

CASE NO. A08-242

State of Minnesota
In Court of Appeals

A & L POTATO COMPANY, INC.,

Plaintiff/Appellant,

vs.

AGGREGATE INDUSTRIES,

Defendant & Third Party
Plaintiff/Respondent,

vs.

BURLINGTON NORTHERN SANTA FE RAILWAY,

Third Party
Defendant/Respondent.

APPELLANT'S BRIEF

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ISSUES PRESENTED

- 1. Whether an Offer of Settlement specifically and exclusively made under *Rule 68, Minn. R. Civ. P.*, also constitutes an offer under *Minn. Stat. § 549.09*.**

The Trial Court ruled an Offer of Settlement made under *Rule 68, Minn. R. Civ. P.*, also constitutes an offer under *Minn. Stat. § 549.09*.

Apposite Case:

Schwickert, Inc., v. Winnebago Seniors, Ltd., 680 N.W.2d 79
(Minn. 2004).

Apposite statutory provisions and rules:

Minn. Stat. § 549.09.

Rule 68, Minn. R. Civ. P.

- 2. If the answer to the first issue is yes, then if the Rule 68 Offer is the only offer made under *Minn. Stat. § 549.09*, what must it be compared against for purposes of calculating prejudgment interest?**

The Trial Court determined that prejudgment interest would be computed based on the only valid written offer in the case and no comparison was made.

Apposite Case:

Trapp v. Hancuh, 587 N.W.2d 61 (Minn. App. 1998).

Apposite statutory provisions and rules:

Minn. Stat. § 549.09 subdiv. 1(b).

Rule 68, Minn. R. Civ. P.

STATEMENT OF THE CASE

The above entitled matter came on for Jury Trial on January 30, 31, and February 1, 2, 2007, before the Honorable Tamara Yon, Judge of the District Court, in the Ninth Judicial District, for the County of Polk, State of Minnesota. *See Findings of Fact, Conclusions of Law, Order for Judgment and Judgment*, Appellant's Appendix (hereafter "AA") at 13. On March 8, 2007, the District Court, being fully advised of the record and having considered and read the jury verdict, entered its *Findings of Fact, Conclusions of Law, Order for Judgment and Judgment*. *Id.* The District Court determined that Plaintiff/Appellant A & L Potato Company, Inc. (hereafter "A & L Potato") is entitled to judgment against Defendant and Third Party Plaintiff/Respondent Aggregate Industries (Hereafter "Aggregate") for the amount of \$57,348 together with taxable costs and disbursements. *Id.*

A & L Potato filed its *Affidavit of Costs and Disbursements* with the Polk County Administrator on March 9, 2007. *See Affidavit of Costs and Disbursements*, AA at 15. On April 12, 2007, the Court Administrator taxed the statement of costs but revised the amount, including the amount of prejudgment interest, to reflect a lesser total than those submitted by A & L Potato. *Id.* A & L Potato appealed the Court Administrator's revisions to the Trial Court. *See Notice of Appeal of Costs and Disbursements*, AA at 17. A hearing on the matter was held on August 14, 2007, before the Honorable Tamara L. Yon, Judge of the District Court. *See Order*, AA at 34. The Court entered its Order awarding A & L Potato all requested costs (except the opening statement transcript) and prejudgment interest in the amount of \$493.70. *Id.*, AA at 35. Judgment upon this Order was docketed on December 20, 2007. *See Judgment*, AA at 40-41. A & L Potato now

brings this appeal before the Court of Appeals of the State of Minnesota requesting review of the Trial Court's calculation of prejudgment interest.

STATEMENT OF THE FACTS

The underlying dispute in this case involves events that caused a train to derail. An action in tort was subsequently litigated between the parties. *See Complaint*, AA at 6. Most of the facts surrounding the train derailment are not pertinent to this appeal. So as not to inconvenience the Court, the facts below have been limited to those pertaining only to the calculation of the award of prejudgment interest, which was awarded to A & L Potato. All other issues regarding the awarded costs are not in dispute.

A & L Potato served upon Aggregate a *Notice of Claim* on November 10, 2003. *See Notice of Claim*, AA at 1. The amount owed by Aggregate set forth in the *Notice of Claim* was \$70,985.95. *Id.* Aggregate did not counteroffer or otherwise respond. A & L Potato then commenced an action against Aggregate by serving a *Summons* and *Complaint* and filing the two documents with the Court on July 13, 2004. *See Summons*, AA at 3. *Complaint*, AA at 3. On April 24, 2006, Aggregate served an Offer of Settlement upon A & L Potato pursuant to Rule 68 of Minnesota Rules of Civil Procedure offering a lump sum settlement amount of \$5,000. *See Rule 68 Offer of Settlement*, AA at 10. The Jury Trial commenced on January 30, 2007, and concluded on February 2, 2007. *See Findings of Fact, Conclusions of Law, Order for Judgment, and Judgment*, AA at 13. The Jury returned its special verdict in favor of A & L Potato and against Aggregate in the amount of \$57,348.00. *Id.* The Court entered its *Judgment* against Aggregate on March 8, 2007, in the amount of \$57,348.00. *Id.*, AA at 14.

Plaintiff filed its *Affidavit of Costs and Disbursements* with the Polk County Administrator on March 9, 2007. *See Affidavit of Costs and Disbursements*, AA at 15. On April 12, 2007, the Court Administrator taxed the statement of costs but revised the amount to reflect a lesser total than those included in *Plaintiff's Affidavit of Costs and Disbursements*. *Id.* The Court Administrator only awarded post judgment interest calculated from the date of the entry of Judgment (March 8, 2007), until April 13, 2007. *Id.* (although the post judgment interest award appears under prejudgment interest, it is clearly marked "calculated from 3/8/07 to 4/13/07". The Judgment was entered on March 8, 2007.). Even though prejudgment interest was requested by A & L Potato and included in its *Affidavit of Costs and Disbursements*, no prejudgment interest was awarded to A & L Potato.

A & L Potato appealed the amount of costs and disbursements, including prejudgment interest, to the District Court. *See Notice of Appeal of Costs and Disbursements*, AA at 17. A hearing was held before the Honorable Tamara L. Yon, Judge of the District Court, on August 14, 2007, at which time oral arguments were made by A & L Potato and Aggregate on the issue of how prejudgment interest was to be calculated. *See Order and Memorandum*, AA at 34. The Court entered its *Order and Memorandum* on September 28, 2007, ordering Aggregate to pay A & L Potato, among other costs and disbursements, prejudgment interest in the amount of \$493.70. *Id.*, AA at 35. A *Judgment* pursuant to that *Order* was docketed on December 20, 2007. *See Judgment*, AA at 40. A & L Potato now appeals the calculation of awarded prejudgment interest. A & L Potato served its *Notice of Appeal* on February 5, 2008, and submits this brief in support thereof. *See Notice of Appeal*, AA at 42.

STANDARD OF REVIEW

The facts of this case are not in dispute. The issues appealed consist entirely of questions of law governing prejudgment interest. *See Order and Memorandum*, AA at 36. On appeal, questions of law governing prejudgment interest are reviewed **de novo**. *See Trapp v. Hancuh*, 587 N.W.2d 61, 63 (Minn. App. 1998).

SUMMARY OF ARGUMENT

The issue on appeal involves the calculation of prejudgment interest. *Minn. Stat. § 549.09 subdiv. 1(b)* requires the calculation of prejudgment interest be based upon i) the amount of the judgment award; and ii) the period of time beginning with the date of the written notice of claim to the date judgment is entered. The statute also provides for an alternative means of calculating prejudgment interest which is triggered if a party makes a valid written offer of settlement. Once this alternative is triggered, the method for calculating prejudgment interest may change depending upon a comparison of the parties' offers of settlement. Under this offer/counteroffer provision, if both parties make valid written offers of settlement, then which offer is closest to the Judgment determines how prejudgment interest is calculated. If the plaintiff prevails at trial and its offer was closer to the judgment than the defendant's offer, then the prejudgment interest calculation does not change. On the other hand, if the defendant's offer was closer to the judgment than the plaintiff's offer, then prejudgment interest would be based upon i) the amount of the defendant's offer; and ii) the period of time beginning with the notice of claim and terminating at the time of the defendant's offer.

The offer/counteroffer provision is only triggered if the written offer is valid. The only alleged offer on record in this case is Aggregate's *Rule 68 Offer of Settlement*. The Advisory Committee Notes on Rule 68 expressly state that Rule 68 does not affect the operation of *Minn. Stat. § 549.09*, which provides for the recovery of prejudgment interest. Case law agrees that Rule 68 does not affect the recovery of prejudgment interest. See e.g. *Schwickert, Inc., v. Winnebago Seniors, Ltd.*, 680 N.W.2d 79 (Minn. 2004). The District Court committed reversible error by determining Aggregate's *Offer of Settlement*, specifically and exclusively made pursuant to Rule 68, was also a valid offer under *Minn. Stat. § 549.09*; and, subsequently awarding prejudgment interest based on Aggregate's offer of \$5,000. As a result of the District Court's determination, A & L Potato's recovery of prejudgment interest was not only substantially affected by Rule 68, it was completely determined by Rule 68.

Alternatively, if the Court determines Aggregate's *Rule 68 Offer of Settlement* was a valid offer under *Minn. Stat. § 549.09* then the Trial Court erred by failing to compare Aggregate's *Rule 68 Offer of Settlement* against the amount claimed by A & L Potato's written *Notice of Claim*. According to the statute, a reply to a valid written offer of settlement is only discretionary; it is not required. The statute is silent with respect to the calculation of prejudgment interest if there is only one valid written offer of settlement.

The purpose of the offer/counteroffer provision is to promote settlement. *Trapp v. Hancuh*, 587 N.W.2d 61, 65 (Minn. App. 1998). Such a low ball offer does not encourage settlement; it forces exaggerated litigation. Under these circumstances, it is more consistent with the legislative intent of *§ 549.09 subdiv. 1(b)* to compare

Aggregate's *Rule 68 Offer of Settlement* against the amount set forth in A & L Potato's *Notice of Claim* when determining how to calculate prejudgment interest.

LAW AND ARGUMENT

The right to prejudgment interest is governed by *Minn. Stat. §549.09*. See *Schwickert v. Winnebago Seniors*, 680 N.W.2d 79, 89 (Minn. 2004). *Minn. Stat. §549.09* states:

Except as otherwise provided by contract or allowed by law, preverdict, preaward, or preresort interest on pecuniary damages shall be computed ... from the time of the commencement of the action . . . , or the time of a written notice of claim, whichever occurs first, except as provided herein. The action must be commenced within two years of a written notice of claim for interest to begin to accrue from the time of the notice of claim.

See *Minn. Stat. §549.09 subdiv 1(b)* (emphasis added).

The award of prejudgment interest, which is applied to the amount of the Judgment and calculated from the date of the notice of claim to the date of the entry of judgment, is mandatory if the statutory criteria are met. The criteria are i) that there are no contracts between the parties stating otherwise; ii) that the date of the written notice of claim is prior to the date of the commencement of the action; and iii) that the action be commenced within two years of the written notice of claim. See *Minn. Stat. §549.09 subdiv. 1(b)*. It is undisputed that all three of these criteria have been met in this case. See *Order and Memorandum*, AA at 36 - 38.

The only other limitation of the Court's ability to award prejudgment interest arises when a party makes a valid written offer of settlement subsequent to the commencement of the action. See *Minn. Stat. §549.09 subdiv. 1(b)*. According to the statute:

If either party serves a written offer of settlement, the other party *may* serve a written acceptance or a written counteroffer within 30 days. After that time, interest on the judgment or award shall be calculated by the judge or arbitrator in the following manner. The prevailing party shall receive interest on any judgment or award from the time of the commencement of the action . . . or the time of the written offer of claim . . . only if the amount of its offer is closer to the judgment or award than the amount of the opposing party's offer. If the amount of the losing party's offer was closer to the judgment or award than the prevailing party's offer, the prevailing party shall receive interest only on the amount of the settlement offer or the judgment, whichever is less, and only from the time of commencement of the action . . . or the time of a written notice of claim whichever occurs first, . . . until the time the settlement offer was made.

See Minn.Stat. § 549.09 subdiv 1(b) (emphasis added).

Under the offer/counter offer provision, if a defendant makes an offer and it is closer to the Judgment award than the counteroffer, then prejudgment interest is reduced by i) applying the interest rate to the amount of the offer rather than the amount of the Judgment (assuming the offer is less than judgment); and, ii) by terminating the prejudgment interest period at the date the offer was made. *See Minn. Stat. § 549.09 subdiv. 1(b)*. The District Court determined Aggregate's Rule 68 offer constituted a valid offer under the statute and, because it was the only valid offer in the record, it was the closest offer to the amount of the judgment by default. *See Order and Memorandum*, AA at 38. Therefore, according to the District Court, prejudgment interest is to be reduced by i) applying the interest rate to the amount of the offer (\$5,000) rather than the Judgment amount of (\$57,348); and ii) by terminating the period of prejudgment interest on the date the offer was made (April 12, 2006) rather than the date of the entry of Judgment (March 8, 2007). *Id.*, AA at 38-39.

The statute is silent with respect to whether an offer made expressly and exclusively pursuant to Rule 68 constitutes a valid written offer that triggers the offer/counteroffer provision (first issue of this appeal). The language of the

offer/counteroffer provision presumes a counteroffer is made yet it does not require the opposing party to respond with a counteroffer. *See Minn.Stat. § 549.09 subdiv. 1(b)* (Compare the language of the following excerpts: “If the amount of the losing party’s offer was closer to the judgment or award than the prevailing party’s offer...”; “the other party *may* serve a written acceptance or a written counteroffer”). The statute is also silent with respect to how the comparison and calculation framework should be applied when the offer/counteroffer provision is triggered by an offer and no responsive counteroffer is made (second issue of this appeal).

1. Issue One: An Offer Made Expressly Pursuant to Rule 68 Does Not Constitute a Valid Written Offer Under Minn. Stat. § 549.09.

The offer/counteroffer provision is only triggered if the written offer is valid. *See Johnson v. Southern Minnesota Machinery Sales*, 460 N.W.2d 68, 73 (Minn. App. 1990). The record is absent of any written offers that would satisfy the statutory requirements of § 549.09. Although Aggregate filed a *Rule 68 Offer of Settlement*, Rule 68 does not affect the operation of *Minn. Stat. § 549.04*. *See Rule 68, Minn.R.Civ.P.*, Advisory Committee Note – 1985. The Minnesota Supreme Court reinforced the notion that §549.09 is not affected by actions taken under Rule 68 by distinguishing between the contractual nature of Rule 68 and the statutory entitlement of prejudgment interest awarded under § 549.09. *Schwickert v. Winnebago Seniors*, 680 N.W.2d 79, 89 (Minn. 2004).

Although *Schwickert* dealt with a case whereby a Rule 68 offer was accepted, the Minnesota Supreme Court made it clear that Rule 68 offers, particularly those lump sum offers that do not expressly address prejudgment interest, have no bearing on the calculation of prejudgment interest. *Id.* “[P]rejudgment interest is statutory, not

contractual. . . . The failure of the Rule 68 offer to expressly include prejudgment interest in the lump sum offered means that prejudgment interest is separately recoverable against [the defendants] . . .” *Id.* at 88. In this case, not only was Aggregate’s offer specifically limited to Rule 68, but it also failed to expressly address prejudgment interest in its \$5,000 lump sum offer. Prejudgment interest, as a statutory award, is separately recoverable and the calculation is not affected by Aggregate’s Rule 68 offer. Prejudgment interest is appropriate under *Minn. Stat. § 549.09* and should be based upon i) the *Judgment* amount of \$57,348.00; and, ii) calculated from the date of the *Notice of Claim* (November 5, 2003) to the date of entry of *Judgment* (March 8, 2007).

The District Court found *Schwickert* did not apply to this case. *See Order and Memorandum*, AA at 37.

The Court finds that *Schwickert* is not applicable to the present case. In *Schwickert*, the Rule 68 offer was accepted by the other party, and the issue was whether the lump sum Rule 68 offer was inclusive or exclusive of prejudgment interest. In other words, the case was akin to a contract interpretation between the parties: did the Rule 68 “contract” between the parties allow for prejudgment interest, or not? The Court ultimately determined that since the Rule 68 “contract” wasn’t clear, the prevailing party could seek prejudgment interest separately pursuant to Minnesota Statute § 549.09.

In the present case, the Defendant’s Rule 68 Offer of Settlement was NOT accepted. Thus, the issue for the Court is whether it qualifies as a written offer of settlement pursuant to Minnesota Statute § 549.09.

Id. at 37-38 (emphasis in original).

This is an overly narrow reading of *Schwickert*. In finding *Schwickert* inapplicable to this case, the District Court relied on two facts. First, the District Court relied on the fact that a Rule 68 offer was accepted in *Schwickert* and not in this case. *See Order and Memorandum*, AA at 37. However, the District Court failed to recognize that the *Schwickert* Court did not focus on the fact the offer was accepted. Instead, the

Schwickert Court focused on the nature of the statute versus the nature of Rule 68. *Schwickert*, 680 N.W.2d at 89. By distinguishing between the contractual nature of Rule 68 and the nature of statutory entitlement inherent in the statute, the *Schwickert* Court determined that unless otherwise specifically agreed upon, the statutory right to prejudgment interest under § 549.09 operates completely independent of and is separately recoverable from Rule 68. *Id.* In support of its conclusion, the *Schwickert* Court quotes the Advisory Committee Notes of Rule 68 stating “Rule 68 does not affect the operation of that statute.” *Id.* The separate and distinct nature of Rule 68 and § 549.09 is not dependent upon the acceptance or rejection of an offer.

The second fact the District Court relied upon was that the issue considered in *Schwickert* was whether prejudgment interest was inclusive or exclusive of the lump sum Rule 68 offer. However, the District Court failed to recognize the logic used to resolve the issue in *Schwickert* also extends to the issue of this case. In *Schwickert*, the Rule 68 offer was a lump sum offer that did not expressly include prejudgment interest. *See Schwickert*, 680 N.W.2d at 88. The *Schwickert* Court found that because prejudgment interest is a statutory entitlement, separately recoverable from the Rule 68 offer, the failure to expressly include prejudgment interest in the Rule 68 offer meant the award of prejudgment interest was entirely independent of an offer made under Rule 68. *Id.* (“Because prejudgment interest is statutory, not contractual, . . . [t]he failure of the Rule 68 offer to expressly include prejudgment interest in the lump sum offered means that prejudgment interest is separately recoverable against [the defendants] . . . as a cost and disbursement in addition to the lump sum.”). That logic extends to the issue in this case. In this case, Aggregate’s offer was made expressly and exclusively under Rule 68. The

offer did not specifically address prejudgment interest and failed to make reference to *Minn. Stat. § 549.09*. In *Schwickert*, the failure to state specifically that a lump sum offer includes prejudgment interest required under § 549.09 precluded the inclusion of prejudgment interest in the lump sum offer. *Id.* Similarly, if Aggregate intended their offer, which was made expressly and exclusively under Rule 68, to affect the calculation of prejudgment interest, notice of such intent was required to be included in the offer. Similar to *Schwickert*, the failure to include such notice in Aggregate's offer precludes Aggregate from benefiting from the offer/counter offer provision of § 549.09.

Clearly Rule 68 and § 549.09 are intended to operate completely independent of one another. This is further illustrated by their time limits. Rule 68 has a ten day period in which an opposing party may accept the offer before it is deemed withdrawn. *See Rule 68, Minn. R. Civ. P.* On the other hand, the period in which a party may accept an offer made under *Minn. Stat. § 549.09* is thirty days. *See Minn. Stat. § 549.09 subdiv. 1(b).* The two are not intended to serve the same function; they are separate, distinct, and the *Schwickert* case and advisory committee notes to Rule 68 support this conclusion.

The result of allowing a Rule 68 Offer of Settlement to automatically serve as a valid offer under § 549.09 would be confusion. Applying the District Court's interpretation to the following hypothetical demonstrates the confusion. Assume a defendant makes a Rule 68 offer. No response is made by the plaintiff within ten days. After twenty days (within the thirty day limit of § 549.09), the plaintiff notifies the defendant that it will accept the Rule 68 offer. However, citing Rule 68 the defendant rejects the plaintiff's acceptance stating the ten day limit had elapsed and the offer is deemed withdrawn. *See Rule 68 Minn. R. Civ. P.* At trial, suppose the plaintiff prevails

and is awarded an amount greater than the defendant's Rule 68 offer. According to the District Court's interpretation of *Minn. Stat. § 549.09 subdiv. 1(b)*, the prejudgment interest may be significantly reduced because the Rule 68 offer triggered the offer/counteroffer provision and, being the only offer in the record, was the closest offer to the amount of the award. Under this hypothetical, the plaintiff was penalized by an offer it was not even permitted to accept despite having complied with § 549.09. This could not have been the legislative intent of this statute.

If an offer is made expressly under Rule 68 and not expressly made under *Minn. Stat. § 549.09*, then Rule 68 would profoundly affect the operation of that statute. This is in direct contradiction to the rule stated under the Advisory Committee Notes to Rule 68. *See Rule 68, Minn. R. Civ. P.* For these reasons, an offer made expressly and exclusively under Rule 68 cannot be a valid written offer of settlement under *Minn. Stat. § 549.09*.

2. Issue Two: If the Rule 68 Offer was a Valid Offer Under Minn. Stat. § 549.09, it Must be Compared Against the Amount Set Forth in the Notice of Claim.

Minn. Stat. § 549.09 subdiv. 1(b) is silent with respect to how prejudgment interest is to be calculated if a valid written offer is made but there is no acceptance or counteroffer. The statute makes clear that a response to a valid written offer is not required, rather it is discretionary. *See Minn. Stat. § 549.09 subdiv. 1(b)* ("If either party serves a written offer of settlement, the other party *may* serve a written acceptance or a written counteroffer within 30 days" (emphasis added)). The purpose of the offer/counteroffer provision is to encourage settlement. *See Trapp v. Hancuh*, 587 N.W.2d 61, 65 (Minn. App. 1998). This purpose must be safeguarded against interpretations of the statute that would impede this purpose. *Id.*

In *Trapp*, the Court expressed concern over an interpretation of the offer/counteroffer provision of § 549.09 because the interpretation could potentially be inconsistent with the legislative goal of encouraging settlement. *Id.*

Trapp's interpretation . . . *would permit* plaintiffs to wait until immediately before trial to make an offer. The offer would erase the defendant's prior offers, if any, and preserve prejudgment interest for the plaintiff. This interpretation is inconsistent with the legislature's goal of encouraging settlement [and] would also impede the application of the closer-offer provision in the prejudgment interest."

Id. (emphasis added) (Note the interpretation contemplated in *Trapp* pertained to the legal effect of subsequent offers and counteroffers.).

While it is true *Trapp* considers an interpretation of a different aspect of the offer/counteroffer provision, the same concerns expressed by the Court apply in this case. In this case, the District Court held when only one offer is made, then by default, it is the closest offer to the actual Judgment amount. According to the District Court, it follows that prejudgment interest must be reduced in accordance with the offer/counteroffer provision. The District Court's bright line interpretation would not encourage settlement; rather, it would more often serve to exaggerate litigation. This is the type of result the *Trapp* Court warned against.

Consider the following illustration. Under the District Court's interpretation it is conceivable that a defendant would make a Rule 68 offer of settlement for one thousand dollars (\$1,000.00) for the sole purpose of virtually eliminating any prejudgment interest from occurring. It would be worth the defendant's time to do this because the plaintiff may not wish to expend the time and money necessary to serve a counteroffer just so it can re-assert its original notice of claim. This behavior is encouraged under the District Court's interpretation and is analogous to what actually happened in the immediate case.

Aggregate's offer was nothing more than a nuisance money offer consisting of only \$5,000. *See Rule 68 Offer of Settlement*, AA at 10. The amount of the Jury award was \$57,348.00. *See Findings of Fact, Conclusions of Law, Order for Judgment, Judgment*, AA at 13. Under the District Court's interpretation, if A & L Potato wanted to preserve its statutorily entitled prejudgment interest, its only viable response to an unreasonably low offer was to participate in needless gamesmanship by issuing a written counteroffer in the amount of the original Notice of Claim or a figure close to this amount. Consequently, both sides would have wasted time and expense without accomplishing anything by way of moving toward a settlement. Requiring that a counteroffer be made in order to preserve prejudgment interest does not encourage settlement; it promotes gamesmanship.

Where there is only one valid offer, an appropriate interpretation of the offer/counteroffer provision consistent with the goal of encouraging settlement, is to compare the defendant's offer against the amount stated in the notice of claim; not zero. In other words, the notice of claim is an appropriate default comparable to defendant's lone offer. In fact, if a Rule 68 offer qualifies as a valid offer under § 549.09, then a written notice of claim would also qualify as a valid offer under § 549.09. The notice of claim is i) in writing; and ii) sets forth an offer such that when it is accepted by the defendant, the result is a settlement. Treating the notice of claim as an initial offer pursuant to § 549.09 and designating it as the plaintiff's default comparable would encourage both parties to make serious attempts to settle a dispute while discouraging needless gamesmanship that effectively requires a response to unreasonable offers.

Comparing defendant's sole offer against the notice of claim is more consistent with the legislative goal of encouraging settlement between the parties than the interpretation set forth by the District Court. In this case, applying *Minn. Stat. § 549.09 subdiv. 1(b)* by comparing the Rule 68 Offer against the amount stated in Aggregate's Notice of Claim would yield the following result: Aggregate's Rule 68 offer of \$5,000 would be compared against the *Notice of Claim* amount of \$70,985.95. Because \$70,985.95 is closer to the Jury Award of \$57,348.00, prejudgment interest should be i) calculated from the date of the *Notice of Claim* to the date of the entry of the *Judgment* pursuant to the Jury's verdict; and ii) based upon the *Judgment* amount of \$57,348.00. A & L Potato respectfully requests the Court of Appeals find the District Court erred in determining the Rule 68 offer was the closest offer by default. Further, A & L Potato respectfully requests the Court determines A & L Potato is entitled to prejudgment interest as follows:

- The annual interest rate to be applied to the applicable period of years from 2003 through 2006 is 4% per annum. *See Minn. Stat. § 549.09 subdiv. 1(c)*.
- The amount to which the 4% interest rate is to be applied is \$57,348.00
- From November 5, 2003 (date of the Notice of Claim) to December 31, 2003 [57 days]: \$357.23
- From January 1, 2004 - December 31, 2004: \$2,293.92
- From January 1, 2005 – December 31, 2005: \$2,293.92
- From January 1, 2006 – December 31, 2006: \$2,293.92
- From January 1, 2007 – March 8, 2007 (date of Judgment) [67 days]: \$421.76
- Total Prejudgment Interest: \$7,660.75

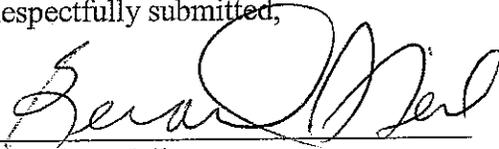
CONCLUSION

It is expressly stated in the Advisory Committee Notes of Rule 68 and in case law that Rule 68 does not affect the operation of Minn. Stat. § 549.09. The District Court's finding that an offer of settlement made expressly and exclusively under Rule 68 automatically constitutes an offer under Minn. Stat. § 549.09 is reversible error. Such a decision allows Rule 68 to profoundly affect and determine the operation of *Minn. Stat. § 549.09*. A & L Potato respectfully requests i) the District Court's determination that Aggregate's Rule 68 offer constitutes a valid written offer under *Minn. Stat. § 549.09* be reversed; and ii) prejudgment interest be awarded to A & L Potato pursuant to *Minn. Stat. § 549.09* in the amount of \$7,660.75 (the calculation would end up being the same as shown above).

Alternatively, if the Court determines an offer made pursuant to Rule 68 constitutes a valid offer under *Minn. Stat. § 549.09*, then the District Court's application of the offer/counteroffer provision of the statute was reversible error. Specifically, the District Court's determination that Aggregate's Rule 68 Offer of Settlement was, by default, the closest offer for purposes of applying the offer/counteroffer provision was reversible error. The District Court's decision constitutes reversible error because i) the statute is silent with respect to how prejudgment interest should be calculated under the circumstances of this case; and ii) its interpretation and application of the statute is inconsistent with the legislative goal of encouraging settlement. The appropriate method for determining whether the offer is the closest offer is to compare the offer against the original amount claimed in the *Notice of Claim*. A & L Potato respectfully requests the

Court of Appeals reverses the District Court's decision on this matter and enter its order to award A & L Potato prejudgment interest in the amount of \$7,660.75.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Gerard D. Neil", is written over a horizontal line.

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IN THE COURT OF APPEALS
STATE OF MINNESOTA

A & L Potato Company, Inc., a Minnesota
Corporation,

Plaintiff,

v.

Aggregate Industries,

Defendant & Third
Party Plaintiff,

v.

Burlington Northern Santa Fe Railway,

Third Party Defendant.

**CERTIFICATION OF
BRIEF LENGTH**

Appellate Court Case NO: A08-242

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