

NO. A08-1105

State of Minnesota
 In Supreme Court

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

Appellant.

In re: Minnesota Asbestos Litigation

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF FACTS..... 1

ARGUMENT 3

 I. AN ATTORNEY RETAINED BY AN INSURER
 TO REPRESENT AN INSURED CORPORATION
 REPRESENTS THE CORPORATION..... 3

 II. COMMUNICATIONS BETWEEN AN ATTORNEY
 REPRESENTING A CORPORATION AND A
 CORPORATE OFFICER ARE PROTECTED FROM
 DISCLOSURE BY THE ATTORNEY-CLIENT PRIVILEGE..... 7

 III. COMMUNICATIONS BETWEEN AN ATTORNEY
 FOR A CORPORATION AND AN OFFICER OF THE
 CORPORATION ARE CONFIDENTIAL..... 10

CONCLUSION 11

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Colton v. United States</i> , 306 F.2d 633 (2 nd Cir. 1962).....	6
<i>In re: Arnold & McDowell</i> , 566 F.Supp. 752 (D. Minn. 1983)	6
<i>In re: Malone</i> , 655 F.2d 882 (8 th Cir. 1981).....	6
<i>Mission National Insurance Company v. Lilly</i> , 112 F.R.D. 160 (D. Minn. 1986).....	6
<i>Roberts & Schaefer Co. v. San-Con, Inc.</i> , 898 F.Supp. 356 (S.D.W.Va. 1995)	4

MINNESOTA CASES

<i>Crum v. Anchor Cas. Co.</i> , 264 Minn. 378, 119 N.W.2d 703 (1963).....	5
<i>Domtar, Inc. v. Niagra Fire Ins. Co.</i> , 563 N.W.2d 724 (Minn. 1997).....	4
<i>Kobluk v. University of Minnesota</i> , 574 N.W.2d 436 (Minn. 1998).....	6
<i>Local 1142 v. United Electrical, Radio & Machine Workers</i> , 247 Minn. 71, 76 N.W.2d 481 (1956).....	10
<i>National Texture Corp. v. Hymes</i> , 282 N.W.2d 890 (Minn. 1979).....	5
<i>Pine Island Farmers Coop. v. Erstad & Riemer</i> , 649 N.W.2d 444 (Minn. 2002).....	3, 4

MINNESOTA STATUTES

Minnesota Statutes Section 302A.305, subd. 2(e)	8
Minnesota Statutes Section 302A.321	9

Minnesota Statutes Section 302A.341 subd. 3..... 9
Minnesota Statutes Section 302A.821, subd. 4(c) 9

MINNESOTA RULES

Minnesota Rule of Professional Conduct 1.6..... 10
Minnesota Rule of Professional Conduct 1.13..... 10

STATEMENT OF FACTS

Respondents' Statement of Facts contains an extensive discussion of facts that are extraneous to those necessary for review of the issue presented in this appeal. In addition, certain facts are presented in an argumentative and potentially misleading fashion. Consequently, Appellant Paul W. Abbott Company, Inc. (hereinafter "PWA") replies to Respondents' Statement of Facts as follows.

Respondents' argumentative conclusion that John Abbott ultimately chose to abandon the corporate dissolution efforts for PWA has absolutely no evidentiary support. Further, contrary to Respondents' assertion that Appellant speculates that Mr. Abbott fully intended to complete the dissolution, in fact, Appellant simply cited to Karen Abbott's testimony on this point, which was as follows:

...I thought if John had tried to dissolve the company earlier, which I thought was dissolved, he must have knew that; and if that's what he decided to do, I'd just go along with it.

A.68.

Respondents state that by 1993, all of PWA's liabilities were solely the responsibility of its insurers. In fact, all liabilities of a corporation are not necessarily covered by insurance, and PWA's insurers at no time assumed liability for all of the company's liabilities.

Contrary to Respondents' statement that Karen Abbott testified that she never held the office of vice president/secretary of PWA, Karen Abbott actually testified that she never "understood" herself to hold those offices. A.76 In addition, Respondents state that Karen Abbott's belief that she may have been a corporate officer at one time stems

from her review of the documents identifying her as vice president/secretary. In fact, Karen Abbott testified that in June of 2007, she probably told Christine Edney that she thought she was either secretary or treasurer of the company. However, at her deposition on November 5, 2007, she testified that she only recently found the documents identifying her as vice president/secretary.¹

The argumentative and potentially misleading nature of Respondents' Statement of Facts is again reflected in Respondents' statement that: "After her initial conversation with Ms. Edney, Mrs. Abbott recalled her husband's concern about asbestos workers and **chose** not to call Ms. Edney back." (Emphasis added.) Nothing in Karen Abbott's testimony indicates that she "chose" not to call Ms. Edney back, let alone that this "choice" was due to a recollection of her husband's concern about asbestos workers.

A.68.

Contrary to Respondents' assertion that Karen Abbott testified that Mr. Rasmussen told her that he represented TIG, Karen Abbott's testimony reads as follows:

Q: Did he tell you that he represented TIG and Riverstone?

A: **I guess maybe he might have** 'cause that's who I would be expecting to hear from next.

A.72.

¹ Contrary to Respondents' assertion that these documents, consisting of the Board of Director's Meeting Minutes, were unsigned, the documents were actually signed by John R. Abbott, who, as the only director of the company at the time, would have been the only one to attend the meeting of the Board of Directors, and thus, was the only one who could have signed the Minutes to verify their accuracy.

Finally, contrary to Respondents' statements that PWA "provided no notice to shareholders of any proposed dissolution, did not hold a shareholder meeting, nor did it conduct a shareholder vote to dissolve that was approved by a majority of the shareholders," PWA's Notice of Intent to Dissolve states that all shareholders attended a special meeting and voted on and approved a resolution calling for the dissolution of PWA A.22.

ARGUMENT

I. An attorney retained by an insurer to represent an insured corporation represents the corporation.

Respondents' argument that the existence of an attorney-client relationship must be established under a tort or contract theory does not apply to the context of an attorney retained by an insurer to represent its insured. This identical argument was presented to this Court in the *Pine Island* case, and was rejected with the conclusion that counsel hired by an insurer to defend a claim against its insured represents the insured. *Pine Island Farmers Coop. v. Erstad & Riemer*, 649 N.W.2d 444, 448-449 (Minn. 2002).

Respondents next argue that the well-established principle that counsel hired by an insurer to defend an insured represents the insured only applies when the counsel is retained by the insurer to defend a particular claim against its insured. PWA submits that Respondents' argument inappropriately attempts to narrow the application of this principle to the point of creating a distinction without a difference. As has been noted, PWA has been named as a defendant in Minnesota asbestos litigation for approximately twenty (20) years, and asbestos claims continue to be asserted on an ongoing basis. As a

practical matter, defense counsel in asbestos cases are not retained on a case-by-case basis, but are retained by insurers to defend an insured against asbestos claims on an ongoing basis. Consequently, the retention of defense counsel in asbestos litigation is not limited to pending claims, but applies to future claims as well. Counsel retained by an insurer to investigate and evaluate a potential future claim against an insured, but not necessarily to defend the insured, has been held to represent the insured. *See Roberts & Schaefer Co. v. San-Con, Inc.*, 898 F.Supp. 356, 357-58 (S.D.W.Va. 1995). Moreover, this Court has concluded that costs incurred to minimize the scope or magnitude of an insured's liability constitute costs of defense under the insured's insurance policy. *Domtar, Inc. v. Niagra Fire Ins. Co.*, 563 N.W.2d 724, 738 (Minn. 1997). PWA submits that the work performed by Leif Rasmussen on its behalf was for the purpose of limiting its liability in asbestos litigation, and thus, constituted sufficient work in support of its defense in asbestos litigation to qualify Mr. Rasmussen as an attorney engaged in work for its defense against such claims. This is confirmed by PWA's assertion of the corporate dissolution defense in cases commenced subsequent to the filing of PWA's articles of dissolution,² and the potential applicability of that defense to cases pending at the time Mr. Rasmussen performed his work for PWA.

To eliminate addressing such purported distinctions in the future, PWA respectfully submits that the law in Minnesota regarding the relationship between an insurer, its insured, and counsel retained by the insurer, as expressed in the *Pine Island*

² PWA has a pending motion to dismiss for insufficiency of service of process based on its corporate dissolution in the case of *Muehlstedt v. A.H. Bennett Co., et al.*, Ramsey County Court File No. 62-CV-08-7404.

case and its precedent and progeny cases should be clarified to state that whenever an insurer retains counsel to perform work on behalf of its insured, that counsel represents the insured. There is no reasonable basis for distinguishing an attorney's role in performing work for an insured in defense of a pending claim from work for the insured for the defense of future claims. The justification for establishing an attorney-client relationship between the counsel retained by the insurer and the insured is no different in either situation. In both situations, the attorney should be under the same obligations of fidelity and good faith as if the insured had retained the attorney personally, *see Crum v. Anchor Cas. Co.*, 264 Minn. 378, 392, 119 N.W.2d 703, 712 (1963), and the attorney-client privilege should apply to protect communications between them from disclosure, to ensure the openness and candor of those communications. *See National Texture Corp. v. Hymes*, 282 N.W.2d 890, 896 (Minn. 1979).

Furthermore, whether the insurer's retention of counsel to perform work on behalf of an insured was within the meaning of the insured's duty to defend as set forth in the insurance policy should also not impact on the relationship between the insured and counsel. Once the insurer retains counsel to represent the insured, it has committed counsel to represent the insured, regardless of the insurer's obligations under the policy.

Consequently, stating the rule generally will avoid the potential for different interpretations of the rule, depending on whether there is a pending claim, whether or not the counsel's work falls within the insurer's duty to defend under the policy, the type of work performed by counsel, etc.

In any event, PWA submits that under either the established case law or the proposed clarification of that case law, Leif Rasmussen was representing PWA, and had an attorney-client relationship with that corporation.

Respondents contend that the nature of the work performed by Mr. Rasmussen was not sufficient to create an attorney-client relationship with PWA. However, none of the cases cited by Respondents support the application of such an argument to the facts and circumstances giving rise to this appeal. In *Mission National Insurance Company v. Lilly*, 112 F.R.D. 160 (D. Minn. 1986), the insurer hired attorneys to investigate a first-party fire loss claim by its insured. In such a situation, the attorneys clearly could not represent the insured. The *In re: Malone*, 655 F.2d 882 (8th Cir. 1981), *In re: Arnold & McDowell*, 566 F.Supp. 752 (D. Minn. 1983), and *Kobluk v. University of Minnesota*, 574 N.W.2d 436 (Minn. 1998) cases only addressed the applicability of the attorney-client privilege to documents, upholding the applicability of the privilege to documents relating to communications between the attorney and the client, and denying the applicability of the privilege to ordinary business and real estate documents. *Colton v. United States*, 306 F.2d 633 (2nd Cir. 1962) did not address the applicability of the attorney-client privilege to communications between the attorney and the client.

Respondents contend that PWA's corporate dissolution solely benefited its insurers. The only benefit to PWA's insurers, however, is the consequential benefit from the primary benefit of the corporate dissolution defense obtained by PWA. The insurers' obligations only arise from PWA's liabilities covered under the insurance policies, and the insurers continue to defend PWA with the assertion of defenses including the

corporate dissolution defense. The bar of claims against PWA by virtue of its corporate dissolution eliminates PWA's potential liability for claims that may be covered under its insurance policies. Consequently, the benefit to PWA's insurers from PWA's corporate dissolution is derivative of the direct benefit of the bar of claims obtained by PWA in completing its corporate dissolution. Further, the corporate dissolution bars all claims against the corporation, not only claims covered by insurance, which would include claims that could potentially be asserted against officers and shareholders of the corporation and their heirs. In addition, the insurance coverage available is finite and limited, and the financial viability of one or more of the insurers could change, creating a gap in the insurance coverage, any or all of which could expose the company, its officers and its shareholders, and their heirs to liability for claims beyond the available insurance coverage. The continued assertion of claims against PWA requires the company, through Karen Abbott, to handle summons and complaints, respond to discovery, and attend trial, if necessary. Clearly, PWA and its officers and shareholders benefit by the bar of claims against dissolved corporations, and Mr. Rasmussen's work on completing the corporate dissolution of PWA, was done on behalf of that company as its attorney.

II. Communications between an attorney representing a corporation and a corporate officer are protected from disclosure by the attorney-client privilege.

Contrary to Respondents' assertions, the trial court did not find that Karen Abbott was not an officer of PWA, but only found that she did not know that she was an officer of the company. More specifically, the trial court stated:

Mrs. Abbott did not know that she was an officer of Paul W. Abbott Company, Inc. **until after the dissolution of the company.**

A.185 (emphasis added). Consequently, the trial court concluded that Karen Abbott was an officer of PWA, but that she did not discover that she had been an officer of the company until after the dissolution, presumably when she found the documents stating that she was the vice president/secretary of the corporation.

Those documents were Minutes of the Annual Shareholders and Board of Directors Meetings of PWA for the years 1988, 1989, 1990, and 1991, identifying John R. Abbott as the sole shareholder and director of the corporation. All of the documents were signed by John R. Abbott, who, as the only shareholder and director of PWA, would have been the only one who attended the meetings. Respondents' contention that the documents required Karen Abbott's signature is misplaced. Karen Abbott was neither a shareholder nor a director of PWA at that time, and, therefore, could not have attended the meetings memorialized by the minutes in question. Consequently, it would have been improper for her to sign the minutes of meetings she did not attend. John Abbott was the only attendee at the meetings, and, therefore, his signature was the only signature required to verify the accuracy of the minutes. Contrary to Respondents' contention, it was not necessary to return the documents to the corporation's attorney to make them official corporation documents. In fact, pursuant to Minnesota Statutes Section 302A.305, subd. 2(e), John R. Abbott, as chief executive officer of the corporation, was required to "maintain records of and, whenever necessary, certify all proceedings of the board and the shareholders..."

Respondents deny that Karen Abbott was the acting chief executive officer of the corporation pursuant to statute when she signed the corporate dissolution documentation in June of 2007, contending that the corporation had no need for a chief executive officer following its involuntary administrative dissolution in 1997. However, in contrast to a voluntary dissolution, a corporation can be reinstated following an involuntary administrative dissolution, pursuant to Minnesota Statutes Section 302A.821, subd. 4(c). Such a reinstatement requires the identification of a chief executive officer of the corporation. The Articles of Incorporation of Paul W. Abbott Company, Inc., A.19-21, do not contain any provisions for the filling of officer vacancies, and no bylaws for the corporation have been located. Therefore, PWA submits that by operation of Minnesota Statutes Sections 302A.341 subd. 3, and 302A.321, Karen Abbott was deemed to be elected to the position of chief executive officer of the corporation by exercising the functions of that position by signing the documentation that completed the corporation's dissolution process.

In response to Respondents' assertion that the attorney-client privilege was waived during Karen Abbott's deposition, PWA submits that Karen Abbott was, at the very least, the only corporate officer of PWA when she met with Leif Rasmussen, the attorney hired to represent the corporation for the purpose of completing its dissolution process. However, the documentation establishing that she was an officer of the corporation was not disclosed until after her deposition. Therefore, the attorney-client privilege covering communications between Karen Abbott and Leif Rasmussen could not have been asserted at Karen Abbott's deposition, and thus, could not have been waived. "To

establish waiver, it must be shown that the party charged therewith knew of his legal right and intended to relinquish it." *Local 1142 v. United Electrical, Radio & Machine Workers*, 247 Minn. 71, 77, 76 N.W.2d 481, 484 (1956).

In any event, Karen Abbott's deposition testimony demonstrates that she did not recall the actual content or substance of any communication between her and Leif Rasmussen, and, therefore, no communications that would be subject to the attorney-client privilege were disclosed in Karen Abbott's deposition testimony. Consequently, the failure to raise the attorney-client privilege at her deposition was inconsequential, and does not waive the assertion of the privilege at Mr. Rasmussen's deposition.

III. Communications between an attorney for a corporation and an officer of the corporation are confidential.

As previously argued, an attorney-client relationship is not even necessary to require an attorney for a corporation to maintain the confidentiality of communications with a constituent of a corporation pursuant to the confidentiality rules of the Minnesota Rules of Professional Conduct, Rules 1.13 and 1.6. Notably absent from Respondents' Brief is any argument in opposition to PWA's position that these confidentiality rules apply to protect the communications between Leif Rasmussen and Karen Abbott from disclosure. PWA submits that Respondents' silence on this issue reflects the merits of the position that Mr. Rasmussen cannot be compelled to disclose the substance of his communications with Karen Abbott pursuant to Minnesota Rules of Professional Conduct 1.6 and 1.13.

CONCLUSION

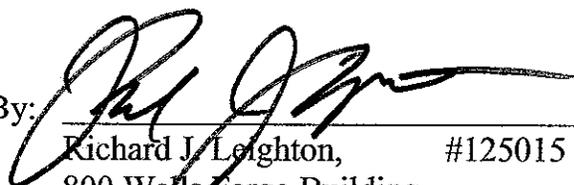
For the foregoing reasons, as well as for the reasons set forth in its initial brief, PWA respectfully requests this Court to vacate the Court of Appeals' Order denying its Petition for Writ of Prohibition, to reverse the district court's Order denying its Motion for a Protective Order, and to direct the district court to grant its Motion for a Protective Order to preclude Mr. Rasmussen from testifying regarding communications with Karen Abbott.

Respectfully submitted,

Dated: December 2, 2008

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