

STATE OF MINNESOTA  
IN COURT OF APPEALS  
CASE NO. A05-0691

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.

RESPONDENT UPONOR ALDYL COMPANY, INC.'S  
LETTER BRIEF AND APPENDIX

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June 2, 2005

Minnesota Court of Appeals  
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Re: *Carol J. Posey, Plaintiff, vs. Richard Fossen, et al., Appellants,*  
*and Richard Fossen, et al., Appellants, vs. Uponor Aldyl*  
*Company, Inc., Respondent*  
Court of Appeals File No.: A05-0691  
Our File: 47667/121

To the Court of Appeals:

Pursuant to Rule 128.01, subdivision 2, of the Minnesota Rules of Civil Appellate Procedure, Respondent Uponor Aldyl Company, Inc. ("Uponor") submits this letter argument, having elected in its Statement of the Case to rely on memoranda previously filed with the trial court.

Since Appellants Richard Fossen and Gary Dillon d/b/a Fossen Oil & Propane and Fossen Oil & Propane LLP ("Fossen") are neither appealing from the trial court's refusal to tax costs and disbursements against Plaintiff Carol J. Posey individually<sup>1</sup> nor from the

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<sup>1</sup> Instead, in its Findings and Order for Amended Judgment for Costs and Disbursements, filed February 7, 2005, the trial court assessed Uponor's costs and disbursements jointly and severally against Appellants and against Carol J. Posey in her representative capacity as trustee for the next of kin of Thomas Myron Posey. Respondent notes, however, that Minnesota law draws a distinction between a trust for the next-of-kin of a deceased individual in a wrongful death action and the estate of the deceased, with the former being unfunded until damages are awarded in the wrongful death action. *See* Minn. Stat. § 573.02, subd. 3.

amount of the costs and disbursements allowed, this appeal is limited to one simple issue:  
**Did the trial court err in taxing Uponor's costs and disbursements against Appellants given that Uponor prevailed in the third-party action asserted against it by Appellants?**

Appellants have correctly identified the applicable standard of review as *de novo*. See *Meister v. Western Nat'l Mut. Ins. Co.*, 479 N.W.2d 372, 376 (Minn. 1992) (statutory construction presents a question of law).

In their Brief, Appellants contend that the trial court erred in taxing them for Respondent's costs and disbursements, arguing that Appellants Fossen and Respondent Uponor were actually co-defendants. This characterization of Appellants and Respondent as co-defendants lacks merit, however, as the record clearly shows that Fossen brought Uponor into this action by asserting a third-party contribution claim against Uponor six months after Plaintiff Posey commenced this wrongful death action against Fossen. Moreover, as noted by the trial court, throughout this litigation, only Fossen actually introduced evidence of Uponor's purported fault:

Plaintiff's expert witness, Thomas Crane, reported that Uponor was not negligent in the design nor in the instructions regarding the use of its product [the coupling for the gas line]. It was only Defendant's [Fossen's] expert who claimed negligent failure to warn through inadequate installation instructions.

\* \* \*

At trial, only Fossen's expert alleged negligent failure to warn by Uponor. The jury found that Uponor was not at all negligent.

(Findings and Order for Amended Judgment for Costs and Disbursements (“Order”), filed February 7, 2005, R-App. 19.)<sup>2</sup> Clearly, as Third-Party Defendant in the contribution action asserted by Defendant and Third-Party Plaintiff Fossen, Uponsor simply cannot be characterized as Fossen’s “co-defendant.”

In fact, the record further shows that Plaintiff supported Respondent Uponsor’s summary judgment motion seeking dismissal of the third-party contribution claim. (*See* Order, R-App. 19.) It was only after this summary judgment motion was denied, two years after filing the initial Summons and Complaint, that Plaintiff sought leave to amend the Complaint shortly before trial to include a direct claim against Uponsor. (Order, R-App. 19.) According to the trial court, “Plaintiff’s counsel made it clear at the hearing upon the motion to amend that Plaintiff had little choice but to bring a direct claim against Uponsor, since the Court’s decision meant that Uponsor’s negligence would be submitted to the jury.” (Order, R-App. 19.)

Yet, as noted above, at trial, only Appellants produced any evidence of Respondent’s alleged negligence. (*See* Order, R-App. 19.) (“Uponsor was only required to incur costs in its defense because of Fossen’s claim and evidence.”). The jury returned a verdict of 90% causal negligence by decedent Thomas Posey, 10% causal negligence by Appellants Fossen, and **no causal negligence** by Respondent Uponsor. (*See* Third-Party Defendant Uponsor Aldyl Company, Inc.’s Memorandum of Law in Support of its Appeal from Clerk’s Taxation

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<sup>2</sup> All citations to R-App. refer to Respondent’s Appendix.

of Costs, R-App. 3.) Thus, the record is clear that Uponsor prevailed in the third-party contribution action asserted against it by Appellants Fossen, with Appellants failing to shift any percentage of causal negligence onto Uponsor.

Appellants' claim that taxation is unwarranted here because the contribution claim had not yet accrued lacks legal merit. As a practical matter, it is well-settled law in Minnesota that third-party actions are asserted and tried with the underlying direct action in the interests of judicial economy. *See, e.g., Calder v. City of Crystal*, 318 N.W.2d 838, 844 (Minn. 1982) (although third-party claims do not "vest or mature" until a defendant's liability is determined, pursuant to Rule 14.01 of the Minnesota Rules of Civil Procedure, "defendants customarily have joined third parties at the time they were initially sued"). Appellants' argument that the trial court's Order will discourage defendants from asserting contribution actions until after first losing in the direct action ignores the reality that regardless of whether the plaintiff ultimately prevails against the defendant, it is in the defendant/putative third-party plaintiff's best interest financially and strategically to only try a case once.

Moreover, in opposing the trial court's Order, Appellants neglect to take into account that the third-party defendant must defend against a contribution claim regardless of whether the plaintiff ultimately prevails in the direct action against the defendant/third-party plaintiff. That is, Appellants ignore the fact that all parties – defendants and plaintiffs alike, whether first or third-party – are subject to the same rules for the taxation of costs. Minn. Stat. § 549.04 ("In every action in a district court, the prevailing party . . . shall be allowed

reasonable disbursements paid or incurred.”); *Klinzing v. Gutterman*, 250 Minn. 534, 538, 85 N.W.2d 665, 668 (1957) (taxing third-party defendant for costs incurred by third-party plaintiff just as losing defendant would be taxed for plaintiff’s costs).

In addition, throughout their Brief, Appellants fail to recognize that although they prevailed with respect to the action asserted against them by Plaintiff Posey, Appellants did **not** prevail in the third-party action they brought against Uponor. As noted above, Appellants failed to shift any percentage of causal negligence to Uponor.

Furthermore, Appellants have misunderstood Uponor’s reliance upon the *Treachout* and *Klinzing* decisions. (See Third-Party Defendant Uponor Aldyl Company, Inc.’s Memorandum of Law in Support of its Appeal from Clerk’s Taxation of Costs, R-App. 3.) Uponor did not cite *Treachout* because it was factually on all fours with the present matter, but rather to illustrate that a third-party plaintiff may be taxed for the costs/disbursements incurred by a third-party defendant in instances where the third-party plaintiff does not prevail in its third-party claim. 376 N.W.2d 460, 465 (Minn. App. 1985). The fact that in *Treachout*, the third-party plaintiff did not prevail in the direct action asserted against him by the plaintiff had no bearing on the fact that the third-party plaintiff failed to shift any percentage of fault onto the third-party defendant. As for *Klinzing*, Uponor cited that decision to the trial court in appealing from the clerk’s taxation of costs to illustrate that Minnesota Statutes section 549.04 applies both to direct and to third-party actions.

In conclusion, Appellants Fossen and Respondent Uponor were not "co-defendants" in the third-party action asserted by Fossen against Uponor. Appellants do not dispute that they failed to prevail in their third-party action against Uponor. Moreover, only Appellants introduced evidence of Uponor's purported negligence, with Plaintiff's expert exonerating Uponor at trial. Thus, pursuant to section 549.04, the trial court properly taxed Appellant for Uponor's costs/disbursements.

For these reasons, Respondent Uponor Aldyl Company, Inc. respectfully requests that the Minnesota Court of Appeals uphold the trial court's Order taxing Respondent's costs and disbursements severally and jointly against Appellants Fossen and Plaintiff Carol J. Posey, in her capacity as trustee for the next of kin of Thomas Myron Posey.

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).