

NO. A08-1105

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State of Minnesota  
**In Supreme Court**

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

*Appellant.*

In re: Minnesota Asbestos Litigation

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**RESPONDENTS' BRIEF**

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## STATEMENT OF LEGAL ISSUES

- I. **DOES AN ATTORNEY-CLIENT RELATIONSHIP EXIST OUTSIDE OF THE REQUIREMENTS OF A TORT OR CONTRACT THEORY AND OUTSIDE THE SCOPE OF AN INSURANCE CONTRACT FOR LIABILITY DEFENSE?**

*The trial court held that it did not. The court of appeals denied a petition for a writ of prohibition, finding that the trial court correctly applied the law and resolved factual matters within its broad discretion.*

Most Apposite Cases:

*Admiral Merchs. Motor Freight, Inc. v. O'Connor & Hannan*, 494 N.W.2d 261 (Minn. 1992)  
*Ronnigen v. Hertogs*, 199 N.W.2d 420 (Minn. 1972)  
*Pine Island Farmers Coop. v. Erstad & Riemer*, 649 N.W.2d 444 (Minn. 2002)

- II. **WHERE AN ATTORNEY REPRESENTS AN INSURER, DOES THAT ATTORNEY ALSO REPRESENT AN INSURED ABSENT EXPRESS ADVICE AND CONSENT?**

*The trial court found no dual representation, and the court of appeals denied appellant's petition for a writ of prohibition.*

Most Apposite Cases:

*Pine Island Farmers Coop. v. Erstad & Riemer*, 649 N.W.2d 444 (Minn. 2002)

- III. **EVEN HAD AN ATTORNEY-CLIENT RELATIONSHIP EXISTED, IS IT WAIVED WHEN THE ALLEGED INSURED FREELY DISCLOSES HER COMMUNICATIONS WITH THE ATTORNEY?**

*The trial court did not reach the issue because it found that no attorney-client relationship existed.*

Most Apposite Cases:

*Swanson v. Domning*, 86 N.W.2d 716 (Minn. 1957)

## STATEMENT OF THE CASE

This matter arises out of discovery in the Minnesota Asbestos Litigation before the Honorable John T. Finley. This Court assigned Judge Finley to preside over all state-wide asbestos cases by order of October 5, 2006. The discovery at issue was noted under the caption *In Re: Minnesota Asbestos Litigation* pursuant to Judge Finley's case management order, which permits counsel of any party to conduct discovery that may be applicable to multiple cases.

Plaintiffs are victims of asbestos-related cancers and other diseases who have been exposed to asbestos sold, supplied, installed, or disturbed by insulation contractor Paul W. Abbott Company, Inc. (hereafter PWA) from 1954 until its administrative dissolution in 1997. Because PWA did not take advantage of statutory dissolution procedures, it remains amenable to suit notwithstanding its 1997 administrative dissolution. PWA has remained a major defendant in the Minnesota asbestos litigation despite the lack of any non-insurance assets or ongoing business.

On June 27, 2007, documents were filed purporting to return PWA to good standing, and immediately thereafter dissolve it statutorily. Because of various irregularities suggesting that the attempted dissolution was invalid, Plaintiffs sought discovery into the process.

Plaintiffs first deposed Karen Abbott, who had signed some of the documents. During the deposition, Plaintiffs' counsel learned that Mrs. Abbott had been approached

by representatives of PWA liability insurer TIG<sup>1</sup>, who wanted to dissolve the corporation. Mrs. Abbott further testified that TIG sent attorney Leif Rasmussen to her home to secure her signature on dissolution documents. In the deposition, Appellant's counsel permitted unfettered inquiry into Mrs. Abbott's communications with Mr. Rasmussen. Similarly, neither counsel for Mrs. Abbott nor Mr. Rasmussen interposed any objection. However, Appellant changed its position when Plaintiffs attempted to depose Mr. Rasmussen, and objected to Mr. Rasmussen testifying about his communications with Mrs. Abbott.<sup>2</sup>

On June 4, 2008, the trial court issued its order denying the motion for a protective order, finding that Leif Rasmussen was "the insurance company's attorney," and that he had no attorney-client relationship with Mrs. Abbott either in an individual or corporate capacity. *See* PWA Appendix A.182, A.184-85.<sup>3</sup> Appellant petitioned the court of appeals for a writ of prohibition and for discretionary review, both of which the court of appeals denied on August 12, 2008. A.208. The court of appeals found that the trial court correctly analyzed Minnesota law and that Appellant had failed to demonstrate that

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<sup>1</sup> TIG matters with respect to PWA were delegated to River Stone Claims Management. A.81. For purposes of simplicity, these entities are referred to collectively as TIG herein.

<sup>2</sup> Although Appellant nominally is PWA, this appeal and PWA's alleged positions are solely taken at the direction of its insurance carriers, given that PWA no longer exists as a corporate entity. Further, the only alleged remaining corporate officer is Mrs. Abbott, who has never claimed that Mr. Rasmussen was PWA's attorney. (As set forth herein, Mrs. Abbott has denied being a corporate officer, and Appellant has failed to meet its burden of proving otherwise).

<sup>3</sup> References herein to PWA's Appendix are cited as "A.#."

the trial court abused its discretion. A.209. This Court granted further review on September 23, 2008.

### STATEMENT OF FACTS

The trial court's finding that no attorney-client relationship existed between TIG attorney Leif Rasmussen and PWA or Karen Abbott necessarily involved the resolution of conflicting factual assertions of the parties. Appellant bases its argument solely on a resolution of disputed facts consistent with its own view of the evidence. Notably, this view is inconsistent with the findings of the trial court and court of appeals and directly contradicted by the weight of the evidence. Often these factual assertions come without citation to the record, or without acknowledgement of contrary evidence. As set forth below, the record demonstrates that the findings of the lower court were correct.

#### **A. Paul W. Abbott Company, Inc.**

PWA incorporated as an insulation contractor in 1954. During the 1950s, 60s, and 70s, PWA sold, supplied, installed, or disturbed asbestos-containing insulation such as pipecovering, cement, and block. After the Minnesota legislature outlawed asbestos in 1973, PWA continued to act as an insulation contractor, creating exposures to asbestos by disturbing in-place asbestos insulation materials during insulation work. Based on these facts, PWA has been a defendant in the Minnesota asbestos litigation for several decades.

By 1993, John R. Abbott was the sole shareholder, chief executive officer, and president of PWA. A.66. On November 19, 1993, Mr. Abbott filed a notice of intent to dissolve with the Secretary of State, pursuant to Minn. Stat. § 302A.723. A.22. The effect of this notice was to allow PWA to file articles of dissolution two years thereafter.

See Minn. Stat. § 302A.7291, subs. 1 and 2. However, pursuant to Minn. Stat. § 302A.7291, subd. 2, those articles of dissolution would have required PWA to represent that it had discharged all known debts, obligations, and liabilities. The required representation would have included confirmation that the corporation was involved in no legal proceedings, unless it had adequately provided for satisfaction of any such judgments. *Id.* It is undisputed that PWA remained a defendant in hundreds of asbestos cases in 1993, and that this situation has continued to the present day. John Abbott ultimately chose to abandon the corporate dissolution efforts, and never filed the articles of dissolution.<sup>4</sup> Mr. Abbott ultimately died in November 2006, without having taken any further steps to statutorily dissolve the company. On August 1, 1997, Minnesota Secretary of State administratively dissolved PWA for failure to file an annual registration for three consecutive years pursuant to Minn. Stat. § 302A.821.

Despite PWA's ongoing liability, it is undisputed that by 1993, it had ceased business operations, was insolvent, and all liabilities were solely the responsibility of its insurers. A.79.

**B. PWA Insurance Defense Counsel.**

As set forth above, PWA has been a defendant in the Minnesota asbestos litigation for several decades, and until 2007, was represented by Jon Parrington of Pustorino,

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<sup>4</sup> Although Appellant speculates that Mr. Abbott fully intended to complete the dissolution, but just never got around to it, it is equally likely that, upon reflection, he chose not to do so because of concerns he had for his workers and others in the insulation trade. Mrs. Abbott testified that Mr. Abbott was concerned because he was losing "many good friends" due to asbestos exposure. A.68.

Tilton & Parrington. A.68. PWA's current insurance defense counsel is Thibodeau, Johnson, & Feriancek, PLLP.<sup>5</sup> It is undisputed that Leif Rasmussen has never defended PWA in any asbestos action.

**C. Karen A. Abbott.**

Karen A. Abbott is the sixty-five year old surviving spouse of John R. Abbott. Although Appellant throughout these proceedings has steadfastly claimed that Mrs. Abbott is a corporate officer and shareholder of PWA, the only witness testifying as to Mrs. Abbott's status was Mrs. Abbott herself. In her deposition, Mrs. Abbott testified that she never, at any time, worked for PWA. A.62. She further testified that she never gratuitously performed any duties for the company, including book work, correspondence, or anything else. A.63. She does not recall seeing any corporate record books, shareholder agreements, corporate bylaws, share redemption agreements, shareholder registers, or any other corporate records. A.76. Mrs. Abbott notably played no role in, nor was aware of, Mr. Abbott's incomplete attempt to dissolve PWA in 1993. A.65.

Appellant selectively cites other testimony where Mrs. Abbott speculates that she may have told TIG representatives that she might have been a corporate officer at one time. *See* A.28. However, when pressed, she testified that she was not sure she made that representation. *Id.* She did, however, later explain that she had recently found incomplete corporate documents that listed her as a corporate officer from 1988-91.

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<sup>5</sup> Appellant's attorney Richard J. Leighton appeared briefly as insurance defense counsel during the transition between Mr. Parrington and the Thibodeau firm.

A.76. She testified that PWA's corporate attorneys, Cochrane Bresnahan, had sent her husband the documents asking that he sign and return them. A.76. It is undisputed that even though these draft documents purported to list Mrs. Abbott as an officer, no evidence exists that they were ever completed, signed by Mrs. Abbott, or ever returned to Cochrane Bresnahan. *Id.* Mrs. Abbott testified that notwithstanding these unexecuted documents, she never in fact held those offices. *Id.* Given Mrs. Abbott's testimony as a whole, her speculation that she may have been a corporate officer at one time stems not from performance of actual duties, but instead from reviewing these incomplete documents.<sup>6</sup>

**D. TIG's Efforts to Effect a Statutory Dissolution of PWA.**

In 2007, the Minnesota legislature amended the corporate dissolution statute such that dissolved corporations remain liable for personal injury or wrongful death claims. *See* Minn. Stat. § 302A.781, subd. 5 (2007). This statute became effective on July 1, 2007.<sup>7</sup> In a last ditch effort to dissolve its insured before this date, TIG case manager, Christine Edney, contacted Mrs. Abbott on June 7, 2007. A.81. Ms. Edney told Mrs. Abbott that TIG wanted PWA dissolved to avoid asbestos lawsuits. A.67. Mrs. Abbott testified that she told Ms. Edney that her request surprised her, given that the company

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<sup>6</sup> No evidence exists that any fully executed corporate document lists Karen Abbott as any type of corporate officer. Plaintiffs properly objected to the admissibility of these incomplete, unsigned, and unauthenticated documents before the trial court. A.48-50.

<sup>7</sup> The trial court did not reach the issue of whether the 2007 amendment preserves personal injury or wrongful death claims notwithstanding the attempted statutory dissolution before July 1, 2007.

was no longer in existence. *Id.* Further, she told Ms. Edney that she did not believe she had any authority to dissolve the corporation. A.72. Ms. Edney did nothing to ascertain whether Mrs. Abbott had any corporate authority, but instead told her that she could do so because she was John Abbott's widow. A.72. Mrs. Abbott remained skeptical, telling Ms. Edney that she had never been part of the company, and that it was "unreal that [she] could just dissolve a company that [she] never had anything to do with." A.72-73.

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. A.68. However, Ms. Edney called again on June 14 to renew her request. A.68, A.81. Mrs. Abbott testified that she felt guilty for not getting back to her and asked her to put her request in writing and confirm that she would have no financial obligation. *Id.* On June 25, 2007, Ms. Edney sent a letter by overnight mail confirming that TIG would be responsible for all expenses. A.81. In response, Mrs. Abbott testified that she decided to "just go along with it." A.68.

**E. Mrs. Abbott's Interactions with Leif Rasmussen.**

Based on Mrs. Abbott's acquiescence to TIG's request, TIG hired Leif Rasmussen to assist in the dissolution. Although Appellant now claims that Mr. Rasmussen was PWA's attorney, Mrs. Abbott testified that he told her that he represented TIG. A.72. That fact was consistent with her understanding, which was that Mr. Rasmussen was neither her attorney nor PWA's attorney. *Id.* Likewise, Ms. Edney expressly disavowed any attorney-client relationship:

This correspondence also confirms that TIG advised you that you should consult with your own attorney about the corporate reinstatement and dissolution. We understand that you have done so in deciding to proceed with the reinstatement and dissolution. We encourage your combined involvement with an attorney, if you so choose, as TIG cannot give you any legal advice about the reinstatement and dissolution.

A.81. Mrs. Abbott did attempt to consult with an attorney, and contacted PWA insurance defense counsel Jon Parrington. A.70-71. However, Mr. Parrington properly informed her that his role was limited to being insurance defense counsel for PWA, and that he could not advise her with respect to corporate dissolution. A.71.

Mrs. Abbott's sole communication with Leif Rasmussen occurred on or about June 27, 2007, when Mr. Rasmussen called her and told her he needed to come over to obtain her signature on some documents. A.29, 72. She does not recall whether the documents had been filled out or whether she was simply signing where he told her. A.73 Although she testified that they had some small talk and he told her why he was there, he did not give her legal advice. A.72. Again, she understood that he was TIG's attorney, and not a PWA attorney. A.72.

At the meeting Mr. Rasmussen secured the signature of Mrs. Abbott on various corporate documents. In particular, he had her sign articles of dissolution on behalf of PWA as an "authorized" signator. This occurred despite the fact that she had told TIG that she believed she did not have authority to sign the documents. Other than asking her to sign the forms, Mr. Rasmussen did not spend any time explaining the forms to her. A.73. Notably, Appellant never submitted any affidavit of Mr. Rasmussen claiming that he ever provided legal advice, or did anything other than obtain Mrs. Abbott's signature.

Although Mr. Rasmussen had secured Mrs. Abbott's signature on the articles of dissolution, he could not file them until the corporation was returned to good standing. As a result, Mr. Rasmussen completed a domestic corporation annual renewal, despite the fact that he had never obtained Mrs. Abbott's authorization. A.90, A-73. The document required the identity of a corporate CEO, and Mr. Rasmussen simply typed in Karen Abbott's name. A.90. Mrs. Abbott testified that she never served as CEO of PWA, and that Mr. Rasmussen never asked her if she had ever held the position. A.73.

It is undisputed 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 shareholders, as required by statute. *See* Minn. Stat. § 302A.721, 302A.435. *See also*, A.75.

## ARGUMENT

### INTRODUCTION AND STANDARD OF REVIEW

This Court has held that a trial court's resolution of discovery disputes will not be disturbed absent a clear abuse of discretion. *Wiggin v. Apple Valley Medical Clinic, Ltd.*, 459 N.W.2d 918, 919 (Minn. 1990). Further, a party seeking a writ of prohibition must demonstrate that the information ordered to be produced is clearly not discoverable. *Thermorama, Inc. v. Shiller*, 135 N.W.2d 43, 46 (Minn. 1965). The determination of whether an attorney-client relationship exists is a question of fact for the trial court as to which the party asserting the privilege has the burden of proof. *State v. Anderson*, 78 N.W.2d 320, 326 (Minn. 1956). This Court has further recognized that because the

assertion of attorney-client privilege tends to suppress relevant facts, it must be strictly construed. *Kobluk v. University of Minnesota*, 574 N.W.2d 436, 440 (Minn. 1998).

As set forth below, no attorney-client privilege existed because Appellant failed to establish that Leif Rasmussen was PWA's attorney, or that Mrs. Abbott was a corporate officer. Further, even to the extent such a relationship existed, Appellant waived it by permitting Mrs. Abbott to freely disclose her communications with Mr. Rasmussen. The lower court correctly rejected Appellant's positions, and this Court should affirm.

**I. APPELLANT FAILED TO ESTABLISH THE EXISTENCE OF AN ATTORNEY-CLIENT RELATIONSHIP BETWEEN PWA AND LEIF RASMUSSEN UNDER EITHER A TORT OR CONTRACT THEORY.**

The trial court correctly found that Leif Rasmussen represented TIG, not Karen Abbott or PWA. A person seeking to establish an attorney-client relationship may do so under either a tort or contract theory. Under a tort theory, an attorney-client relationship is created when a person seeks and receives legal advice from an attorney in circumstances in which a reasonable person would rely on the advice. *Admiral Merchs. Motor Freight, Inc. v. O'Connor & Hannan*, 494 N.W.2d 261, 265-66 (Minn. 1992). See also, *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 693 (Minn. 1980). A contract for legal services may be express or implied from the conduct of the parties. *Ronnigen v. Hertogs*, 199 N.W.2d 420, 422 (Minn. 1972). Appellant failed to establish an attorney-client relationship under either theory.

First, the trial court correctly noted that Mrs. Abbott never sought legal advice from Leif Rasmussen. A.184. Instead, TIG simply asked Mrs. Abbott's cooperation in agreeing to dissolve a company previously belonging to her husband. Part of this

cooperation included signing documents prepared by Mr. Rasmussen at TIG's direction. The court noted that Mrs. Abbott did not know Mr. Rasmussen, did not hire him on her behalf or on behalf of the corporation, never paid him, nor did anything at all other than sign papers at his direction. A.184-85. Accordingly, Mrs. Abbott never sought, nor relied on, any legal advice from Mr. Rasmussen.

Further, the conduct of the parties did not create an attorney-client relationship. Mrs. Abbott never treated Mr. Rasmussen as PWA's attorney, and testified that she understood that he did not represent either her or PWA. A.72. Consistent with her understanding, Mr. Rasmussen told her he represented TIG. *Id.* Finally, TIG recognized Mr. Rasmussen's role, and cautioned Mrs. Abbott to hire her own counsel because TIG's counsel could not give her legal advice. A.81.

A fundamental tenet of any attorney-client relationship is that the alleged client both knows of and consents to the relationship. Further, where a lawyer is paid from a source other than the client, the client must be informed and consent to the arrangement. *See* Minnesota Rule of Professional Conduct 1.7 (2005), *cmt.* 13. Advice and consent of PWA was not possible in this case because no PWA officer remained after Mr. Abbott's death. *See Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 165 (2001) (corporations may act only through directors, officers, and agents). Further, even assuming *arguendo* that Appellant could establish that Mrs. Abbott was a corporate officer, no evidence exists that she did anything more than cooperate with TIG by signing documents. Appellant has produced no testimony or other evidence to suggest that Mrs. Abbott ever agreed to enter into any attorney-client relationship with Mr. Rasmussen, either

individually or as attorney for PWA, and expressly denied doing so. Absent proof of knowledge and consent, Leif Rasmussen could not become PWA's attorney.

In contrast, an attorney-client relationship clearly existed between TIG and Mr. Rasmussen. First, TIG expressly retained and paid Mr. Rasmussen. Second, TIG, and not Karen Abbott, directed Mr. Rasmussen's activities. *See* A.184. Third, TIG alone obtained and relied on Mr. Rasmussen's legal advice. Unlike the case with PWA, Mr. Rasmussen was the attorney of TIG under either a tort or contract theory.

**II. TIG'S RETENTION OF LEIF RASMUSSEN TO FACILITATE ITS OWN BUSINESS INTERESTS FALLS WELL OUTSIDE THE LIMITED AND DISTINCT TRIPARTITE INSURANCE DEFENSE RELATIONSHIP.**

Although Appellant and the *Amicus* devote much of their briefs to the non-controversial assertion that insurance defense counsel represents the insured, both fail to establish that Mr. Rasmussen played that role. It is undisputed that Mr. Rasmussen never appeared on behalf of PWA in any litigation, never participated in the defense of any claim, nor did he do anything more than act as a scrivener in charge of completing and filing preprinted forms at TIG's direction. It is further undisputed that at all relevant times insurance defense duties were the sole responsibility of Jon Parrington, who TIG had paid to represent PWA for decades.

Appellant essentially is urging this Court to broaden the scope of insurance defense to include any attorney hired by an insurer to perform acts it believes will reduce or eliminate the insured's liability (and as a result, the insurer's responsibility for indemnity payments). The clear flaw in this argument, however, is that it ignores the underlying contractual basis permitting the unique tripartite relationship between insurer,

insured, and defense counsel. Only by operation of the insurance contract itself can the insurer retain counsel on behalf of an insured, and then only for the limited purpose of defending claims.

As set forth below, Mr. Rasmussen's activities were well outside the recognized scope of insurance defense. TIG therefore could not simply impose an attorney-client relationship on PWA without its knowledge and consent. Proof of such knowledge and consent requires the establishment of an attorney-client relationship under the general tort or contract theory. *Pine Island Farmers Coop. v. Erstad & Riemer*, 649 N.W.2d 444, 451 (Minn. 2002). As demonstrated above, the trial court properly held that Appellant failed to meet its burden under either theory.

**A. Insurance Defense is a Unique and Narrow Relationship Existing Solely as a Product of the Insurance Agreement.**

This Court has recognized that an insurer typically has a contractual right to retain counsel to defend claims against its insured. *See Pine Island*, 649 N.W.2d at 450. However, this right exists only as a function of express language in the liability insurance contract. *Id.* Under such contracts, notice of a claim typically triggers both the right and the duty to defend that claim. *See Garvis v. Employers Mutual Casualty Co.*, 497 N.W.2d 254, 258 (Minn. 1993). Notably, absent a specific claim, the insurance contract provides neither a right nor a duty to impose an attorney-client relationship on an insured.

It is undisputed that the attempted dissolution of PWA in June of 2007 did not in any way aid in the defense of any pending claim.<sup>8</sup> Instead, TIG undertook the dissolution to create a defense to *future potential* claims. The distinction is significant, because the mere anticipation of future liability does not trigger the duty to defend. Outside of this duty, the concept of insurance defense simply does not exist.

Notably, the role of insurance defense counsel typically includes such activities as investigating or evaluating claims, preparing or responding to pleadings, conducting or defending discovery, negotiating potential settlements, or appearing at court proceedings. The common thread of such duties is that insurance counsel defends an insured against claims arising out of an existing set of facts that gave rise to potential liability. Case law relied upon by Appellant is consistent with these duties. *See Newcomb v. Meiss*, 116 N.W.2d 593 (Minn. 1962) (insurance defense counsel hired to defend insured in personal injury action); *Pine Island*, 649 N.W.2d at 444 (attorney hired by insurer to defend insured against claim alleging failure to properly install milk metering system); *Crum v. Anchor Casualty Co.*, 119 N.W.2d 703 (Minn. 1963) (attorney-client relationship existed where insurance company hired attorney to defend negligence claim against apartment building owner for premises liability). Appellant has provided no authority whatsoever that an attorney hired by an insurer becomes the attorney of the insured outside the defense agreement in an insurance contract.

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<sup>8</sup> Dissolution of a corporation has no effect on claims brought against the corporation while it was viable. Therefore, the only potential effect of the dissolution would be to bar claims filed after dissolution.

It is beyond dispute that Mr. Rasmussen did not defend PWA by participating in the defense of an existing claim. Appellant further has produced no evidence that the insurance policy defined the duty to defend more broadly than defending existing claims.<sup>9</sup> Instead, TIG hired Mr. Rasmussen solely to take part in the creation of new facts that it hoped PWA's insurance defense counsel would be able to successfully argue in the future. Such activities go well beyond any logical understanding of insurance defense.

Finally, denying Mr. Rasmussen's status as insurance defense counsel will lead to none of the adverse consequences threatened by Appellant or the *Amicus*. The sanctity of the relationship between insured and insurance defense counsel will remain intact. The sole effect will be to ensure that an alleged attorney-client relationship created outside the scope of a contract of insurance will be established by proving the elements of the tort or contract theory. Appellant has failed to prove these elements in this case, and the lower courts correctly rejected its position.

**B. Because Mr. Rasmussen Acted Only as an Ordinary Business Person Performing Ministerial Functions on Behalf of TIG, no Attorney-Client Relationship with PWA was Created.**

The existence of an attorney-client relationship also depends on the role performed by the attorney. If the attorney's actions fall outside the role of legal counsel with respect

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<sup>9</sup> To the extent Appellant would suggest that its insurance contract was broad enough to include the retention of Mr. Rasmussen, it had the burden of affirmatively proving its allegation by incorporating the policy language relied upon into the record. Appellant has failed to do so, and no evidence exists that its contract was broader than the standard liability policy.

to the information at issue, the attorney-client privilege does not attach. *Mission National Insurance Co. v. Lilly*, 112 F.R.D. 160, 163 (D. Minn. 1986). The rationale behind this limitation is that the privilege should extend only to confidential communications made for the purpose of facilitating the rendition of legal services. *In Re: Malone*, 655 F.2d 882, 886 (8<sup>th</sup> Cir. 1981). For that reason, courts have denied the existence of an attorney-client relationship where an attorney acts as an ordinary businessman. *Lilly*, 112 F.R.D. at 163.

For example, this Court has noted that the attorney-client privilege is “not without limits” and that no privilege attaches when a lawyer has acted as a “mere scrivener” of a document. *Kobluk*, 574 N.W.2d at 440, citing *In Re: Arnold & McDowell*, 566 F.Supp. 752, 755 (D. Minn. 1983). Instead, the alleged client must actually seek the lawyer’s advice as to the document’s legal terms and effect. *Id.*

In this case, the record demonstrates nothing more than that Mr. Rasmussen:

- 1) Drove to Mrs. Abbott’s house to secure her signature on preprinted Minnesota corporate forms,
- 2) checked the appropriate boxes on the forms as directed by TIG, and
- 3) delivered the completed forms and payment to the Secretary of State’s office to effect TIG’s instructions.

*See* A.88-90. Although Appellant produced evidence that Mr. Rasmussen and Mrs. Abbott conversed generally during their single meeting, it failed to meet its burden of proving that these discussions involved a request for and receipt of Mr. Rasmussen’s legal advice.

Courts have further rejected the existence of an attorney-client relationship in other business contexts. *See, e.g., Malone*, 655 F.2d at 886 (attorney acting as conduit for client's funds does not trigger attorney-client privilege); *Colton v. United States*, 306 F.2d 633, 638 (2<sup>nd</sup> Cir. 1962) (attorney acting as business advisor not subject to attorney-client privilege). Mr. Rasmussen's activities were unquestionably limited to assisting an ordinary business transaction. Absent proof of clearly defined legal services and attorney-client communications, Appellant has failed to establish the existence of an attorney-client relationship.

**III. APPELLANT HAS FURTHER FAILED TO DEMONSTRATE THAT MR. RASMUSSEN PERFORMED DUAL REPRESENTATION OF TIG AND PWA.**

In addition to the fact that no insurance defense counsel scenario existed, no dual representation existed. This Court has recognized the circumstances under which an attorney can represent both an insurer and an insured and held that such dual representation requires proof of the following:

- 1) No apparent conflict of interest between the insurance company and the insured,
- 2) explanation by insurance counsel or another attorney of the implications of dual representation and advantages and risks involved, and
- 3) express consent of the insured to dual representation with knowledge of the circumstances.

*Pine Island*, 649 N.W.2d at 452. Appellant has failed to establish any of these requirements.

First, a clear conflict of interest existed because the dissolution solely benefited the insurers. It is undisputed that the company had been administratively dissolved and had no assets other than insurance coverage from which to satisfy a judgment. A.75. Although Appellant suggests that Mrs. Abbott cooperated in order to benefit her husband's corporation, she testified that the sole purpose of the dissolution was so that the insurance company could avoid future liability for asbestos claims. *Id.*<sup>10</sup>

In contrast to the clear benefits to TIG, dissolution was not in the interest of Mrs. Abbott. For example, she testified that she was concerned that former construction workers that got asbestos-related diseases would no longer have recourse after the dissolution. A.68. She testified that she shared her husband's concern that "John was losing many good friends in the business." *Id.* Likewise, studies have demonstrated that non-employee spouses and family members of insulation workers have contracted asbestos-related cancers due to exposure to an asbestos worker's clothing. *See, e.g., Hennegan v. Cooper, et al.*, 837 So.2d 96, 105 (La. App. 2002); *see also*, Malignant Pleural Mesothelioma after Household Exposure to Asbestos, 26 *Journal of Clinical Oncology* (2008). While dissolution of PWA would clearly benefit its insurers, it would eliminate important rights of Mrs. Abbott and other non-employee family members.

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<sup>10</sup> Appellant claims that Mrs. Abbott wanted to dissolve the company so she would be able to avoid the constant service of summonses and complaints. *See* Appellant's Brief at 8. The record reflects, however, that any service of process concerns occurred in the early 1990s when her husband was alive. A.74. By the time TIG attempted to dissolve the company, insurance defense counsel Jon Parrington had begun accepting service for the corporation to avoid further service at the Abbott home. A.69.

Second, neither Mr. Rasmussen nor any other attorney explained to Mrs. Abbott any advantages or risks involved with dual representation, or its implications. In fact, the issue of dual representation never arose because both Ms. Edney and Mr. Rasmussen told Mrs. Abbott that he did not represent her. Third, Mrs. Abbott has never testified that she ever consented to representation by Mr. Rasmussen, let alone consented to dual representation.

Notably, this Court in *Pine Island* recognized that consultation and consent are essential to avoid an attorney representing two parties without the knowledge and consent of both. *Pine Island*, 649 N.W.2d at 451. In this case, Mrs. Abbott had an absolute right to know that TIG purportedly was retaining an attorney to represent PWA, as opposed to TIG alone. Under *Pine Island*, after such consultation, she had an absolute right to give or withhold consent. The evidence in this case demonstrates that neither consultation nor consent occurred, and no attorney-client relationship was formed.

**IV. THE TRIAL COURT ALSO CORRECTLY FOUND NO ATTORNEY-CLIENT PRIVILEGE BECAUSE APPELLANT FAILED TO ESTABLISH THAT MRS. ABBOTT WAS A CURRENT OFFICER OF PWA.**

Just as Appellant has failed to demonstrate that Mr. Rasmussen represented PWA, it further failed to meet its burden of proving that communications with Mrs. Abbott constituted communications with PWA. As set forth above, Mrs. Abbott testified that she never worked for PWA, nor did she ever hold any corporate offices. A.62, 76. Given Mrs. Abbott's sworn testimony, the trial court's factual finding that Mrs. Abbott was not communicating with Mr. Rasmussen as an officer of PWA was neither clearly erroneous nor an abuse of discretion.

Indeed, Appellant's attempts to transform Mr. Abbott's widow into a corporate officer are based solely on inadmissible documents, as well as strained interpretations of corporate law. For example, Appellant relies on incomplete drafts of documents Mrs. Abbott recently found in her garage. The documents are dated between 1988 to 1991, and purport to appoint Mrs. Abbott as a corporate officer during those years. It is undisputed, however, that the documents required Mrs. Abbott's signature, but her signature line remains blank. Appellant has produced no evidence that the documents were ever finalized and returned to PWA's corporate attorneys to become official corporate documents. Absent this proof, the incomplete documents lack foundation and are not admissible evidence. *See In Re: Minnesota Asbestos Litigation*, 552 N.W.2d 242, 246 (Minn. 1996) (lower courts erred in considering unauthenticated exhibits in support of claim of personal jurisdiction). Appellant's reliance on inadmissible documents is insufficient to prove that Mrs. Abbott was ever a corporate officer, let alone in 2007.

Appellant further relies on speculation to support a claim that Mrs. Abbott necessarily was a shareholder of PWA. It is undisputed that John Abbott was the sole shareholder of PWA at the time of his death in 2006. Appellant has produced no evidence as to how Mr. Abbott's estate disposed of his property. Instead, Appellant speculates that Mr. Abbott may have died intestate and that Mrs. Abbott would have inherited at least fifty percent of the shares of the corporation. As the party bearing the burden of proof, however, Appellant was required to produce affirmative evidence, and not speculation, to support its assertion. Absent such an affirmative showing, it has failed to prove that Mrs. Abbott has or ever had any ownership interest in PWA.

Similarly, Appellant's statutory argument that Mrs. Abbott was chief executive officer of PWA is incorrect. The only evidence in this case is that John Abbott served as chief executive officer in the 1990s up until the administrative dissolution of the company. At that point, the corporation ceased to exist as a statutory entity, and no longer had any need to replace corporate officers. Although Minn. Stat. § 302A.321 requires the filling of a vacancy in the office of chief executive officer due to death, Appellant provides no legal authority to apply the law following an administrative dissolution.

Further, even if the statute did apply after dissolution, it merely states that the position must be filled in one of three ways. First, the corporation must fill the position as provided in the articles or bylaws. Minn. Stat. § 302A.341, subd. 3. If not provided for in these corporate documents, the position is filled by the board of directors. *Id.* If neither of these procedures is available, an officer may be deemed appointed chief executive officer by operation of Minn. Stat. § 302A.321. *Id.*

In this case, Appellant has failed to produce corporate articles or bylaws that would make Mrs. Abbott chief executive officer. Absent review of such documents, it is pure speculation that they do not provide for the appointment of a different individual to serve as chief executive officer. As the party asserting that Mrs. Abbott is a corporate officer, it is incumbent on Appellant to demonstrate that the articles or bylaws do not address the succession issue.<sup>11</sup>

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<sup>11</sup> Respondents agree that no evidence exists that PWA had any members of its board of directors other than John Abbott.

Finally, even if Appellant had established the prerequisites of applying Section 302A.321 to this case, it would not result in the automatic appointment of Mrs. Abbott. Specifically, Section 302A.321 provides only that a person “exercising the principle functions of the chief executive officer” will be statutorily deemed to have been elected to that position. Appellant has failed to demonstrate that Mrs. Abbott exercised any functions of that position, and the only evidence in the record is Mrs. Abbott’s testimony that she has never performed any corporate duties. Given the lack of proof that Mrs. Abbott was a corporate officer, Appellant failed to establish that communications with her were subject to the attorney-client privilege. This Court should affirm the rulings of the lower courts.

**V. EVEN HAD APPELLANT ESTABLISHED THE EXISTENCE OF AN ATTORNEY-CLIENT RELATIONSHIP, IT WAIVED ATTORNEY-CLIENT PRIVILEGE.**

Minnesota law has long held that the attorney-client privilege belongs to the client, and that once a client testifies to confidential attorney-client communications, any attorney-client privilege is waived. *See* Minn. Stat. § 595.02, subd. 1(b); *Swanson v. Domning*, 86 N.W.2d 716, 722 (Minn. 1957). It is undisputed that Appellant permitted Mrs. Abbott to testify freely and without objection to her communications with Mr. Rasmussen. By selectively choosing to permit Mrs. Abbott to testify, Appellant waived any claimed attorney-client privilege to Mr. Rasmussen’s testimony.

**CONCLUSION**

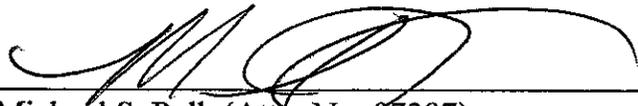
The trial court was within its broad discretion to find no attorney-client relationship existed between Leif Rasmussen and either Karen Abbott or PWA. Further,

PWA voluntarily waived any alleged privilege when it allowed counsel to question Mrs. Abbott about her communications with Mr. Rasmussen. The court of appeals properly denied Appellant's request for a writ of prohibition and Respondents respectfully request that this Court affirm.

Dated: 11/20/08

Respectfully submitted,

**SIEBEN POLK, P.A.**



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