

NO. A09-1963

State of Minnesota
In Supreme Court

Timothy B. Allen,

Appellant,

vs.

Burnet Realty, LLC,
d/b/a Coldwell Banker Burnet,

Respondent.

BRIEF OF AMICUS CURIAE EDINA REALTY, INC.

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INTEREST OF AMICUS CURIAE EDINA REALTY, INC.

Since its inception as a three agent office in 1955, Edina Realty, Inc. has grown into one of the nation's largest real estate companies with more than 2,500 realtors in 65 offices throughout Minnesota, North Dakota and Wisconsin.¹ Edina Realty is one of the largest real estate brokers in the State of Minnesota.

As a real estate broker, Edina Realty is licensed under Chapter 82 of the Minnesota Statutes. Edina Realty conducts its business and interacts with clients through sales associates, who must also be licensed under Chapter 82. Pursuant to Chapter 82, the brokers "hold" the licenses of their sales associates. The brokers are jointly and severally liable for their associates' acts and omissions in connection with real estate transactions for which they provide brokerage services. Minn. Stat. §82.34, subd. 3; *Handy v. Garmaker*, 324 N.W. 2d 168 (Minn. 1982)

For the last twenty years, Edina has required its associates to participate in a Legal Administration Program (also known as Release of Liability Plan) which specifies how Edina Realty and its sales associates will jointly share the costs and risks of legal claims and proceedings that might be asserted against either or both of them, and provides that the sales associates pay the broker an annual fee.

Edina Realty's interest in this matter is both private and public. Edina Realty is deeply concerned how the holding in this case could drastically alter its own business model and increase costs -- costs which the company would have no choice but to pass on

¹ No part of this brief was authored by counsel for a party. No person or entity, other than Edina and its counsel, made any monetary contribution to the preparation or submission of this brief.

to its customers in the form of higher fees and commissions. And as a public matter, the position advocated by Appellant could drastically alter Minnesota law, vitiating the use of indemnification agreements in any commercial setting. Such a holding would impinge on the ability of commercial entities to share and allocate the legal risks relating to their business, a result that would offend the public policy of the State of Minnesota.

ARGUMENT

Edina Realty has no interest in the specific dispute between the parties before this Court. Rather, our interest is in the broader issues of law and policy which this Court must decide to govern future cases.

The brief of Respondent in this Court exhaustively cites the controlling and persuasive authority on the distinction between contracts of indemnity and those for insurance, from Minnesota and many other jurisdictions, and elegantly demonstrates how that law requires affirmance of the decision of the Court of Appeals. Edina Realty has no reason to repeat any of those arguments or authorities. We simply want to advise the Court that -- from the perspective of Edina Realty -- it is critically important that this Court define a bright-line rule that allows legitimate commercial indemnification agreements, such as the contract before this Court, to continue in Minnesota.

It is axiomatic that public policy supports the freedom of contract. *See, e.g., Weirick v. Hamm Realty Co.*, 179 Minn. 25, 28, 228 N.W. 175, 176 (Minn. 1929) (“Public policy ‘requires that freedom of contract shall remain inviolate, except only in cases which contravene public right or the public welfare.’”) (citation omitted). The public policy favoring the freedom of contract extends to the enforcement of indemnification agreements. *See, e.g., Northern Pac. Ry. Co. v. Thornton Bros. Co.*, 206 Minn. 193, 197, 288 N.W. 226, 228 (Minn. 1939) (holding that neither law nor public policy prevents commercial entities from shifting risk through indemnification agreements, even those that require indemnification for the indemnitee’s own fault).

Appellant's proposed definition of insurance runs afoul of this maxim because it would encompass most, if not all, contracts that contain risk-shifting provisions.

For example, Appellant's argument would encompass commercial lease agreements, such as the one before the Minnesota Court of Appeals in *Bogatzki v. Hoffman*, 430 N.W.2d 841 (Minn. Ct. App. 1988). In *Bogatzki*, an employee was killed while working on the premises of her employer. *Id.* at 842. The employee's heirs brought claims against the owner of the premises. *Id.* The owner brought a third party action against the employer, seeking contractual indemnity based on a provision contained in the commercial lease. *Id.* at 845. The Minnesota Court of Appeals held that the indemnification clause in the contract was enforceable. Appellant claims this type of indemnification agreement should constitute insurance, because the employer assumed indemnity obligations for liability that could not be imposed absent the contract. *See Lambertson v. Cincinnati Corp.*, 312 Minn. 114, 257 N.W.2d 679 (1977) (discussing employer immunity under Minnesota's worker's compensation scheme, and its implications on contribution claims brought by third parties).²

Another type of indemnification agreement that is familiar in Minnesota arises in the context of snow and ice removal. One such agreement was addressed by the court in *Potvin v. John Hancock Mut. Life Ins. Co.*, No. C0-00-35, 2000 WL 979138, at *2-3 (Minn. Ct. App. 2000) (Edina Realty's Appendix at pp. 1-3). In *Potvin*, the court of

² As Respondent astutely points out, "nearly every contract involves some shifting of risk in exchange for consideration." Resp. Brief at p. 47. The cases discussed, including contracts with explicit indemnification or exculpatory clauses, merely represent examples of contracts with explicit risk shifting provisions.

appeals enforced an indemnification agreement entered into between a representative of a shopping center and a snow removal company, requiring the latter to indemnify the shopping center for personal injuries caused by its negligence or that of the shopping center. *Id.* at *2. Appellant's definition of insurance would encompass such agreements.

Indemnification agreements in the product liability context would be vulnerable as well. In *Osgood v. Medical, Inc.*, 415 N.W.2d 896, 902-03 (Minn. Ct. App. 1987), the court of appeals enforced a contract between a valve manufacturer and its component part manufacturer, which contained an indemnification clause encompassing product liability claims. Because the indemnification clause encompassed claims for the indemnitee's negligence, such contracts would be considered insurance under Appellant's test.³

Yet another example can be found in the Minnesota corporate statute. Minn. Stat. § 302A.521, subd. 2 requires corporations to indemnify their employees for negligent acts committed within the course and scope of their employment absent a specific limitation in a corporation's articles or bylaws. Under the definition of insurance advanced by Appellant, these agreements would become illicit contracts of insurance resulting in an untenable conflict between statutory provisions. *See* Minn. Stat. § 645.26, subd. 1 ("When a general provision in a law is in conflict with a special provision in the

³ It is important to note that the indemnification obligations in *Bogatzki*, *Osgood* and *Potvin* were not limited to a "specified amount." As Respondent correctly notes, neither is the agreement before this court. *See* Resp. Brief at p. 31.

same or another law, the two shall be construed, if possible, so that effect may be given to both.”⁴

Exculpatory clauses would be eliminated as well. While not favored in the law,⁵ exculpatory clauses are enforceable in Minnesota. *See Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920 (Minn. 1982). Because most, if not all, such clauses require indemnification for liability that the indemnitor otherwise would be impervious to, *see id.* (requiring indemnification for health club’s negligent care of plaintiff), they would qualify as insurance in Appellant’s view. The consequences of such a result would have a chilling effect on many industries. *See id.* (health club); *Weirick*, 179 Minn. 25, 228 N.W. 175 (commercial lease agreement); *Morgan Co. v. Minn. Mining & Mfg. Co.*, 310 Minn. 305, 312, 246 N.W.2d 443, 448 (1976) (burglar alarm); *Beehner v. Cragun Corp.*, 636 N.W.2d 821 (Minn. Ct. App. 2001) (horseback riding); *Arrowhead Elec. Coop. v. LTV Steel Mining Co.*, 568 N.W.2d 875 (Minn. Ct. App. 1997) (commercial lease agreement);

⁴ The enforceability of indemnification clauses contained in construction contracts is limited by statute. *See* Minn. Stat. § 337.02. But, despite this statutory limitation, this Court has routinely enforced risk-shifting provisions in construction contracts. *See, e.g., Holmes v. Watson-Forsberg Co.*, 488 N.W.2d 473 (Minn. 1992). *Holmes* and its prodigy are illustrative because they exemplify the strong public policy, and the commercial advantages, supporting the enforceability of risk-shifting contractual provisions.

⁵ In *Yang v. Voyageur Houseboats, Inc.*, 701 N.W.2d 783, 792 n.6 (Minn. 2005), this Court stated: “Indemnification clauses are subject to greater scrutiny because they release negligent parties from liability, but also may shift liability to innocent parties.” This statement exemplifies the fact that the shifting of liability by contract to irresponsible entities -- the hallmark of Appellant’s definition of insurance and application of *Anstine* -- is present in many contracts, not just that presently before this Court.

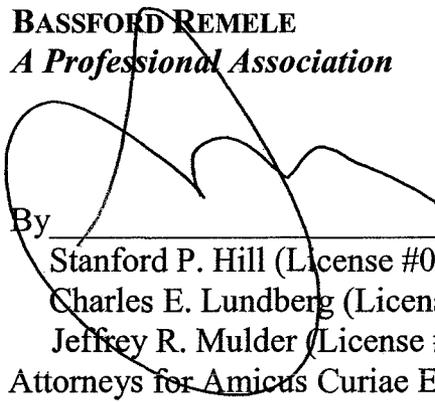
Malecha v. St. Croix Valley Skydiving Club, Inc., 392 N.W.2d 727 (Minn. Ct. App. 1986)
(provider of skydiving course).

Finally, this case is unique in one respect -- the contract at issue was submitted to the Department of Commerce. Staff Attorney Brett L. Bordelon, writing on behalf of the Commissioner, issued an opinion indicating that the contract at issue is not unlawful. Appellant's Appendix at pp. 171-182. From the perspective of Edina Realty, the Commissioner's submission to the trial court is particularly persuasive given the unique expertise of the Commissioner as the regulating body of both insurance and real estate brokers and salespersons. *See* Minn. Stat. § 82 *et seq.*

Respectfully submitted,

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Dated: 6 Dec 10

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