

NO. A04-188

State of Minnesota
In Supreme Court

Jerry's Enterprises, Inc.,

Respondent,

vs.

Larkin Hoffman Daly & Lindgren, Ltd., et al.,

Appellants.

JOINT BRIEF OF AMICI CURIAE

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INTERESTS OF AMICI CURIAE

All four of the amici curiae before the Court have both public and private interests in this appeal:¹

Minnesota State Bar Association

The MSBA is a not-for-profit corporation that has been in existence since 1883. With 15,462 members, the MSBA is the largest organization of attorneys in Minnesota and its membership includes lawyers who practice and provide legal services of every type and in every facet of the law.

The MSBA's mission includes activities that are intended to aid the courts in the administration of justice; apply the knowledge and experience of the profession to the public good; maintain the profession's high standards of learning, competence, ethics, and public service; conduct a program of continuing legal education; organize the entire Bench and Bar of Minnesota into the MSBA and correlate the activities of the affiliated associations; provide a forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence and law reform, and publish information relating thereto; and cooperate with other bar associations and organizations to further the MSBA's objectives.

¹ Pursuant to Rule 129.03, the undersigned counsel certify that no counsel for a party to this case authored this brief in whole or in part and that no one made a monetary contribution to the preparation or submission of this brief other than the four amici curiae and their counsel.

The MSBA and its members have a significant interest in, and are substantially affected by, the Minnesota Court of Appeals' decision in these proceedings which has eliminated the critical "but for" causation element from the standard applied to legal malpractice cases involving transactional activities and other legal services that may not involve the alleged destruction of the client's cause of action.

Minnesota Lawyers Mutual Insurance Company

Minnesota Lawyers Mutual Insurance Company (hereafter "MLM") provides legal malpractice insurance for almost 4,000 Minnesota lawyers from over 1,800 law firms across the state. MLM was founded in 1982 as a result of efforts of the Minnesota State Bar Association to provide a stable source of professional liability insurance for Minnesota lawyers. MLM is a mutual insurance company, wholly owned by its lawyer-policyholders. Its Board is composed almost entirely of practicing Minnesota lawyers.

As a public matter, MLM has an abiding interest in the continued development of clear and predictable rules governing legal malpractice law in Minnesota. In addition, as a major legal malpractice insurance carrier in Minnesota, MLM is concerned about developments in the law that would radically change the exposure of Minnesota lawyers to legal malpractice lawsuits. Both on its own behalf and on behalf of its insured lawyer-shareholders, MLM has serious concerns that language in the opinion below will necessarily increase legal malpractice exposure in Minnesota. (MLM does not insure the Defendant lawyers involved in this litigation.)

Minnesota Defense Lawyers Association

The MDLA is a non-profit Minnesota corporation founded in 1963 whose members are trial lawyers in private practice. MDLA's members devote a substantial portion of their efforts to the defense of clients in civil litigation. MDLA has over 700 individual members from over 180 law firms.

The MDLA's public interest is to promote clarity of the law and uniform application of important legal principles at issue in civil litigation in Minnesota. The MDLA's interest is also private in that its members include attorneys and firms who, though they primarily handle litigation matters, advise clients on transactional matters. As well, the MDLA's members include attorneys and firms who defend other attorneys in legal malpractice actions. The MDLA believes that the adoption of a new and different causation standard for transactional work, as the court of appeals' decision has done, is unwise.

American Insurance Association

The American Insurance Association (AIA), founded in 1866 as the National Board of Fire Underwriters, is a national trade association representing major insurers writing business across the country and around the world. AIA promotes the economic, legislative, and public standing of its members; it provides a forum for discussion of policy problems of common concern to its members and the insurance industry; and it keeps members informed of regulatory, legislative, and judicial developments. AIA is headquartered in Washington, D.C., maintains six regional offices, and retains legislative counsel in every state. Among its other activities, AIA files amicus briefs in cases before

state and federal courts on issues of importance to the insurance industry. This allows AIA to share its broad national perspective with the judiciary on matters that shape and develop the law.

Fair and consistent liability standards provide a predictable basis for lawyer liability. This is important both to the lawyers who practice and to the insurers who protect them. By applying a different and relaxed standard of causation to the liability of lawyers engaged in so-called transactional representation, the court of appeals' decision directly affects AIA's concerns. AIA's interest in participation, therefore, is its interest in clear and reasoned development of law that affects its members and the lawyers they insure.

ARGUMENT

The court below held that the “but for” causation element of a legal malpractice case does not apply to claims arising out of transactional legal work. Amici curiae respectfully submit that this notion is directly inconsistent with established Minnesota case law; that it is contrary to a recent well-reasoned decision of the California Supreme Court that is directly on point and that is based on fundamental principles that are equally well rooted in Minnesota law; and that the policies behind the “but for” causation standard apply equally to transaction and litigation-based malpractice cases.

The History of “But For” Causation in Malpractice Cases

This Court has repeatedly held that to sustain a claim of legal malpractice a plaintiff must establish “but for” causation -- that but for the attorney’s alleged negligence, the plaintiff would have been successful in the underlying transaction or litigation.²

The opinion below flatly holds that the “but for” causation element does not apply to malpractice claims based on an underlying transaction: “This alleged negligence occurred during a transactional matter—negotiations for purchase and the purchase of property—not during the course of litigating a claim. We conclude, therefore, that the

² Such causation requirements are not limited to legal malpractice claims, but rather apply to all professional negligence cases, including claims of accounting malpractice (see, e.g., *Vernon J. Rockler & Co., v. Glickman, Isenberg, Lurie & Co.*, 273 N.W.2d 647, 650 (Minn. 1978) (plaintiff must demonstrate “factual causation,” that is, that “but for” the advice the accountant gave, the plaintiff would not have made the transfers)) and medical malpractice (see, e.g., *Leubner v. Sterner*, 493 N.W.2d 119, 121 (Minn. 1992) (to establish a prima facie case of medical malpractice, a plaintiff must prove that it is more probable than not that his or her injury was a result of the defendant health care provider's negligence)).

district court erred by applying a “but for” analysis.” *Jerry’s Enterprises, Inc., v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 691 N.W.2d 484, 492 (Minn. App. 2005). But this holding is directly contrary to this Court’s opinion in *Blue Water Corp. v. O’Toole*, 336 N.W.2d 279, 282-84 (Minn. 1983). *Blue Water* squarely holds that just as a plaintiff in a malpractice claim arising out of litigation must show but for causation--what would have happened but for the negligence--so too must a plaintiff in a malpractice claim arising out of a transactional matter:

Just as an attorney’s failure to file a medical malpractice suit within the statute of limitations is not enough to permit recovery by a legal malpractice plaintiff absent proof that the plaintiff had a recoverable claim for medical malpractice, *Christy v. Saliterman*, 218 Minn. at 150, 179 N.W.2d at 293, so O’Toole’s failure to file an application for a bank charter, prior to the effective date of the law allowing branch banks, is not enough to permit recovery by Blue Water absent proof that the Commerce Commission would have considered the application favorably and granted the charter.

336 N.W.2d at 282.

This Court first recognized the concept of “but for” causation in a legal malpractice case 35 years ago, in *Christy v. Saliterman*, 288 Minn. 144, 150, 179 N.W.2d 288, 293 (1970) (plaintiff has the burden of proof not only to show attorney negligence, “but also to establish that he had a recoverable claim for medical malpractice”). The concept is simple, straightforward, and deeply intuitive. Merely establishing lawyer negligence is never legally sufficient; to recover, the malpractice plaintiff must show that, but for the lawyer’s negligence, he would have recovered in the underlying matter. In other words, as part of the plaintiff’s case in chief, he must produce evidence showing what would have happened but for the error by the attorney.

Christy is an example of the lost cause of action case, where the lawyer's negligence in failing to timely commence the action deprived the client of the right to litigate his claim. The client therefore must show that he would have won the claim--the classic "case within a case" requirement, where the client actually tries the underlying case within the context of the legal malpractice case and establishes that, but for the attorney's error in missing the statute, he would have prevailed and recovered.

The "but for" causation concept was next referred to in *Glenna v. Sullivan*, 310 Minn. 162, 245 N.W.2d 869 (1976) where the plaintiff alleged the attorney acted negligently by settling a claim rather than trying it to a jury. The Court questioned how a plaintiff could ever prove that if she had tried the case instead of settling it, she would have received more:

While it is possible that a jury could have awarded plaintiffs a sum greater than \$21,110, it is also possible that the jury could have rendered a verdict substantially less than \$21,110 To allow a client who becomes dissatisfied with a settlement to recover against an attorney solely on the ground that a jury might have awarded them more than the settlement is unprecedented.

310 Minn at 169-70, 245 N.W.2d at 873.

One decision stands above the others as the clear voice of authority on the causation requirement of a legal malpractice claim based on either a transactional or a litigation matter. In *Blue Water Corp. v. O'Toole*, 336 N.W.2d 279, 282-84 (Minn. 1983) the Court squarely held that the "but for" standard must be met in malpractices cases arising out of commercial transactions, as well as in lost cause of action cases. In *Blue Water*, the plaintiff alleged that as a result of the defendant lawyer's negligence, the

plaintiff was deprived of the opportunity to obtain a charter for a bank. The Supreme Court carefully analyzed “what would have happened” but for the attorney’s negligence and made it explicit that a malpractice plaintiff must show what would have happened in the underlying transaction had the alleged negligent acts not occurred. *Id.* at 282 (see language from *Blue Water* quoted above at p. 6).³

In *Raske v. Gavin*, 438 N.W.2d 704, 706 (Minn. Ct. App. 1989) the court of appeals confirmed that the “but for” causation requirement applies in transaction-based malpractice claims, following the dictates of *Blue Water*. The plaintiff alleged that the lawyer’s negligence caused the underlying commercial transaction to be structured in a way that was less favorable for the client than another structure would have been.

³ The Court continued this line of analysis in *Friesen’s Inc., v. Larson*, 443 N.W.2d 830 (Minn. 1989) (summary judgment reinstated where plaintiff failed to show that alleged negligence was causally related to any damages plaintiff might have incurred); *Rouse v. Dunkley & Bennett, P.A.*, 520 N.W.2d 406, 410 (Minn. 1994) (affirming summary judgment for defendant lawyers when plaintiff could not show that he would have survived summary judgment on the underlying but foregone defamation claim) and *Ross v. Briggs and Morgan*, 540 N.W.2d 843, 847 (Minn. 1995) (summary judgment reinstated because plaintiff failed to establish that had the defense of the underlying case been properly tendered to the insurer--a *transactional step*--coverage would have been extended).

With a couple of unfortunate exceptions, the Minnesota Court of Appeals has uniformly applied this Court’s decisions on “but for” causation in both litigation and transactional malpractice settings as well. See e.g., *Olson v. Aretz*, 346 N.W.2d 178 (Minn. Ct. App. 1984) (affirming dismissal of legal malpractice case because proof on but for causation and damages--what would have happened had the underlying divorce been handled differently--was too speculative and conjectural); *Paoletti v. Zlimen*, 396 N.W.2d 893, 896 (Minn. Ct. App. 1986), *pet. for rev. denied* (Minn. Feb. 13, 1987) (affirming summary judgment for a lawyer because nothing the lawyer did or did not do was causally related to plaintiff’s loss); *Padco, Inc. v. Kinney & Lange*, 444 N.W.2d 889, 891 (Minn. Ct. App. 1989) *pet. for rev. denied* (Minn. Nov. 15, 1989) (affirming summary judgment for lawyer because plaintiff could not show any “causal link” between alleged negligence and any damage).

Relying on *Blue Water*, the court affirmed a summary judgment ruling on the grounds that the plaintiff had not demonstrated what “would have happened” in the transaction had the lawyer not been negligent. *Id.* at 706. The court emphasized the plaintiff had not shown that the other parties to the transaction would have agreed to the structure plaintiff wanted, and that absent competent proof on that point, the plaintiff had not established the “but for” element of the legal malpractice claim. *Raske*, 438 N.W.2d at 706.

Unfortunately, in *Fiedler v. Adams*, 466 N.W.2d 39 (Minn. Ct. App. 1991), *pet. for rev. denied* (Minn. April 29, 1991), *pet. for reconsideration denied* (Minn. May 23, 1991) the court greatly confused the law by suggesting that but for causation does not apply to transaction-based cases. Worse, the court wrongly held that in transaction cases a plaintiff must only prove up *three* elements to establish malpractice, rather than the standard four elements.

In *Fiedler*, the defendant attorney had provided legal advice, including financial and tax planning information, to plaintiffs for several years. During the same time the lawyer represented a bank in matters and was a member of the bank’s board of directors. Defendant attorney was involved in a variety of business dealings between plaintiffs and the attorney’s bank client. When Plaintiffs experienced some financial problems, the attorney advised plaintiffs to liquidate some assets that resulted in plaintiffs owing several thousands of dollars in taxes and penalties, allegedly without advising plaintiffs of the potential conflicts of interest arising from his relationship with plaintiffs and his bank client. The attorney also allegedly did not advise plaintiffs of alternative methods to deal with their financial difficulties, nor did he advise them to seek independent counsel.

The *Fiedler* language suggesting that the “but for” causation element of a legal malpractice case does not apply to malpractice claims alleging transactional malpractice is simply wrong in light of this Court’s express holding to the contrary in *Blue Water*, as well as the court of appeals’ own holding in *Raske*.

To support its new rule of law, *Fiedler* cited dictum from *Hill v. Okay Construction Co.*, 312 Minn. 324, 252 N.W.2d 107 (1977). There, the lawyer had represented two clients with adverse interests in the same transaction. As a result of the lawyer’s negligent failure to document the precise nature of the transaction, as well as his negligent participation in providing certain financial profiles to creditors, the clients were forced to defend certain creditors’ claims. As the Court pointed out, however, there was no underlying transaction to prove up, since the injury was in the form of legal fees directly caused by the attorney’s errors. Thus, the alleged damages--expenses incurred in defending lawsuits brought by the creditors--were a direct result of the lawyer’s negligence. 312 Minn. 324, 338, 252 N.W.2d 107, 117. In so doing, however, the *Hill* Court added some dictum suggesting that the “but for” causation concept was enunciated for lost cause of action cases, dictum that *Fiedler* would later pick up and apply to eliminate the “but for” analysis entirely in a transactional-based malpractice claim.

Cases interpreting *Fiedler* have since rejected that idea, noting that, rather than eliminating the requirement, *Fiedler* actually applied the “but for” test in a different fact context, thereby affirming the traditional rule that a plaintiff in a legal malpractice case must prove that but for the alleged negligence, a better result would have occurred. For example, shortly after *Fiedler* was decided, the Eighth Circuit Court of Appeals soundly

rejected the notion that *Fiedler* had eliminated the “but for” element. See *Yusefzadeh v. Ross*, 932 F.2d 1262, 1263-64 (8th Cir. 1991):

Plaintiff makes much of the [*Fiedler*] decision, claiming that it helps his case on the issue of causation. We read *Fiedler*, however, as nothing more than another application, in a different fact situation, of the traditional rule of proximate cause. The Court of Appeals’ opinion, for example, referring to affidavits filed in opposition to defendants’ motion for summary judgment, states that “[i]n the opinion of the experts, a competent attorney would have informed the Fiedlers of [certain financing] alternatives and advise them which method would reduce their debt load at the lowest cost.” 466 N.W.2d at 43. We think this is simply an application of the traditional rule of “but for” causation. As in *Fiedler*, our inquiry is whether a competent attorney would have led the client to alternative sources of financing.

Id. at 1264 & n. 4.

The Minnesota Court of Appeals itself recognized precisely the same thing three years later in *Gustafson v. Chestnut*, 515 N.W.2d 114, 116 (Minn. Ct. App. 1994):

Gustafson argues that *Fiedler* eliminates the “but for” or substantial factor test as an element in malpractice actions. We disagree. *Fiedler* is simply an application, in a different fact situation, of the traditional rule of “but for” causation. See *Yusefzadeh v. Ross*, 932 F.2d 1262, 1264 n.4 (8th Cir. 1991)

515 N.W.2d at 116.

In *Yusefzadeh* the Eighth Circuit affirmed a summary judgment ruling in a transactional malpractice case based on plaintiff’s failure to show “but for” causation. There, plaintiff had retained the defendant attorney to represent him in an attempt to buy control of a computer software company. The *Yusefzadeh* court itself made it abundantly clear that “but for” causation is the controlling causation rule in transaction-based cases under Minnesota law:

The issue comes down in the end to this: Would Yusefzadeh, but for the claimed tortious conduct of Ross and his law firm, have obtained financing from another source? We say “but for” advisedly. That is clearly the standard under Minnesota law in legal-malpractice cases.

932 F.2d at 1264 .

Later, in *First Bank of Minnesota v. Olson*, 557 N.W.2d 621 (Minn. Ct. App. 1997), *pet. for rev. denied* (Minn. March 18, 1997) the court of appeals again seemed to apply the traditional “but for” causation test but added unfortunate dicta similar to *Fiedler* suggesting that the “but for” test should not apply to transactional-based claims, stating that the “case within a case” analysis is not applicable where a plaintiff claims harm by some means other than destruction of or damage to some cause of action. *Id.* at 623-24. This decision did not, however, contradict established precedent. To the contrary, it reaffirmed the longstanding requirement that a malpractice plaintiff must show that some loss directly resulted from the attorney’s negligence -- that but for the alleged negligence, a better result would have occurred. *Id.*⁴

The court of appeals’ decision in the present case, citing *Fiedler* and *First Bank*, similarly errs in stating that the “but for” causation analysis does not apply because this is a transactional-based claim. But it is beyond dispute from this Court’s cases for the last

⁴ The opinion clearly embraces a “what would have happened” analysis, notwithstanding its dictum suggesting the “but for” element was not applicable. See 557 N.W.2d at 624, discussing how--if only the attorney had done things differently--the banks could have redeemed the property themselves, and thus would not have had to pay \$83,000 for a release; would not have suffered as large a loss on the sale; and would not have incurred such extensive attorney’s fees.

twenty-two years since *Blue Water* that but for causation does indeed apply to transaction-based malpractice claims.

Finally, it is not clear from the facts discussed in the opinion below how the "but for" causation test should apply in this case. Apparently Plaintiff Jerry's Enterprises, Inc. claims that, had it been advised of the possibility that a new exception to the merger doctrine might be recognized, it could have and would have taken steps to negate the buy back option by beginning significant improvements on the property within the two-year period. Amici take no position on which party ought to prevail on that issue.

Suffice it to say, however, that this formulation contemplates a classic "what would have happened" showing, precisely what is required by the "but for" standard. Amici simply request that the Court take this opportunity to clarify the law by holding that, contrary to the opinion below, the "but for" causation element applies to all legal malpractice cases, not just those arising out of litigation.

Recent persuasive case law, the Restatement of Torts, and Prosser's seminal essay on Minnesota causation law all contradict the court of appeals decision.

The California Supreme Court recently came to the same conclusion, holding that in cases of alleged legal malpractice in the performance of transactional work, as in all legal malpractice actions, "the client [must] prove this causation element according to the 'but for' test, meaning that the harm or loss would not have occurred without the attorney's malpractice." *Viner v. Sweet*, 135 Cal. Rptr.2d 629, 632, 70 P.3d 1046, 1048 (2003). The California court examined and rejected the notion, which the court of appeals adopted here, that the "but for" causation element (i.e., cause-in-fact) is somehow

inapplicable when the alleged malpractice occurred in a legal transaction. *Id.* 135 Cal. Rptr.2d at 638, 70 P.2d at 1054. *Viner* applies the same well-reasoned analysis that this Court applied in *Blue Water*: the cause-in-fact standard applies in all cases, and there is no relaxed causation standard for a select kind of legal malpractice case.

Because *Viner* is based upon the same fundamentals that have informed more than a century of this Court's causation decisions, its value as guidance for this case is best seen in tandem with Minnesota's traditional concepts of proximate cause. While the court of appeals ruled that transactional legal malpractice requires "more traditional concepts of proximate cause, rather than 'but for' causation * * *," it is difficult to imagine a more traditional concept than that of requiring "but for" cause in all negligence cases, not just in legal malpractice cases. Indeed, Dean William Prosser's definitive article on proximate cause in Minnesota recognized cause-in-fact as a necessary antecedent to all matters of proximate cause. Prosser, *The Minnesota Court on Proximate Cause*, 21 Minn.L.Rev. 19, 21-22 (1937) ("A cause is a *necessary antecedent*; the term includes all things which have so far contributed to the result *that without them it would not have occurred*") (emphasis added) (hereafter "*Minnesota Proximate Cause*").⁵ See also, *id.* at 23 (describing this necessary antecedent as "the 'but for' or sine qua non rule," and stating that "[t]he defendant's conduct is not a cause of the accident, if the

⁵ Prosser, then a Professor of Law at the University of Minnesota, reviewed more than 250 Minnesota cases for his comprehensive article. *Minnesota Proximate Cause* at 19, 20. His coverage of the topic is as authoritative today as it was when he wrote it some 70 years ago. See, e.g., *Lewellin v. Huber*, 465 N.W.2d 62, 65 (Minn. 1991) (citing Prosser article with approval on matters of public policy that limit the reach of proximate cause even when cause in fact is established).

accident would have occurred without it”); *Marlow v. City of Columbia Hts.*, 284 N.W.2d 389, 392 (Minn. 1979) (stating that a plaintiff must prove negligence and that “such negligence was the actual and proximate cause of plaintiff’s injury”). This is not a rule for legal malpractice; it is a rule for tort law generally. As this court has more recently put it, “[c]ausation, by definition, is something producing a certain effect or result.” *Leubner v. Sterner*, 493 N.W.2d 119, 121 (Minn. 1992). Thus, because “but for” causation is the link between the conduct and the result, if “but for” cause cannot be shown, liability cannot be justified. Nothing could be more traditional than requiring proof of cause-in-fact.

Viner recognizes that “but for” causation in legal malpractice actions serves the same purpose as it does in tort claims generally — to “safeguard against speculative and conjectural claims.” 135 Cal.Rptr.2d at 636, 70 P.3d at 1052. True, the case-within-a-case methodology used in litigation-malpractice cases does not always transfer literally to transactional-malpractice cases, but that does not justify a relaxed standard for those cases any more than it would justify a relaxed standard for an auto case on the ground that a car accident cannot be analyzed as a case within a case. Case-within-a-case merely describes the methodology for proving this fundamental element in a litigation-malpractice case. *See Viner*, 138 Cal. Rptr.2d at 636 n.4, 70 P.3d at 1051 n.4 (“Phrases such as ‘trial within a trial,’ ‘case within a case,’ ‘no deal’ scenario and ‘better deal’ scenario describe methods of proving causation, not the causation requirement itself. . . .”). Therefore, differences between litigation and transactional work do not justify dropping that element; instead, the differences call for a methodology that satisfies

“but for” cause under the circumstances of transactional legal work (e.g., the so-called better-deal or no-deal scenarios). Otherwise, the safeguard against speculation and conjecture will be lost, and malpractice liability for transactional lawyers will become a random proposition devoid of fundamental moorings.

And as with the other bases for the *Viner* holding, this Court’s traditional causation analysis points to the same result. See *Gamradt v. Dubois*, 176 Minn. 312, 314, 223 N.W. 296, 297 (1929) (ruling that “[t]he causal connection between the negligence claimed and the resulting injury or death for which damages are asked cannot be left to conjecture or speculation”); *Muggenburg v. Fink*, 166 Minn. 411, 413, 208 N.W. 134, 135 (1920) (ruling that “[a] verdict which rests upon evidence which leaves the question of the causal connection between the alleged negligent act and the happening of the accident a matter of speculation and conjecture cannot be sustained”); *Marlow*, 284 N.W.2d at 392 (affirming dismissal because “only sheer speculation would support a finding that but for the city’s negligent conduct plaintiff’s injury would not have occurred”); *Minnesota Proximate Cause* at 24-25 (stating that it is plaintiff’s burden of proof to establish the fact of causation “by more than mere speculation and conjecture”). *Viner* is grounded in fundamentals long established in Minnesota law.

Both *Viner* and longstanding Minnesota law also show that while there is something more to proximate cause than cause-in-fact, there is not something less, as the court of appeals here held. For example, when cause-in-fact is established, matters of foreseeability and intervening forces may still foreclose liability despite the cause-in-fact connection. But those limitations are based upon public policy – when “but for” cause

becomes too attenuated, legal liability is no longer justified. *See e.g., Harpster v. Hetherington*, 512 N.W.2d 585 (Minn. 1994) (per curiam) (holding that particular “but for” cause urged in slip-and-fall case could not support liability because it was “much like arguing that if one had not got up in the morning, the accident would not have happened”). *Viner* recognizes, and proceeds from, the same fundamental premise, stating that “[c]ausation analysis in tort law generally proceeds in two stages: determining cause in fact and considering various policy factors that may preclude imposition of liability.” 135 Cal.Rptr.2d at 632 n.1; 70 P.3d at 1048 n.1. Thus, although cause-in-fact may not of itself be *sufficient* to support liability, it remains a *necessary* antecedent to it.

Nor does the so-called substantial-factor test provide a “more traditional” basis for supplanting the need for cause-in-fact in transactional legal-malpractice cases. Instead, the substantial-factor formulation subsumes “but for” causation, supplanting the latter only in a narrowly defined class of cases – those involving two causes that concur to produce an injury that either *alone* would have been sufficient to produce. *See Minnesota Proximate Cause* at 23 (noting that it was a case of this type – involving so-called concurrent-independent or multiple-sufficient causes – where “the Minnesota court evolved the ‘material element and substantial factor’ test”). The Minnesota case producing the substantial-factor formulation is *Anderson v. St. P. & S. S. M. Ry.*, 146 Minn. 430, 179 N.W. 45 (1920). *Anderson* involved two fires, one of the railroad’s origin and one of unknown origin. Both alone were sufficient to have caused the damage; therefore, strict application of a “but for” analysis would absolve the railroad because the damage would have occurred even without the railroad’s fire. On these

unique facts, this Court rejected that result, and in doing so approved the district court's jury charge that the railroad would still be liable if the jury were to find that its fire was a "substantial factor in causing plaintiff's damage." *Id.* 146 Minn. at 436, 179 N.W. at 47.

This Court made the substantial-factor formulation explicit in 1934. *See Peterson v. Fulton*, 192 Minn. 360, 256 N.W. 901 (1934) (holding that proximate cause asks "whether that act is a material element or a substantial factor in the happening of that result"). *See also*, CIVJIG 27.10 (defining "direct cause" as "a cause that had a substantial part in bringing about the harm"). But as Prosser notes, while this formulation is an improvement over the unmodified "but for" standard – because it meets concurrent-independent-cause situations like the two fires in *Anderson* – "in the greater number of situations it [i.e., the substantial-factor test] amounts to the same thing" as "but for" causation. *Minnesota Proximate Cause* at 24.

Both *Viner* and the Restatement of Torts recognize the same thing. The Restatement (Second) of Torts, § 432 (1) provides that "[e]xcept as stated in Subsection (2), the actor's negligent conduct is *not* a substantial factor in bringing about harm to another if the harm would not have been sustained even if the actor had not been negligent." (Emphasis added). Thus, in the absence of an exception, the substantial-factor formulation requires "but for" causation. And the exception in Subsection (2) is concurrent-independent cause, as identified by this court in 1920 and as described by Prosser in 1937: Where "two forces are actively operating * * * and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about." Restatement (Second) of Torts, § 432 (2). *See*

also, Restatement (Third) of Torts, § 26 comment j (noting that while the substantial-factor test may be helpful in the context of concurrent-independent causes, in all other cases the “but for” or “necessary-condition standard” must be met); Mahaffey, *Cause-In-Fact and the Plaintiff’s Burden of Proof with Regard to Causation and Damages in Transactional Legal Malpractice Matters: The Necessity of Demonstrating the Better Deal*, 37 Suffolk U. L. Rev. 393, 431 and n.218 (2004). Except in a narrow and inapplicable class of cases, the Restatement provides that the substantial-factor test does not supplant “but for” causation as a necessary element in a plaintiff’s prima facie case.

Like the Restatement, *Viner* recognizes that the substantial-factor test does not supplant the fundamental requirement that cause-in-fact be established in all cases – even transactional legal-malpractice cases – that do not involve a concurrent-independent cause (like the two fires in *Anderson*):

We see nothing distinctive about transactional malpractice that would justify a relaxation of, or departure from, the well-established requirement in negligence cases that the plaintiff establish causation by showing either (1) *but for* the negligence, the harm would not have occurred, or (2) the negligence was a concurrent independent cause of the harm.

Id. 135 Cal. Rptr.2d at 636, 70 P.3d at 1051 (emphasis in original). In so holding, the court analyzed the Restatement of Torts in detail, stating that the substantial-factor test *subsumes* the “but for” causation requirement. *Id.* 135 Cal.Rptr.2d at 635, 70 P.3d at 1051. In short, both *Viner* and the Restatement recognize what has been fundamental in Minnesota for more than a century – that “but for” causation is a vital element in tort law, regardless of the kind of negligence alleged. Therefore, because it is well founded, and because it is based upon fundamentals of causation long established in Minnesota law,

amici urge the Court to re-affirm that “but for” causation is a necessary component of proximate cause in all legal-malpractice actions without regard to the type of malpractice alleged.

***The Policies Behind the But For Causation Standard
Apply Equally to Transactional and Litigation-based Malpractice Cases***

Finally, it is helpful to consider some illustrations that demonstrate the crucial need, as a matter of policy, for maintaining the “but for” element as a prerequisite to establishing a claim for legal malpractice:

There are many times when a client has limited bargaining power in a given transaction. Those clients may simply have to take what they can get in order to accomplish such transactions. Having so committed themselves to the transaction, such clients should not then be allowed to exact from their lawyers benefits that they were unable to bargain for in their negotiations with the other party to the transaction. As noted in *Viner*, a client should not be allowed to recover under a claim for legal malpractice unless the client can establish that, but for the attorney’s negligence, the client would or could have received “a better deal” or “a more favorable result” from a particular transaction. 30 Cal.4th at 1238 & 1244, 135 Cal. Rptr. 2d at 634 & 638. *See also Yusefzadeh*, 932 F.2d at 1263-64; *Raske*, 438 N.W.2d at 706.

The same policy applies when, after extensive negotiations, due diligence, and other preliminary activities, a transaction ultimately fails to close. In those cases, a client should not be able to recover a claim against their attorneys unless they can prove that the other party to the proposed transaction would have agreed to the terms demanded by the

client and that the transaction failed to close because of the attorneys' negligence. *See, e.g., Hazel & Thomas P.C. v. Yavari*, 465 S.E.2d 812, 813-15 (Va. 1996) (attorneys not liable to loss of client's \$1 million deposit where failure to close on transaction resulted from series of events caused by client); *Staab v. Cameron*, 351 N.W.2d 463, 464-65 (S.D. 1984) (transaction was delayed and eventually failed to close as result of client's actions).

There are a variety of other situations involving commercial transactions where clients may seek to impose liability on their attorneys for damages based on alleged negligence when the evidence shows that, in fact, a given transaction turned out poorly as the result of the client's own faulty business judgment or for some reason other than the attorney's actions. For example, an attorney who is allegedly negligent in the preparation of the underlying documentation in connection with the purchase of a business should not be liable when the business ends up less profitable than originally expected not because of the faulty documents, but because, after closing, the acquired business' primary supplier goes out of business or because its major client moves its business to a competitor.

There are many other instances that might arise in a transactional setting where the alleged negligence of the attorney, even if proven, was not the "but for" case of the damage, if any, to the client. *See, e.g., Owens v. McDermott, Will & Emery*, 316 Ill. App. 3d 340, 351-53, 736 N.E.2d 145, 155-57 (Ill. Ct. App. 2000) (client's prior execution of voting agreement, rather than attorney's conflict of interest, prohibited him from exercising first right of refusal as to stock); *Bernard v. Las Americas Communications, Inc.*, 84 F.3d 103, 107 (2nd Cir. 1996) (clients required to show they would have "fared

better” in seeking license from regulatory agency but for alleged negligence of attorney); *Raske*, 438 N.W.2d at 706 (client could not establish transaction would have been structured any differently had client received legal advice that was not provided); *Byrd v. Martin, Hopkins, Lemon & Carter, P.C.*, 564 F. Supp. 1425, 1429 (W.D. Va. 1983), *aff’d*, 740 F.2d 961 (4th Cir. 1984) (no damages for alleged legal malpractice in preparing contract where contract in question was unenforceable against county as a matter of law); *Blue Water Corp.*, 336 N.W.2d at 282 (claim for lost profits failed because client could not demonstrate bank charter would have been obtained had attorney not been negligent); *Lamb v. Barbour*, 188 N.J. Super. 6, 15, 455 A.2d 1122, 1127 (1982), (alleged negligence of attorney in failing to warn clients that seller’s claim that its business experienced unreported income might be untrue was not the cause of clients’ loss because clients already knew business was losing money).⁶

The importance of the “but for” element of causation can also be shown in connection with real estate work performed as part of a loan transaction. For example, there may be situations in which loan transactions are to be secured by an interest in the borrowers’ real property and, accordingly, the lender’s attorney is responsible for properly recording a deed to reflect the client’s interest. Even if the attorney can be

⁶ Other jurisdictions also recognize the important policies underlying the “but for” causation element in claims of transactional malpractice. *See, e.g., Serafin v. Seith*, 284 Ill.App.3d 57, 672 N.E.2d 302 (1996) (malpractice claim alleging negligence in drafting incorporation documents and failure to advise that majority shareholders could eliminate minority shareholder’s preemptive rights; “but for” causation a required element of claim); *Levine v. Lacher & Lovell-Taylor*, 256 A.D.2d 147, 681 N.Y.S.2d 503 (App. Div. 1st Dept. 1998) (claim alleging negligent preparation of security interest documents for loan clients made; client “failed to show that ‘but for’ defendants’ alleged negligence they would have been able to collect on their judgment or foreclose on the collateral”).

shown to have negligently performed that work by, for example, identifying the wrong party or even failing to file the deed altogether, that attorney's negligence should not give rise to liability if the evidence shows that, even if the deed had been properly filed, the client's interest still would have been subordinate to the interest of another party. *See, e.g., Schuman v. Investors Title Ins. Co.*, 78 N.C. App. 783, 785, 338 S.E.2d 611, 613 (N.C. Ct. App. 1986). *Cf. Taylor v. Sullivan*, 205 A.D.2d 416, 417, 613 N.Y.S.2d 397, 398 (N.Y. App. Div., 1st Dept. 1994); *Mercer Sav. Bank v. Worster*, 1991 WL 239346, at *1-2 & 7-8 (Ohio Ct. App. 1991); *North Bay Council, Inc., Boy Scouts of Am. v. Bruckner*, 131 N.H. 538, 548-49, 563 A.2d 428, 434 (1989).

The same analysis likewise applies to instances in which an attorney may have negligently failed to arrange for a security interest in similar types of transactions. For instance, the client should not be able to prevail on a legal malpractice claim if the evidence demonstrates that, even if the client had been a secured creditor, he would not have shared in the distribution of the proceeds of the sale of the debtor's assets because those assets were totally consumed in satisfying liens that had priority over the client's lien. *See, e.g., Cramer v. Spada*, 203 A.D.2d 739, 741, 610 N.Y.S.2d 662, 663-64 (N.Y. App. Div., 3d Dept. 1994).

The "but for" causal element is also essential in establishing a legal malpractice claim in connection with pursuing collection of a judgment against the judgment debtor. The client should not be able to recover against the attorney if the evidence demonstrates that the judgment would ultimately have been uncollectible as to the potential judgment debtor. *See, e.g., Lavigne v. Chase, Haskell, Hayes & Kalamon, P.S.*, 50 P.3d 306, 309

(Wash. Ct. App. 2002); *McKenna v. Forsyth & Forsyth*, 280 A.D.2d 79, 83-85, 720 N.Y.S.2d 654, 657-59 (N.Y. App. Div., 4th Dept. 2001) (listing cases).

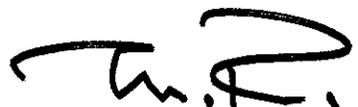
Finally, In the area of tax work, clients should not be able to shift their tax obligations to their attorneys simply by establishing that their attorneys, for example, failed to properly complete a state or federal tax return if the client's own actions and decisions, rather than the attorneys' negligence in preparing the tax return, was the actual cause of the tax liability. *See generally* Bauman, John H., *Damages For Legal Malpractice: An Appraisal Of The Crumbling Dike And The Threatening Flood*, 61 Temp. L. Rev. 1127, 1153-54 (1988).

CONCLUSION

For the foregoing reasons, Amici Curiae respectfully submit that the Court should clarify the law by reaffirming that the “but for” causation element of a legal malpractice claim under Minnesota law applies equally to transactional and litigation-based malpractice claims.

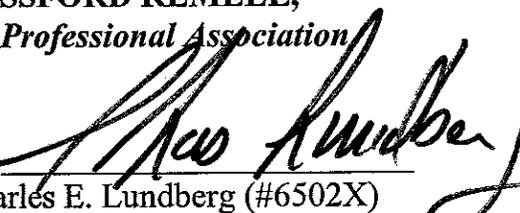
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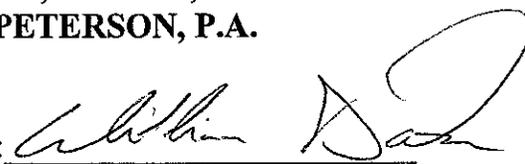
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STATE OF MINNESOTA
IN SUPREME COURT

Jerry's Enterprises, Inc.,

Respondent,

vs.

Larkin Hoffman, Daly & Lindgren, Ltd., et al.,

Petitioners.

CERTIFICATION OF AMICI CURIAE BRIEF LENGTH

I hereby certify that this Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 3(c), for a Brief produced with a proportional 13-point font. The length of this Brief is 6,815 words. This Amicus Brief was prepared using Microsoft Office Word 2003.

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