

A05-340
A05-1952

STATE OF MINNESOTA
IN COURT OF APPEALS

Brown-Wilbert, Inc. and
Christopher Brown,

Appellants,

v.

Copeland Buhl & Co., PLLP and
Lee Harren,

Respondents.

BRIEF AND APPENDIX OF APPELLANTS

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STATEMENT OF THE ISSUES

- I. APPELLANTS' LAWSUIT WAS DISMISSED ON RES JUDICATA GROUNDS BASED ON THE TRIAL COURT'S ORDER AND RESULTING JUDGMENT WHICH CASE IS PRESENTLY BEFORE THIS COURT ON APPEAL. ARE APPELLANTS ENTITLED TO REINSTATEMENT OF THIS CASE WHEN THE DISMISSED LAWSUIT IS REVERSED AND REINSTATED?

Wegge v. Wegge, 252 Minn. 236, 89 N.W.2d 891 (1958)

American Druggists Ins. v. Thompson Lumber Co., 349 N.W.2d 569 (Minn. Ct. App. 1984)

- II. THE TRIAL COURT DISMISSED AN EARLIER LAWSUIT INITIATED BY APPELLANTS FOR PURPORTED FAILURE TO COMPLY WITH MINN. STAT. § 544.42 WHICH MANDATES DISMISSAL OF CAUSES OF ACTION TO WHICH EXPERT TESTIMONY IS NECESSARY TO ESTABLISH A PRIMA FACIE CASE. APPELLANT CONTENDS THAT THE CAUSES OF ACTION ASSERTED IN THIS ACTION DO NOT REQUIRE EXPERT TESTIMONY TO ESTABLISH A PRIMA FACIE CASE AND DO NOT OTHERWISE FALL WITHIN THE PARAMETERS OF MINN. STAT. § 544.42. DID THE TRIAL COURT COMMIT ERROR IN DISMISSING THIS LAWSUIT ON RES JUDICATA GROUNDS BASED ON THE DISMISSAL OF THE EARLIER LAWSUIT?

Minn. Stat. § 544.42

Hauschildt v. Beckingham, 686 N.W.2d 829 (Minn. 2004)

R.W. v. T.F., 528 N.W.2d 869 (Minn. 1995)

STATEMENT OF THE FACTS

The trial court, the Honorable George M. McGunnigle, ordered this case dismissed based on the trial court's order and resulting judgment in Brown-Wilbert, Inc., et al. v. Copeland Buhl & Company, P.L.L.P., et al., Hennepin County District Court file number C2-04-8124 and the doctrine of res judicata. (A. 1.) Appellants/Plaintiffs Brown-Wilbert, Inc. and Christopher Chandler Brown challenge that ruling on appeal.¹ (A. 35.) The material facts are as follows.

A. Underlying Facts Leading to the Lawsuits.

Appellant/Plaintiff Brown-Wilbert, Inc. (Brown) is a Minnesota corporation that manufactures burial vaults, septic tanks and other concrete products. (A. 10.) It also arranges for their distribution and sale throughout the upper midwest. (Id.)

Wilbert, Inc. is a burial vault manufacturing company. Over 80 years ago, the Chandler family of St. Paul became a Wilbert licensee and named the company Chandler-Wilbert, Inc. The company was renamed Brown-Wilbert in 1995 and is still operating. Brown is the successor by way of statutory merger with Chandler-Wilbert, Inc. Appellant-Plaintiff Christopher Chandler Brown (Chris) is the great-grandson of the

¹ When Appellants Brown-Wilbert, Inc. and Christopher Chandler Brown are jointly referred to, they will be referred to as Plaintiffs. When Respondents/Defendants Copeland Buhl & Company, P.L.L.P. and Lee Harren are jointly referred to, they will be referred to as the Accountants.

founder of Chandler-Wilbert, Inc., Henry Fritz Chandler. Chris now owns 100% of Brown. (Id.)

In 1943, Bud Chandler, the maternal grandfather of Chris, purchased the company from his father, Henry Fritz Chandler. The business enjoyed growth under Bud Chandler. To meet the demand for the products, the company's facilities increased from one factory to sixteen. (Id.)

Chris lived next door to his grandfather, Bud, until Bud's death in 1972. Chris and Bud enjoyed a very close relationship. From the time he was young, Chris wanted to own the company that his grandfather had successfully steered for so many years. (A. 11.)

Bud Chandler died in 1972. At that time, his wife, Lucy Chandler Lake (Lucy), took over the daily operation of the company. Trusts established for the benefit of Lucy and the three daughters of Lucy and Bud Chandler (which included Chris's mother, Marge Chandler Johnson (Marge)), became the owners of all of the company stock (Trusts). Lucy remained in charge of Chandler-Wilbert, Inc. until the Trusts sold it in 1995. (A. 10-11.)

In approximately 1993, the company's shareholders, who were the beneficiaries of the Trusts, initiated discussions regarding selling the company and that Chris would ultimately take over the Chandler family business. The purchase of the shares of Chandler-Wilbert, Inc. from the Trusts was complicated by the relationship between Jerry

Brown (Marge's ex-husband and Chris's father) and the beneficiaries of the Trusts. (A. 11.)

Jerry Brown (Jerry) and Marge were married in 1958. Bud hired Jerry to work for Chandler-Wilbert, Inc. as a salesman the same year. Marge and Jerry were divorced in 1970, but Jerry continued to work for Chandler-Wilbert, Inc. after the divorce. After Lucy took over the daily operations of the company, her relationship with Jerry became strained, and in 1982 she nearly fired him. Instead she told him he could come back to work once he agreed to make some major life changes. The other beneficiaries of the Trusts also had strained relationships with Jerry. They were only willing to sell the company to Jerry and Chris if Chris became the majority owner. When Chris and Jerry planned the purchase of all of the stock of Chandler-Wilbert, Inc., Chris and Jerry agreed that Chris would buy the majority of the equity in the company and that Chris and Jerry would share control of the company on a 50-50 basis. (A. 11-12.)

Chris and Jerry incorporated Brown. (A. 12.) During the summer of 1995, the plan to purchase Chandler-Wilbert, Inc. consistently called for Jerry and Chris to each own 50% of the voting stock in the company. Jerry already had a personal accountant, Respondent/Defendant Lee Harren (Harren), of the accounting firm of Copeland Buhl & Company, P.L.L.P. The Accountants had worked with Jerry since the early 1990's. Jerry wanted Harren to be the accountant for Brown. (A. 12.)

Accountants were paid \$15,000 for its initial retainer on July 19, 1995. The Accountants were engaged to assist both Chris and Jerry with the purchase but from the outset Harren and Jerry froze Chris out of many aspects of the purchase. Throughout, the Accountants were not neutral. The Accountants advocated Jerry's interests to the detriment of Chris and never advised Chris of the conflicts of interest between Chris and Jerry. (A. 12.)

While Chris handled matters locally, Jerry and Harren took trips to Chicago to meet with Wilbert, the licensor of the vault products sold by the company. (A. 12-13.) After returning from one of their trips to Chicago, Jerry and Harren presented Chris with a plan whereby Chris would own 80% of the equity in the company but Jerry would own 51% of the voting shares. Trusting his father and Harren, Chris agreed to this proposal because he was led to believe by Harren and Jerry that Wilbert had insisted upon it as a condition for its loan of \$1 million to Brown to help finance the purchase. The transaction for purchase of the company closed in December 1995 and Chandler-Wilbert, Inc. was statutorily merged into Brown. (A. 12-13.)

The Accountants became Brown's auditors after Chris and Jerry bought Chandler-Wilbert, Inc. (A. 13.) The loan by Wilbert was fully repaid by December 1997. This repayment removed the alleged obstacle to Chris obtaining control of Brown commensurate with his 80% majority equity interest in the company. The Accountants knew the Wilbert loan was paid off but did not bring this to the attention of Chris. (Id.)

Between 1997 and 2003, Jerry and the Accountants attempted to squeeze Chris out of Brown using illegal methods. (A. 13.) The actions of the Accountants are set out in detail in the complaint and will not be repeated in detail here, but their actions include such things as

- presenting inaccurate and misleading financial information to Chris to support a proposal whereby Jerry would buy out Chris at a very low price;
- asserting that if Chris did not accept the buyout, Harren would calculate additional funds that Chris allegedly owed to Brown but if Chris accepted the buyout proposal, the alleged outstanding expense reimbursement issue would not be pursued;
- manipulation of documentation to present inaccurate and misleading information that additional money was owed by Chris to Brown;
- accepting money from Jerry under the table, which funds were received by Harren for his efforts to squeeze Chris out of Brown;
- falsifying Brown's audited financial statements.

(A. 13-25.)

Exasperated by the continuing pressure placed upon him by Harren to sell his shares in Brown to Jerry, Chris commenced a shareholder's rights lawsuit against Jerry, contending that he had a right to continued employment with Brown and that he was entitled to buy out Jerry's interest in the company. (A. 20.) Both before and after the commencement of that litigation, Harren unequivocally sided with Jerry. At no time did

the Accountants consider recusing themselves due to their conflict of interest and they acted as if they were management and not Brown's certified public accountants. (A. 22.)

The Accountants mismanaged Brown by supporting Jerry's other ventures -- such as the paying of Jerry's illegal bonuses and paying for some of Jerry's undocumented personal expenses. The Accountants helped mismanage Brown in the form of excess expenses, increased leverage, lost profits and lost value. (A. 15, 22.)

In 2003, the shareholder's lawsuit was settled. To that end, the parties executed a contract whereby Chris would become the sole owner of Brown. (A. 25.)

B. Lawsuit Against Accountants, Hennepin County Court File CT 04-8124.

On March 10, 2004, Plaintiffs brought a lawsuit against the Accountants. (A. 53.) Four counts were asserted in Plaintiffs' complaint. In Count I, entitled "Breach of Contract," Plaintiffs assert that the Accountants had annual contracts with engagement letters executed by them and Brown. Plaintiffs assert that the Accountants breached their annual contracts with Brown resulting in damage to the Plaintiffs. (A. 66.)

In Count II, entitled "Breach of Fiduciary Duty," Plaintiffs assert that the Accountants owed a fiduciary duty to Plaintiffs, which the Accountants breached, resulting in damage to Plaintiffs. (A. 66-67.)

In Count III, entitled "Accounting Malpractice," Plaintiffs assert that the Accountants had a duty to Brown and its majority shareholder Chris. It was further

asserted that the breach of duty by the Accountants constituted a breach of the standard of care expected of accountants, resulting in damage to Plaintiffs. (A. 67.)

Count IV, entitled "Restitution," asserts entitlement to repayment of the amounts paid to the Accountants by Brown. (A. 67-68.)

Plaintiffs did not serve with the summons and complaint an affidavit of expert review. (A. 50.) Sometime thereafter, the Accountants served on Plaintiffs interrogatories, including interrogatories seeking information as to the experts Plaintiffs planned to call for trial. Plaintiffs submitted their answers to interrogatories on June 18, 2004. (A. 51.)

On September 21, 2004, the Accountants served upon Plaintiffs a motion to dismiss Plaintiffs' action under the auspices of Minn. Stat. § 544.42. By order dated December 23, 2004, the trial court ordered that action dismissed (hereinafter Judge Oleisky dismissal). (A. 43.) In that accompanying memorandum, which was incorporated and made part of the order by its attachment, the trial court ruled that the requirements of Minn. Stat. § 544.42 were not met. (Id.) In so ordering dismissal, the trial court offered no analysis as to whether expert testimony was needed to establish each of the four counts set forth in Plaintiffs' complaint.² (A. 52.)

² 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.

Final judgment was entered on December 27, 2004, and Plaintiffs filed their notice of appeal to this Court on February 18, 2005. (A. 42.) In that appeal, Plaintiffs argue that their claims should not have been dismissed pursuant to Minn. Stat. § 544.42 on numerous grounds. (A. 70.)

C. Lawsuit Against Accountants Which Is the Subject of This Appeal.

While that appeal was pending, Plaintiffs brought this lawsuit against the Accountants asserting claims of fraud (Count I - Intentional Misrepresentation), negligent misrepresentation (Count II) and aiding and abetting (Count III). (A. 9.) In response, the Accountants did not file an answer but brought a motion to dismiss asserting that this action was barred by the doctrine of res judicata based on the Judge Oleisky dismissal. (A. 32.) 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, p. 3.) Nonetheless, the trial court by order dated August 5, 2005 dismissed Plaintiffs' complaint on the grounds of res judicata. (A. 1.) 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. 6; footnote omitted.) It is from that judgment of dismissal that Plaintiffs bring this appeal and seek reversal by this Court. (A. 35.)

ARGUMENT

APPELLANTS ARE ENTITLED TO REINSTATEMENT OF THEIR CASE.

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). Under merger or bar, which is also referred to as claim preclusion, final judgment on the merits bars the second suit for the same claim by the parties or their privies. Kaiser v. Northern States Power Co., 353 N.W.2d 899, 902 (Minn. 1984). The

principle underlying the doctrine of res judicata is that when a court of competent jurisdiction directly decides a question distinctly put in issue, that determination cannot be disputed in a subsequent suit by the same parties. Id. at 902.

The necessary elements of res judicata are: (1) a final adjudication on the merits, (2) a subsequent suit involving the same claim or cause of action, and (3) identical parties or parties in privity with the original parties. Demers v. City of Minneapolis, 486 N.W.2d 828, 830 (Minn. Ct. App. 1992). Res judicata applies to all claims actually litigated as well as to all claims that could have been litigated in the earlier proceedings. Care Institute, Inc. - Roseville v. County of Ramsey, 612 N.W.2d 443, 446 (Minn. 2000).

The Minnesota Supreme 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. State v. Joseph, 636 N.W.2d 322, 326 (Minn. 2001).

B. If This Court Reverses the District Court's Decision in Appeal A05-0340, Necessarily This Court Must Reverse the District Court's Dismissal of This Case on Res Judicata Grounds.

Under Minnesota law, once a judgment is reversed, it can no longer form the basis for a res judicata defense or dismissal. See, e.g., Wegge v. Wegge, 252 Minn. 236, 89 N.W.2d 891, 892 (1958) (matters determined by judgment remain res judicata until

judgment is reversed); American Druggists Ins. v. Thompson Lumber Co., 349 N.W.2d 569, 572 (Minn. Ct. App. 1984) (same).

The district court's dismissal of this action is premised solely on Judge Oleisky's ordered dismissal in Brown-Wilbert, Inc. v. Copeland Buhl & Co., et al. That dismissal is the subject of appeal A05-0340 presently pending before this Court. If this Court should reverse Judge Oleisky's dismissal, this Court must necessarily reverse the dismissal of this action.

A situation similar to that before this Court presented itself in Bielke v. Fairview-University Medical Center, 2003 WL 22234892 (Minn. Ct. App. 2003) (A. 108) and Bielke v. Sestero, Court of Appeals Case No. A03-858 (Order Opinion 2/20/04) (A. 105).

In Bielke v. Fairview-University Medical Center, the district court dismissed the medical malpractice action against the hospital for failure to comply with the expert review provisions of Minn. Stat. § 145.682. While that appeal was pending, Ms. Bielke brought suit against Dr. Sestero. Dr. Sestero sought dismissal on res judicata grounds, based on the dismissal of the earlier lawsuit against the hospital. The district court agreed and Bielke appealed. This Court reversed the dismissal of Bielke v. Fairview-University Medical Center. (A. 108.) This Court agreed that with the reversal of the earlier lawsuit, it necessarily follows that the second lawsuit which had been dismissed on res judicata grounds must also be reversed. (A. 105.) Accordingly, the second lawsuit was reinstated.

The same result follows here. If this Court should reverse Judge Oleisky's dismissal in appeal A05-0340, this Court must then reverse the dismissal of this action.

C. Moreover, the Trial Court Committed Error in Dismissing This Case on Res Judicata Grounds.

Furthermore and regardless of the outcome of appeal A05-0340, the trial court's dismissal of this action should be reversed.

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, 58, 148 N.W.2d 804, 807 (1967). Applying that test to this case, the former judgment entered by Judge Oleisky cannot act as a res judicata bar to this lawsuit.

The Plaintiffs' initial lawsuit was dismissed by Judge Oleisky by application of Minn. Stat. § 544.42. This statute allows for dismissal of a professional negligence claim which requires expert testimony to establish a prima facie case which the plaintiffs cannot or do not timely supply. 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 (8th Cir. 1989).

As Plaintiffs have argued in the appeal now pending to this Court, the trial court, Judge Oleisky, improperly applied Minn. Stat. § 544.42 to that case. (A. 96.) The trial court, Judge Oleisky, did not make the necessary determination as to whether all causes of action asserted by Plaintiffs required expert testimony. (Id.) Plaintiffs have asserted that failure is grounds for reversal in the pending appeal. (A. 96-99.)

In dismissing this present action on res judicata grounds the trial court erroneously concluded that a challenge to the Accountants' professional work requires expert testimony and that "[c]laims for fraud based on the professional work would likely have suffered the same fate." (A. 6.) 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 between the two actions is different and the doctrine of res judicata should not apply.

Claims grounded on a professional's 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 clients' funds); Serhofer v. Groman & Wolf, P.C., 610 N.Y.S.2d 294, 295 (N.Y.A.D. 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).

No expert testimony is necessary to establish the causes of action asserted in this case. For example, Plaintiffs have alleged that “Harren accepted money from Jerry under the table without the knowledge of Chris.” (A. 28.) The trial court does not explain why, under these facts, expert testimony would be needed to establish a prima facie case of fraud. (A. 28.) 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.

The Minnesota Supreme 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). The Minnesota Supreme 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 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.

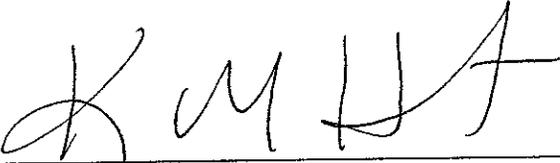
In this action, none of the causes of action contained in the complaint fall within the purview of Minn. Stat. § 544.42. Plaintiffs were not given a full and fair opportunity to be heard on their claims. To invoke res judicata under these circumstances works an injustice. The dismissal of Plaintiffs’ 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. Reversal should be ordered.

CONCLUSION

Appellants respectfully request that judgment be reversed and this action be remanded for an adjudication on the merits.

Dated: October 31, 2005

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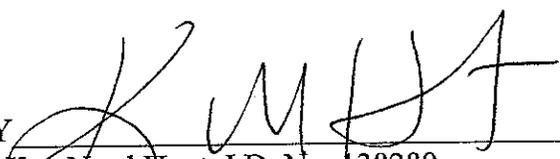
CERTIFICATION OF BRIEF LENGTH

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 3,894 words. This brief was prepared using Word Perfect 10.

Dated: October 31, 2005

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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).