

NO. A06-486

STATE OF MINNESOTA IN SUPREME COURT

McIntosh County Bank, et al.,

Respondents,

vs.

Dorsey & Whitney, LLP,

Appellant.

JOINT BRIEF OF AMICI CURIAE

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INTERESTS OF AMICI CURIAE¹

Minnesota State Bar Association

The MSBA is a not-for-profit corporation of attorneys admitted to practice law before this Court and the lower courts throughout the state of Minnesota. With approximately 16,000 members, the MSBA is the largest association of attorneys in Minnesota. The MSBA's interest in this case is a public one.

Minnesota Defense Lawyers Association

The MDLA is a non-profit Minnesota corporation whose members are trial lawyers in private practice. The MDLA devotes a substantial portion of its efforts to the defense of civil litigation. It includes representatives from over 180 law firms across Minnesota, with 800 individual members. The MDLA's interest in this case is a public one.

Minnesota Lawyers Mutual Insurance Company

MLM provides legal malpractice insurance for over 4,000 Minnesota lawyers from over 1,900 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, and it is endorsed by the MSBA. MLM is a mutual insurance company, wholly owned by its

¹The undersigned counsel for Amici authored the brief in whole, and no persons other than Amici made a monetary contribution to the preparation or submission of this brief. This disclosure is made pursuant to Minn. R. Civ. App. P. 129.03.

lawyer-policyholders. Its Board is composed almost entirely of practicing Minnesota lawyers.

MLM's interest in this case is both public and private. 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 significantly expand the exposure of Minnesota lawyers to legal malpractice lawsuits brought by individuals or entities traditionally considered non-clients. Both on its own behalf and on behalf of its insured lawyer-shareholders, MLM has serious concerns that the opinion below will necessarily increase legal malpractice exposure in Minnesota. (MLM does not insure the Appellant law firm involved in this litigation.)

ARGUMENT

I. Public Policy Strongly Disfavors Expanding the Scope of Who Can Maintain a Cause of Action for Legal Malpractice to Include Unintended Third-Party Beneficiaries.

This Court has long held that an attorney-client relationship is "the primary essential" to a legal malpractice claim. *Ronnigen v. Hertogs*, 294 Minn. 7, 9, 199 N.W.2d 420, 421 (1972). With very rare exception, no legal malpractice claim will lie against a lawyer absent an attorney-client relationship. *Marker v. Greenberg*, 313 N.W.2d 4, 5 (Minn. 1981).

One narrow exception is universally recognized: An attorney's duty can be extended to include non-clients in factual situations where the actual client's sole purpose in retaining an attorney is to directly benefit some intended third-party. *Id.*

However, the opinion below radically broadens the limited *intended* third-party beneficiary exception to include *unintended* third-party beneficiaries. That was serious doctrinal error and must be corrected.

In a footnote at the outset of its opinion, the court suggests that the terms "third-party beneficiary," "sole beneficiary," and "intended beneficiary" are interchangeable. *McIntosh County Bank v. Dorsey & Whitney, LLP*, 726 N.W.2d 108, 114, n.1 (Minn. Ct. App. 2007). With respect, this could not be more wrong: these terms of art carry very different meanings and their distinction is critical to public policy.

A third-party beneficiary is "a person who, though not a party to a contract, stands to benefit from the contract's performance." *Black's Law Dictionary* 65 (2d Pocket Ed. 2001). An intended beneficiary, on the other hand, is "a third-party beneficiary who is intended to benefit from a contract and thus acquires rights under the contract as well as the ability to enforce the contract once those rights have vested." *Id.* at 64. An intended beneficiary, therefore, is a defined sub-group within the broader class of third-party beneficiaries. Public policy requires that Minnesota

continue to limit the class of people or entities who may bring suit for legal malpractice based on the attorney-client relationship of another.

Expanding the class of individuals or entities who may bring claims for legal malpractice would be disastrous for at least three reasons: (1) it would put an undue burden on the profession and diminish the quality of legal services; (2) it would result in potential ethical conflicts for the attorney; (3) and it would open the door to legal malpractice complaints from unknown non-clients.

First, broadening the class of individuals or entities who may bring claims for legal malpractice would put an undue burden on the profession and diminish the quality of legal services received by the client. As noted by the court of appeals in *Eustis v. David Agency, Inc.*, 417 N.W.2d 295, 298 (Minn. Ct. App. 1987):

To make an attorney liable for negligent confidential advice not only to the client who enters into a transaction in reliance upon the advice but also to the other parties to the transaction with whom the client deals at arm's length would inject undesirable self-protective reservations into the attorney's counseling role. The attorney's preoccupation or concern with the possibility of claims based on mere negligence (as distinct from fraud or malice) by any with whom his client might deal "would prevent him from devoting his entire energies to his client's interests."

Id., quoting *Commercial Standard Title Co., Inc. v. Superior Court*, 155 Cal. Rptr. 393, 401 (1979).

Second, as repeatedly recognized by Minnesota courts, if a lawyer were to owe a duty to someone who is not a client, it could result in potential ethical conflicts for the lawyer. For example, in *L & H Airco v. Rapistan Corp.*, 446 N.W.2d 372 (Minn.

1989), this Court held that (absent extraordinary and extreme circumstances involving actual fraud) an attorney may not be held liable in damages to his party-opponent. *Id.* at 380. The Court stated: “[i]t would undermine the attorney’s duty to zealously represent the client and resolve all doubts in favor of the client.” *Id.* at 379. It would also undermine the trust between the attorney and client, which is an essential element of the relationship.” *Id.* at 379.

This is one reason that courts forbid the assignment of legal malpractice claims: to prevent the risk of tempering an attorney’s zeal with concern that her client’s adversary, as a judgment creditor, may view the attorney as a source of collection. *See Wagener v McDonald*, 509 N.W.2d 188 (Minn. Ct. App. 1993). As stated by the court in *Alcman Services Corp. v. Samuel H. Bullock, P.C.*, 925 F. Supp. 252, 255 (D.N.J. 1996), *aff’d*, 124 F.3d 185 (3d Cir. 1997):

Centuries ago alchemists endeavored to transmute lead into gold. The plaintiff before us today, equally inspired and perhaps more creative, has attempted to transform its leaden judgment against an impecunious adversary into claims of gold against the adversary’s well insured lawyer. Plaintiff’s black magic consisted of entering into a settlement with its adversary in which plaintiff agreed to stay execution of its judgment against the adversary in exchange for the adversary assigning to the plaintiff the adversary’s legal malpractice claim against its lawyer. Alas, such a transmutation is as impossible in law as it is in chemistry.

Third, expanding a lawyer’s scope of liability to third-party beneficiaries opens the door to legal malpractice complaints from non-clients whose identity may not even become known for months or even years later. For example, in the context of real

estate transactions where mortgages are routinely sold after closing, an attorney who drafts the initial mortgage documents cannot be liable to anyone who later purchases an interest in the mortgage. *See e.g. One Nat'l Bank v. Antonellis*, 80 F.3d 606, 608-609 (1st Cir. 1996).

II. This Court has Consistently Held that the *Marker* Threshold Must be Met before the *Lucas* Factors are Considered.

“The general rule in legal malpractice is that an attorney is liable for professional negligence only to a person with whom the attorney has an attorney-client relationship.” *Marker v. Greenberg*, 313 N.W.2d at 5. This Court has recognized only limited circumstances where a third-party who lacks privity, has standing to sue an attorney for legal malpractice.

The relaxation of the strict privity requirement is very limited . . . [T]his stringent restriction is a necessity to prevent a myriad of causes of action. . . . “The cases extending the attorney's duty to non-clients are limited to a narrow range of factual situations in which the client's sole purpose in retaining an attorney is to benefit directly some third party.” *Id.*

Only then may a court consider the *Lucas* factors to “determin[e] the extent of an attorney's duty to a non-client.” *Id.*

The Court followed the same rule eleven years after *Marker*:

[A]n intended third-party beneficiary may bring an action for legal malpractice in those situations when the client's sole purpose is to benefit the third party directly, and the attorney's negligent act caused the beneficiary to suffer a loss. *Marker v. Greenberg*, 313 N.W.2d 4, 5 (Minn.1981). **In these limited situations, the determination is a matter of balancing the [*Lucas* factors].**

Admiral Merchants Motor Freight, Inc. v. O'Connor & Hannan, 494 N.W.2d 261, 265 (Minn. 1992) (emphasis added).

Finally, the Court repeated the same principle in *Pine Island Farmers Coop. v. Erstad & Riemer, P.A.*, 649 N.W.2d 444, 448, n.4 (Minn. 2002): “We have recognized an exception to [the rule requiring an attorney-client relationship], extending an attorney’s duty to a nonclient in a ‘narrow range of factual situations in which the client’s sole purpose in retaining an attorney is to benefit directly some third party.’” *Id.* at 448, n.4, citing *Marker*, 313 N.W.2d at 5; *Admiral Merchants*, 494 N.W.2d at 266.

The very different test that the Court of Appeals sets out simply does not follow the rule that this Court has laid down. First, the court “disagree[d] that Minnesota courts have required the benefit to a third party to be truly the sole purpose of legal representation in order for the third party to have standing in bringing a legal malpractice claim.” *McIntosh*, 726 N.W.2d at 115. But this is directly contrary to the standards set out in both *Marker* and *Admiral Merchants*. In both decisions, the Court made it very clear that third-parties can bring a claim of malpractice only in limited circumstances, where the client’s sole purpose is to benefit the third-party directly.²

²In the parallel federal action, Judge Frank also recognized that the multifactor *Lucas* analysis is not properly reached if the plaintiff is not an intended third party beneficiary of the attorney-client relationship. *In re SRC Holding Corp.*, 2007 WL 1080002, 2007 WL 108002, *40 n. 46 (D. Minn. 2007) (expressly recognizing that its holding is “a departure from the recent Minnesota Court of Appeals ruling”).

Second, the court below relied on language in *Goldberger v. Kaplan, Strangis & Kaplan, P.A.*, 534 N.W.2d 734 (Minn. App. 1995), which applied the *Lucas* factors to determine “whether the attorney owed a duty to the nonclient.” *McIntosh*, 726 N.W.2d at 116. With respect, the court of appeals in *Goldberger* misinterpreted *Marker* and *Admiral Merchants*. After correctly pointing out that “the nonclient must be a direct, intended beneficiary of the attorney’s services,” the court erred by saying “[i]t seems, then, that the supreme court intended the *Lucas* factors as an aid in determining **whether** the nonclient is a third-party beneficiary³ and that is how we have analyzed this case.” *Goldberger*, 534 N.W.2d at 73 (emphasis added).

This flatly ignores the plain requirement that whether the non-client is a direct and intended beneficiary must be answered in the affirmative **before** applying the *Lucas* balancing factors. “In determining the extent of an attorney’s duty to a non-client, courts frequently consider the [*Lucas* factors].” *Marker*, 313 N.W.2d at 5. “In these limited situations [where a party is a third-party beneficiary], the determination is a matter of balancing the [*Lucas* factors].” *Admiral Merchs.*, 494 N.W.2d at 266.

III. There Must be Clarity in the Law as to Who is the Client.

From a policy perspective, it is important that there be clarity in the law concerning the creation of an attorney-client relationship. In addressing who is the

³Here, the court uses the term third-party beneficiary as a “direct, intended beneficiary of attorney’s services” See *Goldberger*, 534 N.W.2d at 738.

client in the tripartite relationship between insurer, insured, and defense counsel, this Court acknowledged the need for a “bright-line rule.” *Pine Island Farmers Coop.*, 649 N.W.2d at 451.

For practical purposes, it is imperative that an attorney be able to ascertain who her clients are and who her clients are not. A lawyer sitting at her desk must be able to apply a test that will accurately resolve whether a particular individual or entity is a client. Such certainty is critical because an attorney must serve her client’s interests with fidelity, confidentiality, and loyalty. For example, she must know what communications are protected by the attorney-client privilege. Where facts are undisputed, this client identification issue should be so clear that a court could decide the question as a matter of law at summary judgment.

In determining who is the attorney’s client, the underlying principal is mutuality. The attorney must render legal advice and there must be acceptance of that legal advice by the putative client. Such a relationship requires reasonable or justifiable reliance on the attorney’s advice. If the putative client seeks legal advice but does not rely on it or if any purported reliance is not justifiable or reasonable, there can be no legal malpractice claim. After all, the essence of any professional negligence claim is reliance on the actions of the professional to one’s detriment.⁴

⁴Reliance on the advice or conduct of a lawyer alone, of course, is not legally sufficient to create an attorney-client relationship. *TJD Dissolution Corp. v. Savoie Supply Co., Inc.*, 460 N.W.2d 59 (Minn. Ct. App. 1990) (shareholder knew that lawyer represented corporation).

Of paramount concern is the relaxation of the requirement of privity in the context of the attorney-client relationship. Where courts have relaxed the privity requirement in other areas of the law -- such as in products liability -- public policy supports such relaxation. In those cases, public policy favors protecting the public at large from the potential harm a product may cause by requiring the product manufacturer to provide compensation because it is in the best position to insure against that risk and to finance that risk by incorporating it into the price of the product being sold. *McCormack v. Hanksraft Co.*, 278 Minn. 322, 154 N.W. 2d 488, 500-501 (1976). The search for compensation by those sustaining losses in transactions where lawyers have participated seems to be assuming the same policy motivations.

But, as this Court has recognized, there are distinct and important differences between an attorney-client relationship and the relationship between the product manufacturer and the user of a product. The lawyer's fiduciary obligations of loyalty and confidentiality are particular to the client. Expanding the limitations of who is the client encroaches on the essential obligations of undivided loyalty, independent judgment, and confidentiality owed to the client. Other policy considerations include the economic exposure to the legal profession and the ultimate cost that would be borne by the public. *See e.g. Briggs v. Sterner*, 529 F. Supp. 1155, 1177 (D.C. Iowa

1981) (refusing to extend lawyer's liability to class of investors whose composition was uncertain and potentially limitless).

As a matter of policy, the lawyer must know that his or her duty is owed exclusively to the client; there can be no confusion concerning who has a right to complain about the lawyer's services. This Court should not relax the privity requirement.

As illustrated by the decision below, confusion has been generated by the use of three theories -- contract, implied contract and tort -- to determine who is the attorney's client. Under a fourth theory - the third-party beneficiary theory - the beneficiary is not the attorney's client, but as a non-client he or she may maintain a cause of action for professional malpractice as an intended third-party beneficiary of the lawyer's services.

Fundamentally, the tort theory that creates an attorney-client relationship cannot be separated from an implied contract theory that creates an attorney-client relationship. Yet that is exactly what the opinion below has attempted to do. *McIntosh*, 726 N.W.2d at 117-119. Any distinction between an implied contract and negligence theory is insignificant and their separation has introduced confusion into the law. The court below expressly rejects a "tort theory" attorney-client relationship because there was no direct contact between the Banks and Dorsey. The Banks did not seek legal advice directly from Dorsey, and thus any reliance by the Banks on

Dorsey's advice would have been "unreasonable." *Id.* at 118-119. The court then rejected negligent representation theories against Dorsey because the Banks did not have a basis for "justifiable reliance" on Dorsey's advice. *Id.* at 120.

Since the Court of Appeals has ruled that the putative clients, the Banks, had no reasonable or justifiable basis to rely on the advice of the attorney at issue -- a ruling that is not challenged on appeal -- it defies explanation how this legal malpractice action can proceed at all, let alone on the theory of an implied contract. An implied contract analysis is simply too similar to a tort theory to lead to a different result. *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 693 (Minn. 1980) (noting the similarity between a tort and contract analysis).

Finally, in concluding there was a fact issue as whether the Banks had an implied contract for legal services with Dorsey, the Court of Appeals ignored the essential adverse relationship between the Banks and Miller & Schroeder. Typically, courts have held that an attorney may not represent a buyer and seller in the same transaction. *See e.g. Baldassarre v. Butler*, 625 A2d 458, 467 (N.J. 1993) (recognizing the inherent conflict and holding attorney may not represent both the buyer and seller in commercial real estate transaction) As this Court explained in *Newcomb v. Meiss*, 263 Minn. 315, 116 N.W.2d 593, 598 (1972): "The idea of an attorney appearing adversely to the interests of his clients is not only repugnant to the trust relations between lawyer and client but to the fundamental concept of justice itself."

If, at the outset of Dorsey's representation, the Banks had asked Dorsey for representation, Dorsey would clearly have had to decline based on the Banks' adverse relationship to its client. Since Dorsey could have not voluntarily entered into an agreement to represent both the Banks and Miller & Schroeder, a court certainly cannot create a duty to do so by finding an implied contract for such services.

CONCLUSION

For these reasons, Amici MSBA, MDLA and MLM respectfully request that the Court of Appeals' decision reinstating this legal malpractice action be reversed.

Dated: April 25, 2007

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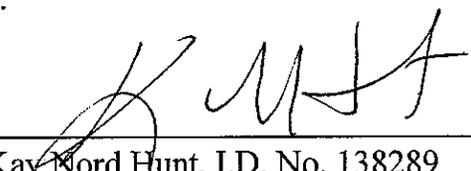
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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 3,126 words. This brief was prepared using Word Perfect 10.

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