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STATE OF MINNESOTA
SUPREME COURT
No. A08-1730

Katherine M. Rucker,

Respondent,

v.

Steven B. Schmidt and
Rider Bennett, LLP,

Petitioners.

KATHERINE RUCKER'S RESPONSE TO PETITION FOR REHEARING IN SUPREME COURT

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LEGAL ARGUMENT

This Court should deny Petitioners' Petition for rehearing because this Court got it right the first time. For the most part, Petitioners are simply re-hashing arguments that were properly rejected. They also raise a host of arguments unrelated to the narrow issue of whether there is privity between Petitioners and Robert Rucker for purposes of res judicata. There is no "material question" which this Court has overlooked, failed to consider, misapplied or misconceived. See Minn. Civ. App. 140.01.

Petitioners spend an inordinate amount of time trying to distinguish between res judicata and collateral estoppel for purposes of privity. (See Petition, pp. 1-6). While there are some immaterial distinctions between the two concepts, Petitioners do not and cannot explain why privity would exist under the facts of this case. Petitioners also talk about the difference between the estopped party and the party to be estopped (id., pp. 3-4), yet they fail to offer a coherent explanation of how the purported difference would compel a different outcome in this appeal. Again, the difference is immaterial under the circumstances. There is no conceptual reason that demands a finding of privity in this case merely because Petitioners served as Robert Rucker's attorneys in the underlying dissolution proceeding.

Petitioners further argue that there is a distinction, for purposes of this case, between an "identity of interests" and whether a party's interests were represented. (Id., p. 5). They say that this Court "disregards these important distinctions," yet they do not identify what the distinctions are or why they would matter here. Petitioners claim that

"courts across the nation" have found that simply being a lawyer qualifies one as his client's privy. (Id., p. 6). But, as the Court of Appeals concluded here, there was an "astounding lack of analysis" in those out-of-state cases. It is better to follow one well-reasoned case than ten poorly-reasoned ones. Plus, as cited in Respondent's brief to this Court, there are several cases from other jurisdictions that have declined to find automatic privity between a lawyer and client and have instead held, similar to this Court, that there is no privity between an attorney and client. (Respondent's App. Br., pp. 37-38).

Petitioners argue that this Court "has undermined the important policies of res judicata," i.e. "to protect courts, parties and their privies from multiple lawsuits, vexatious litigation and require that litigation come to an end," and "to prevent double recovery." (Petition, p. 6). Petitioners ignore that Minnesota has long allowed joint tortfeasors to be sued in separate lawsuits. Kisch v. Skow, 305 Minn. 328, 332, 233 N.W.2d 732, 734 (1975); Schneider v. Buckman, 433 N.W.2d 98, 101 (Minn. 1988). The Court's decision in this case is in keeping with its earlier line of cases. As to Petitioners' suggestion that this case is vexatious, the evidence here – including witness testimony and documents – demonstrates that Petitioners, Steve Schmidt in particular, knowingly and actively assisted in a fraud. Respondent's suit against them is in no way "vexatious." In addition, there is no chance of double recovery here, contrary to Petitioners' misleading suggestion. Respondent was only partially compensated by her settlement in the initial fraud case and she is only seeking to recover the difference in this action, together with treble damages under Minn. Stat. §§ 481.07 and 481.071.

Contrary to Petitioners' argument, this Court did not adopt a per se rule, "effectively" or otherwise. This Court made that much clear in footnote 6, where it stated, "In reaching this conclusion, we do not mean to suggest that an attorney representing a client can never be in privity with the client. . . . We only conclude that on the facts of this case privity has not been established." A rehearing would not change the outcome of this appeal and is therefore unnecessary.

Petitioners also ask for a rehearing to address the case of Hoppe v. Klapperich, 28 N.W.2d 780 (Minn. 1947) because they forgot to address it in their briefs and at the oral argument. Hoppe, of course, holds that an attorney forfeits his immunity to the claims of opposing parties and may be liable by becoming an instrumentality of his client's perpetration of fraud. Id. at 791. It was cited by Respondent three times in her reply brief to the Court of Appeals in response to Petitioners' claim of immunity, so Petitioners had notice of it. (Resp. Reply Br. dated Feb. 9, 2009, pp. 9, 10, and 12). It is preposterous to request a rehearing simply because Petitioners forgot to make a particular argument or chose not to cite a particular case. That reasoning would require a rehearing in virtually every case. Petitioners actively colluded with their client to cheat Respondent out of millions of dollars and cannot use the doctrine of res judicata to escape liability.

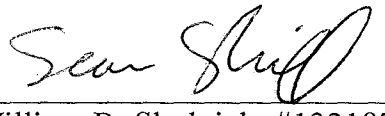
The remaining issue raised by Petitioners is similarly unavailing. The parties have already addressed the issue of the agency relationship as it pertains to attorney-client privity. (Petition, p. 9). Indeed, Petitioners' own brief specifically discusses at length the

principal-agent relationship as it relates to privity. (Petitioners' Brief, dated Oct. 29, 2009, pp. 22, 23, and 35-36). Again, this is not a ground for rehearing.

In summary, Petitioners are re-hashing the same arguments they made to this Court the first time. While they try to parse this Court's words and phrases to create the appearance of important issues that will supposedly throw the practice of law into a quagmire of uncertainty and leave all lawyers forever questioning their ethical responsibilities, those issues are nothing more than false alarms. Therefore, this Court should deny the Petition for Rehearing.

SKOLNICK & SHIFF, P.A.

Date: January 24, 2011

By: 

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