

State of Minnesota
In Court of Appeals

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DOUG DAMMANN AND PIPESTONE PLUMBING & HEATING, INC.,

Appellants,

vs.

MASTER BLASTER, INC.,

Respondent.

APPELLANTS' BRIEF, ADDENDUM AND APPENDIX

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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).

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STATEMENT OF THE LEGAL ISSUES

I. WHETHER SUMMARY JUDGMENT REQUIRING DAMMANN-PIPESTONE TO INDEMNIFY MASTER BLASTER UNDER “VOUCHING” OR TENDER OF DEFENSE PRINCIPLES MUST BE REVERSED, WHERE AN INHERENT CONFLICT OF INTEREST EXISTS BETWEEN DAMMANN-PIPESTONE AND MASTER BLASTER IN THE DEFENSE OF THE SOUTH DAKOTA LITIGATION.

The Washington County District Court erred by granting summary judgment in Master Blaster’s favor under “vouching” or tender of defense principles, due to the inherent conflict of interest between Dammann-Pipestone and Master Blaster in the defense of the South Dakota litigation.

RESTATEMENT (SECOND) OF JUDGMENTS, § 57 (1982)

Barber-Green Company v. Bruning Company, 357 F.2d 31 (8th Cir. 1966)

Universal American Barge Corp. v. J-Chem, Inc., 946 F.2d 1131 (5th Cir. 1992)

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II. WHETHER THE DISTRICT COURT’S SUMMARY JUDGMENT VIOLATES DAMMANN-PIPESTONE’S CONSTITUTIONAL DUE PROCESS RIGHTS, WHERE DAMMANN-PIPESTONE NOW IS BOUND TO A FOREIGN JUDGMENT, DESPITE THE ISSUING COURT’S LACK OF PERSONAL JURISDICTION OVER DAMMANN-PIPESTONE AND DESPITE DAMMANN-PIPESTONE’S LACK OF PRIVITY WITH MASTER BLASTER.

The Washington County District Court’s summary judgment violates Dammann-Pipestone’s due process rights given the South Dakota court’s lack of personal jurisdiction over Dammann-Pipestone and the inherent conflict of interest between Dammann-Pipestone and Master Blaster in the South Dakota action.

U.S. Const., Amend. XIV, clause 1

Minn. Const., Art. I, Section 7

Hansberry v. Lee, 311 U.S. 32, 61 S.Ct. 115 (1940)

Postal Telegraph Cable Company v. City of Newport, Kentucky, 247 U.S. 464, 38 S.Ct. 566 (1918)

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- III. TO THE EXTENT THE COURT RECOGNIZES “VOUCHING” AND TENDER OF DEFENSE PRACTICES AS EFFECTING A FORM OF COLLATERAL ESTOPPEL PECULIAR TO THE LAW OF INDEMNIFICATION, WHETHER SUMMARY JUDGMENT MUST BE REVERSED, WHERE DAMMANN-PIPESTONE LACKED A FULL AND FAIR OPPORTUNITY TO BE HEARD IN SOUTH DAKOTA.**

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 99 S.Ct. 645 (1979)

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- IV. WHETHER SUMMARY JUDGMENT MUST BE REVERSED RELATIVE TO MASTER BLASTER’S INDEMNITY CLAIM STEMMING FROM SUPREME PORK’S BREACH CLAIM FOR IMPLIED WARRANTY OF FITNESS, WHERE DAMMANN-PIPESTONE, AS THE SELLER OF SERVICES, HAS NO IMPLIED WARRANTY LIABILITY.**

Minn. Stat. § 336.2-102 (2009)

Minn. Stat. § 336.2-315

S.D.C.L. § 57A-2-102 (2008)

S.D.C.L. § 57A-2-315

STATEMENT OF THE CASE

Appeal is taken from the summary judgment of the Washington County District Court, the Honorable Gregory G. Galler, presiding.

Supreme Pork, Inc., sued Respondent Master Blaster, Inc., (“Master Blaster”) in Minnehaha County Circuit Court in South Dakota on or about January 22, 2004, alleging negligence and breach of implied warranty in connection with the installation of a pressure washer system and seeking resulting damages caused by a fire, which occurred at Supreme Pork’s Lake Benton, Minnesota, facility on or about March 21, 2002. On or about May 25, 2004, Respondent commenced a third-party action for contribution or indemnity against Appellants Doug Dammann and Pipestone Plumbing & Heating, Inc. (“Dammann-Pipestone”). The Minnehaha County Circuit Court dismissed Appellants from that action for lack of personal jurisdiction. The South Dakota action proceeded to trial without Dammann-Pipestone involved as a party and resulted in a judgment for damages well in excess of \$1 million.

Master Blaster subsequently commenced this action for common law indemnity against Appellants. It moved for summary judgment, demanding that the Washington County District Court conclusively bind Dammann-Pipestone to the South Dakota judgment under collateral estoppel principles and demanding that the district court require Appellants to pay Master Blaster’s defense costs incurred in the South Dakota action. The district court entered summary judgment against Dammann-Pipestone, despite the fact they were not parties to the South Dakota action, despite the fact that their interest in that action conflicted with that of Master Blaster, and despite the fact that

Dammann-Pipestone has no warranty liability for which indemnity is owed. Moreover, the district court never bothered to consider Dammann-Pipestone's argument that it lacked a full and fair opportunity to be heard in the South Dakota action, because procedural opportunities are available to the party in Minnesota that are likely to cause a different result. For the reasons set forth herein, this court must reverse the district court's summary judgment and remand the case for trial.

STATEMENT OF THE FACTS

I. DAMMANN-PIPESTONE IS A MINNESOTA BUSINESS.

Appellant Doug Dammann ("Dammann") purchased Appellant Pipestone Plumbing & Heating, Inc. ("Pipestone"), a Minnesota corporation, from his employer in 1979. *See* Appellant's Appendix at 42:7. Prior to that purchase, Pipestone employed Dammann while he worked to obtain a master plumber license. *See id.* Between 1979 and 2003, Dammann operated Pipestone, performing residential plumbing and heating as well as small commercial jobs in and around the area of Pipestone, Minnesota. *See id.* In 2003, Dammann moved to Washington County, where he continues to operate his plumbing and heating business. *See id.*

II. THE WORK DAMMANN-PIPESTONE PERFORMED FOR MASTER BLASTER OCCURRED IN MINNESOTA.

In or about March of 1999, Master Blaster, a South Dakota corporation, hired Dammann-Pipestone to install chimney vents for two power washers Master Blaster sold to Supreme Pork, a South Dakota corporation, for installation at its facility in Lake Benton, Minnesota. *See id.* at 45:17. Dammann-Pipestone performed no other work

relative to the pressure washer installation. No written contract governed this work, either as between Dammann-Pipestone and Master Blaster or as between Dammann-Pipestone and Supreme Pork, although there is an invoice for the work. *See id.* at 71. Because no written contract exists, there is no contractual indemnification provision, which otherwise might form the basis of any claim for contractual indemnity by Master Blaster against Dammann-Pipestone. Master Blaster was free to insist on written contract with an indemnification provision had it wanted one.

After performing the chimney vent installation, Doug Dammann inspected the work his company performed to insure that combustibles did not obstruct the chimney vents. *See id.* at 46. To Dammann-Pipestone's knowledge, the chimney vents posed no problems. Dammann-Pipestone heard nothing about the work performed at Supreme Pork's Lake Benton facility for the next three years.

Over that same three-year period, Master Blaster continued to be involved with Supreme Pork's pressure washer system. *See id.* at 125:22. Supreme Pork hired Respondent to repair and maintain the pressure washer system. *See id.* Master Blaster repaired one of the power washers at issue just days before the fire. *See id.* at 125:24. Paul Miersma, testified that Master Blaster removed a power washer that malfunctioned and took it to Master Blaster's shop for repair and replacement of broken parts. *See id.* at 125:24-25.

III. DAMMANN-PIPESTONE'S CAUSE AND ORIGIN EXPERT DISAGREES WITH THE THEORY THAT CAUSE AND ORIGIN EVIDENCE POINTS CONCLUSIVELY TO DAMMANN-PIPESTONE'S WORK.

Two site inspections occurred within a month of the March 21, 2002 fire. The first of these inspections halted when those involved realized that not all interested parties had received notice. The second inspection occurred on April 18, 2002. Dammann-Pipestone's fire cause and origin investigator, Terry Parks, attended the inspection.

Mr. Parks' cause and origin investigation revealed that Supreme Pork significantly altered the fire scene by removing and/or destroying evidence in a way that seriously compromised his investigation. *See* Appellant's Appendix at 168-169. Doug Dammann, who also attended the inspection, noted the removal of about 75 percent of the Lake Benton facility's buildings and that the only room available for inspection was the room that housed the pressure washer system. *See id.* at 65:100. Nevertheless, based on the available physical evidence, Mr. Parks disagrees with Master Blaster's contention that cause and origin evidence points conclusively to Dammann-Pipestone's work as the cause of the fire. *See id.* at 169.

IV. SUPREME PORK SUED ONLY MASTER BLASTER IN SOUTH DAKOTA.

Master Blaster was the only entity Supreme Pork sued for this fire loss. *See id.* at 30. That action ("the primary action") commenced on January 22, 2004 in Minnehaha County Circuit Court. *See id.* Supreme Pork alleged that Master Blaster was liable to Supreme Pork under theories of negligence and implied warranty. *See id.* at 31-33. Although Supreme Pork's complaint mentioned Dammann-Pipestone's work as a

potential cause of the fire, it alleged that Master Blaster was generally negligent with respect to the installation of *the pressure washer system*. *See id.* at 31-32. In that regard, Supreme Pork alleged:

[Master Blaster] was negligent in breaching its duty of reasonable care to [Supreme Pork] *including, but not limited to the following*:

- A. *Negligently installing the new pressure washer system, including the venting system;*
- B. *Negligently failing to perform the contract skillfully, carefully, diligently, and in a workmanlike manner;*
- C. *Negligently failing to supervise its employees, subcontractors, and their agents and employees, and other persons performing any of the work under the contract with Defendant.*

Appellant's Appendix at 31-32 (emphasis added).

Although the fire occurred in Minnesota and most of the witnesses resided there, Master Blaster did not contest venue or jurisdiction in South Dakota.

V. ALTHOUGH MASTER BLASTER COMMENCED A THIRD-PARTY CONTRIBUTION OR INDEMNITY CLAIM AGAINST DAMMANN-PIPESTONE IN SOUTH DAKOTA, THE CIRCUIT COURT DISMISSED DAMMANN-PIPESTONE FOR LACK OF PERSONAL JURISDICTION.

Master Blaster commenced a third-party contribution or indemnity claim against Dammann-Pipestone on or about May 25, 2004. *See* Appellant's Appendix at 73-75. Dammann-Pipestone immediately moved for dismissal on personal jurisdiction grounds. *See id.* at 76. Following limited discovery relative to the personal jurisdiction issue, the Honorable Gene Paul Kean, Judge of the Minnehaha County Circuit Court, venued in the State of South Dakota, dismissed Dammann-Pipestone from the action on June 6, 2005.

That court determined that Dammann-Pipestone's contacts with South Dakota were extremely slight and insufficient to trigger personal jurisdiction in South Dakota.

Specifically, Judge Kean found:

Pipestone does not have an office in South Dakota. It has no registered agent here and is not licensed to do business here. It does not employ workers from South Dakota. It has no bank accounts, inventory, or real estate here. It does not pay taxes in South Dakota nor does it possess a contractor's excise tax license. Pipestone's state of incorporation is Minnesota. Pipestone does not pay unemployment insurance or worker's compensation insurance in South Dakota. Service of process occurred in Minnesota. Pipestone has no number for South Dakota as its business is in Pipestone, Minnesota.

Appellants' Appendix at 79.

Based on these findings, Judge Kean concluded: "Pipestone has not purposefully availed itself to the privilege of doing business in South Dakota." *Id.* at 84. It further held that Pipestone did not intentionally direct any of its alleged tortious conduct at South Dakota, making the assertion of personal jurisdiction over Pipestone unreasonable and unconstitutional under the Due Process clauses of the South Dakota and United States Constitutions, given Pipestone's lack of minimum contacts with the forum. *See id.*

VI. MASTER BLASTER TENDERED COMPLETE CONTROL OF ITS DEFENSE TO DAMMANN-PIPESTONE TWICE.

Master Blaster first tendered the defense of the primary action to Dammann-Pipestone on common law indemnity grounds the very day the Minnehaha County Circuit Court issued its dismissal order. *See id.* at 88-89. A second tender followed on November 14, 2006. *See id.* at 90-91. Both notices purported to tender complete control of the defense of Master Blaster to Dammann-Pipestone:

June 6, 2005 Letter

“We hereby tender the defense of Master Blaster to your client, Pipestone, and its insurance carrier.” Appellant’s Appendix at 88.

November 14, 2006 Letter

“Please consider this once again to be a Tender of Defense of this Claim.” *Id.* at 91.

As noted above, the claim involved Master Blaster’s work generally and Pipestone’s work specifically. Dammann-Pipestone rejected both tenders of defense.

VII. MASTER BLASTER DEFENDED THE SOUTH DAKOTA ACTION IN DAMMANN-PIPESTONE’S ABSENCE WITHOUT PRESENTING DEFENSES DAMMANN-PIPESTONE WOULD HAVE IF SUBJECT TO THE SOUTH DAKOTA COURT’S PERSONAL JURISDICTION.

With Dammann-Pipestone absent, Supreme Pork focused its case solely on Dammann-Pipestone’s work of installing chimney vents. Master Blaster’s cause and origin expert, Jeffery Washinger, was deposed a mere three months before trial. His deposition consisted only of 33 pages, wherein he testified that he reviewed the opinions of Supreme Pork’s experts and had no reason to dispute their conclusions. *See id.* at 129-137 (specifically 135:25-28 and 136:29-31). Aside from Mr. Washinger, Master Blaster apparently presented testimony from two more cause and origin experts, neither of whom testified to alternative fire sources. Those experts did not acknowledge that Master Blaster’s repair work on the pressure washer system could have caused the fire.

Based on the testimony of Master Blaster’s experts and the limited documents produced in the South Dakota action, none of Master Blaster’s experts apparently performed any forensic tests in an effort to disprove Supreme Pork’s theories of liability

to the extent those theories implicate Dammann-Pipestone's work. Master Blaster has never said exactly what it did to defend Dammann-Pipestone's interests in that regard. Missing from the record is any evidence that Master Blaster even bothered to refute the notion that any part of the pressure washer system caused the fire.

As noted earlier, Dammann-Pipestone had an oral contract with Master Blaster only for the installation of chimney vents. Dammann-Pipestone did not perform other services relative to the installation of the pressure washer system, and its contract predominantly was one for services. *See* Appellant's Appendix at 7. Despite this fact, Master Blaster submitted to the South Dakota jury the question of whether its unnamed agent (*i.e.*, Dammann-Pipestone) breached an implied warranty of fitness to Supreme Pork. *See id.* at 35-36.

Thus, Master Blaster defended the case only in terms of whether Dammann-Pipestone and Plaintiff were at fault, as indicated by the Verdict Form. *See id.* Despite the fact that Supreme Pork's complaint implicated Master Blaster's independent fault at least generally, the only fault issues presented were those pertinent to Dammann-Pipestone as Master Blaster's unnamed agent and Supreme Pork. *See id.* The South Dakota jury decided the negligence claim on these questions:

1. Was the defendant's agent negligent?

YES

* * *

3. Was defendant's agent's negligence a legal cause of plaintiff's injuries?

YES.

Appellant's Appendix at 35.

Despite the fact that Dammann-Pipestone's oral contract was one for services, the jury found Dammann-Pipestone breached Master Blaster's implied warranty to Supreme Pork, an implied warranty that arises only within the context of a sale of goods. Those questions were phrased thus:

5. Did defendant's agent breach the implied warranty of fitness for a particular purpose?

YES

* * *

7. Did that breach of the implied warranty damage the plaintiff?

YES.

Id. at 36.

Although the jury considered Supreme Pork's negligence, it assessed Supreme Pork with only 5 percent of the fault, whereas it assessed Master Blaster with 95 percent of the fault on the basis of vicarious liability for the acts of its unnamed agent, Dammann-Pipestone. *See* Appellant's Appendix at 36.

VIII. MASTER BLASTER'S MINNESOTA INDEMNITY ACTION AGAINST DAMMANN-PIPESTONE GIVES RISE TO THIS APPEAL.

Master Blaster commenced this action in or about July of 2007, seeking common law indemnity from Appellants. It moved for summary judgment, demanding that the Washington County District Court conclusively bind Dammann-Pipestone to the South Dakota judgment under vouching-in or tender of defense doctrines related to collateral

estoppel. Master Blaster further demanded that the district court require Dammann-Pipestone to pay Master Blaster's defense costs incurred in the South Dakota action. On March 10, 2009, the Washington County District Court entered summary judgment in Master Blaster's favor. Dammann-Pipestone now seeks reversal of that summary judgment for the reasons set forth in detail below.

ARGUMENT

I. INTRODUCTION

Master Blaster used the practice of common law "vouching," or tender of defense, to procure a foreign judgment implicating only Dammann-Pipestone's fault, despite the fact that an inherent conflict of interest between Dammann-Pipestone and itself made it impossible for Master Blaster to fully and fairly represent Dammann-Pipestone's interests in South Dakota, and despite the fact that the same conflict of interest would have prevented Dammann-Pipestone from fully and fairly representing Master Blaster's interests. No Minnesota appellate authority applies "vouching" or tender of defense practices in this way under the circumstances involved here. This result is contrary to modern vouching and tender of defense doctrines. This result also violates Dammann-Pipestone's constitutional due process rights under the Fourteenth Amendment, because it effectively subjects Dammann-Pipestone to the judgment of a South Dakota court which lacked personal jurisdiction over Dammann-Pipestone. Moreover, the South Dakota forum lacked procedural opportunities available to Dammann-Pipestone in Minnesota which likely would have changed the result.

Intensifying the unconstitutional effect of the district court's summary judgment is the fact that the South Dakota verdict determined that Dammann-Pipestone breached an implied warranty to Supreme Pork despite the fact that Dammann-Pipestone's oral contract with Master Blaster was one for services, not for goods. Accordingly, Dammann-Pipestone made no implied warranty of fitness. For the reasons set below, the Washington County District Court's summary judgment must be reversed and remanded for trial on liability and damages, because Master Blaster did not defend Dammann-Pipestone's interests as it claims it did.

II. STANDARD OF REVIEW

Rule 56.03 of the Minnesota Rules of Civil Procedure sets forth the standard whereby summary judgment motions are decided. It provides for entry of summary judgment "if the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue of material fact that either party is entitled to a judgment as a matter of law." Minn.R.Civ.P. 56.03 (2009). This court reviews summary judgment de novo. *See Lefto v. Hoggsbreath Enterprises, Inc.*, 581 N.W.2d 855, 856 (Minn. 1998). In doing so, the reviewing court views the evidence in the light most favorable to the nonmoving party. *McIntosh County Bank v. Dorsey & Whitney, LLP*, 745 N.W.2d 538, 545 (Minn. 2008) (citing *Fairview Hospital & Health Care Serv. v. St. Paul Fire & Marine Ins. Co.*, 535 N.W.2d 337, 341 (Minn. 1995)).

III. SUMMARY JUDGMENT REQUIRING DAMMANN-PIPESTONE TO INDEMNIFY MASTER BLASTER UNDER “VOUCHING” MUST BE REVERSED, BECAUSE AN INHERENT CONFLICT OF INTEREST EXISTS BETWEEN DAMMANN-PIPESTONE AND MASTER BLASTER IN THE SOUTH DAKOTA LITIGATION.

Seventy years ago, before the United States Supreme Court issued its flexible due process analysis embodied in the “minimum contacts” approach to personal jurisdiction,¹ the Minnesota Supreme Court recognized common law “vouching” practice as synonymous with a tender of defense. *See State Bank of New Prague v. American Surety Co. of New York*, 206 Minn. 137, 145, 288 N.W. 7, 11 (1939). *State Bank* did not analyze the common law “vouching” practice or the tender of defense in terms of whether those mechanisms afford due process protection to a nonparty bound by the judgment against the primary defendant, when the judgment is issued a court that lacks personal jurisdiction over the nonparty whose interest conflicts with that of the primary defendant. In fact, the cases *State Bank* and the cases it mentions as establishing “vouching” and tenders of defense as established practices pertain to contractual indemnity or surety agreements, wherein the primary defendant in its indemnitor have no conflict of interest. *See id.* (citing *Milavetz v. Oberg*, 138 Minn. 215, 164 N.W. 910 (1917), *First Presbyterian Church of Duluth v. United States Fidelity & Guaranty Company*, 133 Minn. 429, 158 N.W. 709 (1916), *Great Northern Railway Company v. Akeley*, 88 Minn. 237, 92 N.W. 959 (1903)).

¹ Dammann-Pipestone here refers to the seminal decision of the United States Supreme Court in *International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S.Ct. 154 (1945).

The Washington County District Court's summary judgment against Dammann-Pipestone requires this court to undertake just such an analysis. The district court's summary judgment uses "vouching" or tender of defense² to bind Dammann-Pipestone, a non-party, to a South Dakota judgment issued by a court lacking personal jurisdiction over Dammann-Pipestone, whose interests conflicted with those of Master Blaster, the primary defendant in the South Dakota action. No Minnesota court has done this to Dammann-Pipestone's knowledge in this State's history until now.

Aside from "vouching" or tender of defense practice, the only means available to bind Dammann-Pipestone to the South Dakota judgment is collateral estoppel. Master Blaster argued in its summary judgment reply brief to the district court that common law indemnity, not collateral estoppel, was the basis for its motion. See Appellant's Appendix at 225. In reality, a relationship exists between common law "vouching" or tender of defense practice and collateral estoppel. Although "vouching" or tender of defense practice technically is distinct from collateral estoppel, modern "vouching" has incorporated the requirement that no conflict of interest exist between an indemnitee and its indemnitor as a condition to binding the indemnitor to another court's judgment against the indemnitee. This "no conflict" requirement is identical to the concept of "privity," which remains an essential element to issue preclusion under collateral

² Throughout this brief, Dammann-Pipestone may refer to "vouching" or tender of defense practices separately. In modern practice, there really is no practical difference between "vouching-in" an indemnitor and tendering the defense of an action to the indemnitor. See *State Bank of New Prague v. American Surety Co. of New York*, 206 Minn. 137, 145, 288 N.W. 7, 11 (1939). Accordingly, Dammann-Pipestone uses these concepts synonymously throughout this brief.

estoppel. For the reasons stated below, the Washington County District Court's summary judgment is unlawful, unconstitutional, unjust, and, therefore, demands reversal.

On remand, Dammann-Pipestone is entitled to a full trial on liability and damages. Because the South Dakota courts lacked personal jurisdiction over Dammann-Pipestone, and because an irreconcilable conflict of interest existed between Dammann-Pipestone and Master Blaster in the defense of the underlying action, liability and damage issues are tainted.

A. The Washington County District Court's Summary Judgment Rests Exclusively On Common Law "Vouching" Practice.

The practice of common law vouching binds a non-party to a judgment, regardless of whether the issuing court has personal or subject matter jurisdiction over the non-party. One commentator describes the former common law vouching practice thus:

The procedure known as "vouching" is the predecessor of the modern impleader procedure and can be traced back to seventh century England. When a person who receives notice that he is being sued believes a third person has a duty to indemnify him, he sends the third person a simple letter, called a vouching notice, by which he tenders control of defense of the suit to the alleged indemnitor. If the third person (the "vouchee") rejects the defense or ignores the vouching notice, there are no immediate consequences. However, if the person who sent the vouching notice (the "voucher") loses his suit as defendant and then brings an action for indemnity against the vouchee, the rules of vouching prescribe that the issues decided in the original suit are binding on the vouchee in this second suit for indemnity. This vouching principle applies even if the court in the first suit had neither personal nor subject matter jurisdiction over the vouchee. In effect, the vouchee's only defense in the indemnity suit against him is to contest his duty to indemnify the voucher. Any other issues decided in the first suit, such as the liability of the voucher to the original plaintiff and the amount of damages, may not be contested by the vouchee.

John T. Bostelman, *Due Process Constraints on Vouching as a Device to Bind Non-Parties*, 14 COLUM. J.L. & SOC. PROBS. 189 (1978).

Vouching is equivalent to the act of tendering the defense of an action to another person. See *Liberty Mutual Insurance Company v. J.R. Clark Company*, 239 Minn. 511, 518, 59 N.W.2d 899, 904 (1953); *State Bank of New Prague v. American Surety Co. of New York*, 206 Minn. at 146, 288 N.W. at 11; *Dixon v. Fiat-Roosevelt Motors, Inc.*, 8 Wash. App. 689, 692, 509 P.2d 86, 89-90 (1973) (holding that “vouching in” is equivalent to the modern tender of defense). The Washington County District Court’s summary judgment rests exclusively on this practice. See Appellant’s Addendum at 10-15.

B. Where A Conflict Of Interest Exists Between An Indemnitee And The Indemnitor In The Defense Of The Underlying Litigation, “Vouching” Does Not Bind The Indemnitor To The Judgment Against The Indemnitee.

Recognizing no on-point Minnesota authority exists, the Washington County District Court based its summary judgment largely on the Fifth Circuit’s decision in *Universal v. J-Chem, Inc.*, 946 F.2d 1131 (5th Cir. 1991). That decision discussed common law “vouching” within the context of collateral estoppel, indicating that collateral estoppel and “vouching” are related doctrines and that “vouching” simply is a form of collateral estoppel that applies to an indemnitee and its indemnitor. See *Universal*, 946 F.2d at 1139-1140. Privity between parties is an essential element to collateral estoppel. See *Ellis v. Minneapolis Commission on Civil Rights*, 319 N.W.2d 702, 704 (Minn. 1982). Privity denotes a unity of interest between parties, who are so connected “in estate or in blood or in law as to be identified with them in interest, and consequently to be affected with them by the litigation.” *Hetschel v. Smith*, 278 Minn. 86, 95, 153 N.W.2d 199, 206 (1967) (citing *In re Smith’s Estate*, 60 Mont. 276, 299, 199

P. 696, 703 (1921)). To be effective, modern “vouching” requires there be no conflict of interest between the indemnitee and the indemnitor in the primary litigation. This “no conflict” requirement is synonymous with collateral estoppel’s privity requirement. Any difference between the two concepts in this regard purely one of semantics.

In the district court, Dammann-Pipestone fully analyzed why Master Blaster’s summary judgment motion should have failed due to a lack of privity between Dammann-Pipestone and Master Blaster. *See* Appellant’s Appendix at 180 -187. Dammann-Pipestone is not waiving any of those arguments by not repeating them here. In fact, Dammann-Pipestone incorporates those arguments by reference here and takes the position that there can be no privity between itself and Master Blaster for collateral estoppel purposes if there is a conflict of interest between itself and Master Blaster. Master Blaster never disputed a lack of privity in the district court. In fact, it went out of its way to argue that it sought indemnification under “vouching” or tender of defense, not collateral estoppel. *See id.* at 224-225. Thus, presumably even Master Blaster agrees that its interests conflicted with those of Dammann-Pipestone if this court analyzes the “no-conflict” requirement of vouching in terms of “privity.” *See e.g., Pirrotta v. Independent School District No. 347, Willmar*, 396 N.W.2d 20, 22 (Minn. 1986) (collateral held estoppel inapplicable, where school district, motivated by its own self-interest, could not adequately represent the interests of its school teacher in primary litigation); *Schumann v. McGinn*, 307 Minn. 446, 471, 240 N.W.2d 525, 539 (1976) (collateral estoppel held inapplicable, where lack of privity between city and its police officer made it impossible for city’s police officer to defend himself in a manner

consistent with the city's defense strategy relative to plaintiff's vicarious liability claim against the city stemming from officer's conduct).

If a person (the indemnitor) is obligated to indemnify another (the indemnitee) for a liability the indemnitee owes a third person, the indemnitor may be bound by the judgment against the indemnitee if the indemnitor rejects the indemnitee's tender of defense. Section 57 of the Second Restatement of Judgments outlines the circumstances under which a judgment against the indemnitee may bind the indemnitor by providing:

§ 57. Effect on Indemnitor Of Judgment Against Indemnitee

(1) Except as stated in Subsection (2), when one person (the indemnitor) has an obligation to indemnify another (the indemnitee) for a liability of the indemnitee to a third person, and an action is brought by the injured person against the indemnitee and the indemnitor is given reasonable notice of the action and an opportunity to assume or participate in its defense, a judgment for the injured person has the following effects on the indemnitor in a subsequent action by the indemnitee for indemnification:

(a) The indemnitor is estopped from disputing the existence and extent of the indemnitee's liability to the injured person; and

(b) The indemnitor is precluded from relitigating issues determined in the action against the indemnitee if:

(i) the indemnitor defended the action against the indemnitee;
or

(ii) the indemnitee defended the action with due diligence and reasonable prudence.

(2) If there is a conflict of interest between the indemnitee and the indemnitor regarding the injured person's claim against the indemnitee, so that the indemnitor could not properly have assumed the defense of the indemnitee, a judgment for the injured person precludes the indemnitor only with respect to issues determined in that action as to which:

(a) there was no conflict of interest between the indemnitee and the indemnitor; and

(b) the indemnitee conducted a defense with due diligence and reasonable prudence.

(3) A “conflict of interest” for purposes of this Section exists when the injured person’s claim against the indemnitee is such that it could be sustained on different grounds, one of which is within the scope of the indemnitor’s obligation to indemnify and another of which is not.

RESTATEMENT (SECOND) OF JUDGMENTS § 57 (1982).

Under this rule, a judgment against the indemnitee who tendered the defense of the primary lawsuit to the indemnitor precludes the indemnitor from litigating issues in the subsequent indemnity action that present no conflict of interest between the indemnitee and the indemnitor. This rule is consistent with the collateral estoppel’s privity requirement. *See e.g., Pirrotta*, 396 N.W.2d at 22 (school district, motivated by its own self-interest, could not adequately represent the interests of its school teacher in primary litigation); *Schumann*, 307 Minn. at 471, 240 N.W.2d at 539 (lack of privity made it impossible for city’s police officer to defend himself in a manner consistent with the city’s defense strategy relative to plaintiff’s vicarious liability claim against the city).

Typically, a conflict of interest manifests between an indemnitee and an indemnitor manifests itself in situations where the primary plaintiff’s complaint raises claims, some of which are indemnifiable and some of which are not indemnifiable. One commentator has described the problem this way:

[T]he conflict of interest . . . arises whenever the primary suit involves both indemnifiable claims and nonindemnifiable claims. When such a conflict of interest is present between voucher and vouchee, whoever defends the primary suit will lack sufficient incentive to avoid prejudicing the other’s interests. A vouchee who accepts the voucher’s defense will avoid having to pay indemnity if he succeeds in defending the indemnifiable claims, regardless of the outcome of the nonindemnifiable claims. The voucher

who defends himself need only succeed in defeating the nonindemnifiable claims in order to avoid all liabilities for which he cannot be reimbursed. Furthermore, the defending party might seek to protect himself by agreeing with the primary plaintiff, either tacitly or expressly, to permit recovery on the claims upon which the defender will bear no ultimate burden of payment in return for the plaintiff's promise to permit a successful defense of the other claims. Although in theory such an agreement would probably constitute collusion, which would invalidate the primary judgment, in practice such an arrangement would be difficult to uncover, especially if it were merely tacit.

Bostelman, *Due Process Constraints on Vouching*, 14 COLUM. J.L. & SOC. PROBS. at 196.

Under these circumstances, courts do not bind the indemnitor to the judgment against the indemnitee in the primary action.

The Eighth Circuit's decision in *Barber-Greene Company v. Bruning Company*, 357 F.2d 31 (8th Cir. 1966) illustrates this point. In the primary action, Warren Grace sustained injury when sprayed with hot asphalt from a mixing plant, built by Barber-Greene. *See Barber-Greene*, 357 F.2d at 32. The plant embodied a patented coupling device, which controlled the amount of asphalt in the mixture the plant produced. *See id.* Before Grace's personal injury action commenced, Barber-Greene tendered the defense of the anticipated action to Bruning, the company that manufactured the coupling device, stating that it anticipated litigation, that it anticipated Bruning's coupling device failed, and that it offered Bruning complete control of the defense of the anticipated action. The second and third tender notices followed after Barber-Greene's attorneys received Grace's New York summons and complaint, alleging that Barber-Greene "negligently and carelessly designed, manufactured, constructed, inspected and installed the . . . machine." *Barber-Greene*, 357 F.2d at 33. Bruning did not accept tender, Grace tried his

New York personal injury claim, resulting in a \$16,231.85 verdict against Barber-Greene.

See id.

Barber-Greene then commenced an indemnity action against Bruning in the United States District Court for the District of Nebraska, wherein the District Court entered judgment for Bruning after trial. *See id.* In doing so, the District Court observed:

“More than one theory existed for holding Barber-Greene liable in the New York suit”; that the exploitation of these theories would have been to Bruning’s best interests in order to escape its own liability; that its position “as defender in the New York case would have been a compromising one indeed”; that Barber, as indicated by its notices, “expected Bruning to take over the entire defense of the action”; and that Bruning was not required to do this. It also noted . . . that no witness was called by Barber from Bruning in the New York case to explain the design and function of the coupling; that there was lengthy testimony as to such design and function in the subsequent Nebraska trial; that from this testimony “one would virtually have to conclude” that any failure on the part of the coupling was not due to design but “to factors such as improper use or abuse”; and that the defense in the New York suit “was not handled in good faith” so far as Bruning was concerned.

Barber-Greene, 357 F.2d at 33, 34.

Thus, the United States District Court sitting in Nebraska declined to bind Bruning to the New York judgment against Barber-Greene.

The Eighth Circuit affirmed. The Honorable Harold A. Blackmun observed that the validity of tender of defense principles really were not at issue. *See id.* at 34. What was at issue was the inherent conflict of interest between the indemnitee and the putative indemnitor *in terms of the defense to be presented* to the original plaintiff’s claims. Judge Blackmun noted: “What is at issue is the application, upon the facts here, of another rule, subordinate but nevertheless valid and established, namely, that the liability of the alleged

indemnitor — except in those instances where the successive warranties or other bases for responsibility are identical — remains to be proved in the indemnity action and is not necessarily concluded by the result of the injured person's suit against the one claiming to be an indemnitee." *Barber-Greene*, 357 F.2d at 34. Judge Blackmun further observed:

Bruning thus was placed in a position where demand was made upon it to defend the Grace action on the broadest possible base and one not at all restricted to the area of its coupling responsibility. Any causative non-coupling defect in the large asphalt plant should not result in liability on Bruning's part. Bruning's posture was one necessarily and sweepingly antagonistic to Barber and was not merely that of one party in a primary-secondary relationship. Bruning's best defense, apart, perhaps, from contributory negligence on Grace's part, would have been to pin responsibility for the accident on some feature of the plant other than the coupling. It was a situation where, even though Bruning were to appear in the New York action and successfully defend its coupling, a judgment in Barber's favor would not necessarily be the result. *Bruning thus could not consistently defend both Barber's interests and its own.* Under these circumstances, Bruning had no obligation to defend the New York action and is free to defend itself in the indemnity action against any claim of negligence on its part.

Id. at 35 (emphasis added).

"The situation might have been different," Judge Blackmun went on to note, "had Barber's notice and demand upon Bruning been restricted to a defense of the coupling. In that narrow area Barber's liability was secondary to Bruning's." *Id.* Instead, Barber-Greene expected Bruning to defend Barber-Greene's interests as well as its own. The conflict of interest between Barber-Greene and Bruning made doing so impossible. Thus, *Barber-Greene* stands for the proposition that vouching and tenders of defense cannot bind the putative indemnitor to a judgment against the indemnitee, where the indemnitee does not defend the primary action in a way that protects the putative indemnitor's

interests by failing to defend the primary claim in a manner consistent with the putative indemnitor's interests.

The Fifth Circuit reached a similar result in *Universal American Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131 (5th Cir. 1992), the very case the Washington County District Court relied upon as the basis for entering summary judgment against Dammann-Pipestone. See Appellant's Addendum at 11-15. In that action, Universal American Barge Corporation ("Universal"), a carrier, contracted with the general Authority for Supply Commodities, Cairo, Republic of Egypt ("GASC") to transport bagged wheat flour from the United States to Egypt. Universal contracted with J-Chem, Inc. ("J-Chem") to fumigate the shipment pursuant to United States Department of Agriculture requirements. Residue from the chemical used to fumigate the cargo ignited and damaged several thousand bags of flour. Universal initiated arbitration proceedings against GASC for payment, and GASC counterclaimed for cargo damage. Unable to secure personal jurisdiction to compel J-Chem to join in the arbitration, Universal tendered the defense of the arbitration to J-Chem, who declined the tender.

Universal called the only witnesses in the arbitration and based its defense on a federal statute, which relieves a vessel owner of liability for cargo damage from fire unless the owner's design or negligence caused the fire. GASC attempted to establish that Universal was negligent. The arbitration panel concluded that Universal was responsible and awarded GASC a total of nearly \$ 3.9 million in damages, after which GASC and Universal settled for \$ 3.5 million.

Universal then commenced an indemnity action against J-Chem in the United States District Court for the Southern District of Texas, which entered summary judgment in Universal's favor for indemnification. The Fifth Circuit reversed, observing:

The district court thought that the defendant in the primary action, who vouches in his putative indemnitor, has no duty whatsoever to defend the interests of the indemnitor in order to obtain the benefit of subsequent preclusion as to issues relevant to the indemnitor's liability. In some cases, therefore, those issues will not be fully and fairly litigated. Other authorities express similar concerns because, *inter alia*, a conflict of interest between the indemnitor and the indemnitee could interfere with full and fair litigation of issues.

Universal, 946 F.2d at 1139.

The Fifth Circuit then proceeded to analyze the case in terms of the above-quoted Restatement rule, holding that "a conflict of interest between the indemnitee and the indemnitor would preclude the indemnitor from accepting the defense of the indemnitee in the primary action, and would compromise the indemnitor's interests." *Id.* at 1140.

The *Universal* court then made this comment, citing Judge Blackmun's decision in *Barber-Greene*:

Common-law vouching practice permits the vouchee to contest the basis and scope of indemnification in the second action. But a vouchee may not relitigate in the indemnification action an issue properly determined in the first proceeding merely because it is arguable that he had no duty to indemnify. So the combination of these two principles requires that the court contemplating preclusion consider together (1) the scope of the putative indemnitor's duty, under whatever theory is properly available to the indemnitee, and (2) the existence in the first proceeding of any liability claims against the indemnitee which fall outside the scope of indemnification, thus raising issues tainted by conflict of interest and requiring relitigation.

Id. (citing *Humble Oil & Refining Co. v. Philadelphia Ship Maintenance Co.*, 444 F.2d 727, 735 (3rd Cir. 1971) and *Barber-Greene*, 357 F.2d at 34.

Universal, therefore, stands for the proposition that a district court faced with the issue of whether to conclude the putative indemnitor in a foreign court's judgment against the indemnitee must consider whether a conflict of interest existed between the indemnitee and the putative indemnitor in terms of the kind of defense actually presented. If such a conflict exists between the indemnitee and its putative indemnitor, then the foreign judgment has no preclusive effect against the putative indemnitor in a subsequent indemnity action by the indemnitee.

Equally instructive is the pair of decisions by the Court of Appeals of the State of Washington in *Dixon v. Fiat-Roosevelt Motors, Inc.*, 8 Wash.App. 689, 509 P.2d 86 (1973) and in *Dixon v. Fiat-Roosevelt Motors, Inc.*, 4 Wash.App. 731, 483 P.2d 855 (1971). Dixon, the plaintiff in the primary action, sustained injuries while driving a car that Fiat manufactured and Aurora sold. *See Dixon*, 4 Wash.App. at 731, 483 P.2d at 855. He sued both Aurora and Fiat for injuries caused by an allegedly defective mag wheel. *See id.*, 4 Wash.App. at 731-732, 483 P.2d at 855-856. Both Aurora and Fiat tendered the defense to American Racing Equipment Co. ("A.R.E."), who manufactured the car's mag wheels. *See id.*, 4 Wash.App. at 732, 483 P.2d at 856. A.R.E. rejected Aurora's tender and failed to respond to Fiat's tender. *See id.* Neither Aurora nor Fiat presented the issue of whether the wheel was defective when it left Fiat's control. *See id.*, 4 Wash.App. at 733, 483 P.2d at 856. The primary action resulted in a judgment for Dixon. *See id.*, 4 Wash.App. at 732, 483 P.2d at 856.

Fiat sued A.R.E. for indemnification, and the Superior Court for Lincoln County granted summary judgment against A.R.E., who then appealed. *See id.*, 4 Wash.App. at

732, 483 P.2d at 856. The Washington Court of Appeals reversed, holding that A.R.E. was entitled to litigate the issue of whether the wheel was defective when it left Fiat's control, because that issue was not litigated in Dixon's personal injury action. *See id.*, 4 Wash.App. at 733, 483 P.2d at 856. On remand, in a manner reminiscent of the Washington County District Court in this case, the Superior Court for Lincoln County granted judgment as a matter of law in Fiat's favor, because A.R.E. supposedly had no proof that the defect occurred after the wheel left Fiat. *See Dixon*, 8 Wash.App. at 690, 509 P.2d at 88. The Washington State Court of Appeals again reversed and remanded, holding:

[W]e hesitate to apply the tender of defense doctrine. Before the common-law vouching-in device can be used to bind a nonappearing party in an instance such as presently before us, the facts at the time of the tender of defense must demonstrate that liability would eventually fall upon the indemnitor, thereby placing it under a duty to defend. The tender in the instant case did not demonstrate that A.R.E. would eventually be liable for plaintiff's injury if Fiat was found liable. The instant action was based on strict liability. In this case the facts at the time of the tender do not necessarily demonstrate that liability would eventually fall upon the indemnitor, A.R.E. In fact, Fiat's position as the retailer and A.R.E.'s position as the manufacturer are in conflict. It is to Fiat's benefit to show the alleged defect occurred at the time of manufacture; yet it is to A.R.E.'s benefit to show the defect occurred subsequent to the time the wheel left the manufacturer, *i.e.*, while the product was in transit or being held by the retailer. In this situation the vouching-in doctrine is inappropriate.

Dixon, 8 Wash.App. at 693-694, 509 P.2d at 90-91.

Hence, the Washington State Court of Appeals remanded the case for trial, because Fiat's right to indemnity hinged on when the defect in the mag wheel occurred, an issue not litigated in Dixon's primary personal injury action. *See id.*, 8 Wash.App. at 696, 509 P.2d at 92. Both decisions in *Dixon* emphasize that a judgment against the indemnitee in

the primary action does not preclude the putative indemnitor from litigating in the subsequent indemnity action an issue the indemnitee did not litigate in the primary action for the sake of its own self-interest.

C. The Washington County District Court Improperly Granted Summary Judgment In Master Blaster's Favor, Because It Failed To Properly Analyze Whether A Conflict Of Interest Existed Between Master Blaster And Dammann-Pipestone In The Defense Of Supreme Pork's Claims.

The Washington County District Court granted summary judgment in Master Blaster's favor based on two flawed determinations. The first is that no inherent conflict existed between Master Blaster and Dammann-Pipestone with respect to the defense of the primary action. *See* Appellant's Addendum at 13. The second is that Master Blaster is entitled to summary judgment, because Dammann-Pipestone has failed to present specific facts supporting the theory that Master Blaster's work caused the fire and Supreme Pork's resulting damage. *See id.* Both determinations are flawed, based on the legal authorities discussed above.

1. The district court erred by failing to properly analyze whether a conflict of interest existed between Master Blaster and Dammann-Pipestone.

The district court believed that no conflict of interest existed between Master Blaster and Dammann-Pipestone, because it interpreted Supreme Pork's claims as presenting only the theory of Master Blaster's vicarious liability for the fault of its agent, Dammann-Pipestone. *See id.* A careful examination of Supreme Pork's complaint in the primary action reveals the district court's interpretation is incorrect. While Supreme Pork's complaint focused to some extent on Dammann-Pipeston's vent installation,

Supreme Pork did not premise its negligence claim against Master Blaster on that theory alone. Paragraph 10 of Supreme Pork's complaint alleges:

[Master Blaster] was negligent in breaching its duty of reasonable care to [Supreme Pork] *including, but not limited to the following:*

- A. *Negligently installing the new pressure washer system, including the venting system;*
- B. *Negligently failing to perform the contract skillfully, carefully, diligently, and in a workmanlike manner;*
- C. *Negligently failing to supervise its employees, subcontractors, and their agents and employees, and other persons performing any of the work under the contract with Defendant.*

Appellant's Appendix at 38-39 (emphasis added).

Dammann-Pipestone did not install the entire pressure washer system, only the vent chimneys. *See id.* at 98. Accordingly, it could not be responsible for any negligence of Master Blaster relative to the installation of other components, any negligence of Master Blaster in performing its contract with Supreme Pork which did not implicate the chimney vents, and any negligence in supervising Master Blaster's own employees.

Similar to the primary complaint interposed in *Barber-Greene*, Supreme Pork's complaint alleged Master Blaster's negligence with respect to the installation of *the entire pressure washer system*, not simply with respect to the vent chimneys for which Dammann-Pipestone had responsibility. Accordingly, more than one theory existed for finding Master Blaster liable to Supreme Pork. One was the chimney vent installation, work that fell within the scope of indemnification. The other was Master Blaster's own

negligence in installing the entire pressure washer system, work that fell outside the scope of indemnification.

Like Barber-Greene, Master Blaster tendered the defense of the *entire action* to Dammann-Pipestone, not simply that part of Supreme Pork's claim implicating Dammann-Pipestone's work. Master Blaster's tenders of defense demanded, in effect, that Dammann-Pipestone defend Master Blaster as well as itself, because Supreme Pork's negligence claim implicated Master Blaster's work generally and Dammann-Pipestone's work specifically. Any causative defect in the pressure washer installation generally, apart from the chimney vent installation, should not result in Dammann-Pipestone's liability. Dammann-Pipestone's posture was one necessarily and sweepingly antagonistic to Master Blaster and was not merely that of one party in a primary-secondary relationship. Dammann-Pipestone's best defense, apart, perhaps, from contributory negligence on Supreme Pork's part, would have been to pin responsibility for the fire on some feature of the pressure washer installation other than the chimney vent installation. It was a situation where, had Dammann-Pipestone been subject to the South Dakota circuit court's personal jurisdiction, undertaken discovery consistent with its own liability theory, and successfully defended its chimney vent installation, a judgment in Supreme Pork's favor would not necessarily be the result.

This fact is especially important, given the fact that Master Blaster originally installed the pressure washer system as a whole and repaired a pressure washer less than a month before the fire. Dammann-Pipestone's chimney vent installation occurred three years earlier, making it unlikely that venting issues caused the fire. Master Blaster,

accordingly, had a vested interest in not exploring the possibility that its own work caused the fire, particularly in the situation where Supreme Pork's evidence ultimately criticized just the venting work. It is only fair to presume that Dammann-Pipestone would have developed its own theories about cause and origin, especially if those theories pointed at Master Blaster. Dammann-Pipestone could not have done so had it accepted tender, because the tenders of defense was broad enough to require Dammann-Pipestone to defend Master Blaster. *Dammann-Pipestone thus could not consistently defend both Master Blaster's interests and its own, any more than Master Blaster defended Dammann-Pipestone's interests as well as its own.*

Like the United States District Court for the Southern District of Texas, which entered summary judgment in Universal's favor for indemnification, the Washington County District Court apparently thought that Master Blaster, having vouched in Dammann-Pipestone, had no duty whatsoever to defend Dammann-Pipestone's interests in order to obtain the benefit of subsequent preclusion as to issues relevant to Dammann-Pipestone's liability. Otherwise the Washington County District Court would have been more concerned about the fact that Master Blaster failed to address other potential ignition sources for the fire, as Dammann-Pipestone would have had it been subject to the South Dakota circuit court's personal jurisdiction.

Master Blaster really did not represent Dammann-Pipestone's interests as Dammann-Pipestone would have represented them had it been subject to the personal jurisdiction of South Dakota courts. None of Master Blaster's experts apparently performed any forensic tests in an effort to disprove Supreme Pork's theories of liability

to the extent those theories implicate Dammann-Pipestone's work. Master Blaster has never said exactly what it did to defend Dammann-Pipestone's interests in that regard. Missing from the record is any evidence that Master Blaster even bothered to refute the notion that any part of the pressure washer system caused the fire. Master Blaster simply did not represent Dammann-Pipestone's interests in South Dakota, regardless of how one interprets Supreme Pork's complaint in the primary action.

The Fifth Circuit held that "[a]dequate representation makes sure that the issues of shared concern to the indemnitee and the indemnitor alike are actually and fully litigated." *Universal*, 946 F.2d at 1140. Master Blaster never litigated alternative liability theories other than Supreme Pork's contributory negligence, because it had no incentive to do so. The Washington County District Court did not find Master Blaster's failure to do so troubling, because it apparently believed that Master Blaster had no duty to litigate issues relevant to Dammann-Pipestone's defense. The Washington County District Court's failure to analyze the defense to Supreme Pork's claims in terms of Master Blaster's and Dammann-Pipestone's competing interests requires this court to reverse the district court's summary judgment, just as the Fifth Circuit did in *Universal*.

Finally, as noted above, Supreme Pork's complaint generally alleged Master Blaster's negligence in installing the pressure washer system as a whole as well as negligence attributable to Dammann-Pipestone specifically. Master Blaster's position as general contractor and Dammann-Pipestone's position as its subcontractor conflicted. Master Blaster benefitted by submitting the primary case to the jury in South Dakota in terms of whether Supreme Pork sustained damage due to the negligence of its unnamed

agent, Dammann-Pipestone. Yet, had Dammann-Pipestone been subject to the South Dakota circuit court's personal jurisdiction and appeared in that action, it would have benefitted by showing that other aspects of the pressure washer installation within Master Blaster's control caused the fire and resulting damage. As in *Dixon*, vouching-in or tender of defense strategies are inappropriate means for binding Dammann-Pipestone to the South Dakota circuit court's judgment given the inherent conflict of interest between Master Blaster and Dammann-Pipestone in the defense of Supreme Pork's claims. Accordingly, Dammann-Pipestone is entitled to reversal of the district court's summary judgment in Master Blaster's favor.

2. **The district court erred by granting summary judgment on the ground that Dammann-Pipestone lacked evidence supporting its theory of liability in the primary action, because of its disregard for Dammann-Pipestone's inability to develop that liability theory in the South Dakota action.**

In *Dixon*, the trial court granted Fiat judgment as a matter of law, because A.R.E. supposedly had no proof that the defect occurred after the wheel left Fiat. *See Dixon*, 4 Wash.App. at 733, 483 P.2d at 856. A.R.E., however, could not develop that proof in the primary action, because the issue of when the defect occurred never was at issue in the underlying action. For that reason, the *Dixon* court reversed and remanded a second time. *See Dixon*, 8 Wash.App. at 693-694, 509 P.2d at 90-91. Because A.R.E. was interested in litigating the issue of when the mag wheel became defective, and because the conflict between Fiat and A.R.E. prevent the litigation of that issue in the primary action, A.R.E. was entitled to litigate that issue fully in Fiat's indemnity action. *See id.*

The same is true here. Dammann-Pipestone had no meaningful opportunity to litigate fully the issue of Master Blaster's potential fault, because the Minnehaha Circuit Court dismissed Dammann-Pipestone from the action on personal jurisdiction grounds. Dammann-Pipestone's absence from the South Dakota action insured that Master Blaster would not litigate the issue of its own responsibility for Supreme Pork's losses, because Master Blaster had no interest in pointing the proverbial finger at itself. With one eye on the Minnesota indemnity action, Master Blaster was more than content to present expert testimony that concurred with Supreme Pork's expert. For the same reason, Master Blaster was more than content to submit the case to the jury in South Dakota in terms of Dammann-Pipestone's negligence only. To penalize Dammann-Pipestone under these circumstances, as the district court did by granting summary judgment in Master Blaster's favor, is a supreme injustice, given the conflict of interest between Master Blaster and Dammann-Pipestone and the fact that Dammann-Pipestone's inability to develop its liability theory in South Dakota stemmed directly from its constitutional right to defend itself on personal jurisdiction grounds. Therefore, the Washington County District Court's summary judgment requires reversal.

IV. THE DISTRICT COURT'S SUMMARY JUDGMENT VIOLATES DAMMANN-PIPESTONE'S CONSTITUTIONAL DUE PROCESS RIGHTS, BECAUSE DAMMANN-PIPESTONE NOW IS BOUND TO A FOREIGN JUDGMENT, DESPITE THE ISSUING COURT'S LACK OF PERSONAL JURISDICTION OVER DAMMANN-PIPESTONE AND DESPITE DAMMANN-PIPESTONE'S LACK OF PRIVITY WITH MASTER BLASTER.

The Fourteenth Amendment to the United States Constitution, as well as Article I, section 7 of the Minnesota Constitution forbid government to deprive any person of life,

liberty, or property without the due process of law. See U.S. Const., Amend. XIV; Minn. Const., Art. I, § 7. In this regard, the United States Supreme Court has held:

It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States . . . prescribe, and judicial action enforcing it against the person or property of the absent party is not that due process which the *Fifth* and *Fourteenth Amendments* require.

Hansberry v. Lee, 311 U.S. 32, 40-41, 61 S.Ct. 115, 117-118 (1940) (citations omitted).

Hence, just as a State cannot enforce a judgment against a nonparty who lacks a hearing and opportunity to be heard consistently with the Fourteenth Amendment, “so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.” *Postal Telegraph Cable Company v. City of Newport, Kentucky*, 247 U.S. 464, 476, 38 S.Ct. 566, 571 (1918).

The concept of privity is key for purpose of this appeal generally and this argument specifically. The Minnesota Supreme Court has said that parties are in privity when they are so connected “in estate or in blood or in law as to be identified with them in interest, and consequently to be affected with them by the litigation.” *Hetschel*, 278 Minn. at 95, 153 N.W.2d at 206 (citing *In re Smith’s Estate*, 60 Mont. At 299, 199 P. at 703). Privity denotes that a relationship between parties who have a unity, not a conflict, of interest. *See e.g., Pirrotta*, 396 N.W.2d at 22 (school district, motivated by its own self-interest, could not adequately represent the interests of its school teacher in primary

litigation); *Schumann*, 307 Minn. at 471, 240 N.W.2d at 539 (lack of privity made it impossible for city's police officer to defend himself in a manner consistent with the city's defense strategy relative to plaintiff's vicarious liability claim against the city). Collateral estoppel's privity requirement guarantees that an indemnitor's due process rights remain protected when an indemnitee uses collateral estoppel offensively³ to preclude a putative indemnitor from relitigating issues resulting in a primary judgment against the indemnitee. *See Postal Telegraph Cable Co.*, 247 U.S. at 476, 38 S.Ct. at 571.

Vouching-in and tender of defense procedures, as originally described by the First Restatement of Judgments, do not require privity between the indemnitee and the putative indemnitor. The predecessor to section 57 of the Second Restatement of Judgments simply provided:

In an action for indemnity between two persons who stand in such relation to each other that one of them has a duty of indemnifying the other upon a claim by a third person, if the third person has obtained a valid judgment on this claim in a separate action against

(a) the indemnitee, both are bound as to the existence and extent of the liability of the indemnitor, if the indemnitor gave to the indemnitee reasonable notice of the action and requested him to defend it or to participate in the defense;

(b) the indemnitor, neither is affected by the judgment, except to the extent that the judgment affects the indemnitee's liability to the creditor.

RESTATEMENT OF JUDGMENTS, § 107 (1942).

³ Offensive collateral estoppel occurs when "a plaintiff is seeking to estop a defendant from relitigating the issues which the defendant previously litigated and lost against

Unlike collateral estoppel, this rule does not require privity between the indemnitee and the indemnitor as a precondition to binding the indemnitor to the judgment against the indemnitee. That rule predates the United States Supreme Court's determination that the Due Process Clause "does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations." *International Shoe Co. v. State of Washington*, 326 U.S. 310, 319, 66 S.Ct. 154, 160 (1945) (citations omitted). Accordingly, the historic, common law vouching practice creates a due process problem, given "today's emphasis on flexibility in the due process standard [which] requires that considerations of form must give way to a closer examination of the actual protections a defendant receives." Bostelman, *Due Process Constraints on Vouching*, 14 COLUM. J.L. & SOC. PROBS. at 211 (citing *International Shoe Co.*).

Section 57 of the Second Restatement of Judgments includes a conflict of interest exception to deal with that very problem. *See* RESTATEMENT (SECOND) OF JUDGMENTS, § 57(2)-(3). By not properly analyzing the inherent conflict of interest between Master Blaster and Dammann-Pipestone in the primary action, the Washington County District Court read the conflict of interest exception to section 57 out of existence. In effect, the district court's summary judgment represents vouching-in at its constitutional worst, because it allows vouching to act as an end-run around the due process requirement that *in personam* judgments bind only parties and their privies. Thus, the Washington County

another plaintiff." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 329, 99 S.Ct. 645, 650 (1979).

District Court's summary judgment offends Dammann-Pipestone's due process rights and must be reversed on that ground as well.

V. TO THE EXTENT THE COURT RECOGNIZES "VOUCHING" AND TENDER OF DEFENSE PRACTICES AS EFFECTING A FORM OF COLLATERAL ESTOPPEL PECULIAR TO THE LAW OF INDEMNIFICATION, WHETHER SUMMARY JUDGMENT MUST BE REVERSED, WHERE DAMMANN-PIPESTONE LACKED A FULL AND FAIR OPPORTUNITY TO BE HEARD IN SOUTH DAKOTA.

As Dammann-Pipestone has noted, *Universal* analyzes vouching practice within the context of collateral estoppel, making it fair to conclude that vouching is simply a species of collateral estoppel that applies within the context of indemnification. That being said, summary judgment must be reversed because support for the fourth collateral estoppel element is lacking. Collateral estoppel's fourth element requires that "the estopped party [be] given a full and fair opportunity to be heard on the adjudicated issue." *Ellis*, 319 N.W.2d at 704. Within the collateral estoppel/vouching analysis, this issue turns on whether procedural opportunities are available to the party in the subsequent action "that might be likely to cause a different result." *Universal*, 946 F.2d at 1137-1138 (citing *Parklane*, 439 U.S. at 332, 99 S.Ct. at 652). If a party who chooses not to appear in a proceeding despite having notice and an opportunity to be heard can make a particularized showing of harm necessary to establish the prejudicial effect of the procedural differences between the two forums, that party cannot be bound by the subsequent judgment. *See id.* at 1138. Dammann-Pipestone can make that showing here. The district court never bothered to address this issue, even though *Universal* does, and

Dammann-Pipestone had urged the district court to do so given the issue's potentially dispositive quality.

Procedural opportunities existed in Minnesota relative to the defense of Supreme Pork's claim that did not exist in South Dakota which well may have affected the result. For example, South Dakota and Minnesota have different approaches to dealing with the problem of spoliation of evidence, which is an issue here. Before Dammann-Pipestone's expert, Mr. Terry A. Parks, was allowed to conduct his cause and origin investigation, Supreme Port significantly altered the scene from its post-fire condition by removing and/or destroying relevant evidence. *See Appellant's Appendix at 216.* As a result, Mr. Parks' ability to conduct a cause and origin investigation was significantly compromised by Supreme Pork's spoliation of evidence. *See id.*

In Minnesota, the district court judge likely would have excluded Supreme Pork's expert's opinion resulting in a dismissal of the entire case for spoliation without reference to the plaintiff's specific intent or bad faith. *See Patton v. Newmar Corp.*, 538 N.W.2d 116, 119 (Minn. 1995). In South Dakota, a judge can respond to spoliation with no more than an adverse inference instruction, and then only when the spoliation is intentional and done in bad faith. *See State v. Essenger*, 661 N.W.2d 739 (S.D. 2003). Forcing Dammann-Pipestone to litigate through "vouching" or a similar procedural mechanism in South Dakota, whose procedures for dealing with spoliation are likely to result in an outcome different than what might be achieved in Minnesota, is hardly fair to Dammann-Pipestone. Under such circumstances, Master Blaster is not entitled to take advantage of

offensive collateral estoppel. Therefore, the South Dakota judgment is not enforceable against Dammann-Pipestone, and Dammann-Pipestone is not bound by that judgment.

VI. SUMMARY JUDGMENT MUST BE REVERSED RELATIVE TO MASTER BLASTER'S INDEMNITY CLAIM STEMMING FROM SUPREME PORK'S BREACH OF IMPLIED WARRANTY OF FITNESS CLAIM, BECAUSE DAMMANN-PIPESTONE, AS THE SELLER OF SERVICES, HAS NO IMPLIED WARRANTY LIABILITY.

In the district court, Dammann-Pipestone argued that the South Dakota circuit court had no basis for finding that Dammann-Pipestone breached any implied warranty to Supreme Pork, because: (1) Dammann-Pipestone's contract with Master Blaster predominantly was one for services and not goods; and (2) claims for implied warranty fall only within the context of sales of goods. *See* Appellant's Appendix at 98. The district court's summary judgment memorandum does not address this issue squarely. To the extent Master Blaster argues that the South Dakota judgment binds Dammann-Pipestone on an implied warranty liability theory, Dammann-Pipestone presents the same arguments on appeal.

Under Minnesota law, implied warranties of fitness arise within the context of sales of goods. *See* Minn. Stat. §§ 336-2.102 and 336-2.315 (2009). The same is true in South Dakota. *See* S.D.C.L. §§ 57A-2-102 and 57A-2-315 (2008). Master Blaster submitted not one shred of evidence in the district court, which indicated that Dammann-Pipestone predominantly contracted with Master Blaster for anything other than a sale of services. *See* Appellant's Appendix at 98. Moreover, to the extent Supreme Pork's negligence claim was predicated on faulty vent installation, that portion of its complaint which implicated Dammann-Pipestone's work involved a service, not a good. Hence,

Master Blaster is not entitled to indemnification from Dammann-Pipestone on any implied warranty of fitness theory. Therefore, summary judgment must be reversed on that ground as well, to the extent Master Blaster takes the position that Dammann-Pipestone has indemnity liability stemming from an implied warranty of fitness liability theory.

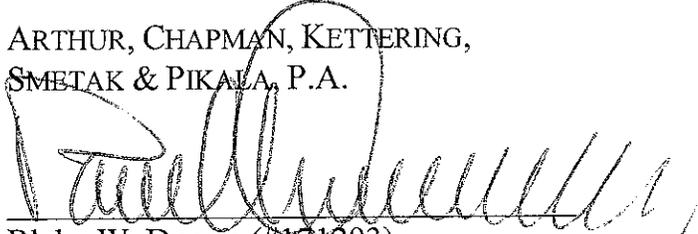
CONCLUSION

The rule of law Dammann-Pipestone would have applied in this case, and in future cases involving similar issues, is that vouching and tenders of defense cannot be used to bind a putative indemnitor to a judgment against an indemnitee where conflicts of interest exist between the putative indemnitor and the indemnitee relative to defenses presented in the primary litigation. A contrary rule violates the putative indemnitor's constitutional due process rights, particularly in situations where, as here, the issuing court lacks personal jurisdiction over the putative indemnitor. Moreover, the putative indemnitee is not collaterally estopped from litigating the issue of its own fault in the subsequent indemnity action, where procedural advantages in the subsequent action might cause a different result. Furthermore, a putative indemnitor, such as Dammann-Pipestone, owes no duty to indemnify an indemnitee, such as Master Blaster, where, as here, the putative indemnitor had a contract with the indemnitee for services rather than goods. Therefore, for all the reasons cited above, Dammann-Pipestone respectfully asks this court to reverse the district court's summary judgment and to remand for trial on the issues of breach and causation.

Respectfully submitted,

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Dated: 10/5/09



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CERTIFICATE OF WORD COUNT COMPLIANCE

I hereby certify that the foregoing Brief of Appellants Doug Dammann and Pipestone Plumbing and Heating, Inc., conforms to Minn.R.Civ.P. 132.01, subd. 3(c)(1) (2009), for a brief produced with proportionally spaced font.

There are 10,993 words in this Brief, not including the Table of Contents and the Table of Authorities. The word processing software used to prepare this Brief was Microsoft ® Office Word 2003.

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