

No. A10-355

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STATE OF MINNESOTA

**In Supreme Court**

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*Michelle A. Kern and Terry Kern,*

*Appellants,*

vs.

*Jennifer Torborg, et. al.,*

*Respondents,*

*Cody S. Janson, et. al.,*

*Respondents.*

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**APPELLANTS' REPLY BRIEF**

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## ARGUMENT

### I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BECAUSE CONTACT WITH AN ATTORNEY IS NOT THE SOLE DETERMINATIVE CONSIDERATION IN DECIDING A MOTION TO VACATE.

In their response brief, the Torborgs do not dispute that Kern is almost identically situated to the plaintiff in Jorissen v. Miller, 399 N.W.2d 82 (Minn. 1987). In both Kern and Jorissen, the district court found that the plaintiff: (1) was not aware of the preclusive effect of conciliation court judgments, (2) was not aware of the no-fault thresholds for a personal injury action, and (3) did not have a ripe personal injury claim at the time of filing suit in conciliation court. Id. at 84; AD 12. In each case the district court granted the plaintiff relief by vacating the prior conciliation court judgment. Id. at 83. Indeed, the Torborgs concede that the only arguably-material difference between Kern and Jorissen is that Jorissen had no contact with an attorney prior to filing in conciliation court, whereas Kern consulted<sup>1</sup> with an attorney who advised her to “just go ahead and take care of her property damage claim in conciliation court.” (AD 15, 19, 23).

Consequently, the Torborgs’ principal argument is that the district court abused its discretion based solely on this single factual difference between

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<sup>1</sup> The Torborgs contend that “Kern argued to the Court of Appeals that there was no evidence in the record that she was **represented prior to the conciliation court action**, but now admits that she was in fact represented.” (Resp. Br. 25 n. 5). Kern conceded that she had **consulted** with attorney Doug Anderson prior to the conciliation court action, but the record does not reveal the exact date when Mr. Anderson was retained and formally “represented” Kern, and whether it was before the conciliation court action. In any case, Kern does not believe the result of this case turns on the distinction between “consulted” and “represented.”

Jorissen and Kern. In particular, they argue that a “close examination of the Jorissen and Mattsen decisions, in conjunction with subsequent decisions, demonstrates that representation prior to initiating a conciliation court judgment is a determinative factor that precludes the vacation of a judgment.” (Resp. Br. 19). The Torborgs proceed, however, to conduct only a superficial analysis of the case law and make conclusory statements that contact with an attorney was the deciding factor in each case, while ignoring or glossing over the other relevant factors discussed in the opinions. Kern will address the Torborgs’ analysis below.

**A. The Torborgs Mischaracterize the Jorissen Decision as Being Based on the Fact that Jorissen was Unrepresented.**

The Torborgs contend that the Jorissen decision was *based on* the fact that the plaintiff did not have contact with an attorney before the conciliation court action. In particular, the Torborgs argue:

The Jorissen Court acknowledged that the exception [to res judicata] did not apply in Mattsen because an attorney represented plaintiff prior to the commencement of his action. However, the Jorissen Court found that the exception did apply to the facts because counsel did not represent Jorissen prior to the commencement of his counterclaim.

(Resp. Br. at 15). Kern concedes that contact with an attorney was explicitly referenced as *a factor* in the Jorissen decision. The Torborgs’ argument that the Mattsen and Jorissen decisions were reached solely “*because*” of contact with an attorney, however, ignores the vast majority of the reasoning in the opinions.

In addition to contact with an attorney, the Jorissen court clearly relied on other factors to distinguish the case from Mattsen:

[Mattsen] did not contend that he was unaware of the threshold requirements of the no-fault act when he instituted his conciliation court action nor did he assert that his personal injury claim was immature at that time. . . . [In this case, on the other hand, the] trial court found that [Jorissen] was not aware of the rules against splitting causes of action or the tort threshold requirements for bringing a personal injury action. Even if respondent had known, the extent of his injuries apparently did not meet the threshold when he was forced to respond to appellants' claims in conciliation court.

Jorissen, 399 N.W.2d at 84-85. The detailed discussion of these other factors belies the Torborgs' claim that contact with an attorney was the deciding element. Indeed, it makes sense that the Court would look to multiple factors because vacating a judgment is a discretionary action and "the very nature of the discretionary power in cases of this kind is such as to prevent any absolute rule being laid down." Bode v. Minnesota Dept. of Natural Resources, 612 N.W.2d 862, 870 (Minn. 2000).

The Torborgs attempt to dismiss the discussion of other factors in the Jorissen opinion by arguing that the Court only engaged in this analysis because the threshold requirement of "no contact with an attorney" was met. In particular, the Torborgs speculate that "[h]ad Jorissen been represented by counsel . . . the Jorissen court would have terminated its analysis at that point in recognition of the fact that the exception simply could not be met." (Resp. Br. at 20). Such speculation, however, is directly contradicted by the Mattsen decision. In Mattsen, the plaintiff *did* have some contact with an attorney, but the Court did not stop its analysis there. Instead, the Court nonetheless proceeded to analyze the

other factors such as knowledge of the no-fault thresholds and ripeness of his claim. Mattsen v. Packman, 358 N.W.2d 48, 51 (Minn. 1984).

The Torborgs' argument also ignores the fact that the clearest statements in both Mattsen and Jorissen as to when a party is entitled to vacate a conciliation court judgment do not reference contact with an attorney at all, but instead focus on knowledge of the preclusive effect of a judgment and ripeness of the claim:

- **“This is not to say that a party who is excusably ignorant of the effect of a judgment should have no remedy. Relief may be had for cause; the judgment may be reopened through proceedings to vacate pursuant to Rule 60.02 . . . .”**
- **“The failure of a personal injury claim to exceed the no-fault threshold, Minn. Stat. § 65B.51 (1982), until sometime subsequent to entry of a conciliation court judgment might justify relief from operation of the judgment pursuant to Rule 60.02(6) . . . .”**
- **“To encourage the continued use of conciliation courts by the public, persons who lacked an understanding of the consequences of a conciliation court action should not be barred from subsequently bringing claims in courts of record.”**

Jorissen, 399 N.W.2d at 83-84; see also Mattsen, 358 N.W.2d at 50-51.

Finally, the Torborgs' argument elevates form over substance. The Torborgs point incessantly to contact with an attorney as the difference between Jorissen and Kern. They fail, however, to provide any reason *why* contact with an attorney makes Kern's request for relief *less just* than Jorissen's, especially considering that the attorney did not warn Kern of the preclusive effect of a conciliation court judgment. On the contrary, Jorissen and Kern are indistinguishable from an equitable perspective. Nor is there any policy reason

why Kern should be treated differently from Jorissen. In Jorissen, the Court was concerned with encouraging the continued use of conciliation courts by the public and thus held that “persons who lacked an understanding of the consequences of a conciliation court action should not be barred from subsequently bringing claims in courts of record.” Jorissen, 399 N.W.2d at 84. This reasoning is equally applicable to Kern, as the district court specifically found that she lacked an understanding of consequences of a conciliation court judgment.<sup>2</sup> (AD 12). Likewise, the need for finality of judgments is no greater in Kern than in Jorissen. The concerns for court congestion, delay, and cost of litigation cited in Mattsen are no more present in Kern’s case than in Jorissen. From a perspective of justice, reason and equity, there is no basis for treating Kern differently than Jorissen. Accordingly, the district court did not abuse its discretion in granting Kern relief.

**B. The Wood Case does not Conclude that Contact with an Attorney is Determinative of a Motion to Vacate.**

In addition to Jorissen and Mattsen, the Torborgs rely heavily on the case of Wood v. Loomis, No. C4-03-344, 2003 WL 21500325 (Minn. Ct. App. July 1,

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<sup>2</sup> The Torborgs contend that the concerns of the Jorissen court are not implicated in this case “where Ms. Kern was fully assisted by counsel and made the **informed choice** to proceed with a claim for damages.” (Resp. Br. 24) (emphasis supplied). This argument is directly contradicted by the record. The district court explicitly found that Kern “was unaware of . . . the preclusive effect of a conciliation court judgment.” (AD 12). Furthermore, both the Torborgs and the Court of Appeals acknowledge that Mr. Anderson advised Kern to “just go ahead and take care of her property damage claim in conciliation court.” (AD 19, Resp. Br. 8, 22). Accordingly, there was nothing “**informed**” about Kern’s decision to use the conciliation court when she was not aware of the principle risk involved in using the court, i.e., preclusion of her personal injury claim.

2003) (unpublished) for the proposition that contact with an attorney is the determinative factor in analyzing a motion to vacate. The Torborgs reliance on this case is misplaced. As an unpublished Court of Appeals case, Wood is not binding on this Court, nor is it even of any precedential value for the Court of Appeals. Minn. Stat. § 480A.08, subd. 3 (“Unpublished opinions of the Court of Appeals are not precedential.”). Even as persuasive authority, however, Wood does not demonstrate that the district court abused its discretion in this case.

The Wood opinion provides very little factual background of the underlying case. Plaintiff Shannon Wood filed suit in district court and moved to vacate a prior conciliation court judgment for property damages he had obtained more than seven years earlier. Id. at \*1. The record showed that Wood had retained an attorney prior to bringing the conciliation court action, but “did not consult his attorney regarding the consequences of obtaining a conciliation court judgment”. Id. Although Wood argued before the Court of Appeals that his personal injury claim was not ripe at the time he sued in conciliation court, he “failed to provide the district court with an approximate date as to when his claim for personal injuries matured.” Id. Furthermore, the opinion does not state whether Wood was aware of the no-fault thresholds for bringing a personal injury claim at the time he sued in conciliation court. The district court, therefore, “concluded that there was an insufficient fact basis in this case to forsake the doctrine of res judicata” and denied the motion to vacate. Id. at \*2.

Wood is distinguishable for several reasons. First, in Wood the district court *denied* the motion to vacate, whereas here the district court *granted* the motion to vacate. The district court has discretion in ruling on a motion to vacate and appellate courts will only reverse a decision if there is a *clear abuse of that discretion*. Lund v. Pan American Machine Sales, 405 N.W.2d 550, 552 (Minn. Ct. App. 1987). Accordingly, Wood stands only for the proposition that the district court did not abuse its discretion in denying the motion under the specific facts of that case. It does not stand for the proposition that district courts *must* deny motions to vacate in *all cases* where there is any contact with an attorney.

As the Tenth Circuit explained:

The [abuse of discretion] formulation may appear opaque, but it is one we have long understood to mean that we will reverse a district court's determination only if the court exceeded the bounds of the rationally available choices given the facts and the applicable law in the case at hand. That is to say, **we recognize that in many cases there will not necessarily be a single right answer, but a range of possible outcomes the facts and law at issue can fairly support; rather than pick and choose among them ourselves, we will defer to the district court's judgment so long as it falls within the realm of these rationally available choices.**

Big Sky Network v. Sichuan Provincial, 533 F.3d 1183, 1186 (10th Cir. 2008) (emphasis supplied); see also U.S. v. McComb, 519 F.3d 1049, 1053 (10th Cir. 2007). Therefore, even though the district court in Wood may not have abused its discretion in denying the motion to vacate, it does not automatically follow that the district court in this case **did** abuse its discretion. In cases where the plaintiff had some contact with an attorney, there might not be a "single right answer."

Rather, the district court must exercise its discretion to determine what result is required by justice and equity under the specific facts of each case. In this case, the district court found that fairness required that the judgment be vacated.

Second, the nature of the attorney contact in Wood is different from this case. In Wood, like in Mattsen, the plaintiff had consulted with an attorney about his injuries, but apparently did not bother to seek his attorney's advice about instituting the action in conciliation court. Thus, a trial court could conclude that Wood's ignorance of the preclusive effect of a conciliation court judgment was **not excusable** because he might have been forewarned of the preclusive effect of a final judgment if he had only sought his attorney's advice. Kern, on the other hand, did consult with an attorney, but was specifically told to "just go ahead and take care of her property damage claim in conciliation court." Kern had absolutely no reason to know of the danger of filing in conciliation court because she was given the "green light" by the very person she entrusted to protect her legal rights.

Finally, Wood is additionally distinguishable on other grounds. The plaintiff in Wood failed to provide the district court with a date when his claim for personal injuries matured. Kern, on the other hand, did provide the district court with clear evidence that her claims were not mature at the time of the conciliation court judgment, and did not mature until at least October 5, 2006, approximately two years after she filed her conciliation court case. (AA 79). Furthermore, in Wood there was no indication that the plaintiff was unaware of the no-fault thresholds for filing a personal injury claim, whereas in this case Kern provided

explicit testimony that she was unaware of the statutory prerequisites. (AA 79).

For all these reasons, Kern's case is distinguishable from Wood and there is nothing in the Wood opinion to demonstrate that the district court abused its discretion in granting relief in this case.

**II. CASES DECIDED UNDER RULE 60.02(a) ARE RELEVANT IN INTERPRETING THE MEANING OF "EXCUSABLE" IGNORANCE UNDER JORISSEN AND MATTSSEN.**

The Torborgs acknowledge statements in Jorissen and Mattsen that a party who is "excusably ignorant of the effect of a judgment" may have relief under Rule 60.02. Mattsen, 358 N.W.2d at 50; Jorissen, 399 N.W.2d at 83. Neither Jorissen or Mattsen, however, define the meaning of the word "excusable" in this context. In her principal brief, Kern cited to numerous decisions by this Court finding that a party's conduct is "excusable" if the party herself is blameless, even if some mistake was made by the party's attorney or representative. The Torborgs, however, argue that this Court should ignore its long line of decisions because those cases are decided under Rule 60.02(a) rather than under Rule 60.02(f).<sup>3</sup> This argument is unpersuasive.

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<sup>3</sup> It should also be noted that the Torborgs are incorrect in their assertion that all cases discussing attorney negligence are decided under Rule 60.02(a) rather than Rule 60.02(f). In fact, some cases reference both provisions (a) and (f) of Rule 60.02 and thus suggest that the discussion might be applicable to either provision of the Rule. See, e.g., Finden v. Klaas, 128 N.W.2d 748, 750 (Minn. 1964) (citing both subsection (a) of the Rule as well as "any other reason justifying relief from the operation of the judgment."); Lund v. Pan American Machines Sales, 405 N.W.2d 550, 552 (Minn. Ct. App. 1987) (same). Nothing in these opinions explicitly limit the reasoning to 60.02(a). Nevertheless, Kern will address the Torborgs argument.

Kern is not seeking relief from the judgment under Rule 60.02(a), so the one-year time limitation for that section cited by the Torborgs is not applicable. Rather, Kern is merely arguing that the meaning of the word “excusable” should be interpreted the same way under Jorissen and Mattsen as it has been interpreted in other Rule 60.02 cases, even if they involve a different subsection of the rule. The Torborgs provide no legal authority or rational reason to support their proposition that the “excusable” concept should be interpreted differently in this case than it has in Rule 60.02(a) cases. Indeed, even though the cases cited by Kern reference Rule 60.02(a), the language in those cases suggests that there are policies at play which apply broadly and transcend any particular subdivision of the rule. In particular, this Court explicitly referenced such considerations as “furtherance of justice,” “the spirit of Rule 60.02” and “a liberal policy conducive to trial of causes on their merits” as part of the rationale underlying its decisions. See, e.g., Finden, 128 N.W.2d at 750; Hinz v. Northland Milk & Ice Cream Co., 53 N.W.2d 454, 455-56 (Minn. 1954); Conley v. Downing, 321 N.W.2d 36, 40-41 (Minn. 1982) (also citing “our well-established approach to Rule 60.02, which favors trials on the merits whenever possible”); Charson v. Temple Israel, 419 N.W.2d 488, 491 (Minn. 1988). Obviously, these same considerations of justice, the spirit of Rule 60.02, and a liberal policy conducive towards trial on the merits all apply with equal force to Rule 60.02(f) as they do to a claim under Rule 60.02(a).<sup>4</sup> Accordingly, the Torborgs argument on this point is without merit.

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<sup>4</sup> This is supported by the fact that decisions that pre-date Rule 60.02 cite to these

### III. EVEN IF THE DISTRICT COURT ABUSED ITS DISCRETION IN VACATING THE JUDGMENT, THE COURT MAY STILL DECLINE TO APPLY RES JUDICATA.

The Torborgs' final argument is that if this Court finds the district court abused its discretion, the proper remedy is for summary judgment to be entered for the Torborgs. In particular, the Torborgs argue that "[t]here is no reason to remand the case back to the trial court to decide the application of res judicata because all of the elements are indisputably present in this case . . . and the doctrine of res judicata must be applied." (Resp. Br. 30). This argument misstates the facts and the law. First, the argument ignores the fact that the district court seemed to question whether the fourth element of the res judicata test was met in this case.<sup>5</sup> More importantly, however, the Torborgs completely fail to address the cases cited in Kern's brief stating that *even if all four elements are present* and res judicata is thus *available*, the district court still must exercise its discretion to determine whether or not to actually *apply* the doctrine in light of justice concerns. As courts have noted, "[i]f the doctrine applies, the decision *whether to actually*

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same policies. See Duenow v. Lindeman, 27 N.W.2d 421, 429 (Minn. 1947) (stating generally that a "litigant is not to be penalized for the neglect or mistakes of his lawyer. Courts will relieve parties from the consequences of the neglect or mistakes of their attorney, when it can be done without substantial prejudice to their adversaries").

<sup>5</sup> In particular, the district court stated that Kern's "claim for personal injuries did not become actionable until December 2006, denying her a full and fair opportunity to litigate the full extent of her damages in conciliation court." (AD 10) (citing State v. Joseph, 636 N.W.2d 322, 328 (Minn. 2001) ("The question of whether a party had a full and fair opportunity to litigate a matter generally focuses on whether there were significant procedural limitations in the prior proceeding . . .").

*apply it is left to the discretion of the trial court.”* Erickson v. Comm’r of Dept. of Human Services for State of Minn., 494 N.W.2d 58, 61 (Minn. Ct. App. 1992) (emphasis supplied); see also Pope County Board of Com’rs v. Pryzmus, 682 N.W.2d 666 (Minn. Ct. App. 2004) (finding availability and application of the doctrine to be two separate inquiries and noting that “the decision to apply the doctrine is left to the trial court's discretion.”)<sup>6</sup>

Even if (as the Torborgs contend) all four elements of the res judicata test are met and res judicata is available, the district court has discretion to determine whether it is fair to actually apply the doctrine. The district court’s decision to vacate the conciliation court judgment, however, rendered this question moot. Therefore, the district court did not have occasion to address that question and the case must be remanded back to the district court for it to complete its analysis. There is no basis for the Torborgs’ argument that “the Court of Appeals under Rule 60.02 already addressed the potential injustice that Ms. Kern seeks to have the trial court address under a res judicata principle.” (Resp. Br. 26). A matter committed to the discretion of the district court cannot be decided by the Court of Appeals in the first instance and, in any case, there is no legal basis for claiming that the Rule 60.02 analysis is a substitute for the district court’s additional discretion to determine whether application of res judicata “would work an injustice on the party against whom the doctrines are urged.” Hauschildt v. Beckingham, 686 N.W.2d 829, 837 (Minn. 2004).

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<sup>6</sup> See also the other cases cited in Kern’s principal brief at page 37.

## CONCLUSION

For the reasons stated herein and in Appellants' initial brief, this Court should reverse the judgment of the Court of Appeals, and reinstate the decision of the district court vacating the conciliation court judgment. In the alternative, if this Court determines the district court abused its discretion in vacating the judgment, the case should be remanded to the district court to exercise its discretion whether to apply res judicata.

Dated: January 27, 2011

Respectfully submitted,



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