

NO. A05-1952

A05-340

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State of Minnesota  
**In Supreme Court**

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

v.

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

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**APPELLANTS' REPLY BRIEF**

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Kay Nord Hunt (#138289)  
LOMMEN, NELSON, COLE &  
STAGEBERG, P.A.  
2000 IDS Center  
80 South Eighth Street  
Minneapolis, MN 55402  
Tel: (612) 339-8131  
Fax: (612) 339-8064

George E. Antrim, III, Esq.  
GEORGE E. ANTRIM III PLLC  
201 Ridgewood Avenue  
Minneapolis, MN 55403  
Tel: (612) 872-1313  
Fax: (612) 870-0689

*Attorneys for Respondents*

Thomas J. Shroyer (#100638)  
Peter A. Koller (#150459)  
MOSS & BARNETT, P.A.  
4800 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, MN 55402  
Tel: (612) 877-5000  
Fax: (612) 877-5999

*Attorneys for Appellants*

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## INTRODUCTION

The initial brief filed by Defendants Copeland Buhl & Company, PLLP (“Copeland Buhl”) and Lee Harren effectively rebuts many of the arguments contained in the responsive brief that Plaintiffs Brown-Wilbert, Inc. (“Brown-Wilbert”) and Christopher Brown (“Chris”) have now filed. Accordingly, this reply brief will focus upon those arguments and statements of Plaintiffs that warrant additional attention.

## ARGUMENT

### **I. THE DISTRICT COURT PROPERLY HELD THAT RES JUDICATA PRINCIPLES BAR PLAINTIFFS’ CLAIMS IN THIS ACTION.**

#### **A. There Was A Final Judgment in *Brown-Wilbert I.*<sup>1</sup>**

Plaintiffs devote a large part of their brief to a dubious attempt to support the Court of Appeals’ erroneous statement that “[r]es judicata requires the expiration of the appellate process before a judgment is considered final.” For the reasons set forth below and in Defendants’ initial brief, the Court should correct the Court of Appeals’ misstatement of Minnesota law and reinstate the decision of the District Court.

#### **1. Minnesota Follows the Majority Rule that A Judgment that Has Been Appealed Remains Final for Res Judicata Purposes.**

The federal courts and a majority of the states have adopted the rule that, for purposes of the res judicata doctrine, an appeal does not affect the finality of a judgment. *See Campbell v. Lake Hallowell*, 852 A.2d 1029, 1039-40 (Md. Ct. Spec. App. 2003) (discussing majority and minority rules and cataloging decisions from numerous jurisdictions). Indeed, even Plaintiffs acknowledge that “the established rule in the

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<sup>1</sup> This brief refers to Plaintiffs’ first action (App. File A05-0340) as *Brown-Wilbert I.*

federal courts and in the majority of the states is that a final judgment retains all of its res judicata consequences pending decision on appeal.” Resp. Br. at n. 9.

The court in *Campbell* thoroughly explains the rationale behind what the Restatement (Second) of Judgments refers to as “[t]he better view.” 852 A.2d at 1040-41 (quoting Restatement (Second) of Judgments § 13 cmt. f (1982)). Specifically, the court in *Campbell* states:

[T]o strip a judgment of its preclusive effect merely because an appeal is pending, in our view, undermines the very purpose of the doctrine of res judicata, which is "to avoid the expense and vexation of multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibilities of inconsistent decisions."

*Id.* at 1040 (emphasis added; citation omitted).

In that same vein, the court in *Campbell* further notes:

“If a judgment was denied its res judicata effect merely because an appeal was pending, litigants would be able to refile an identical case in another trial court while the appeal is pending, which would hog-tie the trial courts with duplicative litigation.”

*Id.* at 1041 (quoting *Warwick Corp. v. Maryland Dept. of Transp.*, 573 F. Supp. 1011, 1014 (D. Md. 1983), *aff’d*, 735 F.2d 1359 (4th Cir. 1984)) (emphasis added). In addition, the court in *Campbell* points out that the burden of vexatious litigation in the absence of the majority rule would be felt at the appellate level, as well as at the trial court level:

[I]f the pendency of an appeal prevented a judgment from having a res judicata effect, litigants would be encouraged to file meritless appeals to obtain a second chance to relitigate the same issue or to delay the imposition of a valid judgment.

*Id.* (emphasis added).

Contrary to Plaintiffs' contentions and the ruling of the Court of Appeals, the courts of this state have long followed the majority rule that a judgment retains its res judicata effect while under appeal. *See, e.g., State ex rel. Spratt v. Spratt*, 150 Minn. 5, 7, 184 N.W. 31, 32 (1921); *Wegge v. Wegge*, 252 Minn. 236, 238, 89 N.W.2d 891, 892 (1958); *American Druggists Ins. v. Thompson Lumber Co.*, 349 N.W.2d 569, 572 (Minn. Ct. App. 1984). As the following section of this brief explains, that rule has not been discarded in previous decisions; and, there is no reason for this Court to discard it now. Instead, this Court should reverse the erroneous decision of the Court of Appeals and reinstate the judgment of dismissal in this action on res judicata grounds.

## **2. Plaintiffs' Attempts to Twist Minnesota Law Must Be Rejected.**

Instead of simply trying to argue for a change in existing Minnesota law, Plaintiffs have resorted to an elaborate charade to try to justify the ruling of the Court of Appeals.<sup>2</sup> They have woven a tapestry of misleading quotations from prior decisions of this Court in an effort to disguise the Court of Appeals' misunderstanding of the law of res judicata. This Court should see through Plaintiffs' deception and recognize that the cases on which Plaintiffs rely are not controlling authority because those cases did not involve the same issue as the present case.

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<sup>2</sup> Presumably, Plaintiffs recognize that arguing for a change in the law would be tantamount to an admission that the Court of Appeals erred, since the Court of Appeals did not believe that it was changing existing law and even acknowledged that it lacked the authority to do so. *See* A.A. 9 (acknowledging that "the task of extending existing law" belongs to the Minnesota Supreme Court and the Minnesota Legislature, not to the Court of Appeals) (citations omitted).

According to Plaintiffs, in *Holen v. Minneapolis-St. Paul Metro. Airports Comm'n*, 250 Minn. 130, 184 N.W.2d 282 (1957), this Court overruled a long line of res judicata decisions dating back to 1921, without so much as mentioning (a) any of those decisions or (b) the doctrine of res judicata. Furthermore, Plaintiffs suggest that this Court temporarily forgot about that major change in the law of res judicata when, less than ten months after issuing *Holen*, the Court again authoritatively cited the 1921 decision that was the keystone decision in the line of res judicata decisions that Plaintiffs claim were overturned *sub silentio* in *Holen*. See *Wegge v. Wegge*, 252 Minn. 236, 238, 89 N.W.2d 891, 892 (1958) (citing *Spratt* in support of rule that a judgment retains its res judicata effect while on appeal).<sup>3</sup>

In truth, the *Holen* decision has nothing to do with res judicata. That decision addresses a completely different issue - namely, the proper application of retroactive changes in the law. 250 Minn. at 136-37, 184 N.W.2d at 287. Indeed, the decision expressly states that “the authoritative rule of [the] decision is necessarily limited to curative legislation enacted after an adjudication of public rights.” *Id.* at n. 9. For purposes of that narrow issue, this Court held that a judgment or order in a case is not “final” -- *i.e.*, the case is considered to be “pending” and, therefore, subject to changes in

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<sup>3</sup> Rather than acknowledging the simple fact that the *Holen* decision was never intended to have any application in the res judicata context, Plaintiffs claim that the Court in *Wegge* “ignored” *Holen*. Resp. Br. at n. 6. Plaintiffs do not mention the 1984 Court of Appeals decision that also “ignored” *Holen* and favorably cited the *Spratt* line of decisions. See *American Druggists*, 349 N.W.2d at 572. The fact is, Plaintiffs and the Court of Appeals are the ones doing the “ignoring.” They have ignored *Wegge*, *American Druggists*, and the rest of the line of res judicata cases dating back to *Spratt*.

the law -- until any appeal process has been completed. *Holen*, 250 Minn. at 136-37, 184 N.W.2d at 287.

The holding in *Holen*, is in accordance with the position stated by the United States Supreme Court in *Griffith v. Kentucky*, 479 U.S. 314, 322-23 (1987). That fact is significant when one recalls that the rule in the federal courts with regard to res judicata is that a judgment remains final during the pendency of any appeal. See *Pharmacia & Upjohn Co. v. Mylan Pharm. Inc.*, 170 F.3d 1373, 1381 (Fed. Cir. 1999). Plainly, this Court and the federal courts have each recognized that the rule governing whether to apply retroactive changes in the law to cases on appeal need not be the same as the rule governing whether a case being appealed retains its res judicata effect.

As a practical matter, while the *Holen* decision refers to “finality,” the issue in that case (and in the other Minnesota cases cited in footnote 3 of Respondents’ Brief) was the meaning of the word “pending” in the context of a judicial or statutory directive to retroactively apply a change in the law to “pending” cases.<sup>4</sup> Indeed, the very language that Plaintiffs quote from *Holen* was expressly characterized by this Court in a later decision as a discussion of what constitutes a “pending” case for purposes of applying a retroactive change in the law. See *Lewis*, 656 N.W.2d at 537.

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<sup>4</sup> Like *Holen*, the three cases cited in footnote 3 of Respondents’ Brief all involved the issue of retroactive application of changes in the law, not res judicata. See *State v. Lewis*, 656 N.W.2d 535, 537-38 (Minn. 2003) (effect of retroactive change in law governing criminal sentencing); *County of Hennepin v. Brinkman*, 378 N.W.2d 790, 792-93 (Minn. 1985) (effect of repeal of a statute); *Brezinka v. Bystrom Bros., Inc.*, 403 N.W.2d 841, 843 (Minn. 1987) (effect of a change in the law upon the “law of the case” doctrine). The same is true of *People v. Bank of San Luis Obispo*, 112 P. 866 (Cal. 1910), a decision that is cited in *Holen* and in Respondents’ Brief.

Given the fact that the issue in *Holen* was retroactivity rather than res judicata; given the total absence of any mention in *Holen* of res judicata or the line of decisions that Plaintiffs claim the Court overruled in that case; and given this Court's subsequent citation with approval of one of those purportedly overruled cases; this Court must reject Plaintiffs' argument that *Holen* established a new rule of finality in res judicata cases.

This Court must also reject Plaintiffs' suggestion that the *Indianhead Truck Line* decision somehow controls the present case. See *Indianhead Truck Line, Inc. v. Hvidsten Transport, Inc.*, 268 Minn. 176, 128 N.W.2d 334 (1964). That case actually deals with the construction of the term "final order" in an agreement between the parties, not in the context of any attempt to apply res judicata principles. *Id.* at 340. In fact, the language that Plaintiffs have quoted from *Indianhead Truck Line* is *dicta*, since the Court in that case determined that the language of the agreement was clear and unambiguous. *Id.* Moreover, the cases that the Court in *Indianhead Truck Line* cited in support of the quoted language do not fully support that language. See *Ancateau v. Commercial Cas. Ins. Co.*, 48 N.E.2d 440 (Ill. Ct. App. 1943) (garnishment case that was subsequently overruled in *Cuttone v. Peters*, 214 N.W.2d 499 (Ill. Ct. App. 1966)); *In re Harkavy's Estate*, 34 N.Y.S.2d 910 (N.Y. City Ct. 1942) (rejecting attack on a tax ruling years after the appeal process was over); *Commonwealth v. Jackson*, 28 A.2d 894 (Pa. 1942) (per curiam affirmance of lower court decision that rejected a collateral attack on an administrative ruling after the time for appealing the administrative ruling had expired); *N.E. Texas Motor Lines, Inc. v. Texas & Pac. Motor Transp. Co.*, 159 S.W.2d 926 (Tex.

Civ. App. 1941) (rejecting argument that earlier order that expressly contemplated further administrative proceedings rendered order following subsequent proceedings void).<sup>5</sup>

Finally, as pointed out in Defendants' initial brief, the *Joseph* decision on which the Court of Appeals relied and from which Plaintiffs now quote did not actually involve the issue of the res judicata status of a judgment that has been appealed. *See State v. Joseph*, 636 N.W.2d 322 (Minn. 2001). The judgment in question in that case was never appealed and all appeal rights had expired. *Id.* at 325. The issue concerning finality in that case focused upon whether a Rule 41 dismissal functions as a judgment on the merits, not upon whether an appeal would have affected the finality of the judgment for res judicata purposes. Indeed, nothing in the *Joseph* decision or in the briefs submitted to this Court by the parties to that case indicates that any party was arguing that the judgment of dismissal was not "final." The issue was whether that judgment was "on the merits." Accordingly, Plaintiffs' reliance upon *Joseph* is misplaced, just like Plaintiffs' reliance on *Holen* and *Indianhead Truck Lines* is misplaced.

### **3. Affirming the Decision of the Court of Appeals in *Brown-Wilbert I* Will Preserve A Final Judgment.**

The Court should reject Plaintiffs' argument that no final judgment will exist in the event that this Court affirms the decision of the Court of Appeals in *Brown-Wilbert I*. That argument is based upon cases that deal with "finality" for purposes of whether a case is appealable. Those cases are not controlling in the present case, since appealability is not at issue here.

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<sup>5</sup> Plaintiffs conveniently omitted all citations when they quoted *Indianhead Truck Line*. Resp. Br. at 8.

As a practical matter, a decision by this Court affirming the dismissal of the professional malpractice claim in *Brown-Wilbert I* will necessarily be final, in that such a decision will not be subject to additional appeals. Furthermore, that final determination will serve as a bar to the claims in the present case, since the claims in the present case all relate back to Plaintiffs' basic contention that Defendants breached professional duties to Plaintiffs.

**B. The Other Res Judicata Factors Are Met in the Present Case.**

In addition to a final judgment, the following three elements must be established in order for res judicata to be applied: (1) the earlier claim involved the same parties or those in privity with them; (2) the earlier claim involved the same cause of action; and (3) the estopped party had a full and fair opportunity to litigate the earlier claim. *See Wilson v. Comm'r of Revenue*, 619 N.W.2d 194, 198 (Minn. 2000). Even Plaintiffs do not dispute that the present action involves the same parties as *Brown-Wilbert I*. Thus, this Court may focus on the other factors.

**1. *Brown-Wilbert I* is the Same Cause of Action As *Brown-Wilbert II*.**

The District Court correctly observed that “[t]he factual allegations in the former action were simply reasserted without material changes and the Counts were re-labeled to sound in fraud.” A.A. 13. The District Court further observed that “Defendants do not overstate in characterizing the complaint as a virtual ‘clone’ of the earlier complaint.” A.A. 14. Plaintiffs respond to those obvious problems by advancing the unconvincing argument that the allegations against Defendants in the present case are not in the nature of professional malpractice claims and that those allegations therefore (a) do not trigger

the expert affidavit requirements of Minn. Stat. § 544.42 and (b) are not subject to dismissal on res judicata grounds by virtue of the dismissal of *Brown-Wilbert I*. Under the circumstances, the Court should reject Plaintiffs' argument for several reasons.

First, as explained in Defendants initial brief, res judicata is not limited to matters that were actually litigated in the first lawsuit; it also applies "to every matter which might have been litigated therein." *Hauser v. Mealey*, 263 N.W.2d 803, 805 (Minn. 1978) (emphasis in original). Plaintiffs have not articulated any reason why the claims in this lawsuit could not have been made in *Brown-Wilbert I*. That is because there is no reason. Indeed, in all but name, the claims in the present action were made in *Brown-Wilbert I*.

Second, Plaintiffs' argument ignores the fact that the central theme of the complaints in both actions is that Lee Harren breached professional duties to Plaintiffs by siding with Jerry Brown against Chris rather than remaining neutral. Expert testimony will plainly be required to sort out Defendants' competing obligations to Jerry and Plaintiffs. *Meyer v. Dygert*, 156 F. Supp. 2d 1081, 1091 (D. Minn. 2001) (explaining that claims related to conflicts of interest "involve[ ] information that is not within the common knowledge of the jury" and that expert testimony is therefore necessary with regard to such claims).<sup>6</sup>

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<sup>6</sup> Plaintiffs falsely claim that Defendants did not contest Plaintiffs' contention that the expert witness requirements of Minn. Stat. § 544.42 do not apply to the claims in *Brown-Wilbert II*. See Resp. Br. at n. 9. Defendants actually argued that "Plaintiffs are flatly wrong" to contend that some of their claims do not require expert testimony. See Defendants' Reply Memorandum in Support of Their Motion to Dismiss (5/5/05) at 7-8 (emphasis added). Furthermore, in support of that strong statement, Defendants cited a

Third, Plaintiffs' attempt to create an exception to Minn. Stat. § 544.42 for "claims grounded on a professional's intentional acts" improperly overlooks the fact that § 544.42 applies to claims for "negligence or malpractice in rendering a professional service where expert testimony is to be used by a party to establish a prima facie case." Minn. Stat. § 544.42, subd. 2 (emphasis added). Plaintiffs' proposed exception improperly reads the underscored language right out of the statute. *See* Minn. Stat. § 645.17 (2) (establishing presumption that "the legislature intends the entire statute to be effective and certain"). By its terms, the statute governs any claim against a professional where expert testimony is needed to establish the claim, regardless of whether the claim is based on negligence or on some other theory. As noted above, expert testimony would be necessary to resolve the conflict of interest allegations that are at the heart of each of Plaintiffs' claims.<sup>7</sup>

Fourth, the one allegation that Plaintiffs contend supports a claim for intentional fraud does nothing of the sort. Plaintiffs point in their brief to their simple allegation that Lee Harren "accepted money from Jerry under the table without the knowledge of Chris." Even if that allegation were true (which it is not), it does not state a claim for fraud or anything else. Fraud claims must be stated with particularity. Minn. R. Civ. P. 9.02.

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court of appeals decision that rejected a similar attempt to avoid dismissal under § 544.42. *Id.* (citing *Albert v. Binsfield*, 2003 WL 139529 (Minn. Ct. App.)).

<sup>7</sup> The weakness of Plaintiffs' argument is reflected in the dubious case citations that Plaintiffs offer in support of the argument. *See Meyer*, 156 F. Supp. 2d at 1091 (noting that expert testimony is required in conflict of interest cases involving professionals); *Serhofer v. Groman & Wolf, P.C.*, 610 N.Y.S.2d 294, 295 (A.D. 1994) (defendant conceded that expert testimony was unnecessary); *Kohoutek v. Hafner*, 383 N.W.2d 295, 299 (Minn. 1986) (medical battery claim).

Plaintiffs' claim lacks particularity and, more importantly, does not reflect any damage to Plaintiffs. The fact that Jerry paid money to Lee Harren does not mean that any fraud occurred, as it is undisputed that Lee Harren provided services to Jerry Brown and Brown-Wilbert.<sup>8</sup>

**2. Plaintiffs Had A Full and Fair Opportunity to Litigate *Brown Wilbert I.***

As discussed in Defendants' initial brief to this Court, Plaintiffs had ample opportunity in *Brown-Wilbert I* to litigate their claims against Defendants. That *Brown-Wilbert I* was dismissed under Minn. Stat. § 544.42 does not mean that Plaintiffs did not have a fair opportunity to pursue their claims. Plaintiffs simply squandered that opportunity through ill-conceived procedural maneuvers and missteps.

While it is true that res judicata is an equitable doctrine and that its application turns on the particular facts and circumstances of each case, *R.W. v. T.F.*, 528 N.W.2d 869, 872 n.3 (Minn. 1995) (citing *Johnson v. Consol. Freightways, Inc.*, 420 N.W.2d 608, 613-14 (Minn. 1988)), equity does not require that Plaintiffs be allowed to burden the courts and Defendants with a second lawsuit. Plaintiffs have no one but themselves to blame for the dismissal of *Brown-Wilbert I*. Moreover, Plaintiffs are not without recourse. Through their appeal in *Brown-Wilbert I*, Plaintiffs still have the opportunity to contend that none of their claims should be barred under Minn. Stat. § 544.42 or to

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<sup>8</sup> Reading between the lines, it seems as if Plaintiffs are alleging that money that should have gone to Copeland Buhl was wrongly paid to Lee Harren. No such payments to Lee Harren were made. Even if such payments had been made, however, Plaintiffs would not have any standing to complain. Any claim would belong to Copeland Buhl.

contend that only some of their claims should be barred under that statute. If they are successful in that regard, they can then seek to amend their complaint in that action to assert the claims they have inappropriately tried to pursue in the present action.

Because Plaintiffs retain the opportunity to obtain relief in their initial lawsuit (*Brown-Wilbert I*), there is nothing unfair about foreclosing the present lawsuit (*Brown-Wilbert II*). On the contrary, it would be unfair to Defendants and the public to let Plaintiffs continue to pursue the present lawsuit. This attempt by Plaintiffs to simultaneously pursue this lawsuit at the district court level while their prior lawsuit arising out of the identical facts was still on appeal was an abuse of the legal system and a source of vexation for Defendants. Accordingly, the District Court properly dismissed the present lawsuit.

## **II. PLAINTIFFS' CLAIM SPLITTING SHOULD NOT BE PERMITTED.**

### **A. Defendants Properly Raised the Rule Against Splitting A Cause of Action.**

Contrary to the assertions in Respondents' Brief, Defendants properly raised the rule against splitting a cause of action before the District Court and the Court of Appeals. Indeed, that rule was discussed by both parties in memoranda submitted to the District Court. *See* Defendants' Memorandum of Law in Support of Motion to Dismiss and for Sanctions (3/15/05), at 9-11 (noting that "a plaintiff may not split his cause of action," "Plaintiffs may not split legal theories," and "Plaintiffs cannot avoid the preclusive effect of res judicata simply by splitting causes of action"); Plaintiffs' Memorandum of Law in Support of Plaintiffs' Application for a Default Judgment and in Opposition to

Defendants' Motion to Dismiss (4/29/05) at 25 (arguing that "Plaintiffs did not intend to split their causes of action").

Of course, the rule against splitting a cause of action received greater attention at the appellate level, after the decision of the Court of Appeals in *Brown-Wilbert I*. That decision resulted in a dispute over whether or not a final judgment still existed in *Brown-Wilbert I*. At that point, Plaintiffs argued that the res judicata doctrine does not apply in the absence of a final judgment and Defendants argued that the rule against splitting a cause of action would continue to bar Plaintiffs' duplicative claims, regardless of whether a final judgment existed.

Even without the arguments of the parties, the Court of Appeals would have been free to consider the rule against splitting a cause of action, since that rule is decisive of the entire controversy. This Court has long recognized the rule that an appellate court may properly base its decision upon a ground not presented to or considered by the trial court "where the question raised for the first time on appeal is decisive of the controversy on the merits." See *Christianson v. Hager*, 242 Minn. 41, 44, 64 N.W.2d 35, 38 (1954) (citing *Skolnick v. Gruesner*, 196 Minn. 318, 265 N.W. 44 (1936)); see also *Land v. Washington County*, 243 F.3d 1093, 1095-96 (8th Cir. 2001) (recognizing that an appellate court "may affirm [a] judgment on any grounds supported by the record, even if not relied upon by the district court").<sup>9</sup>

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<sup>9</sup> The above-stated principle is also recognized in the *Holen* decision on which Plaintiffs have placed so much emphasis in their brief to this Court. See *Holen*, 250 Minn. at 135, 84 N.W.2d at 286.

Furthermore, Plaintiffs failed to argue to the Court of Appeals that the Court of Appeals should not consider the rule against splitting a cause of action. In fact, Plaintiffs acknowledged in their Reply Brief to the Court of Appeals that the rule against claims splitting was argued at the district court level. *See* Reply Brief to the Court of Appeals at 2 (acknowledging that Defendants argued in the district court that “Plaintiffs could not avoid the effect of res judicata by splitting causes of action”).

For all of these reasons, this Court must reject Plaintiffs’ contention that the rule against splitting a cause of action should not have been considered by the Court of Appeals.

**B. Defendants Are Not Asking for “A Return to Code Pleading.”**

Plaintiffs fail to distinguish between the elimination of the “plea in abatement” as a distinct procedural device and the ongoing vitality of abatement principles through the “prior pending action” doctrine. Defendants do not dispute that the adoption of the Federal Rules of Civil Procedure (and corresponding state rules of civil procedure) eliminated “pleas in abatement.” As the court in one of the cases cited by Plaintiffs explains, however, that does not prevent a party from moving to have a duplicative lawsuit abated in favor of a prior lawsuit involving the same parties and claims. *Transamerica Ins. Co. v. Avenell*, 66 F.3d 715, 720 (5th Cir. 1995). Such a motion now merely takes the form a motion to dismiss under Rule 12(b) or Rule 41. *Id.*

Long after the adoption of the Federal Rules of Civil Procedure, the federal courts continue to apply abatement principles under what is frequently referred to as the “prior pending action” doctrine. *See, e.g., Stone v. Baum*, 409 F. Supp. 2d 1164, 1177-78

(D. Ariz. 2005); *Lesavoy v. Lane*, 304 F. Supp. 2d 520, 535 (S.D.N.Y. 2004), *aff'd in part and vacated in part on other grounds*, 170 Fed. Appx. 721 (2006) (unpublished summary order); *Continental Time Corp. v. Swiss Credit Bank*, 543 F. Supp. 408, 410 (S.D.N.Y. 1982); *Atchison v. Nelson*, 460 F. Supp. 1102, 1107-08 (D. Wyo. 1978).

Courts have cited “a variety of considerations” in support of abating a duplicative second action where an essentially identical action is already pending, including: (1) “the friction created by the appearance that the second court is interfering with the first;” (2) “the waste of judicial resources caused by the litigation in two courts;” (3) “the unnecessary burden placed on already overcrowded dockets;” (4) “the dual burden placed on litigants;” and (5) “the possibility that dual litigation might involve the courts in an unseemly race to judgment.” *Weiner v. Shearson, Hammill & Co.*, 521 F.2d 817, 820 (9th Cir. 1975).

Those same considerations of avoiding duplicative and vexatious litigation are also at the heart of the rule against splitting a cause of action. *See Boland v. Morrill*, 275 Minn. 496, 502-03, 148 N.W.2d 143, 148 (1967) (recognizing that the rule against splitting a cause of action exists to protect defendants against vexatious litigation and to protect the public against the delay and expense of piecemeal litigation). Accordingly, this Court should expressly recognize that the rule against splitting a cause of action is, in part, a rule of abatement, and should enforce that rule by reversing the decision of the Court of Appeals and reinstating the judgment of dismissal ordered by the District Court.

C. **Plaintiffs Have No Response to the Authorities that Treat the Rule Against Splitting a Cause of Action as a Separate Doctrine.**

Plaintiffs make a point of suggesting that two of the cases cited by Defendants can be read to support Plaintiffs' argument that the rule against splitting claims is just another name for res judicata, but Plaintiffs have no response to the other authorities cited by Defendants that treat the rule against splitting a cause of action as a separate doctrine. *See* App. Br. at 15-17. Likewise, Plaintiffs have no response to Defendants' argument that the rule against splitting a cause of action should be used to prevent a plaintiff from simultaneously pursuing duplicative lawsuits for tactical reasons or to simply harass the defendants. *See* App. Br. at 19. Furthermore, Plaintiffs have no response to Defendants' observation that treating the rule against splitting a cause of action as merely another name for the doctrine of res judicata will create a procedural trap for unwitting defendants. *Id.*

It should also be noted that there is nothing unfair about applying the rule against splitting a cause of action in the present case. As discussed above at p. 12, Plaintiffs retain the opportunity to obtain relief in *Brown-Wilbert I*. As such, this lawsuit was an unnecessary and burdensome waste of time. Moreover, this Court should not be misled by Plaintiffs' belated suggestion in their brief to this Court that the proper way for the District Court to handle this duplicative lawsuit would have been to order a stay. *Resp. Br.* at 10-11. At no time prior to the submission of their brief to this Court did Plaintiffs ever ask for a stay of the present action. In addition, Plaintiffs have offered no

explanation as to why they bothered to commence the present action if they now concede that it should have been immediately stayed by the District Court.

**CONCLUSION**

For all of the reasons set forth above and in Defendants' initial brief, the Court should reverse the decision of the Court of Appeals and reinstate the judgment of dismissal that was entered by the District Court in this matter.

Respectfully submitted,

MOSS & BARNETT  
A Professional Association

Dated: October 16, 2006.

By *Peter A. Koller*

Thomas J. Shroyer (#100638)

Peter A. Koller (#150459)

4800 Wells Fargo Center

90 South Seventh Street

Minneapolis, MN 55402-4129

Telephone: (612) 877-5000

Facsimile: (612) 877.5999

**Attorneys for Appellants**

**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief was prepared using Microsoft Word, in Times New Roman font, 13 point, and according to the word processing system's word count, is no more than 4814 words, exclusive of the cover page, table of contents, table of authorities, and signature block, and complies with the typeface requirements of Minn. R. Civ. App. P. 132.01.

Dated: October 16, 2006.



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Peter A. Koller

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