

NO. A04-188

State of Minnesota
In Supreme Court

Jerry's Enterprises, Inc.,

Plaintiff-Respondent,

vs.

Larkin Hoffman Daly & Lindgren Ltd.,
Thomas P. Stoltman, and Gary A. Renneke,

Defendants-Appellants.

**BRIEF AND APPENDIX OF
LARKIN HOFFMAN DALY & LINDGREN LTD.,
THOMAS P. STOLTMAN, AND GARY A. RENNEKE**

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STATEMENT OF THE ISSUES

- 1. Does a lawyer have a duty to predict, conduct research about, and advise a client of, possible future changes in well settled, apparently well settled, and/or unsettled law?**

The District Court ruled that an attorney, as a matter of law, had no duty to predict changes in the common law. The Court of Appeals reversed the District Court holding that while attorneys do not have a duty to anticipate changes in the law, it remains a question of fact as to whether an attorney has a duty to research and advise a client regarding possible future changes in the law. *Jerry's Enterprises, Inc. v. LarkinHoffman, Daly & Lindgren, Ltd.*, 691 N.W.2d 484 (Minn. Ct. App. 2005).

AUTHORITY:

Rouse v. Dunkley & Bennett, P.A., 520 N.W.2d 406 (Minn. 1994)

Meagher v. Kavli, 256 Minn. 54, 97 N.W.2d 370 (Minn. 1959)

Baker v. Fabian, Thielen & Thielen, 578 N.W.2d 466 (Neb. 1998)

Hodges v. Carter, 80 S.E.2d 144 (NC. 1954)

- 2. Does the “but for” causation standard apply in a transactional legal malpractice lawsuit?**

The District Court ruled that the “but for” test applied in a transactional legal malpractice case. The Court of Appeals reversed and held that in a transactional, as opposed to a litigation, malpractice case, the plaintiff need only prove that damages were proximately caused by the malpractice.

AUTHORITY:

Ross v. Briggs & Morgan, 540 N.W.2d 843 (Minn. 1995)

Blue Water Corp., Inc. v. O'Toole, 336 N.W.2d 279 (Minn. 1983)

Gustafson v. Chestnut, 515 N.W.2d 114 (Minn. Ct. App. 1994).

STATEMENT OF THE CASE

Larkin, Hoffman, Daly & Lindgren, Ltd., Thomas P. Stoltman, and Gary A. Renneke (collectively "Larkin") were retained by Jerry's Enterprises, Inc. ("Jerry's") to represent Jerry's in a commercial real estate transaction in which Jerry's purchased undeveloped commercial real estate from Bruggeman. The transaction closed in August 1995 when Bruggeman signed and delivered a warranty deed to Jerry's. In 1997, Bruggeman attempted to repurchase the property based on a repurchase option in the purchase agreement that was not preserved in the 1995 deed. Jerry's refused to reconvey the property because the option had not been memorialized in the deed and was, therefore, unenforceable under Minnesota's common law merger-by-deed doctrine ("merger doctrine").

Bruggeman sued Jerry's in Washington County District Court to enforce the option. The District Court Judge, Susan R. Miles, determined that the merger doctrine applied and that the repurchase option was unenforceable, and granted summary judgment to Jerry's. Bruggeman appealed. The Court of Appeals reversed, finding that there were exceptions to the merger doctrine for agreements collateral to the deed and for conditions subsequent. The Supreme Court granted review. After rejecting the Court of Appeal's proposed collateral

agreement exception, it affirmed and judicially recognized a new “exception we announce today” for conditions subsequent to the closing. *Bruggeman v. Jerry’s Enterprises, Inc.*, 591 N.W.2d 705, 710 (Minn. 1999).

On remand, the District Court applied the Supreme Court’s new exception and determined that Jerry’s was obliged to reconvey the property in accordance with the prescribed formula in the option agreement. Rather than reconvey the property, Jerry’s reached a financial settlement with Bruggeman and kept the property.

On March 21, 2002, Jerry’s sued Larkin alleging that Larkin was negligent in failing to advise Jerry’s that the title to the Bruggeman land was unclear and could be impaired by a possible future change in the law regarding the merger doctrine. Specifically, Jerry’s asserted that Larkin “did not provide any advice or warning to Jerry’s prior to or during [the 1995 closing] that there was even a possibility that the repurchase option might be deemed to continue in full force and effect after closing. . . .” (Appendix A1 at ¶ 22).

At the conclusion of Jerry’s case in chief, Larkin moved for a directed verdict. The District Court granted the motion, finding as a matter of law that Larkin was not obliged to predict changes in the law and that the “but for” standard of causation applied to transactional legal malpractice claims.

Jerry’s appealed. The Court of Appeals reversed, holding that Larkin had no duty to predict changes in the law but that it was a question of fact whether Larkin had a duty to research and advise Jerry’s that it was possible that the law might change. It also held that

the District Court erred in applying the “but for”, as opposed to proximate, causation standard in a malpractice claim arising out of a business transaction, as opposed to a matter in litigation.

Larkin petitioned for review by the Supreme Court. The Court granted Larkin’s petition on April 19, 2005.

STATEMENT OF THE FACTS

A. The Representation and the Transaction

In 1993, Jerry’s retained Larkin to assist in Jerry’s acquisition of land – Bruggeman¹ property – in Woodbury, Minnesota. (Trial Transcript (“T.”) 106-107). Jerry’s president, Robert Shadduck (“Shadduck”), was an experienced attorney and sophisticated commercial real estate developer who was intended to develop the property as a Cub store. (T. 321-330). During negotiations that led to the execution of an option agreement in favor of Jerry’s, Bruggeman requested a “buy back” or “repurchase” option that would give him the ability to repurchase the property based on an agreed formula if Jerry’s failed to develop the property within a year. (T. 110). Jerry’s granted the repurchase option, but requested and received a two-year time limit. (T. 111).

During the option period, Jerry’s decided not to build a Cub store on the property and

¹ The “Bruggeman property” is a collective name for the subject Woodbury property. It is made up of several parcels, some of which Bruggeman owned and other parcels which were purchased from another owner. The repurchase option included all of the property.

instead began efforts to develop the property for multi-purpose tenants. (T. 77, 120-122). In light of Jerry's new plan, Stoltman advised Shadduck in a letter dated January 17, 1994, that, with respect to the repurchase option, Jerry's would not, as a practical matter, bother to exercise its option until all its development plans and approvals were in place. (Trial Exhibit ("Ex.") 9; T. 112-114, 395-396, 486). Shortly thereafter, the option agreement, with the two-year repurchase option included, was executed by both parties. (Ex.15; T. 116, 118-120). Eighteen months later, without its development plans in place, Jerry's exercised its option rights, and the parties closed on the property on August 10, 1995. (Ex. 25, 27; T. 141).

Bruggeman's attorneys prepared the deed and most of the other closing documents. The deed did not incorporate the repurchase option agreement, and the sellers gave Jerry's affidavits of clear title. (Ex. 25, 27). Robert Shadduck acknowledged at trial that he personally concluded that the repurchase option had been extinguished at closing and that Jerry's was no longer obligated to perform under its terms. (T. 361, 364-366, 370-372). He admitted that he did not ask anyone at Larkin whether his assumptions were correct. (T. 371-374, 380). Gary Renneke, the Larkin attorney attending the closing with Shadduck, recognized that the repurchase option was not included in the deed, but felt that this omission benefitted Jerry's. (T. 787, 797). Renneke testified at trial that, under the law at the time of closing in 1995, he believed Jerry's was receiving clear title to the property. (T. 789, 794).

B. Bruggeman's Attempt to Exercise the Re-purchase Option

Over the next two years, Jerry's tried and failed to develop the Woodbury property.

On August 13, 1997, two years and three days after the closing, Bruggeman's counsel sent a letter to Jerry's advising that Bruggeman was exercising his right to repurchase the property under the repurchase option. (Ex. 43, T. 79, 194). Stoltman testified that he was surprised by Bruggeman's attempt to exercise the option because the option had not been preserved in the deed. (Ex. 45; T. 470, 472-474, 477). According to Minnesota's merger doctrine in 1995, all documents "merged" into the deed and any rights not expressly preserved in the deed were extinguished. (T. 776, 794). Stoltman testified that in 1995 there were only two recognized exceptions to the merger doctrine—fraud and mistake. (T. 880). Based on the law at the time, Stoltman advised Jerry's that Bruggeman did not have a valid claim, so Jerry's refused to reconvey the property. (T. 474-476).

C. The *Bruggeman* Lawsuit and Appellate History

Bruggeman filed suit against Jerry's, in a case entitled *Bruggeman v. Jerry's Enterprises, Inc.*, in Washington County District Court seeking specific performance of the buy-back provision. Jerry's moved for summary judgment arguing, in part, that the repurchase option merged with the deed. (T. 843-844). The District Court granted Jerry's motion the day after oral arguments. (Ex. 96, T. 844). Bruggeman appealed the ruling. The Court of Appeals reversed the District Court, stating that the repurchase option was both a "collateral agreement" and a "condition subsequent," and that the merger doctrine was inapplicable. (Ex. 190, T. 844-845). Jerry's appealed the Court of Appeals' decision to the Minnesota Supreme Court, which granted discretionary review. (T. 845).

This Court disagreed in part with the Court of Appeals and held that the repurchase option was not a “collateral agreement.” (Ex. 192). However, on the question of conditions subsequent, the Court stated “[w]e have not squarely addressed, until now, whether agreements to perform acts subsequent to closing are governed by the merger doctrine” and that as far back as 1893 “[n]o rule of law is better settled’ than the doctrine of merger.” (*Id.* at 708-09). The Court then ruled “[t]he exception we announce today simply removes the presumption of merger from a situation in which the parties would not necessarily contemplate that acceptance of the deed would bar a party from later asserting its contractual rights.” (*Id.* at 710). Thus, in its ruling, the Court created a new, third, exception to the merger doctrine. (T. 1115-1116).

Following remand to the district court, Judge Miles, noting that because the Supreme Court had created a new exception to the merger doctrine, held that Bruggeman’s repurchase option was valid. (Ex. 185, T. 220). Shortly thereafter, Jerry’s settled with Bruggeman. (T. 861, 874).

D. Jerry’s Sues Larkin: The Trial and Appellate History

On March 21, 2002, Jerry’s sued Larkin, claiming that Larkin should have foreseen the possible change in the merger doctrine and should have advised Jerry’s of the potential cloud on its title.

During Jerry’s case in chief, its legal expert, Theodore Meyer, conceded that, prior to the Minnesota Supreme Court’s ruling in *Bruggeman*, there was no exception to the merger

doctrine for conditions subsequent and that the Court's ruling created new law. (T. 1101, 1115-1116). He also agreed that, prior to the Court's decision in *Bruggeman*, there were no published Minnesota opinions holding that there was an exception to the merger doctrine for conditions subsequent.

At the close of Jerry's case in chief, Larkin moved for directed verdict. It argued, in part, that an attorney had no duty to predict, and could not be found negligent as a matter of law, for losses caused by changes made in existing case law or for judicially announced clarifications to an unsettled area of the law. (T. 1126-1129). Counsel for Jerry's conceded that, until *Bruggeman*, the applicability of conditions subsequent to the merger doctrine never arose in any published Minnesota opinions after the *dicta* passage in the 1914 case *In re Brown*. (T. at 1148, 1153). While acknowledging that the ruling constituted a change or clarification of law, Jerry's argued that Larkin was nevertheless liable because it should have advised Jerry's that the law was unsettled and might change if the issue was presented to the court. (T. at 1162).

The District Court concluded that Jerry's basis for bringing the malpractice claim was the adverse decision in *Bruggeman* and that, but for the *Bruggeman* decision, Larkin would not be liable. (T. at 8). Judge Posten reasoned: "I am not persuaded by the testimony that I heard that the standard of care has not been met. And that is that the Defendants had a duty to predict that the Minnesota Supreme Court was going to create a new exception to the merger doctrine. Accordingly I am granting Defendants['] motion for directed verdict." (T.

at 9).

Jerry's appealed. The Court of Appeals reversed the District Court, finding that there was a question of law as to whether Larkin had a duty to research and advise its client of the potential for changes in the law. It said that while "we agree attorneys do not have a duty to predict changes in the law . . . the attorney must exercise legal judgment in some way to be so protected." *Jerry's Enterprises, Inc. v. Larkin, Hoffman, et al*, 691 N.W.2d 484, 492-93 (Minn. Ct. App. 2005). The Court of Appeals then found that "[b]ecause Larkin, Hoffman did not research the issue created by the repurchase provision before advising Jerry's, we conclude that Larkin, Hoffman did not exercise legal judgment before providing its advice and therefore is not immune from liability here." *Id.* at 493.

The Court of Appeals also reversed the District Court for applying the "but for" causation standard to a transactional legal malpractice claim. It held that because a transaction is not a "cause of action", the "but for" test was inapplicable and only the "proximate cause" standard should be used. *Id.* at 492. The Court of Appeals then determined that Jerry's had produced enough evidence to create at least a question of fact as to whether or not the advice given during the Bruggeman transaction was a proximate cause of Jerry's alleged damages. *Id.*

Larkin now appeals the Court of Appeals' decision reversing the District Court order for directed verdict in favor of Larkin. Larkin maintains that the Court of Appeals erred in concluding that attorneys have a duty to research and then advise the client of a risk of

change in a body of well settled, or apparently well settled, law and that the Court of Appeals erred in refusing to apply the “but for” causation standard to a transactional malpractice claim.

ARGUMENT

I. STANDARD OF REVIEW

When reviewing a trial court order for directed verdict, the appellate court must make an independent judgment regarding the appropriateness of the directed verdict. *Walton v. Jones*, 286 N.W.2d 710, 714 (Minn. 1979). A directed verdict should be granted when (1) in light of the evidence as a whole, the trial court would have a clear duty to set aside a contrary verdict as being manifestly against the entire evidence; or (2) where it would be contrary to the law applicable to the case. *Id.* (citing *J. N. Sullivan & Assoc. v. F.D. Chapman Const. Co.*, 231 N.W.2d 87 (1975)). Although the court must treat as credible all evidence from the non-moving party and all inferences that may be reasonably drawn from such evidence, it must allow for a directed verdict when the plaintiff has not sustained the burden of proof. *Wall v. Fairview Hospital and Healthcare Services*, 584 N.W.2d 395, 405-06 (Minn. 1998).

II. A LAWYER IS NOT LIABLE TO A CLIENT FOR A LOSS CAUSED BY AN UNANTICIPATED CHANGE IN WELL SETTLED, OR APPARENTLY WELL SETTLED, LAW

The elements for legal malpractice are: (1) the existence of an attorney/client relationship; (2) acts consisting of negligence or breach of contract; (3) the acts were the proximate cause of the plaintiff’s damages; and (4) “but for” the defendant’s conduct, the

client would have been successful in the action. *Blue Water Corp., Inc. v. O'Toole*, 336 N.W.2d 279, 281-82 (Minn. 1983). A lawyer is duty bound to exercise the “degree of care and skill that is reasonable under the circumstances, considering the nature of the undertaking.” *Prawer v. Essling*, 282 N.W. 2d 493, 495 (Minn.1979). This duty is met if the lawyer “acts honestly and in good faith to the best of his skill and knowledge, or with at least reasonable skill and learning and an ordinary degree of care.” *Sobeck v Leach*, 6 N.W.2d 819, 822 (Minn. 1942). Failure to fulfill that duty is negligence. The issue in this case is whether this duty obliges a lawyer to anticipate, conduct research about, and advise a client of, a possible future change in well settled, apparently well settled, or unsettled common law. The answer is no.

- A. A LAWYER IS ENTITLED TO RELY ON THE STATE OF THE LAW AS PUBLISHED BY THE COURT OF LAST RESORT AND HAS NO DUTY TO PREDICT, CONDUCT RESEARCH ABOUT, AND ADVISE A CLIENT OF, A POSSIBLE FUTURE CHANGE IN WELL SETTLED, OR APPARENTLY WELL SETTLED, LAW, AND IS NOT LIABLE FOR DAMAGE CAUSED BY SUCH A CHANGE.**

Minnesota has only one case in which it considered the duty of a lawyer to predict how an appellate court would rule on a disputed issue of law. *Meagher v Kavli*, 256 Minn. 54, N.W. 2d 370 (1959) (Attorney who acts in good faith is not answerable for a mistake in a point of law on which reasonable doubt may be entertained by well-informed lawyers and which has not been settled by the court of last resort). *Meagher* dealt with a change in unsettled law. But what if the change is to well settled, or apparently well settled, law? The phenomena is not unknown in American jurisprudence. A leading commentator on the law

of lawyers describes it this way:

The aphorism that law is more an art than a science is illustrated best by the frequent misconception that particular legal principles are settled. The history of American jurisprudence reveals that legal customs, practices, or beliefs, which were respected for decades, can suddenly be found imprudent, outdated, or erroneous by a judicial decision. Thus, unsettled propositions may include propositions that are apparently settled. The frequency of such frustrations for attorneys is well documented in American jurisprudence.

Mallen and Smith, *Legal Malpractice*, §18.11, p.31 (5th Ed. 2000).

Other states have been asked to impose liability on a lawyer for a bad result caused by a change in apparently well settled law. None appear to have done so.

A leading and frequently cited case, *Hodges v. Carter*, 80 S.E.2d 144 (NC. 1954), held in favor of a defendant lawyer who was sued by his client over a missed statute of limitations. The lawyer served the complaint by mailing a copy to the Commissioner of Insurance. At the time he did so, lawyers and insurers interpreted the governing statute as permitting this type of service. For 20 years, foreign insurers had acquiesced in service of process by mailing the complaint to the Commissioner of Insurance. Unfortunately for attorney Carter, on this occasion a group of insurers challenged the Commissioner's authority. They prevailed on the issue before the Supreme Court. Thus, a sudden change of apparently well settled law and practice took place. Carter's service was lawful before the change, but unlawful after.

The trial court granted a directed verdict in favor of the lawyer. The Supreme Court affirmed, and reasoned:

The Commissioner of Insurance is the statutory process agent of foreign insurance companies doing business in this State, . . . and when defendants

mailed the process to the Commissioner of Insurance for his acceptance of service thereof, they were following a custom which had prevailed in this State for two decades or more. Foreign insurance companies had theretofore uniformly ratified such service, appeared in response thereto, filed their answers, and made their defense. The right of the Commissioner to accept service of process in behalf of foreign insurance companies doing business in this State had not been tested in the courts. Attorneys generally, throughout the State, took it for granted that under the terms of G.S. s 58-153 such acceptance of service was adequate. And, in addition, the defendants had obtained the judicial declaration of a judge of our Superior Courts that the acceptance of service by the Commissioner subjected the defendants to the jurisdiction of the court. Why then stop in the midst of the stream and pursue some other course?

Id. at 520.

The Nebraska Supreme Court, in a fact setting remarkably similar to the instant case, held that as a matter of law, a lawyer, who conducted her representation consistent with then well settled law, was not liable for a loss sustained by her client as a result of a later change in that well settled law. *Baker v Fabian, Thielen & Thielen*, 578 N.W.2d 446 (Neb.1998). Victoria Baker hired Barbara Thielen in a fire damage lawsuit against her insurer who denied coverage on the ground that Baker, despite reminders and a cancellation notice, had not paid her premium. At trial, Thielen adduced testimony from Baker that Baker had placed her premium in the mail chute at her place of work and that such mail had always been received. The jury returned a verdict in favor of Baker. The insurer appealed.

After the Baker trial, but before the hearing in the insurer's appeal, the Nebraska Supreme Court decided *Houska v. City of Wahoo*, 456 N.W. 2d750 (1990) in which it held that the presumption of receipt by mail is not invoked in the absence of proof that the mail is deposited into a U.S. Postal Service depository. Relying on *Houska* in the insurer's appeal

of the Baker case, the Court concluded that Baker had failed to prove the necessary element that her payment had been placed with the U.S. mails because she failed to adduce any evidence that the mail chute at her place of work was a regular U.S. Postal Service depository. At the same time, the court held that the insurer was entitled to the statutory presumption of receipt by mail of its notice of cancellation. Because of the exquisite timing of this change in well settled Nebraska law, Baker's victory became a complete loss.

Theilen, on behalf of Baker, petitioned for a rehearing on the ground that *Houska* and been decided after the Baker trial. It was denied. Then, Baker sued Thielen for negligently failing to adduce evidence that the mail chute was a regular U.S. Postal Service depository. The case was tried to a jury. Expert witnesses were called by both sides. The jury returned a general verdict for Theilen. Baker appealed.

The Supreme Court concluded that Theilen was not liable as a matter of law and, in fact, was entitled to a directed verdict at the trial level. The court reasoned that Theilen had properly elicited testimony consistent with then-well-settled Nebraska law. Her conduct was controlled by the law at the time of her service, not the changed law after her service. She could not, as a matter of law, be liable for a loss to her client occasioned by an unanticipated change in well settled law. *See also: Watkins v Saperstein*, 931 P.2d 840 (Utah 1996) (Summary judgment affirmed for law firm that commenced lawsuit within then applicable statute of limitations because it had no duty to predict or anticipate that, after commencement of lawsuit, appellate court would, in an unrelated case, change and shorten long settled

limitation period which resulted in dismissal of client's case.); *Ruchi v. Glodfein*, 113 Cal. App 3d 928 (1980) (Summary judgment affirmed for divorce lawyer because he had no duty to predict 180 degree shift in California law on community property status of unvested military benefits and was not liable, as a matter of law, for loss sustained by client in light of subsequent change in law by Supreme Court.); *Littelton v. Stone*, 497 S.E.2d 684 (Ga. 1998); *Procanik v. Cillo*, 543 A.2d 985 (N.J. Super.A.D. 1988); *DeThorne v Bakken*, 539 N.W.2d 695 (Wis. App. 1995); *Vande Kop v McGill*, 528 N.W. 2d 609, (Iowa 1995); *Patterson v Powell*, 31 Misc.250, 64 N.Y.S. 43 (1900), *aff'd* 56 A.D. 624, 68 N.Y.S. 1145 (1900). *Compare: Stake v Harlan*, 529 So. 2d 1183 (Fla. App. 1988) (Lawyer who has personal knowledge of certification to court of last resort of question that could materially adversely effect client has duty to inform client); *Also see: Wartnick v. Barnett*, 490 N.W. 2d 108 (Minn.1992) (Legislature's change in the law by removal of wrongful death limitations period for "death caused by an intentional act" could not be foreseen by lawyer and lawyers are not "held to a standard which requires them to anticipate . . . extreme and unlikely changes in the law").

It is not just civil lawyers who face claims stemming from changes in well settled law. In the criminal law arena, defense lawyers are frequently criticized by their defendant clients who claim that the lawyer should have anticipated future changes in the law and raised them in their case – the objective being to prove that the conviction was caused by ineffective counsel and they should be released or granted a new trial.

In the criminal setting, most courts hold that defense counsel has no general duty to anticipate changes in the law. *United States v. Wenzel*, 359 F. Supp.2d 403, 411 (W.D. Penn. 2005) (Defense counsel was not ineffective in failing to forecast the change in the legal landscape brought about by the Supreme Court's *Blakey* decision). The principle holds true regardless of whether the law was well settled and the change was entirely unexpected or whether the law was unsettled and the case law trends clearly indicated the upcoming change. In either event, courts have repeatedly cautioned against using 20/20 hindsight and, instead, hold that an attorney is only responsible for the law as it is at the time, not what the law may be in the future. *United States v. Davies*, 394 F.3d 182 (3rd Cir. 2005); *Rickman v. State*, 587 S.E.2d 596 (Ga. 2003); *Duncan v. Morton*, 256 F.3d 189 (3rd Cir. 2001); *Senk v. Zimmerman*, 886 F.2d 611, 615 (3rd Cir. 1989).

B. BEFORE BRUGGEMAN V. JERRY'S ENTERPRISES, INC., 591 N.W.2D 705 (MINN. 1999), MINNESOTA'S COMMON LAW ON THE MERGER DOCTRINE WAS WELL SETTLED, OR, AT A MINIMUM, APPARENTLY WELL SETTLED.

In Minnesota, at the time of the Bruggeman closing in August 1995, the merger doctrine was well-settled. It became the law of the state in the 1880's. Between 1884 and 1893, the Minnesota Supreme Court discussed the merger doctrine in four separate cases: *Fritz v. McGill*, 31 Minn. 536, 18 N.W. 753 (1884); *Whitney v. Smith*, 33 Minn. 124, 22 N.W. 181 (1885); *Griswold v. Eastman*, 51 Minn. 189, 53 N.W. 542 (1892); and *Slocum v. Bracy*, 55 Minn. 249, 56 N.W. 826 (1893). In these and other cases that followed, the Court stated the general merger rule: in the absence of fraud or mistake, the terms of a purchase

agreement or other representations made before execution of the deed merge with the deed and are unenforceable. It was a two exception rule. It engendered the practice of memorializing (in the deed itself) agreements intended to survive the execution and delivery of the deed.

On April 15, 1999, the Supreme Court decided *Bruggeman v Jerry's Enterprises, Inc.*, 591 N.W. 2d 705 (Minn. 1999). *Bruggeman* substantially altered Minnesota's common law merger doctrine. In so doing, it took pains to explain its reading of its old opinions, inclusive of their shortcomings. Carefully acknowledging its reliance on a sentence of *dicta* in *In re Brown's Estate*, 148 N.W. 121, 122 (Minn. 1914), and confirming that "our opinions have generally been limited to recitations of the general rule that all prior agreements are deemed to have merged into the deed." *id.* at 709, the Court changed a common law doctrine that had been well settled for 115 years.

The well settled nature of this body of law, its duration, the fulsome and misleading text of the oft-quoted rule itself, and the reliance placed on it by practitioners and citizens must have been on the mind of the Supreme Court when it said "[b]y 1893, we declared that '[n]o rule of law is better settled' than the doctrine of merger." *Bruggeman*, *Id.* at 708 (*citing Slocum v. Bracy*, 56 N.W.2d 826, 827 (Minn. 1893)). And, aware of the potential for unintended and unfair consequences that might follow, it chose to describe the change in the law as a third "exception that we announce today" as opposed to a holding that suggested the third exception had been clear and controlling for the preceding 115 years.

The Court's caution and apparent concern about harsh consequences was not misplaced. The dispute in this case, for example, arises from a 1995 real estate closing, four years before the third exception was created by the Court in 1999. A lawyer at that closing had good reason to conduct business with the understanding that there were only two exceptions to the merger doctrine. Moreover, there was no reason for a prudent lawyer at that closing to know, or be charged with the duty to advise a client, that the law might change dramatically four years hence.

In addition to the cautious language of the Court, a fair reading of the merger cases explains why this change in well settled law was not anticipated by reasonable and prudent lawyers. For example, even after *In re Brown's Estate*, 148 N.W. 121 (1914), every Minnesota Supreme Court case discussing merger prior to *Bruggeman* applied the merger doctrine broadly to exclude any condition or contractual term not contained in the deed. See *Peters v. Fenner*, 294 Minn. 488, 199 N.W.2d 795 (1972) (prior agreement that did not allow for prepayment merged into contract for deed that did); *Bernard v. Schneider*, 264 Minn. 104, 117 N.W.2d 755 (1962) (earnest money contract containing buyer's condition subsequent right to engage in commercial activity on property was not in deed and was thus extinguished); *Berger v. First Nat'l Bank & Trust Co.*, 198 Minn. 513, 270 N.W. 589 (1936) (same); *Rosendahl v. Mudbaden Sulphur Springs Co.*, 144 Minn. 361, 175 N.W. 609 (1919) (purchase agreement conditions calling for note payments after conveyance of deed was not extinguished because deed was specifically made subject to terms of purchase agreement);

McCarthy's St. Louis Park Cafe, Inc. v. Minneapolis Baseball & Athletic Ass'n, 258 Minn. 447, 104 N.W.2d 895 (1960) (oral evidence of prior agreement to build ballpark if land was conveyed was insufficient to challenge language of deed).

These decisions, together with the traditional broadly stated rule, provided good reason for prudent lawyers to think that, save for fraud or mistake, “The merger doctrine generally precludes parties from asserting their rights [even those dependent on a condition subsequent not memorialized in the deed] after the deed has been executed and delivered.”, *Bruggeman*, 591 N.W.2d at 708 (bracketed clause added for comparison and contrast).

The published decisions of the Minnesota Court of Appeals are in line with the Minnesota Supreme Court’s merger doctrine decisions: *Pickar v. Erickson*, 382 N.W.2d 536 (Minn. Ct. App. 1986)(easement in purchase agreement merged into contract for deed that did not contain the easement); *Sullivan v. Eginton*, 406 N.W.2d 599, 600 (Minn. Ct. App. 1987)(purchase agreement that did not allow tenancy until November 1, 1985, merged into contract for deed allowing possession as of October 7, 1985 – condition subsequent was the agreement not to occupy until November 1, 1985); *St. Louis Park Inv. v. R.L. Johnson Inv.*, 411 N.W.2d 288, 289-90 (Minn. Ct. App. 1987)(purchase agreement requiring seller to add additional space to property merged into contract for deed that did not require additional space).

In fact, in two published decisions the Court of Appeals specifically found that the merger doctrine applies to collateral issues. In *Resolution Trust Corp. v. Kahn*, 501 N.W.2d

703 (Minn. Ct. App. 1993), the court held that a quitclaim deed that did not reference mortgage payment requirements in the contract for deed extinguished those requirements. The court specifically found that collateral obligations are extinguished by the merger doctrine). Similarly, in *B-E Constr., Inc. v. Hustad Dev. Corp.*, 415 N.W.2d 330 (Minn. Ct. App. 1987), a contract for deed required developer to improve lots, but the deed did not. The Minnesota Court of Appeals court found that the improvement requirement was extinguished by merger, and specifically noted that merger applied even though the improvement agreement was “collateral to the purpose of the deed”).²

Accordingly, because the merger doctrine at the time of the August 1995 closing was well settled, and provided for only two exceptions – fraud and mistake, and a third exception for conditions subsequent did not become the law until four years later in 1999, Larkin had no duty to predict, conduct research about, or advise its client of, a possible future change in the law.

²Larkin is prepared to demonstrate that the *only post-In Re Brown, pre-Bruggeman* case law to even suggest the possibility that a condition subsequent is an exception to the merger doctrine is unpublished and conflicting. However, mindful of this Court’s admonition in *Vlahos v R & I Construction, Inc.*, 676 N.W. 2d 672, 676, fn. 3 (Minn. 2004) regarding citation of unpublished opinions, it refrains from doing so without permission or direction of the Court.

III. WITH RESPECT TO UNSETTLED LAW, A LAWYER WHO ACTS IN GOOD FAITH AND HONEST BELIEF THAT HIS ADVICE AND ACTS ARE WELL FOUNDED AND IN THE BEST INTEREST OF HIS CLIENT IS NOT LIABLE FOR A MISTAKE IN A POINT OF LAW THAT HAS NOT BEEN SETTLED BY THE COURT OF LAST RESORT AND ABOUT WHICH REASONABLE DOUBT MAY BE ENTERTAINED BY WELL-INFORMED LAWYERS.

Assuming, in the alternative, that the merger doctrine was unsettled law in 1995, the result is the same. Minnesota does not oblige an attorney to predict changes even with respect to unsettled law. The Court of Appeals agreed. (“We agree that attorneys do not have a duty to predict changes in the law.” *Jerry’s Enterprises, Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 691 N.W.2d 484, 492 (Minn. App., 2005).

It supported its view with a passage from *Meagher v Kavli*, 256 Minn.54. N.W. 2d 370 (1959):

We agree that attorneys do not have a duty to predict changes in the law. It is well settled that ... [a]n attorney who acts in good faith and in an honest belief that his advice and acts are well founded and in the best interest of his client is not answerable for a mere error of judgment or for a mistake in a point of law which has not been settled by the court of last resort in this State and on which reasonable doubt may be entertained by well-informed lawyers.

Id. at 493-4

However, the court mistakenly confined its analysis to “an error of judgment or mistake in a point of **unsettled law . . .**” *Id.* at 492 (emphasis added). Ignoring the problem presented by changes in **well settled, or apparently well settled, law**. See Section II A, *infra.* p. 11. It concluded that *Meagher* required Larkin to exercise legal judgment and do so by researching Minnesota’s common law of merger:

But we conclude that while an attorney is not liable for an error of judgment or mistake in a point of unsettled law, the attorney must exercise legal judgment in some way to be so protected. Because Larkin, Hoffman did not research the issue created by the repurchase provision before advising Jerry's, we conclude that Larkin, Hoffman did not exercise legal judgment before providing its advice and therefore is not immune from liability here.

Id. at 493.

The Court of Appeals was wrong and exceeded its role as an error correcting court. It failed to properly interpret and follow the rule in *Meagher*. Instead, it imposed a duty to exercise judgment by conducting legal research, even in a transactional setting.

Meagher addressed the question of whether a lawyer can be held liable for failing to accurately predict how a court will rule on an issue of unsettled law. In *Meagher*, a former client, Kavli, refused to pay his legal bill to his defense lawyer, Arthur Geer. Geer was Kavli's defense attorney in a personal injury suit commenced by Dix who fell into an open elevator shaft in a building owned by Kavli. *Dix v Harris Machinery Co.*, 60 N.W. 2d 628 (1953). There was a large verdict. Kavli claimed that Geer was negligent in conducting the defense.

The Meagher firm sued Kavli for unpaid fees. Kavli disputed the amount, and also claimed that Geer negligently permitted the introduction of damaging, but incompetent and inadmissible, financial exhibits by Dix that, in turn, caused the jury to render an excessive award. Geer defended the legal position he took at trial as reasonable in light of it being a point of unsettled law.

There were four exhibits at issue - L, M, N, and O. All were tendered to support past

and future lost income. The first, Ex. L, was a copy of an audit used to compute Dix's income tax for 1947, the year before the accident. It showed the plaintiff as an able wage earner. Geer did not object. He did, however, object to exhibits M, N, and O for years 1948, 1949, and 1950 on the ground of foundation and incompetence. They showed a considerable reduction in Dix's income after the accident. The trial court overruled the objection on the ground that since all of the audits had been prepared in a similar manner, and Geer had not objected to Ex. L regarding pre-accident income, it would be unfair to exclude similarly prepared audits for the post accident years. The Supreme Court sustained the trial court's decision, in a split decision – 4 to 2. *Id* at 228-231 (majority analysis), 231-233 (dissent analysis).

Then, in *Meagher*, the appeal from the fee dispute trial, the Supreme Court rejected Kavli's claim that Geer was negligent for being wrong about the law governing the evidentiary issue during the personal injury trial. The *Meagher* court held that:

an attorney who acts in good faith and in an honest belief that his advice and acts are well founded and in the best interest of his client is not answerable for a mere error of judgement or for a mistake in a point of law which has not been settled by the court of last resort in this State and on which reasonable doubt may be entertained by well-informed lawyers.

Id. at 57.

Upon a fair reading, it is evident that the *Meagher* rule is conspicuously different than that adopted by the Court of Appeals. It provides that:

An attorney who acts

- a) in good faith, and
- b) in an honest belief that his advice and acts are well founded and in the best interest of his client,

is not liable for

- c) an error of judgment or
- d) a mistake in a point of law that
 - i has not been settled by the court of last resort in this State, and
 - ii reasonable doubt about the issue may be entertained by well informed lawyers.

This rule is dispositive of this case. This is so because the dispute is over a mistake in a point of law, the record is clear Larkin acted in good faith with an honest belief that its advice and acts were well founded and in the best interest of their client, the issue had not been settled by the Supreme Court, and reasonable doubt about the issue was entertained by well informed lawyers.

It is true that the *Meagher* rule is a two-pronged rule. One prong contemplates the circumstance of an error in judgment, and the second a mistake in a point of law. In this case, only the “mistake in a point of law” prong is implicated, not the “error of judgment prong”.

But even if the error in judgment prong was implicated, there is no supporting precedent, nor sound reason to conclude, that “judgment” within the meaning of the *Meagher* rule can only be provided, as the Court of Appeals implies, through research. In this case that

research would have to have found dictum in a 1914 case and, perhaps, an unpublished Court of Appeals decision – all this in connection with a traditional real estate closing.

Judgment is acquired by lawyers over time – trial by trial, transaction by transaction, lessons taught, lessons learned. For many lawyers, specialists in particular, experience breeds good judgment. Moreover, clients are well served by this form of judgment as it permits lawyers to address issues, answer questions, and accomplish objectives quickly, efficiently, and economically, without conducting research on every conceivable topic. With experience as the teacher, and in the fullness of time, lawyers learn to exercise judgment instinctively, even reflexively. That is not to say that judgment need never be informed by legal research. Lawyers are obliged to know the law of their jurisdiction in their specialties, and be capable of effective legal research when circumstances warrant. But it is far from the mark to say that legal research is the only source of judgment, especially for seasoned, certified specialists.

And so it was in this case. Bruggeman delivered a clean warranty deed to Jerry's. It was an unexpected benefit to Jerry's as it did not incorporate the repurchase option. And, since as Justice Lancaster put it in her opinion in *Bruggeman*, “[n]o rule of law is better settled” than the doctrine of merger, *Bruggeman*, at 708, it is hard to fault Larkin for relying on such durable common law. Thus, Larkin's conduct falls well within the rule in *Meagher*.

IV. THE COURT OF APPEALS ERRED IN HOLDING THAT A PROXIMATE CAUSE STANDARD APPLIES TO TRANSACTIONAL LEGAL MALPRACTICE CLAIM.

Jerry's claims that in a transactional legal malpractice case, unlike a case involving

the loss of a cause of action, a plaintiff need only prove that its damages were proximately caused by its attorney's mistake. The Court of Appeals agreed, reasoning that a transaction was not an "action", and therefore, the "but for" causation standard is not applicable.

The Court of Appeals erred. The "but for" standard has been the law of Minnesota since *Blue Water Corporation, Inc. v. O'Toole*, 336 N.W.2d 279 (Minn. 1983), regardless of whether the disputed negligence occurred in a transaction or a lawsuit. See *Ross v. Briggs & Morgan*, 540 N.W.2d 843, 847 (Minn. 1995); *Gustafson v. Chestnut*, 515 N.W.2d 114, 116 (Minn. Ct. App. 1994); *Yusefzadeh v. Ross*, 932 F.2d 1262, 1264-63 (8th Cir. 1991). Instead of requiring Jerry's to prove that it would not have been damaged "but for" his lawyer's alleged negligence, the Court of Appeals enunciated new law by holding that a transactional malpractice plaintiff need only prove his damages were proximately caused by his lawyer.

In so doing, it has contradicted and displaced established precedent. Moreover, its holding on this point is rejected by most other courts, the most recent and leading example being *Viner v. Sweet*, 30 Cal. 4th 1232, 70 P. 3d 1046 (Cal. 2003) (Just as in litigation malpractice actions, owners, as plaintiffs, had to show that but for alleged malpractice, it was more likely than not that they would have obtained a more favorable result). Thus, "in both litigation and transactional malpractice cases, the crucial causation question is what would have happened if the defendant attorney had not been negligent. This is so because the very idea of causation necessarily involves comparing historical events to a hypothetical

alternative. *Viner* at 1052. Accordingly, the decision of the Court of Appeals should be reversed with instructions to apply the “but for” test.

CONCLUSION

Thomas Stoltman and Gary Renneke provided legal services to Jerry’s in August of 1995. Their professional conduct should be judged in the light of the well settled law at the time of their service in 1995, not with 20/20 hindsight in the light of the what the law became four years later in 1999.

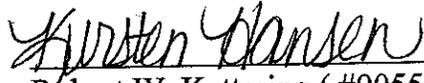
A rule requiring lawyers to predict, conduct research about, and advise clients of possible future changes in well settled law would be unfair, impractical, wasteful, and unworkable. More important, it would promote uncertainty in a system of law meant to be stable, reasonably certain, and upon which citizens and lawyers may rely.

Accordingly, since Larkin is not, as a matter of law, liable for a loss to its client caused by an unanticipated change in well settled law, it respectfully requests that the Supreme Court reverse the Court of Appeals and return the case to the District Court for entry of judgment of dismissal in favor of the defendants.

Respectfully submitted,

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Dated: 5/18/05



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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).