

A05-340  
A05-1952

**State of Minnesota  
In Supreme Court**

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Brown-Wilbert, Inc., a Minnesota corporation, and  
Christopher Chandler Brown, an individual,

Respondents,

v.

Copeland Buhl & Company, P.L.L.P., and  
Lee Harren, an individual,

Petitioners.

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**BRIEF AND APPENDIX OF RESPONDENTS  
BROWN-WILBERT, INC. AND  
CHRISTOPHER CHANDLER BROWN**

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## STATEMENT OF THE ISSUE

RESPONDENTS' LAWSUIT WAS DISMISSED ON RES JUDICATA GROUNDS BASED ON A TRIAL COURT'S ORDER AND RESULTING JUDGMENT WHICH WAS THEN ON APPEAL. THE COURT OF APPEALS SUBSEQUENTLY RULED THAT THE TRIAL COURT HAD ABUSED ITS DISCRETION AND REMANDED THAT CASE FOR FURTHER PROCEEDINGS. BASED ON THE FACTS OF RECORD AS APPLIED TO MINNESOTA LAW, ARE RESPONDENTS ENTITLED TO REINSTATEMENT OF THIS LAWSUIT?

State v. Joseph, 636 N.W.2d 322 (Minn. 2001)

Holen v. Minneapolis-St. Paul Metropolitan Airports Comm'n, 250 Minn. 130, 84 N.W.2d 282 (1957)

Vineseck v. Great Northern Ry. Co., 136 Minn. 96, 161 N.W. 494 (1917)

## STATEMENT OF FACTS

### **A. Brown-Wilbert I Lawsuit.**

On March 10, 2004, Respondents/Plaintiffs Brown-Wilbert, Inc. and Christopher Chandler Brown (Plaintiffs) brought a lawsuit against Petitioners/Defendants Copeland Buhl & Company and Lee Harren (Accountants).<sup>1</sup> (A.A. 48.) Plaintiffs' lawsuit included counts asserting accounting malpractice, breach of contract, breach of fiduciary duty and restitution. (A.A. 61-63.) A judgment of dismissal was entered on December 27, 2004, based on the trial court's conclusion that Plaintiffs had failed to timely comply with Minn. Stat. § 544.42, the expert review statute. (A.A. 87.) In ordering dismissal the trial court offered no analysis and did not determine whether expert testimony was needed to establish a prima facie case on each of the four counts set forth in Plaintiffs' Complaint.<sup>2</sup> (Id.) Plaintiffs filed their Notice of Appeal to the Minnesota Court of Appeals on February 18, 2005. (A.A. 97.)

### **B. Brown-Wilbert II Lawsuit and Its Ordered Dismissal on Res Judicata Grounds.**

While the appeal in Brown-Wilbert I was pending, Plaintiffs brought this lawsuit (hereinafter Brown-Wilbert II) against Accountants asserting claims of fraud (Count I – Intentional Misrepresentation), negligent misrepresentation (Count II), and aiding and abetting (Count III). (A.A. 20.) The Accountants did not file an Answer but brought a

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<sup>1</sup> For purposes of this appeal, that lawsuit will be referred to as Brown-Wilbert I.

<sup>2</sup> Minn. Stat. § 544.42 provides that failure to comply with the dictates of § 544.42 can only result in dismissal of causes of action “as to which expert testimony is necessary to establish a prima facie case.” Minn. Stat. § 544.42, subd. 6.

motion to dismiss, asserting that this action was barred by the doctrine of res judicata based on the dismissal in Brown-Wilbert I. Accountants requested the following relief from the trial court:

Because *res judicata* acts as a bar to this action, it is appropriate for this Court to dismiss the [Brown-Wilbert II] complaint in its entirety.

(Defendants' Memorandum of Law in Support of Motions to Dismiss and for Sanctions, dated March 15, 2005, p. 14.)

In response, Plaintiffs asserted that the doctrine of res judicata does not bar this action. Specifically, Plaintiffs asserted:

Although the fraud complaint involves the same parties, there has never been a final judgment on the merits with respect to all causes of action; rather there has only been a procedural determination which is statutorily limited to causes of action needing expert testimony to establish a prima facie case. Finally, res judicata is an equitable doctrine that must be applied in light of the facts of each individual case. Exceptions to its strict application are well established in Minnesota and the Restatement of Judgments 2d, and this litigation requires application of those exceptions. Plaintiffs must be given their day in court. If any parts of the prior litigation are reversed and remanded on appeal, Plaintiffs will seek consolidation of those parts with this litigation for trial.

(Plaintiffs' Memorandum of Law in Support of Plaintiffs' Application for a Default Judgment and in Opposition to Defendants' Motion to Dismiss dated April 29, 2005, p. 3.)

Nonetheless, the trial court, by Order dated August 5, 2005, dismissed Plaintiffs' Complaint on the grounds of res judicata. In so dismissing, the trial court reasoned:

Judge Oleisky thus held, implicitly if not explicitly, that all the claims in the prior lawsuit challenged the Defendants' professional work for a client, and thus required affidavits. Claims for fraud based on that same professional work would likely have suffered the same fate. If Judge Oleisky was wrong on that score, the Court of Appeals will reverse and remand. At that point, Plaintiffs will be free to seek to amend their prior Complaint to allege fraud.

(A.A. 15.)

On September 30, 2005, Plaintiffs appealed the dismissal of Brown-Wilbert II. (Respondents' Appendix [R.A.] 1.) In seeking affirmance, Accountants asserted for the first time that there is a doctrine against splitting of causes of action apart from res judicata which provides a separate basis for affirming the dismissal. (Respondents' Brief to the Court of Appeals, dated December 5, 2005, p. 17.)

**C. While Brown-Wilbert II Appeal Is Pending, Court of Appeals Reverses Brown-Wilbert I and Further Review Is Granted by This Court.**

While Brown-Wilbert II was pending on appeal, the Court of Appeals reversed the judgment in Brown-Wilbert I. (A.A. 98.) Although the Court of Appeals affirmed the dismissal of the accounting malpractice count, the Court of Appeals concluded the trial court had abused its discretion in its application of Minn. Stat. § 544.42 as to the other counts. (A.A. 105.) The case was remanded to the trial court to determine whether the counts in question required expert testimony to establish a prima facie case. (*Id.*)

Plaintiffs sought further review by this Court. Specifically, Plaintiffs asserted there was no demand for the first affidavit, the Minn. Stat. § 544.42, subd. 2(1), 3(a)(1) affidavit of expert review, and the answers to interrogatories fulfilled the statutory

requirements of the second affidavit, the expert identification affidavit. Minn. Stat. § 544.42, subd. 2(2), 4(a). It is Plaintiffs' position that Minn. Stat. § 544.42, properly applied, results in reinstatement of Plaintiffs' case in toto. In response, Accountants did not file a conditional petition challenging the Court of Appeals' reversal and remand as to three of Plaintiffs' counts. Accountants did seek conditional review as to whether Plaintiffs had released their causes of action against Accountants.

**D. This Court Grants Further Review in Brown-Wilbert I. Brown-Wilbert II Is Reversed by the Court of Appeals.**

By Order dated February 14, 2006, this Court granted further review in Brown-Wilbert I. (R.A. 3.) In granting review, this Court denied the cross-petition of Accountants as to the effect of the release. (*Id.*) Even if this Court were to affirm the Court of Appeals' ruling and analysis in Brown-Wilbert I, given the Court of Appeals' ruling, there is no final judgment in Brown-Wilbert I. The trial court must conduct the analysis as ordered by the Court of Appeals.

After Brown-Wilbert I was accepted for further review, Brown-Wilbert II was argued to the Court of Appeals. On June 13, 2006, the Court of Appeals reversed Brown-Wilbert II. (A.A. 1.)

Because there is no final judgment on which a doctrine of res judicata can be premised, the Court of Appeals reversed the dismissal. (A.A. 6-7.) The Court of Appeals also rejected Accountants' request that it affirm dismissal on the ground of splitting of causes of action, recognizing that under well settled Minnesota law it is the doctrine of res judicata that prevents parties from the splitting of claims. (A.A. 7-9.) Accountants

sought further review with this Court, which was granted by Order dated August 23, 2006. (A.A. 18.)

### ARGUMENT

#### **PLAINTIFFS ARE ENTITLED TO REINSTATEMENT OF BROWN-WILBERT II.**

##### **A. Application of Doctrine of Res Judicata is Reviewed De Novo.**

The Accountants' motion for dismissal was premised on the doctrine of res judicata. There are two separate aspects of res judicata: (1) merger or bar; and (2) collateral estoppel. Ellis v. Minneapolis Comm'n on Civil Rights, 319 N.W.2d 702, 703 (Minn. 1982). Merger or bar "operate where a subsequent action or suit is predicated on the same cause of action which has been determined by a judgment, no matter what issues were raised or litigated in the original cause of action." Hauser v. Mealey, 263 N.W.2d 803, 806 (Minn. 1978). This Court has held that res judicata bars a subsequent claim when (1) the earlier claim involved the same claim for relief; (2) the earlier claim involved the same parties or those in privity with them; (3) there was a final judgment on the merits; and (4) the estopped party had a full and fair opportunity to litigate the matter. State v. Joseph, 636 N.W.2d 322, 327 (Minn. 2001).

This Court has also held that since res judicata is an equitable doctrine, it must be applied in light of the facts of each individual case. Because res judicata is a flexible doctrine, the focus is on whether its application would work an injustice on the party against whom estoppel is urged. R.W. v. T.F., 528 N.W.2d 869, 872, n. 3 (Minn. 1995).

The applicability of res judicata is a question of law subject to de novo review. Joseph, 636 N.W.2d at 326.

**B. There Is No Final Judgment on the Merits.**

The Court of Appeals reversed the res judicata dismissal based on the lack of a final judgment. Since there is no final judgment, Plaintiffs request affirmance of the Court of Appeals.

**1. This Court has held that an appeal suspends a judgment and deprives it of finality.**

Accountants challenge the Court of Appeals' holding that res judicata requires the expiration of the appellate process before a judgment is considered final and assert "[t]he Court of Appeals provides no reason for discarding longstanding Minnesota law" and "it appears that the Court of Appeals was oblivious to the fact that it was making new law." (Appellants' Brief, p. 9.) But that holding by the Court of Appeals is fully supported by decisions of this Court.

In Holen v. Minneapolis-St. Paul Metropolitan Airports Comm'n, 250 Minn. 130, 84 N.W.2d 282, 287 (1957), this Court states:

An appeal suspends a judgment and deprives it of its finality, and that lack of finality continues until the appeal is dismissed or until the appellate court has pronounced its decision.<sup>3</sup>

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<sup>3</sup> This quote from Holen has been reiterated in State v. Lewis, 656 N.W.2d 535, 537-38 (Minn. 2003), and Hennepin County on behalf of Bartlow v. Brinkman, 378 N.W.2d 790, 792-93 (Minn. 1985), and cited with approval in Brezinka v. Bystrom Bros., Inc., 403 N.W.2d 841, 843 (Minn. 1987).

Seven years later, in Indianhead Truck Line, Inc. v. Hvidsten Transport, Inc., 268 Minn. 176, 128 N.W.2d 334, 341 (1964), this Court states:

The courts have generally observed that an order or judgment becomes final only after the appellate process is terminated or the time for appeal has expired. The foregoing concept of finality has been recognized in Minn. Stat. § 216.25, which governs appeals from the Railroad and Warehouse Commission. (Internal citations omitted.)<sup>4</sup>

In Joseph, 636 N.W.2d 322, the case cited by the Court of Appeals, this Court, in discussing the application of res judicata to the facts of that case, states:

Therefore, when judgment was entered and the time for appeal from that judgment expired, the judgment became a final judgment on the merits, thereby satisfying the third requirement for the application of res judicata.

Id. at 328.<sup>5</sup>

While it is true that, generally, prior to 1957 this Court had held that an appeal does not alter the status of the finality of a judgment, the same is not true after this Court's decision in 1957 in Holen.<sup>6</sup> The Court of Appeals' enunciation of the law is in accord with this Court's pronouncements.

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<sup>4</sup> This statement from Indianhead Truck Line was cited in Marzitelli v. City of Little Canada, 582 N.W.2d 904, 906 n. 12 (Minn. 1998).

<sup>5</sup> In the commentary to Restatement (2d) of Judgments § 13 (1982) cmt. b, cited by Accountants, it is noted: "It has often been suggested that finality for appellate review is the same finality for purposes of res judicata, but that has probably never been quite true."

<sup>6</sup> The only case after 1957 where this Court states to the contrary is Wegge v. Wegge, 252 Minn. 236, 89 N.W.2d 891 (1958), a case in which this Court ignored Holen and cited State ex rel. Spratt v. Spratt, 150 Minn. 5, 184 N.W. 31 (1921).

**2. Minnesota law is in accord with law from other jurisdictions.**

Minnesota is not the only jurisdiction which has held that pendency of an appeal affects the operation of a judgment and its res judicata effect.<sup>7</sup> For example, California, a jurisdiction which this Court cited to in Holen, 84 N.W.2d at 287 n. 6, states that the finality required to invoke the preclusive bar of res judicata is not achieved until an appeal from the trial court judgment has been exhausted or the time to appeal has expired. People v. Bank of San Luis Obispo, 112 P. 866, 871 (Cal. 1910); Franklin & Franklin v. 7-Eleven Owners for Fair Franchising, 102 Cal. Rptr. 2d 770, 774 (Cal. Ct. App. 2000). See also State ex rel. Lynn v. Eddy, 163 S.E.2d 472, 478 (W. Va. 1968) (same); In re Petition of David Donovan, 623 A.2d 1322, 1324 (N.H. 1993) (same); CS-Lakeview at Gwinnett, Inc. v. Retail Development Partners, 602 S.E.2d 140, 142 (Ga. Ct. App. 2004), cert denied (same); Boucher v. Barsalou, 69 P. 555 (Mont. 1902) (same); Methvin v. Methvin, 127 P.2d 186, 188 (Okla. 1942) (same); Dupre v. Floyd, 825 So. 2d 1238, 1240-41 (La. Ct. App. 2002) (per curiam), cert. denied, 840 So. 2d 546 (La. 2003); McBurney v. Aldrich, 816 S.W.2d 30, 34 (Tenn. Ct. App. 1991).

According to the American Law Reports Annotation, Judgment as Res Judicata Pending Appeal or Motion for New Trial, or During the Time Allowed Therefor, 9 A.L.R.2d 984 (originally published in 1950) (discussing state and federal cases), the better rule is that the pendency of an appeal does affect the operation of a judgment's res

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<sup>7</sup> It is true that the established rule in the federal courts and in the majority of the states is that a final judgment retains all of its res judicata consequences pending decision on the appeal.

judicata effect. The rule that the pendency of an appeal does not prevent a judgment from operating as a res judicata may permit an erroneous judgment, facing certain reversal, to be used to preclude further inquiry into a key issue before reversal “and thereby lead to another judgment, from which it may be impossible to obtain relief notwithstanding such reversal.” Id. (quoting 2 A.C. Freeman, Law of Judgments 1526, 1528 (5<sup>th</sup> ed. 1925)). Since the time for appeal is limited to a reasonable period of time, the rule that pendency of an appeal precludes the operation of a judgment for res judicata purposes is the preferable rule.

A final decision on the merits of the second suit should be delayed until the decision on appeal has been rendered. This can be accomplished by a stay or postponement of the decision on the second suit, either upon application of one of the parties or by the court upon its own motion. Even though the Restatement of Judgments takes the position that the pendency of an appeal should not suspend the operation of a judgment for purposes of res judicata, the Restatement does acknowledge the validity of staying the second proceeding, pending appellate review of the judgment whose validity is in issue. The Restatement (2d) of Judgments § 13 (1982) cmt. f, a section cited by Accountants, states:

The pendency of a motion for a new trial or to set aside a judgment or of an appeal from a judgment is relevant in deciding whether the question of preclusion should be presently decided in the second action. It may be appropriate to postpone discussion of that question until the proceedings addressed to the judgment are concluded.

Accountants sought dismissal of this lawsuit on res judicata grounds at a time when there was real doubt whether the decision in Brown-Wilbert I would be affirmed. The better course is to suspend proceedings until appellate review is completed.

**3. Even if this Court should affirm the Court of Appeals in Brown-Wilbert I, there is no final judgment in Brown-Wilbert I.**

Accountants assert that “[o]nly if this Court overturns that judgment [in Brown-Wilbert I] will there no longer be a final judgment for res judicata purposes.” (Appellants’ Brief, p. 11.) Plaintiffs disagree. Even if this Court should affirm the Court of Appeals’ ruling in Brown-Wilbert I, there is no final judgment.

An affirmance by this Court is an affirmance of the Court of Appeals’ decision in Brown-Wilbert I. The Court of Appeals held in Brown-Wilbert I that before dismissal of the entire case could be ordered under Minn. Stat. § 544.42, the trial court must determine that each asserted cause of action requires expert testimony to establish a prima facie case. (A.A. 105.) The net result of the Court of Appeals’ ruling is that there could be no final judgment in Brown-Wilbert I until and unless the trial court undertakes the necessary analysis and determines that all of the counts require expert testimony to establish a prima facie case.<sup>8</sup> Reversal was properly ordered in this case by the Court of Appeals because the final judgment requirement for res judicata is not met.

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<sup>8</sup> Accountants’ statement that the Court of Appeals’ affirmance of the dismissal of the accounting malpractice claim means there is still a final judgment in Brown-Wilbert I has no support in Minnesota law. Emme v. C.O.M.B., Inc., 418 N.W.2d 176, 178 (Minn. 1988); Krmpotich v. City of Duluth, 449 N.W.2d 507, 509 (Minn. Ct. App. 1989); see Minn. R. Civ. App. P. 103.03(a). A judgment is only final when the trial court has finally determined all the rights of all parties. The trial court’s judgment did not do so.

**C. The Other Elements of Res Judicata Are Not Met.**

Although argued before the Court of Appeals, the Court of Appeals did not address Plaintiffs' assertion that other res judicata requirements also were not met.

- 1. The earlier claims do not involve the same set of circumstances in that expert testimony is not needed on the causes of action asserted in this case.**

The "common test for determining whether a former judgment is a bar to a subsequent action is to inquire whether the same evidence will sustain both actions." McMenomy v. Ryden, 276 Minn. 55, 148 N.W.2d 804, 807 (1967). Applying that test to this case, Brown-Wilbert I cannot act as a res judicata bar to this lawsuit.

Brown-Wilbert I was dismissed by the application of Minn. Stat. § 544.42. This statute allows for dismissal of professional negligence claim which require expert testimony to establish a prima facie case when the plaintiff cannot and does not timely supply it. Only those causes of action against a professional alleging negligence or malpractice where expert testimony is required to establish a prima facie case are affected by Minn. Stat. § 544.42. Minn. Stat. § 544.42 requires the trial court to identify and to allow causes of action outside the statutory scheme to stand. See, e.g., Vakil v. Mayo Clinic, 878 F.2d 238, 239 (8<sup>th</sup> Cir. 1989).

As the Court of Appeals ruled in Brown-Wilbert I, the trial court improperly applied Minn. Stat. § 544.42. It did not make the necessary determination as to whether all causes of action asserted by Plaintiffs require expert testimony.

In dismissing this present action on res judicata grounds, the trial court erroneously concluded that any challenge to the Accountants' professional work requires expert testimony and that "[c]laims for fraud based on that same professional work would likely have suffered the same fate."<sup>9</sup> (A.A. 15.) The trial court's assumption is wrong. The causes of action asserted in this case do not fall within the purview of Minn. Stat. § 544.42 and do not need expert testimony to establish a prima facie case. Accordingly, the evidence required to sustain Brown-Wilbert I and Brown-Wilbert II is different and the doctrine of res judicata should not apply.

Claims grounded on professionals' intentional acts which allegedly resulted in injury are not required to be accompanied by an expert affidavit, nor do they otherwise fall within the purview of Minn. Stat. § 544.42. *See, e.g., Meyer v. Dygert*, 156 F. Supp. 2d 1081, 1091 (D. Minn. 2001) (expert testimony not necessary if claim involved clear case of stealing client's funds); *Serhofer v. Groman & Wolfe, P.C.*, 610 N.Y.S.2d 294, 295 (N.Y. 1994) (expert testimony not required to establish a prima facie case of legal malpractice since such allegations rested on principles of contract and agency, rather than negligence); *Kohoutek v. Hafner*, 383 N.W.2d 295, 299 (Minn. 1986) (in battery case no expert testimony needed).

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<sup>9</sup> Before the trial court, Accountants never contested Plaintiffs' position in Brown-Wilbert II that "[n]one of the causes of action contained in the Complaint before this Court need expert testimony to establish a prima facie case." (Plaintiffs' Memorandum of Law in Support of Plaintiffs' Application for a Default Judgment and in Opposition to Defendants' Motion to Dismiss, dated April 29, 2005, p. 21.)

No expert testimony is necessary to establish the causes of action asserted in this case. For example, Plaintiffs allege that “Harren [one of the accountants] accepted money from Jerry [Brown] under the table without the knowledge of Chris [Brown].” (A.A. 39.) The trial court does not explain why, under these facts, expert testimony would be needed to establish a prima facie case of fraud. Clearly, it would not. The same is true for Plaintiffs’ counts of negligent misrepresentation and aiding and abetting. Such claims are not claims of negligence or malpractice and do not fall within the purview of § 544.42. These causes of action should not have been ordered dismissed on res judicata grounds.

**2. Plaintiffs were not given a full and fair opportunity to be heard.**

The res judicata doctrine is not to be rigidly applied. Hauschildt v. Beckingham, 686 N.W.2d 829, 837 (Minn. 2004). Because res judicata is a flexible doctrine, the focus must be on whether its application would work an injustice on the party against whom estoppel is urged. R.W., 528 N.W.2d at 872, n. 3.

This Court has made clear that the policy requiring that every party be given his day in court should not be defeated by an arbitrary application of the doctrine of res judicata. See Johnson v. Consolidated Freightways, Inc., 420 N.W.2d 608, 613-14 (Minn. 1988) (holding that the determination of the driver’s comparative fault in an arbitration proceeding could not be used as collateral estoppel in a later wrongful death action where the earlier proceedings afforded neither party to the latter action “a full and fair” opportunity to litigate comparative fault). This Court has cited with approval the United

States Supreme Court's caution in Brown v. Felsen, 442 U.S. 127, 132 (1979), that res judicata should only be invoked after careful inquiry because it "may govern grounds and defenses not previously litigated" and therefore "blockades unexplored paths that may lead to truth." Hauschildt, 686 N.W.2d at 837. Although Plaintiffs explained to the trial court the injustice that would occur if this Complaint were dismissed, the trial court did not even consider the injustice that follows from the doctrine's application here.

In this action, none of the causes of action contained in the Complaint fall within the purview of Minn. Stat. § 544.42. Nor were Plaintiffs given a full and fair opportunity to be heard on their claims in Brown-Wilbert I.<sup>10</sup> Accountants' assertion that Plaintiffs had ample opportunity to pursue any and all claims in Brown-Wilbert I is not supported. Accountants brought their Minn. Stat. § 544.42 motion and Plaintiffs' action was dismissed long before discovery was completed and long before the court-ordered

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<sup>10</sup> As stated in Restatement (2d) of Judgments § 26(1)(d) (1982).

- (1) When any of the following circumstances exist, the general rule of Section 24 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:

...

- (d) the judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme, or it is the sense of the scheme that the plaintiff should be permitted to split his claim

....

discovery cutoff date of February 28, 2005 and the nondispositive and dispositive motion deadlines of March 14, 2005 and April 4, 2005, respectively. To invoke res judicata under these circumstances works an injustice. The dismissal of Plaintiffs' earlier action does not and cannot bar litigation of the claims in this action that could never have been dismissed pursuant to Minn. Stat. § 544.42 at any time. On this ground, the trial court should be reversed.

**D. Accountants' Request for Affirmance of Dismissal on a Separate Theory That Plaintiffs Split Their Causes of Action Should Be Denied.**

**1. Rule against splitting is an aspect of res judicata and not a separate theory on which to seek dismissal of this action.**

Before the trial court, Accountants did not assert that a prohibition on splitting of causes of action is a separate concept and provides a separate basis for dismissing Brown-Wilbert II. That theory was raised for the first time on appeal and in support of that proposition, Appellant cited no case law. (Respondents' Brief to the Court of Appeals, p. 17.) Under well-established law, this theory should not have been considered for the first time on appeal. Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988).

It is Plaintiffs' position that it is the merger principle of res judicata doctrine that operates to prevent splitting causes of action. Hauser, 263 N.W.2d at 807 (Minn. 1978) (the merger or bar principle of res judicata doctrine operates so that a party "should not be twice vexed for the same cause, and that it is for the public good that there be an end to litigation. To that end, plaintiff may not split his cause of action and bring successive suits involving the same set of factual circumstances."); see Loo v. Loo, 520 N.W.2d 740,

744, n. 1 (Minn. 1994) (res judicata prevents parties from splitting claims into more than one lawsuit and precludes further litigation of the same claim); Vineseck v. Great Northern Ry. Co., 136 Minn. 96, 161 N.W. 494, 496 (1917) (“The more important question in this case is whether the judgment in the former action is res judicata, and a bar to the present suit. The decision of the question involves the elementary rule that a single cause of action cannot be split or divided in independent actions brought upon each separated part.”).

In essence, res judicata contains the concept of merger and bar that originated in the civil law to prevent litigants from prolonging a lawsuit by splitting claims and defenses that arise from the same transaction into separate (and serial) causes of action. Because the rule against splitting causes of action is an aspect of res judicata, it logically follows that if res judicata is not a bar to the bringing of a claim, an assertion of splitting causes of action is not either. As succinctly stated in 46 Am. Jur. 2d Judgments § 452 (May 2006):

The doctrine of merger serves to prevent splitting of causes of action. It is inextricably related to the purposes of res judicata and its application to bar a subsequent action depends upon the existence of a valid and final prior judgment.

Courts across the country have held that the rule against splitting of causes of action and the doctrine of merger are inextricably related to the principle of res judicata. Baertsch v. County of Lewis and Clark, 727 P.2d 504, 506 (Mont. 1986) (rule against splitting causes of action and doctrine of merger inextricably related to principle of res

judicata); Risse v. Meeks, 585 N.W.2d 875, 880 (S.D. 1998) (same); Bank of Sun Prairie v. Marshall Development Co., 626 N.W.2d 319, 322 (Wis. Ct. App. 2001), pet. for rev. denied (same); Maldonado v. Flynn, 417 A.2d 378, 382 (Del. Ch. 1980) (same); Brenton State Bank of Jefferson v. Tiffany, 440 N.W.2d 583, 585 (Iowa 1989) (“The doctrine of merger is an aspect of res judicata which prevents re-litigation of existing judgments . . . . It serves to prevent the splitting of causes of action.”).

Accountants cite this Court’s decision in Boland v. Morrill, 275 Minn. 496, 148 N.W.2d 143 (1967). But in Boland, this Court states that it is “under the doctrine of merger a recovery of an assigned part of a claim extinguishes the cause of action and bars further prosecution for the balance of the original claim.” Id. at 148. Accountants also cite McDowell v. State, 23 P.3d 1165 (Alaska 2001). But the Alaska Supreme Court in McDowell states: “The rule against claim splitting that we describe in this case is a conventional application of the doctrine of res judicata . . . .” Id. at 1167 n. 9.

A prohibition on splitting of causes of action does not operate apart from the doctrine of res judicata.

**2. If this Court concludes Plaintiffs may not split their causes of action as a separate doctrine, it should not be applied here.**

Accountants request that this Court “join the California Supreme Court in recognizing that the prohibition against claim splitting functions as a rule of abatement as well as a rule of res judicata.” (Appellants’ Brief, p. 20.) The Minnesota Rules of Civil Procedure, which are patterned on the Federal Rules, specifically do not recognize pleas

in abatement.<sup>11</sup> Minn. R. Civ. P. 7.01, “Demurs, pleas and exceptions for insufficiency of a pleading shall not be used.” See, e.g., Aetna State Bank v. Alzheimer, 430 F.2d 750, 754 (7<sup>th</sup> Cir. 1970), overruled on other grounds; Calvert Fire Ins. Co. v. Will, 560 F.2d 792 (7<sup>th</sup> Cir. 1977).

Even under the common law and code practice, motions in abatement have been regarded with disfavor. Id.; see also Williams v. Bell, 37 S.W.3d 477, 480 (Tenn. Ct. App. 2000) (plea in abatement and other technical forms of pleading abolished by Rules of Civil Procedure); Transamerica Ins. Co. v. Avenell, 66 F.3d 715, 719 (5<sup>th</sup> Cir. 1995) (with the adoption of Federal Rules of Civil Procedure, the United States Supreme Court abolished the plea in abatement). The days of code pleading are long gone, as this Court has recognized. See, e.g., Ryan Contracting, Inc. v. JAG Investments, Inc., 634 N.W.2d 176, 190 (Minn. 2001) (“Since the days of code pleading are gone . . .”).

To adopt Accountants’ position would require major reworking of the Rules of Civil Procedure and a return to code pleading. Accountants’ request that this Court recognize a rule of abatement should be rejected.

If this Court concludes that the rule against splitting a cause of action differs from and operates apart from the doctrine of res judicata, then it must be based exclusively on grounds of public policy. It should not be aided by any presumptive correctness of a

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<sup>11</sup> It is unclear what Accountants are really advocating. On the one hand, Accountants assert this Court should recognize a “rule of abatement,” but they then assert that the Court should not return to the use of pleas of abatement. (Appellants’ Brief, p. 20.) Accountants cannot have it both ways.

former judgment and ought not to be permitted to favor a wrongdoer as against the injured party. The doctrine's parameters must be made clear.

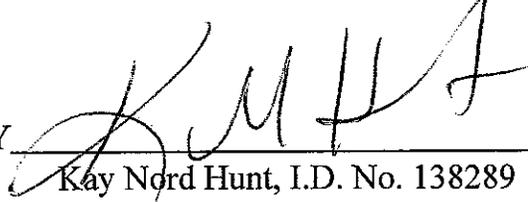
Here, the judgments in Brown-Wilbert I and Brown-Wilbert II are plainly inconsistent with a fair and equitable implementation of the statutory scheme contained in Minn. Stat. § 544.42. As previously set forth, only those causes of action requiring expert testimony are affected by the scheme. Those claims which do not require expert testimony to establish a prima facie case are outside the purview of the statutory scheme. Public policy does not favor dismissal of Brown-Wilbert II.

**CONCLUSION**

Respondents/Plaintiffs respectfully request that the Court of Appeals' reversal and reinstatement of this action be affirmed.

Dated: October 4, 2006

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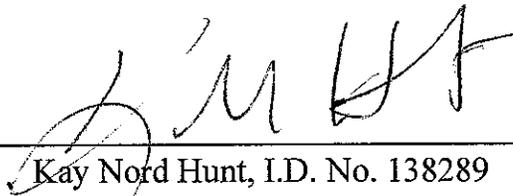
**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 5,189 words. This brief was prepared using Word Perfect 10.

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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) (with amendments effective July 1, 2007).