NO. A06-0486

# State of Minnesota
# In Court of Appeals

McIntosh County Bank, First State Bank of Bigfork, Security First Bank of North Dakota, Campbell County Bank, Inc., Security State Bank, Choice Financial Group, United Community Bank of North Dakota, Community National Bank, Lake Country State Bank, Bank of Luxemburg, Peoples State Bank of Madison Lake, New Auburn Investment, Inc., Oregon Community Bank & Trust, State Bank of Park Rapids, Farmers State Bank, Citizens State Bank of Roseau, First Independent Bank, First National Bank of the North, Security State Bank of Sebeka, Northstate, LLC, First American Bank & Trust, First Federal Savings Bank of the Midwest, North Country Bank & Trust, Dacotah Bank - Valley City, First National Bank & Trust Co. of Williston, Ultima Bank Minnesota, Security Bank USA, The Ramsey National Bank and Trust Co. of Devils Lake, McVille State Bank, Page State Bank, First National Bank of the North, and Marshall Investments Corporation, a Delaware Corporation,

*Appellants,*

vs.

Dorsey & Whitney LLP, a Minnesota Limited Liability Partnership,

*Respondent.*

## APPELLANTS' BRIEF AND APPENDIX, VOLUME I

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1. Whether the District Court erred in ruling that no genuine issues of material fact existed and that, as a matter of law, Appellants' were not third party beneficiaries of Dorsey's representation entitled to bring an action for malpractice against Dorsey.

    Yes.

    Most Apposite Cases:

    *Admiral Merchants Motor Freight, Inc. v. O'Connor & Hannan*, 494 N.W.2d 261 (Minn. 1992).

2. Whether the District Court erred in ruling that there were no genuine issues of material fact and that, as a matter of law, there was no implied contract between Dorsey and the Appellants.

    Yes.

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3. Whether the District Court erred in ruling that no genuine issues of material fact existed and that, as a matter of law, no attorney-client relationship existed under the tort theory of professional negligence.

    Yes.

Most Apposite Cases:

*Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 693, fn. 4 (Minn. 1980); and

*Sandum v. Doherty, Rumble & Butler, P.A.*, 1994 WL 593925 (Minn. Ct. App. 1994).

4. Whether the District Court erred in ruling that Appellants could not assert a claim for misrepresentation because there was no attorney-client relationship between Appellants and Dorsey.

Yes.

Most Apposite Cases: *See* cases cited under 1 through 3 above.

## STATEMENT OF THE CASE

### A. Relief Sought From This Court

The Appellants[1] seek an order from this Court reversing the trial court's grant of summary judgment in favor of the Appellee Dorsey & Whitney LLP ("Dorsey") and a remand of this case to the trial court for further pretrial proceedings and for trial. This Court should rule that there are genuine issues of material fact that preclude summary judgment.

### B. Background

The Appellants, community banks from Minnesota and the Upper Midwest, were participants in two loans totaling approximately $12,000,000 to President R.C.-St. Regis Management Company ("President"), the developer and manager of an Indian Casino owned by the St. Regis Mohawk Tribe ("Tribe") in New York. The loans were originated by Miller & Schroeder ("M&S"). M&S acted as the nominal lender on behalf of the Appellants and almost immediately after the loans closed M&S sold to Appellants the entire beneficial interest in the loans. M&S did not and, as Dorsey knew, never intended to retain a principal position in the loans.

Prior to the closing of the loans, M&S secured participation commitments from the Appellants. M&S asked Dorsey to represent the lenders and draft all of the loan transaction documents on behalf of the lenders. There was no written agreement between M&S and Dorsey relating to the representation.

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1 Appellants will sometimes be referred to as "Bank Participants."

As a component part of the structure of the loan transactions, a "Notice and Acknowledgement of Pledge" (the "Pledge") was signed by the Tribe pursuant to which the Tribe pledged the casino revenues to secure the repayment of the loans. Dorsey drafted the Pledge and issues arose prior to closing regarding the need for the National Indian Gaming Commission ("NIGC"), a federal agency charged with oversight responsibility for Indian gaming transactions, to approve the Pledge and the other loan documents. Dorsey lawyers discussed among themselves the need for NIGC approval and the need to postpone closing of the loans until the NIGC had acted. Dorsey did not, however, convey its concern to M&S or the Appellants, instead advising the lenders to proceed with closing without first obtaining NIGC approval.

The loans closed in February 1999. President almost immediately defaulted and the Tribe then claimed that the lack of NIGC approval of the Pledge rendered that agreement null and void under federal law. The Appellants were left with millions of dollars in bad debt. M&S and the Appellants would not have closed the loans had they been advised of the risks of closing and funding the loans before the NIGC had made a determination regarding the Pledge and loan documents.

## C. Bankruptcy Court Proceedings and Initiation of the Present Action

M&S filed for bankruptcy in 2002. Pursuant to federal law, a Trustee was appointed to administer the bankruptcy estate. The bankruptcy Trustee, the Appellants and Marshall Investments ("Marshall"), the successor to M&S as servicer of the loans, sued Dorsey in Federal Bankruptcy Court in 2003, alleging malpractice in connection with Dorsey's work on the loans. The Trustee and Marshall also asserted a claim for breach of fiduciary duty arising out of Dorsey's failure to disclose the potential malpractice claim and Dorsey's failure to disclose a conflict of interest when Bremer Bank, a loan participant that is not a party to the present action, sued M&S to recover Bremer Bank's participation interest. Dorsey responded to the malpractice action by seeking dismissal of the case, including, among other arguments, on the basis that the Bank Participants did not have "standing" to sue Dorsey.

The Bankruptcy Court decided that it did not have jurisdiction over 28 of the 31 Bank Participants. As to the three Bank Participants over which the court had jurisdiction it denied Dorsey's motion for summary judgment on the standing issue. The Bankruptcy Court granted Dorsey's motion to dismiss Marshall's claim for malpractice, but allowed the Trustee to re-plead his case of malpractice to define what damages M&S may have suffered. (Ultimately, the Trustee voluntarily dismissed his malpractice claims). Finally, the court denied Dorsey's motion to dismiss the breach of fiduciary duty claims. *See* "Order Dismissing Certain of Plaintiffs' Claims and Granting in Part and Denying in Part Defendant's Motion for Summary Judgment as to Remaining Plaintiffs" dated January 10, 2005, in *McIntosh County Bank, et al. v. Dorsey & Whitney LLP*, United States Bankruptcy Court, District of Minnesota, Adv. Case No. ADV 03-4291, Appellants' Appendix ("AA") at 433-441.

Dorsey then brought a motion asking the Bankruptcy Court to abstain from hearing the remaining three Bank Participants' malpractice claims. While that motion was pending, and to eliminate possible statue of limitations preclusion, all the Bank Participants and Marshall initiated the present case in Hennepin County District Court, asserting the same claims as had been asserted in the Bankruptcy Court action. Appellants alleged that Dorsey committed malpractice and that they were entitled to recovery under the intended beneficiary, tort and/or contract theory of legal malpractice liability. Appellants also alleged that Dorsey had negligently misrepresented the enforceability of the loan. *See* AA at 1-98.

The Bankruptcy Court then granted Dorsey's motion for abstention as to the remaining Bank Participants. "Memorandum Order Granting Motion for Abstention" dated May 11, 2005, in *McIntosh County Bank, et al. v. Dorsey & Whitney LLP*, United States Bankruptcy Court, District of Minnesota, Adv. Case No. ADV 03-4291. AA at 442-451.

Later, Marshall voluntarily dismissed its breach of fiduciary duty claim in Hennepin County. The net result is that the Trustee's and Marshall's claims proceeded in Bankruptcy Court and the 31 Bank Participants' claims proceeded in Hennepin County.

### D. United States Bankruptcy and District Court Rulings on the Standing Issue

At approximately the same time that the present action was initiated, Bremer Bank, along with the Trustee, sued Dorsey in a separate malpractice action in Bankruptcy Court. *Bremer Business Finance Corporation, et al. v. Dorsey & Whitney LLP*, United States Bankruptcy Court, District of Minnesota, Adv. Case Nos. ADV 05-4051. Bremer Bank is one of the participants in the underlying loans and is the only participant that is not a plaintiff in the present case. The Bankruptcy Court exercised jurisdiction over Bremer's case and has twice denied Dorsey's requests to dismiss the action for lack of "standing." In ruling on Dorsey's last motion, Judge Dreher stated:

> This motion, in some respects, borders on the frivolous… Bremer Bank raises a material issue of fact and law regarding the scope of the law firm's representation in connection with this transaction.

"Order Denying Defendant's Motion for Summary Judgment with Limited Direction to the Parties" dated November 9, 2005, in *Bremer Business Finance Corporation, et al. v. Dorsey & Whitney LLP*, United States Bankruptcy Court, District of Minnesota, Adv. Case Nos. ADV 05-4051 and ADV 03-4291. AA at 452-456.

Shortly before the case was to go to trial before Judge Dreher, Dorsey asked the United States District Court to review Judge Dreher's denial of summary judgment on the standing issue (quoted above). The request for discretionary review was assigned to Judge John Tunheim, who not only refused to grant review but also stated:

> The existence of an attorney-client relationship is usually dependent on facts, and this case is no exception. Indeed, as the Bankruptcy Court noted, there are a number of disputed factual issues, including whether Bremer relied on Dorsey's legal work, whether Dorsey understood that third parties, like Bremer, would be relying on Dorsey's legal work, and whether the parties intended that third parties would be able to sue Dorsey directly for malpractice.

"Order Denying Motion for Leave to Appeal" dated February 7, 2006, in *Bremer Business Finance Corporation, et al. v. Dorsey & Whitney LLP*, United States District Court, District of Minnesota, Civil No. 05-2768 (JRT). AA at 457-461.

On February 8, 2006, Bremer Bank's case along with the Trustee's and Marshall's claims, which had been consolidated with Bremer's case, proceeded to trial on all claims. The trial was completed on February 21, 2006, and the parties are awaiting Judge Dreher's decision.

## E. Proceedings Below

In the present case, Dorsey immediately responded to the complaint with a motion for summary judgment. No discovery was conducted.[2] After a number of judges recused themselves from hearing the case, Dorsey's motion was finally heard by the Honorable Heidi S. Schellhas. Dorsey had argued to the Bankruptcy Court that M&S had no claim for malpractice because it had sold off 100% of the beneficial interest in the loans and, therefore, could not prove it suffered any damages. Dorsey now argued to the Hennepin County District Court that the Participant Banks lacked standing because they were neither a client nor a direct beneficiary of Dorsey's agreement with M&S. Dorsey, then, is contending that it never had any potential liability for its malpractice to anyone, even though it collected tens of thousands of dollars in fees for its legal representation.

On January 17, 2006, Judge Schellhas granted Dorsey's motion, ruling that no genuine issues of material fact existed and that, as a matter of law, the Appellants had no standing to sue Dorsey for legal malpractice and, furthermore, as non-clients Appellants could not assert a claim for negligent misrepresentation. AA at 237-251.

As a result of all of the above, the Appellants, thirty-one of the thirty-two participant banks (representing the vast majority of the damages), have been denied their "day in court" and the right to proceed against Dorsey. Meanwhile, one of the Bank Participants, Bremer Bank, has been allowed to try its case against Dorsey and may well recover its damages.

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2 Dorsey relied on the depositions and discovery obtained in the *Bremer* case.

Appellants have standing to sue Dorsey for malpractice. The objective of Dorsey's work, as Dorsey knew, was to assure that the loans were enforceable by the Appellants upon default. The District Court absolved Dorsey of any responsibility. This Court should reverse.

## STATEMENT OF FACTS

### A. Dorsey's Knowledge of the M&S Business Model

Prior to its work on the loans that are the subject of this case, Dorsey knew M&S' business model well, as it had worked on approximately **three dozen** other such loans originated by M&S. Dorsey, then, knew that one of the primary objectives of its work was to benefit the Appellants.

M&S provided, among other services, specialized debt finance including commercial loan and gaming finance. AA at 257, ¶2. One of the businesses of M&S was the origination, participation, and servicing of commercial loans, including Indian Gaming loans. *Id.*

All of M&S' gaming loans were structured in the same general way. *Id.* at ¶3. M&S would originate and initially fund the loan and act as placement agent and servicer. *Id.* Upon M&S and the borrower agreeing to terms, M&S would prepare a "Loan Participation Marketing Book", including a template Participation Agreement. *Id.* These books were then sent to a network of banks that had expressed an interest in participating in loans originated by M&S. The interested banks would evaluate the loan and decide whether to purchase an interest in the loan. *Id.* Since M&S' business plan was to originate and sell loans to banks, it typically would not close a loan with a borrower until it had commitments from bank participants to purchase 100% of the loan. *Id.* M&S normally retained only the servicing rights. *Id.*

M&S would hire experienced counsel to handle the documentation and closing of the loans, a fact that was made known to the banks. AA at 258, ¶8. After M&S obtained commitments from the banks, a closing with the borrower would be scheduled. AA at 257-258, ¶4. Immediately after closing with the borrower and funding the loan, M&S would send a Closing Book (that included all the loan documents and a "Participation Agreement") to each bank participant that had committed to purchase an interest. *Id.* The bank participant would then sign the Participation Agreement and transfer the funds to M&S to formally purchase an interest in the loan. *Id.* M&S' sales of the participation interests to bank participants were generally completed one week after closing with the borrower. *Id.* In other words, while M&S originally funded the loan, it only held a lender's position for about one week. *Id.* at ¶5. Thereafter, the bank participants held the lender's position and bore all risk of loss in the event the loan went into default. *Id.*

M&S' network of banks consisted mostly of small to medium size community banks in the Upper Midwest. In the present case the Appellants are banks from the following communities: Luxemburg, WI, Herreid, SD, Langdon, ND, Roseau, MN, Lino Lakes, MN, Valley City, ND, Phillipsburg, KS, Sioux Falls, SD (2), Russell, MN, Sandstone, MN (2), Williston, ND, Bigfork, MN, Long Prairie, MN, Ashley, ND, McVille, ND, New Auburn, WI, Manistique, MI, Shakopee, MN, Oregon, WI, Page, ND, Lewisville, MN, Devils Lake, ND, Center, ND, Bemidji, MN, Sebeka, MN, Iron River, WI, Park Rapids, MN, Winger, MN and Leeds, ND. The vast majority of the banks contributed $300,000 or less to the loans, with many contributing just $100,000.[3]

Dorsey was paid $50,000 to handle the transactions. AA at 261, ¶20. It is Dorsey's contention, accepted by the trial court, that the banks had no right to rely on

3 Bremer Bank's contribution is not included.

Dorsey's work in this specialized area of Indian Gaming loans, but instead should have each found their own counsel with experience in the highly specialized area of Indian Gaming finance and paid that counsel what would surely be significant fees (presumably approaching the $50,000 paid to Dorsey) to review all the loan documents and the applicable Indian Gaming transaction laws and to provide an opinion that the loans were properly documented and enforceable. That contention, and the trial court's acceptance of that contention, ignores the practical realities of the situation and ignores Dorsey's own knowledge of how these transactions work and what role Dorsey was playing.

As noted above, prior to being retained on the St. Regis loans, Dorsey had been retained on 36 other gaming loans which had been originated and sold by M&S. AA at 258, ¶7. Each of these prior gaming loans had been sold to bank participants and in each transaction Dorsey had been retained as lenders' counsel. *Id.* Dorsey's job was to represent the lenders in structuring, documenting and closing the loans, including obtaining all necessary approvals and securing the loans; work that benefited M&S and the Bank Participants. *Id.*

Dorsey was well aware of M&S' business model for its gaming loans. *Id.* and AA at 304, ¶5.

## B. Dorsey's Knowledge of the Specific Relationships in the St. Regis Loans

The loans and sale of loan participations in this case followed the same pattern as that described above. In 1998, M&S entered into discussions to finance the construction of the Akwesasne Mohawk Casino in Hogansburg, New York (the "Casino"). AA at 259, ¶9. The Casino was to be built for the Tribe on reservation land in New York state owned by the United States for the benefit of the Tribe. *Id.* The Casino was to be developed and managed by President. *Id.*

President approached M&S about providing funding to construct the Casino, the parties came to terms and in December 1998, M&S hired Dorsey. *Id.* As was the case in the previous thirty-six transactions, Dorsey was hired to assist in the structuring, documenting and closing of the loans; in this case two loans (the "St. Regis loans"), totaling over $12,000,000 to President. *Id.* at ¶11. There was no written agreement between M&S and Dorsey regarding the representation. As in the past, M&S' interests and the Bank Participants' interests were aligned, Dorsey was hired for the benefit of all and Dorsey knew its role. *Id.*

Dorsey assigned several attorneys to work on the St. Regis loans, including Paula Rindels and Mark Jarboe, both partners in Dorsey's Minneapolis office, and Chris Karns, a partner in Dorsey's Washington, D.C. office. AA at 258, ¶6 and AA at 303, ¶3. Ms. Rindels, however, had primary responsibility for drafting the loan documents and advising the lenders. AA at 347-348. Ms. Rindels, in fact, did ninety percent of the work on the file. AA at 351. Among other documents, she drafted the Loan Agreements, Promissory Notes, Escrow Agreement and the Pledge.

Ms. Rindels knew that Dorsey's work was for the benefit of the Appellants:

> Q. Did you understand in 1998 and 1999 when you were doing work for Miller & Schroeder that they would act as originator of the St. Regis loans?
>
> A. Yes.

> Q. Did you understand that their Indian gaming loans were structured so that they would be sold off in loan participations?
>
> A. I understood that they would be participating the loans, yes.

AA at 350.

In addition to her testimony, the documents establish Ms. Rindels' knowledge of the participations. For example, on the same day as it was entered into, M&S sent to Ms. Rindels the "Loan Placement Agreement" signed by M&S and President relating to the smaller of the two loans. AA at 353-354 and AA 358-367. Under that agreement, M&S is referred to as the "Placement Agent" for the loan. AA at 359. There is no designation of "Lender." Instead, under the heading "General Terms & Conditions" on page 6 of the agreement, it states:

> Placement Agent shall provide Borrower with an irrevocable commitment...to close and fund the [loan] **at the time** the Placement Agent satisfactorily completes all due diligence associated with the underwriting of the [loan]...**and Placement Agent has received signed "Commitments to Participate" letters from all other [loan] Participants for purchase of 100% of the [loan]**.

AA at 364. (Emphasis Added). Ms. Rindels, then, knew that unless M&S had commitments from banks to purchase 100% of the loan, there would be no loan.

Similarly, while "Lender" is defined in the loan agreements as M&S, the loan agreements, consistent with the Loan Placement Agreement, expressly contemplate that the loans would be owned by the Bank Participants. AA at 401, ¶8.06; 402, ¶8.08. In fact, the loan agreements (drafted by Dorsey) provide that President "acknowledges that the Lender will be selling participation interests in the Loan," expressly allows assignment of the agreement by the Lender and is made binding on the Lender's successors and assigns. AA at 401-402.

Dorsey, moreover, did specific work that solely benefited the Bank Participants. Before the St. Regis loans closed Mary Jo Brenden, M&S' in-house counsel, discussed with Ms. Rindels and Mr. Karns revising the Participation Agreements to provide protection to the Bank Participants. AA at 304, ¶7. Specifically, based on information that Mr. Karns had received from the State of New York Racing and Wagering Board, sections 3.1 and 7.7 of the Participant Agreements were revised to assure that the Bank Participants could enforce the provisions of the loan documents. *Id.* Dorsey not only knew that the St. Regis loans would be sold to participants, but it specifically rendered legal advice for the express purpose of protecting the interests of the Bank Participants. AA at 350 and 304, ¶7.

Dorsey was also familiar with the terms of the Participation Agreements, both because of its work on the previous thirty-six transactions and also because several years prior to 1998, M&S had asked Dorsey to review the Participation Agreements. AA at 304, ¶6. The Participation Agreements contained the following at paragraph 2.2:

> **<u>Relationship of Parties</u>**. The relationship between Lender [Miller & Schroeder] and Participant is and shall be that of a seller and purchaser of a property interest (i.e., **an outright, absolute partial assignment of an undivided interest in and to the Loan, in the Collateral and in the Collections**)....The Participant hereby approves of and authorizes the [Miller & Schroeder] to be named as the **nominal payee of the Note and nominal beneficiary of each Guaranty and the nominal secured party under the**

> **Loan Documents** and, subject to the provisions of this Agreement, to **generally act as agent for all the Participants** in the holding and disposition of the Collateral. [Miller & Schroeder] agrees that [it] holds the security interests and other interests granted by the Note and the Loan Documents not in its individual capacity **but rather as an agent for the Participants** in accordance with this Agreement.

AA at 310. (Emphasis added). Dorsey, then, had full knowledge of the relationship between the Bank Participants and M&S and the role M&S played in the loan transaction: **Agent** for the participants and **nominal** lender.

M&S, too, understood that Dorsey was working for the Appellants. As Steven Erickson, the head of M&S' Indian Gaming Department, testified:

> Q. Because with regard to Dorsey's role in this transaction, you expected that Dorsey's work would benefit both Miller & Schroeder and the participants, correct?
>
> A. Yes.

AA at 410.

That everyone understood the nature of the relationships is highlighted by events prior to the closing. When the issues arose regarding whether the loan should be closed on schedule, M&S, conveying the negligent advice that Dorsey had given regarding the Pledge, asked the Participant Banks to approve or disapprove of continuing with the transaction. *See e.g.,* AA at 412-413. In other words, relying on Dorsey's advice, the Bank Participants were requested to renew their respective commitments to participate.

## C. The Bank Participants' Understanding of the Transactions

The St. Regis loans closed on February 24, 1999 and interests, representing the entire principal balance, were sold in varying amounts to 32 participating banks (31 of which are plaintiffs in this action and Appellants in this appeal). AA at 260, ¶14. On March 1, 1999, one week after closing as previously planned, M&S formally sold the vast majority of the St. Regis loans in varying participation interests to 29 Bank Participants. AA at 260, ¶15. By May, 1999, the balance of the St. Regis loans had been formally sold to three additional Bank Participants. *Id.*

Each Bank Participant had purchased other participations from M&S before purchasing an interest in the St. Regis loans; knew that M&S was the originator, placement agent, and servicer of the loans; knew that M&S intended to sell 100% of the St. Regis loans and would not retain the position of a lender; and knew that M&S acted as agent on behalf of the Bank Participants. AA at 414-416.

Each Bank Participant also knew that it was M&S' practice to retain nationally recognized experts and attorneys with well-respected gaming law practices to provide advice and counsel in their gaming transactions; knew that Dorsey had been hired to structure, document and close the St. Regis loans for the benefit of the Bank Participants; knew that Dorsey was a large and well-known Minneapolis law firm; and, importantly, knew that the legal fees generated by Dorsey for work done in relation to the St. Regis loans would be paid either by President or the Bank Participants, not M&S. AA at 415-416, ¶7. Each Bank Participant relied on Dorsey to properly document and close the loan, to obtain all necessary approvals and to secure the collateral. *Id.*

## D. The Participation Agreements

The Participation Agreements signed by the banks contain identical language. The trial court, ruling against Appellants, concluded that the disclaimer language in the Participation Agreements precludes an action against Dorsey for malpractice. AA at 249, ¶15.[4] A review of that language, however, shows the opposite to be true.

As an initial matter, it should be noted that the Participation Agreement makes clear that M&S is assigning to each bank an undivided interest in the loans, collateral and collections. AA at 310, ¶2.2. The Participation Agreements also provide that each participant will make its own "credit analysis and decision to purchase its participation interest" based on the information and documents provided by M&S. AA at 310-311, ¶3.1. The agreements go on to state that the banks disclaim any reliance on "representations or warranties" made by M&S. *Id.* and AA at 314 ¶5.2. There is no language, however, that disclaims any reliance on the work or representations of counsel retained to provide advice and document the loans. In other words, the Participation Agreement effectively results in the banks having to rely solely on work of counsel (Dorsey) hired to document and close the loans.

## E. Dorsey's Negligence

Although the trial court did not reach the issue, it is worth noting the nature of the malpractice claim against Dorsey. The trial court stated that the malpractice claim is

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4 The trial court's decision is not without irony. The court ruled that there was no privity between Appellants and Dorsey and, therefore, Appellants could not assert a malpractice claim based on contract. The court based its ruling giving Dorsey liability protection, however, on language in a contract (the Participation Agreement) to which Dorsey was not a party.

"based on Dorsey's legal advice given to M&S that the Pledge Agreement...did not require NIGC approval to be enforceable." AA at 241, ¶8. This recitation of the nature of the claim is only partially correct.

The Affidavit of Michael Cox, the former general counsel at the NIGC who was largely responsible for drafting the regulations at issue in the case, provides a detailed explanation of how and why Dorsey was negligent. AA at 417-422. In summary, the sole source of security for the St. Regis loans was the Pledge. The Dorsey lawyers were not sure whether the Pledge needed NIGC approval in order to be valid and enforceable. What the Dorsey attorneys did know was that if the St. Regis loans closed and NIGC approval was needed, but not obtained, the lenders' sole source of collateral for repayment of the St. Regis loans would be lost.

Several weeks before closing, with knowledge of the risk, the Dorsey attorneys sent the Pledge to the NIGC for its review. As the days passed without hearing from the NIGC, and with the date of the closing and funding of the loan transactions approaching, there was a flurry of internal e-mails exchanged between the Dorsey attorneys questioning what should be done if the NIGC did not decide the issue before the St. Regis loans closed. In addition, on February 16, 1999, approximately eight days before closing, the NIGC notified the parties to the St. Regis Loans that it would need additional time to review an amendment to the Management Agreement underlying the loans. Despite receiving this letter, which was full of "red flags," the Dorsey attorneys never discussed with either M&S or the Bank Participants any of the risks of proceeding to close the loan transaction without a response from the NIGC and, at no time, advised them to wait until these concerns were satisfactorily addressed and resolved before closing and funding the loans.

When the St. Regis loans closed on February 24, 1999, the NIGC had still not made a determination as to whether the Pledge was subject to its approval obligations and had not approved the amendment to the Management Agreement. As noted above, shortly before closing Dorsey told M&S that the Pledge did not need NIGC approval and that the NIGC would likely confirm that position in the near future. This information from Dorsey was passed on to the Bank Participants. After receiving responses from the Bank Participants, M&S told Dorsey to proceed to closing.

Had M&S known of the risks associated with not waiting for the NIGC to make a determination both on the Pledge and the issues raised in the NIGC's February 16, 1999 letter, M&S would have waited to close and fund the St. Regis loans until the NIGC had made its determination. AA at 410. M&S would not have proceeded to close the St. Regis loans if there was even a "perceived risk." AA at 411. Likewise, had the Bank Participants been advised that there was any issue as to either the validity or enforceability of any of the loan documents, the Bank Participants would not have purchased the participant interests and, instead would have waited until such issues or concerns were satisfactorily resolved. AA at 424-425.

The Appellants' claims, then, revolve around the fact that Dorsey did not in any way advise its clients of the risks and consequences of proceeding to closing without a determination from the NIGC that the Pledge did or did not need approval and prior to the NIGC approving the amended management agreement.

### F. President's Default and the Tribe's Refusal to Pay.

In February, 2000, President stopped making any payments on the St. Regis loans. AA at 260, ¶16. Once it became evident that President would not cure its default, representatives of M&S and representatives of several of the Bank Participants, along with their attorney John Thomas of the Dorsey firm, traveled to New York to meet with the Tribe in October, 2000. AA at 426-428. At that meeting, a Tribal Chief stated that the Tribe was not obligated to make any payments under the Pledge because, lacking NIGC approval, it was not enforceable. *Id.* The Tribe has never made any payments under the Pledge. AA at 260, ¶17.

## ARGUMENT

### I. INTRODUCTION

Dorsey knew that the Bank Participants were the beneficiaries of its services. Dorsey understood how M&S' loan participation business worked and that it was the Bank Participants who needed the loans to be properly documented and the lenders' rights to be enforceable. Dorsey was hired to make sure the loans were properly documented and the lenders' rights were enforceable.

Dorsey does not believe that anyone involved in the St. Regis loans can sue Dorsey for malpractice. When this case was in the Bankruptcy Court, Dorsey asserted:

> Dorsey concedes, for purposes of this discussion, that the Bank Participants did, in fact, suffer an investment loss when the Loans went into default. Miller & Schroeder **suffered no such loss, however, because it sold both Loans in their entirety to the Bank Participants after closing and, therefore, had no interest that could have been harmed** as

> a result of President's default. Because Miller & Schroeder suffered no loss, Dorsey questions whether the Trustee can assert claims against Dorsey set forth in the first three counts of the complaint.

"Defendant's Memorandum of Law Regarding Subject Matter Jurisdiction" dated December 8, 2004, at p. 3, in *McIntosh County Bank, et al. v. Dorsey & Whitney LLP*, United States Bankruptcy Court, District of Minnesota, ADV Case No. 03-4291. (Emphasis added)[5] AA at 462-470.

The "first three counts of the complaint" are the negligence/malpractice and misrepresentation claims. Under Dorsey's theory, the Bank Participants are not clients nor can they otherwise make a claim for malpractice, so Dorsey cannot be held liable to those parties. M&S, meanwhile, has not suffered a loss, so Dorsey cannot be held liable to that client. According to Dorsey, no one can sue it for its negligence in handling the St. Regis loan transactions; it accepted $50,000 for its work, but is responsible to no one for its performance. Such a position is untenable. Dorsey must be made accountable to the parties that suffered a loss as a result of Dorsey's negligent advice and counsel.

## II. STANDARD OF REVIEW

On appeal from summary judgment, this Court reviews the evidence *de novo* and in the light most favorable to the non-moving party. *Ingram v. Syverson*, 674 N.W.2d

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5 The Trustee, in fact, dismissed its malpractice claim in bankruptcy court for this reason. It should also be noted that the trial court apparently believed it was significant that "Miller & Schroeder has not sued Dorsey for legal malpractice." AA at 242, ¶11. The court seems to have concluded that this was evidence of weakness in the Appellants' case. The court was both incorrect and, as the above quote from Dorsey's brief to the Bankruptcy Court suggests, misinformed as to Dorsey's position. The Trustee, who took over all of M&S' assets by virtue of bankruptcy law, did sue Dorsey for malpractice. The court, moreover, apparently discounted the fact that Dorsey represented M&S (and never disclosed a potential malpractice claim) until just months before the company went bankrupt and that Dorsey took the position in this litigation that M&S had suffered no damage.

233, 235 (Minn. Ct. App. 2004); *citing Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). The reviewing court determines whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law. *Id.*; *citing Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 112 (Minn. 1992). All doubts and factual inferences must be resolved in favor of the non-moving party. *Id.*; *citing Offerdahl v. Univ. of Minn. Hosps. & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988). The standard of review does not change simply because the District Court makes findings of fact. Under Minn. R. Civ. P. 56, a district court may make findings of fact "if it wishes to do so," but such findings "are not entitled to the respect which an appellate court is required to give findings made pursuant to Rule 52.01." *Whisler v. Findeisen,* 280 Minn. 454, 455 n. 1, 160 N.W .2d 153, 154 n. 1 (1968); *see also Gresser v. Hotzler,* 604 N.W.2d 379, 383 (Minn. Ct. App.2000).[6]

Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03 (2004); *accord Thommes v. Milwaukee Mut. Ins. Co.*, 622 N.W.2d 155, 157-58 (Minn. App. 2001). A party moving for summary judgment has the burden of proving the absence of any genuine material fact. *Ritter v. M.A. Mortenson Co.*, 352 N.W.2d 110, 112 (Minn. Ct. App. 1984). A court considering a motion for summary judgment may not weigh the evidence or make factual determinations. *Fairview Hosp. & Health Care Serv. v. St. Paul Fire & Marine Ins. Co.*, 535 N.W.2d 337, 341 (Minn.

6 The trial court expressly stated that nothing in its Order should be considered a finding of fact. AA at 240, n.3.

1995); *Murphy v. Country House, Inc.*, 307 Minn. 344, 351, 240 N.W.2d 507, 512 (1976). Summary judgment is a "blunt instrument" to be used only when there is clearly no material issue of fact involved. *Drager by Gutzman v. Aluminum Indus.*, 495 N.W.2d 879, 882 (Minn. Ct. App. 1993). Summary judgment "should be granted only where the moving party has established a right to judgment with such clarity as to leave **no room for doubt**, and only where the non-moving party is not entitled to recover under any circumstances." *Id.* (Emphasis added).

## III. APPELLANTS HAVE STANDING TO SUE DORSEY

Appellants have standing to sue Dorsey for malpractice. Under Minnesota law a plaintiff can sue for malpractice if there is an attorney-client relationship created either by an explicit or implicit contract or under the "tort theory" of malpractice or if the plaintiff was a third-party beneficiary of the lawyer's services. *Admiral Merchants Motor Freight, Inc. v. O'Connor & Hannan*, 494 N.W.2d 261 (Minn. 1992). Appellants have standing to sue under any of the above theories.

In particular, it should be beyond dispute that Appellants were the third party beneficiaries of Dorsey's services, as it is clear that "one of the primary objectives" of Dorsey's retention was to benefit the Bank Participants. The trial court, in ruling that Appellants were no more than "incidental" beneficiaries, failed to conduct the analysis required by Minnesota law.

The court, moreover, weighed the evidence and made factual determinations against Appellants in the face of competing material facts. Dorsey argued below that it did not represent Appellants and owed no duty to Appellants because it did not know the identity of the committed Bank Participants, had no contact with any Bank Participant and was never specifically told, "You represent the Bank Participants."[7] The trial court appears to have accepted this argument, highlighting that litany in its Order. AA at 241-242. In doing so, however, the trial court was engaged in weighing the evidence. It was comparing and contrasting Dorsey's proffered evidence with all the evidence set forth above showing Dorsey's knowledge of how these M&S deals worked and the position and understanding of the Bank Participants, M&S and Dorsey. Appellants are entitled to have a jury hear all this evidence. As the Supreme Court said in *Admiral Merchants*:

> Whether an attorney-client relationship exists is usually **a question of fact dependent upon the communications and circumstances.**

*Admiral Merchants,* 494 N.W.2d at 265 (Emphasis added).

The trial court chose to ignore some circumstances, but not others; chose to ignore some communications, but not others. The decision of the trial court must be reversed.

### A. THE BANK PARTICIPANTS WERE THE THIRD PARTY BENEFICIARIES OF THE AGREEMENT BETWEEN DORSEY AND M&S

Appellants were the third party beneficiaries of Dorsey's work. As an initial matter, it is important to note, as the trial court did, that "[t]he primary scope of Dorsey's

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7 Although Dorsey and Ms. Rindels knew that participants would be taking over M&S' position after the loans closed, it appears that no one at Dorsey ever inquired as to the identity of the committed Bank Participants. In the context of a transaction like the St. Regis loans, where the lawyer's role is to document the loans and advise as to enforceability, the specific identity of each bank is irrelevant to that work. Nor does such knowledge, or lack thereof, have a bearing on whether the lawyer owes a duty to the banks. It is only after the fact, in this litigation, that Dorsey has decided that knowing the identity of the banks has significance.

legal representation" was the preparation of the loan documents. AA at 241, ¶10. M&S and the Appellants were perfectly aligned in wanting Dorsey to competently document the loans and provide accurate legal advice as to the transaction. It is beyond dispute, then, that one of the primary objectives of M&S' retention of Dorsey was to benefit the Bank Participants.

Third parties have standing to pursue malpractice claims to "implement the client's intent and...enforce the lawyer's obligations to the client..." *CPJ Enterprises, Inc. v. Gernander*, 521 N.W.2d 622, 624 (Minn. Ct. App. 1994). Dorsey's position is that it has no responsibility to anyone. The trial court's decision leads to that conclusion. Minnesota law, however, does not allow for such a result.

The case law requires that the court conduct a multi-factor analysis to determine whether "one of the primary objectives" of the agreement between the client and lawyer was to benefit the third party. The trial court, however, failed to conduct the required analysis and, thus, missed the true import of the "scope" of Dorsey's work. Instead, the trial court concluded, without analysis, that Appellants were merely the "incidental" beneficiaries of Dorsey's work. This conclusion is not supported by the facts or the law. The required analysis, moreover, leads to the conclusion that there are questions of material fact that preclude summary judgment.

Even Dorsey, prior to the initiation of the present case, acknowledged that the Bank Participants were the beneficiaries of its services. Dorsey partner John Thomas rhetorically commented, upon reading an internal Dorsey memo in which the writer asserted that the Bank Participants "might" be third party beneficiaries of Dorsey's work: "Aren't they?" AA at 429. As Mr. Thomas acknowledged, the answer is "Yes."

### 1. A Multi-Factor Analysis Centered Around the "Primary Objective" Standard was Required

The trial court was required, but did not, conduct a multi-factor analysis in deciding whether questions of fact existed on the issue of whether Appellants were the third party beneficiaries of the agreement between M&S and Dorsey. *See Goldberger v. Kaplan, Strangis and Kaplan, P.A.*, 534 N.W.2d 734, 738 (Minn. Ct. App. 1995). The trial court concluded that it did not need to conduct the analysis unless it first determined that Appellants were an intended beneficiary. AA at 249, ¶17. This conclusion is incorrect and is a misapplication of Minnesota law.

Since *Admiral Merchants* was decided in 1992 there has been continuing development in this area of the law, with commentators and courts recognizing that unique and complicated transactions require greater analysis to determine whether a lawyer owes a duty to a particular plaintiff. Some confusion, moreover, may have arisen because of the language employed by the *Admiral Merchants* court. *See e.g., Marker v. Greenberg*, 313N.W.2d 4 (Minn. 1981). A cursory review of that language may lead, as it did in this case, to a result that is contrary to what the court in *Admiral Merchants* intended and that is contrary to the law applicable today.

In *Admiral Merchants* the Minnesota Supreme Court, in allowing application of the third party beneficiary doctrine in legal malpractice cases, recited the legal theory as requiring that the client's "sole purpose" in hiring the lawyer must be to benefit the plaintiff. *Admiral Merchants*, 494 N.W.2d at 266. This "sole purpose" requirement is not what it may appear to be at first blush and, moreover, has been clarified in later cases.

The defendant lawyers in *Admiral Merchants* had been hired by Admiral Merchants to represent both Admiral Merchants and related companies, which were referred to as the "Control Group." *Id.* at 264. It was clear that the lawyers' services benefited both Admiral Merchants and the Control Group entities. *Id.* at 264-265. The liability of the Control Group was a "major concern" to the client, but not the "sole" concern. *Id.* at 265-266. The *Admiral Merchants* court, in fact, indicated that it was necessary to examine "the extent to which the transaction was intended to affect" the third party. *Id.* at 266. The "sole purpose" requirement, then, seems to focus on the nature of the legal services requested and does not mean that there can be no benefit to the client or any other party. To hold otherwise would effectively eliminate that basis of liability, as the client is always in some way benefited by the representation and, moreover, the theory could have no applicability where there is more than one third party beneficiary.

This reading of *Admiral Merchants*, moreover, was confirmed by later cases. In *Goldberger,* cited above, this Court addressed the language of *Admiral Merchants*. It concluded that the multi-factor analysis set out in *Admiral Merchants* is required to determine whether the plaintiff is a third party beneficiary of the defendant's legal services. In discussing *Admiral Merchants* and comparing it to *Marker*, this Court, in *Goldberger,* reconciled the apparent conflict between the "sole purpose" language and what the Court referred to as the "balancing-of-factors test":

> Both cases...state that the non-client must be a direct, intended beneficiary of the attorney's services. The cases then state the *Lucas* factors (*Lucas v. Hamm*, 56 Cal. 2d 583, 15 Cal. Rptr. 823-24, 364 P.2d 685, 687-88 (1961), cert. denied, 368 U.S. 987, 82 S.Ct. 603, 7 L.Ed. 2d 525 (1962)) **must be considered** in determining the attorney's duty to the non-client. It seems, then, that the supreme court intended the *Lucas* factors as an aide in determining whether the non-client is a third party beneficiary and that is how we have analyzed this case.

*Goldberger*, 534 N.W.2d at 738. (Emphasis added)(Citation omitted).

This point was confirmed and further clarified in *Francis v. Piper*, 597 N.W.2d 922, 925 (Minn. Ct. App. 1999), when this Court noted that the third-party beneficiary doctrine in Minnesota follows the *Restatement (Third)*,[8] which provides that the attorney owes a duty to a non-client when the attorney knows that the client "intends as one of the **primary objectives** of the representation" to benefit the non-client. *Francis*, 597 N.W.2d at 925 (quoting the draft *Restatement*) (Emphasis added).

The issue, then, is not whether the client's "sole" purpose was to benefit the third party. As *Francis* and *Goldberger* make clear, the law actually requires that "one of the primary objectives" of the client's retention of the lawyer be to benefit the third party and that a multi-factor test should be employed to make that determination.

It is currently unclear from the case law whether the court should use what has been referred to as the "*Lucas* factors" or should use the factors set out in § 51(3) of the

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8 At the time *Francis* was decided, the *Restatement (Third)* was in draft form and the court cited §73(3). That draft section was incorporated into § 51 of the final version of the *Restatement (Third)*.

*Restatement (Third) of the Law Governing Lawyers*. The result from either approach, however, is the same.

### 2. Application of the *Lucas* Factors Requires Reversal

As explained in *Goldberger,* whether the third party beneficiary doctrine applies involves "'a matter of policy and...the balancing of various factors,'" set out in *Lucas* including: 1) the extent to which it was intended that the transaction benefit the plaintiff; 2) the foreseeability of harm to the plaintiff; 3) the certainty of harm to the plaintiff; 4) the connection between the lawyer's conduct and the harm; and 5) the policy of preventing future harm. *Goldberger*, 534 N.W.2d at 738; *see also Anoka Orthopaedic Associates, P.A. v. Mutschler*, 773 F. Supp. 158, 166-67 (D. Minn. 1991)(noting that the rule is applicable in a variety of situations, not just the estate planning context, and denying summary judgment on basis that fact issues existed under contract, tort and third-party beneficiary analysis of doctors' claims against attorney representing professional association and benefit plan).[9] Application of the analysis to a particular case is a question of fact. *See Admiral Merchants*, 494 N.W.2d at 266. Application of the factors here shows that summary judgment should not have been granted.

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[9] The *Anoka Orthopaedic* court's reference to the theory going beyond the estate planning context was in response to an argument that the third party beneficiary doctrine was limited to those types of cases. Usually in such cases a lawyer improperly drafts a will, thereby defeating the intent of the client and causing harm to the beneficiary. The beneficiary, like the Bank Participants here, suffers the real loss as a result of the malpractice. The third-party beneficiary rule is routinely applied in such cases to allow recovery against the lawyer. *See Marker*, 313 N.W.2d at 5. These cases also establish that the question is one of "primary objective," rather than "sole purpose," as a testator has other purposes besides a bequest to any one beneficiary.

First, the transaction at issue (the St. Regis loans) was intended to benefit the Bank Participants, as the lenders. M&S received a benefit as well for the services it provided under the Participation Agreements, but the Bank Participants were the real lenders with an interest in the loans. Dorsey was retained to make sure the loans were properly documented and closed and that the lenders' interests were protected. Second, it was clearly foreseeable that the Bank Participants would be harmed if the St. Regis loans were not properly documented and closed. The Bank Participants had committed to participate in the St. Regis loans before closing, the St. Regis loans would not have closed without those commitments, and Dorsey knew that the Bank Participants would be buying all of the debt. Third, the Bank Participants have certainly suffered harm. The debt has, so far, been uncollectible. Fourth, there is a direct connection between the inability of the Bank Participants to collect on the Pledge and the advice and counsel provided by Dorsey on the issue of whether to close the St. Regis loans without NIGC approval of the Pledge.

Fifth, and finally, the policy of preventing future harm leads to the conclusion that Dorsey should be held liable. As noted above, to accept Dorsey's position is to conclude that it has no responsibility to any party. Dorsey claims that the Bank Participants cannot sue it and that M&S has not suffered a loss. Loan participations are not uncommon and a holding that an attorney who represents the lenders' interests in the underlying loan transaction does not have any responsibility to the participants would effectively absolve the lawyer from any harm caused by the lawyer's negligence.

### 3. The Restatement and Cases From Other Jurisdictions Support the Conclusion That Summary Judgment Should Not Have Been Granted.

The *Restatement (Third) of the Law Governing Lawyers* which was adopted after *Admiral Merchants* and *Marker* were decided, also requires reversal of the trial court. As noted in *Francis*, Minnesota follows the *Restatement*. Section 51(3) of the *Restatement* provides:

> A lawyer owes a duty to use care within the meaning of Section 52 in each of the following circumstances: ...(3) to a non-client when and to the extent that: (a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the non-client; (b) such a duty would not significantly impair the lawyer's performance of obligations to the client; and (c) the absence of such a duty would make enforcement of those obligations to the client unlikely.

*Restatement (Third) of Law Governing Lawyers*, § 51(3). *See also*, Comment (f) thereto.

There can be no real dispute that M&S hired Dorsey to benefit the Appellants and that Dorsey knew that one of the most important, the "primary," objective of its services was to benefit the Appellants. There was no impairment of Dorsey's obligations to M&S, meanwhile, as the scope of Dorsey's work was limited to properly documenting and closing the transaction. M&S' and the Bank Participants' interests were perfectly aligned and the scope of Dorsey's work was to advance those interests. M&S did not ask Dorsey to negotiate the participations or in any other way become adverse to the Appellants. To the contrary, M&S asked for Dorsey's advice in changing the Participation Agreements for the sole purpose of making sure the Appellants could enforce the loans. Finally, if Dorsey has no responsibility to the Appellants then enforcement of its obligations is unlikely, because M&S (now bankrupt) did not retain a lender's position in the loans. It is the Appellants who have "skin in the game" and who, properly, are seeking to enforce Dorsey's obligations.

Courts in other jurisdictions, both prior to and after enactment of the *Restatement*, have also found that an attorney is responsible to non-client third parties in similar circumstances. *See Collins v. Binkley*, 750 S.W.2d 737 (Tenn. 1988); *Friske v. Hogan*, 698 N.W.2d 526 (S.D. 2005)(applying *Restatement (Third)*); and *Estate of Leonard v. Swift*, 656 N.W.2d 132 (Ia. 2003)(applying *Restatement (Third)*). For example, in *First Financial Savings & Loan Assoc. v. Title Insurance Company of Minnesota, et al.*, 557 F.Supp. 654 (N.D. Ga. 1982), the court held that attorneys representing the lender in closing loan packages owed a duty to the assignees of the loans. *Id.* at 659-660. The court held that the defendant lawyers were not entitled to summary judgment where "defendants knew an assignment of their loan packages...was to follow each of their respective loan closings, **even if they did not know the specific identity of the intended assignee.**" *Id.* at 660. (Emphasis added). Since the attorneys knew beforehand that the loans would be assigned, it was "clearly foreseeable that direct assignees such as plaintiff would rely on the accuracy of the closing attorneys' certifications." *Id.* As a result, the non-client third party had a right to pursue negligence claims against the attorneys.

In the present case, although the trial court recited the *Lucas* factors and recited the language of the draft version of the *Restatement*, there is no indication that the court conducted the required analysis. Instead, the trial court seems to have mistakenly believed that no such analysis was required and concluded, without explanation, that "[a]ny intended benefit to the plaintiffs of the attorney-client relationship between Miller & Schroeder and Dorsey was incidental…" AA at 250, ¶20. This ruling, and the method by which it was reached, is in error and requires reversal.

### B. AN ATTORNEY-CLIENT RELATIONSHIP EXISTED BETWEEN DORSEY AND THE BANKS

Both the "contract" theory and the "tort" theory of representation lead to the conclusion that Dorsey represented the Bank Participants. Dorsey's representation of the Bank Participants was implicit, if not explicit, in its role in the transaction. The Bank Participants reasonably relied on Dorsey's advice and counsel and it was foreseeable to Dorsey that its negligence would cause harm to the Bank Participants. An attorney-client relationship existed between Dorsey and the Bank Participants. At a minimum there is a question of fact as to whether such a relationship existed.

#### 1. Dorsey Implicitly Represented the Banks

That Dorsey was representing the Bank Participants was made clear by the context and documentation of the St. Regis loans. Dorsey's role as the representative of the Bank Participants was implicitly understood.

Under the "contract" theory of the attorney-client relationship, such a relationship can be found "if the parties explicitly or implicitly agree that the attorney will provide legal services" for the plaintiff. *Schuler v. Meschke*, 435 N.W.2d 156, 161 (Minn. Ct. App. 1989). The contract can be express or implied from the conduct of the parties. *Pine Island Farmers Coop v. Erstad & Riemer, P.A.*, 649 N.W.2d 444, 448 (Minn. 2002). There is no requirement of formality or even compensation. See Comment, *Attorney*

*Malpractice: Use of Contract Analysis to Determine the Existence of an Attorney-Client Relationship*, 63 Minn. L. Rev. 751, 754-755 (1979). The contract is created when the attorney undertakes work on a person's behalf. *Id.*; citing *Christy v. Saliterman*, 288 Minn. 144, 179 N.W. 2d 288 (Minn. 1970) (jury verdict finding that contract for employment as attorney was created where attorney began work on matter).

In the present case, Dorsey acted as lenders' counsel in thirty-six prior gaming loan transactions. In each of those, as Dorsey knew, M&S sold participations. The loan documents here, drafted by Dorsey, expressly make reference to M&S' role as servicer and agent for the Bank Participants. The Participation Agreements also make clear that M&S is the "nominal" lender and is acting as the Bank Participants' agent. Just as it had done thirty-six times before, M&S went to Dorsey for advice and counsel in structuring, documenting, and closing a gaming loan transaction on behalf of the participants. Dorsey also gave specific advice relating to amending the Participation Agreement so that the Participants could enforce the loan agreement. Dorsey's role and its representation of the Bank Participants was both explicit and implicit.

### 2. The Contract Theory Also Applies as a Result of the Bank Participants' Status as M&S' Assignee

The contract theory also applies because Appellants were the assignees of M&S' rights under the loans. As the Participation Agreement states, M&S assigned all of its interests to the Appellants. Although Minnesota law currently holds that malpractice claims cannot be assigned,[10] that rule has been rejected in other courts around the country

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10 *See Wagener v. McDonald,* 509 N.W.2d 188, 191 (Minn. Ct. App. 1993).

faced with a commercial transaction where the assignor no longer has interest in pursuing a malpractice claim and the loss is suffered by the assignees. An exception to the current Minnesota rule should be made in the present case.

In *Cerberus Partners, L.P. v. Gadsby & Hannah*, 728 A.2d 1057, 1061 (R.I. 1999), for example, the Rhode Island Supreme Court held that a legal malpractice claim was assignable because it arose out of an earlier commercial loan transaction. *Cerberus* involved a suit by purchasers of commercial loans against two law firms that, while representing the original lenders, failed to perfect the lenders' security interests. *Id.* at 1057-59. The court stated "that legal malpractice claims, transferred along with other assets and obligations to an assignee in a commercial transaction, are assignable ...." *Id.* at 1061. There, the court acknowledged "the distinction between market assignments involving purely economic transactions...and freestanding malpractice personal injury claim assignments that necessarily involve and invoke the unique lawyer-client relationship and duty of confidentiality...." *Id.* at 1060. The court in *Cerberus*, moreover, stated that "an assignment such as the sort that is involved in this particular case, serves as a waiver of the client's attorney-client privilege." *Id.*

Here, as in *Cerberus*, the claims arise out of a commercial loan transaction where the Bank Participants relied on Dorsey's opinion but were not involved in the same unique lawyer-client relationship as that in a personal injury case. *See also Cowan Liebowitz & Latman, P.C., v. Kaplan*, 902 So.2d 755 (Fla. 2005) (holding that legal malpractice claims against attorneys preparing a private placement memorandum were assignable, the attorneys knew it would be distributed and that potential investors would rely on it).

In *Security National Servicing Corp. v. Law Office of David J. Stern*, P.A., 916 So.2d 934, 30 Fla.L.Weekly D 2685 (Fla.Ct.App. 2006), the Florida court of appeals also distinguished between commercial and non-commercial assignments of malpractice claims. *Security National Servicing Corp.*, 916 So.2d at 938. The court noted that the policy concerns behind prohibiting assignment are not as apparent in commercial situations, where the assignment is not made to a former adversary. *Id.* The court also discussed, as did the *Cerberus* court, the issue of attorney-client privilege, noting that the assignment serves to waive that privilege. *Id.* In the present case, in any event, Dorsey has not sought to protect any privilege, allowing both Dorsey's attorneys to testify as to communications with M&S and questioning the former M&S employees about those communications.

Dorsey knew that the loans would be assigned to the Appellants; that, in fact, there would be no loans unless and until there had been commitments to accept the assignments. The Appellants were the assignees of the interests of M&S, the "nominal" lender. The malpractice claim was not specifically assigned and, thus, the policy considerations behind the prohibition of such a specific assignment are not impacted. If the Appellants cannot sue Dorsey, then Dorsey and any counsel who represent parties in similar commercial transactions that present relationships like those here will be immune from liability for their negligent acts. This court should reverse the trial court and hold that the malpractice claim was assigned to the Appellants and, thus, the Appellants are in privity with Dorsey and can recover damages resulting from Dorsey's malpractice.

### 3. The "Tort" Theory Creates An Attorney-Client Relationship

Dorsey was representing the Bank Participants under the "tort" theory of the attorney-client relationship. An attorney-client relationship is found under the "tort" theory when advice is given "under circumstances in which a reasonable person would rely on the advice." *Viet v. Anderson*, 428 N.W.2d 429, 431-32 (Minn. Ct. App. 1988) (quoting *Langeland v. Farmers State Bank of Trimont*, 319 N.W.2d 26, 30 (Minn. 1982). In considering reliance, the courts look at whether it was reasonably foreseeable to the attorney that the plaintiff would be injured if the advice was rendered negligently. *Viet*, 428 N.W.2d at 432; see also *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 693, fn. 4 (Minn. 1980). There is no requirement that direct contact occur between the plaintiff and the lawyer. *Sandum v. Doherty, Rumble & Butler, P.A.*, 1994 WL 593925, p. 3 (Minn. Ct. App. 1994). The question, moreover, is one of fact that should prevent summary judgment. See e.g., *Viet*, 428 N.W. 2d at 432. The facts of the present case lead to the conclusion that an attorney-client relationship existed or, at a minimum, create a fact issue for resolution at trial.

Dorsey understood that the Bank Participants were the lenders. The Bank Participants relied on M&S to select counsel with experience and expertise for the purpose of protecting the Bank Participants' interests. Dorsey's advice and counsel, as Dorsey could foresee, was transmitted to the Bank Participants. As the closing approached and the issue as to NIGC approval of the Pledge arose, the advice from

Dorsey was passed on to the Bank Participants. Had Dorsey provided further advice regarding the risks of going forward, that too would have been passed through M&S to the Bank Participants. It was reasonable for the Bank Participants to rely on the advice coming from the experienced counsel selected to properly document the St. Regis loans. It was foreseeable to Dorsey that if it acted negligently the Bank Participants would be injured, as it was the Bank Participants who would be holding the debt.

The Bank Participants relied on Dorsey's counsel and advice. Dorsey knew that they would be harmed by any negligence of Dorsey. There was an attorney-client relationship between Dorsey and the Bank Participants.

## IV. THE NEGLIGENT MISREPRESENTATION CLAIM SHOULD BE REINSTATED

Count II of the Complaint alleges that Dorsey negligently misrepresented the enforceability of the Pledge Agreement. The trial court recited Minnesota law to the effect that non-clients cannot sue attorney's for negligent misrepresentation and, because it had concluded that Appellants were not Dorsey's client, summarily ruled that the misrepresentation claim could not stand. As shown above, Appellants were Dorsey's clients and do have standing to sue Dorsey and, therefore, the trial court should be reversed and the misrepresentation claim should be reinstated.

## CONCLUSION

A court, as a basic matter of fairness and equity, must recognize that when an attorney who accepted substantial fees asserts that he or she is immune from claims arising out of the legal services provided, genuine issues of material fact must exist and must be carefully examined by a trier of fact. Appellants, as Dorsey admitted, suffered the loss, yet Dorsey denies any responsibility, to anyone, for that loss. Appellants are entitled to ask a jury whether or not it agrees with Dorsey's position.

The trial court chose to rely on the evidence advanced by Dorsey and to discount the evidence of Dorsey's knowledge of how these M&S deals worked and the position and understanding of the Bank Participants, M&S and Dorsey. Instead of recognizing that there were fact issues, the trial court weighed the evidence and made factual determinations. *See Fairview Hosp. & Health Care Serv.*, 535 N.W.2d at 341 (court must not weigh evidence or make factual determinations). Instead of resolving doubts and inferences in favor of Appellants, the trial court resolved all doubts and factual inferences in favor of Dorsey, the moving party. *See Offerdahl v. Univ. of Minn. Hosps. & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988) (all doubts and inferences must be resolved in favor of the non-moving party).

For the reasons set forth above, Appellants respectfully request that the Court reverse the District Court's order granting summary judgment and remand this case for trial.

Respectfully submitted,

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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).