

CASE NO. A08-583

**STATE OF MINNESOTA
IN SUPREME COURT**

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

vs.

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

vs.

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

**BRIEF OF AMICUS CURIAE
MINNESOTA ASSOCIATION FOR JUSTICE**

WILL MAHLER LAW FIRM
William D. Mahler (#66539)
202 Ironwood Square
300 Third Avenue SE
Rochester, MN 55904
(507) 282-7070*Attorneys for Respondents Virgil and
Connie Dykes d/b/a Dykes Farms*BIRD, JACOBSEN & STEVENS, P.C.
Charles A. Bird (#8345)
305 Ironwood Square
300 Third Avenue SE
Rochester, MN 55904
(507) 282-1503*Attorneys for Amicus Curiae
Minnesota Association for Justice*ERSTAD & RIEMER, P.A.
Patrick D. Reilly (#90451)
Leon R. Erstad (#27534)
200 Riverview Office Tower
8009 34th Avenue South
Minneapolis, MN 55425
(952) 896-3700*Attorneys for Appellant Sukup
Manufacturing Company*VOGEL LAW FIRM
Robert Manly (#0289681)
215 30th Street North
P.O. Box 1077
Moorhead, MN 56561
(218) 236-6462*Attorneys for Respondent
Superior, Inc.**(Additional counsel listed on next page)*

BRIGGS AND MORGAN, P.A.
Diane B. Bratvold (#18696X)
Jessica J. Stomski (#0388973)
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 977-8400

*Attorneys for Amicus Curiae
Minnesota Defense Lawyers Association*

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INTRODUCTION

Minnesota Association for Justice (MAJ) submits this Amicus Curiae brief on two issues: (1) Whether the mediated settlement agreement (coupled with the dismissal or not) is a complete release of all claims against all parties for full consideration, and (2) Whether a release that does not incorporate a provision indemnifying the settling tortfeasor from claims for contribution operates to either partially or wholly release a non-settling tortfeasor.¹ The answer to both questions is “No.” The starting point in the analysis is Gronquist v. Olson, 242 Minn. 119, 64 N.W.2d 159 (1954), which overturned the longstanding legal maxim that “release of one tortfeasor releases them all.” The rule laid out in Gronquist and its progeny dictates the result in this case.

Contrary to the arguments of the Appellant and Minnesota Defense Lawyers Association (MDLA), subsequent case law has not changed the result dictated by Gronquist. The settling tortfeasor (Superior) neither bargained for nor obtained indemnification from future contribution cross-claims by joint tortfeasors arising out of the present litigation – a so-called Pierringer release. As a result, Respondent Dykes does not stand to gain double recovery, the non-settling tortfeasor’s (Appellant Sukup’s) legal position is unaffected, and Appellant is not prejudiced.

The party with the financial incentive to obtain indemnification, the settling tortfeasor, should logically suffer the consequences of failing to include such a provision

¹ Pursuant to Minn. R. Civ. App. Prac. 129.03, neither MAJ nor the writer of this brief has received or been promised any monetary or other compensation in regard to this case. Neither MAJ nor the writer of this brief have any financial stake in the outcome of this case. No one affiliated with a party has participated in writing any part of this brief.

in the release. Those consequences include being required to defend and pay lawful claims for contribution from other tortfeasors. Appellant is legally entitled to, and has pursued a cross-claim against the settling tortfeasor, and can recover from the settling tortfeasor under the statute (Minn. Stat. §604.02, subd. 1 (2002)) for any share of damages that may be allocated to it by virtue of joint and several liability. There is no inequity for this Court to fix.

ARGUMENT

1. The mediated settlement agreement is not a complete release of liability for all claims, whether or not coupled with the stipulation of dismissal, nor does it provide full consideration for damages claimed.

In Gronquist, this Court overturned the longstanding rule that release of one joint tortfeasor automatically releases the others. In its place the Court adopted the following rule:

We believe that the factors determinative of whether a release of one of several joint tort-feasors 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 tort-feasor 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.

Id., 242 Minn. at 129, 64 N.W.2d at 166.

Bixler by Bixler v. J. C. Penney Co., Inc., 376 N.W.2d 209, 215-15 (Minn. 1985) states the rule that has applied since Gronquist was decided. “[T]he release of one alleged tortfeasor will release all others *if* the settlement agreement manifests such an

intent, or *if* the plaintiff received full compensation in law or in fact for damages sought against the remaining tortfeasors.”), citing Luxenburg v. Can-Tex Industries, 257 N.W.2d 804, 807-08 (Minn. 1977) (italics added). And, just as important in the context of the summary judgment standard of review, the (1) intent of the parties as to whether the release is full and final and (2) the question of whether full compensation was paid are questions of fact for the jury. Couillard v. Charles T. Miller Hosp., 253 Minn. 418, 428, 92 N.W.2d 96, 103 (1958).

The “Mediated Agreement” in this case provided that the parties to the previous lawsuit reached an agreement “relating to all of the issues growing out of the above noted lawsuit.” AA-81. In summary, the mediated agreement provided in the four numbered paragraphs:

- 1) Superior would remove the equipment and replace original equipment;
- 2) Superior would remove a separate 13-inch auger and the Dykes would make sure the electricity was disconnected;
- 3) “Superior, Inc. will remove its lien it placed upon this property and dismiss its complaint and Virgil L. Dykes and Constance E. Dykes will dismiss their answer and counter complaint.”;
- 4) Superior would return two un-cashed checks.

Id

No monetary payments were required or made. There was no mention of release of any party. Indeed, the word “release” is not present in the agreement. Specifically,

there was no mention of either indemnifying or releasing other claims or other tortfeasors. There was no separate release document signed by the parties, except the release of the mechanics lien, signed only by Superior, the settling tortfeasor. AA-86. By its terms, the mediated agreement only related to “the issues growing out of the above noted lawsuit.” There was no statement in the mediated agreement that full compensation was received. There was no statement that the release was either “absolute” or “unqualified.” Appellant was not mentioned in the mediated agreement. After the parties performed according to the mediated agreement, the entire case was dismissed with prejudice and without costs to either party. AA-84.²

Because the mediated agreement is silent on the issue of whether it was intended as a complete release of all claims against all tortfeasors, as a matter of law it does not, without more evidence, suffice to release other tortfeasors. Gronquist, Bixler, Luxenburg, *supra*. Parol evidence may help to determine the “intent of the parties” but that would be a jury question, precluding summary judgment. Couillard v. Charles T. Miller Hosp., 253 Minn. at 428, 92 N.W.2d at 103 (holding that parol evidence is allowable to both interpret and contradict terms of a release and that intent of the parties is a fact question for the jury).

² The claim against Respondent Superior was based upon defective installation, whereas the claim against Appellant Sukup is based upon design defect. The facts may thus involve lack of common liability, an alternative reason to affirm the Court of Appeals. For purposes of this brief, MAJ assumes that there is both common liability and common damages.

Adding the stipulation of dismissal and dismissal with prejudice into the mix does nothing to change the analysis or result. Every settlement of a lawsuit necessarily involves a dismissal and most are with prejudice and without costs to either party. The result of this is claim preclusion between the parties or *res judicata*. The doctrine of *res judicata* prevents only re-litigation of claims between parties or their privies. Beutz v. A.O. Smith Harvestore Prods., Inc., 431 N.W.2d 528, 533 (Minn. 1988), rev'd in part on other grounds, 748 N.W.2d 608 (Minn. 2008) ("privity requires a person so identified in interest with another that he represents the same legal right"); Margo-Kraft Distributors, Inc. v. Minneapolis Gas. Co., 294 Minn, 274, 278, 200 N.W.2d 45 47-48 (Minn. 1972) (privity includes (1) those who control an action though not parties to it, (2) those whose interests are represented by a party to an action, (3) successors in interest to those having derivative claims, citing Restatement, Judgments, §83). Appellant does not represent the "same legal right" as Superior, nor do any of the definitions in Margo-Kraft apply. Consequently, the dismissal with prejudice does not bar any claims against Appellant.

This result makes sense because it is the settling tortfeasor who is benefited by an indemnification agreement. Conversely, why would a tort victim ever have incentive to limit his own future damages by giving indemnification protection to the party that injured him? By putting the onus for including such an agreement on the settling tortfeasor, the court would prevent unwitting plaintiffs from giving away lawful claims for damages without consideration. Conversely, the settling tortfeasor would reasonably and fairly be limited to the bargain it makes with the victim.

A corollary to this rule in the context of later litigation between the settling and non-settling tortfeasors is case-law holding that a settling tortfeasor can only pursue a contribution action against a non-settling tortfeasor if the settlement extinguished the liability of the non-settling tortfeasor. Reserve Ins. Co. v. Village of Big Lake, 304 Minn. 148, 153, 230 N.W.2d 47, 50 (1975), citing Milbank Mutual Ins. Co. v. Village of Rose Creek, 225 N.W.2d 6, 7 (Minn. 1974) (“The right to seek contribution is not equivalent to the right to recover contribution. The right to recover contribution is equitably limited by the extent to which the settling tortfeasor has relieved the other tortfeasor of its potential liability”); Neussmeier Elec., Inc. v. Weiss Mfg. Co., 632 N.W.2d 248, 253-54 (Minn. Ct. App. 2001) (citing Gronquist and holding that contribution barred when settlement agreement did not relieve settling tortfeasor of potential liability, and discussing difference between lack of common liability and lack of common damages). In order to pursue such litigation, the settling tortfeasor must have removed the threat that the tort victim might later proceed directly against the non-settling tortfeasor. Reserve Ins. Co., 304 Minn. at 153-54, 230 N.W.2d at 50. Again, the onus should be on the settling tortfeasor to obtain a release that removes all doubt and addresses both the issue of whether other parties are released and whether damages paid represents full compensation. Without such statements in the releasing document, fact questions exist, precluding summary judgment. Couillard v. Charles T. Miller Hosp., *supra*.

The summary judgment record indicates that the parties differed as to the value of the claim, i.e., what constituted “full compensation,” the second part of the Gronquist rule. Gronquist, 242 Minn. at 128, 64 N.W.2d at 165. The trial court in this case noted that the parties were over \$2 million apart on what constituted full compensation. There is no statement in the mediated agreement that the consideration represented full compensation. Affidavits from Respondent Dykes and his prior attorney are admissible parol evidence. Couillard, supra. The Court of Appeals properly held that a fact question existed in this case on the issue of whether the Dykes Respondents were fully compensated, precluding summary judgment on this issue. Dykes v. Superior, Inc., 761 N.W.2d 892, 896 (Minn. Ct App. 2009).

2. Because the settling tortfeasor neither bargained for nor obtained an agreement to indemnify on future cross-claims from joint tortfeasors, non-settling tortfeasors, such as Appellant, are not entitled to either dismissal or to offset damages allocated to the settling tortfeasor.

The reason the courts are concerned about partial settlements in the context of multi-defendant litigation is related to potential double recovery and how, in equity, the trial court can fashion a remedy for any prejudice to other parties that might be caused by a partial settlement. Luxenburg v. Can-Tex Industries, 257 N.W.2d 804, 807 (Minn. 1977). Thus, if there is no concern about double recovery or other prejudice to non-settling defendants, equity should not intervene. Hart v. Cessna Aircraft Co., 276 N.W.2d 166, 169 (Minn. 1979) (“contribution is an equitable action, and the rules governing its use should promote the fair and just treatment of the parties”). Under the

facts of this case, there can be no double recovery and there is no prejudice to Appellant Sukup.

Say, for example, the victim in this case (Dykes) recovers \$1 million against Appellant Sukup and the jury apportions the fault 100% to Sukup. There is no double recovery. Say, alternatively, the jury apportions fault 10% to Sukup and 90% to Superior. By operation of the statute (Minn. Stat. §604.02³), Sukup's liability is limited to 40%. By operation of the statute and the law on contribution, Appellant Sukup would be jointly and severally liable for up to 4 times its fault (40%), but could then recover on its cross-claim against Superior for any share it was required to pay over the 10%. Again, there is no double recovery and no prejudice to Sukup. Say, alternatively, the jury apportions 60% of the fault to Sukup and 40% to Superior. By operation of the statute and the law on contribution, Sukup would be jointly and severally liable for the whole verdict, but would be able to recover 40% from Superior based upon its cross-claim for contribution. Again, there is no prejudice and no double recovery.

A non-settling tortfeasor cannot obtain a greater release than the settling tortfeasor obtained. In this case, the mediated agreement and subsequent dismissal with prejudice prevents future claims by the Respondent Dykes against Respondent Superior, but does

³ Minn. Stat. §604.02 was amended in 2003. The comparative fault statute as it would be applicable to this case (the operative facts of which arose before the amendment) reads in relevant part: "When two or more persons are jointly liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that each is jointly and severally liable for the whole award. . . a person whose fault is 15 percent or less is liable for a percentage of the whole award no greater than four times the percentage of fault, including any amount reallocated to that person under subdivision 2."

not state that the settling tortfeasor is protected from claims for contribution that might be brought by joint tortfeasors, such as Appellant Sukup, who were not released.

Appellant argues that, even though the settling tortfeasor did not bargain for or obtain an indemnification with respect to claims for contribution (a so-called Pierringer⁴ release), it should nevertheless be allowed one. This unreasonable position would give the settling tortfeasor something not part of the original agreement. The settling victim has no incentive or reason to want to indemnify the settling tortfeasor with respect to future cross-claims that might be made by other joint tortfeasors. The whole purpose of such an indemnification agreement (Pierringer release) is for the benefit of the *settling tortfeasor* – to give the settling tortfeasor a complete release, including protecting the settling tortfeasor from claims that might be made by non-settling tortfeasors.

The method that has been approved by this Court to effectuate such an indemnification agreement was set out in Frey v. Snelgrove, 269 N.W.2d 918, 923 (Minn. 1978):

⁴ Reference to Pierringer v. Hoyer, 21 Wis. 2d 182, 124 N.W.2d 106 (1963). This court discussed the effect of Pierringer releases in Gusk v. Farm Bureau Ins. Co., 559 N.W.2d 421, 424 (Minn. 1997): “It is true that a Pierringer release relieves a settling defendant in a multiple tortfeasor situation from incurring additional liability, [citing Frey]; the remaining defendants in such cases are not entitled to any credit or offset based on the settlement proceeds received by the plaintiff, Rambaum v. Swisher, 435 N.W.2d 19, 22-23 (Minn. 1989) (relying on the intent of the parties, the concern that tortfeasors should pay their fair share, and the law's policy of encouraging settlements); and, in general, nonsettling tortfeasors are not allowed to object to the amount a settling tortfeasor pays for a release, State Farm Ins. Co. v. Galloway, 373 N.W.2d 301, 305 (Minn. 1985).” Obtaining a Pierringer release thus ensures that the non-settling tortfeasor is only responsible for its fair share of the verdict. Frey v. Snelgrove, 269 N.W.2d 918, 922 (Minn. 1978).

When a settlement or release is entered into, the trial court and other parties should be immediately notified, and the terms of the agreement made a part of the record. If the plaintiff has agreed to indemnify the settling defendant against all possible cross-claims of the nonsettling parties, the trial court should ordinarily dismiss the settling defendant from the case, in accordance with the Pierringer release. Since the settling defendant has fixed his limits of financial liability to the plaintiff by entering into the release, he is deemed also to have relinquished any cross-claims against the remaining defendants.

On the other hand, if a nonsettling party has cross-claims for both contribution and indemnity, either of which is not covered by the terms of the release, then the settling defendant should continue as a party for the limited purpose of defending against the surviving cross-claim (Italics added.)

In the case at bar, all agree that the non-settling party (Appellant Sukup) has extant claims for contribution which are not covered by the terms of the mediated agreement. In such a case, the settling defendant (Respondent Superior) remains as a party for the limited purpose of defending against the cross-claim.

Strangely, MDLA advocates a rule that "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." MDLA br. at 14. The factual basis for this rule, presumably based in some perceived inequity, is not stated, but MDLA relies upon Hart v. Cessna Aircraft Co., 276 N.W.2d 166, 167-69 (Minn. 1979) for this proposition.

Hart does not support the rule that MDLA advocates. Instead, the result should be dictated by the equities, that is, whether the Dykes stand to obtain a double recovery or whether Appellant Sukup has been in any way prejudiced by the mediated agreement. That agreement, coupled with the dismissal with prejudice, prevents the victim from making further claims against the settling tortfeasor, but does not disturb the non-settling

tortfeasor's rights to claim contribution from the settling tortfeasor. The Court of Appeals in this case mandated precisely the result dictated by Frey in the above-quoted italicized language.

Hart is easily distinguishable. In Hart, there was a prior *jury verdict* establishing the damages and extent of liability of one tortfeasor. Hart, 276 N.W. 2d at 168. There was no release to consider or interpret. In such a situation, where a defendant has been adjudicated as having no liability and gone through the time and expense of trial, this Court felt there was no "common liability" (Id.) and that the equities were best served by protecting the other defendants from having to pay any portion of a subsequent verdict that is attributed to the defendant whose fault was adjudicated. Id. at 169 (discussing possible inequity of Vigen-Sptzak rule and concluding that defendant in second trial would be relieved of any liability second jury apportioned to third-party defendant that had been previously adjudicated to not be at fault).

Thus, Hart created a special rule for special circumstances: Where there is a prior jury verdict exonerating a single defendant from liability, the law equitably will not permit such a defendant from again having to undergo the expense and time of another trial, and will limit both the first defendant's liability *and* the liability of the other defendants to the extent that the second jury apportions any fault to the defendant who was exonerated in the first case.

Here, neither the settling tortfeasor nor the non-settling tortfeasor are prejudiced and no equities favor a new rule limiting claims for contribution by Appellant Sukup

against Respondent Superior. Respondent Superior had the option to seek an indemnification agreement. It had the financial incentive to do so. It is equitable that the burden of obtaining a Pierringer release should be on the party who benefits from it. Having failed to obtain a Pierringer release, Respondent Superior cannot complain that it is now being subjected to claims for contribution and that it may have to pay on Appellant Sukup's claim for contribution.

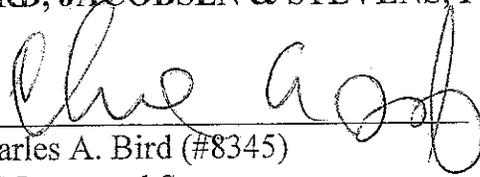
By the same token, Appellant Sukup cannot complain. Appellant is equitably entitled to no better deal than was bargained for by the settling tortfeasor. Appellant's claim for contribution is entirely preserved. On remand, the jury will be required to apportion fault to the settling tortfeasor, and Respondent Superior will be required to pay valid claims of Appellant for contribution according to that verdict. Appellant has made a cross-claim that will, by operation of Minn. Stat. §604.02, subd. 1 (2003), protect it from ever having to pay more than its "fair share" of any verdict.

CONCLUSION

The Court of Appeals should be affirmed. Where the settling tortfeasor does not obtain an indemnification agreement regarding claims for contribution from other joint tortfeasors, then claims for contribution are preserved and can be determined and paid in subsequent litigation. No prejudice results to non-settling tortfeasors and equity does not need to intervene.

Dated: August 3, 2008

BIRD, JACOBSEN & STEVENS, P.C.

A handwritten signature in cursive script, appearing to read "Charles A. Bird", written over a horizontal line.

Charles A. Bird (#8345)
305 Ironwood Square
300 Third Avenue SE
Rochester, MN 55904
(507) 282-1503

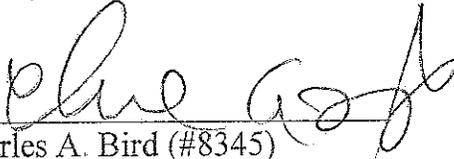
*Attorneys for Amicus Curiae
Minnesota Association for Justice*

CERTIFICATE OF COMPLIANCE

The undersigned counsel for amicus curiae Minnesota Association for Justice certifies that this brief complies with the requirements of Minn. R. Civ. P. 132.01, subd. 3(a)(1) in that it is printed in a 13 point, proportionately spaced typeface, and contains 3452 words, excluding the Table of Contents and Table of Authorities. The brief was prepared using Microsoft Word 2007.

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BIRD, JACOBSEN & STEVENS, P.C.


Charles A. Bird (#8345)
305 Ironwood Square
300 Third Avenue SE
Rochester, MN 55904
(507) 282-1503

*Attorneys for Amicus Curiae
Minnesota Association for Justice*