

NO. A08-583

State of Minnesota
In Supreme Court

VIRGIL DYKES AND CONNIE DYKES
 D/B/A DYKES FARMS,

Respondent,

vs.

SUKUP MANUFACTURING COMPANY,
Defendant and Third-Party Plaintiff-Appellant,

vs.

SUPERIOR, INC.,
Third-Party Defendant-Respondent.

**BRIEF OF AMICUS CURIAE
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STATEMENT OF INTEREST

The Minnesota Defense Lawyers Association (“MDLA”) is a non-profit Minnesota corporation founded in 1963 whose members are trial lawyers in private practice.¹ MDLA devotes a substantial portion of its efforts to the defense of civil litigation. MDLA is affiliated with the Minnesota State Bar Association and the Defense Research Institute. Over the past 45 years, MDLA has grown to include representatives from over 180 law firms across Minnesota, with 800 individual members. The MDLA pursues the public interest in protecting the rights of litigants in civil actions, promoting high standards of professional ethics and competence, and improving the many areas of law in which its members regularly practice. Those interests translate into concerns regarding the practical impact of developing law within the civil justice system.

To that end, the MDLA urges this Court to reverse the court of appeals in this matter and hold that Respondents Virgil and Connie Dykes (“Farmers” or “plaintiffs”) settled all claims that were or might have been asserted regarding damages allegedly caused by the Cyclone when it entered into a settlement agreement and stipulation for dismissal with prejudice with third-party defendant Superior, Inc. (“Installer” or “settling party”). The MDLA supports reversal for the reasons stated in the opening brief filed by Appellant Sukup Manufacturing Company (“Manufacturer” or “defendant”), but will not

¹ The undersigned counsel for *Amici* authored the brief in whole, and no persons other than *Amici* made a monetary contribution to the preparation or submission of the brief. Minn. R. Civ. App. P. 129.03.

repeat those arguments. Instead, the MDLA's brief will focus on the implications of affirming the court of appeals' decision.

First, in the event that this Court affirms the decision of the court of appeals in whole or in part, its decision should articulate a bright-line ruling on the effect of a plaintiff's settlement with one tortfeasor without executing a *Pierringer* release where the settlement is followed by a successive suit against a joint tortfeasor alleging damages arising from the same occurrence. The MDLA respectfully requests that this Court clarify whether the "release of one tortfeasor releases all joint tortfeasors" rule has continuing vitality and, if so, in what way. Additionally, if the Court's decision includes a remand for trial, then the Court should comment on how to handle the related issues of fault allocation and joint liability among the settling and non-settling tortfeasors in light of a settlement that includes a stipulation for dismissal with prejudice. By addressing these aspects of a decision that reverses the district court's summary judgment for the defendant, this Court will enable future litigants to enter into settlements with certainty and, in most cases, avoid litigation over the effect of the settlement.

INTRODUCTION

Before this Court is a dispute between Sukup Manufacturing Company ("Manufacturer" or "defendant"), Virgil and Connie Dykes, d/b/a Dykes Farms ("Farmers" or "plaintiffs"), and Superior, Inc. ("Installer" or "settling party") about the effect of a settlement agreement between the Farmers and the Installer where the settlement agreement resolved the Farmers' prior claim that alleged the same damages sought by this action.

The Manufacturer makes farm machinery, specifically pneumatic grain moving equipment including a model known as the "Cyclone." The Installer sells and installs the Cyclone. In 2002, the Farmers purchased a Cyclone from the Installer, and the Installer installed it at the Farmers' farm. The Farmers used the Cyclone briefly in 2002 but claimed it damaged their corn, so they stopped using it and refused to pay the Installer. In 2003, the Installer filed a mechanic's lien action against the Farmers. The Farmers brought a counterclaim, alleging that the Cyclone caused damages exceeding \$50,000. In August 2003, the parties reached a mediated settlement ("Mediated Agreement"), then both parties executed and filed a stipulation for dismissal with prejudice in October 2003.

In 2006, the Farmers brought the present lawsuit against the Manufacturer, asserting negligence, strict liability, breach of warranty, and consumer fraud claims arising out of their use of the Cyclone and claiming damages from that use. The Manufacturer denied the Farmers' allegations and asserted a third-party claim for contribution and/or indemnity against the Installer. The Manufacturer sought dismissal of the Farmers' lawsuit because of the prior settlement agreement with the Installer.

The parties disagree about the effect of the Mediated Agreement and the resulting stipulation for dismissal with prejudice. The Manufacturer and Installer contend that the Farmers' prior settlement with the Installer constituted a general release of all claims the Farmers had against all tortfeasors arising from the Farmers' use of the Cyclone. (*See* Manufacturer's Court of Appeals Brief, p. 5; Installer's Court of Appeals Brief, p. 4.)

The Farmers claim that the prior settlement with the Installer only stipulated that the Cyclone was to be removed from the Farmers' property, the Farmers' old equipment

returned, and the mechanic's lien discharged. (See Farmers' Court of Appeals Brief, p. 2.) All parties agree, however, that the Mediated Agreement, coupled with the stipulation for dismissal with prejudice was *not* a *Pierringer* release. (See Farmers' Court of Appeals Brief, p. 17; Manufacturer's Court of Appeals Brief, p. 12; Installer's Court of Appeals Brief, p. 3.)

The Wabasha County District Court, the Honorable Terrence M. Walters presiding, agreed with the Manufacturer and Installer and granted summary judgment in favor of the Manufacturer, holding that there was no evidence at the time the Farmers settled with the Installer that the Farmers intended to reserve claims against other tortfeasors, or that they did not receive adequate compensation for all claims between the Farmers and Installer where both parties settled all claims and agreed to stipulate to a dismissal with prejudice. (See Appellant's Addendum, pp. 7-8.)

The court of appeals reversed and remanded, holding that the district court misapplied the law. *Dykes v. Superior, Inc.*, 761 N.W.2d 892, 895 (Minn. Ct. App. 2009). The court of appeals held that the proper inquiry is not whether the plaintiff intended to reserve claims against other tortfeasors, but whether the plaintiff "intended to release other joint tortfeasors from joint and several liability." *Id.*

This Court granted the Manufacturer's petition for review. The Court also granted motions of the MDLA, and the Minnesota Association for Justice to serve and file briefs as *amicus curiae*.

ARGUMENT

In order to protect the rights of non-settling tortfeasors, such as the Manufacturer here, this Court should clarify the effect of settling with one tortfeasor without a *Pierringer* release when a plaintiff proceeds in successive litigation against a joint tortfeasor. In doing so, this Court should discuss the viability of the oft-cited rule that a release of one tortfeasor releases all joint tortfeasors. Further, if the Court remands this matter for trial, its opinion should guide the district court on how to handle allocation of fault and how to ensure that the non-settling defendant does not pay more than its fair share of any judgment. To that end, the jury should allocate fault among all parties and non-parties – the Farmers, the Manufacturer, and the Installer – according to the proof at trial.

Additionally, in no event should the jury's special verdict impose joint liability against the Manufacturer, the non-settling party, for the fault of the Installer, the settling party. The Farmers have rightfully exerted control over their claim and exercised the option to proceed successively and separately against the Installer and the Manufacturer, therefore, the plaintiffs should bear any risk entailed by their decision to sue piecemeal and settle with the Installer without executing a *Pierringer* release. The Manufacturer is liable to the Farmers, if at all, strictly in accordance with the fault apportioned to it by the jury and without imposing joint liability. Only with this caveat will this Court's decision ensure that the non-settling defendant is not prejudiced by an agreement to which it was not a party.

I. PUBLIC POLICY FAVORS SETTLEMENT OF CLAIMS AND THE COMMON LAW SHOULD DEVELOP TO ENCOURAGE SETTLEMENTS

Public policy encourages settlement of disputes. *Employers Mut. Cas. Co. v. Chicago, St. Paul, Minneapolis, & Omaha Ry. Co.*, 235 Minn. 304, 314, 50 N.W.2d 689, 695 (Minn. 1951) (“The law favors settlement of claims without recourse to litigation.”). *Rambaum v. Swisher*, 435 N.W.2d 19, 23 (Minn. 1989) (stating that even *Pierringer* agreements that produce lop-sided results not contemplated at the time the agreements were made are “acceptable within the context of the law’s strong policy to encourage settlement of disputes”). The reasons for this public policy are many, but paramount among them is judicial economy, expediency, and cost savings for the court system as well as the parties. To encourage parties to settle, the common law must offer clarity and ensure finality in order to deter litigation after a settlement agreement is reached. “The law favors compromises, and there must be a zone of free action within which differences may be terminated by the parties with the complete assurance that the matter is final.” *Schmidt v. Smith*, 299 Minn. 103, 107, 216 N.W.2d 669, 671-72 (Minn. 1974).

Some countervailing concerns arise with various settlement scenarios. For example, the rights of non-settling defendants should not be prejudiced by the settlement of other defendants. John E. Simonett, *Release of Joint Tortfeasors: Use of the Pierringer Release in Minnesota*, 3 WM. MITCHELL L. REV. 1, 19 (1977). “Where a plaintiff settles with a defendant who may be liable for the plaintiff’s damages, the settlement cannot be done to the prejudice of the remaining nonsettling defendants.” *Eckblad v. Farm Bureau Mut. Ins. Co.*, 371 N.W.2d 78, 81 (Minn. Ct. App. 1985) (citing

Frey v. Snelgrove, 269 N.W.2d 918, 922 (Minn. 1978). A plaintiff and one joint tortfeasor should not, by contract, be able to limit the rights of parties that had nothing to do with the settlement. The ability to do otherwise would encourage plaintiffs and tortfeasors to manipulate the settlement process and leave at least one joint tortfeasor “holding the bag.”

In order to facilitate settlement and protect the rights of non-settling parties, the law governing the settlement of claims must be clear. In this appeal, the parties disagree on the applicability of the long-standing common law rule that the release of one joint tortfeasor releases them all. Minnesota law certainly reflects an erosion of this rule, but the rule has not been explicitly overruled. The Minnesota Court of Appeals has addressed a party’s reliance on the release-of-one-tortfeasor-releases-all rule:

Respondent cites *Smith v. Mann*, 184 Minn. 485, 487-88, 239 N.W. 223, 224 (1931) and several other cases following *Smith* for the proposition that release of one joint tortfeasor automatically discharges the others. We note that rigid application of this rule has been criticized and ultimately rejected. See, e.g., *Luxenburg v. Can-Tex Industries*, 257 N.W.2d 804 (Minn. 1977). Although *Smith* has never been explicitly overruled on this point, it has been implicitly overruled and is no longer good law.

Johnson v. Brown, 401 N.W.2d 85, 89 (Minn. Ct. App. 1987). As this statement demonstrates by describing the rule as “implicitly overruled,” the viability of the release-of-one-tortfeasor-releases-all rule is not completely clear. For example, in *Gronquist*, this Court loosened the once rigidly-applied release-of-one-tortfeasor-releases-all rule by stating it applies depending on a case-by-case application of a two-factor analysis.

We believe that the factors determinative of whether a release of one of several joint tortfeasors will operate to release the remaining wrongdoers should be and are: (1) the intention of the parties to the release instrument,

and (2) whether or not the injured party has in fact received full compensation for his injury. If we apply that rule, then, where one joint-tortfeasor is released, regardless of what form that release may take, as long as it does not constitute an accord and satisfaction or an unqualified or absolute release, and there is no manifestation of any intention to the contrary in the agreement, the injured party should not be denied his right to pursue the remaining wrongdoers until he has received full satisfaction.

Gronquist v. Olson, 242 Minn. 119, 128, 64 N.W.2d 159, 165 (1954). A few years later, in *Couillard v. Charles T. Miller Hospital, Inc.*, 253 Minn. 418, 92 N.W.2d 96 (1958), this Court expressly limited the release-of-one-tortfeasor-releases-all rule by overruling aspects of the rule as it regarded subsequent tortfeasors.

[I]n so far as *Benesh v. Garvais*, *supra*, and *Smith v. Mann*, *supra*, do not permit parol proof that a party to a release never was compensated for and never intended to release claims based on injuries caused by a subsequent tortfeasor for which the releasee is also liable because of the rules of proximate cause, those decisions are overruled. The intent of the parties and the question of actual compensation are questions of fact for the jury. The release is, however, prima facie evidence that full compensation was received from the original wrongdoer, including that for injuries caused by the subsequent tortfeasors, and the burden is on the plaintiff to prove the contrary.

Id. at 428, 92 N.W.2d at 103. See also *Luxenburg v. Can-Tex Indus.*, 257 N.W.2d 804, 808 (Minn. 1977) (describing release-of-one-tortfeasor-releases-all-joint-torfeasors as a rule “we have rejected” and applying *Gronquist*).

Remnants of the rule still abound, however. In fact, this Court has cited *as the general rule* the proposition that “the release of one tortfeasor releases them all long after *Gronquist* and *Couillard* appeared to have modified it. See, e.g., *Frey v. Snelgrove*, 269 N.W.2d 918, 921 (Minn. 1978) (“Where there are multiple defendants in a tort action, the general rule of law is that a release of one joint tortfeasor releases all others.”).

The rule that a release of one joint tortfeasor releases all others may have lost currency after *Frey*, given the subsequent widespread use of *Pierringer* releases to address the release of fewer than all tortfeasors. See, e.g., *Klimek v. State Farm Mut. Auto. Ins. Agency*, 348 N.W.2d 103, 105 (Minn. Ct. App. 1984) (stating that “[o]rdinarily, in Minnesota, liability apportioned between joint tortfeasors is joint and several, and the release of one tortfeasor releases all,” but one consequence of a *Pierringer* release is that “the non-settling tortfeasor is liable only for that part of the award attributable to his percentage of causal negligence”). Since this Court recognized *Pierringer* releases in *Frey*, the focus of case law shifted to the issues raised by using *Pierringer* releases. The release-of-one-tortfeasor-releases-all rule was left behind, but not overruled.

Indeed, Minnesota courts do not agree about how to discuss the rule. For example, in a 2002 unpublished opinion, the Minnesota Court of Appeals gave great weight to the determination that “the plain language of the release simply does not give any indication that FSB [plaintiff] did not intend to release McNally [non-settling party].” *First State Bank v. McNally*, No. CX-02-726, 2002 WL 31749164, at *6 (Minn. Ct. App. Dec. 10, 2002). Yet, the court of appeals in this case stated the opposite, that “[t]he appropriate inquiry is whether the injured party, by settling with and releasing one joint tortfeasor, intended to release other joint tortfeasors from joint and several liability.” *Dykes v. Superior, Inc.*, 761 N.W.2d 892, 895 (Minn. Ct. App. 2009). Such conflicting statements of applicable law can only be explained by uncertainty in the common law.

Other states have addressed the sometimes harsh result of the release-of-one-tortfeasor-releases-all rule by legislative enactment. The body of common law in Minnesota relating to settlement releases is all we have.² The MDLA asks the Court to use this opinion as an opportunity to clarify for these parties, and all Minnesota litigants, the effect on all parties of a settlement such as the one between the Farmers and Installer. In doing so, this Court will enhance the public policy that favors the finality and enforceability of settlement agreements.

II. IF THIS CASE IS REMANDED FOR TRIAL, THIS COURT'S OPINION SHOULD GUIDE THE PARTIES AND THE TRIAL COURT ON THE PROCEDURAL RAMIFICATIONS OF THE MEDIATED AGREEMENT

A. This Court Should Exercise Its Discretion In Shaping The Remand Instructions

All parties in this appeal agree that the Mediated Agreement was not a *Pierringer* release. (See Farmers' Court of Appeals Brief at p. 17; Manufacturer's Court of Appeals Brief at p. 12; Installer's Court of Appeals Brief at p. 3.) According to the court of appeals, the settlement between Farmers and Installer cannot be characterized as a general release, first, because no evidence established that the Farmers intended to release

² Many such statutes are modeled after the Uniform Contribution Among Tortfeasors Act, 12 U.L.A. 193 *ff.* (2008). See *Moore v Mo. Pac. R.R.* 773 S.W.2d 78 (Ark. 1989), 6 A.L.R. 5th 1188 (discussing and evaluating three views applied by other states in enacting legislation to modify the common law rule that releasing one tortfeasor releases all: (1) that a general release discharging all other parties who might be liable for damages in addition to a named tortfeasor is sufficient to release a joint tortfeasor not named or specifically identified in the release; (2) that a release will serve to release all other tortfeasors if and to the extent that the parties so intended; and (3) the release of one tortfeasor does not discharge other tortfeasors unless the latter are named in the release or are otherwise specifically identifiable from the face of the instrument).

all joint tortfeasors, and second, because there is a “factual dispute regarding whether appellants were fully compensated as a result of the settlement with Superior.” *Dykes*, 761 N.W.2d, 895-96. The court of appeals directed a remand, but it did not offer the trial court any guidance as to how to proceed with a trial. Therefore, this Court has the opportunity to clarify the remand order if its decision affirms the court of appeals.

This Court has the discretion to address issues not included in the parties’ briefs and has exercised that discretion in previous cases involving similar questions. For example, in *Hart v. Cessna Aircraft Co.*, 276 N.W.2d 166, 167 (Minn. 1979), this Court heard a defendant’s appeal from an order granting a third-party defendant’s motion for summary judgment against a manufacturer’s claim for contribution and indemnity. This Court affirmed the decision in part, but also established six specific procedural guidelines for the trial court to follow. *Id.* at 169-70. “The case is thus affirmed and remanded for proceedings consistent with procedures set out in this opinion.” *Id.* at 170.

Similarly, in *Frey v. Snelgrove*, 269 N.W.2d 918, 923 (Minn. 1978), this Court identified guidelines that courts should follow when some parties enter into a *Pierringer* release but a non-settling defendant proceeds to trial. The guidelines instruct parties and trial courts on how to “assure a fair trial to all parties.” *Id.* “A trial court’s deviation would not constitute error if those modifications substantially protect the rights of all parties and preserve the adversary process.” *Id.* See also *Luxenburg*, 257 N.W.2d at 808 (holding release of one of three concurrent tortfeasors did not release other two and providing instructions for remand regarding issues for trial).

As it has done in prior opinions, this Court can and should exercise its discretion to establish guidelines that will assist this trial court, as well as future courts, on how to proceed where one tortfeasor has settled with the plaintiff in prior litigation without executing a *Pierringer* release, and the plaintiff then proceeds in a successive suit against a joint tortfeasor. The primary questions for this Court to resolve are how to handle allocation of fault and how to ensure the non-settling defendant does not pay more than its fair share.

B. Upon Remand, The Fact Finder Should Allocate Fault Among All Parties And Non-Parties According To The Proof At Trial

Under Minnesota's Comparative Fault Act, the trial court may direct the jury to issue separate special verdicts to determine the amount of damages and the percentage of fault attributable to each party, including the plaintiff when supported by the evidence. Minn. Stat. § 604.01 subd. 1 (2008). A plaintiff cannot recover from any defendant whose percentage of fault is less than the plaintiff's. *Id.*

A jury also must have the opportunity to consider and apportion the fault of non-parties. *See* CIVSVF 28.91. In *Frey*, this Court held, “[i]n almost every case the trial court should submit to the jury the fault of *all parties*, including the settling defendants, even though they have been dismissed from the lawsuit.” 269 N.W.2d at 923 (emphasis added); *Lines v. Ryan*, 272 N.W.2d 896, 902-903 (Minn. 1978) (“[A] jury must have the opportunity to consider the negligence of all parties to the transaction, whether or not they be parties to the lawsuit . . .”). In this case, the jury should determine the comparative fault of the Installer, Manufacturer, and Farmers, according to the proof at

trial. *Frey*, 269 N.W.2d at 921; *Hart*, 276 N.W.2d at 170. This would achieve the “goal,” as stated by this Court, of always “preserv[ing] the remaining parties’ right to a fair trial under the circumstances.” *Frey*, 269 N.W.2d. at 922. And instructing the jury to allocate fault among the Installer, Manufacturer, and Farmers is consistent not only with *Frey*, where the jury allocated fault to a settled party, but also with *Hart*, where the jury was asked to allocate fault to a party who had been found “not negligent” in an earlier suit.

Therefore, the fault of the Installer should be submitted to the jury so that the jury can properly allocate fault among all parties. Even though the Installer has settled with the Farmers, the Manufacturer has a right to a fair trial, including a full defense regarding the cause of any damage caused by the Cyclone based on the potential fault of the Installer as distinguished from the fault of the Manufacturer, if any.

C. Upon Remand, The Defendant Should Pay No More Than Its Fair Share Of The Damages, If Any Are Awarded

“The essential elements for contribution in a tort action are a common liability of joint tortfeasors to an injured party and the payment by one of the tortfeasors of more than his share of that liability.” *Hart*, 276 N.W.2d at 168 (citing *Bunge v. Yager*, 236 Minn. 245, 252, 52 N.W.2d 446, 450 (1952)). The requirement of common liability is imposed because this Court “believe[s] that only a tortfeasor who is liable for a plaintiff’s loss should be required to contribute to the payment for that loss.” *Id.* at 168-69. “[C]ontribution is an equitable action, and the rules governing its use should promote the fair and just treatment of the parties.” *Id.* at 169.

Here, the Manufacturer has served a third-party complaint against the Installer for contribution and/or indemnity. If the Farmers' settlement agreement with the Installer – which included a stipulation of dismissal with prejudice – operated to extinguish all claims against all tortfeasors, then the Manufacturer's claim is moot. If the Farmers' settlement agreement with the Installer had comported with a *Pierringer* release, then the Farmers would have agreed to indemnify the Installer for the contribution claim by the Manufacturer and the Manufacturer's liability would be limited to the fault allocated to it by the jury – joint liability would not apply. But all parties agree that the Mediated Agreement was not a *Pierringer* release. Because the plaintiffs chose to sue and settle piecemeal, the defendant should not be held jointly liable for the settling party's fault, if any.

In this case, the Farmers elected to sue for damages allegedly caused by the Cyclone in successive suits; first, against the Installer in a counterclaim, and then, against the Manufacturer in this action. This Court has held that, when a plaintiff “elects to sue [defendants] piecemeal, it is he who should bear any risk imposed by using that procedure.” *Hart*, 276 N.W.2d at 169. One risk created by piecemeal litigation is that successive suits will impose an unjust burden by eliminating the non-settling defendant's right to contribution if it subsequently it pays more than its fair share. *Id.* In this case, if the Farmers discharged all claims against the Installer but not against the Manufacturer, and the Manufacturer's claim for contribution is defeated by the prior settlement and stipulation for dismissal, then there is a substantial risk the Manufacturer will pay more than its fair share upon trial of the Farmers' claim.

This Court has grappled with this equitable dilemma in prior decisions. In *Hart*, this Court decided that the manufacturer was only severally liable for its own fault.³ Similarly, under a *Pierringer* agreement, this Court approved the device in part because a plaintiff releases “the settling defendants as to their portion of the total causal negligence which might be found at trial and further agree[s] to indemnify the settling defendants from any liability which they might have to [future defendants] for contribution or indemnity . . .” *Frey*, 269 N.W.2d at 920-21. “The effect of a *Pierringer* release is to limit each joint tortfeasor to liability only for that part of the award which is his percentage of causal negligence.” *Schneider v. Buckman*, 433 N.W.2d 98, 101 n.4 (Minn. 1988) (citing *Frey*, 269 N.W.2d at 922).

The facts and this Court’s analysis in *Hart* are instructive. Hart’s husband died in a plane crash, and Hart first brought a wrongful death action against the plane’s pilot and owner, Vogt. 276 N.W.2d at 167-68. At trial, the jury determined that Vogt was not negligent. *Id.* at 168. Later, Hart brought an action against Cessna, the manufacturer of the plane. *Id.* Cessna served a third-party complaint on Vogt, alleging indemnity or contribution. *Id.* Vogt argued that the first lawsuit established that he was not liable to Hart “and that, therefore, he could not be liable to Cessna for indemnity or contribution.” *Id.* The district court agreed with Vogt, granted summary judgment, then Cessna appealed. *Id.*

³ Hart adds the caveat so long as plaintiff “is less than 50 percent negligent.” 275 N.W.2d at 170. Since *Hart* was decided, Minn. Stat. § 604.01, subd. 1, has been revised to allow a plaintiff to recover so long as its fault is not greater than that of any defendant and joint liability applies only where a defendant’s fault is greater than 50 percent.

This Court created an “equitable solution” and held that Cessna could not sue Vogt “because Vogt has already been sued and held not liable to this same plaintiff” *Id.* at 169. “[B]ut we do not want the second defendant, Cessna, to bear the entire burden of the plaintiff’s loss if he can show that Vogt’s negligence contributed to that loss.” *Id.* The Court reasoned that while the plaintiff has the “right to control his own lawsuit to sue or not to sue whomever he chooses,” the plaintiff should “bear any risk imposed” by piecemeal litigation. *Id.*

Upon remand for trial, this Court held that Cessna could present all potential defenses, “including the claim that the injury was caused by Vogt’s negligence” and “Vogt may be required to appear as a witness in the second lawsuit.” *Id.* at 169. But, “Vogt shall not be liable to plaintiff or to Cessna.” *Id.* “Cessna will be liable to plaintiff for only that portion of the negligence attributable to it.” *Id.* at 170. This Court declined to enforce joint liability.

In the case at hand, this Court is considering a similar equitable dilemma based on plaintiffs’ strategic decision to sue two defendants piecemeal. The second defendant – the Manufacturer – should not bear any potential risk created by the Farmers’ decision to successively sue and settle. Although the Farmers were fully aware of the Manufacturer’s identity, they did not join the Manufacturer in the first litigation. Instead, the Farmers chose to settle with the Installer without a *Pierringer* release and executed a mutual stipulation for dismissal with prejudice. Because this stipulation allows for entry of judgment in favor of the Installer on the merits, it puts these parties in the same position as the parties in *Hart*. The Installer, like the pilot/owner, has the benefit of a

settlement, including a judgment on the merits, and the Manufacturer, like Cessna, should be held liable to pay no more than its fair share of any subsequent judgment.

Just as it did in *Hart*, this Court should decline to enforce joint liability against the remaining tortfeasor because the risk of piecemeal litigation should not impose an unjust burden on a non-party. For instance, if, upon remand, the jury found that the Farmers suffered \$100,000 in damages and were 0% at fault, while Manufacturer was 60% at fault, and Installer was 40% at fault, the trial court should direct entry of a \$60,000 judgment against the Manufacturer. Joint liability should not be permitted in this situation in light of the Farmers' decision to proceed piecemeal. The Manufacturer, as a non-party to the first lawsuit, should not pay more than its fair share of the Farmers' damages.

CONCLUSION

The MDLA urges the Court to reverse the court of appeals and hold that the Farmers discharged *all* claims arising from their use of the Cyclone when it settled with the Installer and stipulated to dismissal of all claims with prejudice. The reasons for reversal are fully set forth in the Appellant's Brief. On the other hand, if this Court affirms the court of appeals in whole or in part, then this Court should address any ambiguities that exist in the common law in order to clarify the effect of a plaintiff's decision to successively sue and settle with joint tortfeasors in the absence of a *Pierringer* agreement. To help these parties reach a final resolution in this matter, the Court's opinion should guide the parties and the trial court on the consequences arising from any remand for trial. Specifically, the jury should allocate fault among all parties and non-

parties, according to the proof at trial. Additionally, this Court should ensure that the defendant pay no more than its fair share if damages if any are awarded to the plaintiffs. The Manufacturer should only be required to pay damages in accordance with the percentage of fault returned against it by the jury with no joint liability for the Installer's fault.

Respectfully submitted,

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Dated: July 6, 2009.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Amicus Curae Minnesota Defense Lawyers Association, certifies that this brief complies with the requirements of Minn. R. App. P. 132.01 in that it is printed in 13 point, proportionately spaced typeface utilizing Microsoft Word 2003 and contains 4,993 words, including headings, footnotes and quotations.

Dated: July 6, 2009.

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