
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' REPLY BRIEF

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ARGUMENT

Respondent relies on the history of the litigation and the evidence at trial to avoid the co-defendant characterization. The case proceeded to trial with a direct claim by the Plaintiff against the Respondent. The reasoning behind the Plaintiff's assertion of its direct claim against the Respondent is immaterial. The case proceeded to trial with the Plaintiff seeking damages against Respondent in the event the jury found them at fault. The assertion that Respondent was only required to incur costs in its defense because of Appellants' claim and evidence is inaccurate. Uponor was required to incur costs in its defense because the Plaintiff sued Appellants and alleged that Appellants were negligent in the installation of a fitting manufactured by the Respondent. It was the Plaintiff who presented evidence that this fitting became disconnected, caused a gas leak, and caused the explosion. Obviously, the Plaintiff would have to offer such evidence to get the case to the jury. Consequently, the assertion that Respondent was only required to incur costs in its defense because of Appellants' claim and evidence is inaccurate.

In any event, whether the Respondent is characterized as a Third-Party Defendant or co-Defendant really makes no difference. The claims between the Respondent and the Appellants were not direct claims but in the nature of crossclaims for contribution and/or indemnity. These are claims that are contingent upon the Plaintiff prevailing in the action against one of the parties seeking contribution and/or indemnity. Under these circumstances, costs should not be awarded between parties who are on the same side of the pleadings who assert crossclaims against one another. Whether the Plaintiff initially sued one of the parties or a party was brought into the case by another party on the same side of the pleadings, should not make a difference when determining who is entitled to taxation of costs. When a case results in a verdict in favor of the

defending parties, those parties are all prevailing parties and should not be responsible for any other parties' costs. We respectfully submit that any other interpretation of Minn. Stat. § 549.04 is inappropriate.

When the Plaintiff fails to prevail against any of the defending parties, claims for contribution or indemnity between those parties become moot. Respondent correctly points out that third-party claims do not vest nor mature until the defendants' liability is determined. There being no liability on the defendant, there can be no maturing of the third-party claims. Respondent's argument is that it is the prevailing party in an action that has not matured and, therefore, does not exist.

Respondent asserts that the Appellants did not prevail because they "failed to shift any percentage of causal negligence to Uponor". There is no percentage of causal negligence to shift because the jury verdict results in Appellants prevailing on all claims made by the Plaintiff. The fact that Respondent was not found at fault and Appellants were does not change the fact that Appellants prevailed on all of the claims and are, indeed, a prevailing party in this lawsuit.

Respondent now concedes that there is no authority that is on point that would interpret Minn. Stat. § 549.04 to apply to these facts. Respondent now claims that the cases that it previously relied on were only cited to show that Minn. Stat. § 549.04 applies to third-party actions. Appellants do not now nor have they ever disputed that Minn. Stat. § 549.04 applies to third-party actions. If a defendant and third-party plaintiff is found to be responsible for plaintiff's damages and the third-party defendant is not, then costs are awarded against the defendant and third-party plaintiff. However, those are not the facts of this case. Appellants do not dispute that Minn. Stat. § 549.04 applies to third-party actions but dispute the taxation of costs where plaintiff has made a direct claim against a third-party defendant and where the

defendant and third-party plaintiff prevails against the plaintiff. We respectfully submit that there is no authority for the proposition that costs be awarded under those circumstances.

CONCLUSION

The trial court's order awarding costs and disbursements in favor of Respondent against the Appellants should be reversed and the judgment awarding Respondent costs and disbursements against Appellants should be vacated. There is no authority for the proposition that a third-party defendant can obtain costs and disbursements from a defendant who prevails on the claims of the plaintiff where plaintiff also asserts direct claims against the third-party defendant.

Respectfully submitted,

HANSON LULIC & KRALL

Dated: June 9, 2005

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