

NO. A06-0178

State of Minnesota
 In Court of Appeals

Gary J. Milner, Toni Bjerke, and Annette Barrett,
 individually on behalf of themselves
 and all others similarly situated,

Respondents,

v.

Farmers Insurance Exchange,

Appellant.

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
ARGUMENT	1
I. RES JUDICATA COMPELS REVERSAL AND ENTRY OF A JUDGMENT OF DISMISSAL	1
A. Federal Law Controls The Res Judicata Effect Of A Federal Court Judgment	1
B. Even Under Minnesota Law, the MDL Judgment is Final for Res Judicata Purposes	2
C. Class Members In This Case Are In Privity With The Class In The MDL Case Because The Named Plaintiffs Are Class Members In The MDL Case	4
D. Farmers Is Not Barred From Asserting Res Judicata By Estoppel Or Acquiescence	6
E. Farmers Raised Res Judicata at the First Opportunity	11
II. THE TRIAL COURT ERRED IN ORDERING INJUNCTIVE RELIEF AND PAYMENT OF A CIVIL PENALTY	12
A. Appellant Did Not Violate Minn. Stat. §177.25	12
B. Plaintiffs’ Legislative History Arguments Fail To Demonstrate That The Trial Court Had The Authority To Order An Injunction Or Civil Penalties	13
1. The legislative record does not support Plaintiffs’ position.....	13
2. A retrospective affidavit of a bill’s sponsor is not competent evidence of the legislature’s intent in adopting a statute.....	15
C. Plaintiffs Failed to Plead the Statutory Violations They Now Assert or the Remedies Ordered by the Trial Court	16
III. THE TRIAL COURT ERRED IN ITS ANALYSIS AND AWARD OF ATTORNEYS’ FEES TO PLAINTIFFS’ COUNSEL	18
A. Plaintiffs Misstate the Standard of Review Governing an Attorneys Fee Award ..	19
B. The Trial Court Erred In Awarding A Lodestar Multiplier When The Plaintiffs Failed To Prevail On Any Significant Claim	22

CONCLUSION	24
CERTIFICATION.....	25
ERRATA.....	26

TABLE OF AUTHORITIES

	Page
Federal Cases	
<i>Hensley v. Eckerhart</i> , 461 U.S. 424 (1983)	21, 26
<i>Blum v. Stenson</i> , 465 U.S. 886 (1984)	24, 25
<i>Deposit Bank v. Frankfort</i> , 191 U.S. 499 (1903)	2
<i>Dupasseeur v. Rochereau</i> , 21 Wall. 130, 22 L.Ed. 588 (1875)	3
<i>Fish v. St. Cloud State University</i> , 2001 WL 667778 (D. Minn. 2001).....	21, 22
<i>Bittinger v. Tecumseh Products Co.</i> , 123 F.3d 877 (6th Cir. 1997).....	8
<i>Princess Lida of Thurn and Taxis v. Thompson</i> , 305 U.S. 456 (1939)	13
<i>Sondel v. Northwest Airlines</i> , 56 F.3d 934 (8th Cir. 1995).....	7
<i>Tyus v. Schoemehl</i> , 93 F.3d 449 (8th Cir. 1996)	7
State Cases	
<i>Anderson v. Hunter, Keith, Marshall & Co.</i> , 417 N.W.2d 619 (Minn. 1988)	21, 23, 24
<i>Aguirre v. Albertson's Inc.</i> , 117 P.3d 1012 (Or. Ct. App. 2005).....	8, 9, 10, 11
<i>Briggs v. Kennedy Mayonnaise Products</i> , 297 N.W. 342 (Minn. 1941).....	19
<i>County of Washington v. A.F.S.C.M.E. Council No. 91</i> , 262 N.W. 2d 163 (Minn. 1978)	18
<i>Folk v. Home Mutual Ins. Co.</i> , 336 N.W.2d 265 (Minn. 1983)	19
<i>Graham v. Special School District No. 1</i> , 462 N.W.2d 78 (Minn. Ct. App. 1990) affirmed, 472 N.W.2d 114 (Minn. 1991).....	14
<i>In re State Farm Mutual Automobile Insurance Co.</i> , 392 N.W.2d 558 (Minn. App. 1986)	18
<i>Indianhead Truck Line, Inc. v. Hvidsten Transport, Inc.</i> , 128 N.W.2d 334 (Minn. 1964).....	4

<i>Margo-Kraft Distributors v. Mpls. Gas Co.</i> , 200 N.W.2d 45 (Minn. 1972)	8
<i>MT Properties, Inc. v. CMC Rental Estate Corp.</i> , 481 N.W.2d 383 (Minn. App. 1992).....	19
<i>Murphy v. Allina Health System</i> , 668 N.W.2d 17 (Minn. 2003)	15
<i>Noble v. C.E.D.O., Inc.</i> , 374 N.W.2d 734 (Minn. App. 1985)	15
<i>Pirrotta v. Independent School Dist. No. 347</i> , 396 N.W.2d 20 (Minn. 1986).....	8
<i>Rennie v. Freeway Transport</i> , 656 P.2d 919 (Or. 1982).....	12
<i>Roberge v. Cambridge Cooperative Creamery, Co.</i> , 67 N.W.2d 400 (Minn. 1954).....	19
<i>Semtek Int'l. Inc. v. Lockheed Martin Corp.</i> 531 U.S. 497 (2004)	2, 3
<i>Smith v. Woodwind Homes, Inc.</i> , 605 N.W. 2d 418 (Minn. Ct. App. 2000).....	14
<i>State v. Asfeld</i> , 662 N.W.2d 534 (Minn. 2003).....	15

Federal Statutes

18 U.S.C. § 1407.....	9
28 U.S.C. § 1441.....	12
28 U.S.C. § 1367(a)	3
28 U.S.C. § 1407.....	11

State Statutes

Minn. Stat. § 177.25.....	18
Minn. Stat. § 177.27.....	15
Minn. Stat. § 181.13.....	19
Minn. Stat. §§177.23.....	18
Minn. Stat. §§177.27.....	17
Minn. Stat. §177.27.....	15, 16, 17, 18

Minn. Stat. §177.30.....	20
Minn. Stat. §549.191.....	16
Minn. Stat. §549.20.....	17
Minn. Stat. Chapter 177.....	17

Federal Rules

F.R.C.P. 23(b)(3)	9
-------------------------	---

State Rules

Minnesota Rules of Civil Procedure Rule 53	24
Oregon Rules of Civil Procedure Rule 21	11, 12

ARGUMENT

I. RES JUDICATA COMPELS REVERSAL AND ENTRY OF A JUDGMENT OF DISMISSAL.

A. Federal Law Controls The Res Judicata Effect Of A Federal Court Judgment.

The Plaintiffs' first argument is astonishing. They ask this Court to disregard a clear directive of the United States Supreme Court. The question of what effect is to be given a judgment of a federal court is a question of *federal law*. As the Supreme Court observed:

...we have long held that States cannot give [federal court] judgments merely whatever effect they would give their own judgments, but must accord them the effect that this Court prescribes.

Semtek Int'l. Inc. v. Lockheed Martin Corp. 531 U.S. 497, 506 (2004). That has been black letter Supreme Court law for over a century: “[W]hether a federal judgment has been given due force and effect in the state court is a federal question reviewable by this court” *Deposit Bank v. Frankfort*, 191 U.S. 499, 514-515 (1903), quoted in *Semtek*. 531 U.S. at 507. In other words, the law which determines the effect of a federal court judgment is *federal law*. A state court is not at liberty to apply state law to the question unless federal law grants that liberty. *Id.*

Plaintiffs argue that since the jurisdiction of the MDL court over the Minnesota state law class was based on supplemental jurisdiction, 28 U.S.C. § 1367(a), rather than diversity jurisdiction, the trial court was free to apply Minnesota law. There is no reason

to think that the *Deposit Bank* rule would not apply equally to supplemental jurisdiction cases. The trial court was still obligated to apply federal law to decide the question. And a federal court -- the United States District Court for the District of Oregon -- has already determined that the res judicata effect of its judgment in the MDL case bars the claims *in this lawsuit*. (See SR191).

Plaintiffs assert that in Minnesota, “the preclusive effect of a federal *dismissal* is a matter to be determined by state courts under state law” citing *Beutz v. A. O. Smith Harvestore Products*, 431 N.W. 2d. 528, 531 n. 2 (Minn. 1988) (emphasis added). There are a number of rejoinders to this assertion. First, the Court is not dealing with the preclusive effect of a federal *dismissal* in this case, but a federal *adjudication on the merits* following a trial. Second, state law may have decided the effect of a diversity judgment under *Dupasseur v. Rochereau*, 21 Wall. 130, 135, 22 L.Ed. 588 (1875), prior to *Semtek*. It certainly does not after *Semtek*. Finally, the United States Supreme Court, not the Minnesota Supreme Court, has the last word on the topic -- any inconsistent holding in *Beutz* cannot stand in light of *Semtek*.¹ U.S. Const., Article VI, Clause 2.

B. Even Under Minnesota Law, the MDL Judgment is Final for Res Judicata Purposes.

Plaintiffs argue that under Minnesota law, the MDL judgment cannot have preclusive effect because it is on appeal, citing this Court’s *Dixon* and *Spartz* decisions

¹ In their footnote 2, Plaintiffs claim that it is disingenuous for Farmers to argue that Minnesota law does not apply because it told the trial court that Minnesota law or Federal law gives the same result. (Resp. Br. at 12, n.2). In fact, Farmers told the trial court that if Minnesota law were inconsistent with federal law, as argued by Plaintiffs, then federal law would control. (Defendant’s Reply Memorandum of Law in Support of Motion to Dismiss Based on Res Judicata, pp. 2-3, filed January 11, 2005 (Docket No. 130)).

(Resp. Br. at 17-19). To the extent these cases address whether an appeal affects the finality of a judgment for purposes of claim preclusion, they are based on a misreading of prior case law. The *Dixon* opinion merely cites *Spartz* for its discussion of the finality of a judgment. The analysis in *Spartz* is based on *Indianhead Truck Line, Inc. v. Hvidsten Transport, Inc.*, 128 N.W.2d 334 (Minn. 1964), a case that has nothing to do with res judicata.²

Moreover, the discussion in both *Dixon* and *Spartz* is pure dictum, since neither case involved a situation where an actual or potential appeal could possibly affect the finality of the judgments.³

Finally, neither *Dixon* nor *Spartz* can overrule the Minnesota Supreme Court precedent cited in Farmers' principal brief at p. 16, squarely holding that a judgment is final for res judicata purposes even if it is on appeal. Under well-settled Minnesota case law, the judgment entered by the federal district court in the MDL matter is final and precludes the claims in this action.

² In *Indianhead Truck Line*, the Minnesota Supreme Court interpreted a contract for sale of a North Dakota trucking business which required regulatory approval. 128 N.W.2d at 338. The contract required the consummation of the deal upon a "final order" of three North Dakota regulatory agencies. The contract defined a "final order." *Id.* at 338. The Supreme Court held that *under the contract*, "final order" meant an order entered after all administrative and appeal processes were exhausted. *Id.* at 341. The opinion mentioned neither res judicata nor collateral estoppel.

³ See *Spartz*, 588 N.W.2d at 175 ("The parties agree that *Spartz I* is final and beyond appeal") and *Dixon*, 619 N.W.2d at 755-756 ("Appellant failed to properly appeal *Dixon I* to the Eighth Circuit, and the U.S. Supreme Court denied his writ of certiorari. Similarly, appellant failed to appeal *Dixon II* and is now time barred. (Citation omitted) Thus, both *Dixon I* and *Dixon II* are final decisions").

C. Class Members In This Case Are In Privity With The Class In The MDL Case Because The Named Plaintiffs Are Class Members In The MDL Case.

The Plaintiffs argue that the judgment below applies only to claims representatives who (1) opted out of the MDL action or (2) were never class members in the MDL action. Plaintiffs assert that this truncated class can never be in privity with the MDL class. This argument's superficial plausibility vanishes on close analysis.

Plaintiffs claim that PIP claims representatives were not part of the MDL class. In fact, the PIP CRs *were* in the certified class in the MDL case, for the same reason that they were in the certified class in this case: Their job classifications were included in the class definition and the certification order was never amended. (*Compare* Order for Notice to Class Members, p. 2, filed March 7, 2003 (Docket No. 40) *with* MDL Order and Findings Certifying State Law Classes, SR169). They received notice of the pendency of the MDL action and an opportunity to opt out. (Finch Aff., p. 3, ¶10, filed July 28, 2004 (Docket No. 61)). In fact, most of the Minnesota claims representatives who opted out of the MDL action were PIP claims representatives. (Debner Aff., p.1 and EX. 1, filed April 27, 2005 (Docket No. 139)). They were informally excluded from the MDL class by a subsequent decision of Judge Jones with the acquiescence of the plaintiffs.

But the important fact in the privity analysis is that Gary Milner and all the other named plaintiffs in this case, (Order and Memorandum, p. 1, filed December 18, 2002 (Docket No. 39)), were class members in the MDL case and named in the final judgment.

(SR150, 152). As class representatives, they were chosen because the trial court found they were fair and adequate representatives of the interest of class members. (Order and Memorandum, pp. 8-9, filed December 18, 2002 (Docket 39)). The whole point of having class representatives under Rule 23 is that the court makes a determination that they *do* represent the interests of class members. RESTATEMENT (SECOND) OF JUDGMENTS § 41 (comment e) (1996). And as in *Sondel v. Northwest Airlines*, 56 F.3d 934 (8th Cir. 1995), because Mr. Milner and all other named plaintiffs elected to remain members of the MDL class, and therefore were bound by the MDL judgment, that judgment binds the class they represent, even if the represented class is not part of the MDL class. Because *Sondel* was a Rule 26 (b) (2) class, the class members were bound by the judgment even though they had not received notice of class certification and an opportunity to opt out. In this case, class members, including the MDL opt-outs and the PIP claims representatives to whom the judgment below applies, received notice of the pendency of this class action and an opportunity to opt-out. None did, thereby tying their claims to Mr. Milner and the other class representatives. Thus, Wright and Miller's criticism of *Sondel* in 18A Wright Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE, §4455 at pp. 469-469, n. 27 (2002 ed.) does not affect its application to this case.

Plaintiffs cite *Tyus v. Schoemehl*, 93 F.3d 449, 456 (8th Cir. 1996) for the proposition that "virtual representation" is more appropriate in cases involving "public law" issues "where the number of people with standing is potentially limitless." (Resp. Br. at 15-16). Farmers is *not* arguing for the application of the doctrine of "virtual

representation.” See, e.g., *Pirrotta v. Independent School Dist. No. 347*, 396 N.W.2d 20, 22 and n. 1 (Minn. 1986) and *Bittinger v. Tecumseh Products Co.*, 123 F.3d 877, 881-882 (6th Cir. 1997). Instead, the Court should apply the well-established concept of privity. See *Margo-Kraft Distributors v. Mpls. Gas Co.* 200 N.W.2d 45, 47-50 (Minn. 1972) and *Pirrotta*, 396 N.W.2d at 22. It is black-letter law that a class member is in privity with her or his class representative:

A person who is not a party to an action but who is represented by a party is bound by and entitled to the benefit of a judgment as though he were a party. A person is represented by a party who is:

* * *

(e) The representative of a class of persons similarly situated, designated as such with the approval of the court, of which the person is a member.

RESTATEMENT (SECOND) OF JUDGMENTS § 41(1)(e). Here all the Minnesota Farmers claims representatives, including those who opted out of the MDL action (but not this action) are bound by the MDL judgment affecting their class representatives because they are in privity with them.

D. Farmers Is Not Barred From Asserting Res Judicata By Estoppel Or Acquiescence.

Plaintiffs vigorously argue that Farmers should be barred from the benefits of res judicata because it “acquiesced” in the pendency of simultaneous lawsuits affecting the same class of employees. (Resp. Br. at 20-25, citing *Aguirre v. Albertson’s Inc.*, 117 P.3d 1012 (Or. Ct. App. 2005)). *Aguirre* is distinguishable. There, the plaintiff sued the Albertson’s supermarket chain for unpaid overtime under the Oregon wage and hour law. *Aguirre* filed a complaint in Oregon state court alleging violation of Oregon wage and

hour laws. Meanwhile, Albertson's was the defendant in several putative class action federal lawsuits alleging violations of the Fair Labor Standards Act and the wage and hour laws of 20 states, including Oregon. Some of the claims in the federal lawsuits were identical to Aguirre's. The federal lawsuits were consolidated and transferred to the Idaho federal district court pursuant to 18 U.S.C. § 1407. 117 P.3d at 1014.

While the *Aguirre* action was pending in Oregon, Albertson's class action lawsuit was settled. The settlement provided for payments to class members in Oregon for the same kinds of claims advanced in the *Aguirre* lawsuit. The Idaho federal court tentatively approved the settlement. Notices were sent to class members describing the settlement and their procedural rights. The "opt-out" provisions of F.R.C.P. 23(b)(3) applied to the state claims. Thus class members who did not respond were included in the state law class. Aguirre's address in Albertson's records was incorrect and she did not receive actual notice. She did not respond or file a claim. The class settlement ultimately received final approval and a judgment was entered. 117 P. 3d at 1015.

Albertson's then moved to dismiss Aguirre's state court lawsuit based on res judicata. The trial court granted the motion and the plaintiff appealed. The Oregon Court of Appeals reversed, holding that res judicata did not bar Aguirre's claims under the unique facts of the case. 117 P.3d at 1027.

The court concluded that federal law governed res judicata, but that there was no material difference between Oregon and federal law as applied by the 9th Circuit Court of

Appeals. *Id.* at 1021.⁴ The court observed that res judicata normally would apply:

Plaintiff does not dispute that under those settled principles, this action ordinarily would be barred by the MDL judgment. The essential prerequisites for claim preclusion are satisfied here: Both plaintiff and Albertson's were parties to the MDL Action; the claims in this case are the same or closely related to those in the MDL Action; and the MDL Action was resolved by final judgment.

Id. at 1022. But the court refused to apply the doctrine because it found Albertson's actions waived any claim preclusion defense.

Albertson's "hid the ball" in discovery by failing to inform plaintiff's counsel about the MDL action in response to discovery requests which squarely called for such disclosure. *Id.* at 1025-26. Albertsons also failed to exercise readily available procedures to avoid defending both actions simultaneously. *Id.* at 1024. Finally, the plaintiff was not pursuing simultaneous litigation in multiple forums. *Id.* at 1026. The court observed that Albertson's defended the state action for more than a year, knowing that the plaintiff was unaware that she was a class member in the Idaho federal action. The court distinguished cases in which the defendant, over its resistance, is on the receiving end of actions by a plaintiff to pursue claims in multiple forums. *Id.*

There are substantial differences between this case and *Aguirre*. Albertson's failed to use available procedural remedies to avoid defending both actions simultaneously. *Id.* at 1024-25. It could have moved to dismiss the state action under Oregon Rules of Civil Procedure 21A(3) providing as a defense the fact "...that there is

⁴ Inexplicably, the court failed to cite *Semtek v. Lockheed Martin Corp.*, the controlling federal case, and failed to analyze the law of the federal forum, Idaho, which should have applied under *Semtek*.

another action pending between the same parties for the same cause....”

Farmers had no such alternative available in this case. Minnesota’s rules do not permit the dismissal of a lawsuit merely because another action is pending between the parties raising the same claim. Rule 12, Minn. R. Civ. P. Moreover, although the “parties” in this action are identical in the sense that they are two virtually identical classes, there is no authority which would have permitted Farmers to obtain dismissal of this action because a separate set of named plaintiffs sought to pursue the same cause of action against it in another court.

The *Aguirre* court placed heavy emphasis on Albertson’s failure to notify the MDL court that the *Aguirre* case was a “tag-along” case to the MDL action as required by Rules 1.1 and 7.5(e), Rules of Procedure, Judicial Panel on Multidistrict Litigation, 28 U.S.C. § 1407. 117 P.3d at 1026-1027. Instead, it kept both courts and the plaintiff in the dark by hiding the ball.

Unlike Albertson’s, Farmers kept both the trial court in this action and the MDL court fully informed about the parallel actions. It also removed this case to federal court where it was actually transferred to the MDL court. The plaintiffs, not Farmers, made simultaneous actions necessary by pleading only state-law claims, joining a Minnesota resident as a defendant, and refusing transfer to the MDL court. Farmers had no way of avoiding simultaneous actions.

Faced with similar facts, the Oregon Supreme Court had no trouble in ruling that a defendant did not acquiesce in simultaneous actions and should not be precluded from asserting a *res judicata* defense:

[W]e are not aware of any procedural device whereby a defendant in a state court action can remove a nonfederal claim and force a pendent jurisdiction joinder with a federal claim already pending in federal court. *See* 28 U.S.C. § 1441. Even if defendants, through some procedural manipulation, could have engineered a rejoining of plaintiff's claim, we do not believe that their failure to do so is tantamount to acquiescence in plaintiff's claim-splitting. Where, as here, a defendant has timely voiced objections to a plaintiff's simultaneous prosecution of multiple actions arising from one transaction, through an ORCP 21 A(3) motion or the like, the onus is upon the plaintiff not the defendant to accomplish any necessary joinder.

Rennie v. Freeway Transport, 656 P.2d 919, 924-925 (Or. 1982).

In this case, Farmers could not use ORCP 21(A)(3) to dismiss the state law action – Minnesota has no such rule. It tried the only alternative available to it, removal and transfer to the MDL court, but plaintiffs stymied that approach. Under the governing law, Oregon law (adopted as federal common law under *Semtek*) Farmers cannot be held to have acquiesced in the parallel actions here. The onus was on the plaintiffs, not Farmers, to do what was necessary to avoid parallel actions and possibly inconsistent results. They failed to do so. They cannot be heard to complain.

Farmers' position in this case and in the MDL case has been consistent and open. (*See, e.g.*, Defendant's Memorandum of Law in Opposition to Dave Miller's Motion to Intervene, filed July 28, 2004 (Docket No. 61)). It did not choose to be sued by two sets of plaintiffs. It did not choose to have Plaintiffs plead only state law claims and join a Minnesota resident as defendant so that it could not remove to federal court and consolidate the actions. It did not choose to put itself in a position where it had to defend two lawsuits involving nearly identical classes and the possibility of inconsistent outcomes. When two lawsuits involving the same parties and claims are pending, both

seeking judgment *in personam*, one in state court and one in federal court, both may proceed and neither must yield to the other until judgment is entered in one of them, which may then be set up as res judicata. *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456, 466 (1939).

Until December 22, 2004, Farmers was a defendant in two lawsuits, both seeking judgment *in personam*: this case and the MDL action, neither of which had gone to judgment. To be sure, Farmers was aware that one day, judgment would be entered in one of the cases and that judgment would bar the other. To that end, Farmers vigorously defended each case, hoping to get the best possible outcome, so that if that case went first to judgment, Farmers would be able to live with the result. It lacked the control to dictate which case would be first to judgment. If the trial court in this case had decided the post-trial motions a few months sooner, Farmers might now be in federal court in Oregon, telling that court that its lawsuit is barred by the judgment in this case.⁵

E. Farmers Raised Res Judicata at the First Opportunity.

Plaintiffs argue that Farmers should have asserted res judicata before the MDL judgment was entered. They claim Farmers waived res judicata by failing to raise it in its answer. Both arguments ignore Minnesota law. First, res judicata may be properly raised for the first time in a motion when the defense was unavailable at the time of the original answer. *Graham v. Special School District No. 1*, 462 N.W.2d 78, 81 (Minn. Ct. App. 1990) *affirmed*, 472 N.W.2d 114 (Minn. 1991). Farmers could not have asserted

⁵ Ironically, that could have saved Farmers millions of dollars. The MDL court awarded Minnesota class members \$4,000,000 in damages. If, as plaintiffs assert, Farmers was manipulating verdicts, it didn't do it well, ending up with the higher one.

res judicata as a defense until the MDL court entered its Rule 54(b) judgment on December 22, 2004. *Smith v. Woodwind Homes, Inc.*, 605 N.W. 2d 418, 424 (Minn. Ct. App. 2000). Farmers appropriately raised res judicata by motion as soon as it was available.

This is clearly a case for application of res judicata. The causes of action in this case and the MDL action are the same, the class members in this action are in privity with the class in the MDL action, and the final judgment in the MDL action was entered before any order for judgment in this case. This Court should reverse and remand with instructions to enter a judgment of dismissal based on res judicata.

II. THE TRIAL COURT ERRED IN ORDERING INJUNCTIVE RELIEF AND PAYMENT OF A CIVIL PENALTY.

A. Appellant Did Not Violate Minn. Stat. §177.25.

Incredibly, despite recognizing that neither the jury nor the trial court found that Farmers had violated Minn. Stat. §177.25, Plaintiffs argue that this failed claim provided a basis to order civil penalties and injunctive relief. (Resp. Br. at 29-30). Plaintiffs contend that the record is “replete” with evidence that Minn. Stat. §177.25 was violated, but the jury rejected that claim, and Plaintiffs have not appealed that determination. The jury, by its answer to the verdict form questions, determined that Plaintiffs failed to prove that Farmers employed claims representatives during the class period for work weeks in excess of 48 hours without paying them overtime compensation. (A. 36-38). It was the jury’s province, not Plaintiffs’, to determine from the evidence whether Farmers failed to pay compensation for overtime hours worked. The trial court was free to disregard the

jury's finding only if it determined that the verdict was manifestly contrary to the evidence, a determination it did not make. *Noble v. C.E.D.O., Inc.*, 374 N.W.2d 734, 739-40 (Minn. App. 1985). Plaintiffs' claim for violation of § 177.25 failed and cannot be used to justify any equitable relief.

B. Plaintiffs' Legislative History Arguments Fail To Demonstrate That The Trial Court Had The Authority To Order An Injunction Or Civil Penalties.

Plaintiffs' reliance on legislative history to support their interpretation of Minn. Stat. § 177.27 is inappropriate because the statute is unambiguous. *State v. Asfeld*, 662 N.W.2d 534, 541 (Minn. 2003) ("Because we conclude the statutory language here is unambiguous, we decline to examine the statute's legislative history . . ."). A statute is ambiguous only where it is subject to more than one reasonable interpretation. *Murphy v. Allina Health System*, 668 N.W.2d 17, 20 (Minn. 2003). Plaintiffs do not argue that Minn. Stat. §177.27 is ambiguous (Resp. Br. at 32-35). Accordingly, the legislative history cited and relied on by Plaintiffs should not be considered.

1. The legislative record does not support Plaintiffs' position.

Even if Minn. Stat. §177.27 were ambiguous, the available legislative history does not support Plaintiffs' position that the Legislature intended Minn. Stat. §177.27, subd. 8 to provide the district court with exactly the same powers as the Commissioner in Minn. Stat. §177.27, subd. 7.

Plaintiffs rely heavily on February 5, 1996 committee testimony by Deputy Attorney General Strand, but the bill in question was extensively changed after that committee hearing. Remarks of Rep. Goodno, SR35 ("I saw this bill in Labor

Management Committee, and at the time it didn't really pass the smell test, that's putting it mildly. Since then Representative Leighton has worked with a number of people to make this bill a much better bill and a bill that accomplished what he wants to do in a reasonable manner.")

Of particular note, the language of Minn. Stat. §177.27, subd. 7 and §177.30 (which the court below used as its authority to order civil penalties and an injunction) were substantially changed after the first committee hearing. (SR34). According to Representative Leighton, the revisions to the original bill "also deleted provisions relating to possible putative [sic] damages or treble damages, so we weakened the sanctions division quite extensively." (SR35)(March 8, 1996 House Floor testimony). "Civil penalties" or "cease and desist orders" were omitted from the list of possible remedies available to a private plaintiff. (*Id.*)("The bill also would allow an employee to bring a private civil cause of action to seek injunctive relief, compensatory damages, court costs and attorneys fees under chapter 177 and 181."). Private plaintiffs could make claims for punitive damages and penalties under Minn. Stat. §549.191, as they could in any other lawsuit; they would have no specific remedy in Chapter 177. (*See* SR40)("The language, 'relief otherwise provided by law,' would typically refer to putative [sic] damages that would be awarded under Minnesota Statute 549.20. The goal of this is to, one, make the provision for civil cause of action parallel with the remedies provided by the commissioner, and also to make the employee whole in respect to compensatory damages.")(Asst. AG Leppink, Feb. 9, 1996 House Judiciary Committee testimony). Similarly, the "parallel to the cease and desist orders the commissioner can order under

Minn. Stat. §177.27, subd. 7 (after a compliance order pursuant to Minn. Stat. §177.27, subd. 4), private plaintiffs could seek an injunction.

Far from supporting Plaintiffs' position, the legislative history of the 1996 amendments shows that, consistent with the clear language of Minn. Stat. §§177.27, and 177.30, the Legislature never intended private plaintiffs to have identical enforcement power to the Commissioner. For example, only the Commissioner can fine an employer for a failure to maintain employment records. And the Legislative history reveals that private plaintiffs in lawsuits can get, not civil penalties, but the *parallel* remedy of punitive damages under Minn. Stat. §549.20, a remedy not sought in this case.⁶ Similarly, private plaintiffs do not have the right to a cease and desist order under Minn. Stat. §177.27, subd. 7; instead, they have the right to seek a permanent injunction – if they can meet the required common law tests – which Plaintiffs did not do here.

2. A retrospective affidavit of a bill's sponsor is not competent evidence of the legislature's intent in adopting a statute.

Plaintiffs have provided the court with a November 2004 affidavit from Representative Leighton explaining what he recalls about his intent in proposing what became the 1996 amendments to Minn. Stat. Chapter 177. (SR.16-19). Minnesota courts have adamantly and consistently held that such affidavits of legislators are absolutely inadmissible to prove legislative intent. *See In re State Farm Mutual Automobile Insurance Co.*, 392 N.W.2d 558, 569 (Minn. App. 1986)(“Subsequent testimony by

⁶ Farmers raised the civil penalty for private plaintiffs issue (*see* Resp. Br. at 41, n.12), immediately after it first learned Plaintiffs were seeking civil penalties. (*See* Defendant's Responsive Memorandum of Points and Authorities, pp.6-7, filed November 19, 2004 (Docket No. 123)).

individual legislators regarding legislative intent is inadmissible in construing a statute.”); *County of Washington v. A.F.S.C.M.E. Council No. 91*, 262 N.W. 2d 163, 167 (Minn. 1978). Representative Leighton’s affidavit should be stricken from the record.

C. Plaintiffs Failed to Plead the Statutory Violations They Now Assert or the Remedies Ordered by the Trial Court.

Contrary to their assertions on appeal, Plaintiffs never pleaded or pursued claims for a failure to keep time records or for “misclassification.” Paragraph 28 of Plaintiffs’ Amended Complaint explicitly details all of their claims against Farmers. (A.25). Each and every one of them relates solely to a claimed failure to pay overtime wages under Minn. Stat. § 177.25. The jury, by its answer to the verdict questions, squarely rejected that claim. Because there has been no violation of the statute, no further recovery under Minn. Stat. §177.27, subd. 7 or 8 can be had.

Plaintiffs failed to seek relief from the verdict in the trial court under Rules 50 or 59, Minn. R. Civ. P. and failed to seek review of the verdict on appeal. Instead, in an example of retrospective falsification, they now claim that they had actually asserted additional claims and sought additional relief. Specifically, Plaintiffs now assert that they pleaded violations of Minn. Stat. §§177.23, subd. 7 (6); 177.28; 177.30; and Minnesota Rules 5200.0100 and 5200.0200. They further claim that they pleaded entitlement to civil penalties and an injunction for statutory violations.⁷ Examination of the Amended

⁷ In their Amended Complaint, Plaintiffs did not seek civil penalties at all; they sought “waiting time penalties” for members of the plaintiff class whose employment terminated [presumably under Minn. Stat. § 181.13]. (A.26). Plaintiffs requested injunctive relief only to remedy “workload allocation and assignment” and “unlawful refusal to pay all compensation as heretofore alleged.” (A.27).

Complaint (A. 16-30) reveals that no such claims were ever pleaded.

Relief cannot be based on claims that were never pleaded or litigated by consent. *Roberge v. Cambridge Cooperative Creamery Co.*, 67 N.W.2d 400, 403 (Minn. 1954). Plaintiffs argue that Farmers “knew [unpleaded] §177.30 was encompassed within Plaintiffs’ case.” (Resp. Br. at 31). They claim that Farmers therefore voluntarily litigated the Commissioner’s ability to require employers to produce employment records. Nonsense.

A party must have notice of a claim against it and an opportunity to oppose it before an adverse judgment may be entered. *Folk v. Home Mutual Ins. Co.*, 336 N.W.2d 265, 267 (Minn. 1983). When a party does not seasonably object to evidence as outside the scope of the pleadings, issues raised by that evidence can be treated as if they had been raised in the pleadings; however, mere reference to an issue by a party does not constitute intent to litigate it. Minn. R. Civ. P. 15.02; *MT Properties, Inc. v. CMC Rental Estate Corp.*, 481 N.W.2d 383, 386 (Minn. App. 1992). Moreover, consent to try an issue not raised by the pleadings cannot be inferred from the mere fact that evidence was received without objection which would have been pertinent to such an issue had it been raised, where the evidence was pertinent to issues that were actually raised by the pleadings. *Briggs v. Kennedy Mayonnaise Products*, 297 N.W. 342, 346 (Minn. 1941).

Here, Farmers did not consent to litigate recordkeeping claims. As part of their claim for an accounting to establish overtime wages allegedly owed – the claim they *did* plead -- Plaintiffs alleged that “[u]pon information and belief, Defendants, and each of them, possess books and records, including records maintained pursuant to Minn. Stat.

§177.30, from which the amount of compensation due and owing to each of the members of the Plaintiff Class herein can be determined.” (A.26). To assist them in their damage calculations, Plaintiffs sought payroll records from Farmers in discovery. At trial, Plaintiffs’ calculation of damages was based in part on the number of pay periods for class members. (See Tr. 507, Harrison testimony, Oct. 20, 2004). To avoid needless dispute about a mathematical calculation, Farmers stipulated that collectively the class had experienced 12,870 pay periods in the class period. (See A.47). A stipulation to the number of pay periods is not consent to litigate unpleaded recordkeeping claims nor a claimed violation of Minn. Stat. §177.30 first asserted after the verdict.

When Plaintiffs first attempted to raise §177.30 claims through post-trial motions, Farmers immediately objected. (See Defendant’s Responsive Points and Authorities, pp. 9-10, filed November 19, 2004 (Docket No. 123)). By objecting, Appellant timely opposed voluntarily litigating any new unpleaded issues. Because Appellant never voluntarily litigated unpleaded claims or remedies, the relief granted to Plaintiffs on these claims was error.

III. THE TRIAL COURT ERRED IN ITS ANALYSIS AND AWARD OF ATTORNEYS’ FEES TO PLAINTIFFS’ COUNSEL.

Reduced to its simplest form, Plaintiffs’ argument is this: attorneys’ fees are within the discretion of the trial court, and because the trial court said that it had carefully examined the attorneys’ fees request, this Court is without authority to review the fee award. The law is not so simple. This Court has an obligation to review the trial court’s findings and conclusions awarding attorneys fees to Plaintiffs’ counsel.

A. Plaintiffs Misstate the Standard of Review Governing an Attorneys Fee Award.

As explained in Farmers' principal brief, while the "normal" rule is that a trial court's award of attorneys' fees is reviewed for abuse of discretion, when the trial court's decision is based on the interpretation of case law, the review is *de novo*. As the Supreme Court said in *Anderson v. Hunter, Keith, Marshall & Co.*:

When, as here, the losing party raises serious questions as to the reasonableness of the requested fee or the time and rate components of the "loadstar" (*sic*) figure, in making an award trial courts should address the issues raised and give reasons accepting or rejecting the request.

417 N.W.2d 619, 630 (Minn. 1988). That is what the trial court failed to do in this case. Although it paid lip service to *Anderson* and *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), the trial court failed to articulate any rationale for disregarding Farmers' specific objections to the Plaintiffs' fee application.

Farmers made a series of specific, rifleshot objections to the fee application. For example, Plaintiffs' fee application used an hourly rate of \$450 per hour for Mr. Reed and \$325 per hour for Mr. Becker, the lawyers who tried the case. (Becker Aff., EX. A, filed May 5, 2005 (Docket No. 142)). Farmers objected to the use of copies of a rate survey offered in another case, *Fish v. St. Cloud State University* 2001 WL 667778 (D. Minn. 2001), and to the methodology of that survey. (Defendant's Memorandum of Law in Opposition to Plaintiffs' Claimed Attorneys Fees, pp. 4-6, filed May 23, 2005 (Docket No. 143)). Farmers pointed out that in the *Fish* case, Judge Frank determined that \$350 per hour was a reasonable rate for lead counsel in a class action case and reduced the rate for other lawyers to \$225 per hour. *Id.*

Farmers also filed a detailed affidavit of Gerald Knapton, an attorney with extensive experience evaluating class action attorney fee requests. (*See* Knapton Aff., filed May 23, 2005 (inadvertently filed with Docket No. 144)). The Knapton affidavit demonstrates that the rates claimed by Reed and Becker are excessive. (*Id.* at pp. 8-9).

The sum total of the trial court's explanation of why it disregarded Farmers' objections and accepted Plaintiffs' requested rates is the following:

8. That this Court finds that the current hourly rates *normally charged by the respective Plaintiffs' attorneys* and paralegals are reasonable.

9. That as part of their application for fees the Plaintiffs' submitted and the Court reviewed, a detailed study evidencing that their respective hourly rates are comparable to those charged by equally competent attorneys and paralegals in their respective communities.

(A.68). With all due respect, the trial court did not even attempt to address the issues raised by Farmers. The trial court's blessing of Plaintiffs' attorneys' "normal" rate is particularly remarkable because Plaintiffs' attorneys never submitted an affidavit certifying the normal hourly rate for attorneys for whom compensation was sought and an explanation of any difference between the hourly rate sought and the normal hourly rate as required by Rule 119.02(2) of the General Rules of Practice. The record thus does not disclose the attorneys' "normal" hourly rate.

In *Anderson*, the supreme court used some strong language to describe the trial court's duty to test the reasonableness of claimed fees:

[W]hen the reasonableness of Anderson's attorneys' asserted fees was being challenged as they were here, it seems to us, for example, that the trial court in its order approving a fee based upon a "lodestar" figure, should have articulated why it found it reasonable that Anderson's attorney charged the time of at least three lawyers in each day of a five day trial resulting in

claimed fees which appellant claims is in excess of \$12,000, when only one attorney at trial questioned witnesses and argued the case. While we appreciate that a good way to train associates in trial practice is to have them "sit in" on trials and aid lead counsel, it does not follow necessarily that their time is "reasonably expended" in behalf of the client, and if not, properly billed to one's adversary

417 N.W.2d at 629. The *Anderson* court went on to require that when charges in a fee application are challenged, the trial court must not only decide the claim, but also provide a "concise but clear explanation of its reasons for the fee award." *Id.* In this case, Farmers, through its memorandum of law and the Knapton affidavit, specifically challenged many of the Plaintiffs' requested charges for lack of description of work performed, vagueness, unnecessary duplication of effort and unreasonableness. (Defendant's Memorandum, pp. 6-15, filed May 23, 2005 (Docket No. 143); Knapton Aff., pp. 13-18 (inadvertently filed with Docket 144)). As a specific example, as in *Anderson*, Farmers objected to charges of *four* attorneys who attended the trial, sat in the back and "observed" or "took notes." The trial court simply failed to address Farmers' objections. Thus, for precisely the same reason that the court in *Anderson* reversed and remanded the attorneys' fee award – the trial court's failure to articulate a reason for rejecting objections to the fee application – this Court must reverse and remand the attorneys' fee award in this case.⁸

We do not remand because we conclude the trial court's fee award was unreasonable. The fee allowed by the court may be reasonable and

⁸ To be sure, the scrutiny and articulation of reasons required by *Anderson* and *Hensley* are time consuming and a burden on a time-challenged trial court judge. If a remand is necessary, the Court might suggest that the trial court appoint a special master under Minn. R. Civ. P. Rule 53, someone with credentials like those of Gerald Knapton, to perform and document the necessary analysis.

justified by the circumstances, but in the absence of findings, or their equivalent, employing the *Hensley v. Eckerhart* analysis as adopted by this court in *Specialized Tours, Inc. v. Hagen*, we are unable to say that the trial court's findings were not clearly erroneous.

Anderson, 417 N.W.2d at 630.

B. The Trial Court Erred In Awarding A Lodestar Multiplier When The Plaintiffs Failed To Prevail On Any Significant Claim.

The Plaintiffs argue that under *Blum v. Stenson*, 465 U.S. 886, 901 (1984), the trial court could have erred by adjusting the lodestar upward *only* if a statute or case law prohibited an upward adjustment. (Resp. Br. at 44). *Blum v. Stenson* says no such thing, on page 901 or elsewhere. In fact, the *Blum* Court reversed lower court decisions which awarded a 1.5x upward multiplier to the prevailing plaintiff. *Id.* at pp 891-892, 902.

The Plaintiffs argue that the lodestar multiplier was appropriate because the plaintiffs' lawyers "did a good job" and as a result Farmers now has to pay overtime compensation to all its claims adjusters in Minnesota and a large civil penalty. As noted in Farmers' principal brief at p. 36, n. 7, Farmers reclassified its Minnesota APD and PIP claims representatives as nonexempt before trial and its Minnesota property claims representatives as nonexempt before the trial court issued its injunction order. The civil penalties totaling \$365,000 (*See* A.85-86) pale by comparison to the \$32 million in back pay and liquidated damages the Plaintiffs sought in this lawsuit. In short, the Plaintiffs fell far short of their objectives and wasted most of their time and efforts on unsuccessfully seeking overtime compensation and liquidated damages.

Blum expressly rejects the reasons for enhancing the lodestar amount urged by the Plaintiffs and adopted by the trial court. 465 U.S. at 898-901. So should this Court.

The Plaintiffs claim that *Hensley v. Eckerhart* does not require the trial court to “divide the hours worked between winning and losing claims.” (Resp. Br. at 46). They say, too, that the *Hensley* Court affirmed the district court’s award and explanation of attorneys’ fees. *Id.* Wrong on both points. In fact, *Hensley* reversed, precisely because the trial court failed to consider the extent to which the plaintiff did and did not prevail:

In this case the District Court began by finding that “[t]he relief [plaintiffs] obtained at trial was substantial and certainly entitles them to be considered prevailing.... It then declined to divide the hours worked between winning and losing claims, stating that this fails to consider “the relative importance of various issues, the interrelation of the issues, the difficulty in identifying issues, or the extent to which a party prevails on various issues.” ... Finally, the court assessed the “amount involved/results obtained” and declared: “Not only should [plaintiffs] be considered prevailing parties, they are parties who have obtained relief of significant import. [Plaintiffs’] relief affects not only them, but also numerous other institutionalized patients similarly situated. The extent of this relief clearly justifies the award of a reasonable attorney’s fee.”

* * *

We are unable to affirm the decisions below, however, because the District Court’s opinion did not properly consider the relationship between the extent of success and the amount of the fee award. The court’s finding that “the [significant] extent of the relief clearly justifies the award of a reasonable attorney’s fee” does not answer the question of what is “reasonable” in light of that level of success. We emphasize that the inquiry does not end with a finding that the plaintiff obtained significant relief. A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole.

Our holding today differs at least in emphasis from that of the Eighth Circuit in *Brown*. We hold that the extent of a plaintiff’s success is a crucial factor that the district courts should consider carefully in determining the amount of fees to be awarded.

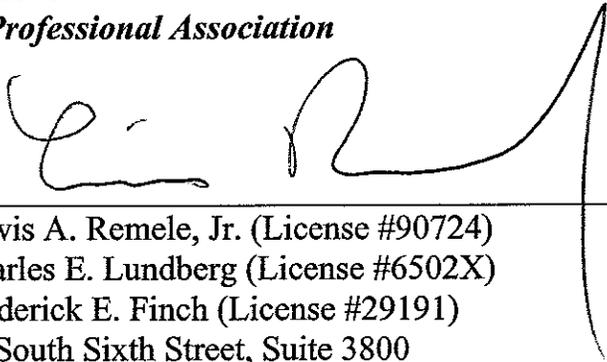
461 U.S. 438-441 (footnotes and citations omitted). Like the trial court in *Hensley*, the court below failed to consider Plaintiff’s lack of success in setting the lodestar fee and in

adjusting that fee. The result here must be the same as the result in *Hensley*. This Court must reverse and remand with instructions to faithfully follow the instructions given by the authority cited above.

CONCLUSION

For all the reasons stated above and in Appellant's principal brief, this Court should remand with instructions to enter a judgment of dismissal because of res judicata. Failing that, the trial court should strike the remedies issued by the trial court and remand for reconsideration of the attorneys' fee award in conformance with the law and its opinion.

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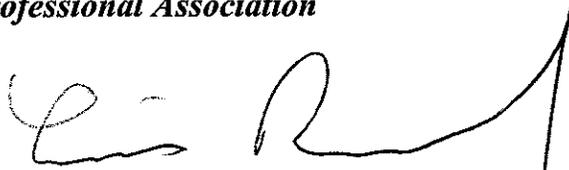
CERTIFICATION

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.1, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 6,997 words. This brief was prepared using Word 2003 word processing software.

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ERRATA

On March 24, 2006, the Court entered an Order granting Appellant's motion to accept a nonconforming transcript. Appellant's principal brief contained ambiguous citations to the record, since Appellant had not noticed the pagination problem at the time the brief was filed. To clarify citations in its brief, Appellant offers the following table, which corrects the ambiguous citations:

Page Citation Appears in Brief	Citation as Stated in Brief	Location of Testimony
Page 5	(Tr. 138-39)	Tr., Oct. 7, 2004, at 138-39
Page 11	(Tr.111)	Tr., Oct. 18, 2004, at 111
Page 24	(Tr. 93)	Tr., Oct. 6, 2004, at 93
Page 36	(Tr. 111)	Tr., Oct. 18, 2004, at 111
Page 36	(Tr. 22-24)	Tr., Oct. 6, 2004, at 22-24