

NO. A05-1322

State of Minnesota
In Court of Appeals

Professional Fiduciary, Inc.,
Personal Representative for the
Estate of Kory James Erickson,

Respondent,

vs.

Steven A. Silverman and
Progressive Casualty Insurance Company,

Appellants.

APPELLANTS' BRIEF AND APPENDIX

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ISSUE

1. Can an adverse party in an underlying lawsuit use its status as a creditor under Minnesota probate law to obtain the right to bring a legal malpractice claim against the opposing attorney in the name of the estate of the attorney's client?

The district court certified this as an important and doubtful question under Minn. R. Civ. App. P. 103.03(i).

Authority:

L & H Airco, Inc. v. Rapistan Corp., 446 N.W.2d 372 (Minn. 1989).

Wagener v. McDonald, 509 N.W.2d 188 (Minn. App. 1993).

Eustis v. The David Agency, Inc., 417 N.W.2d 295, 298 (Minn. App. 1987).

STATEMENT OF THE CASE

This legal malpractice claim arises out of Appellant Steven Silverman's representation of Kory James Erickson in a wrongful death case in which Erickson was one of the defendants. The wrongful death jury returned a \$495,000 verdict, for which Erickson was 50% liable and two related co-defendants were 50% liable. Because Erickson had insufficient insurance coverage and no assets, the co-defendants' liability insurer, Western National Insurance Company ("Western National Insurance"), paid most of the verdict. Erickson himself died after the wrongful death case.

Prior to his death, Erickson did not initiate a legal malpractice suit against Silverman. Instead – without Erickson's widow's direction or consent – Western National Insurance hired a probate attorney to open an estate and retained Respondent Professional Fiduciary, Inc., ("Professional Fiduciary") first to petition the probate court for appointment as the estate's personal representative and then to bring this legal

malpractice claim against Silverman and his employer, Progressive Casualty Insurance Company (“Progressive”). The wrongful death jury verdict simply gave rise to a contribution claim, but since Erickson (and then his estate) was “judgment proof,” Western National Insurance instead took this convoluted path to place itself in a position to extract Erickson’s share of the verdict from Erickson’s attorney.

On March 19, 2005, Appellants moved for summary judgment to dismiss all claims against them. The motion did not address the merits of the legal malpractice claim and was based on the threshold argument that Western National Insurance, through the appointment of a professional agent in a probate proceeding, could not be permitted to “correct” a poor result in the underlying case by suing an adverse co-defendant’s lawyer and insurance company. The district court denied the summary judgment motion by order dated March 29, 2005. The order was not accompanied by a memorandum providing the basis for denial. However, by order dated June 3, 2005, the district court granted Appellants’ motion to certify the issue in this appeal as an important and doubtful question under Rule 103.03(i). The findings of fact and conclusions of law in the June 3, 2005 order fully described the district court’s basis to conclude that this case presents an important and doubtful question, and the order itself set forth the question.

STATEMENT OF FACTS

Facts of the Accident

On February 5, 1998, an automobile owned by Erickson’s wife and operated by Erickson was involved in a collision with a vehicle operated by Sara Jean Meuhlhauser. (A-2.) As a result of the impact, the Meuhlhauser vehicle collided with a well drilling

truck owned by Hartmann Well Drilling and Service, which was insured by Western National Insurance. (A-2, 3.) (Brian J. Hartmann was driving the truck. (A-2.)) The Hartmann truck carried large metal pipes, which became disengaged upon impact. *Muehlhauser v. Erickson*, 621 N.W.2d 24, 27 (Minn. App. 2000). The pipes struck a passenger in the Meuhlhauser vehicle, 14-year-old Salina Meuhlhauser, who died as a result of her injuries. *Id.*

The Wrongful Death Lawsuit

On May 5, 1998, the trustees for the next of kin of Salina Meuhlhauser (“plaintiff”) commenced a wrongful death action against Erickson, Erickson’s wife (as owner of the vehicle), Hartmann Well Drilling and Service, and Brian Hartmann (collectively “the Hartmann defendants”). (A-3.) Attorney Silverman represented Erickson and his wife. (A-3.) Plaintiff in the underlying wrongful death action was represented by Attorney Harry Sieben. (Silverman Depo. p. 181.¹) Attorney James Martin represented the Hartmann defendants. (Silverman Depo. Exh. 9.)

The dynamics of the case created shifting alliances. Both Erickson and plaintiff wanted liability to fall to the Hartmann defendants, Erickson because he had limited insurance coverage and plaintiff because the Hartmann defendants had deep pockets. (Silverman Depo. pp. 53-54, Exh. 9.) The Hartmann defendants’ lawyer ultimately brought a motion for a directed verdict on the question of whether Erickson’s negligence caused the death. (Silverman Depo. p. 104.) Hence, the Hartmann defendants and

¹ The entire deposition transcript of Steven Silverman and all deposition exhibits are attached as Exhibit A to the Affidavit of Patrick H. O’Neill, Jr., filed with the district court in opposition to Appellants’ summary judgment motion.

Erickson were on opposite sides of liability issues. Silverman sought to have Erickson's wife dismissed from the suit, and, from a judgment collection perspective, that was in no other party's interest other than Silverman's clients. (Silverman Depo. pp. 103-04.) Finally, a low damages award would benefit all defendants and obviously harm the plaintiff.

From the very beginning of the case, Erickson's insurer, Progressive, tendered the full amount of its liability policy limits (\$30,000) in exchange for a full release of Erickson and his wife, but this offer was never accepted. (Silverman Depo. Exh. 1.) Before trial, plaintiff demanded \$250,000 to settle the case against all defendants. (Silverman Depo. Exh. 9.) Western National Insurance, as the insurer for the Hartman defendants on a policy with \$5.5 million limits, only offered a nuisance value settlement of \$10,000, even though Progressive had put its \$30,000 in policy limits on the table, and the Meuhlhausers' underinsured motorist insurer had offered its limits (\$50,000). (Silverman Depo. Exh. 7.) Western National Insurance's aggressive settlement posture was curious, given that its insureds' pipes were allegedly improperly stowed and were the physical mechanism that caused the 14-year-old's death. *Muehlhauser*, 621 N.W.2d at 27.

In light of Western National Insurance's nominal offer, the case did not settle and proceeded to trial. There was no dispute in the case that Erickson was negligent. (A-3.) Everyone understood that Erickson faced exposure well in excess of his policy limits, but, because plaintiff would not settle with Erickson individually, there was no alternative short of trial. (Silverman Depo. pp. 35, 80.) Following the close of testimony at trial,

Silverman successfully brought a directed verdict motion dismissing Erickson's wife from the lawsuit. (Silverman Depo. p. 103.) This was critical to Erickson's wife because she may have had assets that could have been subject to a judgment, while Erickson was considered "judgment proof." (Silverman Depo. pp. 103-04, Exh. 15.)

The jury returned a verdict in the amount of \$495,000, apportioning 50% fault on Erickson and 50% on the Hartmann defendants. (A-4.) Under Minnesota law, the defendants were jointly and severally liable for the entire judgment amount. (A-5.) Accordingly, Western National Insurance, as the insurer for the Hartmann defendants, paid the entire amount of the verdict minus the policy limits plus interest paid by Progressive (\$49,933.65). (A-6.)

The Facts Giving Rise to the Legal Malpractice Claim

Western National Insurance took issue with one action taken by Silverman on behalf of his client Erickson; it relates to Silverman's closing argument and has fueled vociferous motion practice, letters, and now this purported legal malpractice claim.

During closing statements, Attorney Martin argued first on behalf of the Hartmann defendants and proposed \$75,000 as an appropriate damages award. (A-4.) In Silverman's opinion, the jury was "clearly offended by that figure." (Silverman Depo. pp. 120-121.) Thus, at least four times during his closing argument, Silverman told the jury that the ultimate damages determination was its to make and was to be based on its evaluation of the evidence and its judgment. (A-47, A-48.) He specifically told the jury that he would not give them "a number." (A-47.) He also mentioned \$1 million as a damages figure to illustrate that Martin's damages assessment was too low and that the

plaintiff's counsel's assessment would no doubt would be too high. (Silverman Depo. p. 122.) Since Mr. Erickson was judgment proof, "[t]here was greater benefit. . . to coming somewhere in between Mr. Martin's number and [plaintiff's] projected number." (Silverman Depo. p. 127.) Martin, apparently unfazed by the jury's reaction to his low valuation of the case, believed that Silverman had instructed the jury to award \$1 million in damages. (Silverman Depo. Exh. 9.)

Shortly after the verdict, attorney Martin, as counsel for Western National Insurance's insureds, brought a post-trial motion, making the claim that there was an "agreement" between plaintiff's counsel and Silverman "to support each other's respective positions on damages and liability issues or alternatively not to challenge such positions." (Affidavit of Steven A. Silverman submitted in support of summary judgment motion Exh. A, p. 2.) In fact, given the shifting alignments of interests, Silverman had declined to enter into an agreement with plaintiff's counsel in which plaintiff's counsel suggested that Silverman advocate for a high damages valuation in exchange for plaintiff's counsel's not mentioning Erickson's liability. (Silverman Depo. p. 113.) Likewise, Silverman did not discuss presentation of evidence or the content of his opening statement or closing argument with plaintiff's counsel. (Silverman Depo. pp. 102, 113.) In a similar vein, Silverman declined to discuss his closing argument with the Hartman defendants' attorney, believing that such a discussion would not benefit Erickson in any way. (Silverman Depo. pp. 109-10.)

The verdict was upheld on appeal, and an attempt to seek review from the Minnesota Supreme Court by the Hartmann defendants was dismissed as untimely.

(*Muehlhauser*, 621 N.W.2d at 24; Silverman Aff. Exh. C.) Erickson committed suicide in February 2001. (A-5.) After losing the appeal, Martin wrote letters to Silverman, blaming Silverman for the jury verdict. (A-34 - A-37.) Martin even threatened to sue Silverman for legal malpractice by taking an “assignment from your client’s estate.” (A-37.) Following through on this threat, Western National Insurance hired a probate attorney, hired Professional Fiduciary to seek appointment as “personal representative” of the Erickson estate, and directed Professional Fiduciary to initiate the legal malpractice claim. (A-38, A-40.) Neither Western National Insurance nor Professional Fiduciary sought Erickson’s wife’s consent for this course of action, even though she was Erickson’s sole heir. (A-38, A-40.) The attorney retained by Western National Insurance to initiate probate proceedings wrote Erickson’s wife, advising her that “legal malpractice claims are difficult to win, but Western National intends to pursue [such a] course.” (A-39.) This same attorney recommended that Erickson’s wife not contact Silverman or Progressive, even though Silverman was her attorney and Progressive was her insurance company. (A-39.) On its face, Professional Fiduciary’s petition to the probate court, drafted by Western National Insurance’s attorney, did not provide any background information regarding the underlying case or the true reason for the appointment, which was to bring a legal malpractice claim against Silverman to try to collect Western National Insurance’s contribution claim against Erickson. (A-40 - A-42.)

ARGUMENT

If Kory James Erickson were alive today, the claims that Professional Fiduciary is making on behalf of Western National Insurance would not – and could not – exist. If he were alive, Western National Insurance could not directly sue Silverman for legal malpractice. If he were alive, Erickson, even if he wanted to, could not assign any legal malpractice claim to Western National Insurance. And under no circumstances could Western National Insurance bring a contribution claim against Silverman. Indeed, Western National Insurance has engaged in legal gymnastics to bring this claim, but no amount of maneuvering should change this conclusion: Western National Insurance, through the appointment of a professional fiduciary agent in probate court, cannot “correct” a poor trial result in an underlying case by having that professional agent sue an adverse co-defendant’s lawyer and insurance company. Western National Insurance shouldn’t be able to get something now that it could not get while Erickson was alive.

On behalf of Western National Insurance, Professional Fiduciary is asserting claims against Silverman for (1) legal malpractice; (2) breach of contract; and (3) breach of fiduciary duty. While pleaded as alternative legal theories, all the claims arise out of Silverman’s alleged “malpractice” in his closing argument during the wrongful death trial. Since all the claims, regardless of their labels, arise out of the same operative facts, they are subject to the law governing legal malpractice claims in Minnesota. *See, e.g., Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 692-93 (Minn. 1980) (holding that whether a malpractice claim is stated in terms of a “tort” or “breach of contract” theory, it is considered a claim for legal malpractice and subject to the same legal

requirements); *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 78 (Minn. 2002) (affirming dismissal of both legal malpractice and breach of fiduciary duty claims upon concluding that defendant attorneys did not breach the fiduciary duty owed to the client). Since Minnesota case law precludes (1) the assertion of a legal malpractice claim by an adverse party, (2) the assignment of a legal malpractice claim, and (3) the assertion of a contribution claim against an adverse co-defendant's attorney, this Court should answer the certified question in the negative.²

I. STANDARD OF REVIEW

Minnesota courts have roundly rejected as a matter of law legal malpractice claims brought by adverse parties, assignments of legal malpractice claims, and contribution claims against adverse parties' attorneys. Accordingly, this case presents a pure legal question of whether a party can use its status as a creditor in probate court to pursue otherwise invalid claims. *See Smith v. Brutger Cos.*, 569 N.W.2d 408, 415 (Minn. 1997). A legal issue of first impression is reviewed *de novo*. *See, e.g., Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 436 (Minn. 1990) (holding that whether tort liability existed for spoliation of evidence was a legal issue of first impression). A question of pure law likewise is reviewed *de novo*, with no deference to lower courts' decisions. *Castor v. City of Minneapolis*, 429 N.W.2d 244, 245 (Minn. 1988) (stating that analysis of constitutional "takings" claim on undisputed facts was a legal question); *Soucek v. Banham*, 503 N.W.2d 153, 161 (Minn. App. 1993) (stating that

² It is not disputed in this case that reversal of the court's decision denying the summary judgment motion would terminate the proceedings. (A-29 - A-30.)

application of doctrine of discretionary immunity is a legal question). Further, when certified questions arise from a denial of summary judgment, the summary judgment standard applies; therefore, the Court of Appeals reviews the record to resolve whether there are any genuine issues of material fact and whether the lower court erred in its application of the law. *Molloy v. Meier*, 660 N.W.2d 444, 450 (Minn. App. 2003), *aff'd*, 679 N.W.2d 711 (Minn. 2004).

II. THE COURT SHOULD ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE BECAUSE IN MINNESOTA PARTIES CANNOT SUE ADVERSE ATTORNEYS FOR LEGAL MALPRACTICE.

In Minnesota, there is a well-established general prohibition against non-clients suing lawyers. For more than 100 years, Minnesota law has consistently recognized a qualified immunity rule that protects attorneys from the claims of non-clients, especially those of adverse parties. *See, e.g., L & H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 378-79 (Minn. 1989) (affirming application of the rule on summary judgment in favor of attorney); *Langeland v. Farmers State Bank of Trimont*, 319 N.W.2d 26, 30-31 (Minn. 1982) (affirming motion to dismiss in favor of attorney); *Marker v. Greenberg*, 313 N.W.2d 4, 5-6 (Minn. 1981) (affirming summary judgment in favor of attorney); *McDonald v. Stewart*, 289 Minn. 35, 40, 182 N.W.2d 437, 440 (1970) (affirming summary judgment in favor of the attorney); *Farmer v. Crosby*, 43 Minn. 459, 461, 45 N.W. 866, 866 (1890) (affirming dismissal as to attorney), *overruled on other grounds by Erickson v. Minn. & Ont. Power Co.*, 134 Minn. 209, 158 N.W. 979 (1916); *CPJ Enters., Inc. v. Gernander*, 521 N.W.2d 622, 625 (Minn. App. 1994) (affirming summary judgment ruling that undisclosed principal cannot sue agent's attorneys for malpractice);

Schuler v. Meschke, 435 N.W.2d 156, 164 (Minn. App. 1989) (reversing denial of motion to dismiss upon certification of important and doubtful question); *Maness v. Star-Kist Food, Inc.*, 7 F.3d 704, 709 (8th Cir. 1993) (applying Minnesota law and affirming summary judgment in favor of attorney).

In all of these cases, this rule has been applied as a matter of law. The rule, as stated by the Minnesota Supreme Court, provides: “an attorney acting within the scope of his employment as attorney is immune from liability to third persons for actions arising out of that professional relationship.” *McDonald*, 289 Minn. at 40, 182 N.W.2d at 440. There are only two narrow exceptions to this otherwise sweeping rule. One pertains to a beneficiary in a will or trust, *see Marker*, 313 N.W.2d at 5, and the other applies when an attorney knowingly commits fraud or other malicious conduct, *McDonald*, 289 Minn. at 40, 182 N.W.2d at 440. Neither exception applies here.

The reasons for this qualified immunity rule are abundantly clear. As Minnesota courts have repeatedly recognized, if attorneys are subject to liability to persons other than their clients, they will be faced with “concurrent” duties that in turn will undermine attorneys’ ethical and legal obligations to act solely in their clients’ best interests. *L & H Airco*, 446 N.W.2d at 379. An attorney must be free to take action on behalf of a client without being concerned about potential liability to non-clients who may in some way be affected by the attorney’s actions. *See Melrose Floor Co. v. Lechner*, 435 N.W.2d 90, 91 (Minn. App. 1989).

The reasoning behind the rule is especially apropos when it comes to adverse parties.

In the litigation context, it is understandable that courts have been extremely reluctant to impose a duty upon attorneys to their client's adversary. Any duty imposed upon an attorney to protect an interest of the client's adversary would necessarily conflict with the duty owed by the attorney to his or her client. 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. A duty to use reasonable care to protect the interests of the client's adversary could prevent an attorney from devoting full energy to the client's interests. An attorney's duty of care is owed to the client and the court, not to the client's opponent.

L & H Airco, 446 N.W.2d at 378-79 (citations omitted).

In the present case, Professional Fiduciary is seeking damages on behalf of Western National Insurance, the insurer for two co-defendants adverse to Silverman's client in the underlying wrongful death case. It is undisputed that the only relief sought in this case is the contribution claim resulting from Western National Insurance's having to pay most of Erickson's share of the judgment because Erickson had insufficient insurance coverage and assets. While Western National Insurance may have had a valid (albeit uncollectible) contribution claim against Erickson and/or his estate, it has no claim against Erickson's lawyer as a matter of law.³

In fact, the shifting sands of the interests in the wrongful death case demonstrate the importance of insulating attorneys from legal malpractice claims brought by adverse parties. It was in Erickson's interest to argue that the majority of liability for the accident

³ The legal malpractice claim fails for a number of other reasons, including the lack of the "but for" causation element of a *prima facie* claim and the professional judgment rule, which provides immunity for tactical or judgment decisions even if later shown to be in error. These arguments were not raised in Silverman's summary judgment motion but instead were preserved for future motion practice.

should fall to Western National Insurance's insureds rather than to him; this approach coincided with plaintiff's interests, as Western National Insurance was the "deep pockets" in the suit. But, all defendants would benefit from a low damages award, which of course would be contrary to the plaintiff's interests. If parties could sue attorneys representing adverse parties, and if Erickson's counsel had argued the case differently to the jury or if the jury had made a different liability or damages determination, then, under Western National Insurance's reasoning, Silverman could have been sued by the adverse plaintiff, rather than by adverse co-defendants, had plaintiff opted to hire a professional agent to seek appointment as personal representative of the Erickson estate and then to pursue a legal malpractice claim. The law simply cannot work that way.

Furthermore, if parties were allowed to bring claims against their adversaries' attorneys, this would spawn seemingly unending satellite litigation. For example, should the Court allow Professional Fiduciary's claim on behalf of Western National Insurance to proceed, shouldn't Erickson's estate also sue Western National Insurance and/or its counsel for failing to settle the underlying wrongful death lawsuit? After all, according to the Hartmann defendants' counsel, plaintiff would have settled the wrongful death lawsuit for \$250,000.00. Both Erickson's insurer and plaintiff's underinsured motorist insurer offered their policy limits (totaling \$80,000.00) to settle the matter, but Western National Insurance only made a nuisance value settlement offer of \$10,000.00, even though the policy had \$5.5 million in limits. As a result, the wrongful death trial proceeded, and the jury's \$495,000.00 award resulted in a verdict in excess of Erickson's insurance coverage. This nettlesome issue demonstrates precisely why parties are not

allowed to sue adverse parties' attorneys. The Court should answer the certified question in the negative.⁴

III. THE COURT SHOULD ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE BECAUSE THE TRANSFER OF ERICKSON'S LEGAL MALPRACTICE CLAIM TO PROFESSIONAL FIDUCIARY AS AGENT FOR WESTERN NATIONAL INSURANCE VIOLATES THE MINNESOTA PUBLIC POLICY AGAINST THE ASSIGNMENT OF LEGAL MALPRACTICE CLAIMS.

In Minnesota, legal malpractice claims are not assignable to non-client third parties. See *Wagener v. McDonald*, 509 N.W.2d 188 (Minn. App. 1993). This rule in Minnesota is consistent with "the vast weight of authority" in other jurisdictions. See *Kracht v. Perrin, Gartland & Doyle*, 268 Cal. Rptr. 637, 639 n.4 (Ct. App. 1990). *Wagener* unequivocally held that "the assignment of legal malpractice claims is against Minnesota's public policy," for five reasons: (1) an assignment is incompatible with an attorney's duty to act loyally toward the client; (2) an assignment is incompatible with an attorney's duty to maintain confidentiality; (3) the inherent fiduciary nature of the attorney-client relationship is of the very highest character, which requires that the relationship be restricted only to the parties involved; (4) there is the risk of collusion

⁴ The only case upon which Professional Fiduciary relied to argue that it could bring a legal malpractice claim against Silverman was *Appletree Square I Limited Partnership v. O'Connor & Hannan*, 575 N.W.2d 102 (Minn. 1998). *Appletree* held that a liquidating agent in a bankruptcy could bring the bankruptcy debtor's legal malpractice claim against its former law firm. Of course, this case is distinguishable because it is rooted in federal bankruptcy law rather than in state law. Furthermore, and more importantly, in *Appletree*, the defendant in the underlying lawsuit allegedly giving rise to the malpractice claim did not take advantage of bankruptcy proceedings to have an agent appointed to sue the attorneys who were adverse to the defendant. Instead, the defendant in the underlying claim was not a creditor of the bankruptcy estate instigating a legal malpractice claim for adverse counsel's prior conduct in an adverse proceeding. Hence, the public policy precluding claims by adverse parties did not apply in *Appletree*.

between disgruntled clients and third parties; and (5) assignment would relegate a legal malpractice action to the marketplace as a commodity to be exploited and transferred to those who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty. 509 N.W.2d at 191.

If Erickson were alive and if he assigned any purported legal malpractice claim to Western National Insurance, such assignment would run afoul of Minnesota's bright-line rule and the reasons undergirding the rule. The assignment would be incompatible with Silverman's duty of loyalty to Erickson, whose interests were frequently adverse to Western National Insurance's insureds throughout defense of the lawsuit and at trial. Furthermore, to defend himself, Silverman would be pressed to disclose both attorney work product and his confidential communications with Erickson. An assignment would adulterate the attorney-client relationship between Erickson and Silverman, with not just a neutral third party but a third party adverse to Erickson stepping into the shoes of Erickson to sue Silverman. The risk of collusion would exist, whereby Erickson would seek to avoid the financial ramifications of an excess verdict based on his own allegedly negligent conduct by blaming his attorney for one sentence in a closing argument and assigning his claim to an adverse party. Last, the assignment would relegate the legal malpractice action to the status of "commodity," to be bartered and sold to satisfy a judgment.

An assignment is simply a transfer of some property or right to another. *Cashman v. Bremer*, 206 Minn. 301, 306, 288 N.W. 732, 734 (1939). There is no question that the legal maneuvering initiated by Western National Insurance has resulted in a *de facto*

assignment of Erickson's legal malpractice claim. In fact, counsel retained by Western National Insurance to defend the Hartmann defendants baldly stated: "[m]y clients are reserving all rights they may have, *including taking an assignment from your client's estate*, in order to recover all amounts that they have had to pay to satisfy the Muehlhauser judgment." (A-37) (emphasis added). Any right that Silverman's client, Erickson, had to bring a legal malpractice claim purportedly was transferred to Western National Insurance by virtue of its claim that it was a "creditor" of the estate and therefore entitled to appoint Professional Fiduciary as a personal representative to pursue the legal malpractice claim. That is an assignment, the benefit inuring solely to Western National Insurance. Since such an assignment would not be allowed while Erickson was alive, it likewise should not be allowed after his death. Western National Insurance should not be allowed to rely upon the estate's fictional interest in a malpractice claim to pursue an otherwise barred cause of action.

Furthermore, the way in which Western National Insurance purportedly obtained Erickson's legal malpractice claim is far more objectionable than would be in a usual client assignment like the *Wagener* case. At least in the typical assignment, the client would be making the decision to transfer the claim to a third party. Here, the client never made that decision, nor did his wife, who was his sole heir. (A-38.) Neither Erickson nor his next-of-kin ever sought to initiate a malpractice claim. Rather, Western National Insurance took tactical advantage of Erickson's death to step in as a "creditor" and assert claims under the guise that it was representing the "estate." In fact, it is representing only itself.

The fundamental concern underlying the prohibition against the assignment of a legal malpractice case is present here – the trafficking of legal malpractice claims to a third party that did not have an attorney-client relationship with the attorney. Indeed, the third party was an adversary in the underlying case. *Wagener* perfectly captured the untenability of the arrangement:

“The client-lawyer relationship is structured to function within an adversarial legal system. In order to operate within this system, the relationship must do more than bind together a client and a lawyer. It must also work to repel attacks from legal adversaries. Those who are not privy to the relationship were often purposefully excluded because they are pursuing interests adverse to the client’s interests.”

509 N.W.2d at 191 (quoting *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338, 343-44 (Ind. 1991)).

The transfer of the client’s alleged legal malpractice claim to Western National Insurance by virtue of Erickson’s death and Western National Insurance’s status of a creditor violates Minnesota public policy against non-client legal malpractice claims. The adversary in a lawsuit should not be allowed to sue the opposing party’s attorney by obtaining an assignment or transfer of a legal malpractice claim, regardless of whether the purported assignment occurs by virtue of the client’s voluntary assignment or – in sharp contrast – because of the client’s death. Under *Wagener*, the certified question must be answered in the negative.

IV. THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE NEGATIVE BECAUSE THE MALPRACTICE CLAIM VIOLATES THE RULE AGAINST BRINGING A CONTRIBUTION CLAIM AGAINST AN OPPOSING PARTY'S ATTORNEY.

Minnesota law prohibits a party from bringing a contribution claim against an opposing lawyer. *See Melrose Floor Co. v. Lechner*, 435 N.W.2d 90, 91 (Minn. App. 1989); *Eustis v. The David Agency, Inc.*, 417 N.W.2d 295, 299 (Minn. App. 1987); *see also* Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* §7.15, at 760 (5th ed. 2000) (citing cases where “policy considerations have been a persuasive reason to preclude a negligence cause of action against the client’s present or former attorney in favor of the client’s adversary or a third party”).

This prohibition is “based on the public policy that permits a lawyer to make decisions for a client without concern for personal liability in contribution claims to persons the client sues.” *Lechner*, 435 N.W.2d at 91. This is also consistent with the rule of law that a lawyer is not liable to a third-party non-client unless the lawyer engages in fraud. *Id.* When the *Eustis* case came under attack by the appellant in *Lechner*, the Court of Appeals held that *Eustis* was “principally founded on public policy reasons which protect the attorney-client relationship,” and the *Lechner* court “[found] no fault in the *Eustis* court’s recitation of public policy. The rule of law barring contribution claims in these cases encourages quality legal services.” *Id.* at 92. Hence, in *Lechner*, an attorney sued by a company for allegedly negligently drafting a pension plan could not bring a contribution claim against the attorneys who administered the plan and unsuccessfully defended the company in an IRS audit of the plan. *Id.* at 91.

In *Eustis*, an insurer-defendant brought a claim against the attorney of a plaintiff who sought to set aside a settlement agreement with the insurer. 417 N.W.2d at 296-97. Plaintiff sought to set aside the settlement agreement because she believed the insurer had acted fraudulently by concealing the existence of relevant coverage, and the insurer sued the plaintiff's attorney, claiming that, if the plaintiff was induced to execute the settlement agreement and if the settlement agreement was obtained by fraud, the improvidence of entering into the settlement agreement was caused by plaintiff's attorney. *Id.* In affirming summary judgment in favor of the attorney, the Court of Appeals stated:

To make an attorney liable for negligent confidential advice not only to the client who enters into a transaction in reliance upon the advice but also to the other parties to the transaction with whom the client deals at arm's length would inject undesirable self-protective reservations into the attorney's counselling role. The attorney's preoccupation or concern with the possibility of claims based on mere negligence (as distinct from fraud or malice) by any with whom his client might deal would prevent him from devoting his entire energies to his client's interest. The result would be both an undue burden on the profession and a diminution in the quality of the legal services received by the client.

Id. at 298 (quotations omitted). The Court of Appeals rejected the insurer's claim, despite the fact that it was one for contribution as opposed to a direct claim for negligence. *Id.* at 299.

Western National Insurance seeks to accomplish exactly what adverse non-clients were barred from doing in *Eustis* and *Lechner*. Western National Insurance has made no secret of the fact that the entire reason it hired a probate attorney and hired Professional

Fiduciary to become personal representative and file this lawsuit was to collect Western National Insurance's contribution claim. In the letter to Erickson's wife, Western National Insurance's probate attorney first explained that Western National Insurance had a \$217,500.00 judgment against Erickson "[d]ue to its right of contribution," and then stated that "[it] is the hope of Western National that the Estate will prevail on its malpractice claim, and any monies received will be used to pay off the . . . Judgment." (A-38 – A-39) (emphasis added). \$217,500.00 is the only indebtedness of the estate listed on the petition for appointment of a personal representative, which was drafted by Western National Insurance's attorney. (A-40 – A-42.) Furthermore, the only damages claimed in this legal malpractice action are "217,500.00, representing the judgment that Hartmann Well Drilling obtained against the estate of Kory James Erickson based upon contribution and indemnity, plus interest." (Affidavit of Kevin P. Hickey submitted in support of summary judgment motion Exh. 2, p. 5.)

If Western National Insurance had attempted to bring a contribution claim against its insureds' adverse attorney while Erickson was alive, the claim would fail without question. Western National Insurance would be situated exactly as was the insurer in *Eustis*, which sought to sue an adverse attorney in a settlement deal. It is only because Erickson is dead that Western National Insurance could position Professional Fiduciary to bring this contribution claim, cloaked as a legal malpractice claim. Western National Insurance should not be allowed to take advantage of Erickson's death to pursue a claim that would otherwise be barred by law. Professional Fiduciary admits it is suing Erickson's attorney to collect this contribution claim for Western National Insurance.

That Erickson is dead changes none of the policy considerations that bar contribution claims against attorneys by adverse parties. Thus, the Court should answer the certified question in the negative.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court answer the certified question in the negative and remand this matter to the district court for entry of summary judgment on all claims and dismissal of the case.

Respectfully submitted,

BASSFORD REMELE
A Professional Association

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).