

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.

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LEGAL 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., did constitute an offer under Minn. Stat. § 549.09.

Apposite authority for this decision is found in the following cases:

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

Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d 826 (Minn.
1988).

Apposite authority for this decision is found in the following statutes/rules:

Minn. Stat. § 549.09

Rule 68, Minn. R. Civ. P.

2. **If the answer to the first issue is “Yes,” then what must the Rule 68 offer be compared against for purposes of calculating prejudgment interest?**

The Trial Court found the respondent had issued the only valid written offer and any prejudgment interest awarded would be based on that offer.

Apposite authority for this decision found in the following cases:

Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d 826 (Minn.
1988).

Apposite authority for this decision is found in the following statutes/rules:

Minn. Stat. § 549.09 subdiv. 1(b).

Minn. Stat § 466.05

STANDARD OF REVIEW

The issues involved in this appeal involve the law governing prejudgment interest. There are no facts in dispute between the parties. Questions of law regarding prejudgment interest are reviewed **de novo** on appeal. Wolf Motor Co. v. One Ford F-350, 658 N.W.2d 900, 903 (Minn. App. 2003).

STATEMENT OF THE CASE

Aggregate concedes and stipulates that the A & L Potato's Statement of The Case is a true and accurate statement regarding the proceedings giving rise to this appeal.

STATEMENT OF THE FACTS

Aggregate concedes and stipulates that A & L Potato's Statement of The Facts is a true and accurate statement regarding the facts giving rise to this appeal.

SUMMARY OF ARGUMENT

The only issue on appeal involves the award of prejudgment interest pursuant to Minnesota's prejudgment interest statute. Minn. Stat. § 549.09 subdiv.1(b). When parties have tendered valid offers of settlement the statute provides a mechanism for calculating prejudgment interest. Under this provision, any valid offer which is ultimately the closest to the final judgment rendered controls the calculation of prejudgment interest. As applied to this case, because Aggregate's offer was closer to the final judgment than A & L Potato's, who failed to make any offer whatsoever, the calculation of prejudgment interest was based on two variables: (1) the amount of Aggregate's Offer and (2) the period of time commencing with the notice of claim and terminating when Aggregate made the last offer closest to the actual judgment.

On appeal A & L Potato argues that this application of Minn. Stat. § 549.09 subdiv. 1(b) is faulty because Aggregate's offer was not valid. In doing so, A & L Potato relies on Schwickert, Inc. v. Winnebago Seniors, Ltd., 680 N.W.2d 79 (Minn. 2004). However, as Aggregate has argued and the District Court agreed, the Schwickert holding is simply not applicable as the holding in Schwickert was based on wording in an offer that "wasn't clear" whereas here the wording in Aggregate's offer is "definite" and "straightforward." See Hodder v. Goodyear Tire & Rubber, Co., 466 N.W.2d 826, 840 (Minn. 1988). And because Aggregate's offer did meet the requirements for a valid offer under Minn. Stat. § 549.09 the interest calculation prescribed in the statute itself is necessarily implicated.

Next, A & L Potato argues that even if Aggregate's offer is deemed valid, that offer should have been compared against A & L Potato's Notice of Claim contending

the statute is silent with respect to the calculation of prejudgment interest if there is only one written offer of settlement. This argument is faulty, overlooking the plain meaning of the statute and applicable case law.

Minn. Stat. § 549.09 does address the calculation of prejudgment interest when there is only one written offer of settlement. The Trial Court noted the distinction created by Minn. Stat. § 549.09 in stating, “written notices of claim are used as the potential starting point for calculating prejudgment interest, with written offers of settlement as potential ending points.” This plain language makes it clear that written offers of claim and offers of settlement are completely separate devices and are not always to be treated as one under Minn. Stat. § 549.09.

Further, in making its contention that its Notice of Claim should be viewed as a valid offer under Minn. Stat. § 549.09 because it serves as a vehicle to initiate settlement A & L Potato completely disregards the fact that they sued a political subdivision, the City of East Grand Forks, and pursuant to Minn. Stat. § 466.05 they had no choice but to file a Notice of Claim before initiating the suit. A & L Potato did not file its Notice of Claim in a good-will attempt to secure a settlement and avoid costly litigation as Minn. Stat. § 549.09 envisions. See Trapp v. Hancuh, 587 N.W.2d 61, 65 (Minn. Ct. App. 1998). Rather, A & L Potato filed its Notice of Claim only out of a need to comply with Minnesota’s laws regarding causes of actions against political subdivisions. Therefore, A & L Potato’s claim that its Notice of Claim should serve as a bona fide offer under Minn. Stat. § 549.09 is without merit as the Trial Court correctly concluded.

LAW & ARGUMENT

I. Issue One: Aggregate's Rule 68 Offer of Settlement Constitutes a Valid Written Offer Under Minn. Stat § 549.09.

The offer/counter offer provision of Minn. Stat. § 549.09 is triggered by a valid written offer to settle the case. Johnson v. Southern Minnesota Machinery Sales, 460 N.W.2d 68, 73 (Minn. Ct. App. 1990). “In order for an offer to be valid under § 549.09 it must be in writing and must offer, in sufficiently clear and definite terms, to dispose completely of the claims between the negotiating parties.” Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d 826, 840 (Minn. 1988). The offer must also be served properly on the other party. Archer Daniels Midland Co. v. Aon Risk Serv., Inc. of Minnesota, 356 F.Supp. 850, 860 (8th Cir. 2004) (citing Garb v. Jansport, Inc., 466 N.W.2d 762, 764 (Minn. Ct. App. 1991)). However, no counteroffer is required and only one offer made “would stand alone and activate the pre-verdict reduction.” Hodder, 426 N.W.2d at 840.

Aggregate's Rule 68 Offer complied with the requirements of Minn. Stat. § 549.09 and the Minnesota Supreme Court. Aggregate's Rule 68 Offer reads in relevant part:

To enter into stipulation to dismiss plaintiff's claim with prejudice and without costs, in return for the payment to plaintiff by defendant Aggregate of the sum Five [Thousand] dollars and no cents (\$5,000.00) with such offer to include all costs and attorney's fees incurred by plaintiff as of the date hereof.

(See Aggregate's Rule 68 Offer, AA p. 10). 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. And it contains clear and

definite terms specifically listing the offered amount (\$5,000) while making explicit reference to “all costs and attorney’s fees” which by implication includes prejudgment interest. These requirements clearly satisfy Minn. Stat. § 549.09 which only require the offer be in writing and meet the requirements of the Minnesota Supreme Court’s “clear” and “definite” standard. Hodder, 426 N.W.2d at 840.

Despite clearly meeting and going beyond any formalities required to trigger the offer/counter offer provision of Minn. Stat. § 549.09, A & L Potato still disputes the validity of the offer made by relying on Schwickert v. Winnebago Seniors, Ltd., 680 N.W.2d 79 (Minn. 2004). This reliance is misguided.

First, in overruling the district court and holding that prejudgment interest was separately recoverable from the lump sum Rule 68 Offer, the Schwickert Court analyzed closely the wording of the offer itself which stated in relevant part: “the amount of Eight Hundred Thousand Dollars (\$800,000) and that judgment may be entered on that amount, if timely accepted, within ten (10) days after service of the offer.” Id. at 88. The entire focus here is on the absence of any sort of wording in the offer that would indicate an intent to include prejudgment interest as part of the offer such as the terms “all costs and attorney’s fees” as used by Aggregate in its offer. Id. Finding no such wording, the Minnesota’s Supreme Court found the prejudgment interest separately recoverable and not included in the lump sum offer. Id.

In the present case, Aggregate made it clear by using the terms **“all costs and attorney’s fees incurred by plaintiff as of this date hereof”** that its intent in tendering the offer was to include prejudgment interest. This intent is especially clear being that the Court in Schwickert used the term “prejudgment interest” and “cost”

interchangeably. See id. (“The failure of the Rule 68 Offer to expressly include prejudgment interest in the lump sum offered means that prejudgment interest is separately recoverable . . . as a cost or disbursement.”). Dissimilar to Aggregate’s offer, no wording of this sort appears anywhere in the agreement used in Schwickert and therefore to conclude as A & L Potato does that the logic employed in Schwickert should be extend to this case is akin to claiming one should peel an apple in the same manner one would an orange.

Second, in arguing Schwickert’s applicability A & L Potato glosses over the fact that in Schwickert the Rule 68 Offer of Settlement was **accepted**. Id. While in the case at bar the Rule 68 offer was not only **rejected**, no counteroffer was ever made. Because the offer was accepted in Schwickert, the Court analyzed the offer as a contract between the two parties and contemplated whether prejudgment interest was intended as part of the contract’s consideration by dissecting the language used in the offer. Id. However, in our case A & L Potato **rejected** the offer and the issue became statutory rather than contractual in nature. The focus then turns on whether the offer made by Aggregate complies with Minn. Stat. § 549.09 not whether the parties agreed via a contract to include prejudgment interest in the settlement as in Schwickert. Schwickert is therefore inapplicable to our case on this second distinguishing ground as well.

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. It

follows that if the legislature had intended to put certain restrictions on what sort of offers are valid under Minn. Stat. § 549.09 they could have easily done so. But in an attempt to encourage settlement, the impetus of the statute in the first place, the requirements under Minn. Stat. § 549.09 were kept simple. Or as the Minnesota Supreme Court opined, “The statute’s aim of promoting settlement is best accomplished by offers which are straightforward and would in an effective and practical manner settle matters between the negotiating parties.” Hodder, 426 N.W.2d at 840. The Rule 68 Offer made by Aggregate accomplishes this goal.

Aggregate made an offer as envisioned by the statute. A & L Potato had every opportunity to accept or counter the offer in an attempt to reach a settlement and avoid unneeded and costly litigation. They failed to do so and instead encouraged the subsequent litigation by not accepting or making an offer on their own behalf. Allowing A & L Potato in retrospect to claim the only offer made in an attempt to settle the case was invalid would subvert the spirit and letter of Minn. Stat. § 549.09 and reward a party for not making a serious attempt at settling the lawsuit, the very thing Minn. Stat. § 549.09 encourages. Aggregate’s Rule 68 Offer of Settlement constitutes a valid written offer under Minn. Stat. § 549.09.

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

Contrary to A & L Potato’s contention, Minnesota law is not silent on how to calculate prejudgment interest when an offer is made, and the other party either fails to accept or counter the offer as A & L Potato did in the instant case. The Minnesota

Supreme Court made it clear in Hodder that it is not necessary to have a counteroffer “to activate the offer/counter offer provision of the prejudgment interest statute.” Hodder, 426 N.W.2d at 840. Therefore, when no counteroffer is made or accepted as was the case here, the Court simply applies the plain-language of the Minn. Stat. § 549.09 to the facts at issue. Minn. Stat. § 549.09 states in pertinent part:

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 award, whichever is less, and **only from the time of commencement of the action, or a demand for arbitration, or the time of a written notice of claim . . . until the settlement offer was made.**

Minn. Stat. § 549.09 subd.1(b). (Emphasis added).

As applied to our case, Aggregate made the only settlement offer in the amount of \$5,000.00 on April 24, 2006. At no point whatsoever, did A & L Potato ever accept or counter this offer. A & L Potato’s offer therefore is \$0.00. The jury found for A & L Potato in the amount of \$57, 348.00. Aggregate’s offer of \$5,000.00 is closer to the offer of \$0.00 made by A & L Potato. In applying the plain meaning of the statute this means that the prejudgment interest award should be based on the \$5,000.00 offered by Aggregate and run from the date the lawsuit was commenced (11/5/2003) to the date Aggregate’s Rule 68 Settlement offer was made (4/24/06), as the Trial Court correctly found.

Despite the statute’s plain-meaning, A & L Potato contends any prejudgment interest award should be based on a comparison between A & L Potato’s original Notice of Claim, Aggregate’s Rule 68 Offer, and the jury’s ultimate verdict. Simply put, A & L Potato argues that their Notice of Claim should be considered an offer under Minn. Stat. § 549.09. The Trial Court rejected this reasoning and in so doing noted:

[t]he Court does not find this argument persuasive given the plain language of the statute. Minnesota Statute § 549.09 specifically refers to written notices of claim as separate and distinct from written offers of settlement as follows: written notices of claim are used as the starting point for calculating prejudgment interest, with written offers of settlement used as potential ending points.

See Findings of Fact, Conclusions of Law, Order for Judgment, and Judgment, p.5, AA p.38.

Furthermore, even though it could be reasonably argued that written notices of claim in certain instances may constitute offers to settle pursuant to Minn. Stat. § 549.09, that is not the issue here. In the instant case, A & L Potato's Written Notice of Claim, had nothing to do with an attempt to amicably resolve the issue by foregoing litigation and encouraging settlement as Minn. Stat. § 549.09 envisions. Instead, because A & L Potato's cause of action was against a political subdivision, the City of East Grand Forks, Minnesota law required that A & L Potato serve a written notice of claim as a matter of course to comply with Minnesota law. Minn. Stat. § 466.05 states:

Except as provided in subdivision 2, every person, whether plaintiff, defendant or third party plaintiff or defendant, who claims damages from any municipality or municipal employee acting within the scope of employment for or on account of any loss or injury within the scope of shall cause to be presented to the governing body of the municipality within 180 days after the alleged loss or injury is discovered a notice stating the time, place and circumstances thereof, the names of the municipal employees known to be involved, and the amount of compensation or other relief demanded. (citations omitted).

Minn. Stat. § 466.05 subdiv.(1). A & L Potato followed this rule precisely, so much so that they even went as far to state in the actual Notice of Claim that, "This Notice of Claim is provided pursuant to M.S.A. § 466.05 and the ordinances of the City of East Grand Forks." (A & L Potato's Notice of Claim, p.2, AA p.2). However, there is no reference made anywhere in the Notice of Claim to Minn. Stat. § 549.09, further

illustrating that A & L Potato, when filing its Notice of Claim had no real belief it would be used as a tool to encourage settlement.

Aggregate agrees with A & L Potato's claim that Minn. Stat. § 549.09 is designed to encourage settlement. Trapp v. Hancuh, 587 N.W.2d 61, 65 (Minn. Ct. App. 1998). And that this purpose should be safeguarded against when interpretations of the statute impede this purpose. Id. However, Aggregate proffers that manipulating the offer/counter offer statute to include notices of claim, when as was the case here, the notice of claim was required by law and not a strategy used to encourage settlement in any sense, ironically illustrates the very thing both A & L Potato in their brief to the Court and the Trapp case warn against: interpretations that impede the statutes purpose. 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.

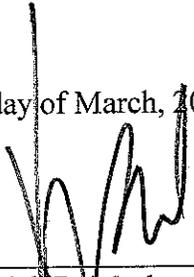
CONCLUSION

Aggregate's offer of settlement was valid pursuant to Minn. Stat. § 549.09. It was in writing, properly served on the other party, and stated in straightforward and definite language the terms of the proposed agreement. Allowing A & L Potato, in retrospect, to claim the only offer made to settle the case was invalid when at no point did they even attempt to make a counteroffer, would subvert the spirit and letter of Minn. Stat. § 549.09. Therefore, Aggregate respectfully requests the Trial Court's order in this matter be affirmed.

Also, A & L Potato alternatively contends that its Notice of Claim should serve as a valid offer for comparison purposes if the Court finds Aggregate's Rule 68 Offer valid. This allegation is faulty. This belief on the part of A & L Potato overlooks the fact that because they were bringing an action against a political subdivision, the City of East Grand Forks, a Notice of Claim is required by Minnesota law and in this context can hardly be construed as an attempt at settlement as Minn. Stat. § 549.09 envisions and encourages via a potential reduction in prejudgment interest. Therefore, Aggregate respectfully requests the Trial Court's order in this matter also be affirmed.

For all the foregoing reasons, Aggregate respectfully requests that the Trial Court's holding be affirmed on both issues of law presented. And in so finding, that prejudgment interest in this case should be based on the Rule 68 Offer of \$5,000.00 made by Aggregate and run from the date this suit was commenced (11/5/03) until the Rule 68 Offer was made (4/24/06) totaling \$493.70 in accordance with the calculations of the Trial Court.

Respectfully submitted this 14th day of March, 2008.



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**CERTIFICATION OF BRIEF
LENGTH**

Appellate Court Case NO: A08-242

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds 1 and 3, for a brief produced with a proportional font. The length of this brief is 3104 words. This brief was prepared using 2003 Microsoft Word.

DATED this 14 day of March, 2008.



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