

NO. A05-1293

State of Minnesota  
 In Supreme Court

Hoyt Properties, Inc. and Hoyt/Winnerka, LLC,  
*Respondents,*

v.

Production Resource Group, LLC,  
 Haas Multiples Environmental Marketing and Design, Inc.,  
 d/b/a Entolo-Minneapolis and Entolo, Inc.,  
*Appellants.*

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

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## INTEREST OF MINNESOTA DEFENSE LAWYERS ASSOCIATION

The MDLA, founded in 1963, is a non-profit Minnesota corporation whose members are trial lawyers in private practice.<sup>1</sup> The MDLA devotes a substantial portion of its efforts to the defense of clients in civil litigation. Over the past 43 years, it has grown to include representatives from over 180 law firms across Minnesota, with 800 individual members.

Among the MDLA's many goals is the protection of the rights of litigants in civil actions, the promotion of high standards of professional ethics and competence, and the improvement of the many areas of law in which its members regularly practice. The MDLA has no interest whatsoever in the particular dispute between these litigants. Rather, the MDLA's interest in this case is primarily a public one: to promote clarity in the law governing settlements and prevent unnecessary confusion as to rescission. Nevertheless, MDLA members may also have a private interest as well, as this case also raises the specter of an entirely new type of legal-malpractice claim that would lie almost exclusively against defense lawyers involved in settling cases. (The appearance of the Minnesota Trial Lawyer's Association as *amicus curiae* in support of affirmance suggests this and also suggests that its members view a broadening of attacks on the finality of settlements as a development likely to be utilized more by a settling plaintiff than a settling defendant.) Because the opinion below both undermines the public goals of

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<sup>1</sup> No part of this brief was authored by counsel for a party. This brief was not written for compensation. No person or entity, other than the MDLA and its counsel, made any monetary contribution to the preparation or submission of this brief.

promoting settlement in Minnesota, and promotes claims of legal malpractice, the MDLA urges the Court to retain and follow the well-established rules and law in Minnesota.

## ARGUMENT

**Viewed through the prism of promoting settlements, the Court should not recognize statements of the kind at issue in this case as grounds to rescind a valid settlement agreement.**

The court of appeals' decision to allow rescission under these facts is anathema to this Court's time-honored goal of encouraging settlements, which promote finality in resolving disputes, thereby enabling parties to avoid the uncertainty and expense of litigation. *See, e.g., Heinz v. Vickerman Const.*, 306 N.W.2d 888, 890 (Minn. 1981) (“[S]ettlements avoid litigation, with resulting economies in time and expense, and are ordinarily encouraged as in the best interests of the parties”); *Weikert v. Blomster*, 213 Minn. 373, 376, 6 N.W.2d 798, 799 (1942) (acknowledging “the policy that there should be an end to litigation and that compromises and settlements should be encouraged”); *see also Schmitt-Norton Ford, Inc. v. Ford Motor Co.*, 524 F. Supp. 1099, 1102 (D. Minn. 1981) (“Courts generally engage in a presumption in favor of the validity of releases because the law favors settlement of disputes.”). And an already-overburdened judicial system relies on settlement to prevent litigation from overwhelming the courts. *See Schmidt v. Clothier*, 338 N.W.2d 256, 260 (Minn. 1983) (encouraging settlements to mitigate litigation expenses, delays in claim payments, and the burden on the court system); *see also Karon v. Karon*, 435 N.W.2d 501, 504 (Minn. 1989) (“In the interest of judicial economy, parties should be encouraged to compromise their differences and not to litigate them.”); *Beach v. Anderson*, 417 N.W.2d 709, 712 (Minn. App. 1988)

("[R]eliance on \* \* \* settlements should be encouraged" to advance the "efforts of trial courts to hear and determine [an] ever-increasing number of cases").

By its ruling here, however, the court of appeals has set the stage for a settling party with "buyer's remorse" to void an agreement based on purported oral statements not reduced to the parties' written settlement — even where the settling party had the benefit of legal counsel and the oral statements constituted merely legal opinions of opposing counsel. In doing so, the court of appeals' ruling will inevitably cast a pall of confusion and uncertainty over many future settlement negotiations. *See Rogalla v. Rubbelke*, 261 Minn. 381, 383-84, 112 N.W.2d 581, 582-83 (1961) (recognizing that "uncertainty, chaos, and confusion as to the effect of settlements in future cases" would be an injustice to both the litigants and courts, which depend on the reliability of such settlements). This would encourage uncertainty among what would often become wary settlement participants, a result that would strike at the heart of settlement principles. And the erosion of parties' faith in the certainty of settlements (and settlement negotiations) — replaced with skepticism or suspicion — would only discourage settlement. *See Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 205 (Minn. 1986) (rejecting result that "would tend to discourage settlements rather than encouraging them"); *see also Wall v. Fairview Hosp. & Healthcare Servs.*, 584 N.W.2d 395, 404 (Minn. 1998) ("To hold otherwise would also contradict our strong public policy of encouraging settlement"). Because of the strong public policy favoring settlement agreements, coupled with the judicial system's support, this Court should

reaffirm the traditional limits on a party's right to rescind a settlement agreement. As discussed below, the court of appeals has gone too far in allowing rescission here.

For several reasons, the court of appeals' decision is erroneous and in derogation of Minnesota's strong policy of promoting settlement, and thus this Court should reinstate the district court's decision. First, the statements at issue here constitute legal opinions — not statements of fact. In his deposition, Steve Hoyt testified that the legal claim of piercing the corporate veil did not occur to him until he heard about PRG's request for a global release: "I said, 'The thought of piercing the veil, that hadn't occurred to me.'" (App. 204).<sup>2</sup> At that point, Mr. Hoyt testified that he asked both of the opposing party's lawyers, "Well, that would be piercing the corporate veil." "I don't know of any reason why they could be liable, do you?" (App. 205).

According to Mr. Hoyt, one of the adverse lawyers to whom he directed the question responded, "There isn't anything. PRG and Entolo are totally separate." (App. 205). But this response is not a statement of fact. Rather, it is a legal opinion. On its face, Mr. Hoyt's inquiry as to "piercing the corporate veil" has no meaning to someone other than a lawyer. Fraught with legal meaning and significance, the phrase means nothing to a layperson. For the court of appeals to hold that the lawyer's statement here constituted a factual representation is tantamount to holding that there is nothing that can be said that is not susceptible to rescission.

Indeed, looking at the facts of this case, the party here — Mr. Hoyt — is himself a lawyer, uniquely qualified to enter into this conversation. Hence, this is the most extreme

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<sup>2</sup> References are to Appellant's brief appendix.

factual circumstance for not allowing rescission; Mr. Hoyt is a trained lawyer, represented by his own lawyer throughout the negotiations, and the statement was made in the context that only one trained in the law would be able to understand. And it happened during the course of settlement negotiations. The offhand statement attributed to counsel that forms the basis for the rescission claim was simply a comment about legal theories, not an assertion of a present or past fact. If the potential for rescission lies under this set of extraordinary and extreme facts, theoretically any party could rescind a settlement under virtually any scenario.

Second, even if the lawyer's statement were considered a fact representation, when viewed through the prism of settlement it is less reasonable for an adverse party to rely on factual representations during settlement negotiations. When parties are involved in litigation, as is the case here, they have at their disposal all the mechanisms of discovery afforded to those in litigation. And these discovery tools are available in advance of settlement. Hence, the law should prevent a would-be settling party from placing the onus on the adverse party to produce discovery-quality factual disclosures during the course of settlement negotiations. Discovery-quality factual disclosures would be those made under oath and as a matter of record, enabling a party to evaluate the merits of the case. In contrast, the lawyer's alleged response here was neither made under oath nor as a matter of record, thereby escaping the evaluation afforded by the discovery process. And Mr. Hoyt's purported question derives exclusively from his own account — it is not a matter of record. But Mr. Hoyt improperly attempts to avoid the discovery mechanism by using settlement negotiations to ask questions and then assert

that the very validity of the settlement agreement depends on his unique recollections of the answers.

In other words, if a party wants to hunt for facts, the civil rules provide discovery procedures wherein the party may procure such discoveries. This Court should prohibit that party from using the settlement negotiations as a forum for interrogating the adverse party about facts for purposes of building a case for settlement. Stated another way, where a party wishes to engage in litigation and discovery, that is its prerogative. But if that party expresses a desire to settle, it cannot then exploit the settlement negotiations as a means to investigate facts or answer fact questions that it has failed to obtain up to that point. And this is particularly true where the party contends that the validity of the settlement agreement is contingent on the answer to its inquiries. The settlement negotiation is not the proper context in which parties can rely on “fact” representations; that is the purpose of the various discovery devices available. So here, even if the representation that “There isn’t anything. PRG and Entolo are totally separate,” were a statement of fact, Mr. Hoyt could not realistically justify any reliance on it in this settlement context.

Several scenarios illustrate the notion that parties have a diminished expectation of reliability on so-called fact representations by the opposing side during settlement negotiations. For example, during settlement negotiations when the defense attorney tells the opposing side that her client will not pay more than a certain amount in settlement — when in fact her client would — that would qualify as a “fact representation.” Yet this representation would hardly qualify as a misrepresentation that would render a valid

settlement agreement vulnerable to rescission. *See* ABA Comm. on Ethics & Prof'l Resp., Formal Op. 439 (2006) ("A party in a negotiation also might exaggerate or emphasize the strengths, and minimize or deemphasize the weaknesses, of its factual or legal position. \* \* \* Such remarks, often characterized as 'posturing' or 'puffing,' are statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely, and must be distinguished from false statements of material fact."). Conversely, when the plaintiff's attorney states during settlement negotiations that her client will accept no less than a certain amount — when in fact, her client has agreed to take what the other side has offered, but the attorney seeks to recover more — this, too, is a "fact" representation, but certainly not a statement that would undo a settlement agreement.

An even closer example is where a lawyer admonishes the other side to accept a settlement offer or else face a summary judgment motion, contending that the parties' dispute is a clear-cut case for summary judgment in his client's favor. Assume, however, that the lawyer knows that another district court has just recently rejected summary judgment on a case involving nearly identical facts, but does not disclose this to the other side when threatening to bring a summary judgment motion. Yet simply because the facts parallel those in the case where the district court rejected summary judgment, this should not prevent the lawyer from taking an aggressive position that the lawyer's client will not pay any more money because the case could likely be lost on summary judgment. Such a representation of "fact" cannot properly constitute grounds for the adverse party to later rescind the settlement agreement on the ground that it was cajoled into settling by

the other lawyer's threat of summary judgment.

In short, a party should rely on its own counsel, not other counsel — and certainly not that of the adverse party — when deciding to settle. Indeed, when a lawyer represents his or her client in settlement negotiations (or in mediation, where a similar result could occur), the lawyer's duty is only to his or her client, not to the opposing party. See *L & H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 379 (Minn. 1989) (“The adversarial nature of a lawsuit precludes an attorney from owing concurrent duties of care to his or her client and the client's opponent. \* \* \* An attorney's duty of care is owed to the client and the court, not to the client's opponent.”).

Third, it is extremely easy for a party to allege fraud, yet it is next to impossible to disprove such a claim. See *Hentges v. Schuttler*, 247 Minn. 380, 383, 77 N.W.2d 743, 746 (1956) (“It is recognized that charges of [fraud] are inherently subject to fabrication, are easily made, and are difficult to disprove.”). Here, the only individual on either side to allege that this conversation ever took place is Steve Hoyt. Both of the lawyers for the adverse party testified unconditionally that this alleged conversation about piercing the corporate veil never occurred. (App. 237-38; 220-21). And Mr. Hoyt's own attorney testified that he never heard this piercing-the-corporate-veil conversation. (App. 227). In short, there are no witnesses to corroborate Mr. Hoyt's claim that this conversation ever took place. Nevertheless, the settlement here is at risk simply because one individual said that a statement was made. This vividly illustrates how easy it is for a party to make such a claim, thereby rendering settlements vulnerable to being undone.

In turn — and with the unquestioned public interest in protecting settlements in mind — the ease with which a party’s fraud claim can threaten a settlement will cripple settlement negotiations generally. This is because the court of appeals’ decision effectively directs parties and their attorneys not to engage in a dialogue — a critical component of successful settlement negotiations generally. If a party to a settlement can undo that agreement simply by attacking after the fact what the opposing counsel allegedly said during negotiations, then the court of appeals’ decision creates a scenario in which parties (and their attorneys) come under a self-imposed gag order in settlement negotiations.

Furthermore, there is no indication that the court of appeals’ decision is limited to communications to or from parties. While the facts here involved an alleged statement by one party’s lawyer to the adverse party, if adverse counsel can make the alleged communication to the adverse party, nothing prevents the court of appeals’ ruling from applying to statements made between the lawyers, who then pass it on to the parties. The bottom line is that in the dynamic of settlement negotiations — where vigorous discussion and robust communication is vital — the court of appeals’ decision effectively deters parties from engaging in such discussion because one individual’s effortless allegation is capable of unraveling the entire settlement. This, in turn, could prevent innumerable settlements from ever taking place, thereby forcing litigants who are actually willing to settle into already packed courtrooms.

Finally, and further set against the backdrop of encouraging settlements, the court of appeals’ decision will have a chilling effect on *lawyers’* willingness to vigorously

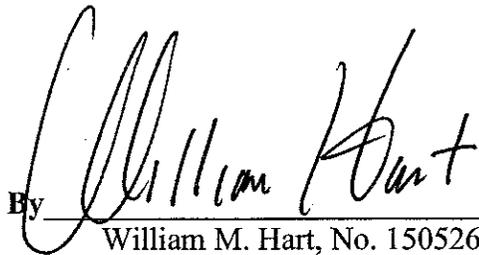
engage in settlement dialogue. As already discussed, communication between the opposing parties — and their lawyers — is essential to successful settlement negotiations. The representation here comes from a lawyer — not from a party. But if a lawyer's representation may become the basis for undoing a settlement, as this case holds, then the court of appeals' decision effectively exposes the lawyer to a claim for damages sustained by the client — namely, exposure to new attorney fees and potential exposure to additional liability caused by the rescission based on the lawyer's statement. In other words, the court of appeals' decision has sown the seeds for a new kind of legal-malpractice claim arising out of settlement negotiations. It would be an understatement to conclude that lawyers will resist participating in settlement negotiations. Under the court of appeals' ruling, lawyers will be fearful to say anything to the other side, lest they run the risk of liability exposure. And if lawyers refuse to speak to the other side, the other side may abandon settlement negotiations altogether, and more parties will have no choice but to resolve their disputes exclusively in the court system. Undeniably, this undermines the public-policy goal of promoting settlement. And it will be impossible to quantify the number of potential settlements that might have occurred, but for the chilling effect brought on by the court of appeals' decision. Thus, not only will the court of appeals' decision increase litigation over settlement rescission, it will also serve as an impediment to settlements in the first instance — further eroding the goal of encouraging settlements.

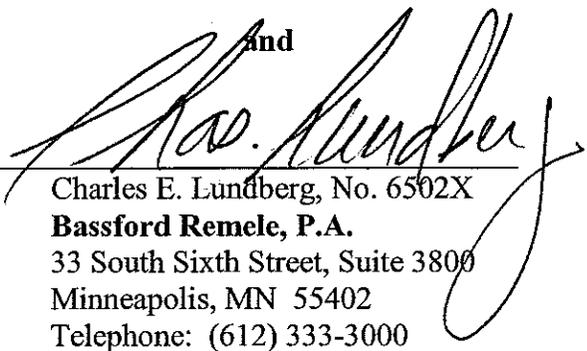
**CONCLUSION**

The court of appeals' decision sends a message to lawyers and litigants that a valid settlement agreement can be unmade by the mere allegation of fraud by a dissatisfied party. It also exposes lawyers to liability for virtually anything they say to the other side during settlement negotiations, leaving lawyers no choice but to clam up. The net effect of the decision is to drive litigants and lawyers out of settlement negotiations and into courtrooms — a result at odds with Minnesota's policy of encouraging settlement. The MDLA respectfully submits that this Court must correct the legal and doctrinal errors contained in the court of appeals' opinion.

Respectfully submitted,

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