Filed in District Court
State of Minnesota
03/19/2025

State of Minnesota **In District Court**

County of Clay **Seventh Judicial District**

Raymond Kvalvog and Katherine Kvalvog as Co-Trustees for the Heirs and Next of Kin of Zachary Kvalvog and as Trustee for the Heirs and Next of Kin of Connor Kvalvog, and Raymond Kvalvog, Individually,

Plaintiffs,

-vs-

Josh Lee, Park Christian School, FCA UC LLC,

Defendants.

Court File No. 14-CV-24-3445

Order and Memorandum

The above-captioned matter came on for an in-person hearing on December 13, 2024, and for a remote hearing via Zoom on December 20, 2024, to address Defendants' Motions to Dismiss and Motions for Sanctions. Plaintiff, Raymond Kvalvog, appeared with his attorney, David Chapman. Attorney William Moran appeared on behalf of Defendant, Josh Lee, and Attorney Lindsey Woodrow appeared on behalf of Defendant, Park Christian School. Based on the arguments of counsel, the motion pleadings and exhibits, and a thorough review of the record, the Court hereby orders as follows:

Order

1. Defendants' Motions to Dismiss Plaintiffs' Complaint and Amended Complaint pursuant to Minnesota Rule of Civil Procedure 12.02(e) are **Granted**. Plaintiffs failed to state a claim upon which relief can be granted under Minnesota Statute §548.14. Additionally, Plaintiffs' claims are barred by collateral estoppel.

2. Plaintiffs' claims against Defendants, Josh Lee and Park Christian School are **Dismissed with Prejudice**.

3. Defendants' Motions to Dismiss Plaintiffs' Complaint and First Amended Complaint pursuant to Minnesota Rule of Civil Procedure 12.02(a) are **Denied**. However, as stated above, Plaintiffs' claims are dismissed on other grounds.

4. Defendants' Motions for Sanctions Pursuant to Minnesota Rule of Civil Procedure 11.03 and Minnesota Statute § 549.211 are **Granted**. Plaintiffs and their counsel, jointly and severally, shall reimburse Defendants for their reasonable costs and attorney's fees incurred in this action. The amount of such an award will be determined in a subsequent order from the Court.

Within thirty (30) days of this Order, Defendants shall submit documentation in support of their reasonable attorney's fees and costs incurred in this matter. Plaintiffs will then have two (2) weeks to submit their written responses. The matter will be taken under advisement unless either party requests a hearing.

5. Defendants' Motions for Sanctions Pursuant to Minnesota General Rule of Practice 9 are **Granted**. Plaintiffs, Raymond Kvalvog and Katherine Kvalvog, are hereby declared frivolous litigants under Minn. Gen. R. Prac. 9.

6. Plaintiffs may not commence any additional lawsuits arising out of the June 23, 2015, accident against Defendants, Josh Lee and/or Park Christian School, without court review and approval, and the posting of an appropriate bond.

Prior to serving a Summons and Complaint in any lawsuit in which Josh Lee and/or Park Christian School are named as defendants, Plaintiffs shall submit a copy of this Order and the Summons and Complaint to Clay County Court Administration, 807 11th Street N., Moorhead, MN 56560, for judicial review.

Plaintiffs shall not serve the Summons and Complaint in any lawsuit in which Josh Lee and/or Park Christian School are named as defendants until:

(a) Plaintiffs receive written permission from the Clay County District Court, and

(b) Plaintiffs deliver a cash bond of $500 for every page in the Summons and Complaint to Clay County Court Administration.

7. See the attached Memorandum, which is incorporated herein by reference.

Dated: March 19, 2025.

Leah J. duCharme
Judge of District Court

MINNESOTA JUDICIAL BRANCH

Memorandum

Factual Background

1. In June 2015, Zachary and Connor Kvalvog were tragically killed in a motor-vehicle accident on Interstate 94 while driving from Minnesota to Wisconsin to compete in a summer basketball tournament. The boys played for the Park Christian School (PCS) basketball team, which was coached by Defendant, Josh Lee (Lee). Zachary, who was 18 years old at the time, was driving his parents' pickup truck. His younger brother, Connor, and teammates, Mark Schwandt (Schwandt) and Jimmy Morton (Morton), were also in the pickup.

2. Zachary's pickup was positioned last in a convoy of three vehicles. Tim Kerr (Kerr), PCS's football coach, drove the lead vehicle, and Lee drove the second vehicle. Around 9:00 a.m., the convoy approached a semi. Kerr and Lee drove past the semi in the left lane. As Zachary attempted to pass the semi, it moved into his lane, causing him to take evasive action and lose control of the pickup. The pickup crossed into the median and rolled, killing Zachary and Connor. Schwandt and Morton survived. The semi driver was never identified.

Procedural History

3. On August 25, 2016, Raymond and Katherine Kvalvog, as Co-Trustees for the Heirs and Next of Kin of Zachary and Connor, and Raymond Kvalvog, individually (Plaintiffs) filed a wrongful death lawsuit in Clay County District Court (File #14-CV-16-4157), against PCS and Lee, arising out of the fatal June 2015, motor vehicle accident. Plaintiffs presented two questions to the jury: (1) Was the trip to Wisconsin a school activity? and (2) Was Lee negligent in his supervision of the Wisconsin Trip? Plaintiffs' claim against PCS was premised only on vicarious liability for the acts of Lee.

4. The wrongful death trial commenced on July 22, 2019, and resulted in the jury's special verdict on July 26, 2019. The jury found: (1) the Wisconsin tournament trip was a "school activity," (2) Lee was not negligent in his supervision of the Wisconsin Dells tournament trip, (3) Zachary Kvalvog was not negligent in the operation of the vehicle at the time of the accident, and (4) the semi-truck driver was negligent and the sole cause of the accident. (Docket #35, Exhibit A, pg. 4-8). As a result of Zachary and Connor's death, the jury determined their heirs sustained damages totaling $5,000,000. *Id*.

5. The District Court's August 16, 2019, Findings of Fact, Conclusions of Law, and Order for Judgment dismissed, with prejudice, "all claims that were or could have been asserted in this action" against Lee and PCS and entered Judgment against Plaintiffs for Defendants' taxable costs and disbursements. *Id*.

6. On September 13, 2019, Plaintiffs filed a motion for a new trial. After a hearing, the District Court denied the motion on February 14, 2020. (Docket #35, Exhibit B, pg. 9-30).

7. Plaintiffs filed their first appeal to the Minnesota Court of Appeals on May 8, 2020. However, the appeal was stayed on June 16, 2020, at Plaintiffs' request, to allow the District Court to hear and decide their Rule 60.02 Motion to Vacate the Judgment based on newly discovered evidence, fraud, and fraud on the court (Rule 60.02 Motion). (Docket #35, Exhibit D, pg. 34-36). In their Rule 60.02 Motion, Plaintiffs identified new evidence they claim could not have been obtained prior to trial, primarily: (1) evidence of a relationship between the lead investigator of the accident, Minnesota State Patrol Sergeant Rodney Eischens (Sergeant Eischens), and PCS and/or two PCS employees, (2) evidence that PCS attempted to silence people from talking about the incident, and (3) evidence that PCS employees had "friends in law enforcement." (Docket #35, Exhibit E, pg. 41).

8. The District Court heard the Rule 60.02 Motion on September 8, 2020, and issued an order denying the motion on December 11, 2020. (Docket #35, Exhibit E, pg. 37-52). The District Court concluded: (1) the relationship between Sergeant Eischens and PCS and its employees was not significant enough to trigger Sergeant Eischens's mandatory disclosure requirement (*Id*. at 43), (2) information regarding a potential relationship between Sergeant Eischens and PCS employees could have been discovered prior to trial through the use of reasonable investigation efforts (*Id*. at 44), (3) the alleged relationship evidence between Sergeant Eischens and PCS is nothing more than impeachment material and does not affect the ultimate issue of the case (*Id*. at 50-51), and (4) the affidavits submitted by Morton, Rodriguez, Doll, and Bogenrief were not credible and the information should have been discovered prior to trial (*Id*. at 48).

9. On July 19, 2021, the Minnesota Court of Appeals affirmed the jury verdict and the District Court's denial of the post-trial motions. (Docket #35, Exhibit F, pg. 53-79). The Court of Appeals concluded, "we are extremely sympathetic to the tragic loss that gave rise to this lawsuit. But the record shows that appellants were allowed to present their chosen claims and case theories to the jury and they received a fair trial." *Id*. at 79.

10. On September 29, 2021, the Minnesota Supreme Court denied Plaintiffs' Petition for Review. (Docket #35, Exhibit G, pg. 80).

11. On July 6, 2021, Plaintiffs commenced a federal case against Defendants involving the same accident, and alleging the same facts argued in their post-trial motions in State Court: United States District Court, District of Minnesota, File 21-CV-1569. Plaintiffs asserted federal civil rights claims and several Minnesota tort claims, arguing Defendants corrupted the first lawsuit and defamed Plaintiffs. On January 12, 2022, the United States District Court granted

Defendants' motions to dismiss on several grounds, including collateral estoppel. (Docket #35, Exhibit H, pg. 81-101).

12. Plaintiffs appealed. The Eighth Circuit Court of Appeals affirmed the District Court's decision on October 20, 2022. (Docket #35, Exhibit I, pg. 102-110).

13. Additionally, Plaintiff Raymond Kvalvog (Kvalvog), has commenced or countersued in at least nine (9) other lawsuits centered around the June 2015 accident. Many of these actions have also been appealed.

(a) *Mark Schwandt v. Park Christian School, Josh Lee, Raymond Kvalvog, American Family Mutual Insurance Company*, (56-CV-21-3056), Otter Tail County, Seventh Judicial District, State of Minnesota.

Schwandt, a passenger in the vehicle driven by Zachary, brought a personal injury claim against various defendants, including Kvalvog. Kvalvog asserted cross claims against PCS and Lee. The cross claims were dismissed, with prejudice, as part of a full and final settlement of Schwandt's claims with Kvalvog's insurer. (Docket #49, Exhibits 14 and 15, pg. 247-251). Dissatisfied, Kvalvog appealed. (Docket #49, Exhibit 16, pg. 252). The Minnesota Court of Appeals affirmed the dismissal, with prejudice. (Docket #49, Exhibit 17, pg. 253-270). The Minnesota Supreme Court declined further review. (Docket #49, Exhibit 18, pg. 271-272).

(b) *Ray Kvalvog v. Tammy Reno*, (14-CO-22-70), Clay County, Seventh Judicial District, State of Minnesota.

Kvalvog brought a conciliation action against Attorney Tammy Reno related to alleged costs incurred responding to a subpoena. Following a hearing, the Court issued an order denying Kvalvog's claim and dismissing the matter, with prejudice. (Docket #49, Exhibit 19, pg. 273-274).

(c) *Raymond Kvalvog v. Secura Supreme Insurance Company*, (56-CV-23-1430), Otter Tail County, Seventh Judicial District, State of Minnesota.

Following the dismissal of the *Schwandt* case, Kvalvog commenced this action against his insurer, Secura Supreme Insurance Company (Secura), largely for settling the case without Kvalvog's input and before Kvalvog could conduct depositions. Secura filed a Motion to Dismiss, which was granted by the District Court on December 14, 2023. (Docket #49, Exhibit 25, pg. 390-408). Kvalvog appealed. The Minnesota Court of Appeals affirmed the dismissal on October 14, 2024. (Docket #49, Exhibit 26, pg. 409-422). Kvalvog filed a Petition for Review with the Minnesota Supreme Court.

(d) *Raymond Kvalvog v. Garth Unke, Stich, Angell, Kriedler & Unke, P.A.*, (56-CV-23-1466), Otter Tail County, Seventh Judicial District, State of Minnesota.

Kvalvog sued his attorney, Garth Unke, and Mr. Unke's law firm, related to its representation of Kvalvog in the *Schwandt* matter. The District Court granted Defendants' Motion for Summary Judgment and dismissed the case, with prejudice. (Docket #49, Exhibit 27, pg. 423-443). Kvalvog appealed. This case is still pending.

(e) *Raymond Kvalvog v. Christopher Nellermoe*, (14-CV-23-2707), Clay County, Seventh Judicial District, State of Minnesota.

Kvalvog initiated a defamation lawsuit against PCS's Principal, Christopher Nellermoe (Nellermoe). Nellermoe filed a Motion to Dismiss and Motions for Sanctions. The Motion to Dismiss was granted, and all counts dismissed with prejudice, except for one allegation. The motions for sanctions and to find Kvalvog a frivolous litigant were reserved pending further proceedings. (Docket #49, Exhibit 28, pg. 444-458). This case is still pending.

(f) *Raymond Kvalvog v. Meaghan Bryan and Cousineau, Van Bergen, McNee & Malone*, (14-CV-23-3138), Clay County, Seventh Judicial District, State of Minnesota.

Kvalvog filed a legal malpractice lawsuit on September 14, 2023, against Attorney Meaghan Bryan, and her prior law firm. On December 12, 2023, the District Court issued an Order for Dismissal with Prejudice based upon the parties' stipulation. (Docket #49, Exhibit 29, pg. 459).

(g) *Raymond Kvalvog v. Minnesota State High School League*, (14-CV-23-3134), Clay County, Seventh Judicial District, State of Minnesota.

On September 14, 2023, Kvalvog sued the Minnesota State High School League (MSHSL), claiming MSHSL failed to follow its own policies regarding PCS's basketball program. MSHSL filed a Motion to Dismiss under Rule 12. The District Court dismissed the case, with prejudice, based upon the parties' stipulation. (Docket #49, Exhibit 30, pg. 460).

(h) *Raymond Kvalvog v. Bradshaw and Bryant, PLLC, Michael Bryant, Joseph Crumley, and Christy Thorson*, (73-CV-24-4433), Stearns County, Seventh Judicial District, State of Minnesota.

Kvalvog commenced a legal malpractice lawsuit against his attorney, Michael Bryant, and the firm, Bradshaw and Bryant, relating to the original wrongful death litigation. A review of the Complaint reveals Kvalvog made several of the same allegations as is set forth in Plaintiffs' First Amended Complaint in this action, including the alleged relationship between Sergeant Eischens and PCS, Sergeant Eischens's failed investigation, insufficient discovery and deposition practices, and issues surrounding liability for the accident. (Docket #49, Exhibit 31, pg. 461-476). The case is still pending.

(i) *Raymond Kvalvog, as Trustee for the Heirs of Zachary and Connor Kvalvog v. Arthur Chapman Kettering Smetak & Pikala, P.A., Paul J. Rocheford, Timothy Carrigan and Stephen Warner*, (27-CV-24-12228), Hennepin County, Fourth Judicial District, State of Minnesota (hereafter "*Kvalvog v. Arthur Chapman*").

Kvalvog commenced this action against Attorney Paul Rocheford, his law partners, and the firm (Arthur Chapman), related to Mr. Rocheford's representation of PCS and Lee in the underlying wrongful death litigation. Defendants filed the case on August 20, 2024, along with their Motions to Dismiss. (Docket #49, Exhibits 32, pg. 477-500). The case is pending before the District Court.

14. In this action, Plaintiffs now seek relief from the August 16, 2019, District Court Judgment and the November 4, 2021, Appellate Court Judgment pursuant to Minnesota Statute § 548.14. According to Plaintiffs, "[n]ewly discovered evidence reveals a web of deceit, lies, collusion and other misconduct that resulted in a fraud upon the court ending in the jury verdict of June 26, 2019, and the ensuing judgment entered by the Court." (Docket #2, pg. 3, ¶15).

Legal Analysis

I. Motion to Dismiss – Minnesota Rule of Civil Procedure 12.02(e)

15. This Court must dismiss, with prejudice, matters which fail to state a claim upon which relief may be granted. *See* Minn. R. Civ. P. 12.02(e). A motion to dismiss under Rule 12.02(e) "... raises the single question of whether the complaint states a claim upon which relief can be granted." *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 739 (Minn. 2000). In analyzing a Rule 12.02(e) motion, "[t]he reviewing court must accept all the plaintiff's allegations as true, but a dismissal must be affirmed if it is clear that no relief can be granted under any set of facts that can be proved consistent with the allegations." *Nelson v. Productive Alts., Inc.*, 715 N.W.2d 452, 454 (Minn. 2006), *citing Radke v. County of Freeborn*, 694 N.W.2d 788, 793 (Minn. 2005). To survive a motion to dismiss, "the plaintiff must 'provide more than labels and conclusions.'" *Mutua v. Deutsche Bank Nat. Tr. Co.*, 2013 WL 6839723, at *1 (Minn. Ct. App.

Dec. 30, 2013). In other words, "[r]ather than a 'formulaic recitation of the elements of a cause of action,' a complaint must set forth 'factual allegations that are enough to raise a right to relief above the speculative level' and sufficient to state a plausible, rather than just a conceivable, claim to relief." *Id*.

16. In evaluating a motion to dismiss, in addition to considering the facts alleged, this Court may consider materials and documents referenced in, attached to, or otherwise embraced by the allegations of the complaint without converting the motion to one for summary judgment. *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 748 (Minn. 2000). Furthermore, given the nature of a complaint brought under Minn. Stat. § 548.14, on a motion to dismiss, a court may "take judicial notice of adjudicated findings in a prior proceeding." *Carlson v. Minnesota Dep't of Labor & Indus.*, 2020 WL 3410483, at *2 (Minn. Ct. App. June 22, 2020) (*citing Rohricht v. O'Hare*, 586 N.W.2d 587, 589 (Minn. Ct. App. 1998), review denied (Minn. Feb. 24, 1999)). *See also In re Trs. Nos. 4, 5, & 6*, 543 N.W.2d 668, 671 (Minn. Ct. App. 1996) ("The district court may . . . take judicial notice of its own prior decisions and the appellate courts' review of those decisions in a subsequent action involving the same parties."). *See also Greer v. Professional Fiduciary, Inc.*, 792 N.W.2d 120, 126-27 (Minn. Ct. App. 2011) ("We are permitted, however, to consider documents that are embraced by the complaint, including pleadings and orders in an underlying proceeding.").

17. After considering the documents referenced in, or embraced by, the First Amended Complaint, as well as the pleadings and orders in the underlying proceedings, Plaintiffs have failed to state a claim upon which relief may be granted.

A.

Minnesota Statue § 548.14

18. Through their First Amended Complaint served on September 6, 2024, Plaintiffs seek relief from the original wrongful death jury verdict, District Court Judgment dated August 16, 2019, and Appellate Court Judgment dated November 4, 2021, pursuant to Minn. Stat. § 548.14.

19. Minnesota Statute §548.14 provides:

> Any judgment obtained in a court of record by means of perjury, subornation of perjury, or any fraudulent act, practice, or representation of the prevailing party, may be set aside in an action brought for that purpose by the aggrieved party in the same judicial district within three years after the discovery by the aggrieved party of such perjury or fraud.

Minn. Stat. § 548.14.

20. The terms "prevailing party" and "aggrieved party" as used in Minn. Stat. § 548.14 are strictly construed. *Stewart v. Duncan*, 42 N.W. 89, 90 (1889) ("The definite article 'the,' and the word 'party,' used with distinct reference to a judgment recovered in an action, are not to be taken to have been employed without regard to their proper signification, unless upon satisfactory reasons apparent in the terms or the obvious purposes of the enactment."). Only the conduct of a "prevailing" party may constitute the factual foundation for a claim. *Id*. Conduct by non-parties to the underlying action is irrelevant to an action under Minn. Stat. § 548.14. *Id*.

21. To prevail under Minnesota Statute § 548.14, Plaintiffs must prove, by clear and convincing evidence, that Defendants engaged in fraud. *Turner v. Suggs*, 653 N.W.2d 458, 466 (Minn. Ct. App. 2002). "Clear and convincing evidence is 'shown where the truth of the facts asserted is highly probable'" and is "unequivocal and uncontradicted, and intrinsically probable and credible." *Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1978); *Deli v. Univ. of Minn.*, 511 N.W.2d 46, 52 (Minn. Ct. App. 1994), review denied (Minn. Mar. 23, 1994). The Minnesota

Supreme Court, in discussing Section 548.14, explained the reasons for requiring clear and convincing evidence "are obvious" and include "preventing attacks on the judgment" based on improper motives. *Walters v. Walters*, 186 N.W. 693, 694 (Minn. 1922).

22. Plaintiffs' fraud claims must be pled with particularity. *See Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 605 (Minn. 2014) (allegations concerning fraud must be stated with more "factual specificity.").

> To properly plead a cause of action for fraud, the complaint must allege with specificity that (1) there was a false representation regarding a past or present fact, (2) the fact was material and susceptible of knowledge, (3) the representer knew it was false or was indifferent about whether it was true or false, (4) there was intent to induce another to act, (5) the representation was reasonably reliable, and (6) there were pecuniary damages.

DQ Wind-up, Inc. Trust ex rel. ACI Telecentrics, Inc. v. Kohler, 2012 WL 1658929, at *4 (Minn. Ct. App. May 14, 2012). "Neither opinions nor statements that are 'general and indefinite' are representations of fact" which can support a fraud claim. *Id*. Failure to establish each of the required prongs of a fraud claim warrants dismissal under Rule 12.02(e). *Id*. at *5.

23. Under Section 548.14, Plaintiffs are required to demonstrate "that the allegations of fraud [are] of an extrinsic nature and collateral to the issue tried in that action. It must be of such a nature as to prevent the unsuccessful party from having his day in court and presenting his case fully. It is well settled that intrinsic fraud is unavailing." *Tankar Gas v. Lumbermen's Mut. Cas*. Co., 9 N.W.2d 754, 759 (Minn. 1943); *In re Jordan's Estate v. Jordan*, 271 N.W. 104, 107–08 (Minn. 1937) ("[T]hat is to say, it must go to the court's jurisdiction or be such as to prevent the losing party from appearing or otherwise presenting his defense."). "The mere allegation by the defeated party that there was, as to such issue, false or perjured testimony by the successful party or his witness, will not bring the case within the statute [§548.14]." *Hansen v. American Nat. Bank*, 396 N. W.2d 642, 647 (Minn. Ct. App. 1986). The allegations must concern matters

collateral to the proceeding, such as hiding of evidence, preventing defendant from knowing of the suit altogether, or misleading the other party as to the nature of the litigation. *See Street v. Town of Alden*, 64 N.W. 157, 162 (Minn. 1895).

24. The standard under which a fraud-on-the-court claim is evaluated is more "strenuous" than that for an ordinary fraud claim. *Doering v. Doering*, 629 N.W.2d 124, 129 (Minn. Ct. App. 2001); *Bauman v. Bauman*, 2006 WL 2256903, at *2 (Minn. Ct. App. Aug. 8, 2006). A finding of fraud on the court under this standard "is justified only by the most egregious misconduct directed to the court itself, such as bribery of a judge or jury or fabrication of evidence by counsel." *AF Holdings LLC v. Doe*, 2014 WL 1285757, at *3 (D. Minn. Mar. 31, 2014). Minnesota courts have long recognized that the mere failure to disclose to an adversary or the court even a material fact that would defeat a party's claim or defense is not fraud on the court. *Halloran v. Blue & White Liberty Cab Co.*, 92 N.W.2d 794, 798 (Minn. 1958); *Beugen v. Beugen*, 352 N.W.2d 821, 823 (Minn. Ct. App. 1984) ("It is recognized that the failure by one party to disclose pertinent information to a proceeding is not 'fraud on the court.'"), *citing Kerwit Med. Products v. N.&H Instruments*, 616 F.2d 833, 837 (5th Cir. 1980) (mere nondisclosure to an adverse party and to the court of facts pertinent to the case does not amount to fraud upon the court).

25. And finally, Minnesota Statute § 548.14 requires the action to be brought within three years after the discovered fraudulent act, practice, or representation by which the judgment was obtained. "The allegations as to the time of discovery of the fraudulent act must be direct, positive, and unequivocal." *McCue v. Weibeler,* 161 N.W. 143, 143 (Minn. 1917); *see also Brockman v. Brockman*, 157 N.W. 1086, 1087 (Minn. 1916) ("[t]he right to have a judgment vacated for fraud is not an absolute one. The granting of relief is governed by equitable principles and may be barred by laches.").

> The period fixed by the statute is not strictly a limitation of remedy. It makes action within the time fixed a condition precedent to relief. The law is that when a statute creates a new liability or an action 'unknown to the common law, and fixes the time within which that action may be commenced, [it] is not a statute of limitations,' but rather one of creation. Hence, commencement of the action within the time fixed 'is an indispensable condition of the liability and of the action which it permits.'

Murray v. Calkins, 254 N.W. 605, 608 (Minn. 1934) (internal citation omitted).

26. To succeed in a Minn. Stat. §548.14 claim, the "aggrieved party" must have exercised "proper diligence" in preparing for trial and procuring evidence in support of its claims and to combat the claims of the opposing party. *See Hass v. Billings*, 43 N.W. 797, 798–99 (Minn. 1889) ("The statute certainly could not have been intended to excuse a party from exercising proper diligence in preparing for trial."). Minn. Stat. § 548.14 was not enacted to permit retrial of the same issues tried and determined in the original action, or which, through the reasonable diligence of the plaintiff, could have been discovered in the original action. *See Betcher v. Midland Nat'l Bank*, 209 N.W. 325, 326 (Minn. 1926); *see also Clements Lumber v. deMartini*, 2011 WL 589626, at *4 (Minn. Ct. App. Feb. 22, 2011) (failure to timely assert legal theories may not be "cured" by later asserting the theory in an equitable attack on a judgment). A Section 548.14 action:

> cannot be maintained to set aside a judgment upon the bare allegation that there was false or perjured testimony by the successful party or his witnesses, where an issue of fact is squarely made by the pleadings, so that each party knows what the other may be expected to prove, and where neither has a right or is under any necessity to depend on the other to prove the facts as he himself claims it. In such case there must be something in the nature of deceit or overreaching fraud which has prevented a full litigation and determination of the case upon the merits.

Young v. Lindquist, 148 N.W. 455, 455 (Minn. 1914).

27. In this case, Plaintiffs must establish, by clear and convincing evidence: (1) they are the "aggrieved party" to the judgment, (2) the judgment was obtained by means of extrinsic acts of perjury or fraud on the court, (3) the acts of perjury or fraud were committed by Defendants Lee and/or PCS, the "prevailing parties," (4) such evidence was discovered within the past three

years (on or after September 6, 2021), (5) such evidence could not have been discovered before trial, despite reasonable diligence by Plaintiffs, ***and*** (6) the extrinsic fraud materially impacted the jury trial and judgment. *See* Minn. Stat. § 548.14 (emphasis added).

28. In their First Amended Complaint, Plaintiffs identify 15 "newly discovered" facts or allegations of fraud on the court to support relief from Judgment. (Docket #2, pg. 4-12). When applying Minn. Stat. § 548.14 to each allegation, Plaintiffs have failed to state a claim upon which relief may be granted.

(a) Declaration of Becky Johnson

29. Plaintiffs allege, sometime after the jury trial, Becky Johnson revealed to Kvalvog that her brother drove the semi which caused the accident that killed Zachary and Connor. (Docket #2, pg. 4). According to Ms. Johnson, her brother told her he had no choice but to enter the other lane because he was cut off by a car right in front of him. *Id*. Additionally, Ms. Johnson stated she tried to provide this information to the State Patrol but was never contacted by Sergeant Eischens. *Id*.

30. The First Amended Complaint does not identify when Plaintiffs discovered this information, and when Ms. Johnson attempted to report the information to the State Patrol. The date of discovery is an "indispensable" element of Plaintiffs' claim and cannot be omitted in their pleadings. If Ms. Johnson attempted to contact the State Patrol after the jury trial, and such information was unknown to all parties at the time of trial, setting aside the judgment pursuant to Minn. Stat. § 548.14 is not appropriate.

31. Ms. Johnson's claim that another driver (Lee) cut off her brother's semi, causing the accident, is not newly discovered evidence and was known by Plaintiffs well before September 6, 2021. In fact, during their closing statements in the 2019 wrongful death jury trial, Plaintiffs asserted Lee's actions contributed to the cause of the crash:

> Well, there's confusion apparently about - - according to the defense - - about what Mr. Rodriguez said when he was on the stand. I heard it and he said it, like, three or four times. Basically he said he saw Josh Lee going in front of the semi.

14-CV-16-4157, Trial Transcript, Docket #225 at 172. Thereafter, Plaintiffs alleged Lee cut off the semi and caused the accident in their September 8, 2020, Memorandum in Support of Rule 60.02 Motion (Docket #35, Exhibit L, pg. 203), and in their July 6, 2021, Federal Complaint (Docket #35, Exhibit R, pg. 14, ¶62).

32. Furthermore, Plaintiffs do not assert Lee or PCS, the prevailing parties, prevented the Court or jury from hearing from Ms. Johnson or her unidentified brother. There is no evidence suggesting Defendants knew of Ms. Johnson or had any information as to the identity of the semi driver at the time of trial. There is no reasonable basis to conclude this allegation supports a claim of fraud on the Court at the hands of Defendants.

33. Finally, the content of Ms. Johnson's Affidavit, along with the circumstances surrounding her disclosure, are problematic. The statements made by Ms. Johnson about the accident are hearsay. It is also puzzling that Ms. Johnson did not disclose the name of her brother, the driver of the semi, and that Plaintiffs haven't acted against this now known semi driver responsible for the accident. Additionally, text messages between Katherine Kvalvog and Ms. Johnson, submitted by Plaintiffs, suggest Ms. Johnson may have been "rewarded" for her testimony. However, Plaintiffs deny this claim. (Docket #59, Exhibit 3, pg. 48).

(b) Investigation by Journalist Gabe Noah

34. According to Plaintiffs, Gabe Noah, a journalist from MBC Multicast Studio in Minneapolis, conducted a *post-trial* investigation of the accident on behalf of the Kvalvogs. After talking to several "major players," including Defendants' Attorney, Tim Carrigan, Mr. Noah alleges the defense team was aware of the relationship between Nellermoe and Sergeant Eischens all through trial, and, although they knew Lee was responsible for the accident, it was their job to get Lee out of a bad situation. (Docket #2, pg.5).

35. The information shared by Mr. Noah is hearsay, immaterial as to the ultimate issue in the case, and is not newly discovered evidence. The very same allegations surrounding PCS's preexisting relationships with Sergeant Eischens, PCS and Sergeant Eischens's attempts to coverup the accident and intimidate witnesses, and Lee's involvement in the accident were known, pled, and litigated by Plaintiffs, on several occasions, prior to September 6, 2021. *See*:

- Affidavit of Katherine Kvalvog dated July 22, 2020 (Docket #35, Exhibit T, pg. 365-395).
- Affidavit of Ray Kvalvog dated September 8, 2020 (Docket #35, Exhibit U, pg. 396-398).
- Affidavit of Andy Doll dated September 8, 2020 (Docket #35, Exhibit V, pg. 399-401).
- Plaintiffs' September 8, 2020, Memorandum in Support of Rule 60.02 Motion (Docket #35, Exhibit L, pg. 195-235).
- Plaintiffs' September 24, 2020, Reply Memorandum in Support of Rule 60.02 Motion (Docket #35, Exhibit M, pg. 236-256), and
- Plaintiffs' July 6, 2021, Federal Complaint (Docket #35, Exhibit R, pg. 298-361).

36. It is clear the District Court heard and considered these allegations when issuing its December 11, 2020, Rule 60.02 Order and Memorandum. (Docket #35, Exhibit E, pg. 37-52). The District Court concluded: (1) the relationship between Sergeant Eischens and PCS and its

employees was not significant enough to trigger Sergeant Eischens's mandatory disclosure requirement (*Id*. at 43), (2) information regarding a potential relationship between Sergeant Eischens and PCS employees could have been discovered prior to trial through the use of reasonable investigation efforts (*Id*. at 44), (3) the alleged relationship evidence between Sergeant Eischens and PCS is nothing more than impeachment material and does not affect the ultimate issue of the case (*Id*. at 50-52), (4) the affidavits submitted by Morton, Rodriguez, Doll, and Bogenrief were not credible and the information should have been discovered prior to trial (*Id*. at 48), and (5) there is no merit in Plaintiffs' assertion that Sergeant Eischens deliberately withheld information as part of a conspiracy to rob Plaintiffs of a fair trial (*Id*. at 52).

37. The same allegations were also considered by the Minnesota Court of Appeals, United States District Court, and the Eighth Circuit Court of Appeals.

38. Plaintiffs had the opportunity to interview and investigate the same individuals contacted by Mr. Noah prior to trial. Neither Defendant prevented Plaintiffs from presenting evidence at trial or calling witnesses interviewed by Mr. Noah. There is no evidence Defendants committed acts of fraud on the Court.

(c) Bribery

39. In their First Amended Complaint, Plaintiffs assert Alonzo Moton, the cousin of teammate Morton, received a diagram and information from Morton regarding Lee's alleged involvement in the accident. Mr. Moton spoke with Sergeant Eischens one time. However, Sergeant Eischens was not interested in the diagram. Also, Mr. Moton was contacted by one of Defendants' attorneys and cautioned to be careful about talking about the knowledge his son possessed as it could be "trouble" for him. Thereafter, Lee allegedly paid Alonzo Moton $500 to say nothing more about the incident. (Docket #2, pg.5-6).

40. A judgment cannot be set aside pursuant to Minn. Stat. § 548.14 for alleged fraudulent acts committed by Sergeant Eischens, or anyone who is not a "prevailing party" in this action.

41. Additionally, the information Alonzo Moton had to share regarding Lee's alleged involvement in the accident: (1) is hearsay, as he was not present at the time of the accident, (2) was discoverable prior to trial, and (3) is not new evidence and has been known by Plaintiffs prior to September 6, 2021.

42. Plaintiffs had access to Mr. Moton throughout the wrongful death litigation. There is no evidence suggesting Lee or PCS prevented Mr. Moton from being questioned, deposed, or called as a witness at trial. Furthermore, Plaintiffs' theory that Lee's driving conduct caused the accident was known, pled, and properly litigated.

(d) Witness Intimidation Beyond Alonzo Moton

43. Plaintiffs allege Attorney Paul Rocheford contacted, bullied, and/or attempted to mold the testimony of Terri Dickelman, Ben Woodside, and Brent Strand related to Kvalvog's inability to drive to Wisconsin because of business responsibilities. (Docket #2, pg. 6).

44. In their First Amended Complaint, Plaintiffs failed to disclose when they discovered this information, why it was undiscoverable prior to trial, how it is material or relevant to the ultimate issues in this case, and how Minn. Stat. § 548.14 applies when the alleged fraudulent act was committed by someone other than Lee or PCS. Also, claims that Lee and PCS attempted to silence people from talking about the incident were already heard and decided by several courts prior to September 6, 2021.

(e) Sergeant Eischens's Hatred for Kvalvog

45. According to Brent Strand, Kvalvog's cousin, Sergeant Eischens told him: (1) he did not like Kvalvog, (2) Kvalvog was rich enough to get over the loss of his two sons, (3) he was not going to do anything to help Kvalvog, and (4) Kvalvog was not acting like a Christian. (Docket #2, pg.7).

46. Sergeant Eischens is not a party to the underlying litigation. Allegations of his wrongful acts, corruption, collusion, bribery, hatred, bias, racism, untruthfulness, and negligence is not evidence of acts of fraud on the Court committed by Lee or PCS. Although the First Amended Complaint does not identify when the alleged comments were made, or when Plaintiffs learned the information from Mr. Strand, Plaintiffs have repeatedly raised and litigated their concerns about Sergeant Eischens and his involvement in the case, prior to September 6, 2021. *See* Plaintiffs' September 8, 2020, Memorandum in Support of Rule 60.02 Motion (Docket #35, Exhibit L, pg. 195-235) and Plaintiffs' July 6, 2021, Federal Complaint (Docket #35, Exhibit R, pg. 313-328).

47. Whether or not Sergeant Eischens liked, or had a good relationship with Kvalvog, is irrelevant and immaterial to the ultimate issue in this case. In its December 11, 2020, Rule 60.02 Order and Memorandum, the District Court concluded:

> There is simply nothing in the record to indicate that the alleged relationship evidence is anything more than impeachment material, and not even very powerful impeachment material at that. There is nothing to suggest that there was a concerted effort on the part of Sergeant Eischens to taint the entirety of the investigation in favor of PCS. Plaintiffs' motion for a new trial under Rule 60.02(b) is DENIED.

Docket #35, Exhibit E, pg. 50).

(f) Attorney Meaghan Bryan's Conflict of Interest

48. Attorney Meaghan Bryan (Bryan), formerly with the Cousineau Law Firm, now on staff with SECURA Insurance, represented Kvalvog in a suit brought against him by PCS. That action settled. When Kvalvog was sued by Schwandt in a separate action, he asked Bryan to represent him. After accepting the case, Bryan withdrew, informing Kvalvog that her firm also represented the Minnesota State Patrol. (Docket #2, pg.7).

49. Bryan withdrew as legal counsel for Kvalvog on July 22, 2021 (Docket #44, Exhibit B, pg. 65). Plaintiffs knew of Bryan's alleged conflict more than three years before commencing this action. As such, these claims are untimely and must be dismissed. Also, Bryan was not a party to the underlying litigation. Her alleged actions do not equate to acts of fraud on the Court at the hands of Lee or PCS. Additionally, Bryan's alleged conduct has no bearing on the ultimate issue in the wrongful death suit. Any claims regarding her actions are irrelevant when evaluating Minn. Stat. §548.14.

(g) Undisclosed Letter

50. According to Plaintiffs, a previously undisclosed letter revealed in other litigation exposed a lie that no member of PCS ever spoke with Lee about the crash. A letter from PCS President, Kent Hannestad, to PCS families, revealed details of the crash which contradicted Hannestad's previous trial statement that he never asked Lee what happened. (Docket #2, pg.8).

51. Plaintiffs' First Amended Complaint fails to identify when the letter was first discovered, and why Plaintiffs were unable to discover this information prior to trial by exercising due diligence. There is no evidence before the Court suggesting Defendants interfered with Plaintiffs' ability to interview Mr. Hannestad or call him as a trial witness. In fact, Plaintiffs deposed Mr. Hannestad on October 26, 2017, prior to trial. The alleged conspiracies involving

PCS leadership, and their conversations with witnesses have been previously litigated and dismissed. Moreover, nothing in this allegation is relevant or material to Lee's alleged negligence.

(h) PCS Immediately Sought to Shore Up their Defense with Insurance Agent

52. According to Plaintiffs, Darren Davis, the insurance agent for PCS, received a call within an hour of the crash from PCS's business manager, inquiring about liability and maintaining the trip was not a school activity. Plaintiffs allege this supports Pastor Ona's email to the church, expressing grief over the loss of Zachary and Connor, and claiming the trip was not a school sponsored event (Docket #2, pg.8).

53. The First Amended Complaint is again silent as to the date Plaintiffs discovered this information. However, the issue of whether the trip was a school sponsored event was well known and litigated during the initial jury trial. Plaintiffs' Minn. Stat. §548.14 claim fails because: (1) Plaintiffs introduced evidence at the jury trial, including Pastor Ona's email, advocating the trip was a school sponsored activity (Docket #35, Exhibit BB, pg. 512), (2) the jury agreed with Plaintiffs and found the trip was a school sponsored activity, (3) Plaintiffs are the prevailing party as to this issue, and (4) this new information is immaterial and does not change the outcome of the jury's verdict.

(i) Mark Schwandt's Redacted Testimony and Animosity Towards Kvalvog

54. At trial, Mark Schwandt testified that he had spoken with Zachary Kvalvog the night before the accident and Zachary told him he would be driving. Plaintiffs allege in a later deposition, Mr. Schwandt stated he did not know who would be driving when he arrived at school. And, according to Plaintiffs, Schwandt revealed he harbored tremendous anger towards the Kvalvogs for perceived wrongs. (Docket #2, pg.9).

55. Allegations of Mr. Schwandt's alleged changed testimony, which is questionable at best, or his alleged hatred for the Kvalvogs, does not equate to acts of extrinsic fraud on the Court by Lee or PCS during the wrongful death trial. Mr. Schwandt was not a party to the underlying litigation. Plaintiffs elicited testimony from Mr. Schwandt at the wrongful death trial and during Schwandt's personal injury case. Whether Mr. Schwandt knew Zachary was going to drive the night before the accident, or his feelings towards Kvalvog, is immaterial to the ultimate issues in the case and doesn't change the results at trial.

(j) 2021 Deposition of Nellermoe

56. In a deposition started on September 8, 2021, and completed on November 22, 2021, Nellermoe allegedly adopted a new story of liability for the crash and admitted Sergeant Eischens was a family friend, that he had given Eischens his personal cell number, and that a previously undisclosed snap chat message was about the crash. (Docket #2, pg. 9-10).

57. Again, Plaintiffs failed to identify when they first discovered this information from Nellermoe. Although Plaintiffs refer to a 2021 deposition in the heading of paragraph 10 of their First Amended Complaint, the body of that paragraph shows Plaintiffs knew this information in 2019.

> [Nellermoe] admitted in his deposition in *Jimmy Morton v. Park Christian School et al*., 19-CV-03134 (D. Minn. 2019) that the message was indeed about the crash and about possible charges against Lee. He admitted that he gave Sergeant Rod Eischens his personal cell number. He also relented and admitted that contrary to past admonitions that his relationship with Eischens was sporadic, Eischens was a family friend.

(Docket #2, pg. 10). A review of Plaintiffs' September 8, 2020, Memorandum in Support of Rule 60.02 Motion (Docket #35, Exhibit L, pg. 195-235), their September 24, 2020, Reply Memorandum in Support of Rule 60.02 Motion (Docket #35, Exhibit M, pg. 236-256), and their

July 6, 2021, Federal Complaint (Docket #35, Exhibit R, pg. 298-361) confirm this information was known by the Plaintiffs prior to September 6, 2021. As such, Plaintiffs' claims are untimely.

58. As a result of Plaintiffs' Rule 60.02 Motion following the wrongful death jury trial, the District Court heard and addressed these very same allegations. The Court concluded the information regarding a potential relationship between Sergeant Eischens and PCS employees could have been discovered prior to trial through the use of reasonable investigation efforts, and the alleged relationship evidence between Sergeant Eischens and PCS is nothing more than impeachment material and does not affect the ultimate issue of the case (Docket #35, Exhibit E, pg. 37-52). The allegations do not constitute extrinsic fraud on the Court.

(k) Lee Pressured Players to Attend the Tournament

59. Plaintiffs allege, while school was still in session, Lee used a Power Point presentation with players to persuade them to attend the summer basketball tournament in Wisconsin. Parents were not at the meeting. Lee made it a mandatory duty of the team captains, including Zachary Kvalvog, to arrange out-of-town transportation to these events, (Docket #2, pg. 10).

60. Plaintiffs failed to disclose the date they learned of this newly discovered evidence. However, in their July 6, 2021, Federal Complaint, Plaintiffs specifically alleged Lee applied "undue influence" on captains of sports teams to arrange transportation to and from team events, and induced players to comply with summer activities. (Docket #35, Exhibit R, pg. 304-306).

61. Plaintiffs' claim of fraud is not supported by the evidence. Plaintiffs do not allege Lee or PCS concealed the fact Lee had a meeting with the players during the school year about the Wisconsin trip. There is no evidence Defendants misled the court, or opposing counsel, rendering

the trial result grossly unfair. Plaintiffs had a full and fair opportunity to present evidence to the jury that the trip to Wisconsin was a school event, and, prevailed on that issue.

(l) Kerr and His Wife Destroyed Texts

62. Plaintiffs claim that in November 2021, they discovered a text message in which the Kerrs stated they had no idea who was driving. The Kerrs suggested Zachary Kvalvog ride in their vehicle with their son driving. (Docket #2, pg. 10).

63. Plaintiffs' Minn. Stat. § 548.14 claim must be dismissed because: (1) Plaintiffs knew this information prior to September 6, 2021, and included this allegation in their July 7, 2021, Federal Complaint (Docket #35, Exhibit R, pg. 336, ¶178(28)), (2) The Kerrs were not parties in the underlying litigation, (3) any alleged wrongful act committed by the Kerrs does not reflect fraud on the Court at the hands of Defendants, (4) this information could have been obtained by the Plaintiffs prior to trial by exercising due diligence, and (5) the alleged destroyed text messages are irrelevant to the questions presented to the jury.

(m) Sergeant Eischens Failed to Talk to Crucial Material Witnesses

64. Plaintiffs allege Sergeant Eischens failed to talk to: (1) Tyrell Rodriquez, who stated Lee cut off the semi, (2) Tyrell's mother, (3) Alonzo Moton, (4) Becky Johnson, whose brother was driving the semi and knew Lee cut him off, and (5) Phil Back, who was the first on the scene. (Docket #2, pg. 11).

65. Once again, Sergeant Eischens was not a party to the underlying litigation. Allegations of his wrongful acts or failed investigative efforts is not evidence of fraud on the Court committed by Lee or PCS. Although the First Amended Complaint does not identify when Plaintiffs discovered this information, Plaintiffs have repeatedly raised and litigated concerns about Sergeant Eischens's failure to talk to material witness prior to September 6, 2021. See

Plaintiffs' September 8, 2020, Memorandum in Support of Rule 60.02 Motion (Docket #35, Exhibit L, pg. 225) and Plaintiffs' July 6, 2021, Federal Complaint (Docket #35, Exhibit R, pg. 320, ¶108-09, pg. 334, ¶178, pg. 341, ¶209, pg. 344, ¶220).

(n) Sergeant Eischens is Racially Biased.

66. Evidence allegedly provided by Jimmy Morton in a Minnesota State Patrol investigation revealed that Sergeant Eischens made comments about him being "just a black kid." Also, according to Plaintiffs, new evidence shows Sergeant Eischens, in his own words, admits racial bias: "Went to the Tea Party in Detroit Lakes last night . . . . . yep, I'm one of those racist, radical, mean spirted Team Party bunch . . . . It was patriotic to speak against the government when Bush was President, now it's racist to do so." (Docket #2, pg. 11-12).

67. Sergeant Eischens is not a party to the underlying litigation. Allegations that he is racially biased is not evidence of acts of fraud on the Court committed by Lee or PCS. Also, Plaintiffs' allegations are untimely. The Minnesota State Patrol investigation interview with Jimmy Morton occurred on June 22, 2020. (Docket #57, Exhibit 40, pg. 89-90). Kvalvog attended that interview. According to Plaintiffs, the post made by Sergeant Eischens occurred on April 17, 2010. (Docket #57, Exhibit 39, pg. 88). Plaintiffs have repeatedly raised and litigated their concerns about Sergeant Eischens, including his alleged biases, prior to September 6, 2021. These issues have been heard and decided by the Court. Furthermore, the allegations are immaterial as to the ultimate issue in this case.

(o) MSHSL Confirmed PCS Must Maintain Waivers

68. Plaintiffs allege PCS could never produce the required waivers for participation by coaches and players in summer activities. MSHSL confirmed they never received any waivers, and it is the job of the school to maintain them. (Docket #2, pg. 11-12).

69. During the wrongful death jury trial, Plaintiffs did not assert a direct liability claim against PCS. That was an intentional decision made by Plaintiffs, and one addressed by the District Court and by the Court of Appeals. Therefore, Plaintiff's allegations of wrongful conduct by PCS cannot be the foundation for a new trial under Minn. Stat. § 548.14. These facts are irrelevant to the question presented to the jury at trial: "Was Josh Lee negligent in his supervision of the Wisconsin Dells Trip?" (Docket #35, Exhibit A, pg. 5). Plaintiffs consented to the jury instructions. Plaintiff chose not to bring a direct negligence claim against PCS or a general negligence claim against Lee.

70. Furthermore, relief under Minn. Stat. § 548.14 is not appropriate because Plaintiffs failed to disclose when they discovered this new information, why the information was undiscoverable prior to trial, or how Lee or PSC committed acts of on upon the Court or prevented them from presenting this information to the jury.

71. As a matter of law, Plaintiffs' First Amended Complaint must be dismissed as none of the newly discovered allegations satisfy the elements of Minn. Stat. § 548.14 or demonstrate a fraud on the Court at the hands of Defendants.

B.

Collateral Estoppel

72. Plaintiffs' claims in their First Amended Complaint are also barred by collateral estoppel. "The doctrine of collateral estoppel may be used as an affirmative defense where the issue presented has already been determined in a previous lawsuit, even though the former suit was based on a totally different cause of action." *Price v. Amdal*, 256 N.W.2d 461, 466 (Minn. 1977). "The law-of-the-case doctrine applies if an appellate court has ruled on a legal issue and remanded the case for further proceedings, in which case '[t]he issue decided becomes the law of

the case and may not be relitigated in the trial court or re-examined in a second appeal.'" *Clements Lumber, Inc. v. DeMartini*, 2011 WL 589626, at *4 (Minn. Ct. App. Feb. 22, 2011) (applying the "law of the case" doctrine to bar a subsequent action under Minnesota Statute § 548.14 after identical issues were raised and adjudicated in a motion under Rule 60.02 and subsequent appeal) *quoting Sylvester Bros. Dev. Co. v. Great Cent. Ins. Co.*, 503 N.W.2d 793, 795 (Minn. App. 1993), review denied (Minn. Sept. 30, 1993).

73. Collateral estoppel applies to bar a claim when:

> (1) the issue was identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or in privity with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

Ill. Farmers Ins. Co. v. Reed, 662 N.W.2d 529, 531 (Minn. 2003) (citation omitted).

74. On July 1, 2020, following the wrongful death jury trial, Plaintiffs brought a post-trial Rule 60.02 Motion before the District Court, claiming the trial was "infected by conflicts of interest, bias and fraud." (Docket #35, Exhibit L, pg. 113). The issues raised by Plaintiffs in this case are the same as those raised in their Rule 60.02 Motion:

- Sergeant Eischens concealed his close relationship with PCS's Principal, Nellermoe, which resulted in a biased report. *Id*. at 198-202, 229.
- PCS officials repeatedly told people they had "friends" in law enforcement and actively participated in the cover-up of the conflict. *Id*.
- PCS told Rodriguez they did not want him saying too much to law enforcement about the accident. *Id*. at 202.
- PCS told Rodriguez he was "'different' and that people might see the accident in a different way than he saw it (Rodriguez is African-American)." *Id*. at 203.
- Lee questioned Morton about the accident and told him PCS had friends with the police. *Id*. at 203.
- Andy Doll reported he received a call from Kerr, who told him Lee might have done something in front of the semi that caused the accident. *Id*. at 203.

- Tim Bogenreif, an assistant football coach, was told PCS had friends with law enforcement and was told to "shut up" about the accident. *Id*. at 203.

- Sergeant Eischens's failed investigative efforts. *Id*. at 204-208.

- Sergeant Eischens's report is biased. *Id*. at 208-213.

- Sergeant Eischens texted Nellermoe in December 2015 about information he had uncovered and suggested PCS seek legal counsel. *Id*. at 217, 229.

- Sergeant Eischens ignored statements of the young people involved in the accident and failed to examine their diagrams, failed to look for the semi, failed to interview the students in the lead vehicle and speak to a mother who sought an interview. *Id*. at 225.

- In his deposition, Nellermoe said he never asked Lee about the accident that day, even though Lee made multiple calls to the school. *Id*. at 227.

- PCS undertook intentional efforts to silence witnesses and those questioning the events of the accident. *Id*. at 229.

- The potential involvement of Lee in causing the accident as suggested by Rodriguez, Morton and other witnesses. (Docket #35, Exhibit M, pg. 238).

75. The District Court heard the Rule 60.02 Motion on September 8, 2020, and issued an order denying the motion on December 11, 2020. (Docket #35, Exhibit E, pg. 37-52). Once again, the District Court concluded: (1) the relationship between Sergeant Eischens and PCS and its employees was not significant enough to trigger Sergeant Eischens's mandatory disclosure requirement (*Id*. at 43), (2) information regarding a potential relationship between Sergeant Eischens and PCS employees could have been discovered prior to trial through the use of reasonable investigation efforts (*Id*. at 44), (3) the alleged relationship evidence between Sergeant Eischens and PCS is nothing more than impeachment material and does not affect the ultimate issue of the case (*Id*. at 50-51), and (4) the affidavits submitted by Morton, Rodriguez, Doll, and Bogenrief were not credible, at times directly contradicted their prior sworn statements, and the information should have been discovered prior to trial (*Id*. at 45-48).

76. On July 19, 2021, the Minnesota Court of Appeals affirmed the jury verdict and the District Court's denials of the post-trial motions. (Docket #35, Exhibit F, pg. 53-79). The Court of Appeals concluded, "we are extremely sympathetic to the tragic loss that gave rise to this lawsuit. But the record shows that appellants were allowed to present their chosen claims and case theories to the jury and they received a fair trial." *Id*. at 79.

77. On July 7, 2021, Plaintiffs raised the very same allegations against Defendants as part of their 64-page Federal Complaint in United States District Court, District of Minnesota (21-CV-1569). Their allegations included:

- Students were required to participate in athletic activities outside of the confines of the calendar year at PCS in violation of MSHSL rules, which PCS regularly flaunted or completely failed to follow. (Docket #35, Exhibit R, pg. 305).

- PCS applies undue influence on captains of sports teams to comply with summer activities and practices and arrange transportation to and from team events. *Id*.

- Kvalvogs were singled out for special scorn and considered PCS's outer family and not good enough Christians. *Id*. at 307.

- PCS wanted tuition money, but not the minority students the Kvalvogs supported with funds. *Id*.

- Tyler Rodriguez, a passenger in Kerr's vehicle, observed Lee cut off the semi which caused the semi to encroach in the passing lane occupied by Zachary. *Id*. at 311.

- As Zachary and Connor lay on 1-94, Lee did nothing to help them and instead immediately called leadership at PCS where the mechanism of the cover up commenced rapidly. *Id*. at 312.

- Lee and Kerr lied to law enforcement about the accident. *Id*. at 312-313.

- PCS rapidly dispatched communications to PCS's sponsoring churches about the tragic crash, but also distancing the school from the crash and any responsibility stating the tournament was not a school event. *Id*. at 314.

- Sergeant Eischens had personal relationships with PCS leadership, including Nellermoe, Hannestad, and Nygard. *Id*. at 316-318.

- Sergeant Eischens engaged in snapchat messages with Nellermoe about the accident and advised him to speak with a lawyer. *Id*. at 318.

- Sergeant Eischens's crash report contained knowingly false statements of fact and misleading conclusions. *Id*.

- Rodriguez and Morton were told by Lee and PCS administration to stay quiet and not talk about the crash because their friends in law enforcement were taking care of it. *Id*.

- Sergeant Eischens told Morton he was "just a black kid" and appeared to be annoyed with Morton. *Id*. at 319.

- Sergeant Eischens never took a statement from Rodriguez who witnessed Lee cut off the semi. Eischens also disregarded diagrams drawn by Rodriguez and Schwandt showing Lee cut off the semi. *Id*. at 320.

- Sergeant Eischens's report was false, inaccurate, and written in a manner to protect PCS and its administrators from claims of negligence. *Id*. at 325.

- Kerr deleted all text messages from his phone following the crash but was able to later produce the texts. *Id*. at 336.

- Sergeant Eischens failed to interview eyewitnesses and follow up and investigate statements. He also disregarded a 26-page statement from Morton. *Id*. at 344-346.

- Nellermoe made several false statements regarding the Kvalvogs. *Id*. at 350-351.

78. On January 12, 2022, the United States District Court granted Defendants' motions to dismiss on several grounds, including collateral estoppel. (Docket #35, Exhibit H, pg. 81-101). Specifically, the District Court reasoned:

> Defendants seek dismissal on several grounds, and their motions will be granted under Federal Rule of Civil Procedure 12(b)(6). To the extent they allege that Defendants corrupted the state judicial process in the first case, Raymond and Katherine's federal claims in this case are barred by Minnesota's collateral-estoppel doctrine. If that weren't so, the federal claims would fail for other reasons. Because there is not an independent basis for federal subject-matter jurisdiction over Raymond and Katherine's remaining state-law theories of recovery, those claims will be dismissed without prejudice.

Id. at 82

> The Kvalvogs assert a § 1985(2) claim against Park Christian School, Nellermoe, Hannestad, Lee, and Sergeant Eischens, alleging that these Defendants conspired to obstruct justice in the first lawsuit. *See id.* ¶ 178 (alleging that these Defendants conspired "individually and with others both known and currently unknown to the Plaintiffs to impede, hinder, obstruct, or defeat the due course of justice in the [Clay County District Court]"). The Kvalvogs' allegations in support of this claim are extensive. *See id.* ¶¶ 178(1)–(28). But it seems fair to say that these allegations concern the non-disclosure of Sergeant Eischens's relationships with Park Christian, Nellermoe, and Hannestad, flaws in Sergeant Eischens's investigation and report, the alleged evasive and deceptive nature of the individual conspirators' trial testimony, and the spoliation of evidence, all in connection with the first suit.

Id. at 92.

> The Court of Appeals' opinion leaves no doubt that the issue of Sergeant Eischens's bias and resulting falsity of his report was the subject of a final judgment on the merits. The Kvalvogs were parties to the prior adjudication. Though the Kvalvogs argue that the post-judgment context in which Sergeant Eischens's conduct was considered in the first suit did not allow them an opportunity to litigate the issue fully and fairly, no authority is cited to support this argument, and the record establishes otherwise. The issue was the subject of extensive briefing by the Kvalvogs before both the District Court and the Court of Appeals, *see* ECF No. 25-1 at 44–84, 152–69, and the Court of Appeals' affirmance of the District Court's determination that the Kvalvogs had the opportunity to "conduct[] extensive discovery" that could have uncovered Sergeant Eischens's connections to Park Christian leadership, *see* 2021 WL 3027269, at *11, confirms the point. The bottom line is that the law does not permit the Kvalvogs to relitigate here the issue of whether Sergeant Eischens's bias and connections to Park Christian School caused him to prepare a false report or give false testimony that, in turn, corrupted the proceedings and the outcome of the first lawsuit.

Id. at 96-97.

> The Kvalvogs do not allege facts plausibly showing either that they were prevented in any sense from accessing Minnesota's courts or that the state courts' procedures were constitutionally deficient in any respect, and the attention the state courts gave to their claims—a trial before a Clay County jury, an appeal, and consideration by the Minnesota Supreme Court of a petition for discretionary review—would seem to undermine such a claim.

Id. at 99.

79. On appeal, the Eighth Circuit Court of Appeals affirmed the District Court's decision on October 20, 2022. (Docket #35, Exhibit I, pg. 102-110).

> We affirm the district court. We agree that *Rooker-Feldman* does not apply, and that collateral estoppel bars the § 1983 claim, and so decline to address qualified immunity. Like the district court, we are doubtful that the § 1985(2) claim survives collateral estoppel. But for the purposes of this appeal, we assume without deciding that we can reach the merits, and we find that § 1985(2) claim fails on the merits.

Id. at 104-105

> The Kvalvogs argue that the judgment was not "on the merits" because the issues raised in the Rule 60.02(b) motion were "immaterial to the judgment." Kvalvog Br. 19. But the state court did make a judgment on the merits. The state court considered whether Sergeant Eischens's relationship with Park Christian "made him biased, tainted his work as a reconstruction expert, and compelled him to perform his duties in a way that advanced the interests of PCS." *Kvalvog v. Lee*, No. 14-CV-16-4157 at *13 (Minn. Dist. Ct. Dec. 11, 2020). The court found that the Kvalvogs' evidence did not indicate a significant relationship and was "[nothing] more than impeachment material, and not even very powerful impeachment material at that." *Id.* at *14. It further held that "[t]here is nothing to suggest that there was a concerted effort on part of Sergeant Eischens to taint the entirety of the investigation in favor of PCS." *Id.* And after this decision, there was "nothing for the court to do but execute the judgment." *Schifsky*, 773 N.W.2d at 788 (citation omitted). The district court considered the relevant issues, so the denial of the Rule 60.02(b) motion was a final decision on the merits.

Id. at 107.

> The Kvalvogs argue that the district court did not consider injustice when applying collateral estoppel. *See Nelson v. Am. Fam. Ins. Grp.*, 651 N.W.2d 499, 511 (Minn. 2002). They claim that collateral estoppel will chill the exercise of their First Amendment rights because it limits their ability to petition the government for redress of grievances. And they argue that an adverse judgment would deter future plaintiffs from bringing Rule 60.02(b) motions out of fear that it will prevent them from pursuing federal claims. But we do not hold that bringing a Rule 60.02(b) motion is a categorical bar to later litigation. Rather, since all the elements for collateral estoppel are met, the Kvalvogs cannot attempt to relitigate these particular issues. *See Ideker*, 788 F.3d at 854–55. The Kvalvogs are not allowed a second bite at the apple for the same underlying issues.

Id. at 108.

80. Plaintiffs' claims in this action are barred by collateral estoppel. The same issues raised in Plaintiffs' First Amended Complaint were adjudicated by the Minnesota District Court (14-CV-16-4157), Minnesota Court of Appeals (Files A20-0693 and A20-1587), United States District Court, District of Minnesota (21-CV-1569), and Eighth Circuit Court of Appeals (22-1315). Plaintiffs were parties in the prior adjudications and given a full and fair opportunity to be heard on the adjudicated issues as determined by all four previous courts.

II. Motion to Dismiss – Minnesota Rule of Civil Procedure 12.02(a)

81. Defendants also challenge this Court's jurisdiction over Plaintiffs' claims on two grounds: (1) Raymond and Katherine Kvalvog have not been appointed as trustees for the next of kin of Zachary and Connor Kvalvog, rendering their claims "a legal nullity," and (2) Plaintiffs commenced *Raymond Kvalvog, as Trustee for the Heirs of Zachary and Connor Kvalvog v. Arthur Chapman Kettering Smetak & Pikala, P.A., Paul J. Rocheford, Timothy Carrigan and Stephen Warner*, Hennepin County Case 27-CV-24-12228, prior to filing this action, and both cases are pursuing identical claims. Because this Court dismissed Plaintiffs' claims in their Complaint and First Amended Complaint on other grounds, it really isn't necessary for the Court to address these issues. However, out of an abundance of caution, and for purposes of completeness, the Court offers the following analysis.

A.

Plaintiffs' Appointment as Trustees

82. Raymond and Katherine Kvalvog were appointed as co-trustees for the next of kin of Zachary and Connor Kvalvog in the original wrongful death action (14-CV-16-4157), pursuant to Minnesota Statute § 573.02 and Minnesota General Rule of Practice 144. In this action, Plaintiffs seek relief from the jury verdict, order, and judgment in 14-CV-16-4157, under Minn.

Stat. § 548.14, based on allegations of fraud. The Kvalvogs did not petition the Court to appoint them as trustees for the next of kin of Zachary and Connor in this action. Defendants now challenge this Court's jurisdiction over Plaintiffs' claims because the Kvalvogs are not appointed as trustees.

83. "A wrongful death claim is purely statutory, as common law recognized no such actions on the theory that a claim for personal injuries died with the victim." *Ortiz v. Gavenda*, 590 N.W.2d 119, 121 (Minn. 1999) (internal citation omitted). Minnesota Statute § 573.02 provides, "[w]hen death is caused by the wrongful act or omission of any person or corporation, the trustee appointed . . . may maintain an action therefor if the decedent might have maintained an action, had the decedent lived, for any injury caused by the wrongful act or omission." Minn. Stat. § 573.02, Subd. 1.

84. The appointment of a trustee is a condition precedent to bringing a wrongful death action, and any action commenced without such an appointment is a "legal nullity." *Ortiz,* 590 N.W.2d at 122-123. A trustee is appointed by the court to commence or continue a wrongful death action and obtain recovery of damages. *See* Minn. Stat. § 573.02, Subd. 3. The trustee's role is to represent the interests of the decedent's next of kin "without compromise." *Ortiz,* 590 N.W.2d at 124.

85. In *Ortiz*, our Minnesota Supreme Court clearly found the appointment of a trustee is a condition precedent to brining a wrongful death action." *See Ortiz,* 590 N.W.2d at 122-123. Raymond and Katherine Kvalvog petitioned, were appointed, and commenced a wrongful death action as co-trustees. What is unclear is their ongoing ability as trustees to challenge the decision in the original wrongful death case through a separate action, without the need for reappointment.

86. Minnesota Statute § 573.02 gives authority to a trustee to "maintain," "commence," or "continue" a wrongful death action. The trustee must represent the interests of the next of kin "without compromise." *Ortiz,* 590 N.W.2d at 124. These terms appear to support a retention of authority to commence a Minn. Stat. § 548.14 action, without a new appointment, when it directly relates to the original wrongful death case. Also, Minnesota General Rule of Practice 144.01 provides, "[e]very application for the appointment of a trustee of ***a*** claim from death by wrongful act under Minnesota Statutes, section 573.02, shall be made by the verified petition of the surviving spouse or one of the next of kin of the decedent." (emphasis added). In this matter, Plaintiffs are not brining a new wrongful death "claim." Instead, they are challenging the outcome of the original wrongful death action based on fraud. Because Plaintiffs are not bringing a new claim for death by wrongful act, a new petition for appointment as trustees is not required.

B.

Identical Claims Litigated in Hennepin County File 27-CV-24-12228

87. On July 12, 2024, Kvalvog, as trustee for the heirs of Zachary and Connor Kvalvog, commenced a legal malpractice action against the attorneys who represented PCS and Lee in the original wrongful death action, alleging fraud occurred before and during trial. *See Raymond Kvalvog, as Trustee for the Heirs of Zachary and Connor Kvalvog v. Arthur Chapman Kettering Smetak & Pikala, P.A., Paul J. Rocheford, Timothy Carrigan and Stephen Warner*, (27-CV-24-12228), Hennepin County District Court (hereafter "*Kvalvog v. Arthur Chapman"*). In that action, Kvalvog seeks monetary damages exceeding $50,000 from the attorneys.

88. On September 6, 2024, Plaintiffs commenced this action against Lee and PCS, asking for relief from the 2019 jury verdict and Judgment in the wrongful death case *Raymond Kvalvog and Katherine Kvalvog as Trustees for the heirs of Zachary and Connor Kvalvog v. Josh*

Lee, Park Christian School, FCA US LLC and SECURA Insurance, et. al (14-CV-16-4157), and for a new jury trial. (Docket #2).

89. Defendants assert this Court lacks jurisdiction over Plaintiffs' claims because Plaintiffs already filed identical claims in *Kvalvog v. Arthur Chapman*.

90. "Ordinarily, where two courts have concurrent jurisdiction, the first court to acquire jurisdiction has priority to decide the matter." *St. Paul Surplus Lines Ins. Co. v. Mentor Corp*., 503 N.W.2d 511, 514-15 (Minn. App. 1993) (internal citation omitted).

> Where two actions between the ***same parties***, on the ***same subject***, and ***to test the same rights***, are brought in different courts having concurrent jurisdiction, the court which first acquires jurisdiction, its power being adequate to the administration of complete justice, retains its jurisdiction and may dispose of the whole controversy, and no court of coordinate power is at liberty to interfere with its action. This rule rests upon comity and the necessity of avoiding conflict in the execution of judgments by independent courts, and is a necessary one because any other rule would unavoidably lead to perpetual collision and be productive of most calamitous results.

Id. at 515 (internal citation omitted) (emphasis added).

91. Although both actions include many of the same fraud allegations, the cases involve different parties, different subject matters, and different requests for relief. *Kvalvog v. Arthur Chapman* is a legal malpractice suit against the attorneys involved in the wrongful death trial, based upon the conduct of the attorneys. The relief sought is monetary damages. The action before this Court is against Lee and PCS, the original parties to the wrongful death case, and involves alleged fraud committed by Lee and PCS. Their demand is for relief from Judgment and a new jury trial. Plaintiffs are attempting to recover on separate harms, caused by different parties, and seek different relief. As such, this Court has jurisdiction over this matter.

III. Sanctions Under Minnesota Rule of Civil Procedure 11

92. Defendants Lee and PCS seek sanctions against Plaintiffs pursuant to Minnesota Rule of Civil Procedure 11 and Minnesota Statute § 549.211 due to Plaintiffs' harassment and ongoing attempts to relitigate the wrongful death case commenced in 2016. On September 27, 2024, Defendants served their safe harbor letters on Plaintiffs, asking them to withdraw their Complaint as required by Rule of Civil Procedure 11.03. Plaintiffs did not withdraw their claims. The Court must now decide whether Plaintiffs violated Minnesota Rule of Civil Procedure 11, and whether sanctions are appropriate.

93. Relevant to the issues before this Court, Minnesota Rule of Civil Procedure 11.02 provides:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or self-represented litigant is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,
>
> (a) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (b) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; [and]
>
> (c) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. . . .

Minn. R. Civ. P. 11.02. Almost identical standards apply when issuing statutory sanctions in civil actions under Minn. Stat. § 549.211, Subd. 2. If the Court determines a violation of Rule 11.02 occurred, sanctions may be imposed on the attorneys, law firms, or parties that have violated the rule. Minn. R. Civ. P. 11.03. Sanctions may include, "directives of a nonmonetary nature, an order to pay a penalty into court, or . . . an order directing payment to the movant of some or all of the

reasonable attorney fees and other expenses incurred as a direct result of the violation." Minn. R. Civ. P. 11.03(b).

94. Rule 11 and § 549.211 "impose on counsel 'an affirmative duty . . . to investigate the factual and legal underpinnings of a pleading.'" *Collins v. Waconia Dodge, Inc*., 793 N.W.2d 142, 145 (Minn. Ct. App. 2011) *quoting Uselman v. Uselman*, 464 N.W.2d 130, 142 (Minn. 1990). Failure to abide by that paramount duty establishes the foundation for sanctions under Rule 11.03. *Radloff v. First American Nat'l Bank, N.A.*, 470 N.W.2d 154, 156 (Minn. Ct. App. 1991) ("If there are violations under Rule 11, sanctions are mandatory."). "Under both the statute and the rule, conduct is measured by an objective standard… '[T]he extent to which the offender persisted in advancing a position while on notice that the position was not well grounded in fact or … law' is an aggravating factor." *Id*. at 157 (internal citations omitted).

A.

Plaintiffs' Claims are Not Warranted by Law

95. None of Plaintiffs' claims, allegations, or theories identified in their First Amended Complaint warrant relief from Judgment under Minnesota Statute § 548.14.

96. As stated above, Plaintiffs must establish extrinsic acts of fraud, perjury, or subornation of perjury on the court, ***committed by*** Lee or PCS, the prevailing parties. Almost all the alleged bad acts were committed by non-parties, other than PCS or Lee, to which no relief can be granted. Hundreds of paragraphs in the First Amended Complaint are devoted to allegations about Sergeant Eischens, Moton, the Minnesota State Patrol, Schwandt, Kerr, Attorney Bryan, Attorney Carrigan, Attorney Rocheford, and MSHSL, and are entirely irrelevant to a § 548.14 claim. The very few allegations involving Lee or PCS (i.e. bribing or intimidating witnesses, no member of PCS talked to Lee about the crash, PCS's coverup attempts, Nellermoe's relationship

with Sergeant Eischens, or Lee pressuring players to attend the tournament) do not constitute extrinsic acts of fraud on the court, or materially impact the outcome of the jury trial.

97. Plaintiffs must also prove they learned of Defendants' fraud ***within three years*** of commencing the claim. Plaintiffs failed to plead the dates of their "newly discovered" evidence in their First Amended Complaint, which is fatal to their claim. "[C]ommencement of the action within the time fixed is an indispensable condition of the liability and of the action which it permits, not a mere statute of limitations." *Murray v. Calkins*, 254 N.W. 605, 608 (Minn. 1934). Nevertheless, upon review of the pleadings and orders in the underlying proceedings, it is clear these "newly discovered" allegations and theories were known, pled, and litigated by Plaintiffs on several occasions prior to September 6, 2021. Plaintiffs' claims are not warranted by law.

B.

Plaintiffs' Claims Do Not have Evidentiary Support

98. According to Plaintiffs' First Amended Complaint, "[n]ewly discovered evidence reveals a web of deceit, lies, collusion and other misconduct that resulted in a fraud upon the court ending in the jury verdict of June 26, 2019, and the ensuing judgment entered by the Court." (Docket #2, pg. 3, ¶15).

99. Plaintiffs further assert, "[f]ollowing trial, evidence that was not available at the time of the Rule 60.02 motion and that was not addressed in the federal case became available and exposes a fraud upon the Court." (*Id*. at ¶18). In paragraph 19 of the First Amended Complaint, they also assert the newly discovered evidence had not been "presented" to the Court. Plaintiffs' representations are simply not true.

100. The "newly discovered evidence" referenced in Plaintiffs' First Amended Complaint, is the same "newly discovered evidence" argued and presented as a basis for their: (1) 2020 post-trial motions to the Minnesota District Court following the wrongful death jury trial (14-CV-16-4157), (2) 2020 appeal to the Minnesota Court of Appeals (A20-0693 and A20-1587), (3) 2021 Complaint to the United States District Court, District of Minnesota (21-CV-1569), and (4) 2022 appeal to the Eighth Circuit Court of Appeals (File 22-1315).

101. Allegations concerning Lee's involvement in the crash (cutting off the semi), witness tampering, intimidation, and/or bribery, PCS's close relationship with law enforcement, PCS's communication with Lee following the accident, Lee's undue pressure on players and captains to attend the tournament, PCS's immediate attempts to "shore up" liability, PCS's violations of MSHSL's policies, undisclosed communication between Nellermoe and Sergeant Eischens, as well as Sergeant Eischens's wrongful acts, corruption, collusion, bribery, hatred, bias, racism, untruthfulness, negligence, and undisclosed close and personal relationships with PCS administration were known, pled, and considered by at least four previous courts as addressed above. These claims are, and have been, barred by collateral estoppel.

102. Following the wrongful death jury trial, and the Minnesota District Court's denial of Plaintiffs' Rule 60.02 Motion to Vacate the Judgment based on newly discovered evidence, fraud, and fraud on the court (14-CV-16-4157), Plaintiffs appealed. The Minnesota Court of Appeals affirmed the decision, noting, "we are extremely sympathetic to the tragic loss that gave rise to this lawsuit. But the record shows that appellants were allowed to present their chosen claims and case theories to the jury and they received a fair trial." (Docket #35, Exhibit F, pg. 79). The Minnesota Supreme Court declined Plaintiffs' petition for review.

103. Next, Plaintiffs raised the very same allegations against Defendants as part of their federal complaint in United States District Court, alleging fraud, perjury, and corruption in the initial wrongful death trial. In this case, the District Court dismissed Plaintiffs' case on several grounds, including collateral estoppel. In its opinion, the District Court clearly conveyed Plaintiffs' claims were barred from further litigation. (Docket #35, Exhibit H, pg. 81-101) "The bottom line is that the law does not permit the Kvalvogs to relitigate here the issue of whether Sergeant Eischens's bias and connections to Park Christian School caused him to prepare a false report or give false testimony that, in turn, corrupted the proceedings and the outcome of the first lawsuit." *Id*. at 96-97. "The Kvalvogs do not allege facts plausibly showing either that they were prevented in any sense from accessing Minnesota's courts or that the state courts' procedures were constitutionally deficient in any respect, and the attention the state courts gave to their claims—a trial before a Clay County jury, an appeal, and consideration by the Minnesota Supreme Court of a petition for discretionary review—would seem to undermine such a claim." *Id*. at 99.

104. Still unsatisfied with the outcome, Plaintiffs appealed. The Eighth Circuit Court of Appeals affirmed the District Court's decision, again communicating to Plaintiffs that their claims are barred from further proceedings: "[S]ince all the elements for collateral estoppel are met, the Kvalvogs cannot attempt to relitigate these particular issues . . . The Kvalvogs are not allowed a second bite at the apple for the same underlying issues." (Docket #35, Exhibit I, pg. 108).

105. Plaintiffs continued litigating issues surrounding the 2015 accident, initiating or countersuing in at least nine separate actions, sometimes incorporating Defendants as parties. To date, Plaintiffs have not prevailed on any of their claims.

106. On July 10, 2024, less than two months before commencing this action, Plaintiffs were again cautioned about their efforts to relitigate the wrongful death suit, specifically under Minnesota Statute § 548.14, by the District Court in *Raymond Kvalvog v. Garth Unke, and Stich, Angel, Kreider & Unke, P.A.*:

> Moreover, Plaintiff has made no showing that a deposition would have allowed him to reopen the wrongful death suit. He postulates that depositions would help him show that Trooper Eischens gave false testimony at trial. And he asserts that he could reopen the matter for fraud under Minn. Stat. § 548.14. But that provision is extremely narrow in its application. *Hass v. Billings*, 43 N.W. 797, 798 (Minn. 1889). It requires extrinsic fraud. *Nichols v. Vill. of Morristown*, 283 N.W. 748, 749 (Minn. 1938). And it does not apply where evidence could have been discovered prior to trial. *Wann v. Nw. Tr. Co.*, 139 N.W. 1061, 1063 (Minn. 1913). Equal, if not broader, relief is available under Minn. R. Civ. P. 60.02. But the district court in the wrongful death action already heard a motion to reopen the judgment in that case under Minn. R. Civ. P. 60.02. It found the fraud exception inapplicable to the circumstances there, and it found that Plaintiff could have discovered the evidence prior to trial. Those findings were appealed and affirmed, such that they are now law of the case. Thus, even if Plaintiff had been able to conduct depositions aimed at vacating the wrongful death judgment, it would seem that those depositions could not possibly have allowed him to succeed at vacating that judgment.

Raymond Kvalvog v. Garth Unke, and Stich, Angel, Kreider & Unke, P.A., (56-CV-23-1466, Docket #78. pg. 19).

107. Despite these orders, and consistent messages from multiple Courts, Plaintiffs commenced this action. They did not withdraw their complaint after given notice Defendants were seeking sanctions. There is no merit to Plaintiffs' claims under Minnesota Statute § 548.14. Because Plaintiffs have raised claims in this matter that are identical to those fully litigated, dismissed, appealed, and dismissed again, they are barred by the principles of collateral estoppel. The claims do not have any evidentiary support and therefore violate Minnesota Rule of Civil Procedure 11.02.

C.

The Case was filed with Improper Purpose

108. Although Plaintiffs insist this action was not commenced for any improper purpose, this Court struggles to find evidentiary support for this contention.

109. Plaintiffs' pursuits against Defendants have persisted for almost a decade. The issues, themes, and core allegations against Lee and PCS remain unchanged. Those issues and themes were tried before the wrongful death jury which rendered a verdict in July 2019. Those same issues and themes, along with the purported "newly discovered evidence" was available, heard, and decided by the District Court during post-trial motions. Those same issues, themes, and alleged "new evidence" were again heard and decided by the Minnesota Appellate Courts, Federal District Court, and Federal Appellate Court. At each stage, the court disposed of Plaintiffs' claims.

110. Minnesota Statute § 548.14 is "not designed to excuse a party from exercising due diligence in preparing for trial or in moving for a new trial on the ground of surprise or newly discovered evidence (internal citation omitted). Nor is it designed to allow a party a second opportunity to challenge a jury verdict or a district court's denial of post-trial motions." *Formo v. Formo*, 2004 WL 772102, at *2 (Ct. App. Apr. 13, 2004) *citing Betcher v. Midland Nat'l Bank,* 209 N.W. 325, 326 (1926).

111. In *Formo v. Formo*, a case factually similar to the one before this Court, plaintiff brought a § 548.14 action, citing fraud by the defendant, relating to personal injury jury verdict involving a motor vehicle accident. *Formo* 2004 WL 772102, at *2 (Ct. App. Apr. 13, 2004). The Court of Appeals determined, "[t]he instances of fraud cited by [plaintiff] tend to involve facts that she knew, information she could have obtained with due diligence, or claims that she has already raised." *Id*. The Court found plaintiff "failed to provide any basis upon which the district court

might have granted her relief under rule 60.02 or Minn. Stat. § 548.14" and denied her motion to set aside the judgment. *Id*. at *3. The Court of Appeals also affirmed the grant of defendant's Rule 11.03 motion against the plaintiff, finding that "continuing to raise the same issues dressed in a different coat, [plaintiff] and her counsel have been acting in bad faith." *Id.* "Because the issues currently raised by [plaintiff] have all been addressed before, in various forms and forums, and because, as the district court concluded, it is time for this case to be over, we cannot conclude that the district court abused its discretion in awarding sanctions against [plaintiff] and her attorney." *Id*.

112. The *Formo* analysis directly applies to Plaintiffs' First Amended Complaint as Plaintiffs are attempting to use Minn. Stat. § 548.14 to get another bite at the apple and relitigate the original wrongful death jury trial. They continue to raise the same issues already addressed by multiple courts, but just in a "different coat." By doing so, Plaintiffs and their counsel are acting in bad faith and sanctions are warranted. It is fair and equitable to require Plaintiffs to reimburse Defendants for their costs and reasonable attorney's fees associated with this action.

IV. Minnesota Rule of General Practice 9 - Frivolous Litigators

113. In addition to monetary sanctions, Defendants are asking this Court to find Plaintiffs "frivolous litigants" and impose sanctions pursuant to Minnesota Rule of General Practice 9.

114. A "frivolous litigant" is one whom, "after a claim has been finally determined against the person, repeatedly relitigates or attempts to relitigate either: (1) the validity of the determination . . ., or (2) the cause of action, claim, controversy, or any of the issues of fact or law determined or concluded by the final determination against the same party or parties as to whom the claim was finally determined." Minn. Gen. R. Prac. 9.06(b)(1). The court may require the

frivolous litigant to furnish security or impose preconditions on the service or filing of any new claims, motions, or requests. Minn. Gen. R. Prac. 9.01.

115. In determining whether to impose sanctions under Rule 9, courts must consider the following factors:

a) the frequency and number of claims pursued by the frivolous litigant with an adverse result;

b) whether there is a reasonable probability that the frivolous litigant will prevail on the claim;

c) whether the claim was made for purposes of harassment, delay, vexatiousness, or in bad faith;

d) injury incurred by other litigants prevailing against the frivolous litigant and to the efficient administration of justice as a result of the claim in question;

e) effectiveness of prior sanctions in deterring the frivolous litigant from pursuing frivolous claims;

f) the likelihood that requiring security or imposing sanctions will ensure adequate safeguards and provide means to compensate the adverse party; and

g) whether less severe sanctions will sufficiently protect the rights of other litigants;

See Minn. Gen. R. Prac. 9.02(b).

A.

Frequency and Number of Claims

116. This is the twelfth (12) legal action Plaintiffs have commenced, or countersued in, surrounding the June 23, 2015, accident. Of those cases, four remain open with pending motions to dismiss (Rule 12) and two with motions for sanctions (Rule 9 and 11), filed by various defendants. All other matters have been dismissed, with prejudice. Many of these cases have also been affirmed on appeal. Plaintiffs have not succeeded in ***any*** claim. Plaintiffs have been litigating their claims every day since August 2016. This factor weighs in favor of Rule 9 sanctions.

B.

Reasonable Probability of Success

117. In this action, Plaintiffs failed to state a claim for which relief can be granted. Plaintiff's First Amended Complaint must be dismissed as none of the "newly discovered" allegations satisfy the elements of Minn. Stat. §548.14 or demonstrate a fraud on the court at the hands of Defendants. Furthermore, Plaintiffs' claims are barred by collateral estoppel. Considering Plaintiffs' long history of adverse rulings, along with their failed claims in this case, Rule 9 sanctions are warranted.

C.

Purpose of the Claims

118. Based on the overwhelming number of cases and claims filed by the Plaintiffs addressed above, it is difficult to conclude this action was brought in good faith, and for purposes other than to harass Defendants or try to obtain a different, more favorable result, than before. *See Ramsey County v. Olson*, 2017 WL 3862730, * 7 (Minn. Ct. App. September 5, 2017). This factor strongly supports a "frivolous litigator" finding and sanctions.

D.

Injury to Successful Litigant and Administration of Justice

119. Since June 2015, Defendants have been inundated with legal actions commenced by Plaintiffs', involving the same accident and allegations, including a wrongful death action in District Court (14-CV-16-4157), appeal to the Minnesota Court of Appeals (A20-0693 and A20-1587), petition to the Minnesota Supreme Court, federal complaint involving the same allegations brought in state court (21-CV-1569), federal appeal to the Eighth Circuit Court of Appeals, a personal injury suit in state district court (56-CV-21-3056), another appeal to the Minnesota Court

of Appeals (22-1315), and now this action. None of Plaintiffs' claims against Defendants have been successful. For almost ten years, Defendants have endured emotional, expensive, and time-consuming litigation, as well as attacks to their reputations on social media and through the press, at the hands of Plaintiffs. It is unlikely Plaintiffs will end their pursuits against Defendants without court intervention. This factor weighs in favor or Rule 9 sanctions.

E.

Effectiveness of Prior Sanctions, Likelihood of Adequate Protection, and Impact of Less Severe Sanctions

120. This Court is unaware of any prior sanctions imposed on Plaintiffs. However, Plaintiffs have been cautioned by several courts, in each successive order denying their claims, that they cannot keep relitigating the same issues. Despite these warnings, Plaintiffs continue to file actions. Motions to dismiss and motions for sanctions are pending in other remaining open cases.

121. Considering Plaintiffs have brought 12 lawsuits in the past eight years, all surrounding the same accident, and every claim has been unsuccessful, monetary sanctions alone will not deter Plaintiffs from pursuing repetitive and frivolous claims moving forward. Requiring adequate security and additional scrutiny for future actions is warranted to safeguard and compensate Defendants.

122. In a 2020 unpublished decision, the Minnesota Court of Appeals held sanctions under Rule 9 were properly granted against a frivolous litigant, even though no sanctions had previously been awarded. *See Mount v. Mount,* 2020 WL 3409818 *4 (Minn. Ct. App. June 22, 2020). "During a two-year timeframe, appellant filed 41 pleadings in the OFP matter and 33 in the family court case. Many pleadings sought to relitigate the district court's previous decisions and were without any basis in fact or law...." *Id.* Here, Plaintiffs have spent eight years litigating the

same issues in 12 different cases. They have filed thousands of documents and pleadings. Each of Plaintiffs' claims, following those raised in the underlying litigation, have lacked a basis in fact and law and have been dismissed. Sanctions under Gen. R. Prac. 9 are appropriate due to the volume and severity of Plaintiffs abuse of the judicial process. While this Court's heart hurts for the terrible tragedy and loss suffered by the Kvalvogs, the ongoing litigation against Defendants must end.

LJD

MINNESOTA JUDICIAL BRANCH