STATE OF MINNESOTA

IN SUPREME COURT

A18-1906

Court of Appeals Hudson, J.

Pamela Maslowski,

Respondent,

vs.

Filed: June 3, 2020
Office of Appellate Courts

Prospect Funding Partners LLC, et al.,

Appellants,

and

Prospect Funding Holdings (NY) LLC,
defendant and third-party plaintiff,

Appellant,

vs.

James Schwebel, third-party defendant, et al.,

Respondents.

James R. Schwebel, James S. Ballentine, Matthew J. Barber, Schwebel, Goetz & Sieben, P.A., Minneapolis, Minnesota, for respondents.

Daniel A. Beckman, Abigail A. Pettit, Gislason & Hunter LLP, Minneapolis, Minnesota, for appellants.

S Y L L A B U S

Minnesota's common law prohibition against champerty is abolished.

Reversed and remanded.

O P I N I O N

HUDSON, Justice.

This appeal arises from a contract between appellant Prospect Funding Holdings LLC and respondent Pamela Maslowski whereby appellant purchased an interest in respondent's personal injury suit. When respondent settled her suit and did not abide by the terms of the contract, appellant sued respondent to enforce the contract. Both the district court and the court of appeals held that appellant could not enforce the contract because it violated Minnesota's common law prohibition against champerty. We reverse and remand to the district court for further proceedings consistent with this opinion.

FACTS

Appellant Prospect Funding Partners LLC ("Prospect") is a litigation financing company.[1] Respondent Pamela Maslowski is a Minnesota resident who was injured in a car accident in Woodbury in 2012. Following the accident, she retained Schwebel, Goetz & Sieben, P.A. to represent her concerning a possible claim against both the driver and owner of the other car involved in the accident.

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[1] The term "litigation financing" refers to "mechanisms that give a third party (other than the lawyer in the case) a financial stake in the outcome of the case in exchange for money paid to a party in the case." *Amer. Bar Ass'n Comm'n on Ethics 20/20, Informational Report to the House of Delegates* 5 (2012).

While her personal injury claim was pending, Maslowski contacted Prospect regarding the company's litigation financing services because she needed money to pay her living expenses. On May 21, 2014, Prospect and Maslowski executed a "Sale and Repurchase Agreement." Maslowski was the "seller" and Prospect was the "purchaser" under the contract. Maslowski sold to Prospect the right to receive a portion of the proceeds of any settlement that she received from her personal injury suit. As consideration for the sale, Maslowski received $6,000 from Prospect that was essentially a cash advance on her prospective settlement. Under the contract's fee schedule, the amount Maslowski owed to Prospect increased by 30 percent every 6 months, starting from a baseline of the $6,000 plus fees, with a cap at $25,245.00. But if Maslowski did not receive a settlement, she owed Prospect nothing. The contract also provided that Maslowski's obligation to Prospect would not exceed the amount of her settlement. Maslowski's attorney in the personal injury suit discussed the contract with her and signed the last page of the agreement certifying that he had reviewed the terms with Maslowski and acknowledged the payment directions in the event of a settlement.

On June 22, 2015, Prospect contacted Maslowski to inform her that she would owe Prospect $14,108.00 if her personal injury claim settled and she made payment to Prospect before September 22, 2015. Maslowski's attorney then informed Prospect that he believed that the litigation financing agreement between Maslowski and Prospect was unenforceable.

Maslowski settled her personal injury suit in July of 2015. When Maslowski did not pay Prospect according to the terms of their agreement, Prospect filed suit in New York

against Maslowski, her attorney, and her attorney's law firm for breach of contract and other related claims.

Maslowski served a complaint for declaratory relief on Prospect on August 6, 2015, seeking a ruling from the Hennepin County District Court that the New York forum-selection clause in the Maslowski-Prospect agreement was invalid. Litigation over the proper forum went on for two years, concluding with decisions in appellate courts of both New York and Minnesota. The New York Supreme Court, Appellate Division, held that the New York action should have been dismissed because the choice-of-forum provision was "unreasonable and should not be enforced." *Prospect Funding Holdings L.L.C. v. Maslowski*, 43 N.Y.S.3d 904, 905 (N.Y. App. Div. 2017). The Minnesota Court of Appeals agreed that any litigation over the agreement should occur in Minnesota. *Maslowski v. Prospect Funding Partners LLC*, 890 N.W.2d 756, 769 (Minn. App. 2017) ("The district court did not abuse its discretion by refusing to enforce the forum-selection clause in the parties' agreement based on Minnesota's local interest against champerty."), *rev. denied* (Minn. May 16, 2017).

The litigation as to the validity of the agreement itself proceeded in Minnesota, with both the district court and the court of appeals holding that Prospect could not enforce the agreement against Maslowski because Minnesota law applied to the agreement and the agreement violated Minnesota's common-law prohibition against champerty. *See Maslowski v. Prospect Funding Partners LLC*, No. A18-1906, 2019 WL 3000747 (Minn. App. July 8, 2019). Prospect petitioned for review of the court of appeals' decision. We

granted review only on the question of whether the agreement violates Minnesota's prohibition against champerty.

ANALYSIS

This case concerns the common-law prohibition against champerty. Champerty is "an agreement to divide litigation proceeds between the owner of the litigated claim and a party unrelated to the lawsuit who supports or helps enforce the claim." *Champerty*, *Black's Law Dictionary* (11th ed. 2019). It is closely related to the concept of maintenance. *See Maintenance*, *Black's Law Dictionary* (11th ed. 2019) ("Improper assistance in prosecuting or defending a lawsuit given to a litigant by someone who has no bona fide interest in the case; meddling in someone else's litigation."). The issue before us is whether we should affirm the court of appeals' decision on the ground that the contract between Prospect and Maslowski is void as against public policy, or reverse the decision and abolish, under Minnesota law, the common-law doctrine that champertous agreements are unenforceable.

The common law's disapproval of champerty and maintenance traces back many centuries. *See* Max Radin, *Maintenance by Champerty*, 24 Calif. L. Rev. 48, 48 (1935) (explaining that laws in both ancient Greece and Rome prevented a third party from intervening in the legal dispute of another). In medieval England, those with means played "the game of writs" to increase their power and harass their rivals through the medieval court system. R. D. Cox, *Champerty as We Know It*, 13 Mem. St. U. L. Rev. 139, 142 (1983). Part of this practice included the maintenance by a lord of a lawsuit against a landowner in exchange for a share of the proceeds of land. *Id.* at 143–44.

To address this problem, English statutes and common law prohibited third parties from taking a financial interest in litigation. *Id.* at 153–54. The law against champerty explains the early prohibitions against assignment of claims and against contingency fees for attorneys in both England and the United States, because both practices were seen as champertous. Radin, *supra*, at 68–70. Although these attitudes were very strong in England, the adoption of the prohibition against champerty in the United States was uneven. *Id.* at 68, 70; Cox, *supra*, at 160 ("Judicial opinion on the question whether a rule against champerty would be good or bad ran from the view that it would be intolerable to the view that it was required for the happiness of mankind.").

We addressed champerty as it applies to an agreement to finance litigation in our decision in *Huber v. Johnson*, 70 N.W. 806 (Minn. 1897). We explained that the "general purpose of the law against champerty and maintenance was to prevent officious intermeddlers from stirring up strife and contention by vexatious or speculative litigation which would disturb the peace of society, lead to corrupt practices, and pervert the remedial process of the law." *Id.* at 807. We subsequently applied the principle articulated in *Huber* to void contracts between attorneys and laypersons to instigate litigation for a profit. *See, e.g.*, *Holland v. Sheehan*, 122 N.W. 1, 2–3 (Minn. 1909) (involving an agreement between a layperson and an attorney to find potential plaintiffs for personal injury suits in exchange for a percentage of the settlements); *Gammons v. Johnson*, 78 N.W. 1035, 1037 (Minn. 1899) (involving a plan by an attorney to "hunt up claims" against a railroad company and fund the lawsuits at no expense to the plaintiffs in return for a share of the recovery).

We most recently considered the status of champertous agreements in *Hackett v. Hammel*, 241 N.W. 68 (Minn. 1932). Hammel was involved in a lawsuit over a stake in an iron mine in northern Minnesota. 241 N.W. at 69. Hackett "advanced $705 to aid [Hammel] in the prosecution of the case" pursuant to a contract that promised Hackett "ten times the amount so advanced" if Hammel prevailed in the suit involving the iron mine. *Id.* If Hammel lost, he owed Hackett nothing. *Id.* When Hammel won the suit, he paid Hackett only $700, and Hackett sued. *Id.* We held that the contract between Hackett and Hammel was void: "Such speculation in litigation in which the adventurer has no interest otherwise, and where he is in no way related to the party he aids, is champertous." *Id.*

Under the rule of law articulated by these cases, the contract between Prospect and Maslowski is champertous because Prospect is a stranger to the lawsuit who agreed to provide Maslowski with financial support during her personal injury litigation in exchange for a right to recover from the proceeds of the settlement of her lawsuit. The lower courts therefore did not err in determining that, under our prior decisions, the contract was unenforceable.

We decline, however, to hold that the contract between Maslowski and Prospect is void as against public policy as we understand it today. Champerty is a common law doctrine, and the development of the common law is "determined by the social needs of the community which it governs." *Tuttle v. Buck*, 119 N.W. 946, 947 (Minn. 1909). We have previously explained that, as society changes, "the common law must also evolve" with it. *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 234 (Minn. 1998). Our review of

changes in the legal profession and in society convinces us that the ancient prohibition against champerty is no longer necessary.

We first recognized the prohibition against champerty in the years before we adopted formal rules of ethics[2] and before we adopted Minnesota's Rules of Civil Procedure.[3] Today, the rules of professional responsibility and civil procedure address the abuses of the legal process that necessitated the common-law prohibition. Although attorneys may advertise to the general public, there are strict limits on solicitation. *See* Minn. R. Prof. Conduct 7.2 (generally permitting, but regulating, attorney advertisements); Minn. R. Prof. Conduct 7.3 (limiting solicitation of clients); *see also* Lester Brickman, *Of Arterial Passageways through the Legal Process: The Right of Universal Access to Courts and Lawyering Services*, 48 N.Y.U. L. Rev. 595, 645 (1973) (explaining that the "historical antecedents" of restrictions on advertising and solicitation by lawyers "are found in common law proscriptions against barratry, champerty, and maintenance"). Attorneys who file frivolous claims or use the legal system for harassment are subject to discipline and

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[2] The American Bar Association adopted a Code of Professional Responsibility in 1969, and we adopted the code shortly after. *See* Edward J. Cleary & William J. Wernz, *Ethics and Enforcement*, 25 Wm. Mitchell L. Rev. 143, 146 (1999). This period marked the beginning of the "modern professional responsibility system, built on a single, statewide system for dealing with all ethics complaints, operating according to formal rules, and under the ultimate jurisdiction" of our court. *Id.* at 147. In 1985, we repealed the Minnesota Code of Professional Responsibility and enacted the Minnesota Rules of Professional Conduct. *Id.* at 151.

[3] We adopted the Minnesota Rules of Civil Procedure for the District Courts in 1951. Order of Promulgation of the Rules Governing the Regulation of Pleadings, Practice, Procedure, and the Forms Thereof in the District Courts of the State of Minnesota (Minn. filed June 25, 1951).

sanctions. *See* Minn. R. Prof. Conduct 3.1 (prohibiting lawyers from asserting frivolous claims); Minn. R. Civ. P. 11.02 (requiring attorneys who submit pleadings, motions, or other documents to the court to certify that they present the materials for a proper and nonfrivolous purpose); Minn. R. Civ. P. 11.03 (providing sanctions for attorneys, law firms, and parties who violate Rule 11.02).

Along with the increase in regulation, another important development in the law has been the narrowing or abolition of other common law prohibitions based on concerns about champerty and maintenance. Although contingency fees were disfavored under early common law, all American jurisdictions now allow attorneys to take cases on contingency. Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark*, 37 UCLA Law Rev. 29, 38–39 (1989); *see also* Minn. Stat. § 549.01 (2018) ("A party shall have an unrestricted right to agree with an attorney as to compensation for services, and the measure and mode thereof . . . ."). Today, we understand contingent fee agreements as a way to facilitate access to justice by incentivizing attorneys to take cases that they might otherwise decline because the client cannot afford their services on an hourly or fixed-fee basis. Brickman, *Contingent Fees Without Contingencies*, *supra*, at 43–44; *see also Hollister v. Ulvi*, 271 N.W. 493, 497 (Minn. 1937) ("Contracts for contingent fees are as much for the benefit of the client as for the attorney, because if the client has a meritorious cause of action, but no means with which to pay for legal services unless he can . . . make a contract for a contingent fee to be paid out of the proceeds of the litigation, he cannot obtain the services of a law-abiding attorney . . . ." (internal quotation marks omitted) (citation omitted)).

Similarly, attitudes have shifted concerning the assignment of choses in action. *See Leuthold v. Redwood County*, 288 N.W. 165, 167 (Minn. 1939) ("The law of this state is that an assignment of a chose in action is valid and complete in itself upon the mutual assent of the assignor and assignee without notice to the debtor." (internal quotation marks omitted) (citation omitted)); Anthony J. Sebok, *The Inauthentic Claim*, 64 Vand. L. Rev. 61, 72–74 (2011) (explaining that fears of champerty and maintenance underlie the traditional common law rule of non-assignability of claims, but the rule has generally been abandoned across the United States in favor of a more modern approach).

Societal attitudes regarding litigation have also changed significantly. Many now see a claim as a potentially valuable asset, rather than viewing litigation as an evil to be avoided. Radin, *supra*, at 72. The size of the market for litigation financing reflects this attitudinal change. *See Investing in Legal Futures: The Rise of the Litigation Finance Firm*, The Practice, Sept./Oct. 2019, at 1 (citing an estimate of the litigation finance market's value at $50 to $100 billion). Businesses often seek financing to mitigate the risks associated with litigation and maintain cash flow for their operations. Victoria A. Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, 36 Cardozo L. Rev. 861, 869 (2015). It is also possible that litigation financing, like the contingency fee, may increase access to justice for both individuals and organizations. Maya Steinitz, *Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements*, 53 U.C. Davis L. Rev. 1073, 1085 (2019).

Maslowski argues that these changes do not justify an abolition of the common law prohibition against champerty. She raises three specific points in support of her argument.

First, she contends that the rules of professional responsibility and civil procedure are insufficient because they do not regulate the substance of champertous agreements. Second, she argues that litigation financing agreements have the potential to strip tort victims of their recovery. Third, she claims that champertous agreements will deter plaintiffs from settling their claims because they will need larger settlements to offset the cost of litigation financing. We address these objections in turn.

It is true that the rules of professional responsibility and civil procedure do not specifically regulate champertous agreements. But, as we have explained, the rules of professional responsibility and civil procedure prevent both attorneys and parties from profiting off of frivolous litigation—which is the type of behavior that we took issue with in *Huber*, *Holland*, and *Gammons*. It is also unlikely that companies like Prospect will fund frivolous claims because they only profit from their investment if a plaintiff receives a settlement that exceeds the amount of the advance—an unlikely result in a meritless suit. *See* David Tyler Adams, Note, *Laissez* Fair*: The Case for Alternative Litigation Funding and Assignment of Lawsuit Proceeds in Georgia*, 49 Ga. L. Rev. 1121, 1148–49 (2015). Litigation financing companies have claim valuation procedures to avoid this very problem. *Id.*

We are likewise unpersuaded by Maslowski's argument that concern for tort victims requires us to maintain an ancient prohibition. Although it is important that the victims of torts receive compensation for their injuries, they nonetheless have the freedom to contract, and we must not lightly disregard that basic principle. *See Jepson v. Gen. Cas. Co. of Wis.*, 513 N.W.2d 467, 472 (Minn. 1994) ("[H]owever significant Minnesota's interest in the

compensation of tort victims, we have other interests which in situations like this one are in conflict with the value we place on victim compensation. For example, we also believe that people should get the benefit of the contracts they enter into, nothing less and nothing more."). Maslowski's argument ignores the many sophisticated parties to whom this reasoning does not apply, such as those who seek commercial litigation financing and understand the risks involved with such agreements.

Regarding Maslowski's argument that litigation financing "under-incentivizes settlement," she cites no empirical evidence to support her claim. There is also a well-reasoned argument to the contrary made by scholars considering the same issue. *See, e.g.*, Ronen Avraham & Abraham Wickelgren, *Third-Party Litigation Funding—A Signaling Model*, 63 DePaul L. Rev. 233, 235 (2014) (explaining that the decision to fund a plaintiff may create a "credible signal" that the plaintiff's case has merit, which can affect a defendant's incentives to settle). And, as Prospect points out, contingent fee agreements arguably affect a plaintiff's calculation regarding settlement in a similar manner because they reduce the plaintiff's ultimate recovery. Yet we permit such arrangements because they allow plaintiffs who would otherwise be priced out of the justice system to assert their rights. We believe the same is true of litigation financing, as explained above.

Finally, we note that district courts may still scrutinize litigation financing agreements to determine whether equity allows their enforcement. *See, e.g.*, *Osprey, Inc. v. Cabana Ltd. P'ship*, 532 S.E.2d 269, 278 (S.C. 2000) ("Our abolition of champerty as a defense does not mean that all such agreements are enforceable as written."). Parties like Maslowski retain the common law defense of unconscionability. *See Abernethy v. Halk*,

166 N.W. 218, 220 (Minn. 1918) (observing that a court "may decline to enforce an unconscionable contract"). Courts should carefully review uncounseled agreements, particularly between parties of unequal bargaining power or agreements involving an unsophisticated party. Courts and attorneys should likewise be careful to ensure that litigation financiers do not attempt to control the course of the underlying litigation, similar to the "intermeddling" that we described in our early champerty precedent. *See Huber*, 70 N.W. at 808 (stating that "it is difficult to conceive of any stipulation more against public policy" than a contract term requiring the litigation financier's permission to settle the underlying litigation). There is also the possibility of further regulation by the Legislature,[4] although this prospect is an issue beyond the scope of our review.

For these reasons, we abolish Minnesota's common-law prohibition against champerty.

CONCLUSION

For the foregoing reasons, we reverse the decision of the court of appeals and remand this case to the district court for further proceedings consistent with this opinion.

Reversed and remanded.

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[4] Arkansas, Indiana, Maine, Nebraska, Ohio, Oklahoma, Tennessee, and Vermont have adopted statutes to regulate consumer litigation financing agreements. *See* Ark. Code Ann. § 4-57-109 (2017); Ind. Code §§ 24-12-1 to -12-10-1 (2019); Me. Rev. Stat. tit. 9-a, §§ 12-101 to -107 (2008); Neb. Rev. Stat. §§ 25-3301 to -3309 (2010); Ohio Rev. Code Ann. § 1349.55 (West 2008); Okla. Stat. tit. 14a, §§ 3-801 to -817 (2013); Tenn. Code Ann. §§ 47-16-101 to -110 (2014); Vt. Stat. Ann. tit. 8, §§ 2251–2260 (2019).