STATE OF MICHIGAN
IN THE SUPREME COURT

On Appeal from the Court of Appeals
(Markey, P.J., and K.F. Kelly and Tukel, JJ)

RONALD TINSLEY,
VAN BUREN STEEL, INC., and
VAN BUREN PROPERTIES OF MICHIGAN LLC,

Plaintiffs/Appellants,

v

NORMAN YATOOMA, and
NORMAN YATOOMA & ASSOCIATES, P.C.,

Defendants/Appellees.

Supreme Court No. 162041

Court of Appeals No. 349354

On Appeal from
Wayne County Circuit Court
Case No. 18-011537-NM
Hon. Patricia Perez Fresard

BRIEF OF *AMICUS CURIAE* OF THE NEGLIGENCE LAW SECTION OF THE STATE BAR OF MICHIGAN

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QUESTIONS PRESENTED

I. **Does Michigan law prohibit enforcement of a fee agreement containing a mandatory arbitration provision which eliminates the right to a jury trial, eliminates appellate reviewability of substantive and procedural errors, and eliminates traditional discovery rights, and where client did not consult with independent counsel regarding the arbitration provision, and was not advised as to all implications of the provision?**

Plaintiff-Appellant says "Yes"

Defendant-Appellee says "No"

Amici SBM Negligence Law Section says "Yes"

INTRODUCTION AND STATEMENT OF INTEREST OF AMICUS CURIAE NEGLIGENCE LAW SECTION OF THE STATE BAR OF MICHIGAN

The Negligence Law Section is a practice section within the State Bar of Michigan. Its primary goal is the unwavering protection of the right to trial by jury and access to justice through the promotion of fair and just administration of negligence law in the Michigan trial and appellate courts.[1]

The Negligence Law Section is composed of over 4,300 litigators and is one of State Bar's the largest practice sections. Membership in the Negligence Law Section is open to all members of the State Bar of Michigan. The Negligence Law Section is governed by a council of 14 attorneys who are members of the plaintiff and defense bars and who are elected in equal numbers to serve three-year terms. Its members are attorneys who practice negligence law in Michigan. Section decisions and positions are made on a non-partisan, significant consensus basis by the Negligence Law Section council.

As attorneys working in the field of law directly implicated by this case, and as a section of the Bar whose primary objective is the preservation of the right to a jury trial and access to justice for all Michigan citizens, the Negligence Law Section is directly concerned with the outcome of the issues briefed herein. Such concern is for and on behalf of the Bar, the Section's members, and, most importantly, the members of the public on whose behalf access to justice and right to a fair remedy is of paramount

[1] Pursuant to MCR 7.312(H), *amicus* states that this brief was authored by the undersigned without the assistance of Plaintiffs-Appellants' counsel. The factual predicate of this Brief is based on the record set forth in Plaintiffs-Appellants' Application for Leave, and is further based on or adopts certain factual assertions made by Plaintiffs-Appellants' in the Application for Leave or documents in the Courts below. No counsel for any party, no party, and no person outside the Negligence Law Section of the State Bar of Michigan or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

importance.

The importance of the decision on this case lies not only in how it affects the outcome of this case for the parties. Rather, consideration must be given to how the Court of Appeals' decision in the case at bar will be applied to the more common situation: an unsophisticated client in a difficult situation, with neither the time nor the money to have a fee agreement reviewed by independent counsel. The potential for abuse is real, which would result in harm to the public and a lowering of the status of the profession in the eyes of the public. There should be some clarity as to what is required for compliance with the Model Rules of Professional Conduct in the context of arbitration clauses in fee agreements. Furthermore, the apparent conflict in the case law concerning the consequence of violating said rules in a fee agreement should be reconciled.

One of the recurrent concerns that run through the various ethics opinions is the non-reviewability of decisions made by arbitrators.[2] To the extent that a decision of an arbitrator or arbitration panel on an arbitrated claim of malpractice is erroneous—and it would be unrealistic to assume this would not happen—the foreclosure of appellate relief would indeed amount to "limiting the lawyer's liability to a client for malpractice" in contravention of MRPC 1.8(h)(1).

It important that this Court express its opinion on the wisdom of MRPC 1.08(h), and whether arbitration clauses such as this are consistent therewith, but it is likewise important to provide guidance on what if any *legal remedy*—invalidation of the

[2] *See* RI-2 ("On the other hand, arbitrator's awards are generally not appealable. A client who believes that a decision of the arbitrator is erroneous is foreclosed from seeking appellate relief, which would have been available in the absence of an arbitration clause had the claim been tried in a court."; RI-257 (discussing balancing public policy favoring settlement via arbitration "with the concern that an unfettered arbitration clause would permit a lawyer to impliedly limit the liability for malpractice with little opportunity for appellate review.")

arbitration agreement, invalidation of the entire fee agreement, the setting aside of settlements or arbitration awards violative of this provision, etc.—there may be in the event of such a violation. To be sure, as the Court of Appeals recognized in *Evans & Luptak, PLC v. Lizza, infra,* it would certainly seem odd that a lawyer could be subject to discipline for having a client agree to a certain arbitration clause, but then be able to enforce this clause with the endorsement of our courts to the detriment of the client. Yet this seems to be a possible outcome given the current state of the law.

There is potentially a conflict in the case law developing in this area of law. *Watts v. Polaczyk*, 242 Mich. App. 600; 619 NW2d 714 (2000) is a published Court of Appeals decision which approved an arbitration provision, even where the evidence showed it violated MRPC 1.08(h). Close analysis of this case shows there is a serious conflict with *Evans & Luptak, PLC v. Lizza,* 251 Mich App 187; 650 NW2d 354 (2002), where the Court explicitly held that a contract (namely, a fee agreement), which violates the MRPC is not enforceable. Given that the rules (ethical and otherwise) governing fee agreements almost universally affect the profession and the public, this Court should grant leave to appeal because the issue involves a legal principle of major significance to the state's jurisprudence. MCR 7.305(B)(3).

Therefore, Amicus Curiae Negligence Law Section of the State Bar of Michigan urges this Court to grant the application for leave to appeal, resolve the apparent conflict in the Court of Appeals' case law on point, clarify attorneys' obligations under MRPC 1.08(h), and reverse the Court of Appeals August 13, 2020 decision as to the issues addressed herein.

STANDARD OF REVIEW

The enforceability of an arbitration agreement is a question of law that is reviewed de novo by this Court. *Watts v Polaczyk*, 242 Mich App 600, 603; 619 NW2d 714 (2000).

STATEMENT OF FACTS

Amicus Curiae Negligence Law Section of the State Bar of Michigan defers to the statement of facts set forth in Plaintiffs-Appellants' Application for Leave to this Honorable Court and will focus its attention on the legal and public policy issues implicated in this case.

ARGUMENT

I. This This Court should grant leave to appeal because the issue decided by the Court of Appeals presents a jurisprudentially significant issue that raises public policy concerns regarding the ethical practice of law as a whole, and requires clarification of attorneys' duties under MRPC 1.08(h) as well as the legal consequences of violating this rule.

Two things are at issue in this case: (1) proper interpretation of MRPC 1.08(h)(1), including whether the rule is implicated in the first instance and (2) the legal consequence of a fee agreement which violates this ethical rule.

The ethical rule in question is MRPC 1.8(h)(1), which provides follows:

> (h) A lawyer shall not:
>
> > (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement;

As Counsel for Plaintiffs-Appellants ably point out, this rule has been the subject of numerous ethics opinions. (Plaintiff—Appellants Application for Leave to Appeal, pp. 9-18). Full recitation of Plaintiffs—Appellants' extensive analysis will be avoided.

In short, however, the ethics opinions dealing with the subject (RI-2, R-23, RI-196, RI-257) *universally* concluded that MRPC 1.08(h)(1) applies to arbitration provisions contained in fee agreements.

Likewise, in the case at bar, MRPC 1.08(h)(1) is implicated by the arbitration provision contained within Defendants—Appellees' fee agreement. The only way to conclude otherwise would be to construe the phrase "prospectively limiting the lawyer's liability to a client for malpractice" as applying exclusively to the "limiting" of the potential

damages an aggrieved client could claim. Everything else—the client's substantive and procedural rights—are indeed drastically "limited."

Defendants—Appellees' fee agreement requires that any dispute—including "a claim of attorney malpractice"—be submitted for **"confidential binding arbitration."** This invokes a client's constitutional right to a jury trial. The clause further requires (1) that discovery is limited to a 60-day window, (2) the *client* is limited to 1 deposition and (3) that the arbitration be conducted by a single arbitrator. Such drastic limitation of a client's right to discovery in a claim of malpractice—claims which can be as complicated as any medical malpractice or business litigation matter—is intended to do nothing but benefit the attorney or firm that authored the provision. **Indeed, the single deposition limited appears to apply solely to the client, seemingly allowing the firm/attorney unlimited depositions.**[3]

That the decision on a legal malpractice claim is required to be made by a single arbitrator, and is not reviewable, would severely "limit" a client's claim for malpractice in every instance where the arbitrator commits legal error, which (because arbitrators are human too) would occur too frequently to ignore.

Lastly, the arbitration provision imposes "all of the costs and expenses of arbitration, including without limitation, fees of the arbitrator, AAA fees and any administrative fees, if applicable" on the client *exclusively*. This would be enough to deter some clients from pursuing the claim altogether. For client that does pursue such a claim, the client's recovery is *de facto* "limited" by (i.e. reduced by) any outlay for

[3] The provision stating that "Discovery will be limited to a 60 day window commencing with the filing of the arbitration and **The Client is limited to taking one (1) deposition in that arbitration**.) (emphasis added).

costs and fees required to be paid under this provision.

So, to the extent that the Court of Appeals in the case at bar[4]—or the Court of Appeals' decision in *Watts v. Polaczyk*, 242 Mich. App. 600; 619 NW2d 714 (2000)—state that 1.08(h)(1) does not apply to such mandatory arbitration provisions, these cases should be overruled.

With regards to specific violation of 1.08(h)(1) in this case, it will be noted that this rule prohibits attorneys from entering into agreements "prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client **is** independently represented in making the agreement." (emphasis added). Notably, despite much of the focus of the ethics opinions being on allowing the *opportunity* for the client to consult with independent counsel, it seems that the rule requires more—and it should require more. It requires that the client **"is"** represented, and represented specifically with regards to "the agreement" which would prospectively limit the "lawyer's liability to a client for malpractice"—i.e. the arbitration provision.

The evidence in this case shows (through affidavits of the client and the alleged "independent counsel") that the Plaintiff—Appellants *were not* independently represented with regards to the substance of the arbitration agreement. The Court of Appeals indicated that it would "seem a bit ludicrous to have mandated defendants to particularly inform plaintiff that [their independent counsel] must examine the arbitration provision as part of his review of the engagement agreement." (08/13/20 COA Opinion, p. 5). However, it would seem that if the Defendants-Appellees did *nothing other* than

[4] The Court of Appeals in this case stated that "[a]lthough there may not be access to the courts for resolution with binding arbitration, appellate or otherwise, we question whether arbitration actually limits liability." (08/13/20 COA Opinion, p. 5).

specifically instruct that the Plaintiffs-Appellants independent counsel explain this provision to them, this would have gone much further toward compliance with MRPC 1.08(h)(1), being that both this rule and the arbitration provision specifically address claims for attorney malpractice. In the context of this case, the term "agreement" in MRPC 1.08(h)(1) does not pertain to a fee agreement generally, but rather the specific provision(s) within a fee agreement pertaining to claims of attorney malpractice.

As such, under a plain reading, the arbitration provision here did violate MRPC 1.08(h)(1). This then raises the question of the legal consequence of this violation, which is addressed in more detail below.

The Michigan Rules of Professional Conduct were violated by Defendants-Appellants failing to advise Plaintiffs—Appellants of the consequences of the arbitration clause before seeking to enforce it. And because they did not ensure compliance with MRPC 1.08(h)(1), the arbitration clause was not enforceable. The Trial Court thus erred when it granted summary disposition and ordered that any dispute must be resolved via arbitration, and the Court of Appeals erred when it affirmed that decision. As the Court of Appeals pointed out in its decision[5], this Court could properly and should grant leave to appeal under MCR 7.305(B)(3).

[5] *See* 08/13/20 COA Opinion, p. 5, n. 4 (stating "We suggest contemplation by the State Bar of Michigan and our Supreme Court of an addition to or amendment of MRPC 1.8 to specifically address arbitration clauses in attorney-client agreements. The issue raises sufficient concerns justifying clarification on the subject."

II. This Court should grant leave to appeal because there is a conflict in the Court of Appeals case law, and nearly every legal matter for which a client signs a fee agreement is implicated. So the issue involves a legal principle of major significant to the state's jurisprudence.

As this Court can appreciate, nearly every matter that makes its way into the court system where a party is represented is a potential subject of the Court's position on these issues. The ethical limitations of fee agreements—and mandatory arbitration provisions in particular—along with the legal consequence of violations of the MRPC, are matters of paramount importance on the subject of this primary interface between the legal profession and the public. It is imperative that attorneys, clients, and these clients' subsequent counsel have clarification in order to avoid confusion and unproductive litigation in the future.

We do not have this clarification at the present time. With the addition of the Court of Appeals' decision in the case at bar, there is potentially a conflict in the case law developing in this area of law. *Watts v. Polaczyk*, 242 Mich. App. 600; 619 NW2d 714 (2000) is a public Court of Appeals decision. The *Watts* decision puts very few limits on an arbitration clause contained within a fee agreement. Namely, however, the consequence of an attorney fee agreement violating the MRPC is left open. In *Watts*, the plaintiff/client alleged (1) that the attorney-defendants "failed to advise [plaintiff] that the fee agreement contained an arbitration clause"; and (2) "he was not provided with an opportunity to obtain the advice of independent counsel concerning the advisability of entering into the arbitration agreement." The *Watts* Court implicitly held, even assuming these allegations as true, that this either did not violate MRPC 1.08(h)(1) or—

if it did—this was not sufficient to invalidate the fee agreement generally or the arbitration agreement specifically.[6]

Contrast this with *Evans & Luptak, PLC v. Lizza,* 251 Mich App 187; 650 NW2d 354 (2002). There, the Court explicitly held that a contract (namely, a fee agreement), which violates the MRPC is not enforceable.

Evans & Luptak does not distinguish—indeed does not even mention—the *Watts* decision from two years prior. It can be feasibly argued, therefore, that *Watts* controls the issue, as it was the first decision to be released, and would therefore be the decision that was "first out," and the *Evans & Luptak* panel did not declare a conflict pursuant to MCR 7.215(J)(2). *See* MCR 7.215(J)(6) providing that "[t]he decision of the special panel must be by published opinion or order and is binding on all panels of the Court of Appeals unless reversed or modified by the Supreme Court."); *See also Romain v. Frankenmuth Mut. Ins. Co.*, 483 Mich 18; 762 NW2d 911 (2009) (stating that the Court of Appeals should have either followed a prior published decision or declared a conflict under MCR 7.215(J)(2)).

Indeed, the Court of Appeals in this case cited the *Watts* decision with approval, noting that the *Watts* Court reached the conclusion upholding the arbitration provision "despite various ethics opinions that were inconsistent with the ruling **and regardless of the fact that the defendants had not specifically advised the plaintiff about the arbitration provision or given him the opportunity to obtain the advice of**

[6] The Court's reasoning is not very clear. The Court references MRPC 1.08(h), but does not provide any analysis as to why, on the facts presented, there was no violation of this rule. So whether the Court's decision was based on perceived compliance with MRPC 1.08(h), or the lack of consequence for its violation is not clear. It is believed to be the latter. *See Watts v. Polaczyk*, 242 Mich App at 609 (its reasoning apparently limited to that "It is undisputed that plaintiff voluntarily signed the fee agreement in which he promised to submit to arbitration all disputes arising out of the agreement or the legal representation.).

independent counsel on the matter. (08/13/20 COA Opinion, pp. 4-5) (emphasis added). It did not attempt to distinguish the *Evans & Luptak* panel on this issue, did not declare a conflict pursuant to MCR 7.215(J)(2).

As such, there is an apparent conflict in the Court of Appeals case law. At the very least, there is a significant ambiguity in which decision—*Watts* or *Evans & Luptak, PLC v Lizza*—actually governs the situation. Given the potential ubiquitous nature of these mandatory arbitration provisions, the "issue involves a legal principle of major significance to the state's jurisprudence," and this Court should grant leave to appeal.

RELIEF REQUESTED

The Negligence Law Section is tasked with promoting and preserving access to civil justice, the core of which is the civil jury trial and the appellate review process.

Allowing unfettered arbitration clauses in fee agreements—which are more often signed by unsophisticated and desperate clients than wealthy, secure businesspeople—is detrimental to the profession and its reputation in the eyes of the public.

Attorney services are a *public* good. In addition to the various other considerations addressed by the parties in this case and by the ethics committee in prior opinions, it should be remembered that a primary effect of mandatory arbitration is to keep the matter confidential. In a perfect world, members of the bar would not need the specter of public damage to their reputation as a motivating force for diligence and ethical behavior. However, given the imperfect world which we occupy, this possibility serves both as a carrot to encourage attorneys and a stick for the public in discovering information that affects its decision on which attorney or firm to hire. Any attempt to impede this intrinsic guiding force should be viewed with skepticism.

For these reasons, Amicus Curiae Negligence Law Section of the State Bar of Michigan urges this Court to grant the application for leave to appeal and reverse the Court of Appeals August 6, 2020 decision as to the issues addressed herein.

Respectfully submitted,

The Negligence Law Section
of the State Bar of Michigan

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Dated: March 9, 2021

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2021, I filed this document electronically with the Clerk of the Court using the MiFILE system, which will send notification of this filing to all counsel of record.

By: */s/ Matthew G. Swartz*
Matthew G. Swartz (P75257)