

CASE NO. A08-242

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State of Minnesota  
In Court of Appeals

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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.

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APPELLANT'S REPLY BRIEF

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**TABLE OF CONTENTS**

<b>Summary</b> .....	1
<b>Argument</b> .....	2
1. <u>Issue One: An Offer Made Expressly Pursuant to Rule 68 Does Not Constitute a Valid Written Offer Under Minn. Stat. § 549.09</u> .....	2
2. <u>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.</u> .....	3
<b>Conclusion</b> .....	7

### Summary

Respondent/Defendant Aggregate Industries (hereafter Defendant Aggregate) raises arguments in its Respondent's Brief to which Appellant/Plaintiff A & L Potato (hereafter Plaintiff A & L Potato) deems necessary to reply. First, Defendant Aggregate argues its Rule 68 offer of settlement also constitutes a valid offer under *Minn. Stat. § 549.09* because the statute only requires that the offer be in writing and properly served. However, despite the fact that Plaintiff's Notice of Claim was also in writing and properly served, Defendant Aggregate goes on to argue Plaintiff's Notice of Claim cannot constitute a valid offer under the statute because something more is required. Second, Defendant contends the statute is not silent with respect to how prejudgment interest must be calculated when there is an offer and no counteroffer. This is not the case; *Minn. Stat. 549.09* is silent under these circumstances.

Finally, Defendant Aggregate claims the amount stated in Plaintiff A & L Potato's Notice of Claim should not be used as a default comparable when determining how to calculate prejudgment interest because Plaintiff's Notice of Claim does not constitute a valid offer under the statute. This argument is incorrect for two reasons. First, if the Rule 68 offer is a valid offer under § 549.09, then the Notice of Claim must necessarily also be a valid offer because the same requirements were satisfied. Second, even if the Court finds the Rule 68 offer is a valid offer under § 549.09 but the Notice of Claim is not, the appropriate default comparable on the part of Plaintiff A & L Potato is still the amount set forth in its Notice of Claim.

## ARGUMENT

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

The reply to this issue overlaps with the second issue. In its brief, Defendant Aggregate first claims their Rule 68 offer constitutes a valid offer under *Minn. Stat. § 549.09* because it satisfies the only two requirements under the statute (writing and service). Under the second issue, despite meeting the same two requirements, Defendant Aggregate argues A & L Potato's Notice of Claim does not constitute a valid offer under § 549.09. We wish to point out that if an offer made expressly and exclusively under Rule 68 constitutes a valid offer under § 549.09, then it necessarily follows that Plaintiff A & L Potato's Notice of Claim must also constitute a valid offer under § 549.09. Once a rule is established to include Aggregate's Rule 68 offer under § 549.09, the rule cannot also work to exclude Plaintiff A & L Potato's Notice of Claim from the same statute if the same criteria are met.

Either both the Rule 68 offer and the Notice of Claim are valid offers under § 549.09 or they both are not. Although Defendant Aggregate does not expressly acknowledge this, consider the following language taken from Defendant Aggregate's brief and note the impracticality of attempting to qualify their Rule 68 offer as a valid offer under the statute and at the same time exclude Plaintiff A & L Potato's Notice of Claim as a valid offer.

#### Statements by Defendant Aggregate claiming Rule 68 is an offer under § 549.09:

- "All that Minn. Stat. § 549.09 requires of an offer is that it be "written." Minn. Stat. § 549.09. The offer made by Aggregate is written. It was served on the other party, A & L Potato." *See Respondent's Brief*, at 7.

- “Finally, it bears noting that nowhere in Minn. Stat. § 549.09 or the subsequent case law is there any requirement that an offer under Minn. Stat. § 549.09 be made explicitly pursuant to that statute specifically as A & L seems to intimate. Instead, the statute itself is left necessarily vague requiring only that the offer be in writing.” *See Respondent’s Brief*, at 9 (compare against the first bullet point under the next sub-heading).

Statements by Defendant Aggregate claiming a Notice of Claim is not an offer under § 549.09:

- “However, there is no reference made anywhere in [A & L Potato’s] Notice of Claim to Minn. Stat. § 549.09.” *See Respondent’s Brief*, at 12 (The Rule 68 offer by Aggregate also contains no such reference).
- “Thus, because A & L Potato was forced by the law to file a Notice of Claim and not out of its own volition to actually work towards a settlement, it should not be construed as an offer pursuant to Minn. Stat. § 549.09 and cannot be adopted as a means of comparison when calculating prejudgment interest.” *Id.* at 13 (Note Plaintiff A & L Potato was not required to serve a notice of claim upon Defendant Aggregate; it was only required to serve a notice of claim upon the City of East Grand Forks.).

For reasons set out in its principal brief, Plaintiff A & L Potato contends Aggregate’s Rule 68 offer is not a valid offer under § 549.09. However, even if the court finds otherwise, then it necessarily follows that Plaintiff A & L Potato’s Notice of Claim must also constitute a valid offer under § 549.09. The amount of the Notice of Claim must be used as Plaintiff’s comparable for the purposes of applying the statute.

**Issue Two: When only one offer is made under *Minn. Stat. § 549.09*, what must it be compared against for purposes of calculating prejudgment interest?**

In its brief, Defendant Aggregate framed the second issue as follows:

**A & L Potato’s Notice of Claim Does Not Serve as a Valid Offer of Under Minn. Stat. § 549.09 and Cannot be Used as a Means of Comparison When Calculating Prejudgment Interest.**

*See Respondent’s Brief*, at 10.

This is not a correct characterization of the second issue. The second issue, as stated in Appellant's Statement of the Case, is as follows:

**When only one offer is made under *Minn. Stat. § 549.09*, what must it be compared against for purposes of calculating prejudgment interest?**

It is true Plaintiff A & L Potato argues if Defendant Aggregate's Rule 68 offer is a valid offer under § 549.09, it necessarily follows that the Notice of Claim must also meet the statutory requirements of a valid offer under *Minn. Stat. § 549.09*. However, Plaintiff A & L Potato's argument does not rely on this finding. Instead, A & L Potato appeals the question of what should be the default comparable in the absence of a counteroffer under § 549.09.

Defendant Aggregate argues the statute is not silent on this issue. This is incorrect. The applicable portion of the statute reads as follows:

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 notice 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.

*Minn. Stat. § 549.09(1)(b).*

Before determining what amount the prejudgment interest should be applied to, the statute first requires a comparison be made between i) how close the first offer is to the jury award; and ii) how close the counteroffer is to the jury award. In other words, the plain meaning of the statute states that if A's offer is closer to the jury award than B's

offer, the interest should be calculated one way.<sup>1</sup> On the other hand, if B's offer is closer to the jury award than A's offer, then it should be calculated another way.<sup>2</sup> The statute gives no guidance as to how to treat situations in which there is no counteroffer (the statute also does not require a counteroffer be made). The statute is simply silent on this issue.

Defendant Aggregate's argument that the answer may be found within the plain meaning of the statute is unfounded. Defendant Aggregate explains itself by unilaterally concluding without authority that the absence of a counteroffer automatically equates to an offer of \$0.00.<sup>3</sup> This is not what the statute says and Defendant Aggregate has provided no authority to support its conclusion.

Because the statute requires a comparison be made, a default comparable on the part of the party not making a counteroffer is necessary. Under the District Court's and Defendant Aggregate's method, if a defendant were to elect not to make a counteroffer, then the defendant's offer for comparative purposes automatically defaults to \$0.00. This works well for defendants because \$0.00 is the defendant's starting position. On the other hand, the plaintiff's starting position is the amount set forth in either the notice of claim or the complaint. According to Defendant Aggregate, if a plaintiff elects not to make a counteroffer, then its default position when applying the statute is NOT the plaintiff's starting position; rather it defaults to the defendant's starting position of \$0.00.

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<sup>1</sup> See *Minn. Stat. § 549.09(1)(b)* ("The prevailing party shall receive interest [from the time of the written notice of claim] **only if** the amount of [the prevailing party's] offer is closer to the judgment or award than the amount of the opposing party's offer" (emphasis added))

<sup>2</sup> *Id.* ("If the amount of the losing party's offer was closer to the judgment amount than the prevailing party's offer, [prejudgment interest shall be calculated as follows]" (emphasis added)).

<sup>3</sup> In its brief, Defendant Aggregate states "At no point whatsoever, did A & L Potato ever accept or counter [Aggregate's] offer. A & L Potato's offer therefore is \$0.00 . . . Aggregate's offer of \$5000.00 is closer to the offer of \$0.00 made by A & L Potato." See *Respondent's Brief*, at 11. In the last sentence, we assume Aggregate meant to say that Aggregate's offer of \$5000.00 is closer to the jury award than the offer of \$0.00 made by A & L Potato.

As a result, a plaintiff electing not to make a counteroffer must sacrifice its starting position whereas a defendant electing not to make a counteroffer preserves its starting position. This could not have been the legislative intent because it favors one side over the other.

Where only one offer has been made, a more equitable and viable interpretation would be to designate the non-offering party's respective starting position as its default comparable. Such an interpretation would not favor one party over the other. This is a viable interpretation that: i) preserves the intention of the statute of encouraging settlement<sup>4</sup>; ii) does not encourage needless gamesmanship<sup>5</sup>; and iii) does not automatically give all defendants an unfair advantage.

An interpretation which allows plaintiffs, who elect not to make a counteroffer, to default to its starting position for the purposes of applying the statute is justifiable because the Notice of Claim is also a valid written offer under *Minn. Stat. § 549.09*. To adopt the rule of defaulting to the starting position is not dependant on a finding that the notice of claim constitutes a valid written offer even though it is consistent with such a finding.

Respondent Aggregate concedes "it could be reasonably argued that written notices of claim in certain instances may constitute offers to settle pursuant to *Minn. Stat § 549 09*." *See Respondent Aggregate Industries' Brief*, pg 12. However, Respondent Aggregate goes on to say that this case is not one of those instances because Plaintiff A & L Potato only provided a notice of claim because it was suing a political subdivision and a notice of claim is required under *Minn. Stat § 466.05*. *Id.* It is worth noting that

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<sup>4</sup> *See Trapp v. Hancuh*, 587 N.W.2d 61, 65 (Minn. App. 1998) (The purpose of the offer/counteroffer provision of *Minn. Stat. § 540 09* is to encourage settlement.)

<sup>5</sup> *See Appellant's Brief* for an analysis of this point.

Plaintiff A & L Potato was required under § 466.05 to only serve the Notice of Claim upon the City of East Grand Forks. It was not required to serve a notice of claim upon Respondent Aggregate. This, in itself, defeats Respondent's argument.

Respondent Aggregate's entire argument with respect to qualifying their Rule 68 offer as a valid written offer under *Minn. Stat. § 549.09* rests solely on the premise that there are only two requirements set forth under that statute: i) that it be in writing; and ii) that it be properly served. *See Respondent Aggregate Industrie's Brief*, pg 7. However, a few pages later, Respondent Aggregate asserts that Plaintiff A & L Potato's Notice of Claim, which was in writing and properly served, cannot be considered a valid offer under § 549.09 because "there is no reference made anywhere in the Notice of Claim to *Minn. Stat. § 549.09*..." *Id.* at 13.

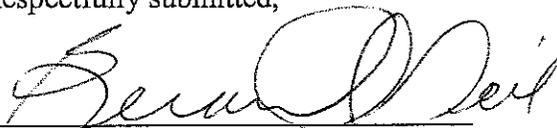
If Respondent Aggregate's Rule 68 offer is a valid offer (even though it made no reference to § 549.09) because it was written and properly served, then A & L Potato's Notice of Claim must also constitute a valid offer because it also meets the same two requirements. As Respondent Aggregate also stated in its brief, "Finally, it bears noting that nowhere in *Minn. Stat. § 549.09* or the subsequent case law is there any requirement that an offer under § 549.09 be made explicitly pursuant to that statute specifically as A & L seems to intimate." *Id.* at 9. Respondent Aggregate cannot choose to apply a rule only when it suits their purpose. The Notice of Claim in this case was made in writing, it was properly served, and therefore satisfies the requirements under *Minn. Stat. §549.09*.

Absent a counteroffer, the appropriate default comparable for a party is its relative starting position. In this case, the appropriate amount for Plaintiff A & L Potato is \$70,985.95, the amount set forth in the Notice of Claim.

## CONCLUSION

For reasons set forth above and in the Appellant's Brief, an offer made expressly and exclusively under Rule 68 cannot constitute a valid offer for purposes of *Minn. Stat. § 549.09*. And even if an offer made expressly and exclusively under Rule 68 is a valid offer under *Minn. Stat. § 549.09*, then the default comparable used to determine how prejudgment interest must be calculated must be the starting position of the party electing not to make a counteroffer. Such a method not only treats both sides the same, but is also justifiable because the Notice of Claim also meets the only two requirements of the statute; that it be in writing and properly served. For the reasons stated above and in Appellants Brief, Appellant respectfully requests the Court of Appeals reverse 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,



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