesota
In Supreme Court

Katherine M. Rucker,

Respondent,

vs.

Steven B. Schmidt and
Rider Bennett, LLP,

Appellants.

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Res judicata applies to this case. In an effort to create confusion about the scope and proper application of res judicata, however, Respondent makes a number of arguments that are inconsistent with Minnesota res judicata law and the important public policies that have long supported its application. There are no exceptions to application of the doctrine for joint tortfeasors, when fraud is alleged, when a new or different legal theory or remedy is requested or when the estopped party prevailed in the first action. Moreover, when the correct analysis is applied to the facts of this case, that analysis demonstrates that Appellants and their former client, Robert Rucker, are in privity as it relates to the relevant subject matter at issue, that application of res judicata to the facts of this case is not unjust, but consistent with Minnesota law, and that Respondent's litigation over her marital estate should finally come to an end. The trial court should be affirmed and the split appellate court reversed.

LEGAL ARGUMENT

A. Respondent's Efforts To Circumscribe The Application Of Res Judicata Are Inconsistent With Minnesota Law.

As a threshold matter, Respondent claims that res judicata does not apply here because: (1) this case involves alleged joint tortfeasors; (2) this case involves alleged fraud; (3) Respondent alleged a new legal theory and demanded a different remedy in this action; and (4) Respondent prevailed in the first fraud action against her former husband, Robert Rucker. It is for these reasons that Respondent distinguishes the numerous compelling legal authorities cited by Appellants in support of their appeal. Respondent's

arguments are directly contrary to Minnesota law, long-established precedent throughout the country and are otherwise unsupported.

1. If joint tortfeasors are in privity, res judicata applies.

Throughout Respondent's Brief, both on a legal and equity basis, Respondent suggests that because Attorney Schmidt and his former client, Robert Rucker, are allegedly joint tortfeasors, res judicata cannot apply. (Resp. Brief at 22, 24-26, 28, 29, 31, 37-38.) According to Respondent, Minnesota jurisprudence establishes an absolute rule that a plaintiff is permitted to bring claims against joint tortfeasors in successive suits regardless of whether those joint tortfeasors are in privity. (*See id.*) Because there is no such rule in Minnesota, Respondent's argument fails.

Indeed, a plaintiff is only allowed to bring successive suits against joint tortfeasors where those tortfeasors are *not* in privity. *See Lawlor v. Nat'l Screen Servs. Corp.*, 349 U.S. 322, 330 (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); *Roebuck v. Walker-Thomas Furniture Co.*, 310 A.2d 845, 848 & n.8 (D.C. 1973).

The Minnesota cases relied upon by Respondent do not contradict these compelling authorities. For example, in *Hentschel v. Smith*, 278 Minn. 86, 153 N.W.2d 199 (1967), this 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. 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.* This 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. *Id.*

Similarly, in *Miller v. Nw. Nat'l Ins. Co.*, 354 N.W.2d 58 (Minn. Ct. App. 1984), 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 Respondent'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 joint tortfeasorship *alone* did not create privity. *See id.*¹

Here, Attorney Schmidt does not rely upon Respondent's allegation that he and Robert Rucker were joint tortfeasors to support the privity relationship between them. As set forth in Appellants' Opening Brief, the privity relationship between Attorney Schmidt and Robert Rucker is independently supported by their agency and attorney-client relationship and the fact that the allegations against them arose out of their actions in that relationship. In other words, privity is based upon the relationship of Attorney Schmidt and Robert Rucker as it relates to the subject matter of Respondent's claims – the underlying divorce proceeding. Accordingly, Respondent's argument that res judicata cannot apply to this matter because Attorney Schmidt and his former client Robert Rucker are alleged joint tortfeasors must be rejected.

2. **Res judicata applies even when the second action involves a fraud claim.**

Next, Respondent erroneously contends that res judicata does not apply because Attorney Schmidt allegedly committed fraud. (Resp. Brief at 27, 28.) This argument ignores the rationale for application of res judicata. If the elements of the doctrine are satisfied, res judicata applies regardless of the legal theory alleged in the second action. There are no exceptions to the res judicata doctrine when fraud or misrepresentation is alleged. (*See* App. Opening Brief at 17-18.) Moreover, res judicata has been applied

¹ In this case, the Court of Appeals also rejected Respondent's joint tortfeasor argument concluding that joint tortfeasors must be sued in the same action when they are in privity. (ADD. 7 n. 4)

when fraud is alleged and the privity relationship was one of agency and/or attorney-client. *Century Intern'l Arms, Ltd. v. Fed. State Unitary Enter. State Corp.*

“*Rosvoorouzheinie*,” 172 F.Supp.2d 79, 95 -97 (D.D.C. 2001) (dismissing fraud and fraudulent inducement claims against agent as barred by res judicata where plaintiff had already sued principal); *see 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). Thus, res judicata and its counterpart, collateral estoppel, will operate to preclude a subsequent action even if the claims asserted are for fraud or misrepresentation. (App. Opening Brief at 18.)

3. **Res judicata applies even when a different legal remedy is alleged in the second action.**

Respondent next contends that because she has requested treble damages under a Minnesota statute in this case, and she could not assert that claim or alleged remedy in the fraud action against Robert Rucker, res judicata does not apply. (Resp. Brief at 22, 38.) Again, Respondent ignores the rationale for application of res judicata. As discussed above, res judicata operates to preclude subsequent litigation regardless of whether a particular legal theory, issue, claim or remedy was actually litigated in the prior action. *Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004) (“Once there is an adjudication of a dispute between parties, res judicata prevents either party from relitigating claims arising from the original circumstances, even under new legal theories.”); *Mattson v. Underwriters at Lloyds of London*, 414 N.W.2d 717, 719 (Minn.

1987) (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. Ct. App. 1994) (a party cannot avoid the application of *res judicata* by changing its theory of liability in a subsequent action) *review denied* (Minn. Apr. 28, 1994); *Anderson v. Werner Cont. Inc.*, 363 N.W.2d 332, 335 (Minn. Ct. App. 1985) (adopting the “same transaction” test to determine whether, for purposes of *res judicata*, identical claims are asserted in two lawsuits, and stating that the test is met “if the same operative nucleus of facts is alleged in support of the claims”); *Dollar Travel Agency, Inc. v. NW. 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); *Hanson v. Friends of Minn. Sinfonia*, No. A05-1783, 2006 WL 1738243, at *3 (Minn. Ct. App. June 27, 2006).

Minnesota courts have long held that *res judicata* operates to bar subsequent litigation even if additional legal remedies are alleged in the subsequent action. *Eder v. Fink*, 147 Minn. 438, 440, 180 N.W. 542, 543 (1920) (“The fact that the form of the present action is different and that a different remedy is sought is not alone sufficient to prevent the application of the doctrine of *res judicata*.”); *see also Doschadis v. Anamosa Cmty. Sch. Dist.*, 13 F.Supp.2d 945, 949 (N.D. Iowa 1998) (“When a valid and final judgment rendered in an action extinguishes the plaintiff’s claim pursuant to the rules of merger or bar ... the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.”); *U.S. v. Temple*, 299 F.2d 30, 32

(7th Cir. 1962) (dismissing new claim for double damages pursuant to res judicata even though that remedy was not demanded in prior action).

Here, Respondent's claims undisputedly arise out of the same set of operative facts that were at issue in the fraud action against Robert Rucker. (Resp. Brief at 30-36; ADD. 28-29.) Thus, even though Respondent chose to articulate a different legal theory in the instant action or demand a different remedy, res judicata still operates to bar this action.

4. Res judicata applies where the estopped party prevailed in the first action.

Finally, Respondent contends that res judicata should not apply in this case because she prevailed in the fraud action against Robert Rucker. (Resp. Brief at 27-34.) Nowhere in the vast jurisprudence of res judicata law is it suggested or even implied that the doctrine is limited in application to cases where the estopped party lost the first case. *Riverbluff Devel. Co. v. Ins. Co. of N. Am.*, 412 N.W.2d 792, 795 (Minn. Ct. App. 1987) (holding that plaintiff, who prevailed in prior action, was barred by res judicata in subsequent action); *Advantage Health Plan, Inc. v. Knight*, 139 F.Supp.2d 108, 110 - 111 (D.D.C. 2001) (dismissing plaintiff's claims, which were successful in the first action, against an agent where the first suit was against the principal, stating "[h]aving already won a judgment in Superior Court with which it is now dissatisfied because the judgment debtor is in bankruptcy, plaintiff brings essentially the same claims to this Court against others whom it might have-but didn't-see to hold liable as well"); *In re El San Juan Hotel Corp.*, 841 F.2d 6, 7, 10-11 (1st Cir. 1988) (dismissing second action

based upon res judicata where plaintiff attempted to bring second suit against attorney in privity after having prevailed in first action).

To the contrary, res judicata operates to bar subsequent litigation even if the estopped party prevailed in the first action, as was the case here. *Id.*; see also *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). Thus, Respondent’s success in the fraud action against Robert Rucker does not prevent the application of res judicata to preclude this action.

B. The Elements Of Res Judicata Are Satisfied As A Matter Of Law.

After setting aside all of Respondent’s flawed arguments, the only element of res judicata that remains in dispute is whether Attorney Schmidt and Robert Rucker were in privity as it relates to Respondent’s allegations against them. Respondent challenges the trial court’s privity conclusion on two grounds. First, Respondent contends that their relationship does not satisfy the privity analysis articulated in *Margo-Kraft Distributors, Inc. v. Minneapolis Gas Co.*, 294 Minn. 274, 278-79, 200 N.W.2d 45, 47-48 (1972). Second, Respondent contends that an attorney-client/agency relationship does not establish privity. Like the split Court of Appeals, Respondent confuses the law of privity and misstates the application of res judicata to the undisputed facts of this case in support

of her challenges. For the reasons that follow, Respondent's arguments should be rejected.

1. **Margo-Kraft does not express an exclusive privity test and is not determinative of privity when privity of the estopping party is at issue.**

Respondent erroneously argues that privity does not exist in this case because none of the three privity categories discussed by this Court in *Margo-Kraft* applies. (Resp. Brief at 22-23.) Respondent's arguments miss the mark for two important reasons. First, *Margo-Kraft* does not set forth an exclusive privity test. Second, *Margo-Kraft* concerns application of collateral estoppel, not res judicata, and therefore analyzes only the existence of privity of the *estopped party*, not the party seeking to invoke the doctrine, *i.e.*, the estopping party, as is the case here.

a. **The *Margo-Kraft* Court did not adopt an exclusive privity test.**

In analyzing the privity element of the collateral estoppel doctrine, the *Margo-Kraft* Court expressly recognized that there is no prevailing test or definition of privity; rather, privity is defined based upon the circumstances of each case. *Id.* at 278, 200 N.W.2d at 47. More specifically, the *Margo-Kraft* Court stated:

There is no prevailing definition of privity which can be automatically applied . . . so we must carefully examine the circumstances of each case. Although there is no precise test of "privity," it is, as stated in Restatement, Judgments, § 83, comment a, "a word which expresses the idea that as to certain matters and in certain circumstances persons who are not parties to an action but who are connected with it in their interests are affected by the judgment with reference to interests involved in the action, as if they were parties." Those in privity would **include**, according to the Restatement, "those who control an action although not parties to it; those

whose interests are represented by a party to the action;
successors in interest to those having derivative claims.”

Id. at 278, 200 N.W.2d at 47-48 (emphasis added). Though this Court stated that those in privity would **include** “those who control an action although not parties to it; those whose interests are represented by a party to the action; [or]successors in interest to those having derivative claims,” this Court did not indicate, or even imply, that those in privity were **limited to** those three categories. *See id.*² Thus, simply because the relationship of Appellants and Robert Rucker may not fall within one of the three categories discussed in the *Margo-Kraft* decision, the privity inquiry does not end. Privity can still be found based upon the relationship of the parties to the subject matter of the dispute.

b. Determining privity of an estopped party is fundamentally different than determining privity of the estopping party.

There is another important distinction between the *Margo-Kraft* privity analysis and the privity analysis required in this case. *Margo-Kraft* involved application of the collateral estoppel doctrine, not res judicata. In Minnesota, the privity elements of collateral estoppel and res judicata are different, despite the split Court of Appeals’

² The Court of Appeals has also recognized that the examples of relationships identified in the *Margo-Kraft* decision are not exclusively determinative of a privity finding. *See Crossman v. Lockwood*, 713 N.W.2d 58, 62 (Minn. Ct. App. 2006) (classifying the *Margo-Kraft* three-category list as “examples” of relationships that provide a basis for privity). Consistent with this understanding, some Minnesota cases do not even refer to the three *Margo-Kraft* “categories” in the privity analysis. *See e.g., Beutz v. A.O. Smith Harvestore Products, Inc.*, 431 N.W.2d 528, 533 (Minn. 1988); *Wessling v. Johnson*, 424 N.W.2d 795, 798 (Minn. 1988); *McMenomy v. Ryden*, 276 Minn. 55, 58-59, 148 N.W.2d 804, 808 (Minn. 1967); *Reil v. Benjamin*, 584 N.W.2d 442, 445 (Minn. Ct. App. 1988); *SMA Servs., Inc. v. Weaver*, 632 N.W.2d 770, 774 (Minn. Ct. App. 2001).

conclusion that they are “identical.” (ADD. 5 n.1.) For collateral estoppel to apply, the following elements must be satisfied:

(1) the issue must be identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) **the estopped party was a party or was in privity with a party to the prior adjudication**; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

Hauschildt, 686 N.W.2d at 837 (emphasis added.) Thus, in all collateral estoppel cases in which privity is at issue, it is only the estopped party’s privity that is considered.

By contrast, for res judicata to apply, the following elements must be satisfied:

(1) the earlier claim involved the same set of factual circumstances; (2) **the earlier claim involved the same parties or their privies**; (3) there was a final judgment on the merits; (4) the estopped party had a full and fair opportunity to litigate the matter.

Id. at 840 (emphasis added). Thus, res judicata requires that both the party invoking the doctrine (the “estopping party”) *and* the party to be estopped (the “estopped party”) must have been a party or in privity with a party of the prior action. *Id.*³

This distinction is critical and important to an understanding of the rationale that underlies the concepts of collateral estoppel and res judicata. The doctrines of collateral estoppel and res judicata have the potential effect of closing the courthouse doors to a litigant. Before a court will take such action it wants to make certain that fundamental notions of due process have been satisfied and that the party to be estopped was given the opportunity to have his or her rights adjudicated. *See Richardson v. Jefferson County*,

³ Because being a party to the first action or in privity with a party to the first action is required for plaintiff and defendant before res judicata will apply to the second action, res judicata cases may consider privity as applied to the estopped party, the estopping party or both.

Ala., 517 U.S. 793, 797-99 & n.4 (1996); *Bernhard v. Bank of Am. Nat. Trust & Sav. Ass'n*, 122 P.2d 892, 894-95 (Cal. 1942) (res judicata must “conform to the mandate of due process of law that no person be deprived of personal or property rights by a judgment without notice and an opportunity to be heard”), cited as authoritative in *Gammel v. Ernst & Ernst*, 245 Minn. 249, 72 N.W.2d 364 (1955); *Schwartz v. First Trust Co. of St. Paul*, 236 Minn. 165, 170, 52 N.W.2d 290, 294 (1952).

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

interests have been sufficiently represented in the first action so that the application of collateral estoppel is not inequitable.” (emphasis added)).

Because the same due process concerns do not arise with a defending party seeking to invoke res judicata, the standards to be applied when considering privity of the estopped party as compared to the estopping party are different. *Bernhard*, 122 P.2d at 894 (“The criteria for determining who may assert a plea of res judicata differ fundamentally from the criteria for determining against whom a plea of res judicata may be asserted.”). In analyzing privity of the estopping party, courts are not concerned with whether their self-interest was represented in the first action. Instead, courts analyze whether the estopping party had an identity of interest with a party to the prior action.⁴ See, e.g., *Beutz v. A.O. Smith Harvestore Prods., Inc.*, 431 N.W.2d 528, 533 (Minn. 1988) (stating in a res judicata case concerning the privity of the estopping party that “[p]rivity requires a person so identified in interest with another that he represents the same legal right.”); *Wessling v. Johnson*, 424 N.W.2d 795, 798 (Minn. Ct. App. 1988)

⁴ An attorney-client privity case where the attorney is the potential estopped party is the *Ammon v. McCloskey*, 655 A.2d 549, 554 (Pa. 1995) case cited by Respondent on page 23 of her Brief. In *Ammon*, the party seeking to apply collateral estoppel sought to do so offensively against an attorney who was a non-party to the prior action. In analyzing privity **against the estopped party**, the *Ammon* court held that the attorney was not barred by *collateral estoppel* from arguing on his *own* behalf. The court reasoned: “[i]n the prior action, the lawyer was a professional representative, who owed complete allegiance to the client, but who had no personal interest in the rights being litigated. His interests were not the same as the client, and he was not in privity with him. Therefore, it cannot be said that the lawyer had a full and fair opportunity to litigate in the prior action the reasonableness or the effect of his conduct in such prior action.” But the inquiry if the lawyer sought to employ res judicata against the party-plaintiff would be different – the question would be whether he had an identity of interests with his client in the first action rather than whether his personal interests were represented.

(same); *Hanson v. N. J&B Enter., Inc.*, No. A08-0413, 2009 WL 234104, at * 3 (Minn. Ct. App. Feb. 3, 2009). Because of these differences, it is important to determine first whether privity of the estopped party or the estopping party is at issue. Respondent and the split Court of Appeals disregarded this critical distinction.

This is not a collateral estoppel case and it does not involve consideration of privity of the estopped party. If that were the relevant inquiry, the Court would consider whether Katherine Rucker was in privity with a party in the Robert Rucker Fraud Action. Since she was a party to that action, that analysis is unnecessary. As a party, Respondent was afforded due process and had a full and fair opportunity to litigate her claims, including the claims at issue in this case. Because the due process concerns implicated by the collateral estoppel privity cases are not at issue here, it is confusing and misleading to rely upon those cases as determinative of privity in this case.

In the context of the case before the Court, the Court must analyze whether the estopping parties, *i.e.*, Appellants, were in privity with a party in the Robert Rucker Fraud Action. When the Court analyzes whether Attorney Schmidt had an identity of interest with his client Robert Rucker arising out of their alleged unlawful actions in the Rucker divorce matter, the conclusion that must be reached is yes. As Robert Rucker's attorney, Attorney Schmidt represented Robert Rucker's legal rights and only his legal rights. All of the alleged fraudulent actions arose out of Attorney Schmidt's relationship with his client and out of his actions as Robert Rucker's agent and representative. These facts are not in dispute. Finding privity in this context is consistent with the numerous authorities

across the nation discussed in Appellants' Opening Brief, and with Minnesota law when the proper privity analysis is applied.

2. **Respondent's limited legal authorities do not support her contention that there is no privity between Robert Rucker and Attorney Schmidt.**

Respondent claims that under the circumstances presented here, other courts have concluded that the presence of an attorney-client relationship does not give rise to a finding of privity. (Resp. Brief at 37-38.) Importantly, almost all of Respondent's legal authorities concern the efforts of parties to employ the doctrine of collateral estoppel or res judicata *offensively*⁵ against attorneys of prior litigants. *See Ammon*, 655 A.2d at 554 (refusing to estop attorney under doctrine of *collateral estoppel*⁶ from arguing merits of dispute where he had represented his client's rather than his own interests in prior litigation); *Marshall v. Fenstermacher*, 388 F.Supp.2d 536, 563-64 (E.D. Penn. 2005) (determining that *collateral estoppel* did not apply to plaintiff's efforts to offensively employ default judgment against attorneys because the issues were not identical; noting that for the purpose of such offensive use, the parties were "likely" not in privity; holding that to use res judicata offensively absolute identity of the parties was required and not present); *Boyles v. Smith*, 759 P.2d 518, 522 (Ark. 1988) (attorney is not estopped under doctrine of *collateral estoppel* from litigating usury issue in clients' legal malpractice action against him because attorney's interests were not represented in prior action); *In*

⁵ The important distinctions between employing res judicata offensively or defensively are discussed in Appellants' Opening Brief at pages 27-29. In this case, Appellants have asked the Court to apply res judicata defensively.

⁶ Respondent refers to this as a res judicata case. (Resp. Brief at 23-24, 37.) It is not; it considers collateral estoppel and the corresponding consideration of privity as against a party to be estopped. *Ammon*, 655 A.2d at 554.

the Matter of Curry, 113 B.R. 546, 551 (D. Neb. 1990) (attorneys not barred from arguing merits regarding security interests under res judicata because their interests were not represented in prior action). For the reasons previously explained in Appellants' Opening Brief, this case does not involve an offensive application of res judicata, nor would such application be proper. (*See* App. Opening Brief at 27-29.)

The only two cases cited by Respondent that consider defensive use of res judicata involve application of a privity standard that is directly contrary to Minnesota law. *See Cont'l Sav. Assoc. v. Collins*, 814 S.W.2d 829, 832 (Tex. Ct. App. 1991) (requiring mutuality of privity and determining that because an attorney would not be responsible for paying a judgment made against his or her client, there can be no privity between an attorney and his or her client); *Branning v. Morgan Guar. Trust Co. of N.Y.*, 739 F.Supp. 1056, 1064-64 (D.S.C. 1990) (applying Georgia law of privity, which requires "mutual or successive relationship to the same rights of property"); *accord Roberts v. Porter, Davis, Saunders & Churchill*, 389 S.E.2d 361, 364 (Ga. Ct. App. 1989) (requiring that parties have "mutual or successive relationship to the same rights of property" in order to show privity). Unlike these authorities, which apply a strict mutuality standard, Minnesota has rejected a mutuality requirement in applying res judicata or collateral estoppel. *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. Respondent's authorities are therefore not persuasive to the issue before the Court.

C. There Is No Basis To Limit This Court's Holding Prospectively.

Finally, Respondent contends that, should this Court rule in Appellants' favor, the ruling should be applied prospectively only. As a general matter, all decisions of this Court will have retroactive effect. *Kmart v. County of Stearns*, 710 N.W.2d 761, 768 (Minn. 2006). Rulings are held to be prospective in "only very limited situations." *Id.* at 769. Thus, Respondent acknowledges that before a decision of this Court is limited to prospective application, three factors must weigh in favor of such a limited application. *See Summers v. R&D Agency, Inc.*, 593 N.W.2d 241, 345-45 (Minn. Ct. App. 1999).

First, the decision must establish a new principle of law, either by overruling clear past precedent, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. (Resp. Brief at 39 (citing *Kmart*, 710 N.W.2d at 767.)) Second, the court must weigh the merits by looking at the prior history of the rule, its purpose and effect, and determine whether retroactive operation will further or retard its operation. (*Id.*) Third, the court must weigh the equities imposed by retroactive application, and avoid "injustice or hardship" with a holding of nonretroactivity. (*Id.*) Because these three factors weigh in favor of applying this Court's holding to the facts of this case, Respondent's request to limit the Court's holding prospectively should be denied.

A decision in favor of Appellants would not overrule clear past precedent or announce a new rule that was not clearly foreshadowed. There is no "clear precedent" indicating that res judicata does not apply to joint tortfeasors. The Minnesota rule that joint tortfeasors can be sued separately does not mean that a plaintiff need not meet the other requirements of law. Moreover, the two cases that consider joint tortfeasorship in

the context of a res judicata privity analysis both indicate – or, at a minimum, foreshadow – even if joint tortfeasors, the tortfeasors can be in privity based upon the context and aspects of their relationship and its relation to the subject matter of the dispute. *See Hentschel*, 278 Minn. at 95, 153 N.W.2d at 206.⁷ Should this Court rule in Appellants’ favor, it will merely be applying the longstanding doctrine of res judicata to the facts of this case.

Applying res judicata in this case also further supports the several important public policies of the doctrine. If applied prospectively only, the policies of the doctrine will be hindered. A third lawsuit involving the same set of operative facts will continue and judicial efficiency and economy will not be preserved. The doctrine recognizes that there must be an end to litigation at some point and we have reached that point. In view of the crowded dockets of the courts today and the fact that Respondent already had her full day in court, and without any basis simply chose not to name Appellants in that case, res judicata should be applied here equally as in future cases based upon similar circumstances.

Finally, no injustice would be had in this case if res judicata is applied as intended. It is undisputed that Respondent already had a full and fair opportunity to litigate all of

⁷ Even when this Court has established a new rule of law, it has been reluctant to hold that the new rule constitutes the overruling of clear past precedent. *Kmart*, 710 N.W.2d at 769 (holding that certain ambiguous tax precedents did not constitute “clear precedent” that was being overruled); *Bendorf v. Comm’r of Pub. Safety*, 727 N.W.2d 410, 414 (Minn. 2007) (holding that the revival of pre-amendment interpretation of statute did not constitute a new rule of law); *Streich v. Am. Family Mut. Ins. Co.*, 358 N.W.2d 396, 397 (Minn. 1984) (holding that insurance company’s own interpretation of statute and several cases did not constitute clear precedent that was being overruled).

her claims arising out of the same set of facts as alleged in this case, including a complete trial before the Honorable Marilyn J. Kaman. Moreover, Respondent prevailed after a trial of her claims on their merits and received an award in the full amount of her damages for her marital estate. There is nothing unjust about holding Respondent to the bargain she struck with her former husband as a compromise after she was awarded the full amount of her damages in exchange for avoiding the risks of her former husband's appeal. This case does not involve allegations that Katherine Rucker was not afforded full due process rights, was denied access to the courts, was denied access to the information upon which she bases her claims, or was denied any other fundamental freedoms. In short, there is no call to limit this Court's holding to a prospective application of the well-established res judicata doctrine. The doctrine should be applied here, and Respondent's successive litigation should be put to an end.

CONCLUSION

Appellants respectfully request that the trial court's order granting summary judgment to Appellants on the basis of res judicata be affirmed, and the split Court of Appeals' decision reversed.

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