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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A10-355**

Michelle A. Kern, et al.,  
Respondents,

vs.

Cody S. Janson, et al.,  
Respondents,

Jennifer Torborg, et al.,  
Appellants.

**Filed September 14, 2010  
Reversed and remanded  
Halbrooks, Judge**

Morrison County District Court  
File No. 49-CV-09-1679

Timothy W. Nelson, Nelson Personal Injury, LLC, St. Cloud, Minnesota (for respondents Michelle A. Kern and Terry Kern)

William J. Cashman, Matthew W. Moehrle, Rajkowski Hansmeier Ltd., St. Cloud, Minnesota (for respondents Cody S. Janson and Jessica Gerwing)

Dyan J. Ebert, Joel M. Frye, Quinlivan & Hughes, P.A., St. Cloud, Minnesota (for appellants)

Considered and decided by Johnson, Presiding Judge; Halbrooks, Judge; and Worke, Judge.

## **UNPUBLISHED OPINION**

**HALBROOKS**, Judge

Appellants Jennifer Torborg and James Torborg challenge the district court's denial of their motion for summary judgment and grant of respondents Michelle Kern and Terry Kern's motion to vacate a conciliation court judgment. Because we conclude that the district court abused its discretion by vacating Michelle Kern's conciliation court judgment and therefore erred by denying appellants' motion for summary judgment, we reverse and remand.

### **FACTS**

This case arises out of two motor-vehicle accidents. On November 14, 2003, Michelle Kern (Kern) was driving in Little Falls when she was involved in a collision with respondent Cody Janson. Kern suffered injuries, resulting in pain in her left shoulder blade and left side of her neck, as a result of this accident. Ten months later, on September 15, 2004, Kern was in an accident with a vehicle driven by Jennifer Torborg. Kern's injuries from the second accident included jaw pain, headaches, neck pain, eye pain, low-back pain, midback pain, fatigue, and pain in her knees and feet. Because Kern did not have collision insurance at the time of the second accident, she sought to recover her property damage from Torborg's insurer. Torborg's insurance adjuster determined that Kern's fault contributed to the accident and offered Kern only a portion of the total property damage.

Kern filed a conciliation court action against James Torborg, the owner of the vehicle, to recover the remainder of her property damage. In her statement of the claim,

Kern asserted that Jennifer Torborg (James's daughter and the driver of the vehicle) was responsible for the damages. Kern sought the replacement value of her vehicle in addition to towing and storage fees. After a contested hearing, judgment in the amount of \$3,423.43 was entered against James Torborg; he later satisfied the judgment in full.

Kern began treating for the injuries she sustained in the second accident on the day that it occurred. But it was not until October 2006 that Kern incurred more than \$4,000 in medical expenses that she claims are related to this accident. It was also in October 2006 that Kern learned that her injuries would be permanent. Kern then submitted a claim for personal-injury damages to Torborg's insurer, but the insurer denied her claim in December 2008, taking the position that it was barred by her conciliation court judgment.

Kern filed a negligence action in district court against the Torborgs, Janson, and respondent Jessica Gerwing, who was the owner of the vehicle driven by Janson at the time of the first accident.<sup>1</sup> Kern alleged that the defendants were jointly and severally liable for her injuries. Gerwing and Janson denied joint and several liability but cross-claimed against the Torborgs for contribution or indemnity in the event they were determined to be jointly and severally liable.

Kern's attorney requested that the district court judge who was first assigned to the case recuse himself because he had "represented . . . Kern prior to ascending to the bench." The judge did recuse and in the recusal notice indicated that the recusal was because he had "represented [Kern] on this claim for a period of time." At the summary-

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<sup>1</sup> Kern's husband also brought a derivative claim for loss of consortium.

judgment hearing, Kern's attorney clarified that Kern had discussed her personal-injury claim with her first attorney before bringing her conciliation court claim and that her attorney advised her to "take care of her property damage claim in conciliation court."

The Torborgs moved for summary judgment on the ground that Kern's personal-injury claim was barred by the doctrine of res judicata. Gerwing and Janson opposed the Torborgs' motion, arguing that because Kern pleaded joint and several liability, the Torborgs should remain in the case so that a jury could properly apportion damages. Kern moved to vacate her conciliation court judgment under Minn. R. Civ. P. 60.02. Kern claimed in an affidavit that she was not familiar with the concept of tort thresholds or the possible preclusive effect of a conciliation court action at the time that she sought relief in conciliation court and that she did not learn the extent of her injuries until after the conciliation court matter had concluded. In the alternative, Kern argued that res judicata did not bar her personal-injury claim.

The district court granted Kern's motion to vacate the conciliation court judgment. Citing the residual clause of rule 60.02, the district court reasoned that equities favored granting Kern's motion. Specifically, the district court relied on the fact that Kern would have been unable to prove that she met the no-fault thresholds until October 2006, and the fact that Kern was unaware of the thresholds and the preclusive effects of a judgment at the time she brought her conciliation court claim. The district court found that Kern had contact with an attorney prior to filing her claim in conciliation court but concluded that the contact was "inconsequential," reasoning that the scope of her consultation was unknown. Despite expressing some reservation about the timing of Kern's motion

(almost five years after the conciliation court judgment was entered), the district court determined that, under the circumstances, Kern's motion was brought within a reasonable time.

Because the district court granted Kern's motion to vacate, it denied the Torborgs' motion for summary judgment and declined to consider the issue of joint and several liability raised by Janson and Gerwing. This appeal follows. *See In re State & Regents Bldg. Asbestos Cases*, 435 N.W.2d 521, 522 (Minn. 1989) (holding that a party may appeal from an order vacating a judgment as a matter of right).

## DECISION

### I.

We review a district court's decision to vacate a conciliation court judgment for abuse of discretion. *Jorissen v. Miller*, 399 N.W.2d 82, 84 (Minn. 1987). Generally, a conciliation court judgment for property damage resulting from an accident "precludes a subsequent action for damages by reason of personal injury," under the doctrine of res judicata. *Mattsen v. Packman*, 358 N.W.2d 48, 49-50 (Minn. 1984). Res judicata is a finality doctrine that prevents a party from relitigating claims arising out of the same circumstances as an earlier cause of action, even under a new legal theory. *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004). But Minn. R. Civ. P. 60.02(f) allows a district court to relieve a party from a final judgment for "[a]ny . . . reason justifying relief from the operation of the judgment." Relief under clause (f) requires a showing of "extraordinary circumstances." *Regents of Univ. of Minn. v. Med. Inc.*, 405 N.W.2d 474,

481 (Minn. App. 1987), *review denied* (Minn. July 15, 1987). A motion made pursuant to clause (f) must be brought within a reasonable time. Minn. R. Civ. P. 60.02.

The district court determined that at the time of Kern's conciliation claim, she would not have been able to meet the no-fault thresholds in Minn. Stat. § 65B.51, subd. 3 (2004), and that even if her injuries met the stated requirements, Kern was not then aware of the no-fault thresholds.<sup>2</sup> The district court found that Kern's primary concern was "promptly and inexpensively recovering for the property damage to her vehicle." The district court characterized the fact that Kern "was in contact with an attorney at the time she filed her conciliation court claim" as "inconsequential" based on its interpretation of the two primary cases that address vacation of a conciliation court judgment notwithstanding a party's prior contact with an attorney.

Our analysis of the case law leads us to a different conclusion. In *Mattsen*, the supreme court first addressed the issue of whether a party may split a single cause of action into two separate proceedings. 358 N.W.2d at 50. While *Mattsen* conceded the general rule that a party is prohibited from bringing multiple causes of action arising out of the same incident, he urged the supreme court to carve out an exception for conciliation court judgments. *Id.* at 49-50. In essence, *Mattsen* argued that courts should limit the effect of conciliation court judgments to only "the matters disposed of by that judgment." *Id.* at 50. Citing court congestion and delay and the cost of litigation, the supreme court "decline[d] to encourage the multiplicity of actions by declaring that each

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<sup>2</sup> Minn. Stat. § 65B.51, subd. 3, states that no person shall recover for noneconomic detriment unless the person's medical expenses exceed \$4,000, or the injury results in permanent disfigurement, permanent injury, death, or disability for 60 days or more.

claimant is entitled to not one but two days in court.” *Id.* Thus, the supreme court upheld the general rule that a party’s judgment for damages arising out of the same incident, whether in conciliation or district court, extinguishes the party’s entire claim for damages and precludes subsequent action for damages arising out of the same incident. *Id.* at 49-50.

The supreme court observed that rule 60.02 *may* offer relief from a prior conciliation court judgment to a party who is “excusably ignorant of the effect of a judgment.” *Id.* at 50. But in *Mattsen*, the supreme court found no compelling reason to disregard the doctrine of res judicata because Mattsen had “engaged, or at least consulted, his attorney some months before commencing [the conciliation court] action.” *Id.* at 51. The extent of Mattsen’s consultation with his attorney was unclear, but the record demonstrated that Mattsen told the opposing party’s insurer that he was contacting an attorney for “further action” and later represented to the insurer that he had consulted with his attorney about the amount of damages he should seek to recover. *Id.* Mattsen’s consultation with an attorney, brief as it may have been, led the supreme court to conclude that the doctrine of res judicata should bar further claims. In addition, the supreme court addressed the no-fault thresholds and the possibility that a party may not meet the thresholds at the time of a conciliation court claim. *Id.* The supreme court rejected the notion that immaturity of a party’s tort claim or ignorance of no-fault thresholds entitles the party to vacate a conciliation court judgment, stating that while

the failure of a personal injury claim to exceed the no-fault threshold until sometime subsequent to entry of a conciliation court judgment *might* justify relief from operation of the

judgment[,] . . . immaturity of the claim does not justify ignoring the finality of the judgment whether the prior action be brought in conciliation court or elsewhere.

*Id.* (emphasis added) (citation omitted).

Here, the district court found and the record reflects that Kern was represented by an attorney before bringing her property-damage claim in conciliation court. Kern's second attorney stated at the summary-judgment hearing that Kern discussed her personal-injury claim with her first attorney and was advised to proceed in conciliation court on her property-damage claim. While the specifics of Kern's communications with her counsel are not developed in this record, what is known demonstrates that her contact with an attorney was equal to, if not more extensive than, the attorney contact present in *Mattsen*. Kern sought her counsel's advice on a possible personal-injury claim and was advised to proceed in conciliation court on her property-damage claim. Because Kern had the assistance of an attorney on these issues before choosing to bring an action in conciliation court, she was not "excusably" ignorant of the possible consequences of bringing a conciliation court claim for property damage so soon after the accident. Under the principles articulated by the supreme court in *Mattsen*, there is no compelling reason to ignore the principle of res judicata. We conclude that the district court thus abused its discretion by granting Kern's motion to vacate her conciliation court judgment.

Although Kern argues that *Jorissen* compels a different result, we conclude that our decision is consistent with *Jorissen*. In *Jorissen*, the parties were involved in a motor-vehicle accident, and one brought an action in conciliation court. 399 N.W.2d at 83. But importantly, *Jorissen*, the party who eventually moved to vacate that judgment,



was the defendant at the conciliation court stage, and he counterclaimed for his property damage and medical expenses. *Id.* At the time, Jorissen’s injuries did not meet the no-fault thresholds and his claim for medical expenses was dismissed. *Id.* The record also indicated that he did not have counsel before filing his counterclaim. *Id.* When he later retained counsel to recover for his personal-injury damages, he moved to vacate the earlier conciliation court judgment. *Id.* In affirming the district court’s decision to vacate the judgment, the supreme court concluded that the facts of the case fell within the exception created by *Mattsen*. *Id.* at 84. Jorissen was not advised by an attorney when he brought his counterclaim, he did not understand the rules against splitting causes of action, and his injuries did not meet the no-fault thresholds at the time. *Id.*

While *Jorissen* shares some factual similarity with this case, it is distinguishable. Jorissen, as the defendant in the conciliation court proceeding, did not have the ability to postpone bringing his claim until a later date. *See* Minn. R. Civ. P. 13.01 (“A pleading *shall* state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction that is the subject matter of the opposing party’s claim . . . .” (Emphasis added.)). Kern did. Furthermore, in *Jorissen*, Jorissen had no contact with an attorney before asserting his counterclaim in conciliation court. 399 N.W.2d at 84. Here, the district court specifically found that Kern consulted an attorney before bringing her conciliation court claim. We therefore conclude that *Jorissen* is consistent with the principle articulated in *Mattsen* that a party is not excusably ignorant of the effect of bringing a conciliation court claim if he had contact with an attorney before bringing such a claim.

Finally, we find the district court's reliance on the fact that Kern had not met the no-fault thresholds at the time she brought her conciliation court claim to be misplaced. As explained above, the express language in *Mattsen* counsels against ignoring res judicata due to immaturity of a tort claim. In circumstances such as those in *Jorissen*, when a party is compelled to bring a counterclaim before it has matured, rule 60.02(f) may justify relief. But these circumstances are not present in this case.

We conclude that the district court abused its discretion by granting Kern's motion to vacate her conciliation court judgment. Because Kern's conciliation court judgment stands, the Torborgs' motion for summary judgment on the ground of res judicata was improperly denied by the district court. We therefore reverse the district court on this issue and remand for entry of summary judgment on behalf of the Torborgs.

## **II.**

Janson and Gerwing argue that if we hold that res judicata bars Kern's claim against the Torborgs, we must determine whether a question of material fact exists as to the issue of joint and several liability, making summary judgment in favor of the Torborgs inappropriate. This question was presented to the district court but not addressed. Thus, it is not properly before this court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (explaining that an appellate court will not consider matters not argued to *and considered* by the district court). We therefore decline to address the issue.

**Reversed and remanded.**