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STATE OF MINNESOTA
IN COURT OF APPEALS

OFFICE OF
APPELLATE COURTS

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FILED

LESLIE FAIN, TRUSTEE FOR THE NEXT
OF KIN OF CHAD JAMES SWEDBERG
RESPONDENT

VS.

KENNETH EUGENE ANDERSEN
APPELLANT

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. THE DISTRICT COURT DID ERROR WHEN SUMMARY JUDGMENT WAS GRANTED

Contrary to Respondent's brief, the issues raised in Appellant's brief and appendix such as withholding evidence (police reports) and falsifying testimony (all evidence and testimony about the 4-wheeler and search warrant) do in fact preclude summary judgment and the district court *did* error when it used a prior criminal conviction to collaterally estop Appellant and bar him from re-litigating the issues in the death of Chad Swedberg.

In a careful review of their brief, one can see that none of their responses take away from the fact that Appellant did not have a fair and full opportunity to be heard regarding the death of Mr. Swedberg. In fact, one can see how crucial the falsified and omitted evidence and testimony was to the finding of the juries' verdict, the upholding of Appellant's conviction, and Respondent's case. This is evident when Respondent continues to misuse and misrepresent facts, as mentioned above; in their brief to convince this court that Appellant was liable in the death of Mr. Swedberg and granting summary judgment in their favor was proper. Although, Appellant has proven, beyond a shadow of a doubt, that the crucial evidence used was untrue.

Another issue on this appeal is whether the summary judgment court erred when it used the post-conviction court's ruling to determine whether collateral estoppel should apply and if there were genuine issues of material fact that may preclude summary judgment.

If one looks at the post-conviction court's ruling, one can see that the court ruled that the issues raised were *believed* to be known to Appellant at the time of direct appeal and applied the Knaffla bar rule. As stated in Appellant's brief, Knaffla rule does not apply to issues of summary judgment.

It is one of Appellant's arguments that the summary judgment court should determine and make an independent ruling as to whether or not Appellant's post-conviction would have affected the result or outcome of the case and whether a reasonable person would have drawn a different conclusion at trial.

The reason behind part of this argument is in the testimony stemming from the theft of a 4-wheeler at Appellant's trial that was untrue. This was proven in Appellant's post-conviction petition, but was overlooked by the post-conviction court knowing it was crucial piece of evidence in the State's case.¹

Had the court independently looked at Appellant's issues and read the post-conviction court's ruling, they would have observed that the post-conviction court had missed this crucial piece of evidence, and that Appellant had, in fact, uncovered *more* evidence that had been proven to be falsified and/or misleading.

More importantly, by not thoroughly reviewing the Appellant's issues and the post-conviction court's ruling, the summary judgment court unknowingly used the falsified evidence and testimony in their memorandum to grant summary judgment in Respondent's favor.

Viewing this evidence mentioned above and the remaining evidence found in Appellant's brief and appendix in a light most favorable to Appellant, shows that summary judgment court erred and there are genuine issues of material facts that have never been in front of a rational trier of fact. These errors show that Appellant did not have a full and fair opportunity to be heard in the liability claim in the death of Mr. Swedberg, which precludes collateral estoppel

¹ The Prosecution claims in their post-conviction memorandum that they never had the discovery in their possession at trial that proves their witness, Investigator Jeff Nelson falsified all his testimony about the facts surrounding the 4-wheeler, which the State used for motive. See Appellant's appendix-pgs-118, 167-68, 277.

A thorough review of Appellant's brief will show that Appellant has never disputed that summary judgment would not be proper in a civil suit based on a theory of battery provided the party convicted of intentionally killing a person (with a gun) had a full and fair opportunity to litigate all issues in the criminal case.

Appellant admits that he was a party to a prior proceeding in which he was convicted and appealed to no avail though the evidence was wholly circumstantial. The core question on this appeal now is whether or not facts from that prior criminal proceeding can be used to collaterally estop Appellant from arguing liability in a civil suit when Appellant has proven the key evidence used to convict him was falsified and/or misleading and that withheld exculpatory evidence surfaced *after* his initial appeal.

The district court and Respondent have taken a position that when a party discovers evidence after trial and appeal, such as appellant has, Appellant should not be able to use that evidence to re-litigate the issues of liability during summary judgment of a civil suit knowing this evidence is crucial to Appellant proving his innocence. The district court and Respondent cite *Travelers Insurance Co. v. Thompson* 163 N.W. 2d 296 (Minn 1969) to come to this conclusion.

A review of this case does show that the Minnesota Supreme court did express that a convicted party should not be able to re-litigate the civil aspects of the determination (liability) over and over again, if, and only if, a review court can infirmly say that after an independent review of the record of the criminal proceedings, the party had an untrammelled right to fully litigate the issues which are identical to those in the action before them. *Id* at 296.

Contrary to the district court and Respondent, using a tainted record during summary judgment is not absolute. There have been safeguards placed in the judicial system for a party, too. These safeguards seeming exist within a civil suit as well.

As stated in Appellant's brief and appendix, none of the newly discovered evidence (4-wheeler, search warrant issues, tax prepares testimony, etc...) has ever been in front of a rational trier of fact. The falsified and misleading evidence has, but should be irrelevant at this point. In fact, nowhere in then district court's memorandum or the Respondent's brief will this court find that these issues have been adjudicated.

Seemingly there has never a case like this in the Minnesota courts before. Appellant agrees with the district court and Respondent that there are a few cases that have been decided by the Minnesota courts before dealing with the prior conviction and whether applying collateral estoppel would be proper in those cases.

In *Travelers Insurance Co. v. Thompson* 163 N.W. 2d 289 (Minn 1969) (affirmed) the court held after reviewing the facts, the husband's judgment of a conviction in the criminal case for the murder of his wife was conclusive as to the rights in the civil action to determine his rights to the life insurance proceeds of his deceased wife; also see *Illinois Farmers Insurance Co. v. Reed* 662 N.W. 2d 529 (Minn 2003) (reversed and remanded) the court held that an insurance company can not invoke collateral estoppel against a third party plaintiff was not a party to the criminal action and did not have a full and fair opportunity to litigate the issues.

The facts surrounding the above cases are substantially different than the issues in this appeal, except that the court held in *Illinois Framers Insurance Co. Reed*, that if a party did not have a full and fair opportunity to litigate the issues, the case should be reversed. Appellant's

case is clearly distinguishable with Illinois Farmers Co. Reed, since Appellant has yet to have a full and fair opportunity to litigate the liability in the death of Mr. Swedberg.²

² Respondent cited numerous cases that have no binding dicta in the Minnesota courts, as well as an unpublished opinion to persuade this court, but in similar situations, higher courts have stated unpublished opinions should be used with caution, or not at all. See *Dynamic Air, Inc. v. Bloch* 502 N. W. 2d 796, 800 (Minn App 1993).

CONCLUSION

In conclusion, Appellant asks this court to independently review the facts found above, and in Appellant's brief and appendix. Viewing this evidence in a light most favorable to Appellant as this court must, one can see that Appellant did not have a full and fair opportunity to be heard on the liability of the death of Mr. Swedberg. This is evident when Appellant is still receiving exculpatory evidence well after the direct appeal of the criminal proceeding in which this case originated. Contrary to Respondent there are genuine issues of material fact that preclude summary judgment. Appellant respectfully asks that the summary judgment ruling be reversed and a new trial be heard on the liability.

Dated: February 22 2012.

Respectfully submitted



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**CERTIFICATION THAT BRIEF COMPLIES WITH
Minn. R. App. P. 132.01 SUBD 3**

The undersigned certifies that the brief submitted herein, using a proportional spaced font size of 13 contains less than 1,400 words and complies with the type/volume limitations of the Minnesota Rules of Civil Appellant Procedure.



Kenneth Eugene Andersen