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**STATE OF MINNESOTA  
IN COURT OF APPEALS**

**A06-2080**

Minnesota Insurance Company,  
Respondent,

vs.

Natural Environments Corporation,  
Appellant,

Michael Sullivan, et al.,  
Defendants,

and

Natural Environments Corporation,  
Third Party Plaintiff,

vs.

Wenzel Engineering, Inc.,  
Third Party Defendant.

**Filed January 29, 2008  
Affirmed and remanded  
Minge, Judge**

Hennepin County District Court  
File No. 27-CV-03-011602

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Considered and decided by Hudson, Presiding Judge; Willis, Judge; and Minge, Judge.

## **UNPUBLISHED OPINION**

**MINGE**, Judge

Appellant contractor challenges the district court's denial of its motion for summary judgment. The litigation had been initiated by homeowners for damages caused by a landslide. Respondent insured homeowners' automobiles that were destroyed by a second landslide. Appellant argues that because the cause of action does not include a claim for damages to automobiles, respondent's subrogation claim for vehicle damage should have been dismissed and that, even if such damage was included, because the district court no longer had personal jurisdiction over the homeowners or subject matter jurisdiction over their claims, it could not substitute respondent insurer into this case in their stead. Because the homeowners' claims were sufficiently broad to include the second landslide and the automobile damage, because the record on appeal does not preclude recovery for such damage, and because the district court has retained jurisdiction over the parties and the action; we affirm its denial of summary judgment, and remand for further proceedings.

### **FACTS**

Michael and Stacy Sullivan, defendants below, and Robert and Jo Ann Hilton, plaintiffs below, are Minneapolis residents. Their properties adjoin. The Sullivans reside on Summit Place; their backyard drops off dramatically. The Hiltons reside on Kenwood Parkway, at a substantially lower elevation. In April of 2002, the Sullivans decided to

rebuild an existing retaining wall in their backyard. The Sullivans contracted with Natural Environments Corporation (NEC), a codefendant and third-party plaintiff below, and appellant here, to do the work. On February 5, 2003, the Hiltons brought suit in Hennepin County District Court against the Sullivans and NEC, claiming that work on the retaining wall caused a large quantity of earthen material to slide down, damaging their property, including landscaping and the garage. The Sullivans answered with affirmative defenses, and also brought a cross-claim against NEC. NEC in turn brought a third-party complaint against Wenzel Engineering, Incorporated, for contribution or indemnity.

On June 25, 2003, during the pendency of the initial proceeding, a heavy rain occurred and part of the slope below the retaining wall collapsed. This landslide caused further damage to Hiltons' property, destroying their garage and two automobiles. The two automobiles were insured by respondent Minnesota Insurance Company (MIC). MIC paid \$39,356.86 to the Hiltons for the damage to the vehicles. Although MIC retained a right through its insurance contract with the Hiltons to subrogation for the insured claims, at the time of its settlement MIC did not become a party to the action and did not assert its subrogation rights. On May 5, 2005, the Hiltons submitted an amended complaint, asking for punitive damages. The amended complaint did not specifically mention the further damage to the garage or the two automobiles.

Following negotiations, the parties reached a settlement covering most claims. At a hearing on July 11, 2005, counsel for the parties recited the terms of the settlement into the court record. NEC and Wenzel Engineering were to pay agreed upon damages. In

exchange, the Sullivans agreed to dismiss their claims against NEC and Wenzel Engineering, and the Hiltons agreed to dismiss their claims against the Sullivans, NEC, and Wenzel Engineering. However, all parties recognized that the settlement did not cover possible subrogation claims regarding the two automobiles. The only other issue remaining was the apportionment of liability between NEC and Wenzel Engineering.

On September 12, 2005, pursuant to the settlement, the district court signed an “Order for Partial Dismissal with Prejudice.” The order stated that “[a]ll claims of Plaintiffs Robert and Jo Ann Hilton against Defendants Michael and Stacy Sullivan herein are hereby dismissed with prejudice and without further costs to either party.”

On September 30, 2005, MIC filed a Motion for Substitution of Parties. It asked the district court to substitute MIC for the Hiltons for the Hiltons’ “insured claims.” This motion was granted by the district court, over the objection of opposing counsel, on April 14, 2006.

On June 2, 2006, the Sullivans moved for summary judgment. The Sullivans argued that because claims against them had been dismissed with prejudice, the district court no longer had personal jurisdiction over them and could not substitute MIC for the Hiltons. NEC joined in the Sullivans’ motion for summary judgment, and brought its own summary judgment motion. NEC argued that the district court had no personal jurisdiction over the Hiltons at the time it substituted MIC into the case, that the automobiles were not included in the Hiltons’ claims, and that any direct claim (as opposed to subrogation claim) by MIC was now barred by the statute of limitations. Wenzel Engineering joined in the motions.

The district court denied both motions for summary judgment. The district court held that its September 12, 2005 order dismissing with prejudice all claims of the Hiltons against the Sullivans was a clerical error. The district court further determined that the September 12, 2005 order did not dismiss the Hiltons' case against the Sullivans, but rather dismissed certain claims. Finally, the district court determined that MIC's subrogation claims were timely because MIC was properly substituted for the Hiltons, who in turn had made timely and adequate claims. To implement its ruling, the district court entered an Amended Order for Partial Dismissal with Prejudice on September 18, 2006, changing the language of the September 12, 2005 order to provide that "the claims of . . . [the] Hilton[s] against . . . [the] Sullivan[s], with the exception of the matter of damages to the Hiltons' automobiles, are hereby dismissed with prejudice . . . ." This appeal follows.

## **D E C I S I O N**

Although the parties have argued a variety of questions, there are basically two issues and a third contingent issue: (1) whether the Hiltons' lawsuit included a claim for damage to the automobiles; and (2) whether the Hiltons' lawsuit is still pending such that a subrogation claim can be maintained. If either of these issues is answered adverse to MIC, the third issue is whether a claim for damage to the automobiles is time barred.

On an appeal from summary judgment, this court determines whether (1) there are any genuine issues of material fact; and (2) the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). We must view the evidence in the light most favorable to the party against whom summary judgment is

sought. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). Where there is no issue of material fact, this court reviews the district court's application of the law de novo. *Commercial Union Ins. Co. v. Minn. Sch. Bd. Ass'n*, 600 N.W.2d 475, 478 (Minn. App. 1999), *review denied* (Minn. Dec. 21, 1999). Because no material facts are contested on appeal, the issues present questions of law and our review is de novo. Questions of civil procedure are questions of law, also reviewed de novo. *City of Barnum v. Sabri*, 657 N.W.2d 201, 204 (Minn. App. 2003).

## I.

We first consider whether the damage to the Hiltons' automobiles was part of the lawsuit. NEC asserts that a careful examination of the record indicates that the Hiltons never made any claim for damages to the automobiles.

Notice pleading took effect in Minnesota in 1952 following the adoption of Minn. R. Civ. P. 8.01. Today,

[t]he functions of a pleading . . . are simply to give fair notice to the adverse party of the incident giving rise to the suit with sufficient clarity to disclose the pleader's theory upon which his claim for relief is based, to permit the application of the doctrine of *res judicata*, and to determine whether the case must be tried by the jury or the court.

*Kelly v. Ellefson*, 712 N.W.2d 759, 767 (Minn. 2006) (citing *N. States Power Co. v. Franklin*, 265 Minn. 391, 394, 122 N.W.2d 26, 29 (1963)) (other citations omitted) (alteration in the original). As such, most pleadings need not be highly specific, but "should be liberally construed in favor of the pleader." *State ex rel. Hatch v. Allina Health Sys.*, 679 N.W.2d 400, 406 (Minn. App. 2004).

In their original complaint, served prior to the damage to the automobiles, the Hiltons alleged that NEC's work caused runoff, damaging their real property and garage. They included the language "[a]s a result of the runoff cause[d] by Defendants, the foundation and walls of Plaintiffs' garage have failed resulting in mud, water and other runoff infiltrating Plaintiffs' garage." The complaint continues, saying, that the landslide resulted in "actual physical damage to Plaintiffs' property."

Later, after the second landslide which damaged the automobiles, the Hiltons amended their complaint to include a prayer for punitive damages. The above-quoted damage language remained in place. That language gives fair notice of the theory under which the Hiltons brought their claim. Other damages caused by the second landslide were treated as included in the litigation. All parties were plainly aware that the automobiles had been damaged. The record at the July 11, 2005, settlement hearing reflects this knowledge. Similarly, all parties were well aware that MIC had paid the Hiltons for the loss of their automobiles. Though not specific, the statement "physical damage to Plaintiffs' property," when broadly construed in the Hiltons' favor, fairly includes damage to the automobiles. Construing the pleadings liberally, the Hiltons' amended complaint included a claim for the automobiles.

NEC submitted a number of documents that were not part of the record in district court to support its claim that the automobiles were not part of the underlying action. MIC challenged this material and urged that we not consider this newly-presented evidence. Generally, documents that are not part of the record are inadmissible for the purposes of appeal. *See* Minn. R. Civ. App. P. 110.01 (record in appeal includes exhibits,

transcripts, and papers filed with district court); *see also Stageberg v. Stageberg*, 695 N.W.2d 609, 613 (Minn. App. 2005) (appellate courts may not consider matters outside the record), *review denied* (Minn. July 19, 2005). NEC does not dispute this and has not identified an applicable exception to this general rule. Accordingly, we do not consider those documents or arguments in the briefs based on those documents.

## II.

Second, we consider whether as a result of the parties' July 11, 2005 oral, on-the-record stipulation for dismissal and the district court's September 12, 2005 order for partial dismissal with prejudice, the Hiltons were dismissed from the case and, if so, whether the underlying cause of action was terminated such that MIC could not be substituted and the district court could not continue the action.

### A. Partial Dismissal Order

This litigation begins with the Hiltons suing both the Sullivans *and NEC*. NEC was an original codefendant. The district court order of September 12, 2005 reads as follows:

Pursuant to the Settlement Agreement of record on July 7, 2005,

IT IS HEREBY ORDERED THAT:

All claims of Plaintiffs Robert and Jo Ann Hilton *against Defendants Michael and Stacy Sullivan* herein are hereby dismissed with prejudice and without further costs to either party.

(Emphasis added.) There is nothing in that order that dismisses the Hiltons' claims against NEC or Wenzel Engineering. In fact, the order is entitled "ORDER FOR PARTIAL DISMISSAL WITH PREJUDICE." Thus, NEC's claim that the September

12 order for dismissal ended all of Hiltons' claims and effectively dismissed Hiltons from the lawsuit is not accurate. The initial claim against NEC for improperly constructing the retaining wall was still outstanding.

**B. Rule 54.02.**

Also relevant to our consideration is Minn. R. Civ. P. 54.02. That rule provides:

When multiple claims for relief or multiple parties are involved in an action, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

From the outset, this was multi-party litigation. The Hiltons sued the Sullivans and NEC, the Sullivans filed a cross-claim against NEC, and NEC promptly filed a third-party complaint against Wenzel Engineering. Absent specific statements by the district court, any partial order, even one purporting to resolve all the Hiltons' claims, would leave the district court with continuing authority to modify its orders. Certainly, the September 12, 2005 order for partial dismissal did not abrogate that authority. It did not state that there was no just reason for delay or direct entry of judgment. Although judgment of partial dismissal was entered, this does not constitute a final determination.

### C. Stipulation

NEC further argues that the July 11, 2005 stipulation took the Hiltons' "claims against NEC out of court" and had the "forensic effect" of stripping the district court of personal and subject matter jurisdiction over the action. NEC cites three cases for this proposition: *Theis v. Theis*, 271 Minn. 199, 135 N.W.2d 740 (1965); *State ex rel. Bassin v. Dist. Court of Hennepin County*, 194 Minn. 32, 259 N.W. 542 (1935); and *Eastman v. St. Anthony Falls Water Power Co.*, 17 Minn. 48, 17 Gil. 31 (1871). In *Theis* and *Bassin*, the district courts made findings that settlements had occurred in open court and proceeded to enforce those settlements. The appellants in those cases argued that the settlements were ineffective without a written stipulation by the parties. *Theis*, 271 Minn. at 204, 135 N.W.2d at 744; *Bassin*, 194 Minn. at 33, 259 N.W. at 543. The *Bassin* court held that the oral stipulation "was a binding settlement of the litigation, notwithstanding [that] the terms had not been incorporated in a written stipulation or memorial of the completed settlement." *Bassin*, 194 Minn. at 33-34, 259 N.W. at 543. Our supreme court reiterated this position in *Theis*. See 271 Minn. at 205, 135 N.W.2d at 745. However, neither *Theis* nor *Bassin* held that a settlement agreement must be enforced where the district courts had not entered final judgment; they hold only that when parties enter into a settlement agreement on the record in open court, the district court may find a case settled without written stipulation of the parties.

We also note that because *Bassin* and *Eastman* only involved two parties, neither case is inconsistent with rule 54.02. In any event, *Bassin* and *Eastman* were decided before the rules of civil procedure, including rule 54.02, were adopted. Thus, we

conclude that none of these cases stands for the proposition that the parties to a settlement can eliminate the requirements of rule 54.02. Under that rule, the district court in the case before us retained the authority to modify its September 12, 2005 order.

It is equally important to look at the terms of the verbal settlement in this case. Here, neither the statements of counsel at the July 11, 2005 settlement hearing nor the September 12, 2005 order purported to dismiss all of Hiltons' claims against NEC or the Sullivans. On three occasions, the Hiltons' attorney reserved subrogation claims regarding the automobiles. First, he said;

Your Honor, as the Court will certainly recall at the commencement of the original trial in this matter, I made one record. The Hiltons have no authority to waive any subrogation claims related to automobiles, just to restate that for the record today because . . . there was a reminder from the insurer that under the terms of the policy we do not have that authority; therefore, we do not waive any subrogation claims related to the automobiles.

Next, during the discussion between the district court and attorneys for NEC and Wenzel Engineering:

[NEC Attorney]: The other point that -- that I want to raise is it's our understanding that this settlement is in full final settlement of all claims against [NEC] . . . except for the dispute which remains ongoing between [NEC] and the engineers . . . .

The Court: Sure.

[Hiltons' Attorney]: And subro. . .

[NEC Attorney]: And subro, yeah.

[Wenzel Attorney]: Your Honor, we have nothing to add, other than saying it's a full and final release of the Sullivans and Hiltons on any claims they have . . .

The Court: Sure.

[Hiltons' Attorney]: With exception to subro.

[Wenzel Attorney]: Yes.

Later, while stipulating to the settlement on behalf of the Hiltons, their attorney finished by saying “[t]he only comment or reiteration I have, Your Honor, is that the Hiltons have no authority to waive, in general release or otherwise, the subrogation claims, and [sic] that’s just . . . I’m just notifying all parties of that.”

Both the court and opposing counsel acknowledged the reservation of the subrogation claims. Everyone understood that the Hiltons did not have the legal authority to settle that portion of the case. NEC would have this court find that by stipulating to this settlement, the Hiltons acted contrary to the best interests of MIC. But this was not the understanding reached at the hearing, certainly not by the Hiltons, or, as demonstrated by the September 18, 2006 amended order, the district court. Counsel for the Hiltons was aware of the need to stay involved in this action in order to keep MIC’s rights alive and, as a result, expressly reserved the subrogation claims of MIC.

#### **D. Subsequent Orders**

After the September 12, 2005 order, the district court entered additional orders. On April 14, 2006, it allowed the substitution of MIC for the Hiltons. On September 18, 2006, the district court amended its July 11, 2005 order to expressly recognize that the automobile claims were never dismissed. This latter amendment was entered pursuant to Minn. R. Civ. P. 60.01 as a correction of a clerical error.

Rule 60.01 allows the district court to correct clerical mistakes in judgments and orders at any time, on its own initiative or by motion of a party. Minn. R. Civ. P. 60.01. A clerical error may be a mistake of the court itself or attributable to counsel. *Egge v.*

*Egge*, 361 N.W.2d 485, 488 (Minn. App. 1985). A clerical mistake “ordinarily is apparent upon the face of the record and capable of being corrected by reference to the record only. It is usually a mistake in the clerical work of transcribing the particular record. It is usually one of form.” *Wilson v. City of Fergus Falls*, 181 Minn. 329, 332, 232 N.W. 322-23 (1930) (quoted in *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438, 447 (Minn. App. 2001)). “[A] motion under Rule 60.[01] can only be used to make the judgment or record speak the truth and cannot be used to make it say something other than what originally was pronounced.” *Gould v. Johnson*, 379 N.W.2d 643, 647 (Minn. App. 1986) (citation omitted) (alterations in original), *review denied* (Mar. 14, 1986); *see also Denike v. W. Nat’l Mut. Ins. Co.*, 473 N.W.2d 370, 372 (Minn. App. 1991) (“Rule 60.01 is not used to state something other than what was originally pronounced.”).

NEC argues that the amendatory order was more than the correction of a clerical error and is not authorized by rule 60.01. NEC is correct. The change is not merely clerical. However, the district court retained authority under rule 54.02 to amend the order. Misidentification of the source of authority to modify an order does not affect the validity of the modification. *See Denike*, 473 N.W.2d at 372. Thus, we conclude the September 18, 2006 amendatory order is effective, that the district court did not err in substituting MIC for the Hiltons with respect to their claim for damages to the automobiles, and that the district court did not err in entering summary judgment.

### **III.**

Finally, NEC has raised a statute of limitations defense. This is premised on the assumption that, because the Hiltons' lawsuits did not encompass the damage to the automobiles or, in the alternative, because the Hiltons' entire cause of action had been dismissed, no subrogation claim could be maintained and MIC must bring a new lawsuit. Based on our disposition of the other issues, we do not consider the statute of limitations.

**Affirmed and remanded.**

Dated: