

No. A04-188

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**STATE OF MINNESOTA**  
**IN SUPREME COURT**

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Jerry's Enterprises, Inc.,

*Plaintiff-Respondent,*

vs.

Larkin, Hoffman, Daly & Lindgren, Ltd.,  
Thomas P. Stoltman, and Gary A. Renneke,

*Defendants-Appellants*

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**BRIEF OF PLAINTIFF-RESPONDENT**  
**JERRY'S ENTERPRISES, INC.**

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## STATEMENT OF THE ISSUES

1. *Is an attorney entitled as a matter of law to “judgmental immunity” from malpractice liability where the attorney admittedly fails to investigate or warn the client of an avoidable risk to real estate title that arises, in part, from a point of unsettled law, even though the attorney (1) never considered or researched the legal doctrine in question; (2) did not rely on that legal doctrine in providing advice to the client about the transaction; and (3) never concluded the legal doctrine was even applicable to the transaction.*

District Court Ruling: The District Court ruled that the existence of an open legal issue precluded malpractice liability as a matter of law, even if the attorney did not use reasonable care to make an informed decision as to the law’s applicability.

Court of Appeals Ruling: The Court of Appeals reversed, ruling that attorneys seeking to escape liability based on their belief as to the status of a point of law must show that, in the course of the representation, they did, in fact, exercise an informed, legal judgment on that issue.

Wartnick v. Moss & Barnett, 490 N.W.2d 108 (Minn. 1992);  
Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980);  
Meagher v. Kavli, 256 Minn. 54, 97 N.W.2d 370 (1959).

2. *To establish a jury question as to causation, is it sufficient for a plaintiff asserting a claim of legal malpractice based on an attorney’s negligent misrepresentation in a real estate transaction to show that “but for” the attorney’s negligence the client would have avoided an expensive challenge to its title to the real estate?*

District Court Ruling: The District Court suggested, in addition to showing that, absent Larkin’s negligence, the transaction would have been successful, Jerry’s needed to also show that “but for” Larkin’s negligence, Jerry’s would have prevailed in the ensuing Bruggeman lawsuit.

Court of Appeals Ruling: The Court of Appeals recognized that Jerry’s was seeking to recover damages caused by Larkin’s negligence in representing Jerry’s in a real-estate transaction, not in representing Jerry’s in the subsequent litigation, and therefore Jerry’s need not show that “but for” Larkin’s negligence it would have prevailed in the litigation.

Hill v. Okay Const. Co., 312 Minn. 324, 252 NW.2d 107 (1977);  
Blue Water Corp., Inc. v. O’Toole, 336 N.W.2d 279, 281 (Minn. 1983);  
Viner v. Sweet, 70 P.3d 1046 (Cal. 2003).

## STATEMENT OF THE ISSUES FOR JERRY'S CROSS APPEAL

3. *Is it error to permit a defendant in a legal malpractice action to introduce opinion testimony as to the status of a point of law the defendant admits it never considered, researched or relied on during the entire course of the legal representation at issue?*

District Court Ruling: The District Court ruled that in a legal malpractice case the jury decides the law and allowed the opinion testimony.

Court of Appeals Ruling: The Court of Appeals ruled that such evidence was admissible to show the "applicable standard of care."

Hughes v. Quarve & Anderson, Co., 338 N.W.2d 422 (Minn. 1983);  
Minn. R. Evid. 402 and 403.

## STATEMENT OF THE CASE

Jerry's Enterprises, Inc. ("Jerry's") brought this action for legal malpractice against the law firm Larkin Hoffman Daly & Lindgren and two of its shareholders, attorney Thomas Stoltman and Gary Renneke. (Collectively referred to as "Larkin"). Jerry's asserts that Larkin negligently represented Jerry's in the course of a real estate purchase transaction by failing to identify, analyze, resolve or advise Jerry's of inconsistencies and ambiguities in the transaction documents that created uncertainty as to Jerry's post-closing obligations and a risk to Jerry's title.

At the close of Jerry's case, the Hennepin County District Court, Judge Janet N. Poston presiding, granted a directed verdict for Larkin based on the judgmental immunity doctrine. (Appx. 45). The Minnesota Court of Appeals reversed the judgment entered pursuant to the directed verdict, reasoning that, under the facts established in the trial record, Larkin was not entitled to judgmental immunity because Larkin never exercised informed, legal judgment as to the status of Jerry's title or post-closing obligations.

(Appx. 11). The Court of Appeals, however, did affirm the District Court's evidentiary ruling that Larkin could introduce opinion testimony on merger law, reasoning such testimony was admissible to show the applicable standard of care. (Appx. 14).<sup>1</sup> On April 19, 2005, this Court granted Larkin's petition for review of the Court of Appeals' reversal of the directed verdict and Jerry's cross petition for review of the Court of Appeals' ruling on the admissibility of opinion testimony as to the law. (Appx. 1-2).

### STATEMENT OF THE FACTS

Jerry's is a Minnesota corporation that operates grocery stores under its own name and as a franchisee of Cub Foods. (T. 72-3). From the mid-1980s until 2001, Larkin attorney Stoltman – a certified real estate law specialist – was Jerry's principal attorney on a variety of business matters, including all real estate matters. (T. 74-5, 93-6, 138-9).

Jerry's asserts that Larkin committed legal malpractice while representing Jerry's in a significant real estate transaction involving rapidly appreciating commercial property in Woodbury. In December 2003, Jerry's negotiated an option to acquire a 16-acre parcel in Woodbury and retained Larkin to represent it in that transaction. (Trial Exhibit ("Ex.") 7). Jerry's believed it acquired clear title to the property at the closing in August 1995.

With Larkin's continuing representation, Jerry's development of the property proceeded

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<sup>1</sup> The Court of Appeals also affirmed the District Court's ruling that this Court's opinion in the Bruggeman litigation was not a superseding cause of Jerry's damages (Appx. 12) and reversed the District Court's ruling that, if Larkin could introduce opinion testimony as to the status of the law, then Jerry's could elicit testimony concerning certain relevant unpublished opinions of the Minnesota Court of Appeals (Appx. 14). Larkin has not presented or argued those rulings on appeal and has waived its right to do so. See Melina v. Chaplin, 327 N.W.2d. 19, 20 (Minn. 1982). If, contrary to law, Larkin should try to contest those rulings in its reply brief, Jerry's refers this Court to the arguments made in its brief and reply brief to the Court of Appeals.

very deliberately. (Trial Transcript (“T”) 152, 158-9, 362-4). Four years after negotiating the purchase, two years after closing, and a year after Jerry’s entered into Larkin-drafted contracts to sell subdivided parcels of the property, Jerry’s received a demand from the original seller to repurchase the property at the original price. (Ex. 43). To protect its interests in the highly appreciated property, Jerry’s paid over \$164,000 to defend its title against the seller’s challenge and, when that defense failed, paid an additional \$4.2 million to acquire the clear title to the property that Jerry’s believed it had received at closing. (Ex. 61, Ex. 431).

At trial, the Larkin attorneys admitted: (1) that they recognized that a buy-back provision Larkin had drafted posed a risk to Jerry’s development plans and should be eliminated from the transaction; (2) that Larkin failed to eliminate the risk or advise Jerry’s of it; (3) that Larkin either failed to recognize the inconsistencies between the terms of the transaction documents or, if they did recognize those inconsistencies, ignored them; (4) that Larkin failed to provide Jerry’s title insurer with relevant purchase documents; (5) that Larkin failed to investigate, clarify or resolve the status of Jerry’s title or post-closing obligations; and (6) that Larkin failed to advise Jerry’s, at any time prior to or after closing, that there was any possible risk to its title or uncertainty as to its post closing obligations. (Infra pp. 7-11). Critically for this appeal, the Larkin attorneys also admitted that, during the entire course of the transactional representation, no Larkin attorney ever formed an opinion that the risk and uncertainty created by the ambiguities and inconsistencies in the transaction documents had been resolved by application of the legal doctrine of merger. (Infra pp. 7-11).

## I. TRIAL EVIDENCE

### A. PRE-CLOSING REPRESENTATION (SEPTEMBER 1993 TO AUGUST 1995)

Starting in 1993, Larkin represented Jerry's in connection with the purchase and development of a 16-acre parcel of land in Woodbury, Minnesota (the "Woodbury Property") near the intersection of Highway I-94 and Radio Drive. (T. 76-7, 92-93, 103, 106-7; Trial Exhibit ("Ex.") 7). The property consisted of several adjoining parcels, one of which (the "Bruggeman Parcel") was owned by William Bruggeman. (T. 106)

During the first several months of the representation, Stoltman negotiated and drafted a written agreement that gave Jerry's an option to purchase the Bruggeman Parcel. (T. 108-9, 481-2). In one of the final drafts of that document, Bruggeman's attorney insisted on the inclusion of a "buy-back" right. (T. 112-13, 483-4; Ex. 9).

Stoltman advised Jerry's of that demand and proceeded to draft the language. (T. 484-5; Ex. 9). In its final form, as drafted by Stoltman, the buy-back provision stated:

21.8) Repurchase Option – Seller shall have the option to repurchase the Property from buyer if Buyer has not commenced construction of improvements on the Property within two (2) years after the date Buyer exercises its option to purchase the Property.

(Ex. 15 at p. 12). That buy back provision was contained in the Stoltman-drafted Option Agreement that Jerry's and Bruggeman executed in February 1994. (Id.).

When it initially contracted to obtain an option to purchase the Woodbury Property in February 1994, Jerry's plans were to build and operate a grocery store on the site. (T. 102-3; Ex. 383). But, in early 1995, Jerry's was able to secure a lease to build its grocery store as part of the huge Tamarack Village shopping development being

constructed on the adjoining property. No longer needing the Woodbury Property to build a grocery store, but recognizing that the property would appreciate in value because of the Tamarack Village development, Jerry's decided to exercise its option to purchase the Woodbury Property, subdivide it, and develop it for resale. (T. 120-2, 124-5; Ex. 383).

Jerry's informed Stoltman of this change in development plans months before the scheduled closing on the purchase of the Bruggeman Parcel. (T. 500-1; Ex. 383). Stoltman's notes from February and March 1995 show that, when Jerry's advised Stoltman of those changes, Stoltman recognized the need to try to eliminate the buy-back provision in the 1994 Option Agreement to give flexibility to Jerry's new plans. (T. 507, 516; Ex. 379; Ex. 73 at LH201747). Although Stoltman recognized that the buy-back provision posed an increased risk to Jerry's new development plans, the trial evidence indicates Stoltman never advised Jerry's of the risk. Jerry's President, Robert Shadduck, testified that he had no conversations with Stoltman about the buy-back provision after advising Stoltman of Jerry's change in development plans. (T. 82, 116, 120, 142-4).<sup>2</sup> In a deposition given under oath, Stoltman similarly testified that he did not recall discussing the buy-back provision with Jerry's at any time after the Option Agreement was signed in February 1994. (T. 493-4, 510).<sup>3</sup> And Stoltman never raised the

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<sup>2</sup> Larkin's assertion that the letter Stoltman wrote in January 1994 constituted his response to Jerry's new development plans (Larkin Br. p. 5) misstates the record. The letter was written *before* the parties entered the February 1994 Option Agreement, not after Jerry's advised Stoltman of the change in development plans in 1995. (See Ex. 383).

<sup>3</sup> At trial, Stoltman acknowledged his deposition testimony but testified that, after reviewing his note, he generally recalled two meetings with Jerry's president – one in

elimination of the buy-back provision with Bruggeman's counsel or discussed his failure to do so with Jerry's. (T. 516, 518-20, 521-3, 544-6).

**B. CLOSING REPRESENTATION (AUGUST 1995)**

Jerry's and Bruggeman closed on the purchase of the Bruggeman Parcel on August 10, 1995 – 18 months after they had executed the Option Agreement containing the buy-back provision. (T. 141). Stoltman reviewed draft closing documents prepared by Bruggeman's attorneys. (T. 547; Ex. 21). The draft deed indicated that Bruggeman was conveying all title to and interests in the Bruggeman Parcel except for several specifically listed encumbrances. (Ex. 21 at JER101700-6). None of the closing documents made any reference to the buy-back provision. (Ex. 21).

Stoltman never identified or advised Jerry's of the inconsistencies between the clear-title closing documents and the Option Agreement containing the buy-back provision. (T. 549-50). In fact, while acknowledging that the "best practice" would have been to review the Option Agreement as part of the closing preparations, Stoltman could not recall that he even looked at that document prior to closing. (T. 548-9). Stoltman conducted no investigation or research to determine whether any of the parties' rights or obligations might survive closing. (T. 551; Appx. 75-78). He said it "did not occur" to him to consider whether or not the buy-back provision would be extinguished. (T. 551).

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February 1995 and one in March 1995 – at which the buy-back provision was discussed. But Stoltman's time records show that the only face-to-face meeting between the two took place on February 21, 1995 and do not list the buy-back provision as one of the topics discussed at that meeting. (Ex. 83 at LH215584). As for the supposed March 1995 meeting, Stoltman conceded that it was possible that the notes he reviewed were merely his own list of things that needed to be accomplished. (T. 514).

Stoltman testified that he did not – before closing, at closing, or in the two years after closing – form an opinion one way or another as to whether the clean title deeds extinguished the buy-back provision. (T. 479). Consequently, Larkin never advised Jerry’s of the possibility that the buy-back option might survive the closing, thereby compromising Jerry’s title to the property. (T. 549-50).

Stoltman also arranged for title insurance for Jerry’s. At trial, Stoltman testified that the reason he did not consider whether Jerry’s obtained clean title at closing was because Jerry’s had a title policy. (T. 479). In securing that policy, Stoltman had provided the insurer with copies of the draft closing deeds, but failed to provide the insurer with a copy of the 1994 Option Agreement or the buy-back provision. (T. 207-8, 593-4). At trial, Stoltman admitted that if he had provided the buy-back provision to the title insurer, the insurer would have defended Jerry’s against the subsequent challenge to Jerry’s title and the resulting litigation. (T. 592-4; see also Ex. 135).

Stoltman went on vacation during the closing and arranged for Gary Renneke to represent Jerry’s in his stead. (T. 548, 550, 769; Ex. 21 at JER101699). Stoltman and Renneke had no substantive conversations about the transaction. (T. 550, 769). Renneke did review the 1994 Option Agreement in preparation for closing and he identified the buy-back provision as an “atypical” provision for such an agreement. (T. 773-74). Renneke noted that none of the draft closing documents referenced the buy-back provision and recognized that this inconsistency between the documents allowed for a legal argument that the buy-back provision would merge with the clean title deeds at closing. (T. 775-7). But, in the course of representing Jerry’s, Renneke did not form an

opinion that the buy-back provision would merge. (T. 777, 780-1). Renneke characterized the survival clause of the Option Agreement as being “unclear.” (T. 783-4, 788, 797). Renneke testified that, from reviewing of the documents, “I hadn’t formed an opinion that they merged.” (T. 777). He continued, “I didn’t form an opinion [that the buy-back provision had merged] and I wouldn’t give an opinion on it without some qualification.” (T. 779). And, repeating his sworn deposition testimony, Renneke testified that, when he reviewed the documents, “in my mind, at that time, no, it was not clear that [the buy-back provision] would have merged.” (T. 779; Appx. 152).

Renneke testified that he would have needed to conduct a “reasoned analysis” of the facts and circumstances surrounding the transaction in order to be able to form an opinion on the merger issue. (T. 780). He did not conduct any such analysis or any legal research to determine whether or not the merger doctrine might apply. (T. 780-81, 788).

Renneke admitted that, even though the survival language in the 1994 Option Agreement was unclear and it was not clear to him whether the buy-back provision would merge, he never discussed the issue with Jerry’s. (T. 789, 793, 798-9). Renneke never told Stoltman of the uncertainties and ambiguities he had recognized. (T. 550).<sup>4</sup>

Prior to closing, Jerry’s President, Robert Shadduck, reviewed the deeds, sellers’ affidavits and other closing documents. Based on the language in those documents, Jerry’s believed the title it was obtaining was subject to only the few encumbrances listed

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<sup>4</sup> As this testimony reveals, Larkin’s assertion in its brief that “Renneke testified that, under the law at the time of closing in 1995, he believed Jerry’s was receiving clear title to the property” (Larkin Br. p. 5) misstates Renneke’s trial testimony.

in those documents. (T. 152, 158-9, 362-3, 368). Shortly before closing, Shadduck asked Stoltman whether there was anything Jerry's needed to be concerned about going forward. (T. 162-4, 363-4). In response to Jerry's inquiry, Larkin failed to identify any issues that might adversely affect Jerry's title or plans for the property. (T. 162-3).<sup>5</sup> Stoltman admits that even though the existence of a valid buy-back opinion was a legal issue that would have a material economic impact on Jerry's interests, that possibility was not identified as a concern by Larkin to Jerry's. (T. 481, 583).

### **C. POST-CLOSING REPRESENTATION (AUGUST 1995 TO AUGUST 1997)**

Following closing, Jerry's proceeded with its plans to develop and sell subdivided parcels of the Woodbury Property. Larkin continued to provide Jerry's with legal counsel in connection with those activities for the next two years. (T. 173-74; Ex. 79; Ex. 83 at LH215589-95). As part of that representation, Stoltman drafted and reviewed contracts for Jerry's to use in selling the subdivided parcels. (T. 555, Ex. 35; Ex. 83 at LH215589 and LH215591; Ex. 115; Ex. 419). All of those contracts – one of which was

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<sup>5</sup> Larkin's implication that Jerry's President, Robert Shadduck, independently formed a conclusion, as an attorney, that the buy-back provision had merged at closing (Larkin Br. at 5) misstates the evidence. Shadduck had not actively practiced law since 1987 when he joined Jerry's. (T. 83-7). In complex real estate transactions, Jerry's turned to certified specialists like Stoltman to represent Jerry's legal interests. (T. 74-6, 102). Shadduck testified that, when Larkin presented him with the clear-title deeds and other closing documents, he read those documents and did not see anything in them that would cause him to believe that Jerry's had anything other than clear title to the property. (T. 152, 158-9, 362-3, 368). Shadduck did not specifically think about the buy-back provision that had been contained in the prior Option Agreement. (T. 362-4). Jerry's paid Larkin to draft and review the closing documents on its behalf and Shadduck specifically asked Stoltman if there was anything not reflected in the documents that Jerry's needed to be concerned about going forward. (T. 102, 162-4, 363-4). Stoltman did not identify any issues that might adversely affect Jerry's plans for the property. (T. 162-3, 363-4).

a fully executed purchase agreement, drafted and delivered by Stoltman – contained a representation that Jerry’s owned the Woodbury Property “free and clear of all encumbrances” and that there were “no existing right of first refusal or options to purchase the Property.” (T. 557-8; Ex. 35 at LH201031; Ex. 419 at LH200525).

Stoltman testified that it “did not occur” to him to include a reference to the buy-back provision as a possible limitation on those representations. (T. 559-60; see also 565). But Stoltman conceded that his failure to include the buy-back provision in the agreements or raise the issue with Jerry’s was not based on a determination that merger law was settled. Stoltman admitted he did not make any judgment on that issue and that he just didn’t think about it. (T. 559-60; see also T. 567). When asked if his failure to raise the issue was “[b]ecause [he] thought the buy-back clause was of no effect,” Stoltman said, “I didn’t have an understanding at that point of whether it was in effect or not.” (T. 581).

**D. JERRY’S INJURY – BRUGGEMAN’S ASSERTION OF A BUY BACK RIGHT**

According to its terms, the buy-back provision could be extinguished by constructing improvements on the Woodbury Property within two years after closing. (Ex. 15 at p. 12). Stoltman conceded that Jerry’s had the ability to and could have commenced construction of a building on the property within two years of closing, thereby extinguishing any buy-back right that might have existed. (T. 591). Jerry’s president testified that if Larkin had advised him that there was even a possibility the buy-back option might be effective after closing, Jerry’s could and would have taken steps to ensure that the option was extinguished before Bruggeman had the opportunity to

assert a buy-back right. (T. 208-10). But because Stoltman never shared his observations that the buy-back provision posed an increased risk to Jerry's revised development plans and Renneke never shared his observation that Jerry's post-closing obligations were unclear, Jerry was completely unaware its title to the property was subject to a two-year fuse and proceeded with its development plans at a deliberate pace, unaware of any deadlines. (T. 398-99).

From his continuing representation, Stoltman was aware of the progress of Jerry's development of the property. (T. 174, 185-6, 587-9). At no time prior to August 13, 1997, did any Larkin attorney advise Jerry's that inconsistent and ambiguous terms in the transactional documents created any uncertainty as to Jerry's title or post-closing obligations. (T. 178, 181-2, 192-4, 201-2, 498-9, 589-91).

On August 13, 1997, Bruggeman's counsel sent a letter to Jerry's and Larkin stating that Bruggeman was exercising its rights under the buy-back provision. (Ex. 43). Acting on Larkin's advice, Jerry's refused to sell the property back to Bruggeman. (T. 202-4).<sup>6</sup> Bruggeman then filed a lawsuit against Jerry's to enforce its buy-back rights. (T. 204). Jerry's diligently tried to protect its property interests, contesting Bruggeman's challenge all the way to this Court. See Bruggeman v. Jerry's Enterprises, Inc., 591

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<sup>6</sup> Stoltman admits that, prior to receiving the August 13, 1997 letter, he had not given any thought about the possibility that the buy-back provision might be in effect. (T. 479-8). Only *after* he received the letter, did Stoltman identify the merger doctrine as a possible defense to Bruggeman's claims, and, without conducting any research, advised Jerry's that Bruggeman had no valid repurchase right. (T. 199-200; T. 596; Ex. 45).

N.W.2d 705 (Minn. 1999).<sup>7</sup> But, Jerry's was ultimately ordered to re-convey the property to Bruggeman pursuant to the terms of the buy-back provision. (Ex. 185).

**E. EXPERT TESTIMONY THAT LARKIN COMMITTED MALPRACTICE**

In the present action, Jerry's does not claim that Larkin was negligent in defending Jerry's in the Bruggeman lawsuit or that Larkin negligently failed to predict how that lawsuit would be resolved. Rather, Jerry's claims that Larkin was negligent during the four years it represented Jerry's in the property transaction by failing to use reasonable care to identify, analyze, clarify, resolve or advise Jerry's of the uncertainty and risk that was created by inconsistent and ambiguous terms in the transaction documents Larkin was retained to draft and review. (Appx 102-08).

At trial, Jerry's presented the testimony of Jerry's President, Robert Shadduck, and Larkin Attorneys Stoltman and Renneke, who established the facts set forth above. Jerry's also presented the expert testimony of Theodore Meyer – an attorney with 30 years experience representing clients in real estate matters – on the standard of care

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<sup>7</sup>Larkin cannot claim that Jerry's attempt to protect its property interests against the claims of Bruggeman was unreasonable. Indeed, Jerry's retained Larkin to defend it against Bruggeman's challenge. (Ex. 87). In response to Bruggeman's lawsuit Larkin asserted the merger doctrine as Jerry's primary defense. But, on appeal, both the Court of Appeals and this Court held that because the buy-back provision was a condition subsequent – one that could only be performed after closing – the presumption of merger did not apply. See Bruggeman v. Jerry's Enterprises, Inc., 583 N.W.2d 299, 302 (Minn. Ct. App. 1998); Bruggeman v. Jerry's Enterprises, Inc., 591 N.W.2d 705 (Minn. 1999). On remand, the district court ruled that the Larkin-drafted buy-back provision was ambiguous and, because Jerry's had not started constructing a building within two-years after closing, Jerry's had not "commenced construction of improvements" sufficient to eliminate the buy-back right. (T. 799). The court ordered Jerry's to transfer the property to Bruggeman pursuant to the buy-back provision. (Ex. 185)

required of real estate attorneys, such as Larkin, practicing in the Twin Cities.<sup>8</sup>

Based on his knowledge and experience, and from his review of the record, Meyer testified that “Larkin undertook to present Jerry’s with a full representation and were required to keep [Jerry’s] fully advised of all facts and circumstances, legal considerations which would bear on [Jerry’s] ownership and enjoyment of th[e] property.” (T. 1028). Meyer explained that a reasonable attorney representing a client on a commercial real estate transaction must “advise a client of all relevant legal considerations that affect the client’s interest so that the client can make informed judgments as to how to proceed.” (T. 1024; see also T. 1034). When asked what type of advice an attorney reasonably should provide, Meyer emphasized, “it’s important that the client understand if there’s any impediment or cloud on the title that would prevent them from using the title of the property for their intended purpose. So if there is such a problem, that should be communicated to the client” (T. 1030; see also T. 1029). He testified, “when the lawyer is acting as an advisor ... it is the role of the lawyer[] ... to try and eliminate problems and resolve problems and not let them turn into situations that can either harm the client or result in litigation and unresolved problems.” (T. 1030-1). “[A]s an advisor, especially in the context of a business transaction, we’re trying to avoid problems, we’re trying to eliminate problems, we’re trying to avoid gray areas, looking for certainty.” (T. 1046). Thus, [w]hen confronted with an uncertainty, “it behooves the lawyer as advisor to attempt to either resolve that ambiguity or to give the client counsel

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<sup>8</sup> Meyer is a Harvard Law School graduate and has practiced real estate law in the Twin Cities area since 1973. He is a former chair of the Real Property Sections of both the Minnesota State Bar Association and the Ramsey County Bar Association. (T. 1021-3).

so that he can eliminate the problem or understand how to resolve it.” (T. 1031).

According to Meyer, to fulfill their obligations, reasonable real estate attorneys should review the transaction documents and compare the rights and obligations listed in the closing documents to the prior purchase agreement to ensure they are consistent and allow the client to do with the property what it intends. (T. 1036-7). He stated, “it’s the job of the commercial real estate attorney to look at all these documents and to sort out what in fact the title is after the property has been purchased and the closing has occurred and make sure that that is what the client wants and what the client needs.” (T. 1038). Meyer explained, “fundamentally and most importantly the lawyer’s job in representing the buyer of real estate [is] to ensure the title that the buyer receives is adequate for the buyer’s purposes and what he intends to do with the property.” (T. 1028). To accomplish that goal, attorneys “need to make sure in looking at what is oftentimes a very complex set of negotiations and agreements [that] those documents do in fact reflect the accurate state of title that is adequate for their client’s purposes.” (T. 1029-30).

Rather than dispute Meyer’s testimony on the required standard of care, Stoltman agreed that Larkin was obligated to protect Jerry’s interests in the real estate transaction, to advise Jerry’s of any contractual provisions that could adversely affect Jerry’s interests, and to advise Jerry’s of anything about the purchase documents that would adversely affect Jerry’s ability to own or control the property. (T. 446-7).

Based on the testimony and evidence presented at trial, Meyer testified that Larkin’s representation repeatedly fell below the reasonable standard of care required of real estate attorneys practicing in the Twin Cities area. (T. 1027). Among the breaches

Meyer identified were: Larkin's failure to attempt to eliminate the buy-back provision after Stoltman identified it as a risk to Jerry's revised development plans or to communicate that failure to Jerry's (T. 1039-40); Larkin's failure to recognize that the ambiguities in and inconsistencies between the buy-back provision and the "clear-title" closing and post-closing documents posed uncertainty and a potential risk to Jerry's interests and plans (T. 1035-8, 1040-3, 1044-6); Larkin's failure to investigate or research the scope of the risk posed by the buy-back provision or to clarify Jerry's post-closing obligations (T. 1046-7); Larkin's failure to provide a copy of the buy-back provision to Jerry's title insurer (T. 1044); and Larkin's failure to advise Jerry's of any uncertainty or risk posed by the buy-back provision (T. 1036-7, 1043).

Meyer testified, that, in his opinion, Larkin's negligence was the proximate cause of Jerry's damages. (T. 1027). Absent Larkin's negligence, the buy-back provision could have been eliminated or at least Jerry's would have been aware of an obligation to commence construction within two years of closing to avoid a title challenge. (T. 1037). And absent Larkin's failure to provide the title insurer with the buy-back provision, the insurer would have defended Jerry's in the Bruggeman lawsuit. (T. 1044).

## **II. RULINGS ON MATTERS CONTESTED ON APPEAL**

### **A. RULINGS ON JUDGMENTAL IMMUNITY**

#### **1. District Court Ruling**

After the close of Jerry's case, Larkin moved for directed verdict on the same ground it advances in this appeal – *i.e.*, that lawyers are absolutely immune from liability for conclusions based on apparently settled or unsettled law. Larkin argued that it could

not be liable for malpractice because this Court's opinion in the Bruggeman litigation constituted a change in merger law that Larkin had no duty to predict. (T. 1127, 1137).

Jerry's resisted, noting that the undisputed trial record showed that, in the entire four-year course of representing Jerry's in the property transaction, no Larkin attorney made any effort to clarify or resolve the risks and uncertainties presented by the ambiguous and inconsistent terms in the transaction documents, no Larkin attorney had considered or researched the law of merger in the context of the Woodbury Property transaction, and no Larkin attorney had formed an opinion that the buy-back provision did not pose a risk to Jerry's interests because it had merged with the clear-title deeds at closing. (T. 1145-51; see also 823-25, 827-8; Appx. 81-2, 136, 137-8, 140, 152).<sup>9</sup>

The District Court ignored this evidence and expert testimony and granted Larkin's motion for directed verdict based on its reading of this Court's opinion in Meagher v. Kavli, 256 Minn. 54, 97 N.W.2d 370 (1959). Relying on Meagher, the District Court ruled that Larkin could not be held liable because "the question of [the merger doctrine's applicability to] conditions subsequent had never been addressed by the [Minnesota] Supreme Court ... [a]nd consequently wasn't something on which there

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<sup>9</sup> Jerry's had made the same argument to the District Court in response to a summary judgment motion Larkin's had filed prior to trial. The District Court had denied that motion reasoning "attorneys must use reasonable care to obtain the information necessary to make an informed, professional judgment on the unsettled issue. .... At this stage of the litigation, based upon the testimony in Stoltman's deposition, it does not appear that Larkin made an informed judgment regarding the effect of the Option Agreement post-closing." (Appx. 166). In granting Larkin's motion for directed verdict, the District Court reversed its own summary judgment ruling.

was a final determination.” (T. vol. 5. p. 9).<sup>10</sup> The District Court had reasoned that the immunity Meagher granted for mistakes in unsettled law was not qualified by a requirement that the attorney’s conduct be the result an informed, professional decision on how the law in question might apply to affect the client. (T. 821-6, 830-1, 1076-8).

## **2. Court of Appeals Ruling**

The Court of Appeals reversed the District Court’s grant of directed verdict. Citing Meagher, the Court of Appeals agreed that “attorneys do not have a duty to predict changes in the law.” (Appx. 11). But, the Court of Appeals noted that this was not the issue presented in this lawsuit and that the judgmental immunity granted by the District Court was improper because there was no evidence that Larkin exercised any judgment or formed any opinion as to whether merger affected the status of the buy-back provision:

[W]hile an attorney is not liable for an error of judgment or mistake in a point of unsettled law, the attorney must exercise legal judgment in some way to be so protected. Because Larkin, Hoffman did not research the issue created by the repurchase provision before advising Jerry’s, we conclude that Larkin, Hoffman did not exercise legal judgment before providing its advice and therefore is not immune from liability here.

(Appx. 11).

## **B RULINGS ON “BUT FOR” CAUSATION**

### **1. District Court Ruling**

The District Court noted that, in malpractice claims arising out of the loss of a lawsuit, the required elements of a claim include not only (1) the existence of an attorney-client relationship giving rise to a duty and (2) a breach of the duty by the attorneys that

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<sup>10</sup> The numbering of the final 12 pages of volume 5 of the trial transcript does not follow consecutively from the earlier pages. The final pages are numbered 1-12.

(3) proximately causes damage to the client, but also a fourth element – *i.e.*, that “but for” the attorney’s negligence, the client would have been successful in the prosecution or defense of the action. At trial, Larkin argued that the relevant “action” was the Bruggeman litigation. The District Court expressed concern that, under this fourth element, Jerry’s needed to show that “but for” Larkin’s negligence, Jerry’s would have succeeded in the Bruggeman litigation. (T. Vol. 5 pp. 8-9).

## **2. Court of Appeals Ruling**

The Court of Appeals recognized that Jerry’s was not disputing the reasonableness of Larkin’s actions in the Bruggeman litigation and was instead contesting the reasonableness of Larkin’s actions in the underlying real estate transaction. Therefore, the Court recognized that Jerry’s need not prove that, “but for” Larkin’s negligence, Jerry’s would have prevailed in the Bruggeman litigation. The Court explained:

Jerry’s argues that Larkin, Hoffman was negligent when it reviewed the closing documents, when it failed to identify the possible cloud on the title, and when it failed to inform Jerry’s of that issue. This alleged negligence occurred during a transactional matter – negotiations for the purchase ... of property – not during the course of litigating a claim. We conclude, therefore, that the district court erred in applying a “but for” analysis.

(Appx. 9).

## C. RULINGS ON EVIDENTIARY ISSUES

### 1. District Court Ruling

Prior to trial, the District Court gave Larkin permission to introduce “expert” opinion testimony on the status of merger law in Minnesota prior to 1999 as well as exhibits discussing malpractice and merger law, including judicial opinions, municipal codes, and CLE publications dealing with real estate law issues. (Appx. 97-100). The court allowed the evidence, reasoning, “[t]his is a legal malpractice case. You put the issue of the law to [the] jury.” (Pretrial Motion Transcript (“PMT”) at p. 60).

The District Court permitted Larkin to introduce CLE articles and the Washington County District Court’s summary judgment order, the Court of Appeals’ opinion, and this Court’s opinion from the Bruggeman litigation. (T. Exs. 96, 152, 190, 192). Over Jerry’s objections, lay witnesses were permitted to opine as to their understanding of the law, including what they thought the Washington County District Court judge was thinking when she initially granted summary judgment to Larkin in the Bruggeman litigation and what this Court was thinking when it reversed that ruling on appeal. (T. 876, 878, 880).

The District Court’s ruling also enabled Larkin, and compelled Jerry’s (over its objection), to question Jerry’s expert witness regarding the status of merger law prior to this Court’s decision in Bruggeman. Attorney Meyer noted that pre-1999 legal authorities on the law of merger had expressly left open the question of whether merger applied to conditions subsequent like the buy-back provision and that the law was not settled on that issue. (T. 1052-53, 1061, 1102-03). He testified that a reasonable attorney reviewing relevant legal authorities would have found “a serious threat” that the buy back

provision did not merge and should have advised the client of that risk. (T. 1060).

Meyer also testified that a reasonable real estate attorney conducting the appropriate review of the transaction documents would have recognized on the face of the documents alone that the ambiguities in and inconsistencies between the documents created uncertainty as to what Jerry's post-closing obligations would be. In light of that uncertainty, an attorney exercising due care could not have reasonably concluded that the inconsistencies and ambiguities weren't even worth looking into. (T. 1045-47, 1063-5).

**B. Court of Appeals Ruling**

The Court of Appeals affirmed the District Court's ruling on the admissibility of "legal" opinion testimony and evidence to establish the "applicable standard of care." (Appx. 13).

## ARGUMENT

*“In my mind, at that time, no, it’s not clear that [the buy-back provision] would have merged.”*

– Trial Testimony of Gary Renneke discussing his thoughts going into closing (T. 779)

*“I didn’t have an understanding at that point of whether [the buy-back provision] was in effect or not.”*

– Trial Testimony of Thomas Stoltman discussing his thoughts in drafting resale contracts 1 year after closing (T. 581)

Larkin’s basis for this appeal is built on a fiction. Larkin contends that it is being persecuted for not predicting how this Court would rule on the applicability of the merger doctrine to the buy-back provision in the Bruggeman litigation. But Jerry’s is not disputing Larkin’s assertion of merger as a defense in the Bruggeman litigation. Rather, Jerry’s claims that Larkin failed to exercise even minimal care to identify, analyze, investigate, resolve or advise Jerry’s of inconsistencies and ambiguities in the transactional documents that created a cloud on the Jerry’s title and uncertainty as to Jerry’s post-closing rights and obligations. The critical flaw in Larkin’s position in this appeal is that the undisputed trial record reveals that Larkin’s failures in the transactional representation were not based on any exercise of judgment as to the status or applicability of the merger doctrine to the transaction.

Neither Jerry’s nor the Court of Appeals dispute that an attorney who exercises reasonable care to make an informed judgment based on law that is either settled or subject to reasonable debate cannot be held liable simply because the law changes or is decided differently than the attorney predicted. But Larkin’s conduct was not the result

of a reasoned conclusion as to the applicability of merger law. During the entire course of the transactional representation, not only did no Larkin attorney ever consider the law of merger, no Larkin attorney ever made even an uninformed conclusion that the buy-back provision had merged at closing. Larkin's claimed reliance on the law of merger is nothing more than an artifice Larkin developed in hindsight to rationalize its failure to identify, analyze, resolve or advise Jerry's of the inconsistencies and ambiguities in the transaction documents. Under these facts, the District Court's directed verdict was error.

#### **I. STANDARD OF REVIEW – DIRECTED VERDICT**

This appeal follows an order for directed verdict at the close of Jerry's case in chief. "[I]t is only in the clearest of cases, where the facts are undisputed and it is plain that all reasonable men can draw but one conclusion from them, that the question for determination becomes one of law for the court." Schmanski v. Church of St. Casimir of Wells, 243 Minn. 289, 292, 67 N.W.2d 644, 646 (1954). Therefore, in reviewing a directed verdict, this Court must "accept[] as true all the evidence favorable to the party adverse to the motion and all reasonable inferences that can be drawn from the evidence." Chemlease Worldwide, Inc. v. Brace, Inc., 338 N.W.2d 428, 432 (Minn. 1983).

#### **II. THE RECORD CREATES A JURY QUESTION AS TO WHETHER LARKIN BREACHED THE REQUIRED STANDARD OF CARE**

The benchmark obligation of an attorney is to advise the client with the degree of care and skill that is reasonable under the circumstances, considering the nature of the undertaking. Sjoberck v. Leach, 213, Minn. 360, 6 N.W.2d 819 (1942). In a malpractice suit, the question of whether an attorney's conduct in a particular situation conforms to

the reasonable standard of care is a fact question. See Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686, 693-94 (Minn. 1980). The standard of care required under particular circumstances and the means by which the defendant attorney breached that standard are typically established by expert testimony. See Minn. Stat. §544.42. When the plaintiff presents the testimony of a qualified expert to establish an attorney's negligence, an issue of material fact exists as to that element of the malpractice claim and it is error for the court to substitute its own view of liability for the witness's. See Admiral Merchants Motor Freight, Inc. v. O'Connor & Hannan, 494 N.W.2d 261, 266 (Minn. 1993). In this case, Jerry's presented sufficient evidence in this case for the question of Larkin's negligence to go to the jury.

**A. EXPERT TESTIMONY ESTABLISHED THE REQUIRED STANDARD OF CARE**

At trial, Jerry's offered the expert testimony of attorney Theodore Meyer to establish the standard of care required of attorneys, like Larkin, who undertake the responsibility of representing a client in a complex commercial real estate transaction. Meyer's testimony, set forth in detail in pages 13-16 above, establishes that attorneys retained to represent clients in such transactions are much more than mere scribes. According to Meyer's testimony, reasonable care requires attorneys representing buyers of commercial real estate to make a concentrated effort to ensure that their client receives title that will enable the client to use the property for its intended purpose without challenge. To accomplish that goal, the attorneys must thoroughly review all transaction documents, analyze the situation, identify any gray areas or areas of risk or uncertainty, attempt to clarify any uncertainties and resolve any potential risks, and inform the client

of any uncertainties or potential risks so that the client is able to make an informed decision as to how to proceed with the transaction. The attorney's goal is to achieve certainty and clarity for the client so that the client's title and property rights are not subject to subsequent challenge, dispute or litigation. (Supra pp. 13-16).

Meyer's testified that Larkin was bound by this standard of care (T. 1028) and Larkin conceded that it was obligated to protect Jerry's interests in the transaction, advise Jerry's of contractual provisions that could adversely affect Jerry's interests, and advise Jerry's of anything about the purchase documents that would adversely affect Jerry's ability to own or control the property. (T. 446-47).

**B. FACT EVIDENCE AND EXPERT TESTIMONY ESTABLISHED THAT LARKIN BREACHED THE REASONABLE STANDARD OF CARE**

Based on the trial testimony and evidence, Meyer concluded that Larkin's conduct in the course of the transaction repeatedly fell below the required standard. (T. 1027). The trial testimony of defendant Stoltman, set forth in detail on pages 6-8 and 10-11, above, confirms as much. By early 1995, Stoltman had recognized that the buy-back provision posed an increased risk to Jerry's revised development plans and should be eliminated. Yet Stoltman never advised Jerry's of the increased risk or made any effort to eliminate the provision. In preparing for closing, Stoltman either did not review the 1994 Option Agreement or failed to recognize that its buy-back provision was inconsistent with the seemingly clear-title closing documents. Stoltman justified his failure to analyze the status of Jerry's title on the fact that he had obtained a title insurance policy for Jerry's. But, by his own admission, Stoltman failed to give the title insurer a copy of the

buy-back provision. At no time before closing or in the two years following closing, did Stoltman recognize or advise Jerry's that the buy-back option set forth in the Option Agreement he had drafted was inconsistent with the clear-title represented in the closing documents he had reviewed or in the subsequent purchase contracts he had drafted. In Stoltman's own words, it "did not occur" to him to consider the inconsistencies and ambiguities in the transaction documents or what they might mean to Jerry's title interests or post-closing obligations. (Supra pp. 6-8, 10-11).

The trial testimony of attorney Renneke, set forth in detail in pages 9-10, above, likewise confirms Meyer's conclusions. Renneke did recognize the inconsistencies between the buy-back provision and the clear-title closing documents and concluded that the survival language of the Option Agreement was "unclear." From that, Renneke concluded that the post-closing status of the buy-back provision was "not clear." But Renneke did nothing to try to resolve the lack of clarity, conducted no research or analysis to determine what the fate of the buy-back provision might be, and never mentioned his observations to either Stoltman or Jerry's. (Supra pp. 9-10)

Meyer's concluded that, in failing to advise Jerry's of the increase risk posed by the buy-back provision, failing to identify or consider that the inconsistencies between the buy-back provision and the clear-title closing documents posed uncertainty and a potential risk to Jerry's interests and plans, failing to investigate the scope of that potential risk or make any effort to clarify Jerry's post-closing obligations, failing to provide a copy of the buy-back provision to Jerry's title insurer, and failing to offer any

advice to Jerry's regarding the uncertainty and risk posed by the buy-back provision, Larkin breached the required standard of care and was negligent. (Supra pp. 15-16).

The above fact evidence and expert testimony creates a fact question as to Larkin's negligence and the issue should have gone to the jury. See Admiral Merchants Motor Freight, 494 N.W.2d at 266.

**C. LARKIN'S FAILURES WERE NOT BASED ON ANY WELL-FOUNDED CONSIDERATION OF MERGER LAW**

Larkin ignores the trial evidence. Instead, Larkin claims it should be immune from liability because this case involves a dispute "over a mistake in a point of [apparently settled or unsettled] law." (Larkin Br. p. 25; see also id. at 11). Larkin argues that it would be error "to fault Larkin for relying a such a durable common law [as the law of merger]." (Id. at 25). But, the lynchpin of Larkin's entire argument – that it actually formed and relied on a conclusion concerning the applicability of merger law to the buy-back provision – is refuted by the record.

In his own words, it "did not occur" to Stoltman to consider whether the closing documents had any affect on the buy-back provision. (T. 551, 559-60, 565). Stoltman could not recall that he even looked at the Option Agreement before he left for vacation prior to closing and he conducted no investigation to clarify the status of Jerry's title or post-closing obligations. (T. 479, 548-9, 567, Appx. 75-78). Stoltman confessed that, after closing, he "didn't have an understanding of whether [the buy-back provision] was in effect or not." (T. 581). At no time prior to closing or in the two years after closing

did Stoltman form an opinion, one way or the other, as to whether the clear-title deeds extinguished the buy-back provision. (T. 479, 559-60).

Renneke admitted that he recognized that the inconsistencies between the buy-back provision and the clear-title closing documents raised a merger issue and that he would have needed to conduct a “reasoned analysis” to determine whether the buy-back provision might merge. (T. 773-4, 775-7, 780). But, rather than conduct that analysis, Renneke simply ignored the merger issue. (T. 550, 780-1, 788). Renneke admitted that, he “hadn’t formed an opinion that they merged.” (T. 777; see also 780-1). He testified, “I didn’t form an opinion [that the buy-back provision had merged] and I wouldn’t give an opinion on it without some qualification.” (T. 779). And he conceded that “in my mind, at that time, no it was not clear [that the buy-back provision] would have merged.” (T. 779; Appx. 152). When asked why he did not raise the merger possibility with Jerry’s, Renneke testified that, to him, “[i]t was fairly clear that [the buy-back obligation] was something that could only be performed after closing.” (T. 789).

The above testimony of Larkin’s own attorneys reveals the invalidity of its invocation of merger law as a defense to Jerry’s claims. Under Minnesota law, Larkin’s retroactive citation to a legal principle it never even considered is simply not a legitimate defense to Jerry’s malpractice claim.

**D. ATTORNEYS ARE IMMUNE FOR MISTAKEN LEGAL CONCLUSIONS ONLY IF THEY EXERCISE REASONABLE CARE TO ENSURE THE CONCLUSIONS ARE WELL FOUNDED AND WELL INFORMED.**

Minnesota law, which is consistent with the law of most other jurisdictions, recognizes that Larkin’s complete failure to research, investigate or form any conclusion

whatsoever as to the applicability of merger law to the buy-back provision precludes Larkin from invoking merger law as a shield to Jerry's malpractice liability.

Like most jurisdictions, Minnesota recognizes that the practice of law is an art, not a science. Therefore, where an attorney's conduct is based on a well-founded conclusion as to the applicability of law that is either settled or law that is subject to reasonable debate, the attorney is not liable for negligence simply because the law changes or her conclusion as to how the unsettled law will be decided ultimately proves to be wrong. See, e.g., Sjobeck v. Leach, 213 Minn. 360, 365, 6 N.W.2d 819, 822 (1942). In trying to invoke this judgmental immunity safe haven in this case, Larkin relies on Meagher v. Kavli, 256 Minn. 54, 97 N.W.2d 370 (1959), where this Court ruled:

An attorney who acts in good faith and in an honest belief that his advice and acts are well founded and in the best interest of his client is not answerable for a mere error of judgment or for a mistake in a point of law which has not been settled by the court of last resort in his State and on which reasonable doubt may be entertained by well-informed lawyers.

Id. at 61, 97 N.W.2d at 375.

Larkin characterizes Meagher as involving an attorney's obligations when the law is unsettled as distinguished from an attorney's obligations when the law is settled or apparently settled. That is a distinction without a difference. The rule set forth by this Court in Meagher is a direct quote from the North Carolina case of Hodges v. Carter, 80 S.E.2d 144, 520 (N.C. 1954), which Larkin cites as the principal case involving an attorney's duties where the law is settled. In both cases, the attorney's obligations are the same: if an attorney makes an informed conclusion as to law that is either apparently well-settled or on which well-informed attorneys could reasonably differ, the attorney is

not subject to liability solely for failing to predict that the law will change or be decided differently than the attorney predicts. But, under the facts of this case, Larkin has no basis for claiming immunity for exercising such professional judgment.

Judgmental immunity does not apply to every decision made by an attorney; rather “[j]udgment involves a reasoned process which presumes the accumulation of all available pertinent facts to arrive at the reasoned judgment.” Glenna v. Sullivan, 310 Minn. 162, 170, 245 N.W.2d 869, 873 (1976) (Todd, J. concurring). The protection afforded attorneys for an “error or mistake in judgment” extends only “so long as [the attorney] acts honestly and in good faith to the best of his skill and knowledge, or with at least reasonable skill and learning and an ordinarily degree of attention or care.” Sjoberck, 213 Minn. at 365, 6 N.W.2d at 822.

In Wartnick v. Moss & Barnett, 490 N.W.2d 108 (Minn. 1992), this Court expressly recognized that an attorney seeking to invoke the judgmental immunity safe haven must use “reasonable care to obtain the information needed to exercise his or her professional judgment” and that “failure to use such reasonable care would be negligence, even if done in good faith.” Id. at 112. In Togstad, this Court similarly refused to grant the defendant attorney judgmental immunity, reasoning, “this case does not involve a mere error of judgment. The gist of plaintiffs’ claim is that [the attorney] failed to perform the minimal research that an ordinary prudent attorney would do before rendering legal advice in a case of this nature.” 91 N.W.2d at 693.

The District Court in this case suggested that the obligation to use reasonable care to obtain all information necessary to exercise an informed, professional judgment only

applies to an attorney's errors in judgment on non-legal matters and not to an attorney's legal conclusions. (T. 821-6, 830-1, 1076-8). But that reasoning elevates judgmental immunity above the fundamental obligation of an attorney to exercise reasonable care in representing the client and is contrary to the clear weight of the law.

In both Togstad and Wartnick, this Court applied the requirement to exercise reasonable care not only to an attorney's non-legal judgment but also to an attorney's legal advice and conclusions. See Wartnick, 490 N.W.2d at 112 (applying the requirement that the attorney use reasonable care to obtain information necessary to make an informed decision to all of the defendant attorney's alleged acts of malpractice, including the claim that the attorney was negligent for "instructing [the client] to assert the Fifth Amendment privilege at his deposition without understanding the legal ramifications of that instruction."); Togstad, 291 N.W.2d at 690 (addressing a claim that the attorney provided the client with improper "legal advice" as to whether or not she had a valid claim).

Minnesota is in good company in recognizing that the mere existence of a possibly applicable law will not insulate an attorney whose conduct is not based on an informed, well-reasoned conclusion as to the status and applicability of that law. In Washington Electric Co-op. v. Massachusetts Mun. Wholesale Electric Co., 894 F.Supp. 777 (D. Vt. 1995), for example, the court cited the judgmental immunity rule verbatim from Hodges v. Carter – the exact same case that this Court cited in Meagher and one of the principal cases relied on by Larkin in this appeal. See 894 F.Supp. at 791. Just as this Court did in Wartnick and Togstad, the federal court recognized that the safe haven provided to

attorneys for errors in judgment or mistakes in points of law was subject to the overriding obligation to use reasonable care:

Even though an attorney will be absolved of liability in cases where the law is unsettled, the lawyer must nevertheless show that he performed reasonable research in an effort to ascertain relevant legal principles and to make an informed decision as to a course of conduct based upon an intelligent assessment of the problem.

Id. at 791 (quotations omitted).<sup>11</sup>

Similarly, in Village Nurseries, L.P. v. Greenbaum, 101 Cal. App. 4th 26, 123 Cal. Rptr.2d 555 (2002), the court rejected the attorney's assertion of the "judgmental immunity doctrine," reasoning that the doctrine only applies if the attorney shows:

(1) the unsettled state of the law that was the subject of professional advice and (2) the attorney's efforts to perform reasonable research in an effort to ascertain relevant legal principles and to make an informed decision as to a course of conduct based upon an intelligent assessment of the problem.

Id. at 36, 123 Cal. Rptr.2d at 562; see also Aloy v. Mash, 696 P.2d 656, 660 (Cal. 1985) (holding that an attorney who "failed to base his judgment on all available data" was not

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<sup>11</sup> Just as courts have not interpreted Hodges as granting attorneys unqualified immunity for mistaken legal conclusions, courts also refute Larkin's contention that Baker v. Fabian, Thielen & Thielen, 578 N.W.2d 446 (Neb. 1998) gave attorneys such unfettered protection. Larkin cites Baker for its holding that the defendant attorney was entitled to judgmental immunity because the attorney's conclusion that the presumption of delivery of mail applied to the facts of the case was reasonable in light of then-existing Nebraska law. But in its subsequent opinion in Wood v. McGrath, North, Mullin & Kratz, P.C., 589 N.W.2d 103 (Neb. 1999), the Nebraska Supreme Court specifically held that the judgmental immunity rule set forth in Baker was subject to the requirement that an attorney make an informed assessment of the nature of the law and its applicability to the client's situation. Wood, 589 N.W.2d at 106-07. Indeed, in Wood, the court went so far as to hold that, even where an attorney correctly concludes that the issue affecting his client has not been decided by the court of last resort in his jurisdiction, but the issue has been decided adversely by courts in other jurisdictions, the attorney may be subject to liability for failing to advise the client of the risk of proceeding in light of the unsettled legal issue. Id. at 108.

entitled to judgmental immunity for his mistake in a point of unsettled law); Wood v. McGrath, North, Mullin & Katz, P.C., 589 N.W.2d 103 (Neb. 1999) (Supra fn. 11); Collins v. Miller & Miller, Ltd., 943 P.2d 747, 754-5 (Ariz. Ct. App. 1996) (rejecting the contention that “in the face of an unsettled point of law, anything the lawyer may do, or omit to do, is shielded from liability” and ruling, “[a] course of conduct must be elected based upon an assessment of the facts and law the attorney has at hand ... that election must be supported by evidence detailing the assessment process in which the attorney engaged to reach that conclusion”); Fisherman’s Wharf Associates II v. Verrill & Dana, 645 A.2d 1133, 1136 (Me. 1994) (holding a complaint alleging the law firm failed to exercise due care in evaluating a risk posed by an unsettled issue of law stated a viable malpractice claim); Copeland Lumber Yards, Inc. v. Kincaid, 684 P.2d 13, 14 (Or. Ct. App. 1984) (“When an area of law is unsettled, a choice between possible courses of action necessarily involves judgment. However, professional judgment, by definition, must be *informed*, and that requires a lawyer to make a reasonable effort to develop an understanding of the problem”); Helmbrecht v. St. Paul Ins. Co., 362 N.W.2d 118, 130-31 (Wis. 1985) (holding an attorney was not entitled to judgmental immunity because the facts revealed that he did “little or nothing to accumulate all the pertinent facts necessary to make an intelligent and professional evaluation of [the client’s] claim”).

Larkin’s reliance on the judgmental immunity rule espoused in such cases as Meagher, Hodges, and Baker is misplaced. The trial record reveals that Larkin did not conduct any investigation into the applicability of the merger rule in advising Jerry’s in the property transaction and no Larkin attorney formed even an uninformed conclusion

that the buy-back provision had merged under Minnesota law. Because a reasoned conclusion as to the applicability of the merger rule was not the basis for Larkin's conduct, under Minnesota law, the merger rule cannot serve as a defense to that conduct.

**E. THE THREAT POSED BY THE BUY-BACK PROVISION WAS NOT CREATED BY A CHANGE IN MINNESOTA LAW**

Larkin devotes 5 pages of its brief to a lengthy discussion of numerous judicial opinions to try to convince this Court that a reasonable attorney looking at that authority could have concluded that merger law was well-settled and that a reasonable attorney could have no doubt that the buy-back provision had merged at closing. Yet because Larkin made no such analysis and reached no such conclusion when it represented Jerry's in the Woodbury Property transaction, whether or not Larkin might have conceivably concluded that the buy-back provision merged is not an issue in this case. Moreover, both Larkin's own admissions and an analysis of Minnesota merger law refute Larkin's implication that, before 1999, no reasonable attorney could have recognized that the inconsistencies in the transaction documents posed any risk to Jerry's. To the contrary, not only should a reasonable attorney versed in the law have recognized a risk that the buy-back might not merge, but Larkin itself did recognize that exact risk.

Jerry's expert witness testified that, to a seasoned real estate attorney, the ambiguities in and inconsistencies between the transactional documents should have been apparent on the face of the documents. He testified that, from looking at the documents, no reasonable attorney could conclude that the status of the buy-back provision was not even worth looking into. (T. 1045-7, 1063-5, 1060).

From the trial testimony, it is clear that Larkin, in fact, did recognize the uncertainty and risk posed by the documents' inconsistent and ambiguous terms. Prior to closing Stoltman noted that the buy-back provision posed an increased risk to Jerry's revised development plans and should be eliminated. (T. 507, 516; Ex. 73 at LH201747; Ex. 379). In preparing for closing, Renneke spotted the inconsistencies and ambiguities in the transaction documents. (T. 775-7). He identified that, on its face, "[i]t was fairly clear that [the buy-back provision] was something that could only be performed after closing" (T. 789) and that the Option Agreement's survival language was "unclear." (T. 783-4, 788, 797). Renneke concluded that the documents were "not clear" as to whether the buy-back would merge and acknowledged he would need to conduct a "reasoned analysis" to be able to form an opinion on that issue. (T. 779, 783-4, 788-9, 797, 780-1, 797). In other words, Renneke made the exact observations that Larkin contends no reasonable attorney could have made under then-existing Minnesota merger law.<sup>12</sup>

There was good reason for Renneke to conclude that the status of the buy-back obligation was unclear. None of the many pre-1999 merger cases Larkin cites in its brief hold that merger applies to contractual conditions subsequent. No such case existed. It was not until it was confronted with the issue in the Bruggeman case in 1999 that this Court finally answered the question of whether merger applied to contractual conditions

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<sup>12</sup> Similarly, when Larkin finally did research merger law for the first time *after* Bruggeman filed his lawsuit, Larkin did not tell Jerry's that the law was "well-settled." Instead, Larkin's characterized the then-existing Minnesota Court of Appeals decisions relating to the application of merger to conditions subsequent such as the buy-back provision as "confusing and inconsistent." (Ex. 167; Ex. 169 at LH204662-3). Larkin told Jerry's that the applicability of merger to the buy-back provision presented "a close legal call." (Ex. 171 at LH214444).

that, like the buy-back provision, expressly stated that they were to be performed after closing. See 591 N.W.2d at 710. And in that opinion, this Court made it quite clear that, in announcing the exception for conditions subsequent, it was not reversing 100 years of settled case law. Rather, it was merely settling what, up to that point, was an open issue in Minnesota. Id.

Prior to 1999, this Court's self-described "most thorough discussion of the merger doctrine" was In re Brown's Estate, 126 Minn. 359, 148 N.W. 121 (1914). See Bruggeman, 591 N.W.2d at 708. The rule of law laid down in that case was that the merger doctrine "applies to all stipulations and agreements contained in the executory contract by which performance of specified acts *are expressly made conditions precedent* to the right to enforce the same." Id. at 363, 148 N.W. at 122 (emphasis added). Given the express limits this Court placed on the scope of the merger rule in In re Brown, there would be no basis for an attorney to presume that merger also applied to acts that were expressly made conditions subsequent to closing. If there were any doubt, the In re Brown Court went on to explain that merger "does *not* necessarily apply to *acts not made conditions precedent, and are to be performed in the future, and continue as a charge upon the estate granted.*" Id. (emphasis added). The express limit the In re Brown Court placed on the scope of merger – that it applied to "conditions precedent" – and its explanation that merger might not apply to conditions to be performed in the future remained the unchallenged in Minnesota for the next 80 years.

No Minnesota Supreme Court case after In re Brown ever extended merger to conditions subsequent. In Bruggeman, this Court recognized that, since noting the

distinction between conditions precedent and subsequent in In re Brown, it had never been called on to decide whether merger might extend beyond conditions precedent;

*Although we have addressed the merger doctrine on several occasions since Brown's Estate, our opinions have generally been limited to recitations of the general rule that all prior agreements are deemed to have merged into the deed. Because of the nature of the issues before us on those occasions, it has not been necessary to discuss the possibility that agreements pertaining to conditions subsequent might not merge with the deed at closing. ... We have not squarely addressed, until now, whether agreements to perform acts subsequent to closing are governed by the merger doctrine.*

Bruggeman, 591 N.W.2d at 709 (emphasis added). In other words, had the Larkin attorneys looked at the "settled" aspects of the law of merger in this state, they would have found that, while it was settled that merger applied to express conditions precedent, the applicability of merger to contractual conditions subsequent was an issue that had been expressly raised and cast into doubt by this Court, but never resolved.

Absent clear precedent, Larkin would have to seek instructive authorities as to the extent of the risk posed by the buy-back option. No published or unpublished Court of Appeals case expressly held that merger applied to conditions subsequent.<sup>13</sup> But, by 1988, 37 of the 39 states to address the issue had ruled that merger did not apply to conditions subsequent. See Bruggeman, 591 N.W.2d at 709 (citing Knight v. McCain, 531 So.2d 590, 595 (Miss. 1988)). Minnesota was recognized as one of 11 states that had not addressed that issue. Knight, 531 So.2d at 595, n.2. Moreover, within the four years

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<sup>13</sup> Indeed, one of the principal cases Larkin cites for that proposition, expressly reiterated the In re Brown holding that merger applies to "all stipulations and agreements contained in the executory contract by which the performance of specified acts are expressly made *conditions precedent* to the right to enforce the same." B-E Const., Inc. v. Hustad Dev. Corp., 415 N.W.2d 330, 331 (Minn. Ct. App. 1987) (emphasis added)..

before Jerry's closing on the Bruggeman Parcel purchase, three panels of the Minnesota Court of Appeals, albeit in unpublished opinions, had concluded that, under Minnesota law, the merger doctrine did not apply to conditions that were not express conditions precedent. See Clarke v. State Bank, Case No. C9-90-22-96, 1991 WL 96654 at \*1 (Minn. Ct. App., June 11 1991) (Appx. 172) (“[t]he “collateral agreement” in this case was *not a condition precedent, and is therefore outside the contemplation of the Brown case.*”) (emphasis added); Remus v. Egan, Case No. C7-91-2291, 1992 WL 115415 at \*2 (Minn. Ct. App., May 27, 1992) (Appx.170) (“construction of the road was *not a condition precedent to the sale of the property and the doctrine of merger is inapplicable.*”) (emphasis added); Flament v. Anderson, Case No. C4-94-89, 1994 WL 523828 at \*1 (Minn. Ct. App., Sept. 27, 1994) (Appx. 168) (“[t]he trial court properly characterized the oral agreement as *a condition subsequent* to the closing on the stock purchase agreement and Flament’s 1986 transfer of the deed to Anderson, *to which the doctrine of merger does not apply.*”) (emphasis added). Thus, prior to 1999, not only could a Minnesota attorney have reasonably recognized that the buy-back provision might not merge at closing, but the express holdings of this Court and the instructive rulings of foreign jurisdictions and the Minnesota Court of Appeals reveal that a reasonable attorney versed in real estate law should have recognized that possibility and advised Jerry’s of the potential risk the unsettled law posed.

#### **F. LARKIN’S SEEKS IMMUNITY FOR UNREASONABLE CONDUCT**

Larkin argues that subjecting it to liability would “be unfair, impractical, wasteful, and unworkable.” (Larkin Br. at 27). Larkin claims that an attorney’s conduct must be

judged by what the attorney knew at the time and that an attorney – especially an attorney specializing in a particular area of the law – should be permitted to let their judgment be guided by experience rather than having to research every possible issue that comes up. (Id. at 25). Contrary to Larkin’s hyperbole, the ruling Jerry’s seeks will not compel transactional attorneys to consult the Minnesota Reporter or Westlaw each and every time a question arises. All Jerry’s asks is that attorneys – like every other profession and person – be required to exercise reasonable judgment.

Exhaustive research may not be required in every instance. But where an attorney is paid tens of thousands of dollars to represent a client in a complex multi-million real estate transaction, reasonable judgment may well require the attorney to thoroughly review the transaction documents, looking for any inconsistencies or ambiguities that might pose a risk to the client’s interests. If the attorney identifies a contractual provision that is “atypical” and that poses such a risk to the client’s development plans that the attorney feels the provision should be eliminated from the transaction, reasonable judgment may well require the attorney to at least advise the client of that risk. And if the attorney identifies inconsistencies and ambiguities in the transaction documents that render the client’s property rights and obligations unclear, reasonable judgment may well require the attorney to make at least some effort to resolve that uncertainty or, at the very least, communicate the risk to the client. In representing Jerry’s, Larkin did not exercise reasonable judgment. Larkin neglected its duties, ignored known risks, and failed to advise its client of known uncertainties and ambiguities. When presented with an opportunity to utilize their legal expertise and exercise professional judgment in their area

of specialization, the Larkin attorneys did nothing. Such inaction is inherently unreasonable.

**II. HOWEVER THE STANDARD IS PARSED, THERE IS SUFFICIENT EVIDENCE OF CAUSATION IN THE RECORD TO SUBMIT THE CASE TO THE JURY**

The formulation of “but for” and “proximate” causation advocated by the Amici Curiae does not in any way affect the result in this case. The Amici essentially argue that “but for” causation is a necessary component of “proximate” causation. Neither the Amici nor Larkin argue that adopting their formulation of proximate cause will preclude this Court from affirming the Court of Appeals’ reversal of the directed verdict. (See Amici Br. at 13; Larkin Br. at 26-27).

As traditionally stated, the fourth element of a legal malpractice claim requires the plaintiff to show that “but for defendant’s conduct the plaintiff would have been successful in his prosecution or defense of the action.” Blue Water Corp., Inc. v. O’Toole, 336 N.W.2d 279, 281 (Minn. 1983). This “fourth” element applies to cases asserting malpractice in the handling of lawsuits. In this case, the Court of Appeals ruled that this traditional “but for” element did not apply to Jerry’s claim because Jerry’s is alleging negligence in a transactional representation, not during the course of litigation. (Appx. 8-9). The Court of Appeals ruled that, rather than show that it would have prevailed in the Bruggeman lawsuit but for Larkin’s negligence, Jerry’s needed to show that its claimed injuries were proximately caused by Larkin’s negligence. (Appx. 9).

In their joint brief, the Amici Curiae interpret the Court of Appeals’ decision as completely eliminating the “but for” causal requirements from certain types of

attorney malpractice claims rather than as simply recognizing that, if the case involves transactional malpractice, the plaintiff need not show that it would have prevailed in a lawsuit “but for” the attorney’s conduct.<sup>14</sup> The Amici argue that the “but for” requirement is an inherent part of Minnesota’s proximate cause inquiry in any attorney malpractice claim and that, where the malpractice occurs in a transactional representation, the “but for” requirement should be reformulated to fit the nature of the representation. (Amici Br. at 9-11). The Amici advocate that a plaintiff alleging legal malpractice in a transactional matter must still show that it is more likely than not that, “but for the alleged negligence, a better result would have occurred.” (Id. at 12).

The “but for” requirement as advocated by the Amici is consistent with Jerry’s claims in this case. Jerry’s has always argued that, absent Larkin’s negligence in the property transaction, Jerry’s would have been aware of the risk presented by the ambiguities and inconsistencies in the transaction documents, would have taken steps to clarify its title by extinguishing any buy-back obligation that might have existed, and, by doing so, would have avoided any challenge to its title by Bruggeman. That claim is consistent with the standard advocated by the Amici and the authorities it cites.

In Blue Water Corp. this Court applied the “but for” element to a transactional malpractice case by requiring the plaintiff show that it was more likely than not that, absent the attorney’s negligence, the transaction would have been successful. 336

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<sup>14</sup> Read in context, it appears that in stating that the “but for” requirement did not apply to Jerry’s claim, the Court of Appeals was not eliminating “but for” causation as an element of proximate causation, but was instead merely responding to, and rejecting, the District Court’s concern that Jerry’s needed to also show that it would have prevailed in the Bruggeman lawsuit but for Larkin’s negligence.

N.W.2d at 282. In Hill v. Okay Construction Co., 312 Minn. 324, 252 N.W.2d 107 (1977), this Court specifically ruled that a fact question as to causation was established where the plaintiffs offered evidence showing that, because of the attorney's negligent representation in the subject property transaction, the plaintiffs were "compelled to enter into litigation with a third party to protect [their] rights." Id. at 347. In First Bank of Minnesota v. Olson, 557 N.W.2d 621, 624 (Minn. Ct. App. 1997) – which the Amicus cite as "embrac[ing]" the proper standard – the Minnesota Court of Appeals ruled that where an attorney's negligence in a transaction compels the client to litigate its property rights, the attorney can be held liable for amounts the client pays to settle that litigation. And in Viner v. Sweet, 70 P.3d 1046 (Cal. 2003) – a California case whose reasoning the Amicus ask this Court to adopt – the court ruled that, where malpractice is alleged in a transactional setting, the obligation of the plaintiff is to "show that *but for* the alleged malpractice, it is more likely than not that the plaintiff would have obtained a more favorable result" in the transaction. 70 P.3d at 1054.

Jerry's has never claimed that Larkin was negligent in representing it in the Bruggeman litigation and, therefore, as recognized by the above authorities, need not prove that but for Larkin's negligence it would have been successful in the Bruggeman litigation. Jerry's claim has always been that, *but for* Larkin's failure to identify, resolve or advise Jerry's of the risk and uncertainty posed by the ambiguous and inconsistent terms in the transaction documents, Jerry's would have obtained a more favorable result in the real estate transaction by *avoiding* Bruggeman's title challenge and the resulting litigation.

Under the standard advocated by the Amici and applied by the authorities they cite, the trial evidence raises a fact question on the issue of proximate cause. Having presented evidence that, but for Larkin's negligence the transaction would have turned out more favorably,<sup>15</sup> Jerry's need not have also presented evidence that, but for Larkin's negligence, it would have prevailed in the Bruggeman litigation.

### **III. CROSS APPEAL OF THE COURT OF APPEALS RULING THAT THE PARTIES COULD INTRODUCE TESTIMONY AS TO THE STATUS OF MERGER LAW**

At trial, the District Court allowed Larkin to introduce opinion testimony and documentary evidence (court opinions and CLE articles) of the status of merger and malpractice law in Minnesota, reasoning, "[t]his is a legal malpractice case. You put the issues of law to the jury." (PMT. 60; T. 87-83, 1113, 1116-8). That ruling was erroneous.

One of the bedrock principles of American jurisprudence is that the jury decides fact questions, while it is the function and duty of the court to decide questions of law. See Hughes v. Quarve & Anderson, Co., 338 N.W.2d 422 (Minn. 1983) ("It would be inappropriate for the court to allow the jury to choose which rule of law to apply to the facts. The court, not the jury, determines the law of a case, and the jury decides the factual issues based on the law submitted to them."); see also 31A Am Jur 2d *Expert and*

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<sup>15</sup> At trial, Jerry's presented evidence that, if it had been advised that there was even a possibility that the buy-back provision might still be in effect, Jerry's could and would have been able to extinguish any buy-back right that did exist and clarify its title to the property by constructing a building on the property within two years after closing. (See supra p. 11-12). In granting Larkin's motion for directed verdict, the District Court did not dispute the sufficiency of the evidence to raise a jury question on that issue, (T. vol. 5. p. 9).

*Opinion Evidence* § 117 (2003 West). The District Court's decision to "put the issue of the law to the jury" in the present case violated this basic tenant.<sup>16</sup>

The Court of Appeals ruled that opinion testimony on the status of merger law was admissible to establish the "applicable standard of care." (Appx. 13). But this is not a case where the jury is being asked to decide whether an attorney's conclusion on a legal issue was sufficiently well founded such that the attorney acted reasonably in basing his or her course of conduct on that conclusion of law. This case is much simpler.

The legal evidence Larkin seeks to introduce consists of testimony regarding case law, CLEs, and treatises that Larkin never consulted and that relate to an area of the law Larkin never considered while representing Jerry's in the real estate transaction. As is fully discussed above, the record shows that no Larkin attorney consulted any of the legal authorities Larkin cites, or formed any conclusion, reasonable or otherwise, that the buy-back provision would merge under Minnesota law.

The question that the jury must answer in this case is whether Larkin's actions breached the required standard of care. Evidence of legal authorities that Larkin never considered offered to show the reasonableness of a legal conclusion Larkin never made has no bearing on that question. Such evidence will only stand to confuse the jury as to

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<sup>16</sup> The illegitimacy of Larkin's introduction of evidence as to the law is best illustrated by its own directly contradictory positions at trial. At trial, Larkin argued that the introduction of legal evidence was necessary because "the jury needs to understand that the Supreme Court's case in ... Bruggeman ... is a huge change in the law." (PMT. 10). Later, Larkin abandoned that theory. In arguing for directed verdict, Larkin argued: "This is a question of law, Your Honor, not a question of fact for the jury ... Whether the law has changed is for the Court to determine. If the law has changed, then there can be no duty and no negligence assessed against Larkin. There's nothing for the jury to consider." (T. 1128).

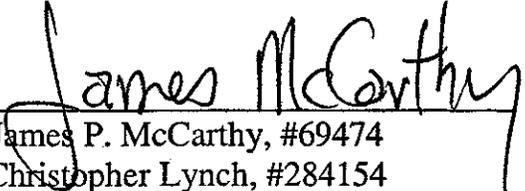
the issues they must decide and will usurp the District Court's function and obligation to instruct the jury on the applicable law. It was error for the District Court to permit Larkin to elicit opinion testimony on or present evidence as to the status of merger law, malpractice law, or any other law. See Minn. R. Evid. 402, 403. The reasonableness of Larkin's actions in the property transaction representation must be decided on the basis of what Larkin did consider, not what Larkin conceivably might have considered, but did not.

### **CONCLUSION**

Based on the forgoing argument and analysis, Jerry's Enterprises, Inc. respectfully requests that this Court affirm the Court of Appeals' ruling that the order for directed verdict and judgment in favor of Larkin were reversible error, reverse the District Court and Court of Appeals' rulings that the parties may introduce opinion testimony and other evidence on the status of any law Larkin did not consider, and remand the case for trial.

Dated: June 17, 2005

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