

**CASE NO. A10-716  
STATE OF MINNESOTA  
IN COURT OF APPEALS**

---

Peggy Greer,

Appellant,

v.

Professional Fiduciary, Inc.; Wells Fargo Bank,  
N.A.; Wells Fargo Investments, L.L.C. d/b/a  
Wells Fargo Private Bank Elder Services; and  
Ruth Ostrom,

Respondents.

---

**APPELLANT'S BRIEF IN REPLY TO RESPONDENTS  
WELLS FARGO BANK, N.A., WELLS FARGO INVESTMENTS, L.L.C.,  
AND PROFESSIONAL FIDUCIARY, INC.**

**ATTORNEYS FOR APPELLANT:**

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.  
David E. Bland (MN 008795)  
Andrew J. Pieper (MN 389262)  
2800 LaSalle Plaza  
800 LaSalle Avenue  
Minneapolis, MN 55402-2015  
Phone: (612) 349-8500

**ATTORNEYS FOR RESPONDENT  
PROFESSIONAL FIDUCIARY, INC.:**

LARSON KING L.L.P.  
Mark Solheim (MN 213226)  
Paula Duggan Vraa (MN 219137)  
2800 Wells Fargo Place  
30 East Seventh Street  
Saint Paul, MN 55105  
Phone: (651) 312-6500

**ATTORNEYS FOR RESPONDENTS  
WELLS FARGO BANK, N.A. AND WELLS  
FARGO INVESTMENTS L.L.C. D/B/A WELLS  
FARGO PRIVATE BANK ELDER SERVICES:  
WINTHROP & WEINSTINE P.A.**

Thomas Boyd (MN 0200517)  
Erin A. Oglesbay (MN 0343092)  
225 South Sixth Street, Suite 3500  
Minneapolis, MN 55402  
Phone: (612) 604-6400

**ATTORNEYS FOR RESPONDENT  
RUTH OSTROM:**

BASSFORD REMELE P.A.  
Kelly A. Putney (MN 237577)  
David A. Turner (MN 0333104)  
33 South Sixth Street, Suite 3800  
Minneapolis, MN 55402  
Phone: (612) 333-3000

## TABLE OF CONTENTS

Table of Authorities .....	3
Introduction .....	4
Arguments	
I.    The Wells Fargo Respondents and PFI Incorrectly Interpret The Elements of <i>Res Judicata</i> .....	4
II.   Ms. Greer’s Claims Do Not Collaterally Attack The Orders From The Guardianship And Conservatorship Proceedings .....	10
III.  Ms. Greer’s Claims Against The Wells Fargo Respondents Are Not Barred By The Doctrine Of Release .....	12
Conclusion .....	14
Supplemental Appendix <sup>1</sup> .....	15

---

<sup>1</sup> Pursuant to Minn. Stat. § 480A.08 Subd. (3) (c), Appellant has provided a true and correct copy of cited unpublished case law in her Supplemental Appendix.

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

## TABLE OF AUTHORITIES

### Statutes:

Minn. Stat. § 524.5-102 (2009).....	6-7
Minn. Stat. § 524.5-308 (2009).....	6-7
Minn. Stat. §524.5-417 (2009).....	8
Minn. Stat. § 524.5-420 (2009).....	10
Minn. Stat. § 524.5-427 (2009).....	6

### Cases:

<i>Barrett v. MacDonald</i> , 121 N.W.2d 165 (Minn. 1963).....	11
<i>Care Institute, Inc.-Roseville v. County of Ramsey</i> , 612 N.W.2d 443 (Minn. 2000) .....	4, 5
<i>Hauschildt v. Beckingham</i> , 686 N.W.2d 829 (Minn. 2004) .....	4, 5
<i>In re Enger's Will</i> , 30 N.W.2d 694, 703 (Minn. 1948) .....	9, 11
<i>Matter of Irrevocable Inter Vivos Trust Established by R.R. Kemske</i> , 305 N.W.2d 755 (Minn. 1981) .....	11
<i>Matter of Kelly's Will</i> , 266 N.W.2d 700 (Minn. 1978) .....	11
<i>Schmidt v. Smith</i> , 216 N.W.2d 669 (Minn. 1974).....	13
<i>Sunshine Anthracite Coal Co. v. Adkins</i> , 310 U.S. 381 (1940).....	7
<i>Wise for Kocemba v. Bix</i> , No. C4-88-2366, 1989 WL 35605 (Minn.App., decided April 18, 1989) .....	11-12

### Secondary Authorities:

<i>Black's Law Dictionary</i> (2d pocket ed. 2001) .....	7, 8, 12-13
6 Kirsch, <i>Minnesota Practice</i> § 37.44 (1990).....	13

## INTRODUCTION

Appellant Peggy Greer respectfully submits this Reply<sup>2</sup> to Respondents Wells Fargo Bank, N.A. and Wells Fargo Investments, L.L.C.'s Brief (collectively the "Wells Fargo Respondents"), and the Brief of Respondent Professional Fiduciary, Inc. ("PFI") in the above-referenced matter.

## ARGUMENTS

### I. THE WELLS FARGO RESPONDENTS AND PFI INCORRECTLY INTERPRET THE ELEMENTS OF *RES JUDICATA*.

The doctrine of *res judicata* applies "when the parties [...] to two actions are the same, the second suit is for the same cause of action, and the original judgment was on the merits." *Care Institute, Inc.-Roseville v. County of Ramsey*, 612 N.W.2d 443, 447 (Minn. 2000). In applying this doctrine, Minnesota courts assess whether "(1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involves the same parties or their privies; (3) there was a final judgment on the merits; [and] (4) the estopped party had a full and fair opportunity to litigate the matter." *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004). If one of these elements is not satisfied, the doctrine of *res judicata* does not bar the subsequently filed claims.

In their briefs, the Wells Fargo Respondents and PFI incorrectly apply the elements of *res judicata* to the instant case. In doing so, they seek to (A) expand the scope of *res judicata* to include conduct that occurs long after facts giving rise to a claim;

---

<sup>2</sup> For the Court's convenience, Ms. Greer is filing separate reply briefs to address arguments raised by the three respondents and the amici curiae in this appeal. The combined word count of Ms. Greer's reply briefs is less than the total word count allowed for in a single reply brief under Minn. R. Civ. App. P. 132.01 Subd. 3 (2010).

(B) redefine themselves as “parties” to Ms. Greer’s guardianship and conservatorship proceedings; and (C) erroneously assert that Ms. Greer’s instant claims are barred because they “could have been brought” in her guardianship and conservatorship proceedings. Because these arguments fail to satisfy the doctrine *res judicata*, the Court should grant Ms. Greer’s appeal.

A. Ms. Greer’s Guardianship And Conservatorship Proceedings Do Not Involve The Same “Claims” As Those Asserted In The Instant Case.

In attempting to establish that the facts giving rise to Ms. Greer’s guardianship and conservatorship proceedings comprise the same “claims” as those in the present case, the Wells Fargo Respondents argue that “[t]he doctrine of *res judicata* applies to bar all claims that arise from or are related to the same factual circumstances that made up the entirety” of Ms. Greer’s guardianship and conservatorship proceedings. (Wells Fargo Respondents’ Br. at 23.) In addition, PFI asserts that Ms. Greer’s instant claims are identical to the “guardianship claims” because the “same evidence would sustain both actions.” (PFI’s Br. at 16.) These arguments, however, distort the first element of *res judicata*.

Under Minnesota law, *res judicata* precludes litigation where “the earlier claim involved the same set of factual circumstances” as the subsequently filed claim. *Hauschildt*, 686 N.W.2d at 840. Thus, “if the right to assert the second claim did not *arise at the same time* as the right to assert the first claim, then the claims cannot be considered the same cause of action” for the purposes of *res judicata*. *Care Institute, Inc.-Roseville*, 612 N.W.2d at 447 (emphasis added).

To the extent Ms. Greer's guardianship and conservatorship proceedings qualify as a "claim" for *res judicata* purposes, the sole question in that proceeding was Ms. Greer's capacity to make her own medical and financial decisions. (Appellant's Opening Br. at 15.) Indeed, PFI admits as much in its brief: "The probate court's establishment of PFI's guardianship over Ms. Greer required a hearing and the probate court was required to find by 'clear and convincing evidence' that Ms. Greer was incapacitated, and that her needs could not be met via a less restrictive means." (PFI's Br. at 11.) The facts giving rise to Ms. Greer's breach of fiduciary duty claims occurred well after the guardianship and conservatorship was established, and arose out of actions and inaction by PFI and the Wells Fargo Respondents, not out of questions regarding Ms. Greer's capacity. (App. 3-12.)

For these reason, the Wells Fargo Respondents and PFI fail to establish the first element of *res judicata*, and the Court should reverse the District Court's findings and remand for further proceedings.

B. The Wells Fargo Respondents And PFI Were Not "Parties" To Ms. Greer's Guardianship And Conservatorship Proceedings.

The Wells Fargo Respondents and PFI also attempt to redefine themselves as parties to Ms. Greer's guardianship and conservatorship proceedings in order to fulfill the second element of *res judicata*, which requires that a subsequent claim involve the same parties as an earlier claim. (Wells Fargo Respondents' Br. at 27.) *See* (PFI's Br. at 17.) PFI and the Wells Fargo Respondents, however, were not parties to Ms. Greer's guardianship and conservatorship proceedings; rather, Minnesota law defines them each

as an “interested person” and fiduciary in such proceedings. *See* Minn. Stat. § 524.5-102 (2009), and Minn. Stat. § 524.5-427 (2009). To assert otherwise runs counter to these accepted statutory definitions.

Under Minnesota statute, “a nominated guardian or conservator, or the duly appointed guardian or conservator” are defined as an “[i]nterested person.” Minn. Stat. § 524.5-102 Subd. 7 (2009). As an “interested person,” a guardian or conservator may receive notice of hearing, as well as reports and other documentation from the proceedings. Minn. Stat. § 524.5-308 (2009). These rights, however, did not translate the Wells Fargo Respondents or PFI into a “party” in Ms. Greer’s guardianship and conservatorship proceedings. Rather, the applicable definition of a “party” is, simply, “one by or against whom a lawsuit is brought.” *Black’s Law Dictionary*, 515 (2d pocket ed. 2001). Thus, in order to be considered “parties” to Ms. Greer’s guardianship and conservatorship proceedings, PFI and the Wells Fargo Respondents—by definition—would have had to have been adverse to Ms. Greer.

Quoting dicta from a Supreme Court case, PFI attempts to argue that “[i]dentity of parties is not a mere matter of form, but of substance.” *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402-04 (1940). *See* (PFI’s Br. at 18.) Neither PFI nor the Wells Fargo Respondents, however, have identified any “substance” that would qualify them as Ms. Greer’s adversary in the guardianship and conservatorship proceedings. PFI and the Wells Fargo Respondents, in their roles as Ms. Greer’s guardian and conservator, were fiduciaries of Ms. Greer. Neither has denied that fact. *See* (PFI App. 3.) *See also* (App. 202-203.) To accept PFI and the Wells Fargo Respondents’ interpretation would mean

defining them simultaneously as Ms. Greer's fiduciary and as her adversary. Such an interpretation is impossible to reconcile under any definition of a fiduciary<sup>3</sup>.

As such, PFI and the Wells Fargo Respondents do not fulfill the second element of *res judicata* and this Court should reverse the District Court's findings and remand for further proceedings.

C. Ms. Greer's Instant Claims Are Not Barred By Virtue Of The Fact That They "Could Have Been Brought" In The Guardianship And Conservatorship Proceedings.

The Wells Fargo Respondents and PFI further argue that the approval of the Wells Fargo Respondents' accountings during Ms. Greer's guardianship and conservatorship proceedings bar her breach of fiduciary claims because the breach of fiduciary claims "could have been brought in the earlier action." (Wells Fargo Respondents' Br. at 29.) *See* (PFI's Br. at 11.) What the Wells Fargo Respondents fail to acknowledge, however, is that the Wells Fargo Respondents, and they alone, had the ability to make a claim or file suit for breach of fiduciary duties on Ms. Greer's behalf. Indeed, the probate court's Order of March 8, 2005, which established Ms. Greer's guardianship and conservatorship, states in paragraph 9 "[t]hat the Conservator has the power and duty to:

- c. Possess and manage the estate of the Protected Person, *collect all* debts and claims *in favor of the Protected Person*, or with the approval of the Court, compromise them, *institute suit on behalf of the Protected Person* and represent her in court proceedings, [...]"

(App. 201.) (emphasis added).<sup>4</sup>

---

<sup>3</sup> "Fiduciary" is commonly defined as "[o]ne who owes to another the duties of good faith, trust, confidence, and candor." *Black's Law Dictionary*, 282 (2d pocket ed. 2001).

<sup>4</sup> *See* Minn. Stat. §524.5-417 (2009).

Respondents are, in essence, contending that they are free to act as they see fit, and their conduct can never be later questioned, even though the very claims brought in a suit like this were claims that only one of them could bring against itself and the other. Had the Legislature intended such an absurd result, it certainly should have said so in the governing statutes. It did not.

Even if the instant claims might have been raised in the guardianship and conservatorship proceedings, however, and Ms. Greer had the ability to raise these claims, Ms. Greer was not obligated to do so. The doctrine of *res judicata* “is not conclusive of equities entitling a party to affirmative relief and counterclaims which might have been asserted but were not.” *In re Enger’s Will*, 30 N.W.2d 694, 703 (Minn. 1948). In *In re Enger’s Will*, the Minnesota Supreme Court held that breaches of fiduciary duties amount to separate causes of action from orders allowing annual accountings in a trust proceeding. *Id.* Thus, even if a breach of fiduciary duty claim might have been raised in annual accounting proceedings, the court found, “they were *not required*” to be brought forward as such claims represent separate and independent causes of action from orders allowing accountings. *Id.* (emphasis added).

Thus, regardless of whether Ms. Greer may or may not have raised her instant claims in the guardianship and conservatorship proceedings, her claims for breach of fiduciary duties, negligence, and intentional and negligent infliction of emotional distress represent separate, independent, and equitable causes of action for which she is entitled to seek relief in a venue of her own choosing.

For these reasons, this Court should reverse the District Court's findings with regard to *res judicata* and remand for further proceedings.

**II. MS. GREER'S CLAIMS DO NOT COLLATERALLY ATTACK ORDERS FROM THE GUARDIANSHIP AND CONSERVATORSHIP PROCEEDINGS.**

PFI and the Wells Fargo Respondents also make arguments that Ms. Greer is collaterally attacking orders from her guardianship and conservatorship proceedings by virtue of her instant claims. (Wells Fargo Respondents' Br. at 30.) *See* (PFI's Br. at 13.) Ms. Greer, however, does not attack the orders of the guardianship and conservatorship proceedings; rather, she alleges breaches of fiduciary duties, negligence, and intentional and negligent infliction of emotional distress against PFI and the Wells Fargo Defendants resulting from their actions and inaction as her guardian and conservator. (App. 3-12.) These actions and inaction were neither subject to nor disclosed in the accountings and orders of the guardianship and conservatorship proceedings. As such, Ms. Greer's instant claims do not represent a collateral attack against those accountings and orders.

As noted in Ms. Greer's opening brief, accountings in guardianship and conservatorship proceedings merely "state or contain a listing of the assets of the estate under the conservator's control and a listing of the receipts, disbursements, and distributions during the reporting period." Minn. Stat. § 524.5-420 (b) (2009). *See* (Appellant's Opening Br. at 14.) Ms. Greer does not contend that these accountings were improperly compiled or disputes their contents. Rather, she alleges breaches of fiduciary duties, negligence, and intentional and negligent infliction of emotional distress against PFI and the Wells Fargo Respondents based on their conduct as her fiduciaries. (App. 3-

12.) This conduct was neither disclosed in the accountings by the Wells Fargo Respondents, nor was this conduct adjudicated by the orders based on those accountings.

Additionally, the case law relied on by PFI and the Wells Fargo Respondents are consistent with Ms. Greer's arguments regarding collateral attack. In those cases—which primarily concern wills and trusts—the disputes center around assets, receipts, or disbursements disclosed in accountings. *See Barrett v. MacDonald*, 121 N.W.2d 165, 171 (Minn. 1963) (final decree of the probate court set aside to include additional securities overlooked on account of clerical error); *Matter of Kelly's Will*, 266 N.W.2d 700, 702-03 (Minn. 1978) (holding that distributions of trust assets were not subject to collateral attack, and equitable action to form constructive trust could not avoid force of probate court decree because appellant was executor, trustee, and beneficiary). Notably, in *Matter of Irrevocable Inter Vivos Trust Established by R.R. Kemske*, 305 N.W.2d 755, 763 (Minn. 1981), the court found challenges to trust distributions listed in a final probate decree were not subject to collateral attack by trust beneficiaries, but at the same time held that claims by the beneficiaries against the trustee for breach of fiduciary duties were *not* a collateral attack on a the final probate decree. As such, trust beneficiaries can sustain an action against a trustee for breach of fiduciary duties, despite a probate court's final decree with regard to distribution of trust assets. *Id. See In re Enger's Will*, 30 N.W.2d at 702.

That Ms. Greer's instant claims are not a collateral attack on the accountings and orders of her guardianship and conservatorship proceedings are further supported in the case law involving those specific issues. Despite PFI's characterization of *Wise for*

*Kocemba v. Bix*, this Court did not hold that “the ward should have addressed her grievances within the probate proceedings.” (PFI’s Br. at 19.) Instead, this Court held that the ward *did* address her grievances within the probate proceedings, that the probate court made findings of facts on those grievances, and that the lower court’s orders specifically embodied its findings on those grievances. *Wise for Kocemba v. Bix*, No. C4-88-2366, 1989 WL 35605, at \*1-2 (Minn.App., decided April 18, 1989). *See* (Appellant’s Opening Br. at 16.) Thus, *Kocemba* is distinguishable from Ms. Greer’s case, as Ms. Greer’s instant claims were not subject to the orders and accountings of her guardianship and conservatorship proceedings.

For these reasons, Ms. Greer’s claims do not represent a collateral attack on the accountings and orders of her guardianship and conservatorship proceedings. Thus, this Court should reverse the District Court’s findings and remand for further proceedings.

**III. MS. GREER’S CLAIMS AGAINST THE WELLS FARGO RESPONDENTS ARE NOT BARRED BY THE DOCTRINE OF RELEASE.**

The Wells Fargo Respondents also assert a theory that their discharge from Ms. Greer’s guardianship and conservatorship proceedings acted as a release from any liability for their breaches of fiduciary duties, negligence, and intentional and negligent infliction of emotional distress. (Wells Fargo Respondents’ Br. at 32.) Their arguments, however, fail to relieve them of liability for Ms. Greer’s instant claims.

Contrary to the Wells Fargo Respondents’ assertion, a discharge is only defined as a “release” as it applies to a debtor or to a prisoner. *See Black’s Law Dictionary*, 206 (2d

pocket ed. 2001). Thus, despite the Wells Fargo Respondents' linguistic sleight of hand, their attempt to correlate the two terms must fail.

Similarly, the Wells Fargo Respondents rely on the 1990 edition of the *Minnesota Practice Series* for its argument that an order discharging a conservator bars claims against the conservator for activities during the conservatorship. (Wells Fargo Respondents' Br. at 32.) This assertion, however, mischaracterizes the actual text, which states that "a final discharge bar[s] any further claims against the guardian or conservator for activities during the guardianship or conservatorship *as to matters disclosed in the accounts.*" 6 Kirsch, *Minnesota Practice* § 37.44, at 599 (1990) (emphasis added). See (App. 413.) Thus, as discussed above and in Ms. Greer's opening brief, any discharge of the Wells Fargo Respondents does not relieve them of liability for Ms. Greer's claims of breach of fiduciary duty, negligence, and intentional and negligent infliction of emotional distress, as they were not disclosed in the accountings. See (Appellant's Opening Br. at 14.)

Furthermore, whether Ms. Greer expressly released her claims "by consenting to approval of WFB's final accounts and WFB's final discharge as Conservator" is not a question of law that this Court may decide. (Wells Fargo Respondents' Br. at 32.) Rather, a release "is not a bar to an action for [...] unknown injuries if it can be shown that such unknown injuries were not within the contemplation of the parties when the settlement was agreed upon." *Schmidt v. Smith*, 216 N.W.2d 669, 672 (Minn. 1974). Additionally, "whether a release was executed through [...] mistake is a question for the jury." *Id.* Ms. Greer has not had an opportunity to litigate these claims before a jury.

Nor has she had the opportunity to conduct discovery into questions of fact concerning any alleged release. Thus, it is inappropriate for the Court to make a determination on an alleged "release" without providing Ms. Greer the opportunity to develop facts in the case.

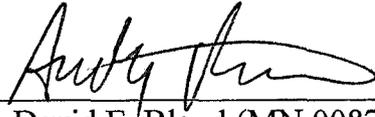
As such, the Wells Fargo Respondents' arguments do not establish release as a matter of law and must fail. This Court should thus reverse the District Court's findings and remand for further proceedings.

**CONCLUSION**

Ms. Greer's Complaint, when all allegations are deemed to be true and all inferences flowing therefrom are drawn in her favor as the law requires, states claims for relief against PFI and the Wells Fargo Respondents. For all the foregoing reasons, Ms. Greer respectfully asks this Court to reverse the District Court's dismissal of her claims against PFI and the Wells Fargo Respondents.

DATED: August 9, 2010

**ROBINS, KAPLAN, MILLER & CIRESI L.L.P.**

By:   
David E. Bland (MN 008795)  
Andrew J. Pieper (MN 389262)

2800 LaSalle Plaza  
800 LaSalle Avenue  
Minneapolis, MN 55402-2015  
612-349-8500

**ATTORNEYS FOR PLAINTIFF  
PEGGY GREER**