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No. A10-0215

STATE OF MINNESOTA
IN SUPREME COURT

Gregory Curtis, Joni Kay Hanzal, Josephine Leonard
and Randy Hoskins, individually
and on behalf of all others similarly situated,

vs.

Respondents,

Altria Group, Inc.,

Dismissed Defendant,

and

Philip Morris, Inc.

Appellant.

MINNESOTA DEFENSE LAWYERS ASSOCIATION'S
AMICUS CURIAE BRIEF

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TABLE OF CONTENTS

	<u>Page No.</u>
TABLE OF AUTHORITIES	ii
INTRODUCTION.....	1
BACKGROUND.....	2
ARGUMENT	4
I. THE “PUBLIC BENEFIT” DETERMINATION IS A QUESTION OF LAW.	5
II. THE “PUBLIC BENEFIT” STANDARD SHOULD BE NARROWLY CONSTRUED.	6
III. THE “PUBLIC BENEFIT” SHOULD BE DETERMINED BASED ON OBJECTIVE STANDARDS.	8
CONCLUSION.....	11

TABLE OF AUTHORITIES

	<u>Page No.</u>
<u>Cases</u>	
<i>Anderson v. Anoka Hennepin Indep. Sch. Dist. 11</i> , 678 N.W.2d 651 (Minn. 2004).....	8
<i>Anderson-Johanningmeier v. Mid-Minn. Women’s Ctr., Inc.</i> , 637 N.W.2d 270 (Minn. 2002).....	7
<i>Bartol v. ACC Capital Holding Corp.</i> , 2010 WL 156448 (D. Minn. Jan. 11, 2010).....	5
<i>Beck v. Sunrise Senior Living Mgmt., Inc.</i> , 2008 WL 3412096 (D. Minn. Aug. 8, 2008)	7
<i>Behrens v. United Vaccines, Inc.</i> , 228 F. Supp. 2d 965 (D. Minn. 2002).....	7, 9
<i>Boland v. City of Rapid City</i> , 315 N.W.2d 496 (S.D. 1982)	4
<i>Bubar v. Dizdar</i> , 60 N.W.2d 77 (Minn. 1953).....	6
<i>Burtch v. Oakland Park, Inc.</i> , 2006 WL 1806196 (Minn. Ct. App. July 3, 2006).....	7
<i>Church of the Nativity of Our Lord v. WatPro, Inc.</i> , 491 N.W.2d 1 (Minn. 1992).....	1, 4, 6
<i>Collins v. Minn. Sch. of Bus., Inc.</i> , 655 N.W.2d 320 (Minn. 2003).....	3
<i>Collins v. Minn. Sch. of Bus., Inc.</i> , 636 N.W.2d 816 (Minn. Ct. App. 2001).....	9
<i>Cummings v. Paramount Partners, LP</i> , 715 F. Supp. 2d 880 (D. Minn. 2010).....	10
<i>Curtis v. Altria Group, Inc.</i> , 792 N.W.2d 836 (Minn. Ct. App. 2010).....	2, 3, 5

Davis v. U.S. Bancorp,
383 F.3d 761 (8th Cir. 2004)7, 11

Dickson v. Lundquist,
2005 WL 147719 (Minn. Ct. App. Jan. 25, 2005) 8

Kinetic Co. v. Medtronic, Inc.,
672 F. Supp. 2d 933 (D. Minn. 2009).....9

Kivel v. WealthSpring Mortg. Corp.,
398 F. Supp. 2d 1049 (D. Minn. 2005).....9

Liess v. Lindemyer,
354 N.W.2d 556 (Minn. Ct. App. 1984).....4

Ly v. Nystrom,
615 N.W.2d 302 (Minn. 2000).....3, 4, 6

Overen v. Hasbro, Inc.,
2007 WL 2695792 (D. Minn. Sept. 12, 2007)10

PCS Prof'l Claim Serv., LLC v. Brambilla's Inc.,
2007 WL 3313661 (D. Minn. Nov. 6, 2007)9, 10

Pecarina v. Tokai Corp.,
2002 WL 1023153 (D. Minn. May 20, 2002).....10

Tuttle v. Lorillard Tobacco Co.,
2003 WL 1571584 (D. Minn. March 3, 2003).....9, 10

Zutz v. Case Corp.,
2003 WL 22848943 (D. Minn. Nov. 21, 2003)9

Statutes:

Minn. Stat. § 8.31, subd. 3a*passim*

Amicus Curiae Minnesota Defense Lawyers Association (“MDLA”) respectfully submits this brief in support of reversing the Court of Appeals’ opinion and affirming the District Court’s decision with respect to the issue concerning Respondents’ requirement to provide a “public benefit” in order to sue as private attorneys general under Minn. Stat. § 8.31, subd. 3a.¹

INTRODUCTION

Nearly 20 years ago, Justice John E. Simonett expressed his view that “it is time to look more closely at the so-called ‘Private Attorney General Statute.’” *Church of the Nativity of Our Lord v. WatPro, Inc.*, 491 N.W.2d 1, 9 (Minn. 1992) (Simonett, J. concurring in part & dissenting in part). The MDLA respectfully submits that it is now time, once again, for the Court to look more closely at the private attorney general statute and, in particular, to articulate the specific standards for determining whether a private party’s cause of action actually benefits the public in a meaningful and material way. For the reasons set forth in greater detail herein, the MDLA asks the Court to clearly establish that: (1) the determination of whether a private claimant provides a public benefit is a question of law; (2) Minn. Stat. § 8.31, subd. 3a should be narrowly construed and applied; and (3) the standard that is applied should be an objective measure that can be applied uniformly in determining whether the claimant has actually provided material and significant benefits to the public.

¹ Pursuant to Rule 129.03 of the Minnesota Rules of Civil Appellate Procedure, the MDLA hereby certifies that its undersigned counsel have authored this brief in whole, and that no other person or entity, other than the MDLA, its members, and its counsel, have made a monetary contribution to the preparation or submission of this brief.

BACKGROUND

The MDLA is a non-profit Minnesota corporation. Its members are trial lawyers in private practice who devote a substantial portion of their efforts to the defense of clients in civil litigation. The MDLA was founded in 1963 and, over the past 48 years, it has grown to include representatives from over 180 law firms across Minnesota, with nearly 800 individual members. The MDLA is steadfastly committed to protecting the rights of litigants in civil actions, promoting high standards of professional ethics and confidence, and improving the many areas of law in which its members regularly practice. The MDLA's interest in this case is primarily a public one: to promote clarity of the law and uniform application of important legal principles at issue in civil litigation in Minnesota.

Respondents assert that they seek to pursue claims as private attorneys general on behalf of themselves individually, as well as others who are similarly situated, for alleged violations of various consumer protection statutes, including the Minnesota Prevention of Consumer Fraud Act, Minn. Stat. §§ 325F.68-.70; the Minnesota Unlawful Trade Practices Act, *id.* §§ 325D.09-.16; the Minnesota Uniform Deceptive Trade Practices Act, *id.* § 325D.43-.48; and the Minnesota False Statement and Advertisement Act, *id.* §§ 325F.67. *Curtis v. Altria Group, Inc.*, 792 N.W.2d 836, 848 (Minn. Ct. App. 2010). Respondents are seeking to recover compensatory damages for injuries caused by alleged violations of these various statutes. *Id.* Further, Respondents are also seeking to recover their attorneys' fees and costs as private attorneys general under Minn. Stat. § 8.31, subd. 3a. *Id.*

There are numerous reasons why Respondents' action does not provide the requisite public benefit necessary to proceed as private attorneys general and recover their attorneys' fees and costs under Minn. Stat. § 8.31, subd. 3a. Some of those reasons, which are unique and particular to the Respondents in this case, have already been set forth by Appellant in its Brief, including (1) the fact that the Minnesota Attorney General, acting on behalf of the public and alleging the same wrongdoing that Respondents have asserted in the instant case, previously sued Appellant in 1994 and obtained a settlement in 1998 pursuant to which Appellant is obliged to pay billions of dollars and submit to significant injunctive relief prohibiting deceptive advertising; (2) federal legislation that was enacted in 2009 which bans the very representations that Respondents claim were misleading; and (3) Respondents seek only private relief in the form of money damages and do not seek injunctive relief. (Appellant's Br. at 13-23)

The District Court correctly dismissed Respondents' claims under Minn. Stat. § 8.31, subd. 3a, due to their failure to establish that their claims would promote the "public benefit." *Curtis*, 792 N.W.2d at 848. The Court of Appeals reversed and held Respondents did satisfy the "public benefit" element of the statute. *Id.* at 849-852.

The MDLA respectfully submits that the Court of Appeals erred in reversing the District Court, and that its ruling in this regard is inconsistent with this Court's decisions in *Ly v. Nystrom*, 615 N.W.2d 302 (Minn. 2000), and *Collins v. Minn. Sch. of Bus., Inc.*, 655 N.W.2d 320 (Minn. 2003). The MDLA believes that the Court of Appeals' opinion applies Minn. Stat. § 8.31, subd. 3a too broadly and beyond its appropriate and intended limited scope.

ARGUMENT

Minnesota courts must be vigilant in limiting the authority of private litigants to proceed under Minn. Stat. § 8.31, subd. 3a.—and to recover attorneys’ fees—in private actions to only those instances in which the proceedings actually benefit the public at large and advance the interests of the State in meaningful and material ways.

After all, as this Court has recognized, the scope of the private claimant’s authority to act as a private attorney general under Minn. Stat. § 8.31, subd. 3a, must mirror “[t]he duty of the attorney general’s office, and thus the purpose of any statute granting private citizens authority to bring a lawsuit in lieu of the attorney general, is the *protection of public rights and the preservation of the interests of the state.*” *Ly*, 615 N.W.2d at 313 (emphasis added). Justice Simonett correctly warned of the legitimate “concern that enterprising plaintiffs, understandably interested in recovering investigation costs and attorney fees,” will seek to stretch this authority beyond its intended scope. *Church of the Nativity*, 491 N.W.2d at 10. And this Court has since echoed concerns that “‘every artful counsel could dress up his dog bite case’ to come under an attorney’s fees statute.” *Ly*, 615 N.W.2d at 312 (quoting *Liess v. Lindemyer*, 354 N.W.2d 556, 558 (Minn. Ct. App. 1984), in turn quoting *Boland v. City of Rapid City*, 315 N.W.2d 496, 503 (S.D. 1982)).

In order to avoid such an unwarranted and unwelcomed expansion, this Court should further clarify the standards that ought to be applied in making the determination of whether a given claimant has actually benefited the public and advanced the public

interests of the State of Minnesota in the ways in which the Minnesota Attorney General is expected to do.

I. THE “PUBLIC BENEFIT” DETERMINATION IS A QUESTION OF LAW.

As a threshold matter, the Court should make it clear that the question of whether a private litigant’s lawsuit actually benefits the public should be clearly recognized as a question of law to be decided by the Court. *Bartol v. ACC Capital Holding Corp.*, 2010 WL 156448, at *6 (D. Minn. Jan. 11, 2010). While this would seem to be self-evident, this particular question has not been squarely addressed in the state court case law.

Many of these cases come to the appellate courts on review of motions to dismiss or for summary judgment. As a result, the standard for review in those cases is properly deemed *de novo*. See, e.g., *Curtis*, 792 N.W.2d at 848. However, there are certainly cases in which the determination of whether the claimant has actually conferred a material and meaningful benefit to the public cannot and should not be made until after trial and the scope of the relief has been established. The determination of whether there has been a public benefit in those cases should still be treated as a question of law.

The MDLA respectfully submits that it is critically important to clarify the nature of this issue as a question of law so as to ensure that these determinations shall be subject to a *de novo* standard of review on appeal in every instance.

II. THE "PUBLIC BENEFIT" STANDARD SHOULD BE NARROWLY CONSTRUED.

The MDLA also respectfully submits that the standard for determining whether a private cause of action actually benefits the public should be narrowly construed. As this Court has recognized, the underlying purpose of the private attorney general statute is to fairly compensate claimants who bring lawsuits that genuinely provide for "the protection of public rights and the preservation of the interests of the state." *Ly*, 615 N.W.2d at 313. As a practical matter, there is no real concern that private claimants will not pursue their lawsuits absent the potential for recovering attorneys' fees under Minn. Stat. § 8.31, subd. 3a. Indeed, the private lawsuit that seeks only to secure benefits for the public at large is very rare. It is much more common for private litigants to bring their lawsuits to recover for the wrongs they allege to have suffered personally, first and foremost, and to include the claims of public benefit under Minn. Stat. § 8.31, subd. 3a, simply as a mechanism to pay for the litigation.

This approach obviously conflicts with the common law rule in Minnesota and throughout the United States that litigants shall pay their own attorneys' fees, unless some contract or statute provides otherwise. As this Court has long recognized, "[a] statute in derogation of well-established principles of common law should ordinarily not be extended by construction beyond its most obvious import." *Church of the Nativity*, 491 N.W.2d at 10 (citing *Bubar v. Dizdar*, 60 N.W.2d 77, 79 (Minn. 1953)). Thus, statutes that modify the application of the "American Rule" that otherwise controls under the common law must be applied with constraint and due care.

The private attorney general statute is particularly unique as compared to other attorneys' fees shifting statutes in that it limits the recovery of attorneys' fees to only those causes of action that actually benefit the public. In *Anderson-Johanningmeier v. Mid-Minnesota Women's Center, Inc.*, 637 N.W.2d 270 (Minn. 2002), this Court noted that recovery of attorneys' fees under the private attorney general statute is more limited for private claimants than for litigants proceeding under the whistleblower statute, for example, because "claimants under the private AG statute must show that their cause of action benefits the public," whereas, under the whistleblower statute, "the role and duties of the attorney general do not constrain such a claimant." *Id.* at 277.

Accordingly, the Court should expressly hold that the standard for determining "public benefit" under Minn. Stat. § 8.31, subd. 3a, should be applied narrowly, so as to avoid allowing the recovery of attorneys' fees in cases in which there is no public benefit "[e]xcept in a tangential sense," *Burtch v. Oakland Park, Inc.*, 2006 WL 1806196, at *6 (Minn. Ct. App. July 3, 2006), or where there is only the "metaphysical potential" of a public benefit. *Behrens v. United Vaccines, Inc.*, 228 F. Supp. 2d 965, 971 (D. Minn. 2002); *see also Davis v. U.S. Bancorp*, 383 F.3d 761, 768 (8th Cir. 2004). Likewise, private parties should not be able to invoke Minn. Stat. § 8.31, subd. 3a for the recovery of their attorneys' fees where the "essence" of the claimant's case is pursuing a private remedy rather than a public benefit. *See, e.g., Beck v. Sunrise Senior Living Mgmt., Inc.*, 2008 WL 3412096, at *2 (D. Minn. Aug. 8, 2008)(holding that "the essence of this action is to compensate Plaintiff for her husband's injuries, not to seek a public benefit.").

III. THE “PUBLIC BENEFIT” SHOULD BE DETERMINED BASED ON OBJECTIVE STANDARDS.

Finally, the MDLA would respectfully encourage the Court to adopt objective standards for determining whether a private litigant’s action actually benefits the public. In the past, at least one court has observed that “it has to be understood that these cases are fact intensive” and that “[t]he term ‘public benefit’ is subjective.” *Dickson v. Lundquist*, 2005 WL 147719, at *2 (Minn. Ct. App. Jan. 25, 2005).² To the extent this has been the case, such an approach and treatment of the “public benefit” standard leads to uncertainty and has the dangerous potential for unduly expanding the instances in which attorneys’ fees and costs may be awarded to the private litigant under Minn. Stat. § 8.31, subd. 3a. The Court should clearly endorse objective standards that are clearly ascertainable and uniformly applicable in all cases. The MDLA submits that an objective standard that is applied narrowly will further serve to avoid any unintended derogation of the “American Rule” under the common law.

Specifically, the MDLA respectfully asks the Court to adopt an objective standard that would require private litigants who seek to recover attorneys’ fees and costs under Minn. Stat. § 8.31, subd. 3a to establish that (1) the benefit to the public is material and

² In *Dickson*, the Court of Appeals expressed its view that “[t]he term ‘public benefit’ is subjective” by comparing it to “the distinction between the terms ‘ministerial’ versus ‘discretionary’ in the municipal immunity area,” and observing that “the term can be about what you want it to be.” *Dickson*, 2005 WL 147719, at *2 (citing *Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 651 (Minn. 2004)).

meaningful, and (2) the claimant's lawsuit has been a direct or proximate cause³ to securing those material and meaningful benefits for the public at large.

There are appropriate objective methods for determining whether the relief sought and/or obtained by a private claimant will actually benefit the public at large and advance the interests of the State in a material and meaningful manner. For example, it is evident that lawsuits brought for the primary purpose of recovering compensatory damages for the sole benefit of the claimants do not, as a matter of law, result in a benefit to the public. *See, e.g., Zutz v. Case Corp.*, 2003 WL 22848943, at *4 (D. Minn. Nov. 21, 2003); *Tuttle v. Lorillard Tobacco Co.*, 2003 WL 1571584, at *6-7 (D. Minn. March 3, 2003). The MDLA respectfully suggests that this Court should expressly recognize that fact.

Moreover, the Court should likewise recognize that private claimants who seek injunctive relief in addition to personal compensatory damages do not automatically render a benefit the public. *See Kivel v. WealthSpring Mortg. Corp.*, 398 F. Supp. 2d 1049, 1056 (D. Minn. 2005) (merely seeking injunctive relief insufficient to constitute a public benefit); *Behrens*, 228 F. Supp. 2d at 971 (same); *see also PCS Prof'l Claim Serv., LLC v. Brambilla's Inc.*, 2007 WL 3313661, at *6 (D. Minn. Nov. 6, 2007). The

³ The Court of Appeals' opinion in *Collins v. Minn. Sch. of Bus., Inc.*, suggested a "but for" standard. 636 N.W.2d 816, 821 (Minn. Ct. App. 2001). However, the Supreme Court did not expressly adopt this "but for" standard in *Collins*. *See Kinetic Co. v. Medtronic, Inc.*, 672 F. Supp. 2d 933, 946 (D. Minn. 2009). The MDLA would respectfully request the Court to expressly adopt what it appears to have implicitly required in *Collins*, and to go even further to require a direct or proximate causal relationship.

claimant must show that the injunctive or other relief obtained has an actual benefit to the public. *See, e.g., PCS Prof'l Claim Serv.*, 2007 WL 3313661, at *7 (“Plaintiffs’ request for an injunction in the form of rescission is personal and is not the sort of injunctive relief that would alter Defendants’ practices such that it would serve a public benefit.”).

Apart from requiring a showing that the relief sought and obtained is intended to provide material and meaningful benefits to the public, the Court should require that the lawsuit has actually been a direct or proximate cause in achieving that public benefit. Thus, for instance, there would be no public benefit where the conduct or product that would otherwise threaten the public has ceased for reasons other than the litigation. *See, e.g., Cummings v. Paramount Partners, LP*, 715 F. Supp. 2d 880, 910 (D. Minn. 2010) (no public benefit because case did “not involve a product that is still on the market”); *Overen v. Hasbro, Inc.*, 2007 WL 2695792, at *3 (D. Minn. Sept. 12, 2007) (same); *Tuttle*, 2003 WL 1571584, at *6 (no public benefit because FDA-required warnings already accomplished plaintiff’s professed goal of warning public of dangers of smokeless tobacco); *Pecarina v. Tokai Corp.*, 2002 WL 1023153, at *5 & n.3 (D. Minn. May 20, 2002) (no public benefit because exclusive distributor in United States has not distributed the particular product for several years).

For these reasons, the MDLA urges the Court to expressly adopt an objective standard for Minn. Stat. § 8.31, subd. 3a, that requires the private litigant to actually obtain material and meaningful benefits to the public, and require that the private lawsuit have a direct or proximate causal connection in securing those material and meaningful benefits for the public at large, so as to ensure the appropriately constrained and uniform

application of the private attorney general statute. *See Davis*, 383 F.3d at 768 (“The class of plaintiffs under the private attorney general statute would be limitless if we assumed that one individual’s negative experience with a company was necessarily duplicated for every other individual and on that basis treated personal claims as benefitting the public.”).

CONCLUSION

Therefore, for the reasons stated herein, the MDLA respectfully requests the Court to clearly establish that: (1) the determination of whether a private litigant provides a public benefit is a question of law; (2) Minn. Stat. § 8.31, subd. 3a should be narrowly construed and applied; and (3) the standard that is applied should be an objective measure that can be applied uniformly in determining whether the private claimant has actually provided material and significant benefits to the public.

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