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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.

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

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ARGUMENT

I. JERRY'S PERSISTS IN INCORRECTLY CHARACTERIZING LARKIN'S DEFENSE AS ONE OF JUDGMENTAL IMMUNITY EVEN THOUGH LARKIN HAS CLEARLY STATED THAT ITS DEFENSE IS THAT IT HAD NO DUTY TO PREDICT A POSSIBLE FUTURE CHANGE IN WELL SETTLED, OR APPARENTLY WELL SETTLED, LAW.

Jerry's theory of the case is fundamentally different than Larkin's. Jerry's asserts that a lawyer in a transactional setting must identify as a legal issue the possibility that the Supreme Court may change well, or apparently well, settled law, even though identification of the issue requires extensive legal research into ancient dicta and unpublished Court of Appeals decisions. Jerry's also argues that the attorney must advise his client of these risks of possible change. If the lawyer does all this, he is not liable to his client for an error of judgment. This is what Jerry's calls the "judgmental immunity" defense.

Larkin's defense is different. The long established error in judgment rule is an important defense invoked in many legal malpractice cases. Larkin's defense is more fundamental. Larkin maintains that, as a matter of law, it had no duty to predict a **possible** change in well settled, or apparently well settled, common law and, also as a matter of law, it cannot be found negligent for not doing so. Since it had no duty to predict a possible change in well, or apparently well, settled law, then by force of logic it had no duty to conduct research about, and advise a client of, a **possible** change in that law.

As both parties recount in their briefs, a "leading, illustrative example [of attorney

liability for changes in long settled law] is the 1954 North Carolina Supreme Court decision in *Hodges v. Carter*[1]." Mallen and Smith, *Legal Malpractice*, §18.11, p.31 (5th Ed. 2000). Jerry's incorrectly claims that *Hodges* is a "judgmental immunity" case. Resp. Br. p. 29-30. Rather, if read with care, it holds that the lawyer was not liable because he had no duty to predict an abrupt change in apparently well settled South Carolina law.

In *Hodges*, attorney Carter was sued by client Hodges whose personal injury suit was dismissed because Carter failed to properly serve the complaint on the defendant insurance company before the statutory limitations period expired. Service of process was controlled by a South Carolina statute that required personal service, not service upon the Commissioner of Insurance as Carter had done. Carter chose to serve the Commissioner because for twenty years foreign insurers had acquiesced in service of process if the complaint were mailed to the Commissioner. While the facts are not well developed in the opinion, it appears that Carter did not even read the statute governing service, much less conduct any research, and it seems obvious that he did not advise his client of risks attendant to his course of action. Rather, he merely did what other South Carolina lawyers had done for twenty years as they followed what they thought to be settled law.

The trial court dismissed the case against Carter. The Supreme Court affirmed, not

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[1]80 S.E.2d 144 (NC. 1954)

because Carter had researched the issue and made a reasoned assessment of how to achieve service, but because he had followed the twenty year old, state-wide legal practice of service upon the Commissioner that he and the local legal community thought to be settled law. Concluding that this was an abrupt change in a long standing, apparently lawful practice by attorneys and insurers, and even though the statute provided otherwise, the court found Carter not liable as a matter of law[2]. Thus, *Hodges* is not, as Jerry's claims, a "judgmental immunity" case. It is, like the instant case, a "duty" case.

In its principal brief, Larkin, in addition to its analysis of *Hodges* and *Baker v. Fabian, Thielen & Thielen,*[3] cites a set of cases that demonstrate the distinction between changes in well and apparently well settled law on the one hand, and changes in unsettled law on the other. App. Br. p. 14-15. Seven of those cases, now incorporating parenthetical descriptions and holdings, are set out below.

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 the long settled limitation period which resulted in dismissal of client's case.); *Ruchi v. Glodfein,* 113 Cal. App 3d 928 (1980)

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[2]It is true, as Jerry's points out, that the *Hodges* employed the same language as the Minnesota Supreme Court in *Meagher v. Kavli*, 256 Minn. 54, 97 N.W.2d 370 (Minn. 1959). However, the facts make it clear that *Hodges* is not an error in judgment case, but rather a "change in apparently well settled law" case.

[3]578 N.W.2d 446 (Neb.1998)

(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) (Summary judgment in legal malpractice action affirmed for lawyer who did not research controlling statute but, consistent with prevailing practice of local bar, dismissed client's medical malpractice action [previously commenced in inferior court] after two year statute of limitations and related statute of ultimate repose had run, with intention of refiling in state court under governing renewal statute, but did so shortly before appellate court in unrelated case held for first time that renewal statute cannot be used to avoid the bar of the statute of repose.); *Procanik v. Cillo*, 543 A.2d 985 (N.J. Super.A.D. 1988) (Holding that defendant "attorney is not obliged to anticipate a change in **settled** law" in context of wrongful life medical malpractice cases in the 1970's and citing *Hodges, Ruchti*, and quoting Mallen and Smith, *Legal Malpractice*, §18.11, p.31 (5th Ed. 2000)); (Vande Kop v. McGill, 528 N.W. 2d 609 (Iowa 1995) (Summary judgment for defendant lawyer who drafted antenuptial agreement for plaintiff husband that lacked provision waiving alimony and restricting property distribution in 1975 when such provisions were void as against public policy in case commenced by husband in 1994 after legislature enacts law reversing common law public policy – "attorney need not be clairvoyant and foresee future changes in the law such as those that occurred with the 1980

amendments"); *Patterson v Powell*, 31 Misc. 250, 64 N.Y.S. 43 (1900), *aff'd* 56 A.D. 624, 68 N.Y.S. 1145 (1900) (Defendant lawyer had no duty to anticipate change in law that had been well-settled for fifty years and dicta, while entitled to respectful consideration, are not binding and do not cause body of law to become unsettled).

The rule proposed by Jerry's – that lawyers have a duty to identify possible changes by the Supreme Court in well, or apparently well, settled law, and conduct research about, and advise clients of the risk of, a possible change – has serious adverse consequences that would affect the efficient and effective practice of law. For starters, the scope of the proposed duty is breathtaking. It is challenging enough for any professional to assess probable changes in developing law, but predicting possible changes in well settled law is simply impossible for a mortal lawyer.

Jerry's rule will place practicing lawyers in a dilemma. Taught to honor and rely on precedent that is recognized and relied upon by the bench and bar alike over many years, they must now question even the most durable precedents. According to Jerry's, they are obliged to look for dicta that might suggest an exception, or a holding, though reasonable on its face, that embraces a bit more than the narrow facts presented. Broadly stated holdings, like those covering Minnesota's merger doctrine, repeated over time by succeeding courts, and relied upon by lawyers as a matter of standard practice, must be read with a jeweler's eye and studied anew. Finally, attenuated advice from lawyer to client, warning that well settled law today may be different tomorrow, will perplex

clients expecting clear and practical advice.

Consider, for example, how attenuated advice will be communicated to the client. Will it be in the form of a percentage (There is a 75 % chance that the law of merger will apply.), or a euphemism (This seems to be the law, but it could be changed at any time).

If attenuated legal advice is not a sufficient evil, cost surely is. How much research is enough on an issue of well settled law? Should a lawyer restrict himself to contemporary case law, or reach back to dicta in 1914 decisions? Must he read unpublished opinions? Should he look beyond Minnesota to all fifty states? And all of this in a transactional setting where no specific issue is even identified. Mounting expense is no small matter to consumers of legal services and the public at large. Courts should be cautious of proposed rules, like that of Jerry's, that unnecessarily make the legal system more, rather than less, costly.

These rhetorical questions illustrate unintended consequences of imposing a duty upon lawyers to anticipate, and predict a change in, well settled law. These consequences are avoided by the rule Larkin proposes: A lawyer has no duty in a transactional setting to predict, conduct research about, and advise a client of, possible changes in well settled, or apparently well settled law, unless and until there is a published decision that raises the prospect that the law in the jurisdiction may be unsettled.

This proposal is no free pass for lawyers. They remain obliged to advise clients

with respect to the risks presented in areas of unsettled law. Thus, as in the past, they must read published appellate decisions, stay abreast in their fields, and advise their clients of developments in the law.

II. JERRY'S TAKES THE TESTIMONY OF THOMAS STOLTMAN AND GARY RENNEKE OUT OF CONTEXT AND DOES NOT ACCURATELY AND COMPLETELY RECOUNT THE EVENTS AT AND AFTER THE AUGUST 10, 1995 CLOSING.

A central event in this case is the real estate closing of August 10, 1995. It was the occasion of a mistake on the part of Bruggeman. The mistake was Bruggeman's failure to incorporate the repurchase option into the closing documents.

A. Thomas Stoltman believed that the buy back provision had merged pursuant to well settled Minnesota law.

In preparation for the closing, Thomas Stoltman reviewed the closing documents submitted by Bruggeman's attorneys (the Maslon firm) about a week before the August 10, 1995 closing. He approved of their form and advised Jerry's accordingly. T. 548. He observed and understood that neither the warranty deed nor the affidavits of sellers incorporated the repurchase option. T. 549, L.17; T. 550. He was leaving on vacation the coming week, so his colleague, Gary Renneke, would attend the closing in his place.

Stoltman did not conduct research on Minnesota's merger rule because "as I said before, I had no reason to." T. 551. He said this because Minnesota's well settled merger rule had terminated Bruggeman's right to enforce the buy back provision. T. 559 ("As of this date [approximately November of 1995] the closing had already occurred and if Mr. Bruggeman had any rights they would have disappeared at closing, under my

understanding of the merger doctrine.").

In response to similar questions, he gave similar responses. T. 559-10 ("As I said, the law was well-settled on the point and there was no need to [conduct any research]"; T. 567. ("I think I've heard this question a few times but to be very clear, as [of] the date of that closing and points following, there was no conscious thought that I had about whether or not [the buy back option] existed anymore. There was no reason to put it into a contract, no reason to discuss it with Mr. Shadduck or Mr. Dreyer. It hadn't been preserved at the closing and there was no reason to think about it.")[4].

B. Gary Renneke attended the closing for the vacationing Thomas Stoltman and formed no opinion one way or the other as to the effect of the merger doctrine.

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[4]Jerry's sets out a single sentence from Stotlman's testimony as a banner heading of the Argument section of its Brief. Resp. Br. p. 22. The banner reads as follows: "I didn't have an understanding at that point of whether [the buy back provision] was in effect or not." T. 581. That sentence comes from Stoltman's response to a question about sales agreements Jerry's had asked him to prepare in August 1996 (one year after the August 1995 closing). At the time this question was asked, Stoltman had already answered similar questions three different times. His answers were to the effect that at all relevant times, he thought that Bruggeman's repurchase option had merged and was no longer enforceable. T. 550-551; T. 559-17, 559-25 thru 560-02, and T. 567. On this fourth occasion, when Jerry's trial counsel asked once again about whether Stoltman raised with Jerry's the "the issue concerning the buy back clause", T. 581., Stoltman responded, as he had before, that "I had no reason in my mind at that point in time to raise it". When asked if this was because he thought the buy-back clause was of no effect, he responded "I didn't have an understanding at that point of whether it was in effect of not. It wasn't in any document that I was aware of that was applicable to that point in time". In light of the full set of questions and answers and the previous testimony on this point, the only fair reading is that in August 1996 (one year after the closing), Stoltman thought the repurchase option was not an issue and he wasn't thinking about it since it had no bearing on the tasks Jerry's was asking him to perform at the time.

Thomas Stoltman was the lead attorney on the transaction. T.769. He had made vacation plans that conflicted with the August 10, 1995 closing. T.769. In advance of his departure, he personally examined and approved the closing documents. T. 548. He then asked his he colleague, Gary Renneke, to attend the closing in his place. T.769. Renneke's involvement was limited to "getting the deal closed". T.770.

Like Stoltman, he observed that Bruggeman had not incorporated the repurchase option into the closing documents. At trial, he was asked about his understanding of the merger doctrine as of August 1995:

Q. You had a general understanding of that doctrine as of August 1995?

A. Certainly did.

Q. Was your understanding of that doctrine that basically, unless a pre-closing agreement between [the] parties to a sale of real estate are mentioned or referred to in the deed signed at closing, those agreements are essentially wiped out and are unenforceable after closing.

A. That's the general rule of merger, yes.

Q. So basically the general rule is if it's not in the deed, it's not enforceable after closing?

A. "It" being a pre-closing agreement regarding the same subject, yes.

T.776.

Renneke had not been personally involved in the negotiations and events that preceded the closing. T. 770. His only service was to attend the closing where the transactional documents, already approved by Stoltman, were to be executed and delivered. He did not during the course of his brief role in the transaction form an opinion as to whether a merger occurred. T. 777-779.

C. Jerry's President, Robert Shadduck, personally concluded that Bruggeman's failure to incorporate the repurchase option into the closing documents caused a merger and rendered the repurchase option unenforceable and never told Larkin of his conclusion or asked Larkin for its opinion.

Jerry's president, Robert Shadduck, was an experienced attorney and sophisticated commercial real estate developer who was intending to develop the property as a Cub Food store. T. 321-330. He reviewed the closing documents sent to him by Stoltman and attended the closing. Shadduck saw and was aware of the mistake that Bruggeman had made in not incorporating the repurchase agreement into the closing documents and he concluded that this failure eliminated the buy back provision. T.364-365. ("I felt that this document along with the affidavit in support of this document in this closing together clearly extinguished any remaining issues of any kind at the closing.") and T.368. ("We [Jerry's] were presented with documents at closing that didn't raise the issue and in my mind extinguished any and all continuing rights that the seller might have had. I thought that it was patently clear as to what the seller's intentions were.").

Shadduck acknowledged at trial that he personally concluded Bruggeman's

mistake relieved Jerry's of the obligation to commence construction within two years of the closing. (T. 361, 363-366, 370-372). He concedes that he never asked anyone at Larkin whether his assumptions were correct:

Q. And you never asked anybody at Larkin Hoffman whether or not you still had the repurchase option, correct?

A. Correct.

Q. You never asked anyone at Larkin Hoffman whether you still had an obligation to start construction in two years, correct?

A. There was no discussion on any aspect of the buy back provision leading up to or after closing.

Q. The answer to my question is you did not bother to ask anybody at Larkin Hoffman wether you still had this construction obligation, correct.

A. I did not ask nor did anyone bring it to my attention.

Q. Did anyone at Larkin Hoffman ever tell you that you no longer had an obligation to start construction within two year as contained you your contract.

A. No

T. 371-374, 380.

He also concedes that he never received any communication from Larkin (no letter, no memo, no phone conversation) that confirmed his conclusion that the repurchase

option had been extinguished. T.372 When asked if he ever asked anybody at Larkin whether they agreed with his personal conclusion that the repurchase option had been extinguished, his response was "Not in those terms. I asked in a general way: "Are these documents good to close?" And the answer was: "yes" and we closed." T.372-373.

Thus, Between the date of the closing on August 10, 1995 and August 13, 1997, the day that Bruggeman gave notice that he intended to exercise the repurchase option, Shadduck did not advise Larkin of his personal conclusions. Nor did he ask Stoltman or Renneke, or anyone else at Larkin, for their opinion and advice on the enforceability of the repurchase option. Nor did he fulfill the construction contingency that would have independently rendered the repurchase option unenforceable.

III. THE TRIAL COURT AND THE COURT OF APPEALS CORRECTLY CONCLUDED THAT IN A LEGAL MALPRACTICE CASE, THE DEFENDANT IS ENTITLED TO INTRODUCE EXPERT AND DOCUMENTARY EVIDENCE ABOUT THE STANDARD OF CARE AND THAT IT HAD BEEN MET.

Jerry's argues that Larkin is not entitled to present expert witnesses to testify about the standard of care followed by Minnesota lawyers with respect to Minnesota's merger doctrine. That argument was correctly rejected by the trial court and the Court of Appeals.

Although Larkin contends that is not liable as a matter of law for failing to predict an unanticipated possible change in well settled law, it was, nonetheless, obliged to prepare and present a defense that it had met the standard of care followed by Minnesota lawyers with respect to real estate conveyances and the merger doctrine. *Sjobeck v Leach*,

6 N.W.2d 819 (Minn. 1942). That defense, by definition, consists of testimony about the practical consequences of the merger doctrine and how and why real estate lawyers discharge their professional duties in its light. It embraces not just what they do, but why, and how they came to form the judgments that they did. The foundation for their testimony comes from practical experience, their basic and continuing legal education, their understanding of statues and case law, and the consensus formed in the community of practicing real estate lawyers. All of this is standard information and long accepted evidence for jury consideration in a legal malpractice case. *Admiral Merchs. Motor Freight, Inc. v. O'Connor & Hannan,* 494 N.W.2d 261, 266 (Minn.1992).

Should this case be submitted to a jury for its consideration of the applicable standard of care, it is, as the Court of Appeals said, important that they "have the benefit of the opinions of local commercial-real-estate attorneys regarding the scope of the merger doctrine before the *Bruggeman* decision". *Jerry's Enterprises, Inc. v. Larkin, Hoffman, Daly & Lindgren, LTD.,* 691 N.W.2d 484 (Minn. App. 2005). The Court of Appeals was correct and should be affirmed.

IV. THE LEGAL ERROR IN THE OPINION BELOW CONCERNING "BUT FOR" CAUSATION MUST BE CORRECTED.

Jerry's does not really argue with the points and authorities submitted by both appellant and amici curiae on the "but for" causation issue. It simply argues that if the law does require a showing of "but for" causation in transactional malpractice cases, it has made that showing. Even though the parties apparently do not disagree on the

applicable legal standard, this Court must resolve the issue in this case, for two separate and independent reasons.

First, because the holding below flatly rejects the "but for" causation requirement in this transactional malpractice case, this Court must clarify that the this requirement does indeed apply here so that the jury can be appropriately instructed on what Jerry's must show to prevail in this case--that, but for the alleged negligence by appellant, Jerry's would have obtained a more favorable result in the underlying transaction.

Second, since the Court of Appeals opinion is a published opinion that will be used and cited in future transactional malpractice cases, it is very important that this Court take the opportunity now to correct the fundamental misstatement of Minnesota legal malpractice law contained in that opinion.

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,

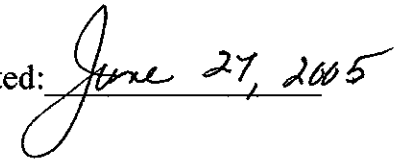
since Larkin is not, as a matter of law, liable for a loss to its client caused by an unanticipated change in well settled law, it respectfully requests that the Supreme Court reverse the Court of Appeals and return the case to the District Court for entry of judgment of dismissal in favor of the defendants.

The Court of Appeals correctly held that a defendant law firm may introduce oral and documentary evidence about the prevailing standard of care amongst commercial real estate attorneys with respect to the merger doctrine and should be affirmed. However, because the Court of Appeals erred in failing to employ the "but for" causation standard, its decision should be reversed with respect to any further proceedings in this case and for the purpose of clarifying the law and avoiding needless confusion and debate over the applicability of the but for causation test in legal malpractice cases.

Respectfully submitted,

ARTHUR, CHAPMAN, KETTERING,
SMETAK & PIKALA, P.A.

Dated: June 27, 2005



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