

No. A10-355

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STATE OF MINNESOTA  
IN SUPREME COURT

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Michelle A. and Terry Kern,

Appellants,

vs.

Jennifer Torborg and James Torborg,

Respondents,

and

Cody S. Janson and Jessica Gerwing,

Respondents.

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**RESPONDENTS JENNIFER TORBORG AND JAMES TORBORGS'  
BRIEF AND APPENDIX**

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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).



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## LEGAL ISSUES

- I. Whether the trial court abused its discretion in granting Appellants Michelle and Terry Kerns' motion to vacate a prior conciliation court judgment when it found that Ms. Kern's consultation with counsel prior to initiating the action was "inconsequential?"

This issue was presented to the trial court through Respondents Torborgs' motion for summary judgment and the Kerns' responsive motion to vacate the conciliation court judgment.

The trial court held that Ms. Kern's legal representation was inconsequential in granting the Kerns' motion to vacate the conciliation court judgment. The Court of Appeals held that Ms. Kern's consultation with counsel prior to commencing her conciliation court action was a decisive factor, reversed the trial court's decision, and remanded the matter back to the trial court for the entry of summary judgment in favor of the Torborgs.

The issue was preserved for appeal to the Court of Appeals in the papers filed with the trial court and the arguments advanced during the motion hearing held before the trial court. This Court granted the Kerns' petition for review.

Apposite Authority:

Mattsen v. Packman, 358 N.W.2d 48 (Minn. 1984).

Jorissen v. Miller, 399 N.W.2d 82 (Minn. 1987).

Kakaygeesick v. Gleason, No. C9-88-113, 1988 WL 75542, (Minn. Ct. App. July 26, 1988) (rev. denied Sept. 28, 1988) (unpublished).

Wood v. Loomis, No. C4-03-344, 2003 WL 21500325, (Minn. Ct. App. July 1, 2003) (unpublished).

- II. Whether the trial court abused its discretion in granting the Kerns' motion to vacate a final judgment because there was no evidence of unforeseen exigencies or excusable mistake as required under Minnesota law?

The issue was presented to the trial court through the Torborgs' motion for summary judgment and the Kerns' responsive motion to vacate the conciliation court judgment.

The trial court held that the Kerns' motion to vacate the conciliation court judgment was appropriate under Rule 60.02(f). The Court of Appeals held that Ms. Kern's consultation with counsel prior to commencing her conciliation court action was a decisive factor, reversed the trial court's decision, and remanded the matter back to the trial court for the entry of summary judgment in favor of the Torborgs. This Court granted the Kerns' petition for review.

The issue was preserved for appeal in the papers filed with the trial court and the arguments advanced during the motion hearing held before the trial court in conjunction with the motions. This Court granted the Kerns' petition for review.

Apposite Authority:

Mattsen v. Packman, 358 N.W.2d 48 (Minn. 1984).

Jorissen v. Miller, 399 N.W.2d 82 (Minn. 1987).

Kakaygeesick v. Gleason, No. C9-88-113, 1988 WL 75542, (Minn. Ct. App. July 26, 1988) (rev. denied Sept. 28, 1988) (unpublished).

Wood v. Loomis, No. C4-03-344, 2003 WL 21500325, (Minn. Ct. App. July 1, 2003) (unpublished).

## STATEMENT OF THE CASE

This matter arises from a personal injury lawsuit filed in Morrison County and presided over by the Honorable Conrad I. Freeberg. AA—1-3.<sup>1</sup> Judge Freeberg denied Respondents Jennifer and James Torborgs' motion for summary judgment, based on the doctrine of res judicata, and granted Appellants Michelle and Terry Kerns' motion to vacate a conciliation court judgment from 2005 involving the same automobile accident that is the subject of the present litigation. AD—4-14.

The Kerns sued the Torborgs for damages as a result of a motor vehicle accident involving Jennifer Torborg that occurred on September 15, 2004. AA—1-3. Nearly five years before commencing the present lawsuit, Ms. Kern filed a conciliation court action against James Torborg seeking damages arising out of the same accident. AA—82. There is no dispute that an attorney represented Ms. Kern prior to commencing the conciliation court action. AA—13-14, AD—15. On January 11, 2005, the conciliation court entered an order for judgment in favor of Ms. Kern awarding her \$3,423.43 in damages against Mr. Torborg. The judgment was satisfied in full. AA—83.

In July of 2009, the Kerns commenced suit against the Torborgs. AA—1-3. Subsequently, the Torborgs brought a motion for summary judgment seeking dismissal of the Kerns' claim based on the doctrine of res judicata. AA—15-16. In

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<sup>1</sup> Citations to Appellants' appendix are cited as "AA—" and citations to Appellants' addendum are cited as "AD—". Citations to Respondents' appendix are cited as "RA—".

response to that motion, the Kerns brought a motion to vacate the 2005 conciliation court judgment to avoid the likely dismissal of their case based on res judicata. AA—42. The trial court denied the Torborgs' motion for summary judgment and granted the Kerns' motion to vacate the conciliation court judgment. AD—5-6. The Torborgs subsequently appealed the order granting the motion to vacate and also filed a Petition for Discretionary Review seeking permission to also challenge the trial court's order denying the motion for summary judgment. RA—1-9. On March 9, 2010, the Court of Appeals issued an Order holding that the Petition for Discretionary Review was unnecessary and the issue of res judicata was properly before the Court as part of the appeal relating to the vacation order. RA—10-11.

The Court of Appeal's reversed the trial court's order granting the Kerns' motion to vacate and denying the Torborgs' motion for summary judgment. AD—25. After applying the legal authority articulated by this Court in Jorissen v. Miller and Mattsen v. Packman, the Court of Appeals held that Ms. Kern's consultation with counsel prior to commencing her conciliation court action was a decisive factor. AD—23; See Jorissen, 399 N.W.2d 82 (Minn. 1987); Mattsen, 358 N.W.2d 48 (Minn. 1984). As a result, the Court of Appeals found no compelling reason to ignore the principle of res judicata, reversed the trial court's decision, and remanded the matter back to the trial court for the entry of summary judgment in favor of the Torborgs. AD—25. The issue before this Court is whether the trial court abused its discretion in granting the Kerns'

motion to vacate a prior conciliation court judgment when it found that Ms. Kern's consultation with counsel prior to initiating the action was "inconsequential."

## STATEMENT OF FACTS

Appellants Michelle and Terry Kern sued Respondents Jennifer and James Torborg for damages they claim to have incurred as a result of a September 15, 2004 motor vehicle accident on Highway 10 in St. Cloud. AA—1-3. Ms. Kern was driving a vehicle and swerved to miss another vehicle being driven by Jennifer Torborg and owned by James Torborg. AA—2. The Kerns allege that Ms. Torborg negligently operated a motor vehicle owned by Mr. Torborg and that her negligence caused injuries to the Kerns. AA—2. The Kerns seek to recover for Ms. Kern's personal injuries and Mr. Kern's alleged loss of consortium. AA—2-3. At the time of the accident, Ms. Kern was already treating for injuries she sustained in a November 2003 accident involving Respondents Jessica Gerwing and Cody Janson.<sup>2</sup> AA—1. The Kerns commenced this lawsuit and asserted claims against the Torborgs arising out of the September 2004 accident and against Respondents Janson and Jessica Gerwing arising out of the November 2003 accident.<sup>3</sup> AA—1-3.

Nearly five years before the commencement of the present lawsuit, on October 21, 2004, Ms. Kern filed a lawsuit in Stearns County Conciliation Court (Court File No. S3-04-1130) against Mr. Torborg and arising out of the September 15, 2004 accident. AA—82. There is no dispute that Ms. Kern had

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<sup>2</sup> Cody Janson was driving Jessica Gerwing's vehicle at the time of the accident.

<sup>3</sup> It should be noted that there was no prior lawsuit filed by the Kerns pertaining to the Janson/Gerwing accident, and the Kerns' claims against Janson and Gerwing are therefore not similarly situated with regard to the pending issue.

been consulting with an attorney, in conjunction with the November 2003 accident, at the time the second accident occurred and prior to the commencement of the conciliation court action. AA-13-14, AD-15. The Statement of Claim for the conciliation court lawsuit asserted the following:

[James Torborg] owes me \$4,357.63 plus filing fees and costs of \$110.80, for a total of \$4,468.43 because on September 15, 2004, Jennifer Torborg was responsible for the complete loss of my Jeep, the towing fees [and] the storage fees. Community Federal Savings [and] loan lists the Jeep at 3,700 – towing 254.63-storage fees as of October 15<sup>th</sup> [is] 403.00 @ 13.00 per day.

AA-82. A contested hearing was held in conciliation court on December 13, 2004. Id. On December 15, 2004, the court issued an order for judgment in favor of Ms. Kern and against James Torborg in the amount of \$3,423.43. AA-83. On January 11, 2005, the court entered a final judgment after the time to appeal expired. Id. Mr. Torborg satisfied the judgment. AA-155.

Prior to initiating the present action, the Kerns did not take steps to vacate the conciliation court judgment of December 15, 2004. AA-18-19. After the Kerns initiated this lawsuit, the Torborgs served and filed a motion for summary judgment seeking judgment as a matter of law under the doctrine of res judicata in light of the prior judgment. AA-15-29. The Torborgs argued that the Kerns' current claims were barred by res judicata because the second lawsuit impermissibly split their cause of action by asserting successive lawsuits based on the same set of facts. AA-22-27. The Torborgs also argued that there was no

basis for the Court to vacate the prior conciliation court judgment under the applicable rule, Minn. R. Civ. P. 60.02. Id.

In response to the Torborgs' motion for summary judgment, and not prior to that time, the Kerns brought a motion to vacate the 2004 conciliation court judgment. AA—42. Ms. Kern claimed she was unaware of the no-fault threshold and the preclusive effect of a conciliation court judgment when she filed the action, and therefore the judgment should be vacated. AA—79. The Kerns alleged they lacked awareness of the impact of the first judgment, even though they did not dispute that an attorney in fact represented Ms. Kern prior to the commencement of the conciliation court action. AD—15. With respect to Ms. Kern's representation, her counsel stated at the summary judgment hearing as follows:

Now, there is nothing before the Court to indicate to you that Ms. Kern was represented by counsel at the time. But I can tell the Court that she did seek counsel of Attorney Doug Anderson in Little Falls at the time, but there is nothing in the record that indicates that she had any discussions with him about the ramification of a conciliation court claim, that she consulted with him about the ramifications of a conciliation court claim. In fact, she went to him regarding her personal injury claim. And so the fact that she had consulted and maybe even retained an attorney to discuss ramifications of a personal injury claim doesn't mean she was represented with regard to this conciliation court property damage claim, or that she ever consulted with him. And, in fact, in this case Mr. Anderson advised her just go ahead and take care of her property damage claim in conciliation court.

AD—15. See also App. Br. pp. 10 (“...Kern... (1) consulted an attorney about her legal rights; and (2) with the attorney’s blessing, she pursued her property damage claim in conciliation court. . . .”).

The trial court denied the Torborgs’ motion for summary judgment and granted the Kerns’ motion to vacate the conciliation court judgment. AD—5-6. The court’s memorandum described its rationale for granting the motion to vacate, in part, as follows:

. . . [S]he was unaware of the existence of the no-fault threshold when she filed suit as well as the preclusive effect of a conciliation court judgment. . . .

The fact that Michelle Kern was in contact with an attorney at the time she filed her conciliation court claim is inconsequential. It has not been made clear what she discussed with her attorney regarding the claim before she chose to proceed in conciliation court. What has been made clear, however, is that her primary concern at the time of suit was promptly . . . recovering for property damage to her vehicle. . . . Moreover, the court is reluctant to penalize a party for speaking with counsel prior to filing a conciliation court claim, as there are many reasons, including issues of timeliness and costs, that a party may choose to forgo representation and proceed in conciliation court.

AD—12. The court relied on Ms. Kern’s alleged ignorance of the no-fault threshold as well as the preclusive effect of a final judgment even though she had counsel. Id. Furthermore, the court found the five year time period between the conciliation court judgment and the filing of the motion to vacate a significant amount of time and hesitated to undermine the finality of judgment, but did so anyway. AD—13. Because the trial court granted the Kerns’ motion to vacate the

conciliation court judgment, the trial court also held that the doctrine of res judicata did not bar the claim in the underlying litigation. AD—9-10.

The Court of Appeals found no compelling reason to ignore the principle of res judicata, reversed the trial court's decision, and remanded the matter back to the trial court for the entry of summary judgment in favor of the Torborgs. AD—25.

### **STANDARD OF REVIEW**

A trial court's decision to vacate a conciliation court judgment is reviewed under an abuse of discretion standard. Jorissen v. Miller, 399 N.W.2d 82, 84 (Minn. 1987). See Simington v. Minnesota Veterans Home, 464 N.W.2d 529, 530 (Minn. Ct. App. 1990) (citing Nelson v. Siebert, 428 N.W.2d 394, 395 (Minn.1988)).

With respect to reviewing a summary judgment order, this Court reviews “de novo whether the district court erred in its application of the law.” See Prior Lake American v. Mader, 642 N.W.2d 729, 735 (Minn. 2002). Summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, the admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” See Minn. R. Civ. P. 56.03. Therefore, it must first be determined whether there are any genuine issues of material fact. Second, it must be determined whether the trial court erred in its application of the law. State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990). If the non-

moving party failed to raise a material issue of fact with respect to an element essential to establishing its case, summary judgment is appropriate. Lubbers v. Anderson, 539 N.W.2d 398 (Minn. 1995). In particular, whether res judicata is available is a mixed question of law and fact subject to de novo review. In Re Trusts Created by Hormel, 504 N.W.2d 505, 509 (Minn. App. 1993). The trial court's decision to apply res judicata will be reversed upon evidence of abuse of discretion. Pope County Bd. of Comm'rs v. Pryzmus, 682 N.W.2d 666, 669 (Minn. App. 2004).

### **ARGUMENT**

#### **I. A CONCILIATION COURT JUDGMENT SHOULD NOT BE VACATED WHEN A PARTY HAD THE OPPORTUNITY TO CONSULT WITH COUNSEL PRIOR TO INITIATING THE ACTION.**

Minnesota Rule of Civil Procedure 60.02 governs the grounds upon which a motion to vacate a judgment may be granted and provides, in pertinent part, as follows:

On motion and upon such terms as are just, the court may relieve a party or the party's legal representatives from a final judgment (other than a marriage dissolution decree), order, or proceeding and may order a new trial or grant such other relief as may be just for the following reasons:

- (a) Mistake, inadvertence, surprise, or excusable neglect;
- (b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial pursuant to Rule 59.03;
- (c) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

- (d) The judgment is void;
- (e) the judgment has been satisfied, released, or discharged or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
- (f) Any other reason justifying relief from operation of judgment.<sup>4</sup>

Minn. R. Civ. P. 60.02. In this case, the trial court identified subdivision (f) as the residual clause and an appropriate one to grant relief as requested by the Kerns.

**A. This Court Has Determined that a Party Represented By Counsel Prior to a Conciliation Court Hearing Should Not Be Allowed to Vacate the Judgment to Avoid the Effects of Res Judicata.**

This Court first acknowledged that a party may attempt to vacate a conciliation court judgment in order to avoid the effects of res judicata in Mattsen v. Packman, 358 N.W.2d 48 (Minn. 1984). In Mattsen, a plaintiff guided by legal counsel secured a judgment in conciliation court against defendant for damages to his motor vehicle as a result of an accident. Id. 49-50. Thereafter, plaintiff brought a subsequent action in district court to recover damages for personal injury and property damage arising out of the same accident. Id.

The Court determined that the conciliation court judgment in favor of the plaintiff extinguished the entire claim for damages arising out of the collision and precluded any subsequent action for damages based on the long-standing

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<sup>4</sup> Relief under subdivision (f) is available only in “exceptional circumstances.” See Chapman v. Special Sch. Dist. No. 1, 454 N.W.2d 921, 924 (Minn. 1990).

principle of res judicata. Id. However, the Court indicated that under certain circumstances, a plaintiff might be able to seek relief through a motion to vacate the conciliation court judgment pursuant to Minnesota Rule of Civil Procedure 60.02, subdivision f. Id. The Court recognized the informality of the conciliation court including the ordinary absence of counsel during the process and wondered aloud, “Should parties unrepresented by counsel be expected to hew exactly to the language of a printed form [conciliation court form]?” Id. at 50.

Significantly, the Court determined that plaintiff consulted with his attorney several months prior to commencing his conciliation court action. Id. at 51. As a result, the Court went on to conclude that although plaintiff asserted that he did not seek specific advice from his attorney about commencing a conciliation court action, plaintiff had “at least consulted” with his attorney several months prior to commencing his conciliation court action. Id. This consultation included a discussion with his attorney about the amount he should recover for his damaged automobile. Id. Because the plaintiff consulted with his counsel prior to the conciliation court hearing and, did not bring a motion to vacate the judgment the Court did not have to answer its question posed above. Id.

**B. The Court Announced a Narrow Exception in Jorissen to Vacate Conciliation Court Judgments When a Party Was Unrepresented and Did Not Understand Claim Splitting or Tort thresholds.**

Three years later, in Jorissen v. Miller the Court had an opportunity to answer their question posed in Mattsen. Jorissen, 399 N.W.2d 82 (Minn. 1987). In Jorissen, the trial court granted a party’s motion to vacate an earlier

conciliation court judgment. 399 N.W.2d at 82. Plaintiff Cranston brought an action in conciliation court for damages to her motor vehicle and Jorissen counterclaimed for damages and medical expenses. Id. at 83. At the time of the conciliation court action, Jorissen's injuries did not meet the tort threshold requirements. Id. The conciliation court found Cranston at fault and awarded Jorissen damages sustained to his motor vehicle, but dismissed his claim for medical expenses. Id. Significantly, Jorissen was unrepresented prior to and at the time of the conciliation court hearing. Id. As a result, Jorissen did not understand issues related to claim preclusion or tort thresholds that applied to his counterclaim. Id.

Approximately one year later, Jorissen retained counsel to represent him on a personal injury claim involving the same accident. Id. Because Jorissen had already submitted his claim for damages to the conciliation court, he sought to vacate the judgment to allow his personal injury claim to proceed. Id. Cranston moved for summary judgment based on the prior conciliation court judgment, and the principle of res judicata. Id. The district court granted the motion to vacate and denied the motion for summary judgment. Id.

On review, the Minnesota Supreme Court began its analysis by first reaffirming its holding in Mattsen v. Packman, in which it determined that a plaintiff "could not secure a judgment for property damages in conciliation court and then sue for personal injuries and property damage in district court." Id. (citing Mattsen v. Packman, 358 N.W.2d 48, 49-50 (Minn. 1984)). However, the

Jorissen Court noted the Mattsen decision contained the following language with respect to moving to vacate a conciliation court judgment:

“This is not to say that a party who is excusably ignorant of the effect of a judgment should have no remedy. Relief may be had for cause; the judgment may be reopened through proceedings to vacate pursuant to Rule 60.02. . .’

Id. (citing Mattsen, 358 N.W.2d at 50) (emphasis added).

The Jorissen Court acknowledged that the exception did not apply in Mattsen because an attorney represented plaintiff prior to the commencement of his action. Jorissen, 399 N.W.2d at 83-84. However, the Jorissen Court found that the exception did apply to the facts because counsel did not represent Jorissen prior to the commencement of his counterclaim. Id. The Court’s reasoning centered on preserving the utility provided by the conciliation courts to unrepresented individuals. The Court stated:

These courts were designed by the legislature to encourage members of the public to settle minor disputes quickly and inexpensively in an informal setting without the usual procedural safeguards and without the requirement of an attorney being present. It is doubtful that one person out of a hundred using a conciliation court would understand that, in doing so, future claims not then apparent to them could later be barred by a decision in that court. Thus, to encourage the continued use of the conciliation courts by the public, persons who lacked an understanding of the consequences of conciliation court decision should not be barred from subsequently bringing claims in courts of record. To hold otherwise would be to render conciliation courts dangerous traps for the unwary.

Id. (emphasis added). As a result, the Court affirmed the decision to vacate the judgment.

**C. The Courts Followed the Precedent as Established in Mattsen and Jorissen.**

In between the issuance of the Mattsen and Jorissen decisions, there were several significant decisions regarding motions to vacate conciliation court judgments. See Qualy v. MacDonald, 395 N.W.2d 423, 425 (Minn. Ct. App. 1986); Haukland v. Peterson, 396 N.W.2d 79, 80 (Minn. Ct. App. 1986) (rev. denied, Jan. 16, 1987). In those cases, the courts had the discretion to vacate conciliation court judgments because the parties seeking to vacate a judgment were notably unrepresented prior to the conciliation court action. Id.

After both the Jorissen and Mattsen decisions were rendered, the courts continued to focus on the representation issue to determine whether a prior conciliation court judgment could be vacated. As such, the controlling factor in these subsequent decisions revolved around whether a party consulted with an attorney prior to instituting the conciliation court claim. See Kakaygeesick v. Gleason, No. C9-88-113, 1988 WL 75542, (Minn. Ct. App. July 26, 1988) (rev denied Sept. 28, 1988) (unpublished); See AA—181-184. Wood v. Loomis No. C4-03-344, 2003 WL 21500325, (Minn. Ct. App. July 1, 2003) (unpublished). See RA—12-14.

In the case of Kakaygeesick v. Gleason, plaintiff sued defendant in conciliation court for property damage to his vehicle, and defendant counterclaimed. 1988 WL 75542 at \*1. On September 17, 1986, the conciliation court granted judgment in favor of the defendant. Id. at \*1. In May 1987, for the

first time, plaintiff retained an attorney and commenced an action in district court against defendant. Id. Thereafter, plaintiff brought a motion to vacate the conciliation court judgment to clear the way for his personal injury action in district court. Id.

The Court of Appeals affirmed the district court's order vacating the judgment. Id. at \*3. In doing so the Court recognized that the plaintiff was unrepresented prior to initiating his conciliation court action and applied the narrow exception enunciated in Jorissen because:

. . . it is impossible for a conciliation court claimant to know that he may have two causes of action rather than one, the general rule against splitting causes of action may not . . . be an absolute bar at a later date to bringing a personal injury action arising out of the same set of facts as the property damage.

Id. at \*2. As a result, the court found that because the plaintiff did not seek legal counsel prior to her conciliation court action she was not be aware of the rules against splitting causes of action or the tort threshold requirements. Id.

In the case of Wood v. Loomis, No. C4-03-344, 2003 WL 21500325, (Minn. Ct. App. July 1, 2003) (unpublished) the court reached a different conclusion than in Kakaygeesick. In Wood, appellant claimed that he should be allowed to vacate his conciliation court judgment because, even though he retained counsel prior to commencing the action, he did not consult with his attorney regarding the consequences of obtaining a conciliation court judgment. Id. at \*1. As a result, appellant claimed ignorance of the concept of res judicata and rules against splitting causes of action. Id. The Wood court relied on the

general rule in Mattsen and held that the appellant's representation and consultation with an attorney prior to the conciliation court hearing prohibits the court from vacating the judgment. Id. The Wood court did not further its examination of the criteria necessary to vacate a judgment under the Mattsen exception because no further analysis was required. In short, Appellant's representation was determinative.

In sum, since the Jorissen decision, the courts have held that if a party had an opportunity to consult with counsel prior to initiating a conciliation court action, a subsequent motion to vacate the judgment should be denied. Id.

**D. The Trial Court Abused Its Discretion When It Found Ms. Kern's Consultation With Counsel "Inconsequential."**

The trial court abused its discretion when it found that Ms. Kern's consultation with an attorney prior to the time she filed her conciliation court claim was inconsequential. The trial court stated:

The fact that Michelle Kern was in contact with an attorney at the time she filed her conciliation court claim is inconsequential. It has not been made clear what she discussed with her attorney regarding the claim before she chose to proceed in conciliation court. What has been made clear, however, is that her primary concern at the time of suit was promptly. . . recovering for property damage to her vehicle. . .

After examining the Mattsen and Jorissen, decisions the Court of Appeals found that Ms. Kern's consultation with counsel prior to commencing her conciliation court action was a decisive factor. AD—20-25. As a result, the Court of Appeals

appropriately reversed the trial court's decision, and remanded the matter back to the trial court for the entry of summary judgment.

Ms. Kern postulates a number of flawed arguments in an attempt to justify the trial court's vacation of her prior judgment to avoid the application of res judicata. First, Ms. Kern argues that contact with an attorney is only one of several factors to be considered by the court when determining whether a judgment should be vacated. App. Br. pp. 22-23. Second, Ms. Kern claims that her counsel's alleged failure to inform her of claim splitting and tort thresholds equates to excusably ignorance, and compels the vacation of the prior judgment. App. Br. pp. 21-22; 32-36. Finally, Ms. Kern contends that the facts of this case are sufficiently analogous to the Jorissen case where the Mattsen exception applied to allow the vacation of a judgment. App. Br. pp. 21-22.

**E. Representation By Counsel Is a Determinative Factor for the Trial Court's Consideration and Is Not a Single Factor to be Applied in a Balancing Test.**

Ms. Kern asserts that legal representation is only one of several factors that the trial court should consider prior to vacating a judgment. See App. Br. p. 11. Ms. Kern's argument is not consistent with this Court's analysis under Mattsen and Jorissen, as well as the subsequent caselaw interpreting these decisions.

A close examination of the Jorissen and Mattsen decisions, in conjunction with subsequent decisions, demonstrates that representation prior to initiating a conciliation court judgment is a determinative factor that precludes the vacation of a judgment. In the Jorissen case, the court acknowledged the Mattsen

exception, and recognized that certain factors must be present in order to vacate a prior judgment under Rule 60.02. See Jorissen, 399 N.W.2d at 83-84. The first factor considered by the court involved a determination of a parties' legal representation when initiating the conciliation court judgment. In Jorissen, the court found that the defendant was not represented prior to commencing his counterclaim in conciliation court. Because the defendant met the first criteria in Jorissen, (i.e. unrepresented by counsel) the court then went on to consider whether the defendant, even if unrepresented, was aware of splitting causes of action or tort thresholds. Thus, if a party were unrepresented, but admitted she had knowledge of tort thresholds and splitting causes of action, there would be no excusable ignorance present and the court would not have good cause to vacate the judgment. Ultimately, the Jorissen Court found that the facts of the case met the exception created in Mattsen and vacated the judgment. Had Jorissen been represented by counsel prior to initiating his counterclaim, the Jorissen court would have terminated its analysis at that point in recognition of the fact that the exception simply could not be met. The Wood case clearly illustrates this point.

In this case, Ms. Kern's representation renders any inquiry into her knowledge of tort thresholds or splitting causes of action unnecessary. The Kerns' claim that the courts must employ a balancing test to examine the application of the Mattsen exception is flawed. The Jorissen decision clearly finds that certain criteria must be present in order to fit the exception created in

Mattsen. If a party is represented there are simply no other factors for the court to examine and balance.

**F. The Failure of Kern's Legal Counsel to Inform Kern of Claim Splitting and Tort Thresholds Is Irrelevant and Not Excusable Ignorance Under Minnesota Rule of Civil Procedure 60.02 (f).**

The Kerns contend that her counsel's alleged failure to inform Ms. Kern of claim splitting and tort thresholds equates to excusable ignorance under Rule 60.02, and compels the trial court to vacate the judgment. The Kerns then proceeds to rely on a litany of legal authority which supports the general proposition that an attorney's omissions or neglect which results in an adverse judgment should be vacated. See App. Br. pp. 33-35. The Kerns' arguments are without merit for several reasons. First of all, the Kerns rely upon caselaw involving Rule 60.02, subdivision (a) to assert that counsel's negligence here is excusable. Ms. Kern ignores the fact that subdivision (a) requires a motion to be brought within one year of the judgment. To the extent that Ms. Kern is asserting excusable neglect by her counsel, as a grounds to vacate her conciliation court judgment, such a motion had to be commenced in 2006 under subdivision (a), and not in 2009 under subdivision (f) as is the case herein.

Furthermore, Ms. Kern's emphasis on the nature and scope of her representation is flawed as demonstrated by the decisions of Mattsen and Wood. Mattsen v. Packman, 358 N.W.2d 48, 51 (Minn. 1984), Wood, 2003 WL 21500325, at \*1. In Mattsen, the Court found:

. . .although plaintiff avers that he did not seek his attorney's advice about instituting the action in conciliation court, he had engaged, or at least consulted, his attorney some months before commencing that action.

Mattsen, 358 N.W.2d at 51. The Wood court, relying on Mattsen, found similarly that:

. . .although appellant states that he did not seek his attorney's advice about instituting an action in conciliation court, the record indicates that appellant did consult with his attorney about the possibility of bringing a personal injuries claim before deciding to proceed with his property damages claim in conciliation court.

Wood, 2003 WL 21500325, at \*1.

Contrary to the trial court's decision and, the Kerns' claim, the courts have previously confirmed that the nature and scope of a parties' representation are irrelevant and not subject to examination. Instead, the salient issue is only whether some consultation occurred. In short, there is simply no dispute that the nature and scope of representation is irrelevant. However, even if this Court does review the nature and scope of Ms. Kern's representation, the record clearly establishes, as in Mattsen and Wood, that Ms. Kern consulted with counsel "regarding her personal injury claim" and her attorney advised her to just go ahead and "take care of her property damage claim in conciliation court." The fact that in hindsight Ms. Kern's counsel may have provided faulty advice is not for this Court's review and consideration.

The case of Wood v. Loomis is almost identical to the facts of this case and clearly illustrates the correct application of the Mattsen exception. No. C4-03-

344, 2003 WL 21500325. In Wood, the plaintiff claimed that he should be allowed to vacate a judgment because he did not consult with his attorney regarding the consequences of obtaining a judgment, and was unaware of splitting causes of action. The Wood court relied on the general rule in Mattsen and held that the plaintiff's representation and consultation with an attorney prior to the conciliation court hearing prohibits the court from vacating the judgment. Id. The Wood court did not further its examination of the criteria necessary to vacate a judgment under the Mattsen exception because no further analysis was required. When analyzing the Jorissen and Mattsen decisions the Wood court properly held that representation was determinative. Similarly, in the current case, the scope of Ms. Kern's consultation with an attorney prior to the conciliation court process is irrelevant when considering whether to vacate the judgment.

In Mattsen and Wood the courts had the opportunity to address the scope of representation but clearly avoided analyzing the attorney-client relationship and communications therein. Certainly, if the Court were to involve itself into the nature and scope of representation to determine whether the Mattsen exception applied it would create a plethora of legal issues including a discovery process involving attorney-client communications. For example, if the trial court's rationale is followed, the Torborgs would be unable based on the attorney-client privilege to delve into the substance of Ms. Kern's conversation with

counsel to determine her knowledge or lack thereof concerning res judicata and tort thresholds. See Minn. R. Civ. Pro. 26.02(a); Minn. Stat. § 595.02.

In sum, the trial court abused its discretion in relying on Jorissen in granting the Kerns' motion to vacate. Here, like in Mattsen, Ms. Kern was represented by counsel prior to initiating her conciliation court action. On the other hand, the Court's holding in Jorissen and Kakaygeesick were wholly dependent on the plaintiff's lack of legal counsel and resulting ignorance of the consequences of proceeding in conciliation court. Jorissen, 399 N.W.2d at 84; Kakaygeesick, 1988 WL 75542, at \*1-2. The Jorissen Court was concerned with the preservation of the conciliation court as an effective means for laypersons to resolve minor disputes. This concern is not implicated here, where Ms. Kern was fully assisted by counsel and made the informed choice to proceed with a claim for damages. This case simply does not fit the narrow exception carved out by the Mattsen Court.

The trial court's finding that Ms. Kern's representation was inconsequential, while at the same time, finding her ignorance of the preclusive effect of a conciliation court judgment significant, was erroneous and an abuse of the court's discretion. It is undisputed that Ms. Kern was represented by counsel prior to initiating her conciliation court action to recover damages arising out of

the accident involving Ms. Torborg.<sup>5</sup> It is also undisputed that this Court has held that if a party “has engaged, or at least consulted” with an attorney prior to commencing an action there is no legal justification to vacate a judgment obtained to avoid the effects of res judicata. See Mattsen v. Packman, 358 N.W.2d 48, 51 (Minn. 1984); Jorissen v. Miller, 399 N.W.2d 82, 83 (Minn. 1987). As a result, the Kerns’ arguments fail as a matter of law.

**G. The Court of Appeals Finding Regarding a Compulsory Claim Under Rule 13.01 Does Not Have a Significant Effect in this Case.**

The Kerns argue that the Court of Appeals erred in concluding that the Jorissen case involved a compulsory counterclaim while their claim did not. App. Br. pp. 18-20. The Kerns go on to contend that the Jorissen case did not involve a compulsory counterclaim under Rule 13.01 and neither did the Kerns’ claim. The Kerns ultimately conclude that the Jorissen court did not address the compulsory claim issue and that it is irrelevant. Although, the Kerns find the compulsory claim issue irrelevant, they assert that the Court of Appeals erred in finding Jorissen and their case distinguishable under Rule 13.01 deserves this Court’s review.

A review of the Jorissen case and Court of Appeals decision confirms that the Rule 13.01 issue is not significant, but rather the representation issue is the primary and determining distinction between these cases. The distinguishing

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<sup>5</sup> It should be noted that Ms. Kern argued to the Court of Appeals that there was no evidence in the record that she was represented prior to her conciliation court action, but now admits that she was in fact represented. See Kern’s Court of Appeals Brief, pp. 11-14.

factor is simple and straightforward: Ms. Kern had representation and Jorissen did not. The Kerns' attempt to complicate and cloud this issue is unpersuasive.

**II. THE COURT OF APPEALS APPROPRIATELY DIRECTED THE TRIAL COURT TO ENTER SUMMARY JUDGMENT BASED ON THE DOCTRINE OF RES JUDICATA.**

The Kerns contend that the Court of Appeals erred in remanding this case for entry of summary judgment and should allow the trial court to determine whether the doctrine applies. App. Br. pp. 36-38. On February 19, 2010, the Torborgs filed a direct appeal from the trial court's vacation of the conciliation court judgment. At the same time, the Torborgs sought discretionary review of the trial court's denial of a motion for summary judgment based on res judicata. RA-1-9. By order dated March 10, 2010, the Court of Appeals appropriately held that the trial court's ruling on res judicata is properly within the Court's scope of review. RA-10-11. The Court of Appeals found that there is no legal basis to remand the case for the application of res judicata, thus it is left for this Court's consideration.

The analysis completed by the Court of Appeals under Rule 60.02 already addressed the potential injustice that Ms. Kern seeks to have the trial court address under a res judicata principle. In short, the Court of Appeals found that no injustice would result under Rule 60.02 and no such finding of injustice would result under a res judicata analysis. The Kerns' claim that an injustice would result if the prior judgment is not vacated because it eliminates their remedy for an alleged wrong. However, the Court of Appeals' decision simply precludes the

Kerns from pursuing a remedy against the Torborgs. It does not abolish the Kerns' ability to pursue other means to obtain a remedy.

Furthermore, the record confirms that the factors of res judicata are clearly met and its application is a certainty. A brief review of the doctrine is insightful. Under the doctrine of res judicata, a final judgment on the merits is an absolute bar to a second suit for the same cause of action and is conclusive, not only to every matter actually litigated, but also as to every matter that might have been litigated. Paulos v. Johnson, 597 N.W.2d 316, 319 (Minn. Ct. App. 1999). Res judicata precludes litigation of subsequent claims arising out of the same group of operative facts, whether or not a particular issue or legal theory was actually litigated in the original action, a party must "assert all alternative theories of recovery in the initial action." Hauschildt v. Beckingham, 686 N.W.2d 829, 840 (Minn. 2004).

In order for res judicata to apply, the time to appeal from a final judgment must be expired. State v. Joseph, 636 N.W.2d 322, 328 (Minn. 2001). Res judicata operates as an absolute bar to a subsequent claim when the following criteria are met:

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.

Wilson v. Commissioner of Revenue, 619 N.W.2d 194, 198 (Minn. 2000); Dorso Trailer Sales, Inc. v. Am. Body & Trailer, Inc., 482 N.W.2d 771, 774 (Minn. 1992).

In this case, Ms. Kern previously litigated the issue of damages caused by the September 15, 2004 accident in her conciliation court lawsuit filed October 21, 2004. The order for judgment established that the first lawsuit brought by Ms. Kern was decided on the merits following a contested hearing on December 13, 2004. Thereafter, the Court entered a Judgment in favor of Ms. Kern and awarded her \$3,423.43. That judgment was satisfied in full.

Each of the four requirements of res judicata is satisfied in this case. First, the earlier claim involved the September 15, 2004 motor vehicle accident between Ms. Kern and Ms. Torborg; the present claim involves the very same motor vehicle accident. In analyzing the first prong of this test, it is notable that the term “claim” or “cause of action” has been defined as “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). Moreover, the two terms can be used interchangeably. See Black’s Law Dictionary 213 (7<sup>th</sup> ed. 1999). “Therefore, the focus of res judicata is whether the second claim arise[s] out of the same set of factual circumstances.” Hauser v. Mealey, 263 N.W.2d 803, 807 (Minn. 1978). In light of the prior Statement of Claim and the Complaint in the present suit, there is no dispute that this matter and the first lawsuit arise out of the identical claim.

The second requirement of the res judicata test requires that the lawsuit pending involve the same parties or their privies. Ms. Kern sued Mr. Torborg for the negligence of his daughter Ms. Torborg in the first lawsuit. In the present lawsuit, the Kerns have named Mr. Torborg and Ms. Torborg as Defendants. It is

apparent that Ms. Kern and Mr. Torborg are identical parties from the first action. The addition of Ms. Torborg as a named party, and Ms. Kern's spouse as a named party, does not defeat the second requirement. Mr. Torborg and Ms. Torborg are in privity in this matter as are Ms. and Mr. Kern. On each side of this lawsuit, i.e. Plaintiffs and Defendants, the parties are identified in the exact same interest with one another in that they represent the same legal right. McMemomy v. Ryden, 148 N.W.2d 804, 807 (Minn. 1967) (finding that in general, privity involves a person so identified in interest with another the represents the same legal right).

Mr. Kern's claim for loss of consortium only arises out of Ms. Kern's right to recover. Therefore, with respect to the claim itself, Ms. Kern fully represents his legal right to recover. Additionally, the negligence of Ms. Torborg gives rise to the liability, if any, of Mr. Torborg as the owner of the motor vehicle alleged to be at fault. Therefore, each of the Torborg's represent the same legal defenses in this matter. Because the parties in the first lawsuit and the second are either identical or in privity with a previously named party, it is clear that the second prong of the test is also satisfied.

The third and fourth requirement of res judicata are that a final judgment on the merits occurred and that the Kerns had a full and fair opportunity to litigate the matter. There is no dispute based upon the court record, that a contested hearing occurred on December 13, 2004, which provided a full and fair opportunity for the Plaintiff to present her case.

In short, the elements of res judicata are present in this case and the Kerns' claims must be dismissed. There is no reason to remand the case back to the trial court to decide the application of res judicata because all of the elements are indisputably present in this case. The sole basis for the trial court's denial of the Torborgs' motion for summary judgment was its decision to vacate the conciliation court judgment. Once vacated, the third element necessary to apply res judicata (a final judgment on the merits) was no longer present. However, because there is no legal support for the judgment to be vacated, all elements are satisfied and the doctrine of res judicata must be applied.

**CONCLUSION**

The facts are undisputed that counsel represented Ms. Kern prior to her conciliation court action. The trial court abused its discretion in granting the Kerns' motion to vacate when it found Ms. Kern's representation inconsequential. Therefore, the Torborgs respectfully request this Court to affirm the Court of Appeals reversal of the trial court in its entirety.

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Dated: 1/14/11

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