
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' REPLY BRIEF AND APPENDIX

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ARGUMENT

I. WESTERN NATIONAL INSURANCE IS THE REAL PARTY IN INTEREST IN THIS MATTER.

Starting on page one of its brief, Respondent repeatedly argues that “[n]o party adverse to the decedent in an underlying action has obtained the right to or asserted a legal malpractice claim in this matter.” In reality, Western National Insurance is using Professional Fiduciary as a stalking horse to assert claims Western National Insurance could not have otherwise brought if Kory Erickson were still alive. The attorney retained by Western National Insurance to defend its insureds in the underlying wrongful death lawsuit foreshadowed this eventuality when that attorney threatened to sue Kory Erickson’s attorney, Steven Silverman, for legal malpractice by taking an “assignment from your client’s estate.” (A-37.) Then, a probate attorney retained by Western National Insurance followed through on the threat, as explained in that attorney’s own words in a letter to Mr. Erickson’s widow:

Please be advised that I have been retained by Western National Insurance Group

. . . .

Western National, as a creditor of Kory’s Estate, has standing to open a probate proceeding. . . . The purpose of opening a probate for your husband’s estate is to pursue a legal malpractice claim against Mr. Silverman and potentially recover monies to deposit into the Estate. . . . [I]t 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 attached judgment.

(A-38-39.)

The discovery conducted in this legal malpractice claim also serves to confirm that Western National Insurance is the real party in interest. The only damages in the legal malpractice claim are \$217,500, which solely consist of the judgment against the estate arising from Western National Insurance's contribution claim. (Affidavit of Kevin P. Hickey submitted in support of summary judgment motion, Exh. 2, p. 5.) In an interrogatory asking about agreements between Western National Insurance and Professional Fiduciary relating to repayments, reimbursements, or any other consideration from any recovery in this legal malpractice claim, Professional Fiduciary stated "the estate of Kory James Erickson is subject to a judgment in favor of Western National Insurance Group." (*Id.*) Western National Insurance has the only claim against the estate, as exhibited by the petition to the district court for appointment of a personal representative drafted by Western National Insurance's own attorney. (A-40-42.)

Not even Mr. Erickson's widow is interested in pursuing this malpractice claim, though she is the sole heir. In the above block-quoted letter, Western National Insurance's attorney suggested to the widow that, pursuant to Minn. Stat. § 524.2-402-404, she might be eligible for up to \$28,000 if Western National Insurance prevailed in "its" malpractice claim. (A-39.) (In this same letter, Western National Insurance's attorney encouraged the widow not to contact Mr. Silverman or Progressive, even though Mr. Silverman defended her in the wrongful death lawsuit, and Progressive was her insurance company. (*Id.*)) Despite this promise of potential money, the widow has done nothing to participate or assist in prosecuting the legal malpractice claim. She apparently was satisfied with Mr. Silverman, who got her dismissed from the wrongful death suit

and thus preserved her assets. Surely, she knows that Western National Insurance, and Western National Insurance alone, is the only party interested in pursuing the claim. Without question, Western National Insurance is the real party in interest.

While ostensibly arguing that it is not a party to the malpractice claim, Western National Insurance has repeatedly portrayed itself as the victim of Mr. Silverman's allegedly bad lawyering. In fact, it insured the defendants who failed to secure pipes to a truck, and those pipes, which became dislodged in the course of the automobile accident that killed the fourteen-year-old, were the physical mechanism that caused her death. *Muehlhauser v. Erickson*, 621 N.W.2d 24, 27 (Minn. App. 2001). Given its insureds' unclean hands, Western National Insurance nonetheless made only a nuisance value settlement offer of \$10,000 on the eve of trial, even though the plaintiffs demanded \$250,000 to settle the suit, Progressive had put its \$30,000 in policy limits on the table, the underinsured motorist insurer had offered its limits of \$50,000, and Western National Insurance's policy had a \$5.5 million limit. (Silverman Depo. Exhs. 7, 9.)¹ Furthermore, the attorney retained to defend Western National Insurance's insureds "clearly offended" the jury in his closing argument by proposing \$75,000 as an appropriate damages award. (A-4, Silverman Depo. pp. 120-21.) Western National Insurance's retained counsel also missed an appeal deadline to the Minnesota Supreme Court after it had appealed the jury verdict to the Minnesota Court of Appeals. (Reply A-1.)

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.

Western National Insurance has likened itself to a plumber who is owed money at the time of someone's death. (Respondent's Brief, p. 7.) In reality, its own conduct before and during the trial greatly contributed to the possibility of a jury verdict in excess of Mr. Erickson's policy limits. Western National Insurance is the real party in interest who is a far cry from a plumber whose bill was not paid simply because his or her customer died.

II. NUMEROUS PUBLIC POLICY CONSIDERATIONS DIRECT THE RESULT THAT AN ADVERSE PARTY IN AN UNDERLYING LAWSUIT CANNOT USE ITS STATUS AS A CREDITOR UNDER MINNESOTA PROBATE LAW TO BRING A LEGAL MALPRACTICE CLAIM AGAINST AN OPPOSING ATTORNEY.

In concentrating in its brief almost entirely on procedural probate code provisions, Professional Fiduciary addresses none of the public policy considerations raised by Mr. Silverman. Indeed, by attempting to reformulate the certified question, Professional Fiduciary is ignoring the public policy ramifications presented by the issue. Professional Fiduciary submits that the appropriate question is “[w]hether the personal representative of the estate of a deceased client may pursue a legal malpractice claim against the decedent's former attorney.” (Respondent's Brief, p. 1.) Of course, that is not an important or doubtful question, as the Minnesota Court of Appeals has already held that the estate of a deceased client can commence a legal malpractice claim against the decedent's attorney. *See Johnson v. Taylor*, 435 N.W.2d 127, 129 (Minn. App. 1989). The real question here – as captured by the district court – goes to the heart of whether circumstances can exist in which an adverse party should be able to sue the other side's lawyer. This case follows in a long line of others that have answered that question “no.”

A. Minnesota Courts Have Repeatedly Relied on Public Policy to Bar Legal Malpractice Claims, Contribution Claims Against Opposing Attorneys, and Assignments of Legal Malpractice Claims.

Minnesota courts have thoroughly analyzed and repeatedly relied on public policy considerations to disallow certain kinds of legal malpractice claims (including those brought by third parties), contribution claims against adverse attorneys, and assignments of legal malpractice claims. When the Minnesota Supreme Court held that attorneys cannot be sued for malpractice by adverse third parties, it relied on public policy considerations, such as not wanting to undermine the trust between an attorney and client or undermine an attorney's duty to zealously represent the client. *L & H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 379 (Minn. 1989); *see also Anderson v. Orlins*, No. C3-88-897, 1988 WL 113764, at *2 (Minn. App. Nov. 1, 1988) (discussing "strong public policy reasons for not extending an attorney's liability to adversarial third parties") (Reply A-2-5).²

In barring contribution claims against an adverse party's attorney and assignments of legal malpractice claims, the Minnesota Court of Appeals has repeatedly referred to public policy as the basis for its decisions. *See, e.g., Wagener v. McDonald*, 509 N.W.2d 188, 191 (Minn. App. 1993) ("We believe the assignment of legal malpractice claims is against Minnesota's public policy."); *Melrose Floor Co. v. Lechner*, 435 N.W.2d 90, 92

² Minnesota courts have also relied on public policy to bar other kinds of legal malpractice claims. *See, e.g., Dziubak v. Mott*, 503 N.W.2d 771, 773 (Minn. 1993) (holding that "sound public policy reasons" dictated that public defenders cannot be sued for legal malpractice); *CPJ Enters., Inc. v. Gernander*, 521 N.W.2d 622, 624-25 (Minn. App. 1994) (holding that an undisclosed principal cannot sue its agent's attorney for malpractice, for numerous public policy reasons).

(Minn. App. 1989) (stating that prohibition on contribution claims against an adverse party's attorney is "principally founded on public policy reasons which protect the attorney-client relationship"). The public policy consideration barring all these types of claims were discussed extensively in Appellants' Brief. (*See, e.g.*, Appellants' Brief, pp. 11-13, 14-15, 18.) All of these public policy considerations go unanswered in Respondent's Brief.

The only public policy argument put forth by Professional Fiduciary is that, if this case is not allowed to proceed, any creditor of an estate could potentially lose its right to commence a probate proceeding if the party became a creditor "by means objectionable to a party against whom the estate holds the claim." (Respondent's Brief, p. 15 n.3.) Answering "no" to the certified question will not throw probate creditors' rights into disarray or inextricably alter Minnesota's contribution and assignment law. Instead, a negative answer will merely be consistent with already well-established and precisely crafted exceptions to malpractice, contribution, and assignment law that preclude a party from suing an adverse attorney. These public policy exceptions are necessary to preserve the unique fiduciary relationship between attorneys and clients and to maintain the ethical strictures visited upon attorneys by the professional responsibility rules. Both precedent and public policy compel the result that the Court answer the certified question in the negative.

B. Holding That Professional Fiduciary's Claim is Barred by Public Policy Considerations Will Not Improperly Invade the Province of the Legislature.

Throughout its brief, Professional Fiduciary impliedly argues that the Court of Appeals should not invade the province of the Legislature by concluding that Professional Fiduciary may not proceed with this legal malpractice claim. The flaw with this argument is threefold.

- 1. The first flaw: Professional Fiduciary has put forth no evidence or argument that the Legislature ever considered how or whether the probate code can be used to bring otherwise barred claims.**

By simply relying on probate court procedure, Professional Fiduciary seeks to upset the apple cart and allow a claim that has been barred by Minnesota courts for more than 100 years. *See Farmer v. Crosby*, 43 Minn. 459, 45 N.W. 866 (1890), *overruled on other grounds by Erickson v. Minn. & Ont. Power Co.*, 134 Minn. 209, 158 N.W. 979 (1916). The common law is clear: third parties cannot bring legal malpractice claims or contribution claims against their adversaries' attorneys or accept assignments of legal malpractice claims. Professional Fiduciary has put forth no evidence or argument that the Legislature intended to disrupt this long line of common law. If a "statute is intended to abrogate the common law, the abrogation must be 'by express wording or necessary implication.'" *Isles Wellness, Inc. v. Progressive N. Ins. Co.*, ____ N.W.2d ____, 2005 WL 2233474, at *6 (Minn. Sept. 15, 2005) (quoting *Wirig v. Kinney Shoe Corp.*, 464 N.W.2d 374, 377-78 (Minn. 1990)). In the absence of this express direction from the Legislature, this Court, relying on public policy considerations and a long line of

precedent, should answer the certified question in the negative and hold that Professional Fiduciary may not proceed with its claim.

2. **The second flaw: The probate code itself gives the Court discretion to conclude that Western National Insurance is not an “interested person” who may institute a probate proceeding or hire Professional Fiduciary to do the same.**

The definition of “interested person” in Minnesota’s probate code also supports the conclusion that the Court may bar Professional Fiduciary’s claims. The definition of “interested person” does not give Professional Fiduciary carte blanche permission to assert this malpractice claim. “[T]he meaning of [interested person] as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding.” Minn. Stat. § 524.1-201.

In interpreting an almost identical statute, the California Court of Appeal held that the definition of “interested person”

broadly permits the court to determine the sufficiency of a party’s interest for the purposes of each proceeding conducted. . . . Thus, [it] is designed to provide the probate court with flexibility to control its proceedings to both further the best interests of the estate and to protect the rights of interested persons to those proceedings. . . . Determination of whether a party has standing under [the definition] requires [the probate court] to evaluate the underlying policy considerations regarding a specific probate proceeding in determining whether the person or party is sufficiently interested to intervene.

Arman v. Bank of Am., N.T. & S.A., 88 Cal. Rptr. 2d 410, 414 (App. Ct. 1999) (quotations omitted) (emphasis added); *see also Estate of Chell*, No. D041122, 2004 WL 27731, at *4 (Cal. Ct. App. Jan. 6, 2004) (holding that a decedent’s child inheriting limited

personal property was not an “interested person” for purposes of the estate’s potential claims of physical and financial abuse against other beneficiaries) (Reply A-6-11); *Estate of Campbell*, 106 P.3d 1096, 1102 (Haw. 2005) (holding that the definition of “interested person” allows the court to determine the sufficiency of a party’s interest relative to the particular probate proceeding); *Estate of Thorne*, 704 A.2d 315, 317-18 (Me. 1997) (holding that adverse parties lacked standing under probate code provision identical to Minnesota’s); *Taylor v. Taylor*, 47 S.W.3d 377, 383 (Mo. Ct. App. 2001) (concluding, under a similar definition of “interested person,” that heirs do not have standing in guardianship cases because no one is heir to the living); *Estate of Miles*, 994 P.2d 1139, 1145 (Mont. 2000) (holding that heirs are not interested persons when their claims against an estate exist only to the extent to which they are entitled to insurance proceeds, and there are no such proceeds payable to the estate).

Answering the certified question “no” will do no violence to Minnesota’s probate code, under which courts consider the sufficiency of parties’ interests on a case-by-case basis.

3. The third flaw: The courts – not the Legislature – regulate the practice of law.

Finally, the judiciary has the inherent authority to regulate the practice of law. *See, e.g., Sharood v. Hatfield*, 296 Minn. 416, 425, 210 N.W.2d 275, 280 (1973). In exercising its inherent authority, the Minnesota Supreme Court, for example, has ruled that a corporation must be represented by an attorney, regardless of any statute to the contrary. *Nicollet Restoration, Inc. v. Turnham*, 486 N.W.2d 753, 755 (Minn. 1992). It

has concluded that a statute re-directing attorney registration fees from a special fund to the state's general revenue fund is unconstitutional. *Sharood*, 296 Minn. at 429, 210 N.W.2d at 282. Courts also retain the inherent power to adopt standards relating to marital or attorney-client privilege, despite statutory creation of the same privileges. *State v. Gianakos*, 644 N.W.2d 409, 415 (Minn. 2002); *Minneapolis Star & Tribune Co. v. Hous. & Redevelopment Auth. in and for the City of Minneapolis*, 310 Minn. 313, 318-19, 251 N.W.2d 620, 622-23 (1976).

Thus, regardless of statutory provisions, when a proposed claim will threaten attorneys' ability to zealously represent their clients, to trust their clients, and to otherwise avoid violations of professional responsibility rules, courts may – and indeed should – bar such claims. In the case at hand, Professional Fiduciary's claim is barred by numerous public policy considerations that go to the crux of practicing law. *See, e.g., L & H Airco*, 446 N.W.2d at 378-79; *Wagener*, 509 N.W.2d at 191; *Lechner*, 435 N.W.2d at 92; *Eustis v. The David Agency, Inc.*, 417 N.W.2d at 295, 298 (Minn. App. 1987). Given the grave public policy considerations presented by Professional Fiduciary's claim, the judiciary, in its regulation of the practice of law, should bar the claim.

III. THE COURT SHOULD ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE BECAUSE THIS LEGAL MALPRACTICE CLAIM IS NOTHING MORE THAN A CONDUIT OF RECOVERY FOR A CREDITOR.

In its brief, Respondent relies on *Appletree Square I Limited Partnership v. O'Connor & Hannan*, 575 N.W.2d 102 (Minn. 1998), to argue that this lawsuit does not constitute an improper assignment of a legal malpractice claim. *Appletree* is

distinguishable on two grounds. First, in *Appletree* the defendant in the underlying lawsuit allegedly giving rise to the malpractice claim did not use the bankruptcy proceeding to have an agent appointed to sue the attorneys who were adverse to the defendant. In fact, the defendant was not a creditor of the bankruptcy estate, and the creditor who appointed the agent who ultimately brought the legal malpractice claim was not involved in the underlying lawsuit. *Id.* at 103-04.

Second, while the *Appletree* court allowed the liquidating agent to prosecute a legal malpractice claim, bankruptcy trustees or liquidating agents are differently situated from the *Appletree* agent when they attempt to prosecute legal malpractice claims that will inure only to the benefit of creditors and not to the bankruptcy estate. In *Moratzka v. Senior Cottages of America, LLC*, No. Civ. 05-809, 2005 WL 2000185 (D. Minn. Aug. 18, 2005)³, a trustee sought to sue the bankrupt entity's former attorney, claiming that the attorney assisted the principal of the bankrupt entity in fraudulently transferring all of the assets to a new entity. *Id.* at *1. The bankruptcy court dismissed the first complaint and refused to allow the trustee to amend the complaint, primarily because the trustee lacked standing to bring the claims because the claims solely belonged to creditors themselves and did not inure to the benefit of the bankruptcy estate. *Id.* at *2. Even though the creditors could not bring a legal malpractice claim against the attorney because they were third parties, the trustee also lacked standing to bring a legal malpractice lawsuit. *Id.*

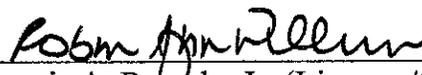
³ This case has been appealed to the United States Court of Appeals for the Eighth Circuit.

The claim failed because the trustee was unable to show that the debtor would act as anything other than a conduit of recovery for creditors. *Id.* at *3.

Professional Fiduciary is improperly doing the same thing as the *Moratzka* trustee, prosecuting a claim in the name of an estate that will only benefit a creditor who otherwise could not bring the claim on its own. The Court should answer the certified question in the negative.

Respectfully submitted,

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