
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.

RESPONDENT'S BRIEF AND APPENDIX

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ISSUE

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

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?

Respondent submits that the question certified by the district court does not accurately reflect the legal issue or the parties and procedural posture in this case. No party adverse to the decedent in an underlying action has obtained the right to or asserted a legal malpractice claim in this matter. The Plaintiff in this legal malpractice action is the personal representative of the estate of decedent Kory James Erickson, not the adverse party in the underlying lawsuit or its insurer. Accordingly, Respondent submits that the appropriate issue to be determined in this appeal is as follows:

Whether the personal representative of the estate of a deceased client may pursue a legal malpractice claim against the deceased's former attorney?

STATEMENT OF THE CASE

Appellants Steven A. Silverman and Progressive Casualty Insurance Company bring this appeal of a certified question following denial of their motion for summary judgment by the Honorable Patrice K. Sutherland, Judge of Dakota County District Court.

This is a legal malpractice claim arising from Appellant Steven A. Silverman's (hereinafter "Silverman") breach of the applicable standard of care in his representation of

Kory James Erickson, which exposed Erickson to liability in excess of available insurance coverage. The underlying case involved a wrongful death claim asserted against Erickson after he rear-ended a vehicle and forced it into the path of an oncoming truck, resulting in the death of a 14-year-old girl. The driver and owner of the truck were also named defendants in the underlying case.

Silverman was an employee of Erickson's auto insurance company, Progressive Casualty Insurance Company (hereinafter "Progressive"). Despite the fact that Silverman had never tried a wrongful death case before, Progressive assigned him Erickson's defense.

The jury in the wrongful death case returned a verdict in the amount of \$495,000 and assigned fifty percent fault to both Erickson and the driver of the truck.¹ Erickson had insufficient assets and liability insurance coverage to satisfy the judgment against him. Accordingly, Western National Insurance Company (hereinafter "Western National"), the insurer for Erickson's co-defendants, paid the portion of Erickson's liability that he was unable to satisfy and obtained a judgment against Erickson for that amount. By paying "more than its fair share" and obtaining a judgment against Erickson, Western National became a judgment creditor of Erickson. Erickson committed suicide on February 8, 2001.

As authorized by and in full compliance with the Minnesota probate statutes, Western National, as a judgment creditor of Erickson's estate, retained a probate lawyer to petition to open the estate for the appointment of a personal representative. Before doing so, the

¹ The jury's verdict was affirmed on appeal. See *Muehlhauser v. Erickson*, 621 N.W.2d 24 (Minn. Ct. App. 2000).

probate lawyer notified Erickson's widow of the impending petition. Erickson's widow did not, at any time, object to this course of action. Respondent Professional Fiduciary was then duly appointed personal representative of the estate of Kory James Erickson. After its appointment, Professional Fiduciary, Inc. retained legal malpractice counsel. Pursuant to Minn. Stat. § 544.42, counsel submitted the case for review by an expert who concluded that Silverman had departed from the applicable standard of care. Professional Fiduciary then commenced this action.

On March 19, 2005, Appellants brought a summary judgment motion. Appellants argued that Professional Fiduciary, Inc. could not maintain a legal malpractice action notwithstanding the fact that it was the duly appointed personal representative of the estate of Kory James Erickson. Appellants argued alternatively that there had been an improper assignment of the legal malpractice claim to Western National, that the claim had been asserted by a representative of an adverse party in the underlying case, or that the claim improperly sought contribution from an opposing attorney.

By Order dated March 29, 2005, the district court, the Honorable Patrice K. Sutherland presiding, denied Appellants' motion. Judge Sutherland subsequently granted Appellant's motion to certify an issue raised in Appellant's summary judgment motion for immediate appeal under Minn. R. Civ. App. P. 103.03(i).

STATEMENT OF FACTS

On February 5, 1998, Salina Muehlhauser was killed when a vehicle operated by Kory James Erickson rear-ended the vehicle in which she was a passenger while it was stopped at

an intersection. The force of the impact propelled the Muehlhauser vehicle into the cross traffic lanes where it collided with a truck owned by Hartman Well Drilling & Service. (A-2.) Salina Muehlhauser's family commenced a wrongful death action against Erickson and the driver and operator of the well drilling truck. At the time of the accident Erickson had automobile insurance through Respondent Progressive with liability limits of \$30,000. (RA 195.) Respondent Silverman was in-house, "captive" counsel for Respondent Progressive. (RA 41-42.) Despite the fact that Silverman had never tried a wrongful death case before, Progressive assigned him to defend Erickson. (RA 46.)

The case did not settle, and a jury trial commenced on January 24, 2000. Prior to closing argument, Defendant Silverman was approached by Harry A. Sieben, Jr., the plaintiff's attorney, who suggested that Defendant Silverman request a high dollar amount in damages in exchange for Mr. Sieben not mentioning anything about the liability of Erickson. (RA 67.) Defendant Silverman now claims he did not agree to such a deal, but in his closing argument made the following statement to the jury:

There's nothing to look at that we can bring into court to say, "This is what you ought to award." So we have to rely on your collective good judgment and applying the fact here to make that determination.

And I don't have any magic answer for you. I can't give you a number and say, 'this number is what it ought to be.' And I'm not going to give you a number that says, "This is what it ought to be."

I can say that given the, given the facts as you've heard on the law that the judge has read to you **that awarding, oh, let's say, \$1 million may be appropriate.** But the ultimate determination is yours in evaluating all of the evidence.

So for the benefit of those who can't see the board that you are looking at as I am writing on it, I believe that \$75,000 is too low. That a multi-million dollar verdict is too high. And I leave the remainder to your good judgment.

(RA 69, RA 150-51.) Defendant Silverman then went on to argue that the jury should find Erickson 5% at fault. (RA 171.) In this malpractice action, Respondent claims that it was a departure from the applicable standard of care for Silverman to suggest a jury award of \$1 million when his client only had \$30,000 in liability insurance coverage. Even if the jury had accepted Silverman's ridiculously low argument for five percent fault allocation to Erickson, an overall jury award of \$1 million would have exposed Erickson to liability \$20,000 in excess of available liability coverage. (RA 71.) The jury returned a verdict in the amount of \$495,000, apportioning 50% fault to Erickson, and 50% fault to Hartman. (RA196-97)

Under Minnesota law, the defendants in the underlying case were jointly and severally liable for the entire judgment amount. Accordingly, Western National, the insurer for the Hartman Defendants, was forced to pay the entire amount of the verdict, less Progressive's liability limits of \$30,000. (RA198-200.) An appeal was taken, and the jury verdict was affirmed on December 26, 2000.

On February 8, 2001, Erickson committed suicide. On February 23, 2001, Kim M. Ledbetter was appointed to serve as representative of the descendants of Erickson per Rule 25 of the Minnesota Rules of Civil Procedure. (RA208-10.) On March 9, 2001 a judgment

in the amount of \$217,500 was entered against the Estate of Kory James Erickson in favor of Western National based on the fact that it paid more than its fair share of the judgment. (RA211-13.)

On May 22, 2003, after being retained by Western National, probate attorney Robert A. McLeod notified Katie Jean Erickson of his intent to open a probate proceeding under Minn. Stat. § 524.3-203. He further informed Ms. Erickson that she may receive up to \$28,000 pursuant to Minn. Stat. § 524.2-402 through §524.2-404. (RA221-26, RA233-34.)

On June 6, 2003, Mr. McLeod filed with the Probate Court Registrar a signed Petition for Formal Adjudication of Intestacy, Determination of Heirs, and Appointment of Personal Representative, a signed Acceptance of Appointment as Personal Representative by Corporation, Notice and Order for Hearing on Petition for Formal Adjudication, Order for Formal Adjudication, Letter of General Administration, and the requisite filing fee. (RA221-26, RA235.) In the Petition for Formal Adjudication of Intestacy, it was made clear that the Estate had an approximate indebtedness of \$217,500. (RA237-39.)

On June 12, 2003, the Honorable David E. Doyscher issued a Notice and Order for Hearing to be held on July 15, 2003. (RA243.) On June 19, 2003, Mr. McLeod served a Notice and Order for Hearing on Katie Jean Erickson, and filed the appropriate Affidavit of Mailing Notice. (RA244-47.) On June 27, 2003 Mr. McLeod also sent Ms. Erickson a copy of the Minnesota Statutes regarding her rights as surviving spouse and children of the decedent. (RA221-26.) At no time did Ms. Erickson object to the proceedings initiated in

the probate court. On July 15, 2003, after no objection was filed, the probate court issued an Order of Formal Adjudication of Intestacy, Determination of Heirs, and Appointment of Personal Representative. (RA248-50.) In said Order, the probate court appointed Jeffrey Kittelson of Professional Fiduciary, Inc. as personal representative for the estate of Kory James Erickson. (Id.) Ms. Erickson also had an opportunity to appeal the appointment of the Personal Representative within 60 days of the Order, and no appeal was filed. See Minn. Stat. § 525.712.

After its appointment as personal representative, Respondent hired the O'Neill & Murphy, LLP law firm to analyze the potential for a legal malpractice claim against Silverman. After submitting the case to an expert as required under Minn. Stat. § 544.42, Respondent commenced the instant action. (A-2, RA33.)

ARGUMENT

Western National Insurance Company is not a party to this action. Despite this undisputed fact, Appellants argue that they are entitled to dismissal of this action commenced by Respondent Professional Fiduciary, Inc. based on Western National's conduct, its perceived motives and their tortured interpretation of Minnesota law as it is alleged to apply to Western National. Western National did nothing improper by initiating probate proceedings to have Respondent Professional Fiduciary, Inc. appointed as personal representative of Kory James Erickson's estate. Similar to a plumber, the funeral home, or anyone else who is owed money at the time of someone's death, Western National is a creditor of Erickson's estate. It is well established that a creditor is specifically identified

among the class of interested persons authorized by the probate code to commence formal testacy and appointment proceedings. How Western National became a judgment creditor of Erickson's estate is irrelevant to the question of whether the personal representative of Erickson's estate may pursue this legal malpractice action.

The undisputed facts of this case also establish that Respondent Professional Fiduciary, Inc. has, at each and every stage of this action, complied in all respects with Minnesota law and has taken actions authorized by the probate code. Respondent is acting in the interests of the estate by pursuing a valid legal malpractice claim that will partially satisfy a debt to a judgment creditor and also confer direct financial benefit upon Mr. Erickson's heirs.

Appellants do not argue that Respondent violated the probate code. Rather, seeking to avoid accountability for their malpractice and collusion, Appellants now asks this Court to ignore the undisputed facts and create an exception to the probate code where none exists. Such a result would clearly violate the province of the legislature.

Through clever argument, Appellants also attempt to cast this action alternatively as the assertion of a legal malpractice claim by an adverse party, as the assignment of a legal malpractice claim, or as the assertion of a contribution claim against an adverse co-defendant's attorney. It is none of these. This is a valid action commenced by the estate of the decedent against the attorney who exposed the estate to an excess judgment through his departure from the standard of care for attorneys. It is negligence on its face for a defense lawyer to suggest \$1,000,000 may be an appropriate award for the death of a 14-year-old

child when his client only has \$30,000 in limits. In accord with the above, this Court should resolve the issue raised by this appeal in Respondent's favor.

I. STANDARD OF REVIEW

Because a certified question presents a matter of law, this Court reviews it independently. See *Foley v. Honeywell, Inc.*, 488 N.W.2d 268, 270, (Minn.1992). When a certified question arises from a denial of summary judgment, the summary judgment standard applies and the appellate court's review is de novo. See *Molloy v. Meier*, 660 N.W.2d 444, 450 (Minn. Ct. App. 2003); *Zimmerman v. Safeco Ins. Co. of America*, 605 N.W.2d 727, 729 (Minn. 2000). In reviewing a summary judgment decision, this Court must determine whether any genuine issues of material fact exist and whether the district court erred in applying the law. See *Cummings v. Koehnen*, 568 N.W.2d 418, 420 (Minn. 1997).

II. THIS COURT SHOULD RESOLVE THE ISSUE RAISED BY THIS APPEAL IN FAVOR OF RESPONDENT AS THE INSTANT ACTION IS AUTHORIZED BY THE PROBATE CODE.

Under the Minnesota Uniform Probate Code (UPC), a formal testacy proceeding may be commenced by an interested person. See Minn. Stat. § 524.3-401 (2000). The UPC defines "interested person" to include:

heirs, devisees, children, spouses, **creditors**, beneficiaries and any others having a property right in or claim against the estate of a decedent, ward or protected person which may be affected by the proceeding. It also includes persons having priority for appointment as personal representative, and **other fiduciaries representing interested persons**. The meaning 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.

See Minn. Stat. § 524.1-201(24) (2000) (emphasis added). The statute does not provide that only certain creditors are deemed interested persons. Presumably, then, this provision includes all creditors within its scope. There is no dispute that Western National was a judgment creditor of Kory James Erickson and later of his estate. Consequently, Western National qualified as an “interested person” entitled to commence formal testacy proceedings with respect to Erickson’s estate. As the designated representative of Western National, Respondent was also an interested person pursuant to § 524.1-201(24). In this capacity, Respondent was entitled under the UPC to file a petition with the probate court for appointment as personal representative of the estate. See Minn. Stat. § 524.3-401 (2000); see also *In re Estate of Spangler*, 2002 WL 31867844 (Minn. Ct. App.) (affirming that any person or entity falling within the definition of “interested person” under the probate code may commence formal testacy proceedings for the appointment of a personal representative of the decedent’s estate.) (RA 219-20)

After being appointed as personal representative, Respondent was authorized under the UPC and duty bound under the probate statutes and common law to take reasonable action for the benefit of the interested persons, which included Western National and Erickson’s heirs. See Minn. Stat. § 524.3-715 (emphasis added). One of the powers specifically granted to the personal representative is the power to prosecute or defend claims. See Minn. Stat. § 524.3-715(22). Thus, every action by Respondent to pursue the instant action was authorized by and in full compliance with the UPC and Minnesota common law.

Appellants do not appear to dispute that the UPC as adopted by the Minnesota legislature allows Respondent to pursue this action. Rather, Appellants argue that because Western National became a creditor through payment of the judgment owed by its insureds' co-defendant in the underlying case, this Court should rewrite provisions of the UPC to preclude this lawsuit. However, to do so would be contrary to the express provisions of the probate code and would also invade the province of the legislature.

It is well settled that statutes may not be construed so as to substitute amendment for statutory construction. See State v. Moseng, 254 Minn. 263, 269, 95 N.W.2d 6, 11-12 (1959). As noted by the Minnesota Supreme Court in State v. Tennyson, 212 Minn. 158, 2 N.W.2d 833 (1942):

It is for the legislature and not the court to create exceptions, if there are to be any. Where a statute is couched in broad and comprehensive language admitting of no exceptions, the court is not justified in engrafting thereon exceptions, however much it may deem the public welfare to require them.

Id. at 161-62, 835 (citation omitted). The UPC definition of “interested person,” which includes creditors without qualification, utilizes broad and comprehensive language. Minn. Stat. § 524.1-201(24) (2000). The UPC also dictates that its provisions are to be liberally construed. See Minn. Stat. § 524.1-102(a) (2000); see also In re Eklund's Estate, 174 Minn. 28, 33, 218 N.W.235, 237 (1928) (construing predecessor statute and recognizing that “[i]t is now well settled in this state that a literal, strict construction is not to be placed upon the words ‘person interested in the estate’”). There is simply no justification for this Court to limit the class of creditors that qualify as interested persons under the probate code where the

legislature chose not to do so. Accordingly, this Court should resolve the issue raised in this appeal in favor of Respondent.

III. THIS COURT SHOULD RESOLVE THE ISSUE RAISED IN THIS APPEAL IN FAVOR OF RESPONDENT BECAUSE MINNESOTA LAW ALLOWS THE ESTATE TO PURSUE A LEGAL MALPRACTICE CLAIM AGAINST THE DECEDENT'S ATTORNEY AND THE PROHIBITION AGAINST SUITS BY "NON-CLIENTS" IS INAPPOSITE.

Appellants spill a great deal of ink arguing that this action was commenced by a party adverse to Decedent Erickson in the underlying case who was not a client of Appellant Silverman. Of course this is not true. In point of fact, the Plaintiff in this case is the personal representative for the Estate of Kory James Erickson, not Western National or the Hartmann Defendants. Minnesota law recognizes the right of the estate of a deceased client to commence a legal malpractice action against the decedent's lawyer. See Johnson v. Taylor, 435 N.W.2d 127, 129 (Minn. Ct. App. 1989). Appellant Silverman represented Mr. Erickson in the underlying action. The personal representative for the Estate of Kory James Erickson hired a legal malpractice attorney, who hired an expert, who in turn has verified that a valid legal malpractice case exists. Thus, Mr. Erickson had a valid malpractice claim which survived his death and passed on to his estate. The personal representative is entitled and obligated to pursue this claim for the benefit of all interested persons, including Erickson's heirs and a creditor such as Western National. See Minn. Stat. § 524.3-715. Accordingly, this Court should resolve the issue raised by this appeal in favor of Respondent.

IV. THIS COURT SHOULD RESOLVE THE ISSUE RAISED IN THIS APPEAL IN FAVOR OF RESPONDENT BECAUSE THERE WAS NO ASSIGNMENT OF THE LEGAL MALPRACTICE CLAIM

"A valid assignment generally operates to vest in the assignee the same right, title or interest that the assignor had in the thing assigned." See *State ex rel. Southwell v. Chamberland*, 361 N.W.2d 814, 818 (Minn.1985). "In effect, an assignee stands in the shoes of the assignor." See *Geldert v. Am. Nat'l Bank*, 506 N.W.2d 22, 29 (Minn. Ct. App.1993), *review denied* (Minn. Nov. 16, 1993). Appellants concede that there has been no actual assignment of the instant legal malpractice action. However, Appellants argue that Respondent's completely legitimate actions under the Uniform Probate Code have resulted in a *de facto* assignment to Western National. The obvious flaw in this argument is that Western National did not acquire a right of action against Appellants and is not a party to this lawsuit. Rather, Western National is an interested person as a creditor for whose benefit the personal representative is required to act. After obtaining a judgment against Appellants herein, Respondent will distribute the proceeds of the judgment pursuant to the probate code, not according to the wishes of Western National. Accordingly, there has been no actual or *de facto* assignment.

The Minnesota Supreme Court has found no improper assignment of a legal malpractice claim in a similar context. In *Appletree Square I Limited Partnership and Bus. Consultants, Inc. v. O'Connor & Hanlan*, 575 N.W.2d 102 (Minn. 1998) *rehearing denied* (Minn. Apr. 7, 1998), the Minnesota Supreme Court addressed whether the designated representative of a bankruptcy estate could pursue a legal malpractice action held by the

debtor for the benefit its creditors.² Like the Defendants in the instant case, the defendant law firm cited *Wagener* in arguing that the grant of authority to the trustee of the bankruptcy estate to pursue the malpractice claim constituted an impermissible assignment. *Id.* at 105.

The court rejected this argument, as follows:

In our view, however, *Wagener* is not applicable to this case because there has not been an assignment. Unlike the case at bar, the claim in *Wagener* unquestionably was transferred to an independent third party who was personally entitled to any resulting judgment. *See id.* at 189 Here, BCI is attempting to assert the claim on behalf of Appletree. The method by which BCI acquired authority over the malpractice claim was more akin to transfer by the operation of law, rather than by an outright assignment. *Cf. Johnson v. Taylor*, 435 N.W.2d 127, 129 (Minn. App.) (holding that a legal malpractice claim survived the death of the decedent) *pet. for rev. denied* (Minn. Apr. 19, 1989). Acquisitions of this nature, where the entity bringing the action merely is representing the original holder, do not come within the traditional definition of an assignment.

Id. The holding in *Appletree Square* controls the issue of whether an assignment occurred in the instant matter. Respondent has asserted a malpractice claim on behalf of the estate of the original holder of the claim, Mr. Erickson. This is clearly authorized under Minnesota law. The claim passed to Respondent by operation of the probate code, not by any assignment. Moreover, Respondent is not personally entitled to the proceeds of any resulting judgment. Rather, a judgment in this case will inure to the benefit Mr. Erickson's estate by at least partially satisfying claims of creditors and also enriching his heirs.

² Contrary to Appellant's assertion, the *Appletree Square* decision is directly on point. While that case involved bankruptcy proceedings commenced under the Federal Bankruptcy Code, the Minnesota Supreme Court decided the case based upon Minnesota law as it relates to assignment of a legal malpractice claim. Moreover, the manner in which the creditors of the bankruptcy estate acceded to their status as creditors was of no consequence to the Supreme Court's decision.

Respondent's pursuit of this legal malpractice claim also does not violate Minnesota public policy.³ There has been no transfer of Kory Erickson's malpractice claim against Appellants to Western National. The duly appointed personal representative of Erickson's estate, not Western National, is pursuing the claim as authorized and allowed under Minnesota law. That neither Mr. Erickson nor his wife pursued this claim is also of no moment. Erickson's wife received notice that the claim would be pursued and did not object when she had several opportunities to do so. Indeed, she stands to benefit along with the other interested persons from any recovery in this case.

Moreover, notwithstanding Appellant's argument to the contrary, if Kory James Erickson were alive today, a valid legal malpractice claim against Silverman would still exist. If Erickson were still alive, Western National would have executed on its judgment against him. As a means of satisfying this judgment, Erickson could have retained a legal malpractice attorney and the same action for clear malpractice on the part of Silverman could have been commenced. As personal representative of the estate, Respondent is merely pursuing that claim in Erickson's absence on behalf of all parties interested in the estate. Under controlling Minnesota case law, then, there has been no assignment and this Court should resolve the issue raised in this appeal in favor of Respondent.

³ Respondents respectfully submit that if this Court decides the issue raised by this appeal in favor of Appellants, then each creditor of an estate will potentially lose its right, conferred by the probate code, to commence formal testacy proceedings as an interested person if it became a creditor by means objectionable to a party against whom the estate holds a claim. Such a result is contrary to public policy. A creditor is a creditor is a creditor. How a person or entity became a creditor is irrelevant under the probate code. (RA224.)

V. THIS COURT SHOULD RESOLVE THE ISSUE RAISED IN THIS APPEAL IN FAVOR OF RESPONDENT BECAUSE THE MALPRACTICE CLAIM IS NOT A CONTRIBUTION CLAIM AGAINST AN OPPOSING PARTY'S LAWYER

Appellants' claim that the instant action is a contribution claim against an opposing lawyer is also completely without merit. The Melrose Floor and Eustis cases barring a contribution claim against an opposing lawyer have no applicability to the facts of this case. As noted repeatedly above, Western National is not a party to this action and has asserted no claim against the Appellants. In fact, Western National perfected and obtained judgment on its contribution claim against Erickson and his estate long before the instant action was commenced. That judgment is the basis for Western National's status as a creditor and interested person with respect to Erickson's estate.

There is no dispute that Defendant Silverman was Mr. Erickson's lawyer. The evidence in this case will establish that Defendant Silverman committed malpractice in representing Mr. Erickson. Erickson therefore owned a viable legal malpractice claim before he died, which passed to his estate upon his death. See Johnson, supra. The present malpractice claim is not a contribution claim. It is a direct claim by the personal representative of Mr. Erickson's estate against his negligent lawyer. As an interested person, Western National was perfectly within its rights to petition to have the estate opened and to have Professional Fiduciary, Inc. appointed as personal representative. Such action is

expressly permitted under Minnesota law, and does not even approach or resemble a contribution claim as discussed in *Melrose Floor* and *Eustis*. Accordingly, this Court should resolve the issue raised in this appeal in favor of Respondents.

CONCLUSION

In their fixation on Western National Insurance Company, Appellants ignore the fact that this action was properly commenced by the duly appointed personal representative of the estate of Kory James Erickson to redress legal malpractice committed by Erickson's lawyer, Appellant Silverman. In keeping with its duties and responsibilities as personal representative, Respondent commenced this action for the benefit of any and all persons interested in Erickson's estate, including Western National. This was a valid exercise of Respondent's powers and duties under the Uniform Probate Act. Because it is not a party to this action, Western National cannot be considered an assignee of Erickson's malpractice claim. Because Western National is not a party to this action, there is also no basis for a finding that the claim was brought by an adverse party or as a contribution claim against an adverse party's attorney. For all of these reasons, Respondents respectfully request that this Court resolve the issue raised by this appeal in their favor.

Respectfully submitted.

Dated: 9/6, 2005

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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).