

A05-340  
A05-1952

STATE OF MINNESOTA  
IN COURT OF APPEALS

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Brown-Wilbert, Inc. and  
Christopher Brown,

Appellants,

v.

Copeland Buhl & Co., P.L.L.P. and  
Lee Harren,

Respondents.

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REPLY BRIEF AND  
SUPPLEMENTAL APPENDIX OF APPELLANTS

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**I. GIVEN THIS COURT'S DECISION IN BROWN-WILBERT I, THE DISMISSAL OF THIS CASE ON RES JUDICATA GROUNDS MUST BE REVERSED.**

**A. Accountants Are Bound by Their Theories, the Record and the Standard Which Applies to Rule 12 Motions.**

This case comes before this Court on appeal from Respondents/Defendants Copeland Buhl & Company P.L.L.P. and Lee Harren's (Accountants) motion to dismiss Appellants/Plaintiffs Brown-Wilbert, Inc. and Christopher Chandler Brown's (Plaintiffs) complaint under Minn. R. Civ. P. 12.02. For purposes of this appeal, Accountants must take as true the allegations in Plaintiffs' complaint. Northern States Power Co. v. Franklin, 265 Minn. 391, 122 N.W.2d 26, 29 (1963).

Accountants, in the context of their Rule 12 motion to dismiss, never contended before the district court that the allegations of Plaintiffs' complaint would not support Plaintiffs' counts of intentional misrepresentation, negligent misrepresentation and aiding and abetting. Nor did they contest Plaintiffs' position that "[n]one of the causes of action contained in the Complaint before this Court need expert testimony to establish a prima facie case."<sup>1</sup> (Plaintiffs' Memorandum of Law in Support of Plaintiffs' Application for a Default Judgment and in Opposition to Defendants' Motion to Dismiss, p. 21.)

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<sup>1</sup> On page 13 of their brief, Accountants contend for the first time that Plaintiffs have failed to plead fraud with particularity and that expert testimony is necessary to establish a prima facie case. Since these assertions are being raised for the first time on appeal, and are a wholesale shifting of Accountants' theory from that presented in their Rule 12 motion, they cannot be considered by this Court. Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988).

Accountants' theories of dismissal were limited to assertions that this action was barred by the doctrine of res judicata and that Plaintiffs could not avoid the effect of res judicata by splitting causes of action. (Defendants' Memorandum of Law in Support of Motions to Dismiss and for Sanctions, p. 1.) Accordingly, for the purposes of this appeal, the Court must accept that Plaintiffs' causes of action are fully supported by the allegations of the complaint and no expert testimony is necessary to state a prima facie case on these causes of action.

**B. Impact of Brown-Wilbert I Mandates Reversal.**

As Accountants concede, given this Court's opinion in Brown-Wilbert, Inc. v. Copeland Buhl & Co., P.L.L.P., 2005 WL 3111959 (Minn. Ct. App. 2005) (hereinafter Brown-Wilbert I) (Supplemental Appendix [S.A.] 1) and the further proceedings mandated by this Court "that action could render the issues in the present motion moot." (Respondents' Brief, p. 2.)

Accountants are correct that if Plaintiffs seek further review of this Court's decision in Brown-Wilbert I and the Supreme Court should grant review and reverse the dismissal of this action, the res judicata ruling in this case must be reversed. (Respondents' Brief, p. 14.) Accountants are incorrect, however, that absent a Supreme Court reversal, the res judicata ruling in this case stands. Even if further review by the Supreme Court is denied, pursuant to this Court's decision in Brown-Wilbert I, this case has been remanded to the trial court to analyze whether expert testimony was necessary in

Brown-Wilbert I to establish a prima facie case on three of Plaintiffs' counts. If the trial court agrees with Plaintiffs that any of those causes of action should not have been ordered dismissed under the auspices of Minn. Stat. § 544.42, there will be no final judgment. Therefore there is no basis for res judicata dismissal of this action.

In addition, regardless of the outcome of Brown-Wilbert I, and as set out in Plaintiffs' initial brief to this Court, application of the doctrine of res judicata here would work an injustice. Therefore it should have not been applied by the district court.

**C. Plaintiffs' Claims Do Not "Relate Back" to Plaintiffs' Negligence Claim in Brown-Wilbert I.**

Accountants have continued their misplaced reliance on this Court's unpublished decision in Albert v. Binsfeld, 2003 WL 139529 (Minn. Ct. App. 2003) (R.A. 1). (See Respondents' Brief, pp. 12, 16.) This Court rejected the Albert reasoning in Brown-Wilbert I.<sup>2</sup> If this Court had accepted Albert's premise and Accountants' argument in Brown-Wilbert I that all of Plaintiffs' claims "relate back" to Plaintiffs' negligence/malpractice claim and therefore all are to be dismissed for failure to file the expert affidavits, this Court would not have remanded this case to the trial court to determine whether "the three remaining claims required expert testimony to establish a prima facie case." Brown-Wilbert, 2005 WL 3111959 at \*4 (S.A. 3). It would have

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<sup>2</sup> Albert is an unpublished decision. Reliance on unpublished opinions is misplaced because they are not binding precedent. Vlahos v. R&I Constr. of Bloomington, Inc., 676 N.W.2d 672, 676 n.3 (Minn. 2004); Dynamic Air, Inc. v. Bloch, 502 N.W.2d 796, 800-01 (Minn. Ct. App. 1993).

simply affirmed the trial court. This Court has rejected this “relation back” notion and properly required the trial court to analyze each and every cause of action to determine whether expert testimony was necessary to establish a prima facie case.

Moreover, in Albert, this Court acknowledged that the district court had only dismissed under § 544.42 after “examining the complaint.” Id. at \*2. The trial court in Brown-Wilbert I made no such examination and had vaguely stated that based on failure to comply with Minn. Stat. § 544.42 “each cause of action where expert testimony is to be used to establish a prima facie case shall [be] dismissed with prejudice pursuant to the penalty for noncompliance under Minn. Stat. § 544.42 subd. 6(b).” As this Court recognized in Brown-Wilbert I, the trial court clearly did not undertake the necessary analysis that § 544.42 demands.

**D. Brown-Wilbert I Supports Plaintiffs’ Position That They Have Not Had a Full and Fair Opportunity to Litigate Their Claims.**

More importantly, this Court’s decision in Brown-Wilbert I supports Plaintiffs’ position that they did not have a full and fair opportunity to litigate their claims in Brown-Wilbert I. As this Court ruled, the trial court dismissed that action without undertaking the necessary analysis under § 544.42. To apply the doctrine of res judicata in this case works an injustice.

## II. THE TRIAL COURT DID NOT DISMISS THIS ACTION ON THE GROUNDS OF PURPORTED IMPROPER SPLITTING OF CAUSES OF ACTION.

The trial court did not dismiss this action on the ground of purported improper splitting of causes of action. Accountants' assertion on appeal that even if res judicata does not apply, this Court should nonetheless affirm on purported impermissible splitting should be rejected.

### A. The Court Cannot Separate Out Doctrine of Res Judicata From Rule Against Splitting Causes of Action.

With citation to no legal authority, Accountants assert that “[a]lthough the prohibition on splitting a cause of action has much in common with the doctrine of res judicata, it is a separate concept and provides a separate basis for affirming the dismissal of the present action.” But both the Minnesota Supreme Court and this Court have held that it is the doctrine of res judicata that prevents parties from splitting claims into more than one lawsuit. Loo v. Loo, 520 N.W.2d 740, 744 n.2 (Minn. 1994). Matter of Minneapolis Community Development Agency, 359 N.W.2d 687, 690 (Minn. Ct. App. 1984) (reason for res judicata doctrine is also to discourage claim-splitting); see also Baertsch v. Lewis and Clark County, 727 P.2d 504, 506 (Mont. 1986) (rule against splitting causes of action and doctrine of merger inextricably related to the principles of res judicata”); Risse v. Meeks, 585 N.W.2d 875, 880 (S.D. 1998) (Konen Kamp, J concurring) (“The rule against splitting actions is an adjunct to the doctrine of res judicata).

It is the doctrine of merger (which is an aspect of res judicata) that prevents splitting of causes of action.<sup>3</sup> “It is inextricably related to the principles of res judicata and its application to bar a subsequent action depends upon the existence of a valid and final prior judgment.” 46 Am. Jur. 2d Judgments § 502 (2005). If this Court concludes that this action is not barred by the doctrine of res judicata, it cannot affirm, as Accountants assert, on the ground of no splitting of causes of action.

**B. Judgment in Brown-Wilbert I Was Plainly Inconsistent With the Fair and Equitable Implementation of Minn. Stat. § 544.42.**

In addition, and as Plaintiffs explained to the trial court, Restatement of Judgments (Second) § 26 sets forth various exceptions to the general rule concerning splitting of the causes of action. The Restatement provides in pertinent part:

Section 26. Exceptions to the general rule concerning splitting.

(1) When any of the following circumstances exists, 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.

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<sup>3</sup> 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).

Exception (1)(d) applies here.

The statutory scheme in question is 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. Minnesota law requires the trial court to identify and allow those claims to stand which are outside the statutory scheme. This the trial court in Brown-Wilbert I did not do, resulting in remand by this Court.

So although the complaint in this action involves the same parties, there has never been a final judgment on the merits with respect to all causes of action contained in the first complaint; rather, there was a procedural determination which was to be statutorily limited to causes of action needing expert testimony to establish a prima facie case.

The trial court's rulings in Brown-Wilbert I were inconsistent with the fair and equitable implementation of the statutory scheme. Plaintiffs must be allowed to pursue all of their causes of action which do not require expert testimony to establish a prima facie case.<sup>4</sup>

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<sup>4</sup> This Court's decision in Brown-Wilbert I illustrates the unfairness of the rulings. Minn. Stat. § 544.42, subd. 6, states that dismissal for failure to serve an affidavit of expert review is not to be granted unless the defendant makes a demand for the affidavit and it is not supplied within 60 days. Here this Court found no demand was ever made but nonetheless affirmed the dismissal under subd. 6.

C. Causes of Action For Which Expert Testimony Is Not Needed to Establish a Prima Facie Case Do Not Fall Within the Purview of Minn. Stat. § 544.42.

Moreover, the Minnesota Supreme Court has made clear that “[w]here a particular matter or issue is withdrawn or withheld from consideration of the court, either by stipulation of the parties or otherwise, it is not adjudicated, and a judgment entered on other issues will not act as a bar to another action on the issues so withdrawn.” Smith v. Smith, 235 Minn. 412, 51 N.W.2d 276, 279-80 (1952). The Supreme Court in Smith continued:

Obviously the doctrine is just. It would be a perversion of the res judicata rule to hold that a judgment is a bar to a subsequent action to recover upon a claim which neither court nor jury was ever considered or determined on the merits.

Id. at 280, quoting Fox v. Fox, 154 Minn. 169, 191 N.W. 420, 421 (1923).

Likewise, here it would be a perversion of the law to hold that Brown-Wilbert I is bar to this action. None of the causes of action contained in the complaint in this action need expert testimony to establish a prima facie case and accordingly, none fall within the purview of Minn. Stat. § 544.42. As this Court has recognized, only those causes of action which required expert testimony to establish a prima facie case could be subject to dismissal in Brown-Wilbert I. The trial court failed to so limit its ruling in Brown-Wilbert I nor did it grant Plaintiffs an opportunity to present an amendment to assert additional causes of action not within the purview of § 544.42.

Since Plaintiffs' complaint was dismissed without opportunity to amend and Plaintiffs' causes of action which do not require expert testimony to establish a prima facie case have never been adjudicated, this action should be allowed to proceed. Since, as a matter of law, causes of action for which no expert testimony is necessary to establish a prima facie case cannot be a part of the judgment in Brown-Wilbert I, that judgment cannot be a bar to this action.

**CONCLUSION**

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

Dated: December 15, 2005

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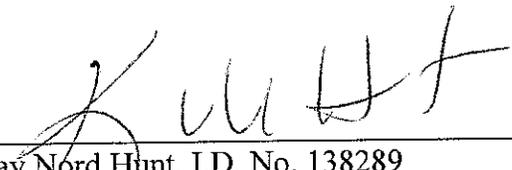
## CERTIFICATION OF BRIEF LENGTH

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 2,211 words. This brief was prepared using Word Perfect 10.

Dated: December 15, 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).