
NO. A04-1367

State of Minnesota
In Supreme Court

Richard Antone,

Respondent,

v.

Israel Mirviss,

Appellant.

BRIEF OF MINNESOTA LAWYERS MUTUAL, *AMICUS CURIAE*

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Statement of Amicus

MLM is a mutual insurance company domiciled in Minnesota that provides professional liability insurance to nearly 4,000 Minnesota lawyers practicing in over 1,800 separate firms across Minnesota. MLM was founded in 1982 as a result of efforts by the Minnesota State Bar Association to secure a stable source of professional liability insurance for Minnesota lawyers. As a mutual insurer, it is owned by its lawyer-policyholders. Since its founding, MLM has issued many thousands of policies of insurance. MLM does not insure Appellant Mirviss for any claims in this action.

Certification Required by Minn. R. Civ. App. P. 129.03

This brief is written by MLM's counsel, and no party or counsel for a party authored the brief in whole or part. No person other than MLM or its counsel made any monetary contribution to the preparation or submission of this brief.

Argument

I. This Court Has Consistently Enforced Proper Statutes of Limitation.

This Court has long recognized that statutes of limitation have an important role of repose in our system. In *Wichelman v. Messner*, 250 Minn. 88, 83 N.W.2d 800, 816 (1957), the Court identified some of the important public policies advanced by statutes of limitation, stating:

Statutes of limitations are based on the theory that it is reasonable to require that stale demands be asserted within a reasonable time after a cause of action has accrued. See, *Basye, Clearing Land Titles*, s 52. In *Baker v. Kelley*, 11 Minn. 480 at page 493, *Gil. 358 at page 371*, we said:

“* * * Statutes of limitation * * * prescribe a period within which a right may be enforced, afterward withholding a remedy for reasons of private justice and public policy. It would

encourage fraud, oppression and interminable litigation, to permit a party to delay a contest until it is probable that papers may be lost, facts forgotten, or witnesses dead. A limitation law is intended to prevent this, and such a law is uniformly held valid.”

250 Minn. at 106, 83 N.W.2d at 816-17. The Court cites to an opinion by Justice Jackson in which he explains statutes of limitation, in relevant part, as “practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizens from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost.” *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945).

II. The Court of Appeals Decision Will Seriously Undermine the Purpose of Statutes of Limitation.

If the proper legislative purpose of statutes of limitation is to provide certainty and an element of repose, the court of appeals decision is as strong an antidote to that proper purpose as a court could issue. *See, Antone v. Mirviss*, 694 N.W.2d 564 (Minn. Ct. App. 2005). If lawyers face exposure long into their retirement from documents drafted decades earlier, they will hardly know repose in their “golden years.” The vast majority of lawyers are not insured for liabilities such as that visited by the court of appeals on Appellant Mirviss, and none would know that they should keep purchasing such insurance. Appellant Mirviss testified that he is uninsured for the claims in this case. *Depo. at 25, A.170*. The rule announced by the court of appeals is unworkable and flies in the face of decades of this Court’s announced jurisprudence, and it should be reversed for the benefits of all participants in the legal system.

A. The Court of Appeals rule is more open-ended than a “discovery rule” that this Court has never adopted in legal malpractice actions.

This court has repeatedly rejected adoption of a “discovery” rule for statutes of limitation in Minnesota legal malpractice actions. *See, e.g., Herrmann v. McMenemy & Severson*, 590 N.W.2d 641, 643 (Minn. 1999). It has appropriately said that such a change in the limitations rules should be left to the legislature. *Johnson v. Winthrop Labs. Div. of Sterling Drug, Inc.*, 291 Minn. 148, 151, 190 N.W.2d 77 (1971). Because the legislature has not seen fit to do this, and the court of appeals should have adhered to this court’s rulings and rejected the ruling it entered.

In fact, the court of appeals decision creates a rule vastly more open-ended than the discovery rule. A discovery rule—rejected by this Court for important policy reasons—would delay the beginning of the limitations period until the plaintiff either knows or ought to know of the facts that would give rise to a claim. This would necessarily be a date before the plaintiff commences a malpractice suit against the lawyer. The court of appeals here created an entirely new rule that extends the time even later, postponing the start of the limitations period until after the plaintiff not only knew of the facts, and even after it later commenced suit; not until a court judgment had finally determined that the lawyer’s work did not accomplish its purpose would the limitations clock begin. It is hard to imagine a more thorough judicial evisceration of the protections created by statutory limitation periods.

B. The Court of Appeals decision ignores decisions on accrual of malpractice causes of action.

Minnesota appellate courts have consistently recognized that a legal malpractice cause of action accrues when it will sustain a motion to dismiss; the courts have explicitly rejected the argument that uncertainty about the full extent of a claim will somehow allow the claim to drag on indefinitely. In *Herrmann v. McMenemy & Severson*, 590 N.W.2d 641 (Minn. 1999), this Court held that a legal malpractice action was barred by limitations, and specifically rejected the Court of Appeal's conclusion that the statute of limitation does not begin to run until the harm manifests in some form or the client otherwise suffers pecuniary loss. This Court concluded that the Court of Appeals essentially was adopting a discovery rule and rejected that approach. *Id.* at 643. The same conclusion is necessary here. The *Herrmann* court noted that "[T]he running of the statute does not depend on the ability to ascertain the exact amount of damages. Thus, in the absence of fraudulent concealment, the running of the statute is not tolled by ignorance of the cause of action." *Id.*

The new rule announced by the court of appeal unambiguously postpones accrual during a period during which a client may be unaware of the claim, and continues to postpone after he learned of it, after it was raised in litigation, and continuing until a final judgment in that underlying case. This holding amounts to the rewriting of this Court's rule.

C. The new Court of Appeals rule will create tremendous uncertainty for lawyers, clients, the courts, and the public.

The Court of Appeals decision will impose dire consequences on lawyers in a wide variety of practice contexts. There is no special rule of limitations for antenuptial agreements. Lawyers necessarily perform work that may not give result in an adjudication of

actual damages for years or decades. Every routine estate planning and real estate transaction has the potential under the court of appeals rule to become a malpractice claim accruing years later. A drafting mistake in an indenture for a 40-year bond issue made even by a young lawyer could create liability for her long into her retirement.

Examples of other areas outside of family law where these issues may arise can be seen in legal malpractice cases dealing with accrual issues. In *Grimm v. O'Conner*, 392 N.W.2d 40 (Minn. Ct. App. 1986), a former clients brought a legal malpractice action alleging negligent representation in omitting an interest escalator clause in refinancing provision of contract for deed involved in the settlement of a lawsuit. The Grimms argued that they were not damaged when they signed the contract because damages were unascertainable at that time. *Id.* The Court explained that “[t]he statute of limitations begins to run when the cause of action comes into being ‘even though the ultimate damage is unknown or unpredictable.’” *Id.* The Court determined that “[a] contract for deed has an ascertainable market value, and one with an interest escalator clause during a period of inflation is of considerable greater value than one without.” *Id.* The court therefore concluded that the Grimms suffered ascertainable damages when the contract was signed. *Id.*

In *Thorsen v. Thompson*, No. C4-95-1542, 1996 WL 146452 at * 1 (Minn. Ct. App. 1996)[copy appended pursuant to MINN. STAT. § 480A.08, subd. 3 (2002)], the court confronted accrual questions in a suit for malpractice based upon a lawyer’s advice with respect to the effect of a settlement agreement. *Id.* at *1. On appeal from dismissal of the case, the client argued that he didn’t suffer any damages until he later was sued under the settlement agreement. *Id.* The court of appeals affirmed the lower court decision. The

court of appeals emphasized that the client “may not postpone the running of the statute of limitations until he incurs liability.” *Id.* The court also emphasized that the statute of limitations may begin to run even though the ultimate damage is unknown or unpredictable. *Id.* at *3. Finally, the court emphasized that it has rejected the use of a “discovery rule” in legal malpractice cases. *Id.*

Because legal malpractice claims may not abate upon the death of a defending lawyer, the expanded liability may extend to lawyers’ estates as well.¹ The ruling will either impose unworkable record retention obligation responsibilities on lawyers or will result in claims being tried without the now-ancient documents that were created or exchanged during the lawyer’s representation.

D. The new Court of appeals rule will create numerous uninsured—and potentially uninsurable—losses.

Perhaps the most onerous burden the court of appeals decision will place on lawyers and their clients is the inevitability of claims for which the lawyer either is not insured or cannot be insured. Just as Appellant Mirviss was sued here long after he retired and long

¹ While Minnesota courts appear not to have directly ruled on this question, MINN. STAT. § 573.01 and *Johnson v. Taylor*, 435 N.W.2d 127 (Minn. Ct. App. 1989), strongly suggest that Minnesota courts would hold that a legal malpractice action may survive the death of the lawyer. *See generally* Annot., *Abatement or Survival of Action for Attorney’s Malpractice or Negligence upon Death or Either Party*, 65 A.L.R. 1211 (1959)[Westlaw database updated June 2004] (“It has generally been held that a cause of action for malpractice or negligence on the part of an attorney survives his death and may be continued against his personal representative if already in process, or may be originally brought against the attorney’s estate if action has not been started at the time of his death.”); *McStowe v. Bornstein*, 388 N.E.2d 674, 677 (Mass. 1979) (“We conclude, consistent with earlier opinions of this court, that the existence of a contractual relationship between the plaintiff and the deceased attorney permits the plaintiff’s claim against the attorney to survive the attorney’s death.”).

after any professional liability insurance he had carried would provide coverage, lawyers will consistently be uninsured for these ancient claims. This decision will require prudent lawyers to attempt to carry “tail” insurance in perpetuity—long after they retire or leave the private practice of law.

The problem of long-tail liabilities and the chaos they created in the insurance markets and for policyholders is well known to this Court. In *In re Silicone Implant Ins. Coverage Litigation*, 667 N.W.2d 405 (Minn. 2003), this Court confronted the aftermath of the conversion of product liability insurance to “claims-made,” and:

In 1985, many manufacturers were forced to buy excess coverage in a new form—claims-made policies—which coverage is triggered by the date of the claim instead of the date the injury or damage occurred. These claims-made policies became the new form of excess coverage because product liability insurers no longer offered significant occurrence-based coverage. The claims-made policies were adopted primarily so that insurers could avoid the uncertainty often involved in occurrence-based policies under which insurers may not know the source or totality of their risks at the end of the policy period because claims can be made after expiration of the policy. Under a claims-made policy, insurers do not cover claims submitted after the end of the policy period, even if the injury underlying the claim arose during the policy period. The claims-made policies include a retroactive date that defines the earliest date the injury can have occurred in order for the policy to cover the resulting claim. The most significant difference between occurrence-based and claims-made policies is that occurrence-based policies can be triggered after the expiration of the policy period, while claims-made policies cannot. *At the expiration of a claims-made policy, coverage available under the policy disappears.*

667 N.W.2d at 409-10 (emphasis added).

For many of the same reasons, since the mid-1970’s, professional liability insurance sold in Minnesota—by any insurer—has been issued on a “claims made” basis, essentially

providing protection only for claims first made against the policyholder during the policy year. As this Court noted, coverage under these claims-made policies “disappears” at the end of the policy period for claims not made during the period. The same is true for Minnesota’s lawyers. For continuing coverage, even if the lawyer is no longer practicing, the lawyer must purchase additional coverage, commonly referred to as “tail coverage,” because it insures the long tail of liability the follows in time any acts giving rise to liability.

Unlimited tail provisions are not readily available under the existing law, and, if this decision is not reversed, will be less available and substantially more expensive going forward. Because the limitations law was settled and relatively ascertainable before the court of appeals decision, a prudent lawyer retiring from practice could buy “tail” coverage for a six-year period, corresponding with the six-year limitation period established by the Legislature. *See* MINN. STAT. § 541.05, subd. 1(5) (2004). If the court of appeals’ new rule applies, there is no safe end date for Minnesota lawyers’ tail insurance—liability might arise in the future from agreements drafted decades earlier. Underwriters sell “tail” insurance where there is some basis to determine how long the “tail” might be, and might not be able to do so for the unlimited risk created by the court of appeals decision.

Because of the great uncertainty over the potential assertion of claims, it will be impossible to underwrite professional liability insurance with any precision and it will certainly require lawyers to be insured long after they stop practicing.

* * * * *

The court of appeals decision is at odds with established Minnesota limitations decisions and will be a very problematic one for Minnesota lawyers, their estates, and their

personal representatives. Legal malpractice claims will be pursued decades after insurance is gone, as well as after evidence is lost, and memories are faded. As noted by Judge Dietzen in his dissent, the practical consequence of this decision will be to make lawyers reluctant to undertake drafting assignments in a wide variety of contexts where liability will potentially follow decades later. 694 N.W.2d 564 at 573 (Dietzen, J., dissenting). Neither clients nor lawyers are served by this uncertainty.

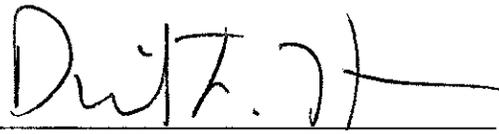
Conclusion

For the foregoing reasons, *amicus curiae* Minnesota Lawyers Mutual respectfully urges this court to overturn the court of appeals decision and reinstate the decision of the trial court.

Dated: August 8, 2005.

Respectfully submitted,

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No. A04-1367

State of Minnesota
In Supreme Court

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Respondent,

CERTIFICATE OF BRIEF LENGTH

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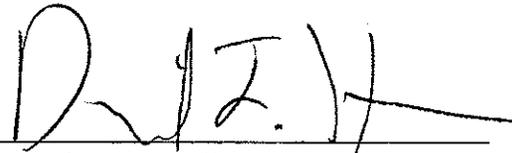
Israel Mirviss,

Appellant.

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. By automatic word count, the length of this brief is 2,553 words. This brief was prepared using Microsoft Word 2000.

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