

NO. A08-1105

State of Minnesota
In Supreme Court

In re: Paul W. Abbott Company, Inc.,

Appellant.

In re: Minnesota Asbestos Litigation

**BRIEF OF AMICUS CURIAE
MINNESOTA DEFENSE LAWYERS ASSOCIATION**

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STATEMENT OF INTEREST

The Minnesota Defense Lawyers Association (“MDLA”) is a non-profit Minnesota corporation founded in 1963 whose members are trial lawyers in private practice.¹ MDLA devotes a substantial portion of its efforts to the defense of civil litigation. MDLA is affiliated with the Minnesota State Bar Association and Defense Research Institute. Over the past 45 years, MDLA has grown to include representatives from over 180 law firms across Minnesota, with 800 individual members. The MDLA pursues the public interest in protecting the rights of litigants in civil actions, promoting the high standards of professional ethics and competence, and improving the many areas of law in which its members regularly practice. Those interests translate into concerns regarding the practical impact of developing law within the civil justice system.

To that end, and for the reasons articulated in this brief, the MDLA urges the Court to reverse the decision below, and re-affirm the holding in *Pine Island Farmers Coop. v. Erstad & Riemer, P.A.*, 649 N.W.2d 444, 449 (Minn. 2002), that “defense counsel hired by an insurer to defend a claim against its insured represents the insured.” *Pine Island’s* protection of the attorney-client relationship will be inalterably compromised if courts are allowed to find – as the courts did below – that an attorney hired to represent an insured is not the insured’s attorney.

¹ The 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 the brief. Minn. R. Civ. App. P. 129.03.

BACKGROUND

The following facts appear to be undisputed. An insurer of Paul W. Abbott Company, Inc. ("PWAC") contacted Karen Abbott in June 2007 to ask whether Abbott would be interested in completing the dissolution of PWAC (a process initiated by her late husband, John Abbott, the Company's founder). (A.25-26.) PWAC's dissolution would aid in the defense of asbestos cases against PWAC, which defense was being provided by a group of the company's insurers. Abbott, an officer of PWAC, agreed, but asked whether the insurer would bear the costs of the dissolution process; the insurer said it would. (A.28.)

The insurer retained attorney Leif E. Rasmussen to represent PWAC to complete the dissolution. (A.128-129.) Rasmussen believed that Abbott was a PWAC officer, and considered PWAC to be his client. (A.130.) Although there is some dispute as to whether Abbott recalled at the time whether she was an officer of PWAC, it was later confirmed that Abbott was, in fact, an officer of PWAC. (A.31, 35.)

In subsequent asbestos litigation against the company, plaintiffs noticed the deposition of Rasmussen to inquire about his communications with Abbott. Rasmussen sought a protective order under attorney-client privilege. (A.4-35.)

The district court denied the protective order despite finding that "[t]he insurance company immediately hired Leif Rasmussen to represent [PWAC] in order to dissolve the corporation ... which would assist the corporation in avoiding further liability in asbestos cases." (A.183.) The district court concluded that "[t]here was no attorney/client relationship established with Abbott, as an individual, and Rasmussen"

and “there was no attorney/client relationship established between Abbott, as an officer or director or even an employee of the corporation and Rasmussen.” (A.184-85.) Rather, Rasmussen was “the insurance company’s attorney.” (A.185.) The district court cited the fact that the insurer paid, hired, and primarily communicated with the insurer as support for its finding. (A. 184-85.)

PWAC filed a Petition for Writ of Prohibition and a Petition for Discretionary Review with the Minnesota Court of Appeals, but both petitions were denied. (A.208-09.) This Court granted PWAC’s petition for further review. (A.220.)

ARGUMENT

The district court found that attorney Leif Rasmussen was hired to represent Paul W. Abbott Company (“PWAC”). Under *Pine Island* and its predecessors, that finding should have been dispositive in establishing an attorney-client relationship between Rasmussen and PWAC. Yet the courts below held that there was no attorney-client relationship between Rasmussen and PWAC because they focused on extraneous considerations of who actually retained and paid the attorney. The lower courts’ decisions should be reversed because *Pine Island* and other controlling case law applied no such test and, in fact, rejected such considerations. Moreover, an affirmance would upend a bedrock common law principle and frustrate professional conduct standards to the detriment of attorneys and clients alike.

I. COUNSEL HIRED BY AN INSURANCE COMPANY TO REPRESENT AN INSURED REPRESENTS THE INSURED

There is a bright-line rule under Minnesota law: “[D]efense counsel hired by an insurer to defend a claim against its insured represents the insured.” *Pine Island Farmers Coop. v. Erstad & Riemer, P.A.*, 649 N.W.2d 444, 449 (Minn. 2002). See also *Miller v. Shugart*, 316 N.W.2d 729, 733 (Minn. 1982); *Crum v. Anchor Casualty Co.*, 264 Minn. 378, 119 N.W.2d 703 (1963); *Newcomb v. Meiss*, 263 Minn. 315, 317, 116 N.W.2d 593, 595 (1962). Furthermore, “[b]ecause defense counsel has an attorney-client relationship with the insured, defense counsel owes a duty of undivided loyalty to the insured and must faithfully represent the insured’s interests.” *Pine Island*, 649 N.W.2d at 449 (citing to *Crum* and *Newcomb*) (emphasis added). Other jurisdictions follow this same principle. *In re Rules of Prof’l Conduct and Insurer Imposed Billing Rules and Procedures*, 2 P.3d 806, 813 (Mont. 2000) (citing authorities from Michigan, New York, Pennsylvania, Arkansas, and federal cases). The rule from *Pine Island* was developed over 40 years ago by this Court.

A. *Newcomb*

Newcomb established Minnesota’s bright-line rule. *Newcomb* was a personal injury case involving two incidents: a low-speed collision and an assault while leaving the scene. The trial court directed a verdict and nominal damages in favor of the plaintiffs with regard to the defendants’ negligence for the low-speed collision, while submitting the issue of negligence and further damages to the jury regarding the assault while leaving the scene. 116 N.W.2d at 598. Counsel for the defendant, who had been

hired by the defendant's insurer, argued that there had been no negligence because the driver's acts were willful, and objected to the trial court's instructions as confusing, misleading, and prejudicial. 116 N.W.2d at 596, 598. This Court affirmed the trial court. 116 N.W.2d at 598-99.

In so doing, this Court noted that defense counsel apparently made its willfulness argument so that the insured's actions would not fall within the coverage of the insurance policy. This strategy had led the trial court to conclude "that counsel's attempted defense was not wholly consistent with the personal interests of the defendants." 116 N.W.2d at 597. Upon further analysis, this Court emphasized that "the idea of an attorney appearing adversely to the interests of his client is not only repugnant to the trust relations between lawyer and client, but to the fundamental concept of justice itself." *Id.* To avert such injustice, this Court declared that when an insurer hires an attorney for an insured, the attorney "owes to the policyholder the same 'undeviating and single allegiance' that he would owe to the insured if retained and paid by him." *Id.* (quoting and citing cases.) Whether the insurer paid and hired the attorney does not enter the equation to determine who the client is: it is the insured.

B. *Crum*

Following shortly after *Newcomb*, *Crum* reiterated the black-letter rule applicable to the formation of attorney-client relationships in the insurance context. *Crum* was an insurance coverage dispute. The plaintiffs owned an apartment building, and had an insurance policy with the defendants. 119 N.W.2d at 704. A tenant fell down the stairs and sued the apartment building owners for negligence. *Id.* During the depositions of the

apartment building owners and the tenant, the insurance company's attorney's questions were directed almost entirely at an insurance coverage issue, *i.e.*, whether the tenant was an employee of the apartment building and therefore not within the scope of the insurance coverage. *Id.* at 705. After the depositions, the tenant amended her complaint, replacing her negligence claim with a workers' compensation claim. *Id.* at 706. The insurance company withdrew from the defense of the action. *Id.* at 707.

The apartment building owners then settled the workers' compensation claim with the tenant, and sued the insurance company for the cost of defense. *Id.* The trial court granted summary judgment to the apartment building owners on the issue of liability. *Id.* The insurance company's appeal turned on whether the insurer had an obligation to defend. This Court held that the insurer had such a duty, and affirmed the trial court's summary judgment decision. *Id.* at 712.

In so doing, this Court reiterated that defense counsel hired by an insurer to defend a claim against the insured represents the insured:

[A]n attorney retained by an insurer to defend its insured, as long as he represents the insured, is under the same obligations of fidelity and good faith as if the insured had retained the attorney personally. The relationship of client and attorney exists the same in one case as in the other. The attorney may not be permitted to take a position adverse to the interest of his client.

Id. As in *Newcomb*, the fact that the insurer hired and paid the attorney had no bearing on the attorney's duty of fidelity to the insured.

C. *Pine Island*

Pine Island reaffirmed this state's black-letter rule. In *Pine Island*, an insurer brought a malpractice action against a law firm based on the law firm's purported

representation of both the insurer and its insured in litigation alleging breach of contract, negligence, and other claims against the insured. 649 N.W.2d at 445-46. In deciding whether the insurer could bring the malpractice claim, the Court first noted that “[i]t is well established under our case law that defense counsel hired by an insurer to defend against a claim against its insured represents the insured.” *Id.* at 449 (citing cases.) The Court reiterated *Crum*’s teaching that “[b]ecause defense counsel has an attorney-client relationship with the insured, defense counsel owes a duty of undivided loyalty to the insured and must faithfully represent the insured’s interests.” *Id.* at 449. The Court then concluded “[t]hus, it is clear that in an insurance defense scenario, defense counsel has an attorney-client relationship with the insured.” *Id.*

Pine Island also delved into whether there was also an attorney-client relationship between the insurance company and the law firm. The Court held that an insurer is not the client of an attorney hired to represent an insured unless there is no conflict of interest, and (i) there has been consultation with the insured and (ii) consent by the insured. *Id.* at 452. Because there had been neither consultation nor consent to dual-representation, the Court held that the insurance company was not a client of the law firm, and hence could not bring a malpractice claim. *Id.* at 452-53.

Since *Pine Island* was decided six years ago, the court of appeals has frequently relied on its bright-line expression of the rule that “defense counsel hired by an insurer to defend a claim against its insured represents the insured.” *See Hawkins, Inc. v. American Intern. Specialty Lines Ins. Co.*, 2008 WL 4552683, at *8 (Minn. Ct. App. Oct. 14, 2008) (ADD.1); *Headwaters Rural Utility Ass’n, Inc. v. City of Corcoran*, 2006 WL 3719473,

at *2 (Minn. Ct. App. Dec. 19, 2006) (ADD.12); *Willert v. Stockwell Const.*, 2006 WL 279080, at * 8 (Minn. Ct. App. Feb. 7, 2006) (ADD.22); *see also Trenchers Plus, Inc. v. Suter*, 2003 WL 21743734, at * 4 (Minn. Ct. App. July 29, 2003) (ADD.17) (citing *Pine Island* in rejecting claim that an attorney’s “real client” was an insurance company rather than an insured). The present case threatens this unambiguous rule.

II. UNDER PINE ISLAND AND ITS PREDECESSORS, RASMUSSEN AND PWAC CLEARLY HAD AN ATTORNEY-CLIENT RELATIONSHIP

After the district court determined that “[t]he insurance company immediately hired Leif Rasmussen to represent [PWAC],” it should have applied the bright-line rule articulated in *Newcomb*, *Crum*, and *Pine Island* to conclude that an attorney-client relationship existed between Rasmussen and PWAC. Nothing else was material to the Court’s analysis.²

Pine Island says that when an insurance company retains a lawyer to represent an insured, the insured is a client. The insurer may also be a client if two considerations – *i.e.*, consultation and consent – are satisfied. Without citing *Pine Island*, the district court turned its binding precedent on its head. First, the court decided that the insurance company was the attorney’s client without performing the consultation and consent analysis required by *Pine Island*. Additionally, the district court determined that the

² Once the threshold ruling regarding the presence of an attorney-client relationship was made, the district court could have analyzed any properly-raised exception to the attorney-client privilege that protects communications between Rasmussen, as attorney, and Ms. Abbott as an officer of PWAC, as his client. Based on its review of the record on appeal, the MDLA believes these exceptions have not been raised for appellate review.

insured was not a client based on several *ad hoc* considerations, including whether the insured paid Rasmussen, how frequently the insured communicated with Rasmussen, and whether the insured gave Rasmussen instruction.

Under *Pine Island* and its predecessors, these factors have no bearing on a determination as to whether an insured is a client of an attorney hired by an insurer. The only question is whether the insurance company retained the attorney to represent the insured. If the answer is “yes,” the inquiry is over.

Also, whether Abbott knew that she was an officer of PWAC at the time she communicated with Rasmussen does not establish the attorney-client relationship. Rasmussen was hired to represent PWAC, and Abbott was, in fact, an officer of PWAC – her purported uncertainty about that fact is irrelevant. Indeed, the relevant inquiry is not whether Abbott was an officer but whether she was an agent acting within the scope of authority. MDLA agrees with Appellant’s argument that Abbott was an agent of PWAC and “a corporation must act through agents. A corporation cannot speak directly to its lawyers.” (App. Br. at 12-13 (quoting case law).) Moreover, Rasmussen proceeded to represent PWAC based on the reasonable belief that Abbott was an authorized agent or corporate officer. (A.130.)

Finally, it is inconsequential that Rasmussen was assisting in the dissolution of PWAC in order to defend against liability in anticipated asbestos claims, rather than defending PWAC in actual litigation. There is no meaningful distinction between an attorney retained to take action that will assist an insured in expected litigation, such as

Rasmussen in this case, and an attorney who is retained to defend against litigation claims, such as the attorneys in *Newcomb*, *Crum*, and *Pine Island*.

III. THE DISTRICT COURT'S DECISION CONFLICTS WITH THE RULES OF PROFESSIONAL CONDUCT

The district court's decision conflicts not only with *Pine Island* and its predecessors, but also with the letter and spirit of the Minnesota Rules of Professional Conduct. Under Rule 5.4(c) "[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." (emphasis added.) Moreover, under Rule 1.7, Comment 13 (2005), "[a] lawyer may be paid from a source other than the client," without creating a conflict of interest or raising uncertainty about whether the attorney-client relationship has been maintained. Thus, the Minnesota Rules of Professional Conduct and *Pine Island* speak with one voice: the insurer can pay the attorney for the representation, but the attorney owes the insured, as the client, his or her unfettered loyalty.

Indeed, the Montana Supreme Court has recently held that it was a violation of that state's professional conduct rules for attorneys to permit an insurer to exercise even a semblance of control over the representation of the insured. *Rules of Prof'l Conduct*, 2 P.3d at 813. In *Rules of Professional Conduct*, several lawyers brought a declaratory-judgment action to have the court determine whether the lawyers could be subjected to insurers' billing and practice rules without violating the Montana Rules of Professional Conduct. *Id.* at 808. Like this Court in *Pine Island*, the Montana Supreme Court held

that when an insurer hires an attorney for the insured, the insured is the sole client of the attorney—no dual representations created, lest it conflict with the lawyer’s professional obligations. *Id.* at 814. Nevertheless, the insurers in *Rules of Professional Conduct* argued that, even if the insurer is not a co-client, the insurer could retain control over the litigation by requiring pre-approval of defense counsel’s litigation activities. *Id.* The Montana high court rejected the insurers’ premise as “deeply flawed,” because it disregarded the professional conduct rules. *Id.* An insurer’s pre-approval requirement could interfere with defense counsel’s exercise of independent judgment on behalf of the insured. *Id.*

Here, the district court used the payment of attorneys’ fees to determine that the insurer was the client of a lawyer hired to represent an insured. (A.184.) Thus, under the district court’s ruling, the insurer had the right to control the representation. Yet, under the Minnesota Rules of Professional Conduct and the Montana *Rules of Professional Conduct* case, permitting an insurer to control the litigation where the attorney has been retained to represent the insured presents a conflict with the attorney’s professional obligations.

IV. ERODING THE CERTAINTY OF *PINE ISLAND* WOULD PROLIFERATE QUESTIONS ABOUT THE FORMATION OF ATTORNEY-CLIENT RELATIONSHIPS AND THE ADMINISTRATION OF JUSTICE WOULD SUFFER

As discussed above, the finding that “[t]he insurance company immediately hired Leif Rasmussen to represent Paul W. Abbott Company” should have ended the district court’s analysis. (A.183.) But the district court went further, considering whether the

insured contacted Rasmussen and whether the insured paid Rasmussen's bills, even though these are factors of no consequence to the attorney-client analysis in the insurance setting under Minnesota law. *See* Restatement (Third) of the Law Governing Lawyers, § 14 (2000) (identifying the principals by which an attorney-client relationship is formed).

If left to stand, the lower court decisions would erode the certainty of *Pine Island* and its predecessors and leave doubt whenever counsel is hired by an insurance company to represent an insured. This would paralyze lawyers, who will be left wondering who is their client, whether conversations will be protected, and who has authority to make decisions about case strategy and resolution. *See* Rule 1.7, cmt. 13 (a third party may pay for another to be represented); *compare with* Rule 5.4(c) (third parties may not direct or control an attorney's professional judgment). Payment cannot be the touchstone of the attorney-client relationship without confusing attorneys and inhibiting fair and honest representation of insureds.

Affirming the district court's decision would also spur new discovery issues in many cases because it would render hiring, payment, and frequency-of-communications the *de facto* test for whether an insured has an attorney-client relationship with counsel. Litigants seeking discovery of communications between an insured and counsel hired by an insurer would demand to know who hired counsel, who paid counsel, and how frequently the insured communicated with counsel in order to lay the groundwork for a motion to compel. And those three factors will inevitably point toward the insurer as the client, rather than the insured, despite the Court's ruling in *Pine Island*.

Indeed, an affirmance would create numerous ethical quandaries. A lawyer would be hopelessly unable to comply with the “Client-Lawyer Relationship” rules of the Minnesota Rules of Professional Conduct without first being certain about the identity of lawyer’s client. *See* Minn. R. Prof’l. Cond. 1.1-1.18. The specific duties that an attorney cannot fulfill without knowing the identity of his client include: the (i) the duty of competent representation (Rule 1.1); (ii) the duty to “abide by a client’s decisions concerning the objectives of the representation” (Rule 1.2); (iii) the duty to consult with the client and keep the client informed (Rules 1.2 and 1.4); (iv) the duty to communicate the scope of the representation (Rule 1.5(b)); (v) the duty not to reveal “information relating to the representation of a client” (Rule 1.6(a); *see also* Minn. Stat. § 595.02, subd. 1(b) (“[a]n attorney cannot, without the consent of the attorney’s client, be examined as to any communication made by the client to the attorney or the attorney’s advice given thereon in the course of professional duty”)); and (vi) various duties not to represent another client due to a conflict of interest (Rules 1.7, 1.8, and 1.9).

In short, a decision affirming the district would diminish the efficacy of the relationship between an insured and counsel hired by an insurer, while chilling the open and honest attorney-client discussions that are critical to the administration of justice. If the district court’s decision stands, insured defendants may often be left without representation (because they have no resources to pay fees outside the insurance contract) or may be forced to hire their own counsel to supplement the insurer’s. This will frustrate the administration of justice in Minnesota.

CONCLUSION

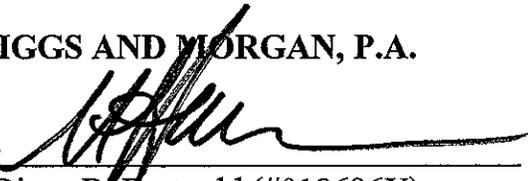
The MDLA urges the Court to reverse the lower courts and re-affirm that “defense counsel hired by an insurer to defend a claim against its insured represents the insured.”

Pine Island, 649 N.W.2d at 449.

Respectfully submitted,

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