

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

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Terrance Fredericks, in his personal capacity,  
as majority owner of Native Energy  
Construction, and derivatively on behalf of  
Native Energy Construction,

Plaintiffs/Appellants,

v.

Vogel Law Firm, Maurice G. McCormick,  
Monte L. Rogneby, McCormick, Inc., and  
Northern Improvement Co., Inc.,

Defendants/Appellees.

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**SUPREME COURT NO. 20190272**

Civil No. 08-2019-CV-00489

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ON APPEAL FROM ORDER DATED AUGUST 20, 2019

BURLEIGH COUNTY DISTRICT COURT  
STATE OF NORTH DAKOTA  
SOUTH CENTRAL JUDICIAL DISTRICT  
HONORABLE DANIEL J. BORGEN

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**BRIEF OF APPELLEES VOGEL LAW FIRM, MAURICE G. MCCORMICK,  
AND MONTE L. ROGNEBY**

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**ORAL ARGUMENT REQUESTED**

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## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

- I. Did the District Court properly dismiss Plaintiff's claims concluding the doctrine of res judicata bars all claims against Vogel Law Firm, Maurice G. McCormick, and Monte L. Rogneby?
- II. Did the District Court properly dismiss Plaintiff's claims prior to discovery?
- III. If the District Court erred in applying res judicata as a bar to Plaintiff's claims, should the decision nonetheless be affirmed as a result of Plaintiff's failure to establish essential elements of his breach of duty and legal malpractice claims.
- IV. Should Defendant-Appellees be awarded costs and attorneys' fees for defending against a frivolous appeal?

### **ORAL ARGUMENT REQUESTED**

[¶1] Vogel Law Firm, Maurice G. McCormick, and Monte L. Rogneby request oral argument in this matter. Oral argument will be helpful to the Court in understanding the underlying facts and procedure in this case as it relates to the District Court’s ruling in the companion case, Supreme Court No. 20190254. Oral argument will also be helpful to clarify the applicability of this Court’s cases related to issue preclusion and claims preclusion as applied to a non-party to the prior litigation.

### **STATEMENT OF THE CASE**

[¶2] The District Court’s legal conclusion should be affirmed. Appellant, Terrance Fredericks’ (“Fredericks”) claims in this case against the Vogel Law Firm, Maurice G. McCormick, and Monte L. Rogneby (“Vogel”) are barred under the doctrine of res judicata. The District Court in the Original Action between Terrance Fredericks and McCormick, Inc., and Northern Improvement Company conclusively determined Vogel did not represent Native Energy Construction, LLC (“Native Energy”), did not represent Fredericks, and did not provide legal service in violation of ethical rules. Vogel is in privity with McCormick, Inc. (“McCormick”) and Northern Improvement Company (“Northern Improvement”), parties in the prior action, and res judicata bars all Fredericks’ claims arising out of the same factual circumstances as those actually litigated or which could have been raised in the prior action.

[¶3] Fredericks initiated suit by Complaint dated February 15, 2019 naming Vogel, McCormick, and Northern Improvement as Defendants alleging Vogel represented Fredericks and/or Native Energy in 2010-2011 and that McCormick, Northern Improvement and Vogel breached fiduciary duties owed to Fredericks or to Native Energy regarding Native Energy’s operations. Fredericks further alleged Vogel committed



malpractice. (App. at 9-17.) These claims are identical to Fredericks' assertions in the Original Action where he sought to disqualify Vogel from representing McCormick and Northern Improvement. The Court in the Original Action found that Vogel was not disqualified. Fredericks has appealed this decision in Supreme Court No. 20190254.

[¶4] Vogel moved the Court for an Order dismissing Fredericks' Complaint or for Summary Judgment on March 12, 2019. (App. at 52-53.)

[¶5] Fredericks submitted a Cross Motion for Summary Judgment on Liability on April 11, 2019. (App. at 55.)

[¶6] On May 21, 2019, the Court heard argument on the limited issue of res judicata. (App. at 57, ¶ 2.) At the hearing, the Court requested additional briefing concerning the applicability of res judicata as a bar to Appellant's claims. (*Id.*)

[¶7] The Court held a hearing on June 28, 2019 on the cross motions for summary judgment.

[¶8] By Order dated August 20, 2019 the Court granted Vogel's Motion and dismissed Fredericks' Complaint with prejudice ruling all of Fredericks' claims in this action were raised or were capable of being raised in the prior action and thus barred under the doctrine of res judicata. (App. at 57-64.) The Court properly ruled Vogel stands in privity with McCormick and Northern Improvement, parties to the prior action, and all claims relative to the facts and circumstances around operation of Native Energy had to be raised in the prior action.

[¶9] Fredericks filed his Notice of Appeal and Request for Transcript on September 4, 2019. (App. at 83-86.)

### **STATEMENT OF THE FACTS**

*Operation of Native Energy Construction, LLC between 2010 and 2014*

[¶10] Fredericks and McCormick formed Native Energy, a North Dakota limited liability company, in 2010. Native Energy is owned 51% by Fredericks and 49% by McCormick. At McCormick and Northern Improvement's request, in 2010 and 2011 Vogel reviewed master service agreements between Native Energy and various oil companies. (App. at 20-32.) McCormick paid Vogel's fees regarding review of those master service agreements as part of the services McCormick provided to Native Energy in exchange for its 5% consulting fee. (Supp. App. 196.) Vogel discussed with McCormick and Northern Improvement language of the master service agreements and potential problems with the language. (App. at 26.)

[¶11] McCormick received a 5% consulting fee from Native Energy for providing professional and technical services. (Supp. App. at 136.) Vogel never communicated in any way with Fredericks, in his personal capacity or as a member of Native Energy. (App. at 20-21 and 25-26.)

[¶12] In the course of discussing a dissolution agreement for Native Energy in 2015, Maurice G. McCormick, a Vogel attorney, advised Fredericks through Fredericks' counsel that Vogel reviewed master service agreements between Native Energy and various oil companies and McCormick paid the attorneys' fees for those services. (App. at 20-21.)

*Vogel's representation of McCormick and Northern Improvement in Original Action*

[¶13] Vogel represents McCormick and Northern Improvement in the Original Action which is the subject of appeal in Supreme Court No. 20190254. Vogel requested the District Court in the instant action take judicial notice of all of the proceedings in the Original Action. Similarly, Vogel requests this Court take judicial notice of Supreme Court No. 20190254 and Burleigh County Case No. 08-2016-CV-01107 pursuant to Rule 201 of

the North Dakota Rules of Evidence. *See Bender v. Beverly Ann, Inc.*, 2002 ND 146, ¶ 5, 651 N.W.2d 642 (citing *1 Weinstein's Fed. Evid.*, § 201.12[3], p. 201-29 (2d ed. 2002) (“Courts have the power to judicially recognize their own records of prior litigation closely related to the present case.”)).

[¶14] The Original Action was initiated against Fredericks by Northern Improvement and by McCormick, individually and on behalf of Native Energy. Northern Improvement and McCormick sued Fredericks seeking compensatory and punitive damages due to Fredericks’ wrongful conduct arising out of the operations of Native Energy. (Supp. App. 225-226.) In the Original Action, Fredericks asserted Counterclaims against McCormick and Northern Improvement regarding the operation of Native Energy and Fredericks alleged McCormick and Northern Improvement breached fiduciary duties owed to both Fredericks and to Native Energy. (*Id.* at 227.)

[¶15] In the Original Action McCormick and Northern Improvement obtained partial summary judgment against Fredericks requiring Fredericks to pay to Native Energy the sum of \$33,104.00 for funds Fredericks wrongly converted which belonged to Native Energy and to pay Native Energy \$168,879.00 for equipment. (Supp. App. 177-188.)

[¶16] The first trial in the Original Action started on October 3, 2017. It ended on the first day in mistrial. Fredericks sought a mistrial during the course of cross-examination of Steve McCormick, Jr., a Vice President of McCormick and Northern Improvement and an officer of Native Energy. (Supp. App. at 132-133) Fredericks alleged at the time that Mr. McCormick’s testimony established that Vogel had represented Native Energy and the representation was the same or similar to the issues in the Original Action and therefore

Vogel was disqualified from representing McCormick and Native Energy against him. Fredericks repeats these allegations in this matter.

[¶17] Following the mistrial, Vogel on McCormick's and Northern Improvement's behalf, requested the Court in the Original Action reconsider the disqualification of Vogel Law Firm. (Supp. App. 195.) Maurice G. McCormick prepared Exhibits 1 and 2 attached to Fredericks' Complaint in connection with McCormick's and Northern Improvement's Motion to Reconsider Disqualification of Vogel Law Firm (*See App. at 20-32.*)

[¶18] On January 18, 2018, the Court in the Original Action found Vogel had not represented Native Energy or Fredericks when it reviewed master service agreements in 2010 and 2011. (Supp. App. 198-199.) Further, the Court held that the subject matter of the Original Action was not the same or similar to the review of the master service agreement so as to disqualify Vogel even if it had represented Native Energy in connection with those agreements. (Supp. App. at 203.) After the District Court issued its decision, Fredericks sought from this Court a Supervisory Writ, which was denied. (*See Supreme Court No. 20180088.*)

[¶19] In reliance on the ruling in the Original Action, Vogel continued to serve as McCormick's and Northern Improvement's counsel in the Original Action.

[¶20] After the mistrial, Fredericks moved the Court in the Original Action to Amend his Answer and Counterclaim to assert additional claims against McCormick and Northern Improvement and to join Vogel as a Third Party Defendant. In April 2018, the Court authorized Fredericks to submit a proposed order granting limited leave to amend his counterclaim to assert additional claims against McCormick and Northern Improvement. The District Court denied Fredericks' motion to add Vogel as a party. (*See Supp. App. at*

217; see also Register of Actions in Original Action #551 (Partial Transcript of Hearing Held April 30, 2018.) On August 9, 2018, just over a month before trial, Fredericks filed a third amended Answer and Counterclaim containing allegations against McCormick, Northern Improvement, and Vogel. The District Court struck the third amended answer and counterclaim because it was untimely and exceeded the Court's limited leave to amend. (Supp. App. at 217.)

[¶21] The issues not disposed of by the partial summary judgment were tried to a jury on September 12-14, 2018. Vogel represented McCormick and Northern Improvement. The jury rendered its verdict on September 14, 2018 finding Fredericks breached fiduciary duties to Native Energy and to McCormick. The jury concluded that Fredericks' actions constituted actual and constructive fraud. The Jury awarded to Native Energy and McCormick \$352,668.55 in compensatory damages and awarded to McCormick \$400,000.00 in exemplary damages. (Supp. App. at 218-220.) The jury also found McCormick and Northern Improvement did not breach any duties owed to Fredericks and Native Energy. (*Id.*)

[¶22] The District Court in the Original Action entered its Judgment July 1, 2019. The final judgment in the Original Action is the subject of an appeal by Fredericks and cross-appeal by McCormick and Northern Improvement in Supreme Court No. 20190254.

#### *Allegations in This Action*

[¶23] Before final judgment in the Original Action was entered, Fredericks initiated the instant action against Vogel relying on the same facts and allegations which were rejected when the Court in the Original Action refused to disqualify Vogel. Fredericks additionally asserted claims that Vogel breached duties owed to Fredericks and Native Energy and

committed malpractice based on the alleged conflict. Fredericks' allegations of breach of duty and malpractice against Vogel rest entirely on his conclusory statement that Vogel represented Fredericks or Native Energy.

[¶24] The issue of Vogel's non-representation of Fredericks and non-representation of Native Energy was conclusively established and fully litigated in the Original Action. The Court's ruling that Vogel did not represent Fredericks and did not represent Native Energy was relied on by Vogel, McCormick and Northern Improvement and was essential in informing decisions concerning presentation of the claims and defenses in the Original Action. Thus, the Court's ruling that Vogel did not represent Fredericks and did not represent Native Energy was essential to the final judgment.

[¶25] In this action, Fredericks again asserts Vogel represented Native Energy and/or Fredericks in 2010 and 2011 as part of the review of master service agreements. Fredericks also claims that the review of those agreements are the same or substantially similar to the claims tried in the Original Action despite the fact that master service agreements were not in any way relevant to the claims and defenses in the Original Action. Fredericks' claims and conclusory statements in this action are in direct conflict with the District Court's decision in the Original Action and its determination that Vogel did not represent Native Energy and did not represent Fredericks when Vogel reviewed master service agreements at the request of McCormick and Northern Improvement. The claims also conflict with the Court's conclusion that the review of master service agreements were not related in any way to the claims and defenses in the Original Action.

[¶26] Fredericks' allegations of breach of duty and malpractice are premised on Vogel's alleged representation of Native Energy or Fredericks. Fredericks' factual allegation to

establish representation of Native Energy is based on his misrepresentation of the limited cross-examination testimony of Steve McCormick, Jr. and the affidavits of Maurice G. McCormick regarding Vogel's review of the master service agreements and Vogel's communication with McCormick and Northern Improvement regarding language in those master service agreements. The Court need not rely on Fredericks' tortured misrepresentation of testimonial and documentary evidence. A review of the source materials – affidavits and transcript - establishes there has never been an attorney-client relationship between Vogel and Native Energy or Vogel and Fredericks. Neither Fredericks nor Native Energy ever authorized Vogel to act on Native Energy's behalf. Vogel never at any time had any communications with Mr. Fredericks in his individual capacity or as a member of Native Energy. Vogel never billed Native Energy for services. Further, the alleged representation concerned limited review of master service agreements that are not the same or similar subjects as the claims tried in the Original Action. Finally, Fredericks fails to articulate any basis by which Native Energy has been damaged by the alleged representation when Vogel was successful in achieving for Native Energy a substantial compensatory damages award in the Original Action.

## **LAW AND ARGUMENT**

### **I. Standard of Review**

[¶27] Whether a district court properly granted summary judgment is a question of law subject to a *de novo* standard of review on the entire record. *Minn-Kota Ag Products, Inc. v. Carlson*, 2004 ND 145, ¶ 5, 684 N.W.2d 60. Summary Judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary

judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Estate of Christeson v. Gilstad*, 2013 ND 50, ¶ 6, 829 N.W.2d 453. Thereafter, the burden shifts to the party defending against summary judgment to demonstrate a genuine issue of fact exists *Id.* In considering a motion for summary judgment, a court may examine the pleadings, depositions, admissions, affidavits, interrogatories and inferences to be drawn from that evidence to determine whether summary judgment is appropriate. *Estate of Otto*, 494 N.W.2d 169, 171 (N.D. 1992).

[¶28] Whether the doctrine of res judicata bars all or a portion of claims is a question of law. *Ungar v. North Dakota State University*, 2006 ND 185, ¶ 8, 721 N.W.2d 16 (additional citations omitted). The District Court in the Original Action concluded Vogel did not represent Fredericks or Native Energy when Vogel reviewed master service agreements at the request of McCormick and Northern Improvement. The District Court in the Original Action fully adjudicated the claims between the parties concerning operation of Native Energy. The parties to the Original Action, and those in privity with those parties, are estopped from collaterally attacking the District Court's determination that Vogel did not represent Fredericks and did not represent Native Energy. Additionally, Vogel is in privity with McCormick and Northern Improvement concerning all claims which Fredericks did raise or could have raised in the Original Action. Thus, Fredericks' claims against Vogel are barred by claim preclusion and collateral estoppel. Because Fredericks is estopped from challenging the District Court's Order determining Vogel did not represent Fredericks and did not represent Native Energy, Fredericks' claims against Vogel are barred. This Court



should affirm the District Court Order dated August 20, 2019 dismissing all of Fredericks' claims with prejudice.

**II. The District Court Did Not Err in Concluding Res Judicata Bars Fredericks' claims against Vogel**

*A. Vogel's Non-Representation of Fredericks and Native Energy Was Conclusively Determined in the Original Action.*

[¶29] “[C]ollateral Estoppel is a branch of the broader law of res judicata, [but] the doctrines are not the same.” *Ungar*, 2006 ND 185, ¶ 11, 721 N.W.2d 16 (additional citations omitted). Collateral estoppel or issue preclusion prohibits relitigation of “issues of fact or law in a second action based on a different claim, which were necessarily litigated or by logical and necessary implication must have been litigated, and decided in the prior action.” *Id.* (citing *Hofsommer v. Hofsommer Excavating, Inc.*, 488 N.W.2d 380, 383 (N.D. 1992)). The Court in the Original Action concluded Vogel Law Firm did not represent Native Energy or Fredericks and that the review performed by Vogel was not the same as the litigation. (Supp. App. 199-203.) Fredericks is barred from relitigating that issue in this action under collateral estoppel.

[¶30] Before collateral estoppel bars relitigation of an issue of fact or law the Court has a four-part test that must be satisfied:

- (1) Was the issue decided in the prior adjudication identical to the one presented in the action in question?
- (2) Was there a final judgment on the merits?
- (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?; and
- (4) Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?

*Silbernagel v. Silbernagel*, 2011 ND 140, ¶ 18, 800 N.W.2d 320 (quoting *Hofsommer*, 488 N.W.2d at 384).

[¶31] All parts of the collateral estoppel test are satisfied. The issue decided in the Original Action – Vogel’s representation of Native Energy and/or Fredericks is identical to the one presented here, Fredericks, the party in the Original Action, was given a fair opportunity to be heard, and the Original Action ended with a final judgment which is presently subject to appeal. The District Court’s Order dismissing all of Fredericks’ claims against Vogel therefore should be affirmed.

[¶32] Although the District Court properly dismissed Fredericks’ claims on the basis of res judicata, it misapplied the doctrine of collateral estoppel. The issue of Vogel’s non-representation of Fredericks and Native Energy, meets the four-part test for application of collateral estoppel.

[¶33] In *Norberg v. Norberg*, 2017 ND 14, 889 N.W.2d 889, this Court held that a jury should not have been permitted to decide facts which were already conclusively established in a prior divorce action. The Court in *Norberg* focused on whether the factual issue was necessarily decided in the prior action and whether the issue was essential to the judgment in the prior action. *Id.* at ¶ 23.

[¶34] Here, the issue - Vogel’s non-representation of Fredericks and Native Energy - determined in the Original Action was essential to the Final Judgment. Fredericks’ allegation of Vogel’s representation and the alleged conflict of interest resulted in a mistrial on October 3, 2017. Thereafter, the parties to the Original Action vigorously litigated the issue of Vogel’s non-representation of Fredericks and of Native Energy. But for the District Court’s Order ruling on that issue, Vogel would have been disqualified from proceeding as counsel for McCormick and Northern Improvement. Fredericks sought a supervisory writ to address the ruling Fredericks asserted was erroneous. The supervisory writ was denied.

Vogel, McCormick and Northern Improvement were entitled to rely and did in fact rely on the Judge's ruling in the Original Action and proceeded based on that decision. Fredericks is barred under collateral estoppel from challenging that decision and attempting to impose liability on Vogel following the Court's decision in the Original Action. Fredericks' sole avenue for relief from the Court's ruling that Vogel did not represent Native Energy and did not represent Fredericks is to seek appeal in the Original Action. Fredericks, well aware that his exclusive remedy is appeal in the Original Action, is pursuing appeal in Supreme Court 20190254.

*B. The District Court Properly Concluded Res Judicata or Claims Preclusion Bars Fredericks' Claims.*

[¶35] Fredericks' claims against Vogel are also barred under res judicata because Vogel stands in privity with McCormick and Northern Improvement, the parties to the Original Action. "Privity exists if a person is so identified in interest with another that he represents the same legal right". *McColl Farms, LLC v. Pflaum*, 2013 ND 169, ¶ 14, 837 N.W.2d 359 (additional citations and internal quotations omitted). Vogel is in privity with McCormick and Northern Improvement and, as counsel is the embodiment of the client's legal rights. Thus, Fredericks' claims against Vogel are barred.

The Court has adopted a somewhat expanded version of the concept of privity regarding res judicata and collateral estoppel. *Hofsommer*, 488 N.W.2d at 384. ...*See e.g. Geringer v. Union Electric Co.*, 731 S.W.2d 859, 866 (Mo.App. 1987) (law firm which represented client in underlying action was in privity with client in the prior adjudication and could assert collateral estoppel as bar to relitigation of issues resolved in previous lawsuit); *Merchants State Bank v. Light*, 458 N.W.2d 792, 794 (S.D. 1990) (lawyer who prosecuted and directed prior litigation was in privity with client for purposes of res judicata); 47 Am.Jur.2d Judgments § 691 (1995), and cases collected therein.

*Simpson v. Chicago Pneumatic Tool Co.*, 2005 ND 55, ¶ 10, 693 N.W.2d 612 (res judicata barred claims even though claims relied on different legal theories and included legal counsel from the original action).

[¶36] The claims in the Original Action include allegations by Fredericks, individually and on behalf of Native Energy, that McCormick and Northern Improvement breached duties owed to Fredericks and to Native Energy regarding lease purchase agreements and McCormick’s receipt of a 5% management fee. (Supp. App. at 145 and 227.) Fredericks also alleged it was improper for McCormick to approve labor and supply contracts between Northern Improvement and Native Energy. (See page 30-31 of the Addendum attached to Brief of Appellees McCormick and Northern Improvement an excerpt from Fredericks’ opening statement to the jury on September 12, 2018.)

[¶37] Fredericks filed this action alleging the exact same breach of fiduciary duty claims against McCormick, Northern Improvement, and Vogel. Fredericks’ inclusion of McCormick’s and Northern Improvement’s counsel in this subsequent action does not alter the legal conclusion that res judicata applies and is a bar to all of Fredericks’ claims in this subsequent action.

[¶38] In *Littlefield v. Union State Bank, Hazen*, this Court explained:

In resolving whether a subsequent action involves the same claims or issues as those that were raised or could have been raised in a prior proceeding, we begin with the rule that res judicata applies even though the subsequent claims may be based upon a different legal theory. But, if the subsequent claims are based upon the identical factual situation as the claims in the prior proceeding, then they should have been raised in the prior proceeding. It matters not that the substantive issues were not directly decided in the prior action; the key is that they were “capable of being, and should have been, raised as part of the [prior] proceeding.”

*Littlefield v. Union State Bank, Hazen*, 500 N.W.2d 881, 884 (N.D. 1993) (quoting *Hofsommer v. Hofsommer Excavating, Inc.*, 488 N.W.2d 380, 385 (N.D. 1992)) (citations omitted). Here, Fredericks allegations of wrongdoing against Vogel are identical to the claims he made against McCormick and Northern Improvement in the Original Action. To the extent Fredericks' allegations differ from the Original Action, the allegations were capable of being and should have been, raised as part of the Original Action. Thus, claim preclusion prohibits Fredericks from asserting the claims against Vogel, McCormick or Northern Improvement in this new action.

[¶39] The Court was faced with a similar factual scenario in *Ungar v. North Dakota State University*. Ungar, a former employee of North Dakota State University, was prohibited from raising claims against the University under res judicata and collateral estoppel because he should have raised claims against the University when he initiated action against a University faculty member. *Ungar*, 2006 ND 185, 721 N.W.2d 16 “A judgment on the merits exonerating a party from liability precludes subsequent action against a party whose liability, if any, is derivative of or secondary to the exonerated party.” *Id.* at ¶ 13 (citing *Medearis v. Miller*, 306 N.W.2d 200, 203 (N.D. 1981)). Vogel's alleged liability is dependent on the liability of McCormick and Northern Improvement which was decided in the Original Action.

[¶40] Contrary to Fredericks' statement of the facts, Fredericks was aware of all operative facts regarding operation of Native Energy. Prior to initiation of the Original Action, Fredericks was advised that McCormick paid legal fees concerning review of master service agreements between Native Energy and various oil companies. (Supp. App. 197.) Additionally, after the mistrial Fredericks was authorized by the District Court in the

Original Action to assert additional claims against McCormick and Northern Improvement. Fredericks was authorized to assert the additional claims in April 2018. Fredericks' inaction until 34 days before trial, resulted in the District Court in the Original Action striking those additional claims. (Supp. App. 217.) As with the claims in *Ungar*, Fredericks was obligated to assert all claims regarding the operative facts, i.e. operation of Native Energy. Fredericks is prohibited from asserting claims against McCormick, Northern Improvement or their privies, like Vogel, arising out of the operation of Native Energy even if packaged under a different legal theory. *Simpson*, 693 N.W.2d at 617 (citing *Littlefield v. Union State Bank*, 500 N.W.2d 881, 884 (N.D. 1993)); see also *Kulczyk v. Tioga Ready Mix Co.*, 2017 ND 218, ¶ 11, 902 N.W.2d 2d 485 (internal quotation omitted) (“This Court uses an expanded version of privity to include a person not technically a party to a judgment, but who is, nevertheless, connected with it by his interest in the prior litigation and by his right to participate therein.”).

[¶41] Vogel, as counsel, is the embodiment of Northern Improvement's and McCormick's interests and rights and is connected at the most basic level to their interests in the Original Action. Vogel became the target of Fredericks' frustrations in his failed claims against McCormick and Northern Improvement. Following the rejection of all of his claims, Fredericks initiated this new action filled with conclusory allegations and lacking in evidence. Because Vogel is in privity with McCormick and Northern Improvement, Fredericks' claims against Vogel relative to the Original Action or to the operation of Native Energy are barred by the doctrine of res judicata. The Order of the District Court should be affirmed.

### **III. The Court Should Affirm the District Court's Dismissal of Fredericks' Complaint on Alternate Grounds**

[¶42] The District Court concluded collateral estoppel and res judicata were an absolute bar to Fredericks' claims against Vogel. However, even if the Court concludes that res judicata is not applicable, the District Court decision dismissing with prejudice Fredericks' claims should still be affirmed. Fredericks fails to establish Vogel represented Fredericks or Native Energy, that the alleged representation was the same or similar to the Original Action, or any evidence of damages, and thus he fails to establish essential elements of his breach of fiduciary duty claim and malpractice claim.

#### *A. Fredericks Failed to Establish a Fact Dispute About Formation of an Attorney-Client Relationship.*

[¶43] The District Court had before it undisputed facts concerning Vogel's non-representation of Fredericks and Native Energy. Fredericks failed to present any evidence to contradict the undisputed facts and failed to identify what evidence or information he could obtain in discovery that would preclude summary judgment if the district court delayed a decision on dismissal of Fredericks' claims.

[¶44] This Court "will not set aside a district court's decision simply because the court applied an incorrect reason, if the result is the same under the correct law and reasoning." *Myers v. State*, 2017 ND 66, ¶ 10, 891 N.W.2d 724; *Schmidt v. City of Minot*, 2016 ND 175, ¶ 16, 883 N.W.2d 909; *In re Guardianship of P.T.*, 2014 ND 223, ¶ 12, 857 N.W.2d 367. Even if the District Court applied an incorrect reasoning, the result, dismissal of Fredericks' claim, was correct under the applicable law and should be affirmed.

[¶45] Fredericks alleges Vogel breached fiduciary duties owed to Fredericks and/or owed to Native Energy. However, Fredericks failed to present any evidence concerning any alleged duty Vogel could theoretically owe to Native Energy or to Fredericks in the absence

of an attorney-client relationship between Fredericks and Vogel or Native Energy and Vogel.

[¶46] Whether an attorney client relationship has formed is based on mutual agreement of the putative client and attorney that the attorney is authorized to act on his behalf. *See Meyer v. Maus*, 2001 ND 87, ¶ 14, 626 N.W.2d 281. While the existence of the attorney-client relationship is based in part on a putative client’s subjective belief that he is represented, the belief must also be reasonable. *See Moen v. Thomas*, 2004 ND 132, ¶ 14, 682 N.W.2d 738 (emphasis added). Here, Fredericks fails to present any evidence concerning his subjective belief concerning the alleged representation<sup>1</sup>. Additionally, it is clear from the testimony of Steve McCormick, Jr. and the affidavits of Maurice G. McCormick that any allegation of a belief that Fredericks was represented by Vogel would certainly not be reasonable. (Supp. App. at 132-133; App. at 20-32.) As set out by the District Court in the Original Action, there was no agreement between Vogel and Native Energy to provide legal services. (Supp. App. 199.) In the absence of an agreement to provide legal services, no attorney-client relationship formed and Vogel owed no duties to Fredericks or to Native Energy.

[¶47] Contrary to the ruling in the Original Action, Fredericks asserts Vogel represented Native Energy when Vogel reviewed master service agreements in 2010 and 2011. An attorney may not represent a putative client without their knowledge and assent. *See Meyer v. Maus*, 2001 ND 87, ¶ 14, 626 N.W.2d 281 (attorney-client relationship is based on

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<sup>1</sup> Fredericks’ incorrectly claims to be the embodiment of Native Energy. *See* N.D.R.Prof.Conduct 1.13, Comment 2 (lawyers represent an organization through its duly authorized constituents. “This does not mean, however, that constituents of an organizational client are the clients of the lawyer”)



mutual agreement). There was never an agreement for Vogel to represent Native Energy. When the attorney client relationship forms is not subject to a single definition but is based on circumstances and actions of the parties. *See Moen*, 2004 ND 132, ¶ 12, 682 N.W.2d 738. At its most basic, the attorney-client relationship forms when the putative client and the attorney have agreed the attorney may take action on the client's behalf. *Disciplinary Board v. McKechnie*, 2003 ND 22, ¶ 19, 656 N.W.2d 661. Here, there was no agreement for Vogel to perform services for Native Energy and Native Energy did not authorize Vogel to act on Native Energy's behalf. It is illogical and unreasonable that a putative client could be represented by an attorney without the knowledge of its majority owner, in this case Fredericks. Vogel did not communicate with Native Energy and it did not bill Native Energy. Vogel did communicate with McCormick and Northern Improvement concerning language in the master service agreements between Native Energy and various oil companies. (App. 25-26.)

[¶48] Fredericks misrepresents the affidavits of Maurice G. McCormick in an attempt to demonstrate Vogel represented Native Energy when Vogel reviewed master service agreements at McCormick's request. Fredericks has brought nothing but conclusory allegations. Fredericks misstates evidence in his efforts to substantiate his claims. The testimonial and documentary evidence speaks for itself. Fredericks failed to refute the fact that there was never an agreement for Vogel to act on Native Energy's behalf. The Court need not give any weight to Fredericks' attempts to mis-read and misconstrue evidence.

[¶49] The existence of an attorney-client relationship is an element of a malpractice claim. "The elements of a legal malpractice action against an attorney for professional negligence are the existence of an attorney-client relationship, a duty by the attorney to the

client, a breach of that duty by the attorney, and damages to the client proximately caused by the breach of that duty.” *Dan Nelson Construction, Inc. v. Nodland & Dickson*, 2000 ND 61, ¶ 14, 608 N.W.2d 267. Fredericks failed to refute the substantial evidence presented to the District Court that no attorney-client relationship ever formed between Fredericks and Vogel or Vogel and Native Energy. Additionally, Fredericks failed to establish any basis by which Vogel’s representation of Northern Improvement and McCormick, Inc., individually and on behalf of Native Energy, caused damage to Native Energy when Vogel was successful in obtaining for Native Energy a substantial compensatory damages award. Fredericks’ claims fail as a matter of law and the District Court’s Order dismissing Fredericks’ claims with prejudice should be affirmed.

[¶50] The District Court had before it sufficient uncontradicted evidence, as did the District Court in the Original Action, that as a matter of law Vogel did not represent Fredericks, individually, and did not represent Native Energy. The Court should affirm the District Court Order dismissing Fredericks’ claims with prejudice.

*B. The Alleged Representation is Not the Same or Similar as the Litigation in the Original Action.*

[¶51] The District Court Order dismissing Fredericks’ claims should also be affirmed because even if Vogel represented Native Energy when Vogel reviewed master service agreements between Native Energy and various oil companies in 2010 and 2011, the master service agreements are unrelated to the claims and defenses in the Original Action. The District Court in this action had before it sufficient information to conclude, as a matter of law, that Maurice McCormick’s limited review of master service agreements is not the same or similar to representing Northern Improvement and McCormick, individually and

derivatively on behalf of Native Energy, in suit against Fredericks for Fredericks' wrongful and fraudulent acts that caused substantial damage to Native Energy. Fredericks fails to articulate any connection between the master service agreements between Native Energy and various oil companies with the claims raised in the Original Action.

[¶52] To the extent Fredericks alleges, without citation to legal authority, that Vogel's alleged representation of Native Energy is synonymous with Vogel allegedly representing him, Fredericks is mistaken as to the scope of representation of limited liability companies and corporations. An attorney does not represent the members or member-managers of a limited liability company merely by representing the limited liability company. *See* N.D. R. Prof. Conduct 1.13, Comment 2 (Constituents of an organizational client are not clients of the lawyer); *see also* SBAND Ethics Op. 99-04 (Recognizing the entity rule that an attorney representing a limited liability company or corporation does not also represent the organization's members, officers, or shareholders).

[¶53] Assuming for the sake of argument the Court finds Vogel's review of master service agreements between Native Energy and various oil companies, at the request of McCormick, was representation of Native Energy, at best, Native Energy is a former client of Vogel. Fredericks fails to demonstrate that Vogel's representation of McCormick, individually and on behalf of Native Energy, and Northern Improvement against Fredericks in the Original Action can form the basis of a malpractice claim on behalf of Native Energy.

[¶54] An attorney is not forever precluded from representing a different client in an adverse proceeding against a former client. The prohibition is against representing a different client in an adverse proceeding dealing with the same or similar representation. *See* N.D. R. PROF. CONDUCT 1.9(a). North Dakota Rule of Professional Conduct 1.9

“prohibits an attorney from representing another person in the same matter in which that person’s interests are materially adverse to the interest of a former client.” SBAND Ethics Op.03-01, at pg. 10. It “applies to situations in which the attorney is representing a claim in a “substantially related” matter in which the present client’s interests are materially adverse to interests of a former client.” *Id.*

[¶55] The North Dakota Supreme Court analyzed Rule 1.9, applying the substantial relationship test and explained “[t]he substantial relationship test presumes a lawyer acquired confidential information from a former client if the current representation of a client whose interests are adverse to those of the former client is the same as or substantially related to the former representation.” *Continental Resources, Inc. v. Schmalenberger*, 2003 ND 26, ¶ 15, 656 N.W.2d 730 (citing ABA/BNA, *Lawyer’s Manual on Professional Conduct* 51:201 (2002)). It is clear, and the District Court in the Original Action concluded, that the Original Action is not the same or similar to the master service agreements. “None of the master service agreements entered into between NEC [Native Energy] and other oil companies are at issue in this case...” (Supp. App. 203.) There are no claims between the parties related to any master service agreement.

[¶56] Fredericks asserts, without any evidence, that Vogel assisted McCormick and Northern Improvement regarding agreements between Native Energy, McCormick, and/or Northern Improvement regarding provision of technical or professional services or Native Energy’s acquisition of equipment. Even assuming Fredericks’ allegations regarding Vogel’s role in the agreements between Native Energy, McCormick and/or Northern Improvement are true, Fredericks’ claims fail. There is no allegation that Native Energy

requested Vogel to review the agreements or provide advice to Native Energy for those agreements.<sup>2</sup>

*C. Fredericks Failed to Establish a Factual Dispute Concerning Damages.*

[¶57] In addition to Fredericks' failure to establish Vogel represented Native Energy when it reviewed master service agreements, Fredericks fails to even allege how Native Energy was damaged by Vogel. Native Energy was dissolved involuntarily by the North Dakota Secretary of State in May 2015 prior to the initiation of the Original Action. McCormick was successful in the Original Action at partial summary judgment wherein the Court ruled as a matter of law that Fredericks owed to Native Energy \$203,983.00. McCormick was successful in securing a special jury verdict in which Fredericks was ordered to pay to Native Energy and McCormick \$352,668.55. Native Energy incurred no attorneys' fees in McCormick's pursuit of those claims on behalf of Native Energy. Fredericks fails to even allege how Vogel's representation of McCormick and Northern Improvement in the Original Action against Fredericks caused damage to Native Energy when McCormick was successful in obtaining a sizable judgment in favor of Native Energy.<sup>3</sup>

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<sup>2</sup> The allegation is absent from Fredericks' pleading because no attorney client relationship ever existed between Vogel and Native Energy.

<sup>3</sup> Fredericks' assertion that Native Energy was damaged by the October 2017 mistrial is illogical. Fredericks is not the personification of Native Energy. The Original Action litigated the claims by the owners of Native Energy that the other breached duties owed to Native Energy and to the owners. Native Energy incurred no costs or attorneys' fees in either owner's pursuit of their claims.

**IV. District Court Properly Dismissed Fredericks' Claims Before Discovery.**

[¶58] No discovery was necessary to conclude Fredericks' claims were barred by res judicata. The Court took judicial notice of the proceedings in the Original Action and properly dismissed Fredericks' claims with prejudice because the doctrine of res judicata is an absolute bar to all of the claims in a subsequent action. The District Court declined to delay decision on Vogel's motion for summary judgment in the absence of discovery because the areas of discovery Fredericks' counsel identified in Fredericks' brief opposing Vogel's motion for summary judgment were immaterial, irrelevant, and would not alter the result that Fredericks cannot establish Vogel owed any duty to Fredericks or to Native Energy. *See Choice Financial Group v. Schellpfeffer*, 2006 ND 87, ¶ 12, 712 N.W.2d 855 (additional citations omitted) (utilizing Rule 56(f) of the North Dakota Rules of Civil Procedure to delay ruling on summary judgment requires party to identify the information to be sought in discovery and how, if particular information were uncovered, it would preclude summary judgment). Fredericks fails to allege essential elements of his claims for breach of duty and malpractice. Nothing identified by Fredericks that he would seek in discovery precludes summary judgment that Fredericks' breach of duty and malpractice claims fail as a matter of law.

**V. Fredericks' Appeal is Groundless and Devoid of Merit**

[¶59] The Court should award to Vogel its appellate attorneys' fees pursuant to Rule 38 of the North Dakota Rules of Appellate Procedure. Fredericks' conclusory assertions concerning alleged representation of Native Energy and Fredericks were not supported by the facts or the law. The District Court detailed in its opinion the applicability of the doctrine of res judicata fully supported by the facts and the law. Fredericks asserted this action only after failing to prove his claims to the court and to the jury in the Original

Action. Fredericks pursued the claims before the district court in bad faith misrepresenting documentary and testimonial evidence. Fredericks' appeal is not grounded in fact or law. Fredericks continued pursuit of these claims against McCormick, Northern Improvement and their legal counsel, Vogel, is further evidence of bad faith. *See Mitchell v. Preusse*, 358 N.W.2d 511 (N.D. 1984) (ruling appellant's factual and legal bases for appeal so devoid of merit as to warrant costs and attorneys' fees in favor of appellees).

### **CONCLUSION**

[¶60] The District Court properly dismissed Fredericks' Complaint. Fredericks' claims against Vogel Law Firm are barred by res judicata. Even if the claims were not so barred, the District Court had before it sufficient evidence from which to grant Vogel Law Firm's Motion for Summary Judgment concluding Vogel Law Firm did not represent Fredericks or Native Energy and thus owed no duties to Fredericks or to Native Energy. The District Court's Order Dismissing Fredericks' Complaint should be affirmed.

Respectfully submitted January 15, 2020.

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 32(e) of the North Dakota Rules of Appellate Procedure, this brief complies with the page limitation and consists of 32 pages including the Certificate of Compliance.

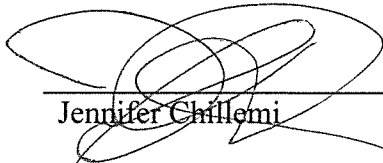
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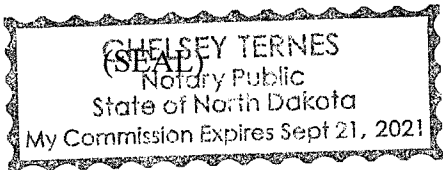


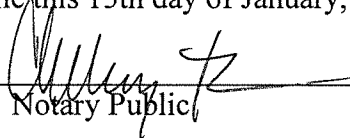




Jennifer Chillemi

Subscribed and sworn to before me this 15th day of January, 2020.



  
Notary Public