**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A09-1614**
**A09-1836**

Wilfred W. Krech,
Respondent (A09-1614),

vs.

Warren W. Krech, et al.,
Appellants,

and

Warren W. Krech, et al.,
Appellants,

vs.

Vermillion State Bank, et al.,
Respondents (A09-1836).

**Filed May 25, 2010**
**Affirmed; motion granted in part and denied in part**
**Schellhas, Judge**

Dakota County District Court
File Nos. 19HA-CV-08-3270; 19HA-CV-09-3011

W. Patrick Judge, Richard D. Anderson, Briggs and Morgan P.A., Minneapolis, Minnesota (for respondent (A09-1614))

Wayne G. Popham, Popham Law Office, Minneapolis, Minnesota (for appellants)

Dale M. Wagner, Louis J. Speltz, Jonathan C. Marquet, Bassford Remele, Minneapolis, Minnesota (for respondents (A09-1836))

Considered and decided by Hudson, Presiding Judge; Kalitowski, Judge; and Schellhas, Judge.

## U N P U B L I S H E D  O P I N I O N

**SCHELLHAS**, Judge

Appellants challenge district court orders in two cases consolidated by this court on appeal. Appellants argue that the district court erred in their first case by denying their motions to amend their answer to add a counterclaim for fraud and to add a bank and its president as parties. Appellants argue that the district court erred in their second case by dismissing the case on the basis of res judicata. Because we conclude that appellants' fraud claim fails as a matter of law, we affirm.

## FACTS

In 1980, appellants Warren Krech and Opal Krech purchased a 20-acre parcel of real property (Jubilation property) in Inver Grove Heights. In 1998, respondent Vermillion State Bank (the bank) extended appellants a $420,000 credit line to finance appellants' work on the Jubilation property. For the next six years, appellants paid only interest on the credit line and real-estate taxes on the Jubilation property.

In March 2004, appellants were attempting to sell the Jubilation property or find a development partner and sought to borrow substantially more money from the bank to be secured by a mortgage against the Jubilation property. In addition to a mortgage, the bank required a third-party guaranty, suggested that respondent Wilfred Krech[1] might

[1] Though not explicit in the record, appellants represent that Wilfred Krech is a "distant relative" of Warren and Opal Krech.

serve as a guarantor, and arranged a meeting on March 8, 2004, between appellants, Wilfred Krech, a lawyer,[2] and a bank representative. At the meeting, appellants executed a $1.4 million promissory note and mortgage against the Jubilation property. The mortgage provided that appellants would be in default if, among other things, they failed to make a payment on the loan when due, and it provided that the bank was entitled to accelerate the debt, foreclose on the mortgage, and sell the property in the event of default, in addition to any other remedies. The mortgage also provided that "[a]ll remedies are distinct, cumulative and not exclusive, and [the bank] is entitled to all remedies provided at law or equity, whether or not expressly set forth."

Also at the meeting on March 8, Wilfred Krech signed a guaranty of appellants' loan up to $1.4 million plus interest and agreed to guarantee payment of the bank's fees and expenses. The guaranty provided that "no act or thing, except full payment and discharge of all indebtedness, shall in any way exonerate [Wilfred Krech] or modify, reduce, limit or release the liability of [Wilfred Krech] hereunder." The guaranty also included an addendum under which the bank agreed that "if [the bank] requires [Wilfred Krech] to pay the full outstanding balance of the loan, [the bank] shall assign all of its rights under the loan documents to [Wilfred Krech]." As consideration for Wilfred Krech's guaranty, appellants executed a $1.4 million promissory note and mortgage in favor of Krech against Jubilation Outlot E to secure future advances. Under the terms of

[2] The record does not include the identity of the lawyer or on whose behalf the lawyer attended the meeting.

the note, appellants promised to pay Wilfred Krech $1.4 million, "or so much thereof as is advanced in [Wilfred] Krech's sole and absolute discretion."

Wilfred Krech did not advance any funds to appellants at the meeting on March 8, 2004. But, on March 16, 2005, Wilfred Krech advanced appellants $150,000 so that they could meet their obligations on the Jubilation property. Appellants have not repaid this advance.

In 2007, appellants defaulted on the bank loan. Instead of commencing foreclosure proceedings against the Jubilation property or enforcing the guaranty against Wilfred Krech, the bank entered into a voluntary foreclosure agreement (VFA) with appellants under Minn. Stat. § 582.32 (2006). Appellants signed the VFA on April 16, 2007, and the bank signed it on November 2, 2007. At the bank's request, appellants executed a quitclaim deed conveying the Jubilation property to the bank. Appellants understood that their execution of the deed would avoid public foreclosure proceedings. The deed was placed in escrow, subject to an agreement that the escrow agent would deliver the deed to the bank if appellants did not satisfy their indebtedness to the bank by November 1, 2007. When appellants did not meet the November 1 deadline, the escrow agent delivered the deed to the bank.

Notwithstanding the escrow agent's delivery of the escrowed quitclaim deed to the bank, the bank commenced foreclosure proceedings of appellants' $1.4 million mortgage, claiming that $1,810,130 was unpaid, and, according to Wilfred Krech, the bank demanded that Krech pay appellants' debt pursuant to his guaranty. Wilfred Krech and the bank then agreed that Wilfred Krech would pay 50% of the debt, and the bank would

remain responsible for the other 50%. On December 31, 2007, "in satisfaction of [his] guaranty obligation," Wilfred Krech purchased a 50% participation interest in appellants' note and mortgage to the bank under the terms of a participation agreement. As consideration for his 50% participation interest, Wilfred Krech executed a promissory note in favor of the bank in the amount of $959,401. This amount represented 50% of the outstanding balance on appellants' loan as of December 31, 2007.

On January 8, 2008, the bank purchased the Jubilation property for $1,853,127 at the sheriff's sale and recorded the sheriff's certificate of sale. The bank's foreclosure eliminated a junior mortgage in favor of Jeffry Oehrlein, one of appellants' former partners, and Wilfred Krech's second mortgage against Outlot E, because neither mortgagee redeemed.

On February 28, 2008, Wilfred Krech sued appellants to recover his $150,000 advance to them. Appellants denied that they owed Wilfred Krech $150,000 and asserted a counterclaim for a declaratory judgment that the promissory note was satisfied.

On April 17, 2008, the bank quitclaimed the Jubilation property to Robert Curve Development LLC (the LLC) of which Wilfred Krech was a 50% member. The quitclaim deed from the bank to the LLC reflects consideration of less than $500.

According to appellants, on April 10, 2008, Wilfred Krech told appellants that he owned the Jubilation property and that he already had sold five acres. Appellants claim that Wilfred Krech gave them a written option to purchase the Jubilation property for $4,000,000 ($200,000 per acre), if they could close within 20 days, representing to appellants that he owned the property and that "he only purchased the property to protect

his loan of $150,000 and just wanted out of the property what he had invested in it plus a small amount 'for his troubles.'" Appellants did not accept Wilfred Krech's offer.

On July 21, 2008, in an affidavit submitted to the district court, bank employee Kevin Pedelty stated that when appellants' loan default forced the bank to foreclose its mortgage, the bank insisted that Wilfred Krech honor his guaranty by paying the bank the principal and interest on the loan plus costs in the total amount of $1,918,803.78, and that, under the terms of the guaranty, the bank assigned all of its interest in the property to Wilfred Krech. After conducting discovery, appellants learned that Wilfred Krech did not own all of the interest in the Jubilation property; in September 2008, the LLC had the Jubilation property listed for sale for $5,300,000. Appellants also learned that the other 50% member of the LLC was respondent John Poepl, president of the bank.

Believing that Wilfred Krech and the bank had defrauded them, appellants moved the district court for leave to amend their answer and counterclaim against Wilfred Krech to add a fraud claim and to join the bank as a defendant to the fraud counterclaim. The court denied appellants' motion. Appellants moved for reconsideration and filed a second motion to amend, seeking to join Poepl, as well as the bank, as a defendant to their fraud claim. Wilfred Krech moved for summary judgment on his complaint and appellants' original counterclaim. Before the court heard the parties' motions, the presiding judge recused himself. On March 16, 2009, the successor judge, who heard appellants' motions, denied appellants' second motion to amend, did not explicitly rule on appellants' motion to reconsider their first motion to amend, and denied Wilfred Krech's summary-judgment motion due to existing fact questions. But the court ordered

that Wilfred Krech's "motion to dismiss [appellants'] fraud claims contained in [their] Counterclaim is granted," although Wilfred Krech brought no such motion. On July 13, 2009, the district court made an express determination that there was no just reason for delay and ordered immediate entry of judgment. Appeal A09-1614 follows.

Meanwhile, in late April 2009, appellants commenced a separate suit against the bank and Poepl, alleging fraud and breach of contract based on the same set of facts underlying their disallowed counterclaims in the first case. Appellants moved to consolidate the two cases, and the bank and Poepl moved to dismiss the second case. On September 17, 2009, the district court dismissed the second case against the bank and Poepl on the basis of res judicata, mooting appellants' motion to consolidate. Appeal A09-1836 follows.

This court granted appellants' motion to consolidate the cases on appeal.

## D E C I S I O N

### *Appeal in the First Case (A09-1614)*

Appellants argue that the district court's order denying their first motion to amend their counterclaim should be vacated because the presiding judge should have recused himself without ruling on the motion. Appellants argue that the order by the successor judge that purported to "dismiss [the] fraud claims contained in [appellants'] counterclaim" and the resulting judgment should be vacated because when the court issued the order, appellants' counterclaim contained no fraud claims. Appellants also argue that the district court erred by denying their motions to amend their counterclaim

against Wilfred Krech and to join the bank and Poepl as additional defendants to the amended counterclaim.

***Appealability of Orders in the First Case***

The appeal in the first case is purportedly from a judgment entered on July 10, 2009, based on the district court's March 16, 2009 order. "Although the issue of appealability has not been stressed, this court cannot confer jurisdiction upon itself by ignoring it." *Laramie Motors, Inc. v. Larson*, 253 Minn. 484, 485, 92 N.W.2d 803, 804 (1958). Subject to several exceptions inapplicable here, this court will entertain an appeal only "from a final judgment, or from a partial judgment entered pursuant to Minn. R. Civ. P. 54.02." Minn. R. Civ. App. P. 103.03(a); *see also City of Chaska v. Chaska Twp.*, 271 Minn. 139, 142, 135 N.W.2d 195, 197 (1965) (stating that "final," when used to designate the effect of a district court's judgment or order, means that the matter is conclusively terminated so far as the court issuing the order is concerned). As the record reflects, no final judgment has been entered in the first case. And the parties acknowledged at oral argument that Wilfred Krech's claim to recover the $150,000 advance made to appellants under the promissory note is still outstanding. Therefore, the orders of the district court in the first case are appealable only if a partial judgment was entered pursuant to rule 54.02, which states:

> When multiple claims for relief or multiple parties are involved in an action, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

Minn. R. Civ. P. 54.02. This rule "is intended to reduce piecemeal appeals by limiting appeals from judgments that resolve only part of the litigation" while "liberaliz[ing] the appellate process for parties who might be prejudiced by waiting to appeal a decision where other claims or liabilities are yet to be decided." *T.A. Schifsky & Sons, Inc. v. Bahr Constr., LLC*, 773 N.W.2d 783, 787 (Minn. 2009). "Whether an order can properly be certified under Minn. R. Civ. P. 54.02 raises a legal question that requires construction and application of a procedural rule, which we review de novo." *Id.* at 786.

In its July 13, 2009 order, the district court stated: "[T]he Partial Judgment entered March 17, 2009 is hereby amended to become a final judgment as to the claims involved therein, and judgment should be so entered, as there is no just reason for delay." But "[t]he district court's use of Rule 54.02's language . . . does not necessarily make the resulting judgment a final partial judgment pursuant to Minn. R. Civ. P. 54.02." *Schifsky*, 773 N.W.2d at 787. Rule 54.01 defines "judgment" to mean "the final determination of the rights of the parties in an action or proceeding." Minn. R. Civ. P. 54.01. Where the court's ruling constitutes only a partial adjudication and does not finally dispose of any claim, the decision is not a judgment from which appeal can be taken. *In re Commodore Hotel Fire & Explosion Case*, 318 N.W.2d 244, 246–47 (Minn. 1982). Here, none of the court's rulings in the March 16, 2009 order constituted a "final determination of the rights of the parties" on any claims or issues in the first case—each simply adjudicated pretrial procedural matters. Therefore, notwithstanding the court's use of rule 54.02 language, the July 13, 2009 order was not a final judgment that can form the basis for an appeal.

Yet, we recognize that in these consolidated appeals, because the issues and facts underlying both cases are closely related, and because the second case is ripe for appeal, a dismissal of the appeal in the first case would potentially cause redundancy and duplication of the consideration of issues on appeal. And such duplication would be contrary to the purpose of rule 54.02. We therefore will extend review of the issues raised by appellants in the first case in the interest of judicial economy. *See Zimprich v. Stratford Homes, Inc.*, 453 N.W.2d 557, 559 (Minn. App. 1990) (extending review in the interest of judicial economy).

***Recusal***

Appellants argue on appeal that the district court judge who denied their first motion to amend their counterclaim should have recused himself without ruling on the motion. Appellants did not raise this issue in district court and therefore are not entitled to review. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). But, regardless, appellants' second motion to amend their counterclaim was heard on the merits by a successor judge thereby mooting any claim of prejudice by appellants.

***Appellants' First Motion to Amend***

Appellants also argue that the district court erred by denying their first motion to amend their counterclaim. "The trial court has wide discretion to grant or deny an amendment, and its action will not be reversed absent a clear abuse of discretion." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

With leave of the court, a defendant may amend the answer to add a counterclaim if the counterclaim was omitted due to oversight, inadvertence, or excusable neglect, or

when justice requires. Minn. R. Civ. P. 13.06. Similarly, once a reply to a counterclaim has been served, the answer containing the counterclaim may be amended only by leave of the court or by written consent of the adverse party. Minn. R. Civ. P. 15.01. Generally, leave to amend a pleading "shall be freely given when justice so requires." *Id.* But the court may deny a motion to amend an answer to add a counterclaim where the additional claim would not survive summary judgment. *Ag. Servs. of Am. v. Schroeder*, 693 N.W.2d 227, 235 (Minn. App. 2005). And a motion to amend a pleading to add a claim for fraud is properly denied if the pleading does not state the claim with particularity as required by rule 9.02. *Schumacher v. Schumacher*, 627 N.W.2d 725, 730 (Minn. App. 2001).

"Persons other than those made parties to the original action may be made parties to [the] counterclaim . . . in accordance with the provisions of Rules 19 and 20," which govern the joinder of parties. Minn. R. Civ. P. 13.08. Under rule 20.01, a party "has the right to join a person against whom the [party] can state a claim." *Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 331 (Minn. 2004). A motion to amend to add an additional defendant may be denied on the same bases as other motions to amend. *See R.B. Thompson, Jr. Lumber Co. v. Windsor Dev. Corp.*, 383 N.W.2d 357, 362 (Minn. App. 1986) (affirming district court's denial of motion to amend to add new defendant in mechanic's-lien case after analysis under Minn. R. Civ. P. 15.01), *review denied* (Minn. May 22, 1986).

In their first motion to amend their counterclaim, appellants sought to add a claim of fraud against Wilfred Krech and to join the bank as a defendant to their counterclaim. To make out a claim for fraud, a claimant must establish that:

> (1) there was a false representation by a party of a past or existing material fact susceptible of knowledge; (2) made with knowledge of the falsity of the representation or made as of the party's own knowledge without knowing whether it was true or false; (3) with the intention to induce another to act in reliance thereon; (4) that the representation caused the other party to act in reliance thereon; and (5) that the party suffer[ed] pecuniary damage as a result of the reliance.

*Hoyt Props., Inc. v. Prod. Res. Group, L.L.C.*, 736 N.W.2d 313, 318 (Minn. 2007). The circumstances constituting fraud must be pleaded with particularity, though "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally." Minn. R. Civ. P. 9.02. "While Rule 9.02 does not specify what constitutes sufficient particularity, the Minnesota Supreme Court has held that all of the elements of a fraud cause of action must be pleaded." *Stubblefield v. Gruenberg*, 426 N.W.2d 912, 914 (Minn. App. 1988) (citing *Alho v. Sterling*, 266 Minn. 71, 73, 122 N.W.2d 869, 870 (1963)).

In their first proposed amended counterclaim, appellants alleged the following false representations by Wilfred Krech and the bank: (1) the bank stated to appellants that Wilfred Krech "was refusing to renew his guaranty and therefore would not provide the funds to keep [the Bank] loan current"; (2) the bank represented to appellants "at the time of the [VFA] that there would not be a sheriff's sale"; (3) the bank represented to appellants that "the purpose of the foreclosure was only to pay its note"; (4) the bank

represented to appellants that "after the foreclosure sale, [Wilfred Krech] became the owner of [appellants'] property"; (5) Wilfred Krech "gave [appellants] a document indicating that he owned the Jubilation property"; (6) Wilfred Krech represented to appellants "that he had already sold 5 acres of the 20 acres" when offering appellants an option to buy back the Jubilation property; and (7) the bank represented to appellants that Wilfred Krech's "payment to the Bank for the property was not a sale but was only the result of [t]he Bank's insistence that [Wilfred Krech] was bound under his guaranty to reimburse [t]he Bank for what it had bid at the sheriff's sale."

But appellants did not demonstrate that they relied to their detriment on any of these allegedly false representations. Appellants claimed that they signed the VFA and quitclaim deed in reliance on the bank's allegedly false representations that Wilfred Krech refused to "renew" his guaranty and that there would be no sheriff's sale, but they did not demonstrate how they suffered pecuniary damage as a result of this reliance. Appellants do not dispute that had they not signed the VFA, the bank could have proceeded with a statutory foreclosure because appellants were in default on their mortgage. Appellants did not demonstrate that their refusal to sign the VFA and quitclaim deed would have preserved their interest in the Jubilation property or in any way enhanced their financial position.

Appellants also claimed that they relied on Wilfred Krech's statement in April 2008 that he personally owned the Jubilation property when he offered them an option to repurchase the property so that they could sell it to a potential buyer. But appellants have not demonstrated how they were harmed by their reliance; in other words, appellants

have not demonstrated what different actions they would have taken if they had known that the Jubilation property was owned by the LLC, rather than by Wilfred Krech. Regardless of who owned the Jubilation property in April 2008, because the January 2008 mortgage-foreclosure redemption period had expired, the parties do not dispute that *appellants* did not own the property and that they would have had to repurchase it from *someone* before they could sell it. Appellants failed to demonstrate that any misrepresentation by Wilfred Krech caused appellants pecuniary damage.

Similarly, appellants claim that Wilfred Krech's allegedly false statement that he had already sold 5 of the 20 acres "deliberately prevented [appellants] from concluding their sale and allowed [Wilfred Krech] and other parties in ownership to retain the property for a projected profit of $3.0 million or more." Even if this statement is read to mean that appellants' reliance on Wilfred Krech's statement caused them not to complete their sale, the fact remains that appellants did not own any of the acreage and that neither Wilfred Krech nor the LLC had an obligation to resell any of the Jubilation property to appellants. Therefore, even if appellants relied on the alleged misrepresentation by Wilfred Krech, appellants did not demonstrate that their reliance caused them pecuniary damage.

In their first proposed amended counterclaim, appellants did not allege detrimental reliance on any of the other allegedly false statements by the bank or Wilfred Krech. Because appellants did not demonstrate pecuniary damage as a result of their reliance on the allegedly false statements made by the bank and Wilfred Krech, appellants' proposed fraud counterclaim failed to state a claim and would not have withstood a motion for

summary judgment. The district court therefore did not abuse its discretion by denying appellants' first motion to amend.

***Appellants' Second Motion to Amend***

Appellants argue that the district court abused its discretion by denying their second motion to amend. Appellants' second proposed amended counterclaim included several additional allegations, supported by additional evidence. Appellants also sought to add Poepl as a defendant to the counterclaim in addition to asserting an amended counterclaim against Wilfred Krech and the bank.

Appellants alleged that "[i]t was anticipated and understood at the time of the guaranty that [appellants] might not be able to meet all of their obligations and that [Wilfred Krech] would then make payments due on [the bank] loan. That was the purpose of the guaranty." Appellants also sought to add several paragraphs pertaining to their allegations that the bank and Wilfred Krech schemed to acquire the Jubilation property for less than it was worth. But none of appellants' proposed paragraphs included allegations of intentionally false statements of fact made by Wilfred Krech, the bank, or Poepl on which appellants relied to their detriment. Instead, the essence of appellants' proposed counterclaim was that Wilfred Krech breached his oral promise to keep appellants' bank loan current if they were not able to do so. Appellants do not support this allegation with any evidence and we therefore conclude that appellants' claim would not survive summary judgment.

Moreover, even if appellants had provided evidence that Wilfred Krech made such a promise, the promise would not form the basis of a fraud claim. The first element of

fraud is that "there was a false representation by a party *of a past or present existing material fact susceptible of knowledge*." *Hoyt Props.*, 736 N.W.2d at 318 (emphasis added). As the supreme court has stated,

> It is a well-settled rule that a representation or expectation as to future acts is not a sufficient basis to support an action for fraud merely because the represented act or event did not take place. It is true that a misrepresentation of a present intention could amount to fraud. However, it must be made affirmatively to appear that the promisor had no intention to perform at the time the promise was made.

*Vandeputte v. Soderholm*, 298 Minn. 505, 508, 216 N.W.2d 144, 147 (1974).

Even if Wilfred Krech made a statement to appellants that he would make all necessary payments to prevent them from defaulting on their bank loan, even if Wilfred Krech intended for appellants to act in reliance on that statement, and even if appellants somehow relied on the statement to their pecuniary detriment, appellants cannot succeed on the basis of this statement because it was a statement about future acts. It was not "a past or present existing material fact susceptible of knowledge." And to the extent appellants alleged a misrepresentation of a present intention, they provided neither evidence nor allegation that Wilfred Krech had no intention to perform at the time he made the alleged promise. Appellants' second proposed amended counterclaim would not survive summary judgment, and the district court did not abuse its discretion in denying the motion to amend.

***Appeal in the Second Case***

Appellants argue that the district court erred by granting respondents' motion to dismiss appellants' complaint against them in the second case. The majority of

allegations in appellants' complaint are materially similar to the facts described above in connection with the first case; appellants asserted claims for fraud and breach of contract against the bank and Poepl. But the complaint clarified appellants' position in several respects.

In the complaint against the bank and Poepl, appellants' fraud claims are clearer than in their proposed, but disallowed, claims in the first case. In the second case, appellants alleged that: the bank and Wilfred Krech orally agreed that the bank would forbear collection of the loan principal until the Jubilation property was sold and that to prevent appellants' default on the bank loan, Wilfred Krech would make any interest and tax payments that appellants were unable to make; the bank falsely represented to appellants that Wilfred Krech was "refusing to renew" his guaranty, i.e., that he would not honor his agreement with appellants to make payments in their stead; the bank made this misrepresentation in order to induce appellants to sign the VFA and deed and appellants were so induced; but for the bank's misrepresentation, appellants would not have signed the VFA and deed and would have enforced their oral agreement with Wilfred Krech to pay the amounts due; if appellants had enforced their oral agreement with Wilfred Krech, foreclosure would have been prevented and appellants' interest in the Jubilation property would have been preserved.

The district court dismissed the complaint, concluding that appellants' claims were barred by res judicata based on the court's decisions in the first case that denied appellants' motions to amend their counterclaim and join the bank and Poepl.

"We review de novo whether the doctrine of res judicata can apply to a given set of facts." *Erickson v. Comm'r of Dep't of Human Servs.*, 494 N.W.2d 58, 61 (Minn. App. 1992). "Res judicata is a finality doctrine that mandates that there be an end to litigation." *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004). The doctrine bars the assertion of a subsequent claim where "(1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the same parties or their privies; (3) there was a final judgment on the merits; (4) the estopped party had a full and fair opportunity to litigate the matter." *Id.* "Under res judicata, a party is required to assert all alternative theories of recovery in the initial action." *Id.* (quotation omitted). "Res judicata not only applies to all claims actually litigated, but to all claims that could have been litigated in the earlier action." *Id.* "Once there is an adjudication of a dispute between parties, res judicata prevents either party from relitigating claims arising from the original circumstances, even under new legal theories." *Id.* at 837.

Here, the district court's conclusion that appellants' claims against the bank and Poepl were barred by res judicata was incorrect because the first and second cases do not involve the same parties or their privies. Because the district court denied appellants' motions to assert claims against the bank and Poepl in the first case, neither the bank nor Poepl ever was a party to the first case. And Wilfred Krech is not a party to the second case. Res judicata therefore was not an appropriate basis for dismissing appellants' complaint against the bank and Poepl.

But we will not reverse a district court's decision where the result was correct, though based on incorrect reasons. *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 728

(Minn. 1990). Here, although res judicata was an incorrect basis for dismissal of appellants' second case, we affirm the court's dismissal because appellants' complaint fails to state a claim upon which relief can be granted. Even under appellants' more cogent theory of their causes of action in their second complaint, we conclude that appellants cannot prevail on their claim that they suffered pecuniary damage by signing the VFA and deed instead of enforcing Wilfred Krech's alleged oral agreement to keep their bank loan out of default. The statute of frauds bars appellants from enforcing Wilfred Krech's alleged oral agreement.

"A debtor may not maintain an action on a credit agreement unless the agreement is in writing, expresses consideration, sets forth the relevant terms and conditions, and is signed by the creditor and the debtor." Minn. Stat. § 513.33, subd. 2 (2008). "Credit agreement" is defined as "an agreement to lend or forbear repayment of money, goods, or things in action, to otherwise extend credit, or to make *any other financial accommodation*." *Id.*, subd. 1(1) (2008) (emphasis added). Appellants allege that Wilfred Krech orally agreed to make a financial accommodation by paying any amounts they could not. Because enforcement of the agreement is barred by the statute of frauds, appellants cannot successfully argue that they suffered pecuniary damage by relying on Wilfred Krech's alleged promise.

Appellants' breach-of-contract claim also fails to state a claim upon which relief can be granted. Appellants allege that they had an oral agreement with the bank that it would require that they pay only interest and taxes until the Jubilation property was sold; that the bank would not foreclose as long as interest and taxes were paid; and that the

bank "would maintain the loan until the property was sold," apparently by obtaining payment from the guarantor if necessary. As with appellants' alleged oral agreement with Wilfred Krech, the enforcement of this oral agreement is barred by the statute of frauds. We therefore affirm the district court's grant of summary judgment to the bank and Poepl and its dismissal of appellants' complaint in the second case.

***Motion to Strike***

Wilfred Krech moves to strike several statements in appellants' statement of facts on the ground that they are not supported by citations to the record. The Minnesota Rules of Civil Appellate Procedure provide that each statement of a material fact contained in the facts section of an appellant's principal brief must be accompanied by a reference to the record. Minn. R. Civ. App. P. 128.02, subd. 1(c). "The purpose behind rule 128 is to provide a standardized brief format to allow appellate courts to read and absorb the voluminous presented materials in each of the multiple cases that the court simultaneously considers." *Cole v. Star Tribune*, 581 N.W.2d 364, 371 (Minn. App. 1998). Citations to the record are particularly important where the record is extensive. *Hecker v. Hecker*, 543 N.W.2d 678, 681–82 n.2 (Minn. App. 1996), *aff'd*, 568 N.W.2d 705 (Minn. 1997). A "flagrant violation" of the rule requiring citations to the record may lead to nonconsideration of an issue or dismissal of the appeal. *Brett v. Watts*, 601 N.W.2d 199, 202 (Minn. App. 1999) (quotation omitted), *review denied* (Minn. Nov. 17, 1999).

In their brief filed in the first case, appellants cite to the record only 10 times in their 20-page statement of facts. Wilfred Krech argues that appellants' failure to provide

citations to the record in their statement of the facts is flagrant and warrants dismissal of the appeal or, at a minimum, an order striking the unsupported statements.

In *Cole v. Star Tribune*, one appellant included only one citation to the record in the statement of the facts and another appellant include no citations to the record in the statement of the facts. 581 N.W.2d at 372. This court granted respondents' motion to strike the nonconforming portions of the appellants' briefs but did not dismiss the appeal. *Id.* Appellants' lack of citations to the record in this case was less severe than in *Cole* and, therefore, does not warrant dismissal of their appeal. But, as in *Cole*, this court will strike those portions of appellants' brief identified by Wilfred Krech that state material facts without citation to the record.

Wilfred Krech also moves to strike two specific assertions in appellants' statement of the facts on the ground that the assertions are not supported by the record. The first assertion consists of appellants' statement on page 18 of their brief: "Each of the two persons who planned the fraudulent scheme to take the Jubilation property have thus admitted their representation to [appellants] on or about April 16, 2007, that there was no longer a guaranty in effect, was false." On his assumption that he is one of "the two persons" mentioned in appellants' statement, Wilfred Krech points out that the record contains no evidence that he ever represented to appellants that the guaranty was no longer in effect. Our review of the record reveals that Wilfred Krech is correct and we therefore strike this sentence from appellants' brief in the first case to the extent that it asserts that Wilfred Krech represented to appellants that the guaranty was no longer in effect.

Wilfred Krech also moves to strike appellants' statement on page 4 of their brief, that at the March 4, 2004 meeting with the bank, "Wilfred Krech agreed that he would make any Bank loan payments that [appellants] could not make until the property was sold." And Wilfred Krech moves to strike the related statement on page 5, that "[appellants] relied on the agreement with Wilfred Krech . . . that their bank loan would be kept current, either by themselves or by Wilfred Krech, until they could sell the Jubilation property." Our review of the record in the first case reveals that it does not contain evidence of such an agreement or any allegation by appellants of such an agreement. Only in their second proposed amended counterclaim in the first case did appellants argue that "[i]t was anticipated and understood at the time of the guaranty that [appellants] might not be able to meet all of their obligations and that [Wilfred Krech] would then make payments due on [the bank] loan." We therefore strike both of these statements from appellants' brief in appeal A09-1614.

**Affirmed; motion granted in part and denied in part.**