

No. A11-1699

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**State of Minnesota  
In Court Of Appeals**

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**Leslie Fain, Trustee for the Next-of-Kin of  
Chad James Swedberg, deceased,**

**Respondent,**

**vs.**

**Kenneth Eugene Andersen,**

**Appellant.**

**BRIEF OF RESPONDENT**

**ATTORNEY FOR RESPONDENT:**

**Charles A. Seuntjens  
PEMBERTON, SORLIE, RUFER  
& KERSHNER, P.L.L.P.  
903 Washington Avenue, P.O. Box 1409  
Detroit Lakes, MN 56502  
(218) 847-4858  
Atty. Reg. No. 0348843**

**APPELLANT:**

**Kenneth Eugene Andersen, Pro Se  
OID 226526  
MN Correctional Facility-Rush City  
7600 525th Street  
Rush City, MN 56509**

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## LEGAL ISSUES

- I. **Did the District Court error when it granted Respondent's motion for partial summary judgment, thereby precluding Appellant from arguing his liability in the Decedent, Chad James Swedberg's, wrongful death?**

District Court Held: Respondent was entitled to partial summary judgment against the Appellant on the issue of Appellant's liability for the Decedent's wrongful death because all of the necessary elements of collateral estoppel were established.

## STATEMENT OF THE CASE

This appeal concerns a wrongful death action that was filed by Respondent on February 22, 2010, as trustee for the next-of-kin of the decedent, her husband Chad James Swedberg (hereinafter "Decedent"), whom was murdered by the Appellant on April 13, 2007. Following the murder, there was an extensive criminal trial which culminated in Appellant being found guilty beyond a reasonable doubt of the first-degree murder of Decedent. *See* Respondent's Appendix, 1 (Certified Felony Judgment dated June 12, 2008, Exhibit A). Subsequently, the Appellant appealed his conviction to the Minnesota Supreme Court, whom, on June 30, 2010, returned a decision affirming Appellant's conviction. *See State v. Andersen*, 784 N.W.2d 320 (Minn.2010).

Following this decision by the Minnesota Supreme Court, on December 17, 2010, a summary judgment hearing was held wherein the Respondent requested that the District Court grant partial summary judgment of her civil wrongful death claim against Appellant, arguing that Appellant's criminal conviction for first degree murder of Decedent precluded Appellant from now disputing his liability for the Decedent's

wrongful death. *See* Respondent's Appendix, 2-16 (Plaintiff's Memorandum in Support of Motion for Partial Summary Judgment, Exhibit B).

On March 3, 2011, the District Court granted the Respondent's motion, finding that Respondent could collaterally estop the Appellant from disputing his liability in the Respondent's wrongful death civil action, since: (I) the issue of Appellant's liability for the Decedent's wrongful death was identical to the issues that had been litigated in the Appellant's criminal case regarding the same events; (II) the Appellant's criminal case had resulted in a final determination on the merits; (III) the Appellant was a party to the criminal case regarding the same events; and (IV) the Appellant had previously received a fair and full opportunity to be heard on the issue of his liability for the Decedent's death. *See* Respondent's Appendix, 17-28 (Notice of Filing of Order, Order, and Memorandum of Judge Michael L. Kirk dated March 2, 2011, Exhibit C). Following this ruling, on April 20, 2011, the matter proceeded to trial with respect to damages solely, and on July 25, 2011, the District Court returned a verdict awarding Respondent, as trustee for the next-of-kin of the Decedent, compensatory damages in the amount of \$1,331,009.44, and punitive damages in the amount of \$2,662,018.88. *See* Respondent's Appendix, 29-48 (Notice of Filing, Findings of Fact, Conclusions of Law, and Memorandum of Judge Michael L. Kirk dated July 25, 2011, Exhibit D). Appellant now appeals from the District Court's March 2, 2011, decision granting Respondent partial summary judgment.

## STATEMENT OF FACTS

On the morning of April 13, 2007, the Decedent, Chad James Swedberg, was shot to death in the woods near his residence in Maple Grove Township, Becker County, Minnesota. *See State v. Andersen*, 784 N.W.2d 320 (Minn.2010). On that particular morning, the Decedent had planned to process maple syrup with the help of his friends Albert Baker and Jesse Fain. *See State v. Andersen*, at 323. The Decedent's wife discovered his body later in the morning when, after hearing gunshots and making several unanswered telephone calls to check on Decedent's welfare, she walked from their home to the syruping camp to check on him. *See Id.* at 324.

Upon arriving at the scene, investigating officers discovered what they believed to be two tracks of footprints in the frost, one track going north in the general direction of the Appellant's house, and the other going south toward the murder scene. *See Id.* at 332. At the criminal trial on this matter, the medical examiner testified that the Decedent was shot twice, once in the back of the right shoulder and once in the left buttock. *See Id.* at 324. The lack of any stippling or gunpowder around the wounds led the examiner to believe that the Decedent had not been shot at close range. *See Id.* A firearms examiner later determined that the bullets removed from the Decedent's body came from a .30 caliber weapon. *See Id.* The examiner was "reasonably certain" that the bullets were Winchester Supreme Ballistic Silvertips. *See Id.* at 325.

In the ensuing investigation into the Decedent's death, Appellant was named as a suspect. During their investigation, the authorities learned that the Appellant and

Decedent had known each other and had previously worked together on several projects. However, in late 2006, the Decedent cooperated with local authorities and implicated the Appellant in the theft of an all-terrain vehicle ("ATV") from a site where the two of them had been working earlier that year. *See Id.* As a result of the Decedent's cooperation, the Appellant was subsequently charged with the theft of the ATV. *See Id.* Following this incident, it was learned that the Decedent had discontinued working with the Appellant. *See Id.*

In the months that followed, the Appellant gave varying accounts of his interactions with the Decedent on the date of the murder, as well as his whereabouts. For instance, it was discovered that on April 13, 2007, the date of Decedent's murder, the Appellant used his cell phone to call the Decedent at 7:46 a.m. *See Id.* The Appellant told police that he called the Decedent because he was looking for a ride to Fargo in order to apply for a loan, but that the Decedent had declined because the Decedent intended to make maple syrup that morning with Albert Baker and Jesse Fain. *See Id.* However, it was also discovered that at 7:52 a.m., the Appellant had used his cell phone to call Albert Baker, and asked Baker to stop by on his way to the Decedent's residence to look at a tank that the Appellant wanted to use to store leeches. *See Id.* Baker agreed but stated that he wanted to buy groceries first. *See Id.* The Appellant claimed that Baker was supposed to be at his house by 8:30 a.m., but at the criminal trial, Baker testified that the Appellant knew that Baker needed to go to Waubun to get groceries first, and that the Appellant had not set any specific time for Baker to arrive at Appellant's house. *See Id.*

The Appellant also told police that he had a tax preparer's appointment at 9:00 a.m. or 9:30 a.m. on the morning of April 13, 2007, and that he had left for the appointment between 8:30 a.m. and 9:00 a.m. *See Id.* However, it was discovered that the Appellant first called a cousin of his a little before 9:17 a.m., to ask for a ride to Fargo, and that the Appellant's cousin had agreed to drive Appellant to Fargo at 9:34 a.m. *See Id.* Further, while his cousin was en route to pick up Appellant, the Appellant had called his cousin and asked him to meet him at the Appellant's sister's house. *See Id.* The Appellant's cousin did so and he and the Appellant left for the tax appointment. *See Id.*

The Appellant arrived at his tax preparer's sometime between 9:45 a.m. and 10:00 a.m. *See Id.* However, contrary to his assertions, it was discovered that the Appellant's tax appointment was not at 9:00 a.m. or 9:30 a.m., but rather, at 2:00 p.m., that day. *See Id.* After meeting with his tax preparer, the Appellant went to Moorhead to attempt to obtain a loan. *See Id.* Contrary to what he had told the police, he did not have an appointment for that day, but rather, was supposed to have met with the branch manager of the financial institution the day before (*i.e.*, April 12, 2007). *See Id.* While the Appellant was meeting with the branch manager of the financial institution, his cell phone rang and he answered it. *See Id.* After the phone conversation, he told the branch manager that his "business partner" (*i.e.*, Chad Swedberg) had been shot and that he had to leave. *See Id.* But when the Appellant returned to his cousin, who was waiting in the vehicle, the Appellant told him that the decedent's brother (*i.e.*, Ken Swedberg) had been shot. *See Id.* at 326. Such a statement was inconsistent with the Appellant's statement to

the branch manager because Ken Swedberg was not the Appellant's business partner. *See Id.* The Appellant later told police that his niece had told him that Ken Swedberg had been shot, and that she had called him shortly thereafter and informed Appellant that Ken Swedberg was dead. *See Id.* However, the Appellant's niece maintained that she had only spoke to the Appellant once, and that she had told the Appellant that the Decedent, *Chad Swedberg*, had been fatally shot, and not Ken Swedberg. *See Id.*

On the day of the Decedent's funeral, the Appellant opened a bank account and told the branch manager yet another story about what had happened the day of the murder. *See Id.* According to this account, the Appellant had stopped by the Decedent's home on the day of the murder to see if the Decedent wanted to go to South Dakota to buy leech traps. *See Id.*

On September 18, 2006, well before the murder, it was discovered that the Decedent had bought the Appellant a Tikka T3 Lite .300 Winchester short magnum rifle and a Nikon Buckmaster rifle scope at Reed's Sporting Goods store in Walker, Minnesota. *See Id.* When police asked the Appellant about this rifle, the Appellant claimed that the Decedent had traded it in for two muzzleloaders on November 23, 2006. *See Id.* However, the Tikka T3 Lite .300 Winchester short magnum rifle and a Nikon Buckmaster rifle scope that the Decedent had purchased for Appellant was found later that day concealed under the insulation of an outbuilding near the Appellant's house. *See Id.* The Appellant's palm print was found on the gun. *See Id.* At the criminal trial, Officers testified that the Appellant had acted suspiciously during the execution of the

search warrant that ultimately led to the discovery of the rifle that the Decedent had purchased for the Appellant.<sup>[1]</sup> *See Id.*

Later, the firearms examiner test-fired the Tikka T3 Lite .300 rifle discovered in the outbuilding near Appellant's house, and concluded that the rifle could have fired the bullets removed from the Decedent's body. *See Id.* The firearms examiner also concluded that bullets found in the Appellant's house on the date of the search had characteristics similar to the bullets removed from the Decedent's body. *See Id.*

On June 4, 2008, a Becker County jury found the Appellant guilty beyond a reasonable doubt of the first-degree premeditated murder of Decedent. To be guilty of such a crime, a defendant must be found beyond a reasonable doubt to have "caused the death of a human being with premeditation and intent to effect the death of the person or of another." *See Minn.Stat.* 609.185(a)(i). On June 12, 2008, the Appellant was sentenced to life in prison. Appellant later appealed the verdict to the Minnesota Supreme Court. On June 30, 2010, the Minnesota Supreme Court affirmed his conviction.<sup>[2]</sup>

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<sup>[1]</sup> The police did not initially inform the Appellant that they had a search warrant and the Appellant originally consented to the search of his house. However, when the police proceeded to attempt to search nearby buildings on the property, the Appellant became angry and stated that his brother, Frank, owned the particular buildings and did not want them to be searched. *See State v. Andersen*, at 326.

<sup>[2]</sup> It should be noted that following the Supreme Court's affirmation of Appellant's conviction, the Appellant attempted to seek post-conviction relief from the District Court, asking that the conviction be reversed and a new trial be ordered. *See Appellant's Appendix*, 1-57 (Appellant's Petition for Post Conviction Relief). However, such a request was denied by the District Court. *See Appellant's Appendix*, 193-200 (Order and Memorandum of Judge Lisa N. Borgen, dated March 2, 2011).

On February 22, 2010, the Respondent, as trustee for the next-of-kin of the Decedent, filed a wrongful death action against the Appellant. On December 17, 2010, a summary judgment hearing was held wherein the Respondent requested that the District Court grant partial summary judgment of her wrongful death claim against Appellant, arguing that Appellant's criminal conviction for first degree murder of Decedent precluded Appellant from disputing his liability for the Decedent's wrongful death. *See* Respondent's Appendix, 2-16 (Plaintiff's Memorandum in Support of Motion for Partial Summary Judgement, Exhibit B).

On March 3, 2011, the District Court granted the Respondent's motion, finding that Respondent could collaterally estop Appellant from disputing his liability in the Respondent's wrongful death civil action, since (I) the issue of Appellant's liability for the Decedent's wrongful death was identical to the issues that had been litigated in the Appellant's criminal case regarding the same events; (II) the criminal case resulted in a final determination on the merits; (III) the Appellant was a party to the criminal case regarding the same events; and (IV) the Appellant had previously received a fair and full opportunity to be heard on the issue of his liability for the Decedent's wrongful death. *See* Respondent's Appendix, 17-28 (Notice of Filing of Order, Order, and Memorandum of Judge Michael L. Kirk dated March 2, 2011, Exhibit C). Following this ruling, on April 20, 2011, the matter proceeded to trial with respect to damages solely, and on July 25, 2011, the District Court returned a verdict awarding Respondent, as trustee for the next-of-kin of the Decedent, compensatory damages in the amount of \$1,331,009.44, and

punitive damages in the amount of \$2,662,018.88. Appellant now appeals from the District Court's March 2, 2011, decision granting Respondent partial summary judgment.

## ARGUMENT

### A. Standard of review

In an appeal from summary judgment, the reviewing court must determine whether there are any genuine issues of material fact and whether the District Court erred in its application of law. Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn.1993). A "material fact" for purposes of a summary judgment determination is one of such a nature as will affect the result or outcome of the case depending on its resolution. Zappa v. Fahey, 245 N.W.2d 258, 259-260 (Minn.1976). Importantly, there is not a genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions. DLH, Inc. v. Russ, 566 N.W.2d 60, 71 (Minn.1997). Speculation is likewise insufficient to defeat summary judgment. Bob Useldinger & Sons, Inc. v. Hangsleben, 505 N.W.2d 323, 328 (Minn.1993). Accordingly, summary judgment is appropriate when no reasonable fact finder could find in favor of appellants on their claims. DLH, Inc. v. Russ, 566 N.W.2d at 69. And the reviewing court "will affirm a district court's grant of summary judgment if it can be sustained on any grounds." Presbrey v. James, 781 N.W.2d 13, 16 (Minn.App.2010).

In the present case, the Appellant challenges the District Court's application of the doctrine of collateral estoppel to preclude him from re-litigating the question of his liability in the wrongful death of the Decedent. Upon review, whether collateral estoppel is available is a mixed question of law and fact, which the reviewing court reviews de novo. Matter of Trusts Created by Hormel, 504 N.W.2d 505, 509 (Minn.App.1993). If the doctrine can be applied, whether to actually apply collateral estoppel is left to the District Court's discretion and will not be reversed absent an abuse of that discretion. Pope County Bd. of Comm'rs v. Pryzmus, 682 N.W.2d 666, 669 (Minn.App.2004), *review denied* (Minn.Sept. 29, 2004).

**I. The District Court did not error when it found that collateral estoppel was available and applied in Respondent's wrongful death case to preclude Appellant from arguing against his liability for the Decedent's death.**

In the present case, the District Court found both that collateral estoppel was available and proper to use in the Respondent's wrongful death case. Such a finding by the District Court was appropriate, since Minnesota law permits courts to allow a criminal conviction to preclude a litigant from disputing a previously litigated issue as long as the necessary elements of collateral estoppel are established.

**(a) Under Minnesota law, it is proper for courts to allow criminal convictions to preclude a litigant from disputing a previously litigated issue, provided the elements of collateral estoppel are established.**

Whether an individual party may use a criminal conviction for first-degree murder for collateral estoppel purposes against a convicted defendant to establish liability in a

civil wrongful death action appears to factually be a case of first impression in Minnesota. However, as noted by the District Court, there are instances where Minnesota courts have allowed criminal convictions to be used for collateral estoppel purposes in civil cases. *See Travelers Insurance Co. v. Thompson*, 163 N.W.2d 289 (Minn.1969) (holding that a husband's judgment of conviction in the criminal case for the murder of his wife was conclusive as to the result in the civil action to determine his rights to the life insurance proceeds of his deceased wife)<sup>[3]</sup>; *see also Illinois Farmers Insurance Company v. Reed*, 662 N.W.2d 529 (Minn.2003) (holding that an insurance company can not invoke collateral estoppel against a third party plaintiff after the defendant was convicted of intentional murder in the criminal case, since the third party plaintiff was not a party to the criminal action and did not have the opportunity to litigate the issue.)<sup>[4]</sup>

However, although the Minnesota decisions (as referenced above) which have discussed the topic concerned cases that were factually different than the case at hand, as noted by the District Court, such decisions provide strong guidance in the present case nonetheless. For example, as noted by the District Court, in arriving at its ruling in *Reed*, the Minnesota Supreme Court considered and ultimately approved of the reasoning utilized by the Massachusetts Supreme Court in two similar cases. *See Illinois Farmers*

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<sup>[3]</sup> In *Travelers Insurance Co. v. Thompson*, a number of insurance companies in essence sought the use of collateral estoppel to limit their liabilities to a beneficiary husband who had been convicted of murdering his wife. The Minnesota Supreme Court agreed, and held that prior criminal convictions can be given collateral estoppel effect in situations "where the convicted defendant attempts by subsequent civil litigation to profit from his own crime." *See Travelers Insurance Co. v. Thompson*, at 294.

<sup>[4]</sup> It should be noted that the present case is clearly distinguishable from *Illinois Farmers Insurance Company v. Reed*, since the Respondent was indeed a party to criminal action, and had a full and fair opportunity to litigate the matter.

Insurance Company v. Reed, at 532, (discussing and approving of the reasoning utilized by the Massachusetts Supreme Court in Aetna Casualty & Surety Co. v. Nizolek, 395 Mass. 737, 481 N.E.2d 1356, 1360 (1985); Massachusetts Property Insurance Underwriting Ass'n v. Norrington, 395 Mass. 751, 481 N.E.2d 1364 (1985)). In each of these Massachusetts cases, the Massachusetts Supreme Court concluded that provided the four elements of collateral estoppel were met, a third party could use a defendant's criminal conviction to preclude a defendant from disputing liability in a civil action regarding the same events. See Aetna Casualty & Surety Co. v. Nizolek at 743; and Massachusetts Property Insurance Underwriting Ass'n v. Norrington at 753; see also Respondent's Appendix, 23 (Memorandum of Judge Michael L. Kirk, dated March 2, 2011, discussing the Minnesota Supreme Court's dicta in Reed). Ultimately, the Minnesota Supreme Court approved of such reasoning by the Massachusetts Supreme Court. As a result, given such previous support by the Minnesota Supreme Court, it was proper for the District Court to conclude that such reasoning should apply to the case at hand, and permit the use of collateral estoppel against Appellant provided all the necessary elements of collateral estoppel were established.

Importantly, in addition to the holdings of the Massachusetts Supreme Court in Aetna Casualty & Surety Co. v. Nizolek and Massachusetts Property Insurance Underwriting Ass'n v. Norrington, it should be noted that there are other rulings that address the issue of whether a criminal conviction can be utilized for collateral estoppel purposes in a subsequent civil action, and such rulings (as similar to Nizolek and

Norrington) provide strong guidance to the present case. A perfect example can be found in the Massachusetts's Federal District Court case of Kowalski v. Gagne, 914 F.2d 299 (1<sup>st</sup> Cir. 1990). In Kowalski, as similar to the present case, the spouse of a decedent brought an action against a defendant seeking damages under Massachusetts's wrongful death statute for the defendant's fatal shooting of the spouse's husband. *See* Kowalski v. Gagne, 914 F.2d at 302-03.<sup>[5]</sup> The defendant in this case had been criminally convicted of second-degree murder for shooting the spouse's husband. *See* Id. In granting the spouse's motion for partial summary judgment on the question of liability, the Federal District Court concluded that the defendant's criminal conviction for second-degree murder collaterally estopped the defendant from contesting the willful, wanton, or reckless nature of his conduct in shooting the decedent. *See* Id. Consequently, the Federal District Court ruled that the defendant was estopped from disputing his liability under the wrongful death ground alleged in the spouse's complaint. The United States Court of Appeals for the First District agreed with the Federal District Court's reasoning, and noted that in finding the defendant guilty of second degree murder, at a minimum, "the jury found that the defendant had intentionally inflicted force upon [the decedent] in a manner that created a strong likelihood of death." Such a finding, according to the United States Court of Appeals, "clearly encompasses the elements of willful, wanton or reckless conducts as defined in the wrongful death context - *i.e.*, conduct having a high degree of

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<sup>[5]</sup> In Kowalski, the Massachusetts wrongful death statute, much like Minnesota wrongful death statute, provided that a claim may be maintained on behalf of the decedent if the defendant's acts or omissions caused the death of the decedent and the decedent could have recovered for his injuries if he had not predeceased. *See* Kowalski v. Gagne, 914 F.2d at 302-03 and Minn.Stat. §573.02 (2010).

probability that harm would result to another.” *See Id.* As a result, the United States Court of Appeals ruled that the Federal District Court properly applied the principles of collateral estoppel to preclude defendant, on the basis of the second-degree murder conviction, from contesting his liability under the wrongful death statute. *See Id.*

Additional rulings (involving the use of criminal convictions to collaterally estop a criminal defendant from issues related to liability in later civil proceedings) have been issued by many courts, and as similar to the cases referenced above, provide strong guidance in the present case. *See, e.g., Dettmann v. Kruckenberg*, 613 N.W.2d 238 (Iowa2000)<sup>[6]</sup> (concluding that a criminal conviction may be preclusive in a later civil suit as to those issues that were previously litigated in the criminal proceeding) and citing *Aetna Cas. & Sur. Co. v. Niziolek*, 395 Mass. 737, 481 N.E.2d 1356, 1360 (1985) (citing Section 85 of Restatement (Second) of Judgments and collecting cases holding “that a party to a civil action against a former criminal defendant may invoke the doctrine of collateral estoppel to preclude the criminal defendant from relitigating an issue decided in the criminal prosecution”); *Jordan v. McKenna*, 573 So.2d 1371, 1377 (Miss.1990) (defendant’s criminal conviction for sexual assault precluded defendant from relitigating the fact issue in a later civil suit of whether he assaulted victim); 47 *Am.Jur. Judgments* 2d § 733, at 210-11 (stating that “under the modern approach, a judgment of conviction

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<sup>[6]</sup> In *Dettmann v. Kruckenberg*, the husband of a deceased wife brought a wrongful death action against an intoxicated teenage driver whose vehicle had collided with the husband’s wife, killing her in the process. The Iowa Supreme Court ruled that the teenage driver’s conviction of vehicular homicide was preclusive in the civil suit on the issue of who was driving the vehicle at the time it collided with the decedent’s vehicle. *See Dettmann v. Kruckenberg*, 613 N.W.2d 238, 249.

precludes the defendant from denying the allegations in a subsequent civil complaint as to issues that were actually litigated and adjudicated in the prior proceeding”).

Overall, based on the above authorities, and the Minnesota Supreme Court's earlier support of the Massachusetts holdings in Nizolek and Norrington, it was proper for the District Court to conclude that collateral estoppel could apply to the Respondent's wrongful death case, and preclude Appellant from disputing his liability for the Decedent's wrongful death, provided all the necessary elements of collateral estoppel were established.

**(b) All of the elements of collateral estoppel were established in Respondent's wrongful death case.**

Under Minnesota law, collateral estoppel (also referred to as issue preclusion) is appropriate when the following four elements are met:

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

Illinois Farmers Insurance Company v. Reed, 662 N.W.2d 529 (Minn.2003) *citing* Ellis v. Minneapolis Comm'n on Civil Rights, 319 N.W.2d 702, 704 (Minn.1982) (*quoting* Victory Highway Village, Inc. v. Weaver, 480 F.Supp. 71, 74 (D.Minn.1979)).

**(i) The issue of Appellant's liability for the Decedent's wrongful death was identical to the issues that had been litigated in the Appellant's criminal case regarding the same events.**

In the present case, for a court to preclude a party from disputing an issue, the court must first determine that the particular issue regarding which the court is precluding

the party from disputing is identical to an issue that was previously determined in a prior adjudication. As noted by the District Court, such a requirement was clearly met in this case.

As previously noted, on June 4, 2008, the Appellant was convicted beyond a reasonable doubt of the murder of the Decedent. It is undisputed that the Respondent's wrongful death action on behalf of the Decedent's next-of-kin arises out of the same actions by Appellant. The elements of first-degree murder, which is the crime that Appellant was convicted of, are contained in Minn.Stat. § 609.185(a)(i), which states as follows:

(a) Whoever does any of the following is guilty of murder in the first degree and shall be sentenced to imprisonment for life:

(1) causes the death of a human being with premeditation and with intent to effect the death of the person or of another;

Minn.Stat. § 609.185(a)(i)(2010).

As set forth in this statute, to be convicted of this offense, the jury had to find beyond a reasonable doubt that Appellant had caused the death of Decedent with premeditation, and with the intent to effect the Decedent's death. As the District Court noted, such elements, as were proven beyond a reasonable doubt in the Appellant's criminal trial, clearly satisfy the elements of Respondent's present wrongful death action, which was based (in-part) on the theory of battery.

Under Minnesota law, a battery is an intentional, unpermitted, harmful or offensive contact with another. *See, e.g., Paradise v. City of Minneapolis*, 297 N.W.2d

152, 155 (Minn.1980). As noted by the District Court, the Appellant's causing of the Decedent's death clearly qualifies as harmful contact. Given such facts, it was proper for the District Court to conclude that the necessary elements of the Respondent's battery claim were identical to those which were previously determined in the Appellant's criminal trial for first-degree murder.

**(ii) The Appellant's criminal case resulted in a final judgment on the merits.**

In regards to the second element required to invoke collateral estoppel (*i.e.*, final judgment on the merits), as noted by the District Court, such an element was also satisfied in this case. As the facts of this case illustrate, on June 4, 2008, the Appellant was found guilty beyond a reasonable doubt by a jury of his peers of the first-degree murder of the Decedent. Subsequently, the Appellant appealed his conviction to the Minnesota Supreme Court. On June 30, 2010, the Minnesota Supreme Court affirmed his conviction. Such facts clearly establish that a final judgment on the merits was reached in Respondent's case, and that the Respondent's motion for summary judgment was not premature. *See State v. Lemmer*, 736 N.W.2d 650, 659 (Minn.2007) citing Restatement (Second) of Judgments § 13, comment (b) (1982) (stating that “[A] judgment will ordinarily be considered final in respect to a claim . . . if it is not tentative, provisional, or contingent and represents the completion of all steps in the adjudication of the claim by the court . . .”); *see also Shuck v. Jacob*, 548 N.W.2d 332 (NEB.1996) (holding that a murder conviction could not be used to establish liability in a wrongful death action

because the conviction was still on appeal and a conviction and sentence are not considered final judgments until after appeal).

Now, in his Appellate Brief, it appears as if the Appellant is attempting to argue that there hasn't been a final judgment on the merits in his criminal case for a host of reasons, reasons which he previously attempted to address in a motion for post-conviction relief (*e.g.*, newly discovered evidence, alleged discovery abuses, prosecutorial misconduct, ineffective assistance of counsel, *etc.*).<sup>[7]</sup> *See* Appellant's Brief, 27-44. However, as noted by the District Court, the Minnesota Supreme Court has held that the fact that a criminal conviction is not "final" in a true sense because it remains open to challenge on the basis of an alleged violation of constitutional rights, does not preclude the application of the doctrine of collateral estoppel in civil cases. *See* Respondent's Appendix, 26 (Memorandum of Judge Michael L. Kirk, dated March 2, 2011, *citing* Travelers Ins. Co v. Thompson, 163 N.W.2d 289 (Minn.1969). Moreover, as also noted by the District Court, the scope of a petition for post-conviction relief does not allow a defendant to raise issues that said defendant has previously brought on appeal. *See* Id. at 40 *citing* Dobbins v. State, 788 N.W.2d 719, 726 (Minn.2010); and State v. Knaffla, 243 N.W.2d 737, 741 (Minn.1976) (for the rule that "where direct appeal has once been taken, all matters raised therein, and all claims known but not raised, will not be considered upon a subsequent petition for post-conviction relief."). As a result, as reasoned by the District Court, although Appellant may be able to challenge his conviction someday on

constitutional grounds in a petition for post-conviction relief, the Appellant will not be allowed to re-litigate the issue of his liability for the death of the Decedent. Such a fact strongly supports the argument that there has indeed been a final judgment on the merits with respect to issue of Appellant's liability for the Decedent's death. Overall, based on the foregoing, it was reasonable for the District Court to conclude that a final decision had been reached on the merits regarding Appellant's liability for the Decedent's death.

**(iii) The Appellant was a party to the previous adjudication.**

In regards to the third element required to invoke collateral estoppel (*i.e.*, the estopped party was a party or in privity with a party to the prior adjudication), as noted by the District Court, such an element was clearly established in this case. As noted previously, Appellant was a party in his criminal case (Becker County Criminal File No. 03-07-171), where he was convicted of first-degree murder. Further, Appellant was clearly a party in his appeal to the Minnesota Supreme Court (Court File No. A081521). Given such facts, it was proper for the District Court to find that the privity element that is a requirement for collateral estoppel was satisfied.

**(iv) The Appellant had a full and fair opportunity to be heard at the previous adjudication regarding his liability for the Decedent's death.**

In regards to the fourth and final element required to invoke collateral estoppel (*i.e.*, that the estopped party was given a full and fair opportunity to be heard on the adjudicated issue), as noted by the District Court, such an element had also been satisfied.

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<sup>[7]</sup> As noted previously, the Appellants request for post-conviction relief was denied by the District Court. *See* Appellant's Appendix, 193-200 (Order and Memorandum of Judge Lisa N. Borgen, dated March 2, 2011).

As set forth above, the Appellant was given, and took full advantage of, a full and fair opportunity to be heard on the merits regarding his liability for Decedent's death in front of both the District Court and the Minnesota Supreme Court. To be sure, given the nature of his actions and the charges against him, Appellant had every incentive to do so. The matter was originally tried in front of a jury, with an extended trial that lasted from approximately May 12, 2008, until June 2, 2008. *See* Respondent's Appendix, 49-53 (Register of Actions, Case No. 03-CR-07-171, Exhibit E). Further, numerous motions were made by both parties both before and during the trial. *See Id.* Lastly, the Appellant took full advantage of his right to appeal his conviction by appealing the matter to the Minnesota Supreme Court, whom subsequently entered a final judgment on the matter on June 30, 2010. Such facts illustrate that not only was Appellant provided with ample opportunity to be heard on this matter, but that he also took full advantage of such opportunities.

Now, in his Appellate Brief, it appears as if the Appellant is attempting to argue that he wasn't provided with a full and fair opportunity to be heard at the previous adjudication for a host of reasons, reasons which the Appellant previously attempted to address in his motion for post-conviction relief (*e.g.*, newly discovered evidence, alleged discovery abuses, prosecutorial misconduct, ineffective assistance of counsel, *etc.*). *See* Appellant's Brief, 27-44. However, as noted by the District Court, the Appellant's arguments in his petition for post-conviction relief were found to be unpersuasive.

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Overall, given such facts, combined with the Appellant's active participation in his prolonged criminal trial, and his subsequent appeal to the Minnesota Supreme Court, it was proper for the District Court to find that the Appellant had received a full and fair opportunity to be heard at the previous adjudication regarding his liability for the Decedent's death. *See also* Respondent's Appendix, 54-60 (Carlson, et al. v. Bloomington Housing Partners II, 2011 WL 2672258 (Minn.App.), Exhibit F (holding by the Appellate Court that the fact that a certain Appellant had corresponded with the District Court and opposing counsel, had had the opportunity to present oral argument at several hearings, and lastly, had received appellate review from the Appellate Court supported the conclusion that the Appellant had received a full and fair opportunity to present his claims).<sup>[8]</sup>

## CONCLUSION

Based on the facts and authorities as set forth above, it was proper for the District Court to hold that the doctrine of collateral estoppel was available and applied to preclude Appellant from arguing against his liability in Respondent's wrongful death case. The exact issues related to Appellant's liability had been litigated, and a final judgment on the merits has been entered. Further, Appellant was a party to the prior adjudication, and he had been given (and taken full advantage of) an opportunity to be heard on the adjudicated issue. Given such facts, it was not an abuse of discretion for the District

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<sup>[8]</sup> In Carlson, the Appellant argued that he had not been afforded a full and fair opportunity to present his claims for a host of alleged mistakes by the trial court, such as making errors regarding discovery, cutting off his oral argument at a hearing, issuing orders without giving him an opportunity to respond, and denying him an opportunity to call witnesses. Ultimately, however, despite these contentions, the Appellate Court held that a review of the record nonetheless supported the inference that the Appellant had received a full and fair opportunity to present his claims. *See Carlson, et al. v. Bloomington Housing Partners II*, 2011 WL 2672258 at 5.

Court to hold that the Appellant should be estopped from relitigating his liability for the Decedent's death during the Respondent's wrongful death action. Accordingly, the District Court's granting of partial summary judgment should be upheld.

Respectfully submitted,

PEMBERTON, SORLIE, RUFER  
& KERSHNER, P.L.L.P.

By 

Charles A. Seuntjens, No. 0348843  
903 Washington Avenue  
Detroit Lakes, Minnesota 56501  
Telephone: 218-847-4858

***ATTORNEYS FOR APPELLANT***

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