

NO. A040615

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State of Minnesota  
**In Supreme Court**

KEVIN KELLY, as Trustee for the heirs and next-of-kin  
of KELLY ANN KELLY, deceased,

*Appellant,*

vs.

JASON ELLEFSON,

*Respondent,*

STEVE EIDEMILLER,

*Defendant,*

and

SUPREME TRANSPORT SERVICES, L.L.C., DAVID L. WHITE,  
DIANA WHITE, and D.L. ENTERPRISES, INC.,

*Respondents.*

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**APPELLANT'S BRIEF AND APPENDIX**

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## STATEMENT OF ISSUES

**Did the trial court err in excluding Plaintiff's amended complaint and expert disclosures offered by a non-settling party to prove the fault of the settling party?**

The trial court held that Plaintiff's amended complaint and expert disclosures were not admissible at trial. The court of appeals reversed and ordered a new trial.

### **Apposite authorities:**

Minn. R. Evid. 801

Frey v. Snelgrove,  
269 N.W.2d 918 (Minn. 1978)

Larion v. City of Detroit,  
149 Mich. App. 402, 386 N.W.2d 199 (Mich. Ct. App. 1986)

## STATEMENT OF CASE

This is an action brought by Kevin Kelly ("Plaintiff"), as trustee for the heirs and next-of-kin of Kelly Ann Kelly. (AA 1-4.)<sup>1</sup> On March 22, 2002, Kelly Ann Kelly was a passenger in a vehicle driven by Jason Ellefson that collided with a semi tractor-trailer driven by David White and leased to Supreme Transport, Inc. (collectively "Supreme"). Kelly Ann Kelly was killed. Kevin Kelly was the husband of Kelly Ann Kelly, and at the time of her death, they had two young children, Zachary (4) and Ashley (2). (Id.)

The wrongful death action was originally commenced in June 2002. (Id.) Plaintiff sued Ellefson, the Supreme defendants, and Steve Eidemiller, who was driving alongside Ellefson shortly before the crash and may have been racing with Ellefson. (Id.) In February 2003, Plaintiff amended the complaint to include dram shop claims against Lido Café, Inc. ("Lidos"), where Ellefson had been drinking before the crash. (AA 29-38.) Two days before opening statements at the trial, Plaintiff settled with Lidos on a Pierringer basis. (II 137-40.)<sup>2</sup> Plaintiff also settled with Eidemiller before trial on a Pierringer basis. (II 37.)

At trial, Supreme sought to introduce Plaintiff's amended complaint, Plaintiff's expert interrogatory answers, and an affidavit from Plaintiff's expert (collectively "amended complaint and expert disclosures") as substantive proof of the fault of Lidos.

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<sup>1</sup> "AA" refers to Appellant's appendix attached to this brief.

<sup>2</sup> The roman numeral refers to the volume of trial transcript, and the arabic numerals refer to the page numbers within the volume.

(IV 358.) Plaintiff objected to the admission of these documents and the trial court refused to admit them.

After all the evidence was submitted, the jury apportioned fault as follows: 40 percent to Ellefson and 60 percent to the Supreme defendants. (AA 61-63.) The jury found no negligence on Steve Eidemiller or Kelly Ann Kelly. (Id.) Lidos was not placed on the verdict form because there was no evidence produced at trial on the threshold issue of whether Lidos had served Ellefson while he was "obviously intoxicated". The trial court entered judgment against Ellefson and the Supreme defendants. (Id.)

The Supreme defendants moved for a new trial, claiming 23 separate errors. (AA 8-10.) The trial court denied the motion for a new trial. Supreme appealed from the denial of the motion. The court of appeals reversed and ordered a new trial, finding prejudicial error in various jury instructions and evidentiary rulings. (AA 64-69.) Plaintiff filed a Petition for Review of all issues. This Court granted review on the "issue of the admissibility of the pleadings, interrogatory answers, and statements in the expert affidavit."

## STATEMENT OF FACTS

### A. The Accident

On March 22, 2002, Kelly Ann Kelly was a passenger in a pickup truck driven by Jason Ellefson that collided with a semi tractor-trailer driven by David White and leased to Supreme Transport, Inc. (collectively "Supreme"). Ellefson was driving along a through street when the Supreme tractor-trailer pulled out from a private driveway into the path of the Ellefson vehicle. Kelly Ann Kelly was killed. A little over two hours after the accident, Ellefson had a blood alcohol content of 0.12.

### B. The Pleadings

In June of 2002, a wrongful death action was brought by Kevin Kelly ("Plaintiff"), as trustee for the heirs and next-of-kin of Kelly Ann Kelly. (AA 1-4.) Plaintiff originally sued the Supreme defendants, Ellefson, and Steve Eidemiller, who was driving near Ellefson before the crash. (Id.)

In February of 2003, Plaintiff amended his complaint to include a dram shop claim against Lidos, where Ellefson had been before the crash, alleging that Lidos had served Ellefson alcohol while he was "obviously intoxicated". (AA 29-38.) The amended complaint states "on information and belief, on or about the evening of March 22, 2002, Defendant Jason Ellefson was illegally sold, bartered or given intoxicating beverages, in violation of various provisions of the Minnesota Civil Damages Act, Minn. Stat. § 340A, et seq., and that as a direct and proximate result of such violations, Defendant Ellefson became obviously intoxicated." (AA 36.) Supreme also brought a cross-claim against Lidos. (AA 6.)

### **C. The Dram Shop Claim**

In support of its dram shop claim against Lidos, Plaintiff retained an expert toxicologist, Dr. Richard Jensen. In response to interrogatories, Plaintiff disclosed the expert opinions of Dr. Richard Jensen. (AA 23-28.) Dr. Jensen opined that Ellefson would have been exhibiting signs of obvious intoxication. (Id.) His opinions were based solely on the blood alcohol content of Ellefson following the accident. Dr. Jensen also executed an affidavit detailing his opinions and the basis for his opinions. (AA 56-58.)

Plaintiff could not locate a single fact witness that would support the dram shop claim and testify that Ellefson was exhibiting signs of obvious intoxication. In contrast, the fact witnesses who observed Ellefson at Lidos before he entered his vehicle testified that he appeared normal. (III 230 - Martinson; III 13 - Eidemiller; III 193 - Eastep.)<sup>3</sup>

Supreme also retained its own expert toxicologist, Lowell Van Berkom. Significantly, Supreme never disclosed that its toxicologist would opine that Ellefson was "obviously intoxicated" at Lidos. (AA 39-40.) Instead, Van Berkom's expert opinions focused solely on the effect of Ellefson's blood alcohol content on his driving behavior. Before trial, Supreme essentially left it to Plaintiff alone to pursue the dram shop claim.

Lidos moved twice for summary judgment on the dram shop claim, claiming there was no evidence to support the dram shop claim. (I 3-28; II 110-117; Lido Café, Inc. Notice of Motion for Summary Judgment.) Supreme took no position with respect to

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<sup>3</sup> Plaintiff Kevin Kelly was not present on the night in question and thus had no personal knowledge of the events at Lidos bar.

Lido's requests to be dismissed from the case. (II 113.) The trial court denied both motions.

#### **D. The Trial**

Two days before opening statements in the jury trial, and based upon all of the fact and expert testimony disclosed at that time, Plaintiff settled with Lidos on a Pierringer basis. (II 137-40.) Once Lidos was released, it did not participate at trial and its name was removed from the case caption. (II 140, 166.) Plaintiff also settled with Eidemiller before trial on a Pierringer basis. (II 37.)

At trial, Supreme attempted to establish fault on the part of Lidos by using Plaintiff's amended complaint and expert disclosures as substantive evidence that Lidos had served Ellefson while obviously intoxicated based upon the theory that these were admissions. (II 162.) Supreme argued to the court that these documents constituted its prima facie case against Lidos and therefore Lidos should be on the verdict form. (II 162.) The trial court withheld making an ultimate ruling stating, "I suppose it depends on what comes in.... [If] he's going to try for impeachment, everyone has agreed he can do that." (II 166.)

Later during trial, Supreme again brought up the issue, and made clear that it was "not using [pleadings] for impeachment here. We are using it as an admission." (IV 356.) Supreme again maintained that Plaintiff's amended complaint and expert

disclosures should be admitted in the trial. (IV 358.)<sup>4</sup> The trial court denied Supreme's request.

The jury apportioned 60 percent fault to Supreme and 40 percent fault to Ellefson. (AA 61-63.) The jury found no negligence on either Steve Eidemiller or Kelly Ann Kelly. (*Id.*) Lidos was not placed on the verdict form because there was no evidence produced at trial on the threshold issue of whether Lidos had served Ellefson while he was "obviously intoxicated".<sup>5</sup> The trial court entered judgment against Supreme and Ellefson. (AA 63.)

#### **E. Supreme's Post-Trial Motions And Appeal**

Supreme moved for a new trial, claiming numerous procedural and evidentiary errors. (AA 8-10.) With respect to the issue under review here, Supreme claimed in its post-trial memorandum that it was "precluded from offering evidence of Lidos fault through Plaintiffs' pleadings," and that "[t]he jury was not permitted to consider and assess the fault of Lidos." (*Id.*) In its affidavit in support of the motion, Supreme contended that its counsel had "requested permission to read to the jury those portions of plaintiffs' amended complaint that concerned Lidos liability," Plaintiff's answers to

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<sup>4</sup> Despite mentioning at the pre-trial hearing that one of the documents it may seek to introduce was the Trustee's answers to Lidos interrogatories, the only interrogatory responses that Supreme sought to utilize during trial was the answers to expert interrogatories. (IV 358.)

<sup>5</sup> After a Pierringer settlement, the alleged fault of a settling party is submitted for a jury's assessment, if there is proper "evidence of conduct which, if believed, would constitute negligence (or fault) on the part of the person" inquired about. *Frey v. Snelgrove*, 269 N.W.2d 918, 923 (Minn. 1978).

interrogatories and "the affidavit of plaintiff's expert toxicologist, Richard Jensen." (AA 20).<sup>6</sup> The trial court denied the motion for a new trial. (AA 59-60).

Supreme appealed. The court of appeals held that Plaintiff's pleadings, interrogatory responses and expert affidavit were admissible under Minn. R. Evid. 801(d)(2) to prove the fault of the decedent Kelly Ann Kelly. (AA 67). The court of appeals did not address the issue of whether the documents were admissible in order to prove the fault of Lidos as had been requested by Supreme at trial. The court of appeals also reversed other trial court decisions and ordered a new trial.

Plaintiff petitioned this Court for review. On May 17, 2005, the Court granted review only on the issue of the admissibility of Plaintiff's pleadings, interrogatory responses and statements in Plaintiff's expert's affidavit.

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<sup>6</sup> In its post-trial motion, Supreme did not claim that the documents ought to have been admitted as admissions to prove the fault of Kelly Ann Kelly. Issues not raised in post-trial motions are generally waived on appeal. Estate of Spiess v. Schumm, 442 N.W.2d 179, 181 (Minn. Ct. App.1989).

## ARGUMENT

The trial court correctly excluded Plaintiff's amended complaint and expert disclosures offered by Supreme as substantive proof of the fault of the settling party. Under the Minnesota Rules of Evidence, these documents are inadmissible hearsay. Nor do these documents qualify as "admissions of a party-opponent under Rule 801(d)(2). First, the complaint is a notice pleading containing allegations against multiple parties and such allegations are not substantive evidence of fault. Second, the expert disclosures are documents generated during discovery that merely alert all parties to the expected testimony. Their admission at trial would frustrate the liberal pleading rules and discourage partial settlement. Finally, these documents were not offered "against" Plaintiff, as required to be considered an admission under Rule 801(d)(2), but were offered against the settling party as substantive proof of fault. As such, the trial court correctly held that the amended complaint and expert disclosures were not admissible.

### I. STANDARD OF REVIEW

The decision whether to admit or exclude evidence rests within the discretion of the trial court and will not be disturbed unless based upon an erroneous view of the law or an abuse of discretion. Uselman v. Uselman, 464 N.W.2d 130, 138 (Minn. 1990).

### II. THE AMENDED COMPLAINT AND EXPERT DISCLOSURES ARE HEARSAY STATEMENTS EXCLUDED BY MINNESOTA RULES OF EVIDENCE

In Minnesota state courts, the Minnesota Rules of Evidence govern the admission of evidence at trial. First adopted in 1977, these rules define and limit what type of evidence should be permitted in a trial proceeding to prove or disprove the facts at issue.

These Rules occupy the field of evidentiary rules and are intended to supersede the common-law jurisprudence that originally developed and governed the admission of evidence at trial. See generally Minn. R. Evid. 101, 1101 ("These rules govern proceedings in the courts of this state", except in grand jury and contempt proceedings, some other miscellaneous proceedings, and preliminary questions of fact).

The Minnesota Rules are based generally on the Federal Rules of Evidence. See Minn. R. Evid., Preliminary Comment (1977). This Court has looked to case law that interprets the Federal Rules of Evidence as a guide for the substantially similar Minnesota Rules. See State v. Amos, 658 N.W.2d 201, 204 (Minn. 2003) (looking to federal case law for guidance in reviewing Minnesota's hearsay rule).

One of the bedrock rules governing the admission of evidence at trial is the exclusion of out-of-court statements as hearsay evidence. See Minn. R. Evid. 801 et seq. Hearsay is defined by the Rules as "a statement, other than one made by the declarant at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). "Generally, hearsay is inadmissible because of its inherent lack of verification and reliability and the inability to cross-examine the declarant." State v. Bauer, 598 N.W.2d 352, 366 (Minn. 1999), (citing Minn. R. Evid. 801(c)).

The exclusion of hearsay promotes the Rules' preference for live witness testimony, taken under oath and subject to cross-examination, so that the jury may assess the credibility of the witness. See Minn. R. Evid. 602, 603 (witness testimony must be competent, based upon personal knowledge, and testified to under oath). Hearsay is not admissible unless otherwise allowed by the rules. Minn. R. Evid. 802.

Here, there can be little doubt the amended complaint and expert disclosures fall within the definition of hearsay. The amended complaint is an out-of-court statement made by an attorney for the Plaintiff. The expert disclosures are out-of-court statements made by Plaintiff and his expert, Richard Jensen. See State v. Bradford, 618 N.W.2d 782, 794 (Minn. 2000) (one expert cannot offer the out-of-court opinions of another expert without violating hearsay rules). Supreme also sought introduction of these statements to prove the truth of the matter asserted, specifically, that Lidos served an obviously intoxicated person in violation of the Minnesota dram shop act. As a result, all proffered statements are considered hearsay, and are excluded unless otherwise allowed by the rules.<sup>7</sup>

### **III. THE AMENDED COMPLAINT AND EXPERT DISCLOSURES DO NOT QUALIFY AS AN ADMISSION OF A PARTY-OPPONENT**

At the trial, Supreme claimed that the proffered documents were not hearsay because the documents were an admission by party-opponent, and thus fell within the definition of "non-hearsay" contained in the Rules. See Minn. R. Evid. 801(d)(2).

In order to qualify as an admission of a party opponent under the Rules, the proffered statements must meet two prongs. First, the statement must be "offered against a party". Minn. R. Evid. 801(d)(2). Second, the statement must be:

(A) the party's own statement, in either an individual or a representative capacity, or

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<sup>7</sup> The interrogatory responses were hearsay within hearsay. Hearsay included within hearsay is not admissible under the evidence rules unless each part of the combined statements conforms with an exception to the hearsay rule. Minn. R. Evid. 805.

(B) a statement of which the party has manifested an adoption or belief in its truth, or

(C) a statement by a person authorized by the party to make a statement concerning the subject, or

(D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or

(E) a statement by a coconspirator of the party, which also requires a showing that (1) a conspiracy existed between declarant and party against whom the statement is offered, and (2) the statement was made in the course of and in furtherance of the conspiracy.

Minn. R. Evid. 801(d)(2). According to the committee comments accompanying the Rules, the rationale for defining such statements as "non-hearsay" is based more on the "nature of the adversary system than in principles of trustworthiness or necessity." Minn. R. Evid. 801, Committee Comment (1989).

Presumably because such statements lack the protections of trustworthiness, this Court has been judicious and careful in ensuring that the explicit requirements of Rule 801(d)(2) have been met before permitting such statements to be considered "non-hearsay". See, e.g., State v. Willis, 559 N.W.2d 693, 699-700 (Minn. 1997) (holding trial court erred in admitting statement of co-conspirator with no showing that statements were made "in furtherance of" the conspiracy, but error harmless in absence of prejudice); State v. Scott, 493 N.W.2d 546, 550 (Minn. 1992) (implicitly finding error, although harmless, in permitting jury to hear "adoptive admission" under Rule 801(d)(2)(B), where surrounding circumstances did not "clearly establish" defendant intended to adopt admission of another as his own).

**A. The Amended Complaint and Expert Disclosures Are Not "Statements" Within the Purview of Rule 801(d)(2)**

The trial court correctly refused admission of the amended complaint and the expert disclosures as an "admission of party-opponent" because the nature and character of these documents do not qualify as a "statement" within the purview of Rule 801(d)(2). Minnesota is a notice-pleading state. Save Our Creeks v. City of Brooklyn Park, 682 N.W.2d 639, 646 (Minn. Ct. App. 2004) (citing Haugland ex rel. Donovan v. Mapleview Lounge & Bottleshop, Inc., 666 N.W.2d 689, 694 (Minn. 2003)). The primary function of notice pleading is to give fair notice to the adverse party of the theory on which the claim for relief is based. Id. Under notice pleading, parties are permitted to make broad general statements that may be conclusory in nature. Barton v. Moore, 558 N.W.2d 746, 749 (Minn. 1997). Notice pleading replaces the old system of code pleading, which required a verified pleading of specific facts before being sufficient to constitute a cause of action. Barton, 558 N.W.2d at 749; see also First Nat'l Bank of Henning v. Olson, 246 Minn. 28, 37, 74 N.W.2d 123, 129 (1955).<sup>8</sup>

Notice pleading expressly permits multiple claims to be stated in the alternative, and permits alternative types of relief to be demanded. Minn. R. Civ. P. 8.01, 8.05. The amendment of pleadings is freely allowed to add potentially culpable parties or to allege new causes of action. Minn. R. Civ. P. 15.01.

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<sup>8</sup> Under the code pleading system, the view was that there could exist only one set of facts in a case and that inconsistent statements were therefore not allowed. See Charles T. McCormick, McCormick on Evidence, §257 (5<sup>th</sup> ed. 1999).

Because of the purpose and rules governing notice pleading, complaints lack the character of an admission that accompanies other types of statements. See McCormick on Evidence § 257 (5<sup>th</sup> ed. 1999) ("It can readily be appreciated that pleadings of this nature are directed primarily to giving notice and lack the essential character of an admission."); see also 30B Charles A. Wright, Arthur R. Miller & Michael H. Graham, Federal Practice and Procedure: Evidence § 7026 (interim ed. 2000).

One potential limited exception is where a party makes a specific statement of fact in a pleading that relates to their own conduct. See In re Petition for Disciplinary Action Against Perry, 494 N.W.2d 290, 293-94 (Minn. 1992) (discussing and defining how inconsistent pleadings are received in the context of a disciplinary proceeding, but not addressing the interpretation of Rule 801(d)(2)). In such a case, however, the party making the statement would presumably be doing so based upon personal knowledge, would be available for testimony, and the pleading would be used for impeachment purposes and not as an admission.<sup>9</sup>

The general exclusion of pleadings as an "admission" under Rule 801(d)(2) makes logical and consistent sense. A party should be permitted to take advantage of the liberal pleading rules and liberal amendments. A party should not be forced to explain to the fact-finder its rationale and basis for pleadings, including why certain parties were

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<sup>9</sup> Both Supreme and the court of appeals rely upon Carlson v. Fredsall, 228 Minn. 461, 37 N.W.2d 744 (Minn. 1949), for the proposition that Plaintiff's pleadings should have been admitted into evidence at trial. Carlson was decided over fifty years ago, before adoption of the Minnesota Rules of Evidence and before the advent of notice pleading, and has no precedential value in this case.

initially sued, why certain parties were added at a later date, and why certain parties were ultimately dismissed from the lawsuit. This practice would shift the focus from the relevant claims at issue to procedural choices that have nothing to do with the material facts for the fact-finder to resolve. See also Wilson Storage & Transfer Co., 242 Minn. 60, 67, 64 N.W.2d 9, 15 (Minn. 1954) (newly adopted rules of civil procedure permit liberal amendments, so fact plaintiff added another party four months after the original action not admissible for impeachment purposes).

In this case, Plaintiff alleged alternative multiple claims against multiple parties. (AA 29-38.) These allegations put all parties on notice of the claims alleged against them, but required competent and admissible evidence to back up the allegations. While there may be certain limited circumstances that would justify treating a complaint as an admission, there are no circumstances present here.

Likewise, expert disclosures are documents generated in the discovery phase of a lawsuit and do not constitute admissions of a party-opponent under Rule 801(d)(2). After notice pleading, the parties engage in broad discovery designed to enable the solicitation of information that may not be admissible at trial. Minn. R. Civ. P. 26.02(a). The Minnesota Rules of Civil Procedure specifically provide that such interrogatory answers are limited in their admissibility at trial by the Minnesota Rules of Evidence. Minn. R. Civ. P. 33.02. While expert disclosures may be used as impeachment if the expert is ultimately called at trial, expert disclosures are merely a summary of expected expert testimony that may or may not be used at trial.

More importantly, the unchecked use of pleadings and expert disclosures at trial will also hinder the use of partial settlements and permit the non-settling parties to prove their cross-claims against the settling parties using incompetent and inadmissible evidence. Plaintiffs will be reluctant to release parties before trial when conclusory pleading allegations and expert disclosures are permitted into evidence without foundation or evidentiary basis. Indeed, plaintiffs would essentially be required to call their own expert retained to comment on the fault of the settling party and subject their own expert to cross-examination in order to weaken the effect of the non-settling party reading the expert disclosure to the jury. This result does not encourage settlement, but instead relieves the non-settling party from its appropriate burden of proving its cross-claim against settling parties and lets the non-settling party “ride the coattails” of the plaintiff.

Other jurisdictions that use "notice pleading" have concluded pleadings lack the character of an "admission" and should not be allowed into evidence. In Larion v. City of Detroit, 149 Mich. App. 402, 386 N.W.2d 199 (Mich. Ct. App. 1986), a passenger of a vehicle died. The personal representative originally sued the driver for negligence, and a municipality and a railroad company for failure to warn of a danger presented by a bridge pier. Later, the representative amended her complaint to include dram shops allegations against two bars, then settled with the dram shop defendants before trial.

In excluding the pleadings, the court reasoned that the plaintiff should not be placed in a position of having to potentially forgo claims at the risk of having alternative allegations of liability against multiple parties be treated as admissions. Larion, at 407,

386 N.W.2d at 201. Moreover, the Larion court likewise denied the use of the personal representative's pleadings at trial in order to prove the alleged negligence of the decedent for being a passenger in the vehicle. The court noted that the non-settling defendant was otherwise allowed to introduce evidence through witness testimony that the driver had been drinking, and that plaintiff had not denied or disputed the fact that the driver had been drinking. Id. at 407-08, 386 N.W.2d at 201.

Likewise, in Lytle v. Stearns, 250 Kan. 783, 792-800, 830 P.2d 1197, 1204-09 (Kan. 1992), the plaintiff as trustee brought an action naming several defendants, then settled with all but one defendant prior to the trial. The remaining defendant used pleadings during cross-examination of the plaintiff, read the pleadings to the jury, and referred to the pleadings in closing argument. Id. at 792-794, 830 P.2d at 1204-05. The Kansas Supreme Court determined that it was prejudicial error to permit use of pleadings during the trial and granted a new trial. Id. at 800, 830 P.2d at 1209. In reaching this result, the court noted that pleadings asserting theories against other parties should generally be excluded and a lay witness should not be cross-examined regarding theories of liability against dismissed parties. Id. at 800, 830 P.2d at 1208-09. The court noted that the prior code pleading practice of "fact pleading" differed substantially from the present "notice pleading," and that allowing the use of notice pleadings at trial where the plaintiff made claims of comparative negligence against multiple defendants frustrated the liberal pleading and joinder rules. Lytle, 250 Kan. at 795, 830 P.2d at 1205; see also Lewis v. Wahl, 842 S.W.2d 82, 89 (Mo. 1992) (driver's cross-claim cannot be used to impeach driver, as "[f]ailure of the pleader's testimony to live up to the expectations of

his pleading is not an inconsistency and may not be used to impeach”); Whatley v. Armstrong World Indus., Inc., 861 F.2d 837, 839 (5<sup>th</sup> Cir. 1988) (holding plaintiff’s statements in his complaint and answers to interrogatories were not admissions to provide substantive proof against various settling defendants); Haderlie v. Sondgeroth, 866 P.2d 703, 712-14 (Wyo. 1993).

In sum, Minnesota utilizes notice pleading, which permits pleading in the alternative and even inconsistent pleadings. The rules governing notice pleadings are not consistent with recognizing a complaint as an “admission” under Rule 801(d)(2) except in limited potential circumstances not present here. Similarly, the rules governing the discovery process and expert disclosure are gearing toward discovery and notice of expected opinions, and also lack the character of an admission under Rule 801(d)(2).

**B. The Documents Were Not Offered “Against Plaintiff” But Were Instead Offered to Prove the Fault of Lidos**

Even if the amended complaint and expert disclosures can be considered “statements” within the purview of Rule 801(d)(2), these documents do not meet the threshold requirement of Rule 801(d)(2), that an admission of party-opponent be offered “against a party”. Minn. R. Evid. 801(d)(2). This Court has not had the occasion to comment upon the substantive meaning of this requirement. The plain language of the Rule, however, suggests that the proffered statement (1) must have been made by a party; and (2) must be offered offensively against the party who actually made the statement.

This interpretation is consistent with other published cases from the Minnesota Court of Appeals. See, e.g., Bersch v. Rgnonti & Assocs., Inc., 584 N.W.2d 783, 788

(Minn. Ct. App. 1998), (under Rule 801(d)(2), plaintiff was not permitted to affirmatively introduce her own out-of-court statement that buttressed her defamation claim against her supervisor); State v. Palmer, 507 N.W.2d 865, 867-68 (Minn. Ct. App. 1993) (Rule 801 applies to “words or action inconsistent with a party’s position at trial, relevant to substantive issues in the case, and offered against the party”) (citing McCormick on Evidence § 254, (4<sup>th</sup> ed. 1992)).

Here, the trial court properly excluded the amended complaint and expert disclosures. Supreme sought to use these documents to establish the substantive fault of Lidos under the dram shop act (and thus attempting to shift causal fault away from itself) after it failed to have its own expert toxicologist disclose any opinion supporting the dram shop claim. In so doing, Supreme sought to use the documents offensively against Lidos. As such, these documents were not offered “against the party” (i.e., Plaintiff) making the statement and thus do not fall within the confines of admissions of party-opponents. In short, the trial court properly excluded the documents from evidence.

Several federal jurisdictions have considered a similar situation and concluded that an admission of a party-opponent must be offered against the party making the statement and cannot be used as substantive proof against another party in the lawsuit. See, e.g., Canter v. Hardy, 188 F.Supp.2d 773, 782 (E.D. Mich. 2002). In Canter, the federal district court refused to permit plaintiff to use the out-of-court written statement of one defendant to prove the plaintiff’s claims against another defendant. Id. In a detailed discussion of the issue, the court held that such out-of-court statements are admissible as non-hearsay “only if offered against that party.” Id. (citing and discussing Stalbosky v.

Belew, 205 F.3d 890, 894 (6<sup>th</sup> Cir. 2000)); see also U.S. v. Sauza-Martinez, 217 F.3d 754, 760 (9<sup>th</sup> Cir. 2000) (out-of-court statement was “admission of party-opponent” only with respect to party who actually made the statement and not with respect to other alleged perpetrators implicated through the out-of court statement).

This requirement—that the statement be offered against the party who made the statement—also promotes the use of partial settlements, as concretely demonstrated by these facts. As the court of appeals has aptly noted, “Minnesota has a history of approving and encouraging partial settlements of claims.” Cincinnati Ins. Co. v. Franck, 644 N.W.2d 471, 475 (Minn. Ct. App. 2002), (citing Frey v. Snelgrove, 269 N.W.2d 918, 921-22 (Minn. 1978)). Under a Pierringer release, a plaintiff releases a settling defendant from its share of causal fault that may be later determined by a trier of fact and the plaintiff agrees to indemnify the settling defendant from potential contribution claims. See Rambaum v. Swisher, 435 N.W.2d 19, 22 (Minn. 1989). Therefore, settlement necessarily includes consideration of the strengths and weaknesses of competent and admissible evidence available to prove the fault of the settling party. Pleading allegations and written expert disclosures have never been permitted to establish a prima facie case against a settling party. If this is allowed, a plaintiff may be likely to forego the use of a partial settlement.

Here, Plaintiff invested resources in developing his prima facie case against Lidos. As outlined above, Plaintiff survived summary judgment but faced the daunting challenge of proving a dram shop claim against Lidos without a single fact witness to support the required proof of “obvious intoxication” (and several fact witnesses that directly

contradicted such a claim). Once Plaintiff settled his case, Plaintiff would not call his expert toxicologist to testify at trial. The trial court correctly refused to permit Supreme to use the amended complaint and written expert disclosures to prove the fault of the settling party, Lidos. These documents were inadmissible hearsay and are only admissible as an "admission of party-opponent" if offered against the party making the statement. Minn. R. Evid. 801(d)(2).<sup>10</sup>

Supreme had cross-claims against Lidos and had retained its own expert toxicologist. For reasons unbeknownst to Plaintiff, Supreme never disclosed (until about five days into trial) that its own expert would opine on obvious intoxication. Supreme bears the burden of proving its cross-claim and cannot use complaint allegations and expert disclosures as competent and substantive proof of the fault of the settling party.<sup>11</sup>

Supreme sought to use the amended complaint and expert disclosures to prove the dram shop claim against Lidos, and as outlined above, this use is not permitted under the Minnesota Rules of Evidence. Nonetheless, the court of appeals concluded that the amended complaint and expert disclosures were admissible under Rule 801(d)(2) because

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<sup>10</sup> In fact, admission of these documents, especially with respect to the written expert disclosures, puts Plaintiff in the position of having to call and discredit his own expert. This cannot be the result that the authors of Minnesota Rules of Evidence intended.

<sup>11</sup> As Supreme acknowledged in its brief to the trial court, the settlement resulted in a situation where the only claim remaining against Lidos was its claim for contribution, and Supreme was required to "advanc[e] the liability claim against Lido's." (Supreme's Memorandum in Support of Motion for New Trial, p. 8.) Thus, the only remaining issue for the case with respect to Lidos was whether Supreme could prove that it violated the dram shop act.

they could be used against Kelly Ann Kelly and were relevant to establishing her claimed fault for riding with Ellefson. (AA 67). The court of appeals was incorrect.

First, the allegation against Lidos in the amended complaint relates to the conduct and knowledge of Lidos, not the conduct and knowledge of Kelly Ann Kelly. The knowledge and conduct of Lidos has nothing to do with any alleged fact of Kelly Ann Kelly in choosing to ride with Ellefson. In short, the allegation cannot be an allegation admitted "against" a party where the allegation does not relate to any of the facts material to the issue of whether Kelly Ann Kelly was negligent.

Second, the allegation sought to be introduced was made by the trustee with no personal knowledge of the facts and not by Kelly Ann Kelly. In this procedural posture, it would not be appropriate to impute the out-of-court statement of a trustee with no personal knowledge of the alleged facts to his deceased wife. An allegation of a surviving spouse is not an admission of a dead spouse. There was no evidence presented that Kelly Ann Kelly made any statements or observations on the condition of Ellefson before she entered the Ellefson vehicle. In addition, Supreme was free to use other fact and expert witnesses (which it attempted to do at trial) to convince the jury that Ellefson would have been showing signs of intoxication before he entered his vehicle.<sup>12</sup>

In short, even if pleadings and expert disclosures fall within the purview of Rule 801(d)(2) as an admission of a party-opponent, the documents were not offered "against a

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<sup>12</sup> The issue of the alleged negligence of Kelly Ann Kelly was allowed to be submitted to the jury on the special verdict form, and the jury concluded that she was not negligent.

party" and therefore do not meet the requirements of Rule 801(d)(2). The trial court correctly excluded them.

## CONCLUSION

In sum, the trial court correctly refused to admit the amended complaint and expert disclosures as substantive evidence of the fault of Lidos. The documents are hearsay and inadmissible. Nor do the documents qualify as an admission of a party-opponent under Rule 801(d)(2). First, because of their character as notice pleadings and discovery disclosures, the documents do not constitute "statements" under Rule 801(d)(2). Second, the documents were not offered against the party making the statement as required by Rule 801(d)(2). Plaintiff respectfully request that the court of appeals be reversed on this issue and that the trial court decision be affirmed.

Respectfully submitted,

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).