
State of Minnesota
In Court of Appeals

CAROL J. POSEY, Individually, and as Trustee for the next-of-kin of
THOMAS MYRON POSEY, Deceased, vs. RICHARD FOSSEN and GARY DILLON,
d/b/a FOSSEN OIL & PROPANE, and FOSSEN OIL & PROPANE, L.L.P., vs.
UPONOR ALDYL COMPANY, INC., a foreign corporation.

UPONOR ALDYL COMPANY, INC., a foreign corporation,
Respondent,

vs.

RICHARD FOSSEN and GARY DILLON,
d/b/a FOSSEN OIL & PROPANE, and FOSSEN OIL & PROPANE, L.L.P.,
Appellants.

APPELLANTS' BRIEF AND APPENDIX

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STATEMENT OF ISSUES

I) Whether the Respondent, Uponor Aldyl Company, Inc., is entitled to taxation of costs and disbursements from a prevailing party, the Appellant, Richard Fossen and Gary Dillon d/b/a Fossen Oil & Propane and Fossen Oil & Propane LLP.

Trial Court held: The Respondent, Uponor Aldyl Company, Inc., is entitled to taxation of costs and disbursement from a prevailing party under Minnesota Statutes §549.02 and §549.04.

Borchert v. Maloney, 581 N.W.2d 838 (Minn. 1998).

STATEMENT OF THE CASE

This appeal comes from Minnesota's Otter Tail County District Court. District Court Judge Honorable Waldemar B. Senyk ruled that the Third Party Defendant Uponor Aldyl Company, Inc. (hereinafter "Uponor") is entitled to costs and disbursements from the Defendants, Richard Fossen and Gary Dillon d/b/a Fossen Oil & Propane and Fossen Oil & Propane LLP (hereinafter "Fossen") under Minnesota Statutes §549.02 and §549.04. The Trial Court made this ruling even though Fossen is a prevailing party, Uponor and Fossen were essentially co-defendants, and the third party action did not accrue or mature. Fossen seeks a reversal of this trial court ruling, and seeks entry of judgment that Uponor is only entitled to costs and disbursements against the Plaintiff.

FACTS

This case arises from an explosion at a lake home owned by Carol J. Posey and Thomas Myron Posey. The explosion occurred after the Poseys smelled gas,

and Mr. Posey lit a cigarette while investigating the source of the gas. The explosion resulted in the death of Mr. Posey.

Plaintiffs brought a wrongful death action against Fossen. Fossen had installed the gas propane system in the Plaintiffs lake home. The Plaintiff alleged that Fossen negligently installed that system. Fossen brought a third party action against Uponor because Uponor manufactured and sold the coupler/connector that was the focus of the Plaintiffs action and alleged to be the source of the gas leak. The third party action requested contribution and/or indemnity from Uponor if Fossen was determined to be liable to the Plaintiff. (A-7). The Plaintiff brought and pursued claims directly against Uponor by serving a fourth amended complaint on the parties. (A-38 - A-40). The Plaintiff asserted various negligent design and strict liability claims directly against Uponor.

The matter was tried to a jury between May 24, 2004 and June 1, 2004, and resulted in a verdict in favor of the Defendant, Fossen. (A-42 - A-45).

Considering the jury verdict, the presiding district court judge ordered the Plaintiff's claims against Fossen and Uponor dismissed. (A-49). The Judge also ordered that Fossen and Uponor have costs and disbursements as provided under Minnesota law. (A-49). Judgment was entered in this regard on September 13, 2004. (A-51 - A-53).

Fossen and Uponor each submitted a notice and a affidavit of taxation of costs and disbursements. (A-54 - A-113). On August 30, 2004, The Clerk of the

Otter Tail District Court taxed the costs and disbursements of Fossen and Uponor. (A-114 - A-118).

The Plaintiff appealed the Clerk's taxation of costs and disbursements to the presiding judge under Minnesota Rule of Civil Procedure §54.04. (A-120). The Plaintiff argued that Carol Posey is not individually liable for costs and disbursements in this case. (A-120). The District Court ruled in favor of the Plaintiff. (A-131, A-132). This ruling has not been appealed.

Uponor also appealed the Clerk's taxation of costs and disbursements under Minnesota Rule of Civil Procedure §54.04. (A-131 - A-133). Uponor's appeal included a claim that Uponor is entitled to taxation of costs and disbursements against the other prevailing party, Fossen, on the grounds that Uponor prevailed against Fossen. (A-132, A-139 - A-142). The District Court ruled in favor of Uponor holding that even though Fossen is a prevailing party, the Plaintiff made claims directly against both Fossen and Uponor, and the third party action never accrued, Uponor's costs and disbursements may be taxed against Fossen under Minnesota Statutes §549.02 and §549.04. (A-127, A128, A-132). Fossen appeals this ruling and seeks entry of judgment that Uponor is only entitled to taxation of costs and disbursements against the Plaintiff. (A-147 - A-154).

STANDARD OF REVIEW

The standard of review is de novo. A review court need not give deference to a trial court decision on a legal issue. *Frost-Benco Elect. Ass'n v. Minnesota Public Utilities Com'n*, 358 N.W.2d 639 (Minn. 1984). Construction of a statute is a question of law, so reviewing court is not bound by the conclusions drawn by the lower court in applying the statute to undisputed facts. *Meister v. Western Nat. Mut. Ins. Co.*, 479 N.W.2d 372 (Minn. 1992).

This appeal seeks review with regard to the District Court's conclusion that Uponsor may recover costs and disbursements from Fossen under Minnesota Statutes §549.02 and §549.04. This is a purely legal issue that requires construction and interpretation of the entitlement created by these statutes. The above facts are undisputed. Fossen does not question the reasonableness of Uponsor's costs and disbursements. Fossen appeals the legal conclusion that Uponsor is entitled to recover costs and disbursements from another prevailing party, where the parties are essentially Co-Defendants.

ARGUMENT

There is no legal basis for the District Court's legal conclusion that Uponsor is entitled to costs and disbursements from Fossen. Fossen is a prevailing party in this case, Fossen and Uponsor were essentially Co-Defendants, and Fossen's third party action never accrued or matured to permit a determination as to who prevailed between Fossen and Uponsor. As such, the District Court erroneously ruled that Uponsor is entitled to tax costs and disbursements against Fossen.

The District Court cited Minnesota Statutes §549.02 and §549.04 to rule in favor of Uponsor. These statutes simply entitle a “prevailing party” to recover costs and disbursements. The statutes do not establish from whom the costs and disbursements may be collected, or permit a party to tax costs and disbursement from a prevailing party.

Minnesota Statute §549.02 states, in part, as follows:

“In actions commenced in the district court, costs shall be allowed as follows:

To Defendant: Upon discontinuance or dismissal or when judgment is rendered in the defendant’s favor on the merits, \$200.00.

To the prevailing party: \$5.50 for the cost of filing a satisfaction of judgment.”

Minnesota Statute §549.04 states, in part, as follows:

“In every action in a district court, the prevailing party . . . shall be allowed reasonable disbursements paid or incurred . . .”

These statutes do not provide authority or entitle a party to tax costs and disbursements against a prevailing party.

Clearly, Fossen is a “prevailing party” in this matter. The prevailing party in any action is one in whose favor the decision or verdict is rendered and judgment entered. *Borchert v. Maloney*, 581 N.W.2d 838 (Minn. 1998); *U.S. v. Minneapolis, St. P. & S.S.M. Ry. Co.*, 235 F. 951 (D. Minn. 1916). The “prevailing party” is a party that prevailed on the merits of the underlying action. *Borchert* at 840. The jury found the Plaintiff 90% at fault for the lake home explosion and resulting damages. As a result of the jury finding, all claims against

Fossen were dismissed by the court. Fossen was awarded costs and disbursements against the Plaintiff.

Case law does not provide authority for taxation of costs and disbursements against the prevailing party. In fact, Minnesota courts seem to only tax costs and disbursements against the “defeated” or non-prevailing party under Minnesota Statutes §549.02 and §549.04. *Harbor v. Board of Com’rs of Blue Earth County*, 65 N.W 457, 458 (Minn. 1895) (Prevailing party is entitled to recover costs and disbursements from the “defeated party.”).

In *Teachout*, this Court taxed costs and disbursements to the Defendant, but the Defendant lost the action brought by the Plaintiff, did not prevail on the third party action, and lost a counterclaim brought by the Third Party Defendant. *Teachout v. Wilson*, 376 N.W.2d 460 (Minn. Ct. App. 1985). In *Klinzing*, the Minnesota Supreme Court taxed costs and disbursements against the Third Party Defendant, but the Third Party Defendant was determined to be primarily liable in the underlying action. *Klinzing v. Gutterman*, 85 N.W.2d 665 (Minn. 1957). Case law does not provide authority to tax costs and disbursements against the prevailing party, and actually seems to tax only the “defeated” or non-prevailing party. As such, the District Court erred in its legal conclusion that Uponor is entitled to tax costs and disbursements against Fossen.

Fossen and Uponor are essentially Co-Defendants in this matter because the Plaintiff asserted claims directly against Uponor. The Plaintiff specifically amended the complaint to include claims against Uponor.

Minnesota Statutes §549.02 and §549.04, the statutes relied upon by the District Court, do not authorize or entitle co-defendants to tax costs against each other. As discussed above, the statutes do not establish from whom the prevailing party may collect costs and disbursements, and do not authorize or entitle a defendant to tax costs against a co-defendant.

Minnesota has a long standing tradition that separate co-defendants are entitled to costs and disbursements from the defeated plaintiff. *See Groomes v. Waterman*, 59 Minn. 258, 61 N.W. 139 (1894); *Salama v. Chicago, St. P. M. & O. Ry. Co.*, 57 Minn. 167, 58 N.W. 989 (1894). A review of the applicable case law does not reveal any matters where co-defendants were permitted to tax costs and disbursements against each other. The only issue that has come up between co-defendants with regard to taxation of costs and disbursements is apportionment of costs and disbursement when the Plaintiff prevails. *See Craft Tool & Die Co. Inc. v. Payne*, 385 N.W.2d 24 (Minn. Ct. App. 1984); *Independent School Dist. No. 22, Winona County v. School Dist. No. 19, Winona County*, 130 Minn. 19, 153 N.W. 113 (1915). Of course, Fossen prevailed so the apportionment issue does not arise in this case.

Fossen's Third Party Complaint conditions its allegations against Uponor on the Plaintiff prevailing against Fossen. Fossen's third party claims never matured or accrued, which prevents a determination as to the "prevailing party" on Fossen's Third Party Complaint. The third party allegations did not accrue because the Plaintiff did not prevail against Fossen.

Rule 14 of the Minnesota Rules of Civil Procedure permits Defendants to bring third party actions. Rule 14 encourages judicial economy by ensuring similar claims are able to be decided in a single action. If the District Court ruling is affirmed, the purpose of Rule 14 will be undermined. Defendants will be discouraged from bringing claims against a would be third party defendant until after the defendant failed to prevail against the plaintiff. This may result in multiplicity of litigation and decrease overall judicial economy.

A reversal is not unjust to Uponsor, and Fossen is not attempting to deny Uponsor from taxation of their costs and disbursements. Uponsor can still tax costs and disbursements against the Plaintiff. In fact, Uponsor has taxed costs and disbursements against the Plaintiff. Fossen simply seeks a reversal of the District Court ruling that discourages Defendants from asserting valid third party claims. A reversal of the District Court ruling is particularly appropriate in this case where the Plaintiff asserted claims directly against Uponsor and Uponsor prevailed against the Plaintiff.

CONCLUSION

There is no legal basis for the District Court's legal conclusion that Uponsor is entitled to costs and disbursements from Fossen. Fossen is a prevailing party in this case, Fossen and Uponsor were essentially Co-Defendants, and Fossen's third party action never accrued or matured to permit a determination as to who prevailed between Fossen and Uponsor. The District Court erroneously found that Uponsor is entitled to tax costs and disbursements against Fossen. Fossen

respectfully requests this Court reverse the District Court's ruling and enter judgment that Uponor and Fossen may only tax costs against the Plaintiff.

Respectfully submitted,

Dated: May 9, 2005.



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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).