

NO. A08-583

State of Minnesota
 In Supreme Court

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

Respondents,

v.

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

v.

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

APPELLANT'S REPLY BRIEF

William D. Mahler (#66539)
 WILL MAHLER LAW FIRM
 202 Ironwood Square
 300 Third Avenue S.E.
 Rochester, MN 55904
 (507) 282-7070

*Attorney for Respondents Virgil and Connie
 Dykes d/b/a Dykes Farms*

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

*Attorneys for Amicus Curiae
 Minnesota Defense Lawyers Association*

(Additional Amicus counsel on following page)

Patrick D. Reilly (#90451)
 Leon R. Erstad (#27534)
 ERSTAD & RIEMER, P.A.
 200 Riverview Office Tower
 8009 – 34th Avenue South
 Minneapolis, MN 55425
 (952) 896-3700

*Attorneys for Appellant
 Sukup Manufacturing Company*

Robert Manly (#0289681)
 VOGEL LAW FIRM
 215 – 30th Street North
 P.O. Box 1077
 Moorhead, MN 56561
 (218) 236-6462

Attorney for Respondent Superior, Inc.

Charles A. Bird (#8345)
BIRD, JACOBSEN & STEVENS, P.C.
300 Third Avenue S.E., Suite 305
Rochester, MN 55904
(507) 282-1503

Attorneys for Amicus Curiae
Minnesota Association for Justice

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

 I. THE COURT OF APPEALS ERRED WHEN IT CREATED
 A PARTIAL RELEASE THAT WAS NEITHER A PIERRINGER
 RELEASE NOR A COMPLETE RELEASE. 3

 II. PUBLIC POLICY IS BEST SERVED BY PERMITTING
 PARTIAL SETTLEMENTS THROUGH *PIERRINGER*
 RELEASES RATHER THAN THROUGH PRO TANTO
 SETTLEMENTS 4

 A. *Pierringer* releases adequately defend the
 interests of settling parties. 4

 B. Classifying release agreements as *pro tanto*
 satisfactions would create unnecessary confusion 6

 III. INTERPRETING A MEDIATED SETTLEMENT
 AGREEMENT AS A PRO TANTO SETTLEMENT
 PRODUCES AN UNJUST RESULT 7

 IV. THE SECONDARY EFFECTS OF PRO TANTO
 SETTLEMENTS WOULD INCREASE LITIGATION 9

CONCLUSION 10

TABLE OF AUTHORITIES

Cases:

Couillard v. Charles T. Miller Hospital, 253 Minn. 418, 427,
92 N.W.2d 96, 102 (Minn. 1958) 3, 4

Frye v. Snelgrove, 269 N.W.2d 918 (Minn. 1978) 1,3, 4, 5

Goldberger v. Kaplan, Strangis & Kaplan, P.A., 534 N.W.2d 734
(Minn. Ct. App. 1995). 4

Gronquist v. Olson, 242 Minn. 119, 64 N.W.2d 159 (1954) 1, 3, 4, 5, 8

Johnson v. Brown, 401 N.W. 2d 85, (Minn. Ct. App. 1987) 6

Pierringer v. Hoger, 21 Wis.2d 182, 124 N.W.2d 106 (Wis. 1963) *passim*

Sorensen v. Coast-to-Coast Stores (Central Org.), Inc., 353 N.W.2d 666
(Minn. Ct. App. 1978) 5

Statutes and Rules

Minn. R. Civ. P. 60.02. 5, 8

Secondary Sources

John E. Simonett, *Release of Joint Tortfeasors: Use of the Pierringer Release
in Minnesota*, 3 Wm. Mitchell L. Rev. 1, 3 (1977) 5, 6

Peter B. Knapp, *Keeping the Pierringer Promise: Fair Settlements and Fair Trials*,
20 Wm. Mitchell L. Rev. 1, 5 (1994) 7, 9

ARGUMENT

The Court of Appeals overreached when it sought to apply concepts from *Gronquist* to declare that a settlement was a partial release when the settlement did not reserve claims or recited less than full compensation. Instead of recognizing the legal effect of a complete release of claims, the Court concluded that the Respondent should be permitted to relitigate claims that it settled with the settlement agreement. The Court of Appeals' interpretation of the settlement agreement as a pro tanto satisfaction does not serve either plaintiffs or defendants. It gives no effect to the intent of the parties to settle claims efficiently. The protections of the *Pierringer* release are well established in Minnesota law. The Court of Appeals' creation of a release that is neither a *Pierringer* release nor a complete release serves no valid public policy.

Since Respondent has admitted, and the Court of Appeals found, that the release in this case was not a *Pierringer* release, then the Court of Appeals created a release that operates as a pro tanto settlement. The Court of Appeals did not properly analyze the consequences of permitting pro tanto settlements for joint tortfeasors to replace the well-established role of *Pierringer* releases under Minnesota law as adopted in *Frye v. Snelgrove*, 269 N.W.2d 918 (Minn. 1978). The court in *Frey*, in adopting an exception to the general rule that a release of one joint tortfeasor releases all, acknowledged the validity of the general rule, more than 20 years after *Gronquist* was decided. *Id.* at 921. The Court of Appeals' decision undercuts the general rule of *Frye* and opens the door to relitigation of lawsuits from plaintiffs claiming they were undercompensated.

The use of pro tanto settlements would serve only to create unnecessary confusion between settling parties and would destroy the finality of releases. This would increase uncertainty in cases that have an adequate remedy under current *Pierringer* law.

The current case is a prime example of how cases may take on new life after all parties to the action believed the claim had terminated in the release and stipulation for dismissal, to which Respondent Virgil Dykes and Connie Dykes (“the Dykes”) had agreed. The Dykes now argue that questions exist regarding their compensation. However, as was the trial court’s determination, none of these questions were present at the time of the settlement. (Appellant’s Addendum - 08) Permitting the Dykes to make new claims for damages based on present intent would set a disturbing precedent that would allow any plaintiff to circumvent release agreements by simply alleging he or she was silent but dissatisfied with the compensation received pursuant to the release agreement.

Finally, the Court of Appeals did not properly address the consequences of pro tanto settlements among joint tortfeasors. The promotion of pro tanto settlements as an alternative to the established protections of *Pierringer* releases would increase the risks of settlement and therefore discourage parties from settling claims before trial.

Rather than interpreting release agreements as pro tanto settlements, the Court should reaffirm the well established rule of *Pierringer* releases and hold that the Dykes relinquished all claims under the original settlement agreement.

I. THE COURT OF APPEALS ERRED WHEN IT CREATED A PARTIAL RELEASE THAT WAS NEITHER A *PIERRINGER* RELEASE NOR A COMPLETE RELEASE.

The Court of Appeals' decision in this case effectively diminishes the operation of general releases and *Pierringer* releases. The court's ruling that the October 2003 mediated settlement agreement was not a complete release makes the release either a modified *Pierringer* release or a satisfaction pro tanto. (Appellant's Addendum - 014) The Court of Appeals simply remanded the case without any direction on the legal consequences of the settlement. The Respondents argue that on remand the matter be tried as though there had been no release. (Respondent Dykes' Brief - 24-25; Amicus MAJ - 8). The Court of Appeals' vague reversal and remand confuses well established legal principles of partial and complete releases.

This approach misconstrues *Gronquist*, *Couillard*, and *Frye*. The nature of the settlement in *Gronquist* was that it limited the plaintiff's recovery to full compensation when both settling parties intended to preserve claims against a non-settling party. *Gronquist v. Olson*, 242 Minn. 119, 64 N.W.2d 159 (1954). In *Couillard*, the court ruled that a release was to be binding "with respect to claims for injuries actually within the contemplation of the parties to the release." *Couillard v. Charles T. Miller Hospital*, 253 Minn. 418, 427, 92 N.W.2d 96, 102 (Minn. 1958). Therefore, *Gronquist* and *Couillard* do not alter the principle that a release which does not preserve claims extinguishes the plaintiff's cause of action. This rule was at the heart of the court's adoption of the form of the *Pierringer* release in *Frye*; that parties could preserve claims against non-settling joint

tortfeasors while reaching a partial settlement with others. *Frye*, 269 N.W.2d at 921.

Here, the Dykes entered into a release agreement and stipulated to the dismissal of their claim without expressing any intention to preserve claims or stating they had not received full compensation. Under the principles of *Gronquist*, *Couillard*, and *Frye*, the Court should not construe the Dykes' agreement with Superior to be anything less than a release of claims against all joint tortfeasors.

II. PUBLIC POLICY IS BEST SERVED BY PERMITTING PARTIAL SETTLEMENTS THROUGH *PIERRINGER* RELEASES RATHER THAN THROUGH PRO TANTO SETTLEMENTS.

A. *Pierringer* releases adequately defend the interests of settling parties.

The courts have expended a great deal of energy to determine what the effect of the mediated settlement agreement and stipulation for dismissal was in this case. The Dykes request the adjudication of a fact dispute which they first asserted years after the settlement. The courts have been reluctant to extend to one litigant the power to unilaterally attack a release when at the time of the release there was no indication of it being a partial release. *Goldberger v. Kaplan, Strangis & Kaplan, P.A.*, 534 N.W.2d 734, 737 (Minn. Ct. App. 1995). To do so opens up an unlimited opportunity for abuse of the settlement and invites extensive and long-lasting litigation. Neither the case law nor the rules of procedure have contemplated such power being placed in the hands of one party. "Appellants must come forward with evidence that there was a mutual mistake regarding the intended scope of the releases or that respondents induced the mistake in some way." *Id.*

(citing *Sorensen v. Coast-to-Coast Stores (Central Org.), Inc.*, 353 N.W.2d 666, 669 (Minn.Ct.App. 1984)). Even when it is alleged that there is fraud or mutual mistake that should void a settlement, the law limits the time for action to one year. Minn. R. Civ. P. 60.02.

This Court has approved a method for litigants to partially settle a lawsuit. The *Pierringer* release is a proven and accepted method of achieving such a result. The *Pierringer* release is designed under legal principles to achieve the following objectives: to discharge a part of the cause of the action equal to the part attributable to the settling defendant's causal negligence; to reserve the plaintiff's additional causes of action against non-settling defendants; and to indemnify the settling defendant from contribution claims from non-settling defendants. *Frye*, 269 N.W.2d at 920, n.1; see also John E. Simonett, *Release of Joint Tortfeasors: Use of the Pierringer Release in Minnesota*, 3 Wm. Mitchell L. Rev. 1, 3 (1977). It provides a natural advantage to the civil plaintiff because the plaintiff controls the direction of litigation; a plaintiff knows the opposite party he or she intends to sue and when to begin the suit. The *Pierringer* release satisfies the *Gronquist* analysis regarding the intent of the parties and adequacy of compensation because a *Pierringer* release contemplates that the plaintiff is receiving less than full compensation for the plaintiff's claims. While the plaintiff may ultimately receive less than full compensation, the choice is made by the plaintiff. Of course, it is also possible that the plaintiff could receive more than full compensation. The plaintiff however, does knowingly take the risk.

A *Pierringer* release renders superfluous the question of whether the plaintiff intends to reserve claims. Because of its effectiveness, it is the accepted tool in achieving partial settlements. Both plaintiff and defense attorneys, as well as mediators, are already familiar with its mechanism and operation. The *Pierringer* release has the advantage of clarity and simplicity and has a well-established history in this state.

B. Classifying release agreements as pro tanto satisfactions would create unnecessary confusion.

The Respondent and Amicus surprisingly assert that upon remand the case should be tried as though there had been no settlement agreement of any kind with Superior. The Court of Appeals appears to suggest through its reference to *Johnson v. Brown* that on remand the settlement agreement should be construed as a pro tanto settlement. The contrast between the clarity of *Pierringer* releases and the uncertainty of the Court of Appeals' decision is stark.

Pro tanto settlements only operate to provide an offset from the final total of a damages award. "In other words, the amount paid by the settling joint tortfeasor for his "release" was no more than a dollar-for-dollar credit that he could have asserted against a contribution claim had one arisen. This aspect of the covenant not to sue is its cardinal shortcoming." Simonett, *supra*, at 15. The settlement does not close the claims against the settling defendant because the settling defendant can be subject to additional claims for contribution and/or indemnity. The settling defendant is exposed to continued involvement in a case that was presumed to have reached a definite, fixed termination. Pro tanto

settlements allow plaintiffs to preserve causes of action by omission, and also allow plaintiffs to decline to articulate what their damages are and which parties may be responsible for these damages.

The use of pro tanto settlements encourages plaintiffs to bring claims piece-meal. This results in an inefficient litigation process prone to stops and starts. “Efficiency is critical because we do not have enough judges, courtrooms, or days in the week to try even half of the civil suits filed.” Peter B. Knapp, *Keeping the Pierringer Promise: Fair Settlements and Fair Trials*, 20 Wm. Mitchell L. Rev. 1, 5 (1994). If the Court were to construe release agreements as pro tanto settlements, then parties to litigation would be held hostage to plaintiffs’ subjective interpretation on whether or not they had received full compensation. The consequences of this decision will be that defendants and their insurers will become reluctant to enter into shifting settlements and will prefer to have the finality of a jury verdict. *Id.* at 6-7. This would only increase the number of cases pursued through trial and lead to the unnecessary use of judicial resources. In the long run, neither the plaintiffs, defendants, nor the courts benefit from such a finding by this Court.

III. INTERPRETING A MEDIATED SETTLEMENT AGREEMENT AS A PRO TANTO SETTLEMENT PRODUCES AN UNJUST RESULT.

The Court should reject the Dykes’ argument that they did not receive full compensation because this subjective claim was raised for the first time several years after the settlement agreement. (Appellant’s Appendix - 088) The Dykes’ claim illustrates the public policy risk of defining settlement agreements as merely pro tanto offsets against

future judgments. At the time of the settlement, the Dykes agreed to give up their counterclaim against Superior (which included claims now raised against Sukup) in return for relief from Superior's mechanic's lien. (Appellant's Appendix - 081) No mention was made of any additional losses stemming from the alleged deficiency of Sukup's Cyclone machine. Now, relying on a pro tanto theory, the Dykes claim they are entitled to restart litigation and to bring new claims in order to achieve a measure of compensation that was never at issue at the time of the original settlement.

The time to assert that the settlement should be set aside for fraud, mutual mistake, new evidence, etc. ended long before the Dykes sued Sukup. Minn. R. Civ. P. 60.02. Here, the Dykes' argument is that the mere assertion of lack of full compensation allows the litigation of issues that were never timely raised before.

The Court should reject Respondent's reliance on pro tanto offsets because it places disproportionate importance on a plaintiff's subjective concept of adequate compensation. A relevant factor in *Gronquist* was that the parties had the jury's determination of the sum total of the damages. *Gronquist*, 242 Minn. at 120, 64 N.W.2d at 161. In that case, the plaintiff could not allege he was due further compensation, and the court did not need to consider what the amount of compensation was sufficient to make the plaintiff whole. The Respondents here unilaterally assert, long after settlement, that they did not receive full compensation. The use of pro tanto offsets only encourages a plaintiff to seek additional payments without requiring the plaintiff face the risk of unfavorable percentages of liability as under *Pierringer* releases. Thus, as in the present case, plaintiffs have substantial

incentives to serially litigate claims with increasing demands. Pro tanto settlements are thus insufficient to keep cases focused on a specific cause of action based on a specific set of facts.

To cast the mediated settlement agreement as a pro tanto offset from a future award does not merely give the Dykes a second chance to re-litigate, it prompts any plaintiff to search for new parties, new causes of action, and new damages claims.

IV. THE SECONDARY EFFECTS OF PRO TANTO SETTLEMENTS WOULD INCREASE LITIGATION.

The statewide judicial interest of promoting settlements and reducing litigation is at risk if the Court adopts a broad interpretation of pro tanto settlements because pro tanto settlements would increase litigation. Settlements that reduce a plaintiff's final award without limiting the scope of the claims at issue provide little incentive to defendants to enter into settlement before trial. Under pro tanto theory, a non-settling defendant only has to pay damages if the jury award is higher than the pro tanto set-off. A non-settling defendant may likely choose to gamble with the amount of a jury verdict to try to avoid paying any damages to a plaintiff. Knapp, *supra*, at 9-10.

An additional consequence of advancing the concept of pro tanto settlements is that contribution claims remain unaddressed. Defendants who (unwittingly) enter into a pro tanto settlement with a plaintiff have no protection that their involvement in the lawsuit is finished, even if the plaintiff agrees to dismiss the action. In the present case, a determination that the settlement agreement was a pro tanto satisfaction would put Superior

at risk of being liable to Sukup's contribution claim, and a case that Superior thought it had settled would need to be re-litigated from the beginning. In broader terms, defendants settling under pro tanto offsets have no guarantee that the claim is concluded. Without the certainty that a release completely ends the claim, defendants will lose a major incentive to settle potential liability exposure and instead will choose to continue litigating until the ultimate determination at trial. Where *Pierringer* releases provide finality and certainty to settlements through indemnity provisions, the pro tanto offset only suspends the cause of action against a defendant for an indeterminate period of time, or until the statute of limitations ends a plaintiff's claim. The *Pierringer* release is by far the better method of securing a partial settlement, and the Court should not allow the use of pro tanto offsets to weaken it.

CONCLUSION

For the reasons set forth above, the Court should reverse the Court of Appeals Conclusions and Order and should remand the case to the trial court for dismissal with prejudice.

Respectfully submitted,

ERSTAD & RIEMER, P.A.

Dated: *Aug 6, 2009*

By: 

Patrick D. Reilly, #90451

Leon R. Erstad, #27534

Attorneys for Appellant
Sukup Manufacturing Company
200 Riverview Office Tower
8009 - 34th Avenue South
Minneapolis, MN 55425
(952) 896-3700