

CASE NO. A06-0959

State of Minnesota
In Court of Appeals

SINUON LEIENDECKER,

Appellant,

VS.

ASIAN WOMEN UNITED OF MINNESOTA,
QUOC-BAO DO, AND SUSHILA SHAH,

Respondents.

RESPONDENTS' BRIEF AND APPENDIX

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ISSUES

I. Whether Appellant's present case is barred by the compulsory counterclaim rule.

Trial court held: Yes.

Authorities: Rule 13.01; House v. Hanson, 72 N.W.2d 874 (Minn. 1955); Dalton v. Dow Chemical Co., 158 N.W.2d 580 (Minn. 1968); Fox Chemical Co. v. Amsoil, Inc., 445 F.Supp. 1355 (D. Minn. 1978).

II. Whether Appellant's present case is barred by res judicata.

Trial court did not address.

Authorities: State v. Joseph, 636 N.W.2d 322 (Minn. 2001); Nelson v. Short-Elliott-Hendrickson, Inc., 716 N.W.2d 394 (Minn. App. 2006).

STATEMENT OF THE CASE

Introduction

This case arises from the same core facts that Appellant (“Leiendecker”) and Respondents (collectively “AWUM”) litigated in the underlying case of Asian Women United of Minnesota, Plaintiff v. Quoc-Bao Do, Sushila Shah, Srividhya Shanker, Pa Vang, Nia Arradando, Akiko Tanaka, Naomi Mueller, Defendants and Third-Party Plaintiffs v. Sinuon Leiendecker, Tru Thao (Hang), Chanda Sour, Teodoro Nasby, Naly Yang, Karissa Vang, Mouafu Mouanoutoua and Matthew Lennon, Third-Party Defendants (“underlying case”).

In the present case, though, Leiendecker raises new legal claims that she could have raised in the underlying case. Accordingly, AWUM moved to dismiss the present complaint based upon the compulsory counterclaim rule and res judicata. The District Court granted the motion under the compulsory counterclaim rule, and thus did not reach the res judicata defense.

Underlying Case

Leiendecker’s Statement of the Case presents a conclusory two-paragraph description of the underlying litigation, conveniently omitting the numerous factual parallels to the present case. (Appellant’s Brief at 8-9) This appeal turns largely on the comparison of the factual issues in the two cases. Thus, Leiendecker’s failure to identify the factual issues in the underlying case is a glaring omission. Nevertheless, AWUM will correct the record and provide a complete description of the underlying case:

The underlying case was started in the name of AWUM by a newly-formed AWUM “board,” created by Leiendecker to replace the existing AWUM board that had fired her. As defendants, Leiendecker’s “AWUM” named the existing AWUM board members -- Quoc-Bao Do, Sushila Shah, Srividhya Shanker, Pa Vang, Nia Arradando, Akiko Tanaka, and Naomi Mueller.

The underlying case officially began on December 18, 2003 with the filing of the Leiendecker AWUM’s Application for Temporary Restraining Order and Declaratory Judgment, Memorandum, and other supporting documents seeking to have Defendants removed from AWUM’s operations and declared not able to “act in the capacity of board members of AWUM.” (R. 4)

On December 19, 2003, the Court partially granted the TRO motion, essentially freezing in place the competing boards and enjoining the existing board from taking any material corporate actions until further court order. (R. 5-6) The Order noted that the case was “a dispute between two groups who allege that they are the legitimate board of directors of Asian Women United of Minnesota.” (R. 6)

The Complaint for Declaratory and Equitable Relief, which Leiendecker’s AWUM served after the TRO Order, made many factual allegations against the existing board, including: (1) that AWUM’s board had been improperly operating for three years without the five directors required by the AWUM bylaws, (2) that Do and Shah should not have been on the board due to the bylaws’ 6-year term limits, (3) that Do and Shah improperly placed Leiendecker on suspension, (4) that Do and Shah improperly required Leiendecker to return a \$10,000 “salary increase” check she had taken, (5) that Do falsely

denied authorizing the salary increase, (6) that Do and other directors falsely accused Leiendecker of embezzling funds, (7) that Leiendecker approved a substitute board, and (8) that the AWUM board improperly discharged Leiendecker. (R. 8-13)

Based upon these factual allegations, the Complaint set forth seven Causes of Action against the existing board (“Defendants”):

1. [Defendants] Failed to follow state law and/or agency bylaws including, but not limited to a failure to maintain and approve agency minutes, and carry out agency affairs as a quorum.
2. Defendants Quoc-Bao Do and Sushila Shah were unlawful and/or de facto members and could not act as legitimate board members capable of electing de jure members.
3. Defendants were unlawful and/or de facto members and could not act, and/or fail to act, in the promotion of their individual interests.
4. Defendants submitted knowingly false information to third parties to the detriment of AWUM.
5. Defendants were reckless in their contacts with outside vendors and parties to the detriment of AWUM.
6. Defendants have attempted, and continue to threaten the performance of acts that would adversely affect the assets of AWUM.
7. Defendants have attempted, and continue to threaten the performance of acts that would adversely affect AWUM’s ability to perform concomitant with its stated charitable mission.

(R. 13-14)

On January 16, 2004, the Defendants served a Third-Party Complaint on Leiendecker and the members of her board – Tru Thao (Hang), Chanda Sour, Ted Basby [Nasby] “and all other pretending to be board members of Plaintiff without having been validly elected as such.” (R. 16-22) Additional Leiendecker board members -- Naly

Yang, Karissa Vang, Mouafu Mouanoutoua and Matthew Lennon -- were subsequently named and added as named Third-Party Defendants.

The Third-Party Complaint alleged that Defendants (including Do and Shah) were the only valid AWUM board. (R. 17) Under Minnesota law, new directors can be voted onto the board only by action of the existing board. (R. 18) They cannot be selected or removed by the Executive Director. (R. 19) Leiendecker's directors should have known this. (R. 18-19) Nevertheless, none of Leiendecker's directors had been validly elected by the existing board. (R. 17-18)

According to the Third-Party Complaint, Leiendecker had been AWUM's Executive Director until a recent board action discharging her. (R. 17) However, none of Leiendecker's directors asked the existing board about their reasons for wanting to discharge Leiendecker as Executive Director. (R. 19) Instead, Leiendecker's board unlawfully attempted to dismiss Defendants as AWUM board members. (R. 17)

Finally, according to the Third-Party Complaint, Leiendecker had created her new board "to avoid board scrutiny of her actions, board criticism of her management, and board termination of her position with the organization." (R. 18)

On February 12, 2004, an Answer to the Third-Party Complaint was served by Leiendecker's board -- Tru Thao (Hang), Chanda Sour, Teodoro Nasby, Naly Yang, and Karissa Vang. (R. 23-26) They denied all the material Third-Party Complaint allegations. They served no Counterclaim against Third-Party Plaintiffs

On February 23, 2004, Leiendecker served her own Answer to the Third-Party Complaint. (R. 27-31) Her Answer copied her board's Answer almost verbatim. Like

her board, she denied the material Third-Party Complaint allegations. *Like her board, she served no Counterclaim against Third-Party Plaintiffs.* (R. 2)

On February 3, 2004, the District Court heard cross motions on the main issues in the case. Defendants/Third-Party Plaintiffs' motion was a motion to amend the temporary injunction. Leiendecker/Third-Party Defendants' motion was a motion to dismiss the Third-Party Complaint. Defendants/Third-Party Plaintiffs (the old directors) were represented by attorney Frank Mabley. (See R. 50) Plaintiff (Leiendecker's board) and Third-Party Defendants (Leiendecker and her directors) were aligned together, and were jointly represented by attorney David Flowers. (See R. 49-50)

With their motion to dismiss the Third-Party Complaint, Plaintiff and Third-Party Defendants jointly submitted a Memorandum arguing that (1) Third-Party Plaintiffs lacked standing to pursue their Third-Party Complaint, (2) Third-Party Plaintiffs had "unclean hands," and (3) Third-Party Defendants had statutory immunity from suit. (R. 32-42) In support of their second argument, Plaintiff and Third-Party Defendants argued that Third-Party Plaintiffs had made "knowingly false representations" to third parties that "(1) the executive director [Leiendecker] had been terminated, and (2) the executive director embezzled \$10,000.00 from the accounts." (R. 38)

In further support of their motion to dismiss the Third-Party Complaint, Plaintiff and Third-Party Defendants submitted an affidavit from third-party defendant Chanda Sour. Mr. Sour claimed that: (1) Do operated as chair of the AWUM board in an unprofessional manner and with lack of regard for procedure and AWUM's bylaws, (2) Do improperly brought Shah onto the board, (3) both Do and Shah were prohibited from

being on the board due to term limits, (4) Leiendecker brought together a group of prospective board members and expressed her “concerns” to them about Do’s and Shah’s continued membership and other “improper activities,” and (5) Do was “retaliating” against Leiendecker by terminating her for disclosing these “concerns” in violation of “whistleblower laws.” (R. 43-48)

On February 25, 2005, the District Court issued its Findings of Fact, Conclusions of Law and Order on the issue of which board was the legitimate governing body of AWUM. (R. 49-55) The Court found that Leiendecker was “the primary instigator in the creation of the new board.” (R. 52) The Court found that Leiendecker had no right to simply create a new board on her own, and that her non-board members had no right to “simply declare themselves to be a board.” (R. 53) In addition, neither Leiendecker nor her new “board” had standing to object to “the old board procedures, governance, practices, expenditure of corporate funds or any other aspects of the management of AWUM.” (Id.)

Based upon these and other findings, the District Court concluded that the old/existing board was “the legitimate governing body of AWUM.” (R. 53) “The new board [Leiendecker’s board] does not have any authority, individually or collectively, to operate AWUM.” (Id.) Further, “[b]y summarily taking over the agency [AWUM] against the wishes of its legitimate and functioning board of directors, the new board may have committed trespass of the entire agency, its assets, interests, holdings, and programs.” (Id.)

As a result of this decision, the plaintiff (AWUM) became realigned with the existing AWUM directors (defendants). Defendants' counsel Frank Mabley also became the plaintiff's counsel.

On April 8, 2005, the District Court ordered AWUM to tender \$25,000.00 in estimated indemnification costs to the trust fund of Leiendecker's attorneys, and to respond to Leiendecker's discovery. (R. 57-58) The Court also ordered Mr. Mabley recused because of his status as a potential fact witness. (R. 59) Thereafter, AWUM and Defendants were unable to find replacement counsel.

On May 13, 2005, Leiendecker filed a motion to dismiss for failure to comply with the District Court's April 8, 2005 Order. In her motion, Leiendecker sought dismissal of all claims against her, and an award of attorneys fees and costs against AWUM. Leiendecker also sought entry of judgment: "Leiendecker respectfully asks the Court to **end this matter once and for all**, and that it reduce its previous indemnification award to a judgment." (R. 60, emphasis supplied)

On August 22, 2005, the District Court granted Leiendecker's motion, dismissed all claims against Leiendecker, ordered AWUM to pay Leiendecker \$25,094.47 in attorneys fees and costs, and ordered entry of judgment. (R. 61-67) Judgment was entered on September 13, 2005. (R. 68) No party appealed the judgment. (R. 3) No party contests the orders or judgment in the underlying case.

Present Case

In the underlying case, as set forth above, Leiendecker moved to "end this matter once and for all." The District Court granted her motion. However, in the present case,

Leiendecker seeks to resurrect the matter, pursuing new legal remedies for the same core factual issues as in the underlying case.

First, Leiendecker's Complaint alleges that AWUM violated Minnesota's Whistleblower Statute. (Complaint Count One) The apparent factual basis for this claim is the assertion that (1) Do and Shah overstayed their term limits; (2) AWUM improperly allowed Do and Shah to remain on the board, and acted without a quorum in violation of AWUM's bylaws and Minn. Stat. Chapter 317A; (3) Leiendecker was "blowing the whistle" about the board's "violation of its bylaws and Minnesota laws"; and (4) the board retaliated with adverse employment actions against Leiendecker, culminating in her wrongful discharge. (R. 84, 87-88)

Second, Leiendecker's Complaint alleges that AWUM breached its employment contract with her. (Complaint Count Two) Specifically, Leiendecker asserts that (1) under her employment contract with AWUM, the terms and conditions of her employment were governed by AWUM's bylaws and Minnesota law; and (2) AWUM breached that agreement by "taking adverse employment action, ultimately resulting in termination, against Leiendecker in violation [of] AWUM's bylaws, policies and other applicable law." (R. 88)

Count Two is conclusory, and contains no specific violations of bylaws, policies or law. The only "violations" Leiendecker cites are those cited earlier – that Do and Shah were improperly on the board, that the board had an inadequate number of directors, and that the board lacked the authority to take adverse actions against Leiendecker. (R. 84)

Third, Leiendecker's Complaint alleges generically that AWUM violated the "obligations and standard of care" imposed by Minn. Stat. Chap. 317A. (Complaint Count Three) Once again, the factual basis for this claim is the purported defect in the board, including Do and Shah's involvement, making its adverse actions toward Leiendecker unauthorized. "By taking adverse employment action, ultimately resulting in termination, against Leiendecker in violation of AWUM's bylaws, policies and other applicable law, AWUM and its agents, including Bao Do, Shah and all others purporting to act on AWUM's behalf, acted illegally and in a manner unfairly prejudicial toward Leiendecker in her capacity as Executive Director." (R. 89)

Fourth, Leiendecker's Complaint alleges that AWUM, Do and Shah defamed her. (Complaint Count Four) Specifically, Leiendecker claims that AWUM's directors falsely accused her of taking money and of mismanaging AWUM. (R. 89)

Fifth, Leiendecker's Complaint alleges that Do and Shah interfered with Leiendecker's employment contract with AWUM. (Complaint Count Five) This conclusory count apparently repeats the claim in Count Two that AWUM breached Leiendecker's employment contract because of the board's defects and unauthorized actions against Leiendecker. (R. 91) Implicit in this count is that Do and Shah were not valid board members – that they were outsiders interfering with the board. (Id.)

Distilling this all down, Leiendecker's present Complaint makes five core factual assertions: (1) that Do and Shah exceeded their term limits and were not proper board members; (2) that AWUM improperly allowed Do and Shah to remain on the board, and otherwise violated proper procedures; (3) that Leiendecker acted as a "whistleblower" by

pointing out the violations of Do, Shah and the board; (4) that Do, Shah and the board retaliated against Leiendecker's "whistleblowing" by penalizing and then terminating her; and (5) that Do, Shah and the board falsely claimed that Leiendecker had embezzled \$10,000 and otherwise mismanaged AWUM's finances.

Based upon the almost complete factual overlap between the two cases, AWUM moved for dismissal under both the compulsory counterclaim rule and res judicata. On March 30, 2006, the District Court granted AWUM's motion under the compulsory counterclaim rule. (App. 1-3) The District Court found that factual bases for the underlying claims are "virtually indistinguishable from the operative facts in the present case," satisfying the compulsory-counterclaim requirement that the second case arise out of the same transaction as the first. (App. 2) The District Court did not reach the res judicata defense.

SUMMARY OF ARGUMENT

The legal claims in Leiendecker's current Complaint arise out of the same core facts as her legal claims in the underlying case. Under res judicata and the compulsory-counterclaim rule, Leiendecker had to assert *all* of her legal claims in the underlying case. Having obtained a recovery and judgment in the underlying case, she is not entitled to enhance her recovery by pursuing new legal claims in this case, based upon the same core facts. She is not entitled to two bites of the apple.

ARGUMENT

I. **LEIENDECKER'S DUPLICATIVE CASE BARRED BY COMPULSORY COUNTERCLAIM RULE**

The compulsory-counterclaim rule applies to “any claim” that arises out of the “transaction” that is the subject matter of the opposing party's claim. Rule 13.01. The word "transaction" means the “aggregate of operative facts.” Popp Telcom v. American Sharecom, Inc., 210 F.3d 928, 941 (8th Cir. 2000) (Minnesota law). Here, Leiendecker’s present case arises out of the same aggregate of operative facts as the underlying case. Under the compulsory-counterclaim rule, she was required to assert her present claims in the underlying case.

A. Two Cases Involve Same Aggregate of Operative Facts

In the present case, as noted above in the Statement of the Case, Leiendecker makes five core factual claims: (1) that Do and Shah exceeded their term limits and were not proper board members; (2) that AWUM improperly allowed Do and Shah to remain on the board, and otherwise violated proper procedures; (3) that Leiendecker acted as a “whistleblower” by pointing out the violations of Do, Shah and the board; (4) that Do, Shah and the board retaliated against Leiendecker’s “whistleblowing” by penalizing and then terminating her; and (5) that Do, Shah and the board falsely claimed that Leiendecker had embezzled \$10,000 and mismanaged AWUM’s finances.

Leiendecker (individually and through her board) made these same factual claims in the underlying case. **First**, Leiendecker claimed that Shah and Do stayed on the board beyond the bylaw term limits. Therefore, “Defendants Quoc-Boa Do and Sushila Shah

were unlawful and/or de facto members and could not act as legitimate board members.”

(R. 13)

Second, Leiendecker claimed that the existing AWUM board lacked sufficient members to form a quorum as required by the bylaws and state law. The board “[f]ailed to follow state law and/or agency bylaws including, but not limited to a failure to ... carry out agency affairs as a quorum.” (R. 13)

Third, Leiendecker claimed that she acted as a “whistleblower” by raising “concerns” about procedural violations by Do, Shah and the board. (R. 10-13, 47-48)

Fourth, Leiendecker claimed that Do, Shah and the board retaliated against her “whistleblowing” by penalizing and terminating her. (R. 10-13, 47-48)

Fifth, Leiendecker claimed that the existing board members (including Do and Shah) “submitted knowingly false information” to third parties, including the claim that Leiendecker “embezzled \$10,000.00.” (R. 13, 38)

Thus, present Complaint and the underlying Third-Party Complaint are based upon the same “operative facts.” As the District Court found, “claims and defenses were asserted in the prior action whose factual bases are virtually indistinguishable from the operative facts in the present case.” (App. 2) Consequently, the present Complaint arises out of the same “transaction” as the Third-Party Complaint.

B. Tort “Transaction” Test Applies to Original Claim, Not Counterclaim.

Leiendecker asserts that the compulsory-counterclaim rule does not apply because some of her *present* claims are tort claims. Leiendecker reverses the law, confusing the **original claim** with the **potential counterclaim**. It is only the *original* claim that must

be a transaction (i.e. a non-tort claim). Once the original claim satisfies that non-tort threshold, then the responding party must assert “any claim” (tort or contract) as a counterclaim. Rule 13.01.

In Minnesota, any claim is a compulsory counterclaim if it arises out of the “transaction” that is the subject matter of the original claim. Rule 13.01. The word “transaction” excludes tort actions. House v. Hanson, 72 N.W.2d 874, 878 (Minn. 1955).

Thus, under House and the plain language of Rule 13.01, the issue is whether the *original* claim was a tort claim. If the original claim was a tort claim, then there are no compulsory counterclaims. However, **if the original claim was not a tort claim, then “any claim” is a compulsory counterclaim.**

Seeking to avoid the plain meaning of the rule, Leiendecker cites language in House v. Hanson that “tort counterclaims” are not compulsory. However, Leiendecker is not being candid with the Court. In House, the Supreme Court did *not* use the phrase “tort counterclaims” to mean “counterclaims consisting of tort claims,” as Leiendecker suggests. Instead, the Supreme Court used the phrase “tort counterclaims” as shorthand for “counterclaims in tort actions.” The phrase occurs in a discussion about the specific “transaction” language the Advisory Committee chose for Rule 13.01. Here is the full context:

The committee’s notes show that many lawyers vigorously opposed the inclusion of the word Occurrence for the very reason that it was thought to be so broad in meaning as to **make tort counterclaims compulsory**. After further consideration the committee revised the tentative draft of Rule 13.01 by substituting for the words “transaction or occurrence” the words “contract or transaction.” In making this change the committee said: “The Committee fears that **compulsory counterclaims in personal injury and**

other tort actions may work a hardship in cases where, for instance, the defendant's injury is presently unknown ...”

House, 72 N.W.2d at 878 (emphasis supplied). Thus, in House, the phrase “tort counterclaims” is interchangeable with the phrase “counterclaims in personal injury and other tort actions.”

In other words, Leiendecker asserts that House made *tort* counterclaims optional in *all* cases. In reality, as shown above, House says the reverse – that *all* counterclaims are optional in *tort* cases, and mandatory in *non-tort* cases. **The issue is the tort status of the original claim, not the tort status of the counterclaim.**

A careful reading of House eliminates any confusion. At the beginning of the case, the Supreme Court clearly framed the issue as whether “**a defendant in a tort action** arising out of an automobile collision must interpose as a counterclaim any claims he has against the plaintiff which arise out of the same collision or be forever barred from asserting them in another suit.” House, 72 N.W.2d at 875 (emphasis supplied). Thus, House dealt with whether counterclaims must be asserted “in a tort action.” Id. The issue was the status of the **original** action as a tort action, not the status of the potential counterclaim as a tort action. In other words, the holding says the exact opposite of what Leiendecker asserts here.

Therefore, under House and the plain language of Rule 13.01, the compulsory-counterclaim rule applies to “any claim” as long as the original claim was a non-tort “transaction.” As set forth below, the underlying claim plainly satisfied the non-tort “transaction” test.

C. Original Claim Was Not a Tort Claim.

AWUM's original Third-Party Complaint was not a tort claim. It was a "transaction" for purposes of Rule 13.01. Therefore, AWUM was required to assert "any claim" in response, including her present tort claims.

Rule 13.01 requires that the original claim be a contractual, equitable, statutory, declaratory, or some other non-tort claim. House, 72 N.W.2d at 878 (counterclaim compulsory when original claim was **contractual**); Gunhus, Grinnel v. Engelstad, 413 N.W.2d 148, 151-52 (Minn. App. 1987) (counterclaim compulsory when original claim was **equitable**); Kolb v. Scherer Brothers Financial Services Co., 6 F.3d 542, 545 (8th Cir. 1993) (Minnesota law) (counterclaim compulsory when original claim was **statutory**); In re Estate of Thein, 1987 WL 18375 (Minn. App. 1987) (unpublished) (counterclaim compulsory when original claims were **statutory** and **declaratory**).

Here, the underlying case satisfied this threshold. It was not a tort case. Instead, the parties sought declaratory relief, statutory construction, construction of the bylaws, equitable relief in establishing the correct board, equitable defenses such as unclean hands, and similar non-tort claims. Both sides were seeking to have their way in getting their boards declared the legitimate boards, and in seeking consequential relief such as attorneys fees.

In particular, the Third-Party Complaint sought (1) a declaration under the laws and bylaws that the original board was the proper board; (2) four specific forms of equitable/injunctive relief to restore the original board and eject Leiendecker and her unauthorized board; and (3) consequential attorneys fees and costs. (R. 20-21)

Leiendecker asserts that her claims do not arise out of the *exact* same facts as the underlying case, highlighting some minor factual differences. However, 100% factual overlap is obviously not required. If it were, then the compulsory counterclaim rule would *never* apply. See Timberland Co. v. Sanchez, 129 F.R.D. 382, 385 (D.D.C. 1990), quoting Moore v. New York Cotton Exchange, 46 S. Ct. 367, 371 (1926) (“the facts relied upon by the plaintiff rarely, if ever, are, in all particulars, the same as those constituting the defendant’s counterclaim”).

Instead, as Judge Devitt stated in Fox Chemical Co. v. Amsoil, Inc., 445 F.Supp. 1355, 1361 (D. Minn. 1978), there need only be a “logical relationship” between the second claim and the operative facts of the first claim. A counterclaim is “logically related” to the original core facts where “separate trials on each of their respective claims would involve a substantial duplication of effort and time by the parties and the courts.” 27 Federal Procedure, Lawyer’s Edition § 62:222. When there are multiple allegations, the court examines whether the claims have “many” of the same factual issues, and whether they are “offshoots of the same basic controversy between the parties.” Id.

Here, the two cases exceed this standard. The cases involve not just “many” of the same facts, but the identical core facts. They are offshoots of the exact same factual controversy between the parties. Therefore, the logical-relationship standard is more than satisfied here.

D. Leiendecker's Counterclaims Ripe At Time of Answer

Leiendecker next asserts that some of the claims in her present Complaint were not “ripe” to be raised in response to the underlying Third-Party Complaint. She concedes that Counts Four and Five (defamation and tortious interference with contract) were ripe. However, she says that the other claims -- Counts One, Two and Three -- were not ripe because they could not have been asserted on February 23, 2004 – when she served her Answer to the Third-Party Complaint. However, as set for the below, Leiendecker’s argument is contradicted by her own pleadings.

For purposes of Rule 13, a claim is ripe if it is “not subject to dismissal for prematurity.” See 1 Minnesota Practice, Civil Rules Annotated § 13.3 (4th ed. 2002). Thus, the issue is whether Leiendecker had a complete claim, with some evidence to support all of the elements. Here, the only issue Leiendecker raises is whether she had the element of damages. She does not dispute that the other elements were present when she answered the Third-Party Complaint.

It is irrelevant whether Leiendecker had sustained *all* of her damages by February 23, 2004. A tort claim accrues when the plaintiff has sustained “some” damage, and thus can survive a Rule 12 motion to dismiss. Herrmann v. McMenemy & Severson, 590 N.W.2d 641, 643 (Minn. 1999). Once some damage occurs, there is a viable claim, “even though the ultimate damage is unknown or unpredictable.” Dalton v. Dow Chemical Co., 158 N.W.2d 580, 585 (Minn. 1968).

In this appeal, Leiendecker denies that she had sustained *any* damage by February 23, 2004. However, as set forth below, this is contradicted by her Complaint in this case, which asserts that she sustained most of her damages in 2003!

Counts 1-3 of Leiendecker's Complaint focus on a purported sequence of retaliatory actions AWUM took against Leiendecker, as a consequence of her "whistleblowing" about Shah and Do exceeding their term limits. Specifically, Leiendecker alleges that she complained about the term limits issue in 2003. (R. 84) After that, in September of 2003, AWUM retaliated by placing her on probation. (R. 85) On November 4, 2003, AWUM further retaliated by voting to terminate her as Executive Director. (Id.) Finally, in December of 2003, AWUM "defamed" Leiendecker by telling third parties that she had mismanaged AWUM and had taken \$10,000. (R. 89)

Therefore, *by the end of 2003*, Leiendecker had all of the alleged damages she needed to plead out Counts 1, 2 and 3. All three counts focus primarily on AWUM's alleged acts of retaliation *during* Leiendecker's employment in 2003. Count One is a whistleblower claim, asserting that AWUM "unlawfully disciplined, threatened, discriminated against, penalized as to terms, conditions and privileged of employment, and discharged Leiendecker" in reaction to Leiendecker's complaints. Count Two is a breach of contract claim, asserting that AWUM breached its agreement with Leiendecker concerning the "terms and conditions of her employment" by "taking adverse employment action, ultimately resulting in termination, against Leiendecker." Count Three asserts that AWUM violated the standard of care under Minn. Stat. Chapter 317A by acting "in a manner unfairly prejudicial toward Leiendecker in her capacity as

Executive Director” and by “taking adverse employment action, ultimately resulting in termination.”

Obviously, then, Leiendecker’s Complaint does *not* assert only post-termination damages, as she now asserts before this Court. Instead, her Complaint expressly alleges pre-termination discipline, threats, and penalties affecting the “terms and conditions” of her employment.

These adverse pre-termination actions would have supported viable claims, even if Leiendecker had never been terminated. First, a Whistleblower action (Count One) *can* be based upon “discharge.” Minn. Stat. § 181.932. However, it can *also* be based upon non-discharge retaliation. An employer may not “discipline, threaten, otherwise discriminate against, or penalize an employee regarding the employee’s compensation, terms, conditions, location, or privileges of employment” in retaliation for reporting a violation of law. *Id.*

Second, a breach of contract claim (Count Two) can address breaches occurring any time during the employment relationship, not just at the time of termination. See Helmin v. Griswold Ribbon & Typewriter, 345 N.W.2d 257, 261-63 (Minn. App. 1984) (employer breaches employment contract by failing to pay promised expenses or provide promised insurance coverage); Hartung v. Billmeier, 243 Minn. 148, 66 N.W.2d 784, 789-90 (1954) (employer breaches employment contract by failing to pay promised bonus).

Third, an action under 317A (Count Three) applies to all phases of a director’s conduct, not just conduct while discharging employees. A non-profit director must

discharge all “duties of the position of director” in good faith, in the best interests of the corporation, and with reasonable care. Minn. Stat. § 317A 251, subd. 2.

Therefore, Leiendecker could have asserted all three Counts as counterclaims with her February 23, 2004 Answer to the underlying Third-Party Complaint, based purely upon AWUM’s conduct in 2003. These counts would not have been subject to dismissal on February 23rd due to lack of damages.

Finally, in addition to her 2003 damages, Leiendecker could also have asserted a viable claim based upon the contingent status of her discharge on February 23, 2004. On that date, the parties were awaiting the District Court’s ruling on whether AWUM’s November 2003 discharge of Leiendecker was valid and enforceable. On February 25, 2004, the District Court ruled it was not. (R. 49-55) *However, that ruling was unknown on February 23rd*. On that date, as far as Leiendecker knew, the Court might have ruled that the November 2003 discharge was fully enforceable. As the Supreme Court recently clarified, a claim accrues when there is contingent legal damage – i.e. before the final ruling on a legal question is known. See Antone v. Mirviss, ___ N.W.2d ___, 2006 WL 2372161 (Minn. 2006) (claim for legal malpractice against divorce lawyer accrued when attorney’s error increased the client’s “risk” of losing part of his premarital property, even though the order of dissolution had not yet been entered). Therefore, Leiendecker could have asserted that contingent risk on February 23rd as well.

In conclusion, Leiendecker could have asserted all her present legal claims as counterclaims on February 23, 2004, when she served her Answer to the Third-Party Complaint. Although her ultimate damage was somewhat “unknown or unpredictable,”

she clearly had sustained damages, according to her own Complaint. Therefore, Leiendecker's claims were ripe, and she cannot avoid the operation of Rule 13.01.

II. LEIENDECKER'S DUPLICATIVE CASE BARRED BY RES JUDICATA

In addition to violating the compulsory-counterclaim rule, Leiendecker's Complaint in this case violates the doctrine of res judicata.

Res judicata is designed to prevent the relitigation of causes of action from a prior case. Beutz v. A.O. Smith Harvestore Prods., 431 N.W.2d 528, 531 (Minn. 1988). It bars claims and defenses that were raised or "might have been raised" in the prior suit. Howe v. Nelson, 135 N.W.2d 687, 692 (Minn. 1965). The phrase "might have been raised" is what distinguishes res judicata from simple collateral estoppel, since res judicata goes beyond the specific claims adjudicated. See State v. Joseph, 636 N.W.2d 322, 327 (Minn. 2001).

The policy of putting an end to litigation, implemented by res judicata, is a strong one. "It is based on the principle that a party should not be twice vexed for the same cause, and that it is for the public good that there be an end to litigation." Shimp v. Sederstrom, 233 N.W.2d 292, 294 (Minn. 1975). A party "is not at liberty to split up his demand, and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail." Liimatainen v. St. Louis River Dam & Imp. Co., 119 Minn. 238, 137 N.W. 1099, 1100 (1912).

A subsequent claim is barred under the doctrine of res judicata when: (1) the earlier claim involved the same claim for relief; (2) the earlier claim involved the same

parties or their privies; (3) there was a final judgment on the merits; and (4) the estopped party had a full and fair opportunity to litigate the matter. Joseph, 636 N.W.2d at 327. Here, as set forth below, all four elements are plainly satisfied as a matter of law.

A. Same Claim for Relief.

A “claim” is defined by the material facts. A claim is “a group of operative facts giving rise to one or more bases for suing.” Martin ex rel. Hoff v. City of Rochester, 642 N.W.2d 1, 9 (Minn. 2002). Two claims are the same when “the same or similar evidence” will sustain both actions. Nelson v. Short-Elliot-Hendrickson, Inc., 716 N.W.2d 394, 399 (Minn. App. 2006). Two claims are the same when they “arise out of the same set of factual circumstances.” Hauser v. Mealey, 263 N.W.2d 803, 807 (Minn. 1978).

A “claim” is *not* defined by the legal claims or defenses actually pursued. The claims are the same “regardless of whether a particular issue or legal theory was actually litigated.” Hauschildt v. Beckingham, 686 N.W.2d 829, 840 (Minn. 2004). A party is required to assert “all alternative theories of recovery in the initial action.” Dorso Trailer Sales, Inc. v. American Body and Trailer, Inc., 482 N.W.2d 771, 774 (Minn. 1992).

Here, the claims Leiendecker asserts in this case were contained in the prior case. They arise out of the same set of factual circumstances, from the same evidence, from the same group of operative facts. As set forth above, Leiendecker’s present Complaint is based upon the same five core factual claims that she asserted in the underlying case: (1) that Do and Shah exceeded their term limits and were not proper board members; (2) that AWUM improperly allowed Do and Shah to remain on the board, and otherwise violated

proper procedures; (3) that Leiendecker acted as a “whistleblower” by pointing out the violations of Do, Shah and the board; (4) that Do, Shah and the board retaliated against Leiendecker’s “whistleblowing” by disciplining and terminating her; and (5) that Do, Shah and the board falsely claimed that Leiendecker had embezzled \$10,000 and otherwise mismanaged AWUM’s finances.

Thus, the claims for relief are the same. The “same evidence” would sustain both actions. The claims arise out of “the same set of factual circumstances.” It is irrelevant that Leiendecker chose not to use those facts to pursue her current legal claims. She was *required* to pursue all remedies in *one* case.

In response to AWUM’s motion in the district court, Leiendecker asserted that res judicata does not apply to some of her claims, because they were only raised as defenses in the underlying third-party claims. However, that is simply not the law. “The fact that the issues raised were purely defensive as to the original action and thus apparently outside a compulsory counterclaim rule is irrelevant.” Wright, Miller and Cooper, Federal Practice and Procedure § 4414, p. 327, citing Merrilees v. Treasurer, Vermont, 618 A.2d 1314, 1316 (Vt. 1992) (res judicata “specifically bars defendants from using defenses available in one action as the basis for a claim in a later action”). Thus, res judicata clearly bars all of Leiendecker’s claims.

B. Same Parties or Their Privies.

In response to AWUM’s motion in the District Court, Leiendecker asserted that she was not a “party” in the underlying case. This is obviously untrue. Leiendecker was a third-party defendant. Res judicata is not limited to plaintiffs in the underlying case, as

Leiendecker apparently asserts. See State v. Joseph, 636 N.W.2d 322, 327 (Minn. 2001) (res judicata applies generically to “parties” in former case); Nitz v. Nitz, 456 N.W.2d 450, 452 (Minn. App. 1990) (res judicata applied to former defendant and current third-party defendant); Margo-Kraft Distributors, Inc. v. Minneapolis Gas Co., 200 N.W.2d 45 (Minn. 1972) (related doctrine of collateral estoppel applied to former third-party defendant).

Thus, the issue is not whether the party was a plaintiff, a defendant, or a third-party defendant. The issue is whether the parties were “actual adversaries” in the prior litigation, at least on *some* issues. Nitz, 456 N.W.2d at 452. Here, Leiendecker and the current defendants were adversaries on *every* issue in the underlying case. Therefore, Leiendecker cannot escape res judicata by asserting that she was not a “party.”

In addition, Leiendecker was in privity with her hand-picked AWUM board that started the underlying case. Those in “privity” are persons who are not parties to an action but who are connected with the action “in their interests” and are “affected by the judgment ... as if they were parties.” Margo-Kraft Distributors, Inc. v. Minneapolis Gas Co., 200 N.W.2d 45, 47 (Minn. 1972). Examples include (1) “those who control an action although not parties to it,” (2) “those whose interests are represented by a party to the action,” and (3) “successors in interest to those having derivative claims.” Id. at 48. Leiendecker’s board is a classic example of all three.

In response to AWUM’s motion in the District Court, Leiendecker also asserted that res judicata does not apply when a former defendant is suing a former plaintiff – that the compulsory counterclaim rule is the exclusive defense. In support of this argument,

Leiendecker relied upon a partial and distorted citation to 18 Wright, Miller and Cooper, Federal Practice and Procedure § 4414 (2d ed. 2002). Leiendecker cited that text for the proposition that in cases involving a former defendant become plaintiff, the compulsory counterclaim provisions of Civil Rule 13 supersede other principles of claim preclusion.

In reality, the text says the exact opposite. Res judicata and the compulsory-counterclaim rule are complementary and mutually-reinforcing doctrines. The straightforward language of Rule 13 makes it unnecessary, in “many” counterclaim cases, to resort to res judicata and similar claims-preclusion doctrines:

Potential subsequent litigation so close to the first action as to present questions of defendant preclusion ordinarily “arises out of the transaction or occurrence that [was] the subject matter of” the first action, and is foreclosed by direct operation of Rule 13(a).

18 Wright, Miller and Cooper § 4414, p. 320. Thus, Rule 13 “answers most of the questions ” Id., p. 321. However, when a claim does fall outside the scope of Rule 13, it is still subject to res judicata and other claims-preclusion rules. “There are limits and exceptions to Rule 13(a)” that “ensure the need for independent rules of preclusion.” Id., pp. 320-31. Therefore, res judicata is clearly available, against defendants turned plaintiffs, in cases that for some reason fall outside the scope of Rule 13.

C. Final Judgment on the Merits.

“Final judgment on the merits” is broadly construed. All judgments are presumed to be on the merits. State v. Joseph, 636 N.W.2d 322, 328 (Minn. 2001).

Here, the final judgment of course encompassed the preceding orders, including the February 2005 order resolving the propriety of the two boards. Leiendecker could

have pursued any other claims prior to the judgment being entered, but elected not to, seeking instead a speedy judgment to pursue her attorneys fees claim against AWUM. That was her choice, and it underscores the finality of the judgment.

D. Full and Fair Opportunity to Litigate.

In response to AWUM's motion in the district court, Leiendecker asserted that she lacked a "full and fair chance to litigate her claims" in the underlying case. She made this claim because the Third-Party Complaint was dismissed based upon Third-Party Plaintiffs' failure to answer discovery and comply with court orders. Leiendecker pretends she was a mere passive spectator in that process. In reality she was the driving force, the moving party, electing to seek attorneys fees and quickly end the case, so that she could collect them.

Leiendecker's Memorandum in support of her motion to dismiss the underlying case concluded with the following request: "Leiendecker respectfully asks the Court **to end this matter once and for all**, and that it reduce its previous indemnification award to a **judgment.**" (R. 60, emphasis supplied) No one was forcing Leiendecker to seek that relief. She could instead have pursued all her present claims. Instead, she sought a quick end to the case, relinquishing any other claims.

Now Leiendecker wants more. Having obtained her fees in the first lawsuit, she wants to come back in this second lawsuit, based upon the same core facts, but enhancing her damages with new legal theories. That abuse of the Courts is impermissible.

CONCLUSION

Leiendecker does not get two bites of the apple. Her present case is barred by both res judicata and the compulsory counterclaim rule. Her present claims were available in the underlying case, and they had to be raised there. Having selected her legal theories in the first case, Leiendecker cannot enhance her recovery with a second lawsuit, pursuing new legal remedies based upon the original core facts. Therefore, the District Court's dismissal of her Complaint should be affirmed.

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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).