

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 RESPONDENT, SUPERIOR, INC.**

---

William D. Mahler, No. 66539  
202 Ironwood Square  
300 3<sup>rd</sup> Avenue Southeast  
Rochester, Minnesota 55904  
Telephone: (507) 282-7070  
*Attorneys for Respondents,  
Virgil and Connie Dykes,  
d/b/a Dykes Farms*

Leon R. Erstad, No. 27534  
Patrick D. Reilly, No. 90451  
8009 34<sup>th</sup> Avenue South, Suite 200  
Minneapolis, Minnesota 55425  
Telephone: (952) 896-3700  
*Attorneys for Appellant,,  
Sukup Manufacturing Co.*

Robert G. Manly, No. 0289681  
215 30<sup>th</sup> Street North  
P.O. Box 1077  
Moorhead, Minnesota 56561-1077  
Telephone: (218) 236-6462  
*Attorneys for Respondent,  
Superior, Inc.*

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities .....	ii
Statement of the Issue .....	1
Statement of the Case and Statement of Facts .....	1
Law and Argument.....	1
I. The Court of Appeals Erred in Holding that the Dykes’ Release of Claims Against Superior Did Not Bar This Subsequent Action.....	1
A. The Mediated Agreement is an Unqualified Release as a Matter of Law .....	3
B. The Appeals Court Failed to Address the Significance of the Dykes’ Dismissal of their Claim Against Superior “With Prejudice.” .....	6
C. The Court of Appeals Erred in Finding Factual Disputes as to “Intent” and “Full Compensation.” .....	7
D. Regardless of Whether the Mediated Agreement Releases Sukup, Superior must be Discharged from this Case Per <i>Hart v. Cessna Aircraft Co.</i> ....	11
Conclusion.....	15

## TABLE OF AUTHORITIES

Page

Statutes:

Minn. Stat. § 604.01 subd. 1 (2008)..... 12

Cases:

*Banbury v. Omnitrition Int'l, Inc.*, 533 N.W.2d 876 (Minn.App.1995)..... 9

*Barilla v. Clapshaw*, 237 N.W.2d 830 (Minn. 1976)..... 5

*Bixler v. J.C.Penney Co., Inc.*, 376 N.W.2d 209 ..... 3

*Butkovich v. O'Leary*, 303 Minn. 535, 225 N.W.2d 847 (1975) ..... 6

*Couillard v. Charles T. Miller Hospital, Inc.*, 92 N.W.2d 96 (Minn. 1958)..... 3, 4, 8, 9, 12

*DLH Inc. v. Russ*, 566 N.W.2d 60 (Minn.1997) ..... 9

*Frey v. Snelgrove*, 269 N.W. 2d at 922 ..... 3, 14

*Goldberger v. Kaplan, Strandgis, Kaplan PA*, 534 N.W.2d 734 (Minn.Ct.App.1995)..... 7

*Gronquist v. Olson*, 64 N.W.2d 159 (Minn. 1954) ..... 1, 3, 4, 8, 11, 14

*Hart v Cessna Aircraft Company*, 276 N.W. 2d 166 (Minn. 1979)..... 1, 11, 13, 14

*Lange v. Schweitzer*, 295 N.W.2d 387 (Minn. 1980)..... 12

*Luxenburg v. Can-Tex Ind.*, 257 N.W. 2d 804 (Minn. 1977) ..... 1, 3, 4, 11, 12

*In re Application of Schaefer*, 287 Minn. 490, 178 N.W.2d 907 (1970) ..... 7

*Snesrud v. Elbers*, 374 N.W. 2d 830 (Minn.App. 1985)..... 14

*Spitzack v. Schumacher*, 308 Minn. 143, 241 N.W.2d 641 (1976)..... 12

**TABLE OF AUTHORITIES**

**Page**

*Voicestream Minneapolis, Inc. v. RPC Properties, Inc.*,  
743 N.W. 2d 267 (Minn. 2008)..... 14

*W.J.L. v. Bugge*, 573 N.W.2d 677 (Minn.1998) ..... 9

**Other Authorities:**

MNR.Civ.App.P. 128.02 (Subd. 2)..... 1

## STATEMENT OF THE ISSUE

- I. Whether the Court of Appeals erred as a matter of law in holding that the Dykes' release of Superior, Inc., and dismissal of claim with prejudice did not preclude the Dykes' subsequent action against Sukup Manufacturing Company.

Apposite cases:     *Gronquist v. Olson*, 64 N.W.2d 159 (Minn. 1954)  
                          *Luxenburg v. Can-Tex Ind.*, 257 N.W. 2d 804 (Minn. 1977)  
                          *Hart v. Cessna Aircraft Company*, 276 N.W. 2d 166 (Minn. 1979)

## STATEMENT OF THE CASE AND STATEMENT OF FACTS

Respondent, Superior, Inc. ("Superior"), is satisfied with the Statement of the Case and Statement of Facts as recited in the Appellant's brief and need not recite them again here, per MNR.Civ.App.P. 128.02 (Subd. 2).

## LAW AND ARGUMENT

### **I. THE COURT OF APPEALS ERRED IN HOLDING THAT THE DYKES' RELEASE OF CLAIMS AGAINST SUPERIOR DID NOT BAR THIS SUBSEQUENT ACTION.**

Superior installed a grain moving system manufactured by Sukup Manufacturing Company ("Sukup") for Virgil and Connie Dykes ("the Dykes") at their farm in southeastern Minnesota in October 2002. The Dykes expressed dissatisfaction with the grain moving system soon after its installation and failed to pay Superior for the product and its installation. Superior initiated a lawsuit seeking payment, while the Dykes counterclaimed for "damages in excess of \$50,000" allegedly suffered as a result of the faulty system. The parties submitted their claims to mediation and reached an agreement resulting in the dismissal of their respective claims in August 2003.

However, four years later, Superior reluctantly found itself back in the middle of litigation regarding the Dykes and the same grain moving system, when it was third-partied into this litigation by Sukup. For the reasons set forth below, Superior must not be forced to continue to defend itself on a claim it settled in good faith six years ago. First, the release entered into between the Dykes and Superior is an unqualified release, extinguishing any further claim by the Dykes related to the grain moving system. Secondly, the Dykes dismissed their cause of action concerning the allegedly faulty grain moving system “with prejudice,” and if those two words are to retain significance, no further claim from the Dykes can be recognized. Third, in reversing the trial court’s judgment, the Court of Appeals erroneously relied upon arguments of counsel to find a fact dispute, when the evidence submitted by the Dykes through affidavits was insufficient to raise a fact question as to the intent of the release or whether the release represented full compensation.

Finally, should this Court entertain the arguments made by the Minnesota Defense Lawyers Association in its *amicus* brief and find that the previous release does not extinguish the Dykes’ action against Sukup, joint liability should not be allowed on remand. At best, the Dykes have dismissed their claim against Superior and cannot recover for installer fault, and can only hope to be compensated for any fault directly attributable to Sukup. As a consequence, regardless of whether the Court of Appeals’ decision is affirmed, Superior should be dismissed from this lawsuit on remand.

**A. The Mediated Agreement is an Unqualified Release as a Matter of Law.**

Despite some back-tracking over the years, the “release of one joint tortfeasor is a release of all other joint tortfeasors” doctrine remains the prevailing law in the State of Minnesota. This Court has modified this doctrine over the following line of cases: *Gronquist v Olson*, 64 N.W.2d 159 (Minn. 1954); *Couillard v. Charles T. Miller Hospital, Inc.*, 92 N.W.2d 96 (Minn. 1958); *Luxenburg v. Can-Tex Ind.*, 257 N.W. 2d 804 (Minn. 1977). In *Gronquist*, the Court articulated its standard for determining whether a release of one tortfeasor releases another:

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*, 64 N.W. 2d at 165 [emphasis added].

Under *Gronquist*, a release will extinguish a claim when the release is “unqualified or absolute,” as well as when the release results in full accord and satisfaction. The intent of the parties, as expressed in the release, is also persuasive in determining a plaintiff’s right to pursue a claim after settling with one party. *Id.*

While the Dykes allege that the Mediated Agreement was not intended to be an unqualified and absolute release, they also concede that the Agreement is not a *Pierringer* release. While *Pierringer* releases retain potential claims against remaining alleged tortfeasors, general releases do not. *Bixler v. J.C.Penney Co., Inc.*, 376 N.W.2d 209,

215(citing *Frey v Snelgrove*, 269 N.W.2d 918, 922 (Minn.1978)). Instead, general releases that do not preserve a right to pursue a lawsuit against a joint tortfeasor are “unqualified” and extinguish any claim against other alleged tortfeasors. *Gronquist*, 64 N.W. 2d at 165, *Couillard*, 92 N.W. 2d 96 (Minn. 1958). The Court of Appeals failed to address the critical issue of whether the Mediated Agreement was an unqualified release.

In those cases where this Court has allowed plaintiffs to pursue a joint tortfeasor after settlement with another tortfeasor, the Court has not waived from the necessity of the release being qualified in order to continue with a subsequent action. In *Gronquist*, the plaintiff specifically reserved the right to pursue a claim against the remaining tortfeasors. The Court determined this reservation rendered the agreement “qualified.” *Gronquist*, 64 N.W. 2d at 166. In *Couillard*, the Court emphasized that a release will dismiss all claims when it acts as “an unqualified or absolute release.” *Couillard*, 92 N.W.2d at 101-102. Similarly, in *Luxenburg*, a release was found to be qualified because the plaintiff specifically reserved a right to pursue the claim against other joint tortfeasors. *Luxenburg*, 257 N.W.2d at 808.

The unqualified and absolute nature of the Mediated Agreement signed by the Dykes in this case is clear from its terms. The Mediated Agreement is not a *Pierringer* release, which would have referenced and reserved their right to bring additional claims against other joint tortfeasors. Instead, the Dykes entered into an unqualified and absolute release of all claims on the merits and with prejudice - there is no mention or

inference of reserving possible additional claims, nor is there any language that would infer the Agreement was qualified. The Dykes, in the Mediated Agreement, specifically agreed that “Virgil L. Dykes and Constance E. Dykes will dismiss their Answer and Counterclaim.” The Counterclaim specifically alleged that the Sukup grain moving system installed by Superior caused damages to their corn, which exceeded \$50,000.00.

The Dykes, based on their claim against Sukup, are now contending that they are dissatisfied with the Mediated Settlement. At the time of the settlement, a year had passed since their claim arose. They were aware of all physical damage allegedly caused by the pneumatic grain system; they were represented by counsel; and they obtained valuable consideration for their agreement to dismiss all claims relating to the grain moving system. At the time of settlement, the Dykes knew that Sukup was the manufacturer of the product; they had been in direct contact with and made numerous complaints to Sukup (See Complaint (against Sukup) ¶ VII, AA-90); and they included in their Counterclaim a request for damages resulting from the performance of the Sukup machinery. Mere displeasure with an unqualified settlement agreement is not grounds to reopen a released claim. When the parties to a contract of release knowingly and voluntarily, with advice of counsel, agree to release all injuries, both known and unknown, they effectively assume the risk of mistake as to the nature and extent of the injuries. *Barilla v. Clapshaw*, 237 N.W.2d 830 (Minn. 1976). The Dykes failed to reserve any future courses of action in reaching the Mediated Settlement. Accordingly,

Superior respectfully requests this Court to hold that its agreement with the Dykes was a final and unqualified settlement of claims as a matter of law.

**B. The Appeals Court Failed to Address the Significance of the Dykes' Dismissal of their Claim Against Superior "With Prejudice."**

In its opinion reversing the trial court, the Court of Appeals devotes its analysis to the issue of whether the Dykes' settlement agreement with Superior precluded any subsequent claim against Sukup, but failed to consider the significance of Dykes having dismissed its claim against Superior "with prejudice and on the merits." While the Mediated Agreement may be silent as to whether it reserves or releases any further claims, the dismissal document filed with the court in the earlier litigation must operate to extinguish any further claim concerning the equipment installed by Superior.

As noted by the trial court, the Dykes dismissed their lawsuit "with prejudice," and the previous lawsuit alleged monetary damages caused by the same grain moving system which is at issue in this lawsuit. (Add-07). The original claim against Superior is nearly identical to the claim now made in the current suit against Sukup. When the previous claim was "dismissed with prejudice and on the merits," the Dykes clearly and unambiguously dismissed and unconditionally relinquished any further right to pursue its claim for damages in excess of \$50,000.00 caused by the grain moving system.

A dismissal with prejudice indicates that it is a final determination on the merits and cannot be set aside absent fraud, collusion, or mistake. *Butkovich v. O'Leary*, 303 Minn. 535, 536, 225 N.W.2d 847 (1975). When a dismissal with prejudice is entered

with the consent of the parties, neither party may pursue further litigation of the action. *In re Application of Schaefer*, 287 Minn. 490, 493, 178 N.W.2d 907 (1970). A settlement agreement which includes a dismissal with prejudice and on the merits is the same as a final judgment on the merits. *Goldberger v. Kaplan, Strandgis, Kaplan PA*, 534 N.W.2d 734, 736 (Minn.Ct.App.1995).

In rendering its decision holding that the Mediated Agreement did not operate to release the Dykes' claim against Sukup, the Court of Appeals failed to address the significance of the Dykes' dismissal of their claim "with prejudice." While the Dykes may argue that the Mediated Agreement operated to only release its claim against Superior, the Dykes would be hard-pressed to argue that the Stipulation for Dismissal with Prejudice is anything other than an unqualified release of their claim. While the Mediated Agreement may have only released a *party* to the action, the dismissal clearly released a cause of action - a *claim* identical to the claim currently posited against Sukup. For this reason, the Dykes have dismissed with prejudice any further claim concerning the grain moving system, and the Court of Appeals decision must be reversed and the trial court's judgment of dismissal reinstated.

**C. The Court of Appeals Erred in Finding Factual Disputes as to "Intent" and "Full Compensation."**

The Court of Appeals held that the record was unclear whether the Dykes intended to release other joint tortfeasors by executing the Mediated Agreement, and further held that in order to release Sukup, the Superior settlement needed to represent "full

compensation.” (Add 14-15). In doing so, the Court of Appeals erred in its application of *Gronquist* by shifting the burden to prove intent on Sukup and Superior rather than the Dykes, unreasonably interpreted “full compensation,” and cited only to *dicta* statements of the trial court in support of its “full compensation” analysis rather than reviewing the actual record.

In *Gronquist*, this Court stated that when a party has “accepted satisfaction in full for the injury suffered by him, the law will not permit him to recover again for the same injury.” 64 N.W.2d at 164. The Court went on to state “an unqualified release imports full satisfaction.” *Id.* *Couillard* also recognized that a release is pro tanto evidence that full compensation for the claim was received from the settling tortfeasor and stated that the burden is on the plaintiff to prove the contrary. *Couillard*, 92 N.W.2d at 103. Therefore the release in the present case is pro tanto evidence that other tortfeasors should be barred from liability. *Id.*

The Dykes did not successfully refute the presumption that the release was executed for full satisfaction of their cause of action. The Dykes attempted to create a factual dispute by submitting affidavits written twelve days before the Summary Judgment hearing, indicating that the Dykes did not intend to extinguish the claim against other tortfeasors. The trial court, not finding these self-serving affidavits reliable, held that it was not “persuaded that the 2003 settlement agreement failed to fully compensate plaintiffs.”

Sukup moved for summary judgment dismissing the Dykes' Complaint, and, to forestall summary judgment, the Dykes were required to do more than rely on "unverified or conclusory allegations" or postulate evidence which might be produced at trial. *W.J.L. v. Bugge*, 573 N.W.2d 677, 680 (Minn.1998). A nonmoving party must present specific facts which give rise to a genuine issue of material fact for trial. *Id.* No genuine issue of material fact exists when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative. . . to permit reasonable persons to draw different conclusions. *DLH Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn.1997). Introduction of affidavits contradicting earlier damaging testimony is not sufficient to create a material fact issue. *Banbury v. Omnitrition Int'l, Inc.*, 533 N.W.2d 876, 881 (Minn.App.1995).

The Dykes submitted affidavits from Virgil Dykes and from their previous attorney aimed at refuting the unambiguous terms of the Mediated Agreement and Stipulation of Dismissal, which clearly do not reserve any additional claims. These affidavits were insufficient as a matter of law to overcome the burden articulated by *Couillard* that the Dykes were required to produce evidence demonstrating that the Mediated Agreement failed to fully compensate them. In contrast, the Affidavit of Virgil Dykes is riddled with cursory allegations and self-serving, unsupported contentions that he suffered additional losses. (AA-16-19). The Affidavit does not indicate that he suffered any additional losses incurred after the August 2003 mediation; in fact, by the

terms of his Affidavit, *all* losses should have been known by then. In his Affidavit, Dykes concedes that he knew “the Cyclone had not functioned as promised” prior to the mediation. (AA-18, ¶ 15). Simply, the evidence submitted by the Dykes fails to overcome their burden to demonstrate the Mediated Agreement did not provide sufficient compensation for the alleged loss.

Rather than review the evidence submitted by the Dykes, the Court of Appeals relied upon language in the trial court’s Memorandum and found that “the parties are ‘two and a half million dollars apart on their opinions as to what amount would render [appellants] fully compensated’ and that ‘the matter of what constitutes full compensated is in dispute.’” (Add 15). Relying on this language in the trial court’s decision, the Court of Appeals held that there was a factual dispute regarding whether the plaintiffs had been fully compensated. The trial court’s reference to the parties’ difference of opinion on damages may be based on counsel’s arguments and pleadings but has no factual support in the evidentiary record. Therefore, the Dykes failed, as a matter of law, to refute the presumption that a release indicates full compensation for one’s harm.

The Court of Appeals also misinterpreted the “full compensation” requirement. As the trial court noted in mentioning the oft-cited principle that “an amount less than the actual or alleged damages may represent ‘full compensation’ when the lesser amount reflects a discount due to the fact that liability is disputed,” the trial court held that the compensation received by the Dykes by Superior represented, as a matter of law, full

compensation of their cause of action for damages caused to their crop, and there was no evidence to indicate otherwise. See *Luxenburg*, 257 N.W.2d at 807. Certainly a Mediated Agreement - a result of compromise between two parties - by its very nature, cannot in the strictest sense be considered “full compensation,” when all compromises require some movement away from the litigants’ initial demands or expectations. The trial court correctly held that such a compromised settlement agreement may still be reasonable to extinguish the Dykes’ claim, while the Court of Appeals decision seems to indicate that unless a plaintiff received every last dollar - or “full” compensation - from the settling tortfeasor, the plaintiff will continue to maintain a cause of action against other tortfeasors regardless of the finality and lack of qualification in the release.

Because the Court of Appeals misinterpreted the “full compensation” requirement, and further failed to place the appropriate evidentiary burden on the Dykes to prove their intent to reserve additional claims against additional defendants when they settled with Superior, the Court of Appeals’ decision must be reversed and the trial court’s dismissal reinstated.

**D. Regardless of Whether the Mediated Agreement Releases Sukup, Superior must be Discharged from this Case Per *Hart v. Cessna Aircraft Co.***

Alternatively, if the Dykes are allowed to pursue their claims against Sukup, public policy requires that the respective fault of the settling party, Superior, be apportioned separately from the liability of any non-settling defendants. The Dykes are only entitled to one full satisfaction for their injuries. *Gronquist*, 64 N.W. 2d at 164. In

fact, preventing double compensation was the motivation behind the common law rule that a “release of one joint tortfeasor releases all joint tortfeasors.” *Couillard*, 92 N.W. 2d at 99; *Luxenburg*, 257 N.W. 2d at 807. As between defendants, it is reasonable and desirable for each to be responsible for only that portion of plaintiff’s damages which is attributable to his own fault. *Lange v. Schweitzer*, 295 N.W.2d 387, 387 (Minn. 1980).

In its amicus brief, the Minnesota Defense Lawyers Association argues that should this case be remanded for further proceedings, this Court should instruct the trial court to apportion fault severally rather than jointly. As stated in their brief, Minnesota’s Comparative Fault Act allows the trial court, when requested by any party, to “direct the jury to find separate special verdicts determining the amount of damages and percentage of fault attributable to each party, and the court shall then reduce the amount of damages in proportion to the amount of fault attributable to the person recovering.” Minn. Stat. § 604.01 subd. 1 (2008). Because the Dykes have dismissed their claim against Superior, the Dykes should be barred from receiving damages (and the resulting double recovery) against Superior. If liability is apportioned, Sukup’s contribution claim is extinguished. See *Spitzack v. Schumacher*, 308 Minn. 143, 148, 241 N.W.2d 641, 644 (1976) (contribution is an equitable action and should be used only to promote the fair and just treatment of the parties). Thus, should this Court hold that the Dykes may continue with their claim against Sukup, there is absolutely no reason for the settling party (Superior) to remain a party to this litigation on remand.

This Court reviewed a similar procedural posture among joint tortfeasors in *Hart v. Cessna Aircraft Company*, 276 N.W. 2d 166 (Minn. 1979). In *Hart*, the Court utilized several liability in the interest of equity. Like the Dykes, the plaintiff in *Hart* sued a tortfeasor (the pilot of a crashed plane) but not an additional tortfeasor (the manufacturer of the plane). The initial case proceeded to trial, and the pilot was found not negligent. The plaintiff then filed a claim against the manufacturer of the plane, Cessna. *Id.* at 168. Despite the final adjudication on the merits negating the pilot's liability, Cessna sued the pilot for indemnity or contribution. The court found itself in a dilemma; either impose liability on a previously successful defendant, or require that the second defendant bear the entire burden when they were not a party to the first case and unable to demonstrate that the pilot's negligence contributed to the loss. *Id.* at 169.

To resolve the dilemma, the Court developed an equitable solution. Cessna was allowed to argue the pilot's comparative fault; however, since the pilot had been successful in the previous litigation, he would be released from the lawsuit. The Court indicated that the pilot could be required to appear as a witness in the second lawsuit but was not allowed to incur further liability. *Id.* at 170. Therefore, Cessna would only be liable to the plaintiff for the portion of the negligence attributable to it, and the pilot was released from the action.

The *Hart* case dictates that Superior must be released from this lawsuit regardless of the Court's holding concerning the effect of the settlement agreement and dismissal in

the previous action. Like in *Hart*, Superior was subject to a previous lawsuit with a final adjudication on the merits absolving it of further liability. Superior agreed to relinquish its claim for payment of the equipment in exchange for the Dykes' relinquishment of all claims against it. If Sukup is not released from this action, then, per *Hart*, the Dykes should be entitled to recover from Sukup only for any harm attributable to Sukup separate from Superior.

Unlike the pilot in *Hart*, Superior was not forced to go through a full trial but rather settled its claim with the Dykes through mediation. This distinction provides further reason for Superior to be dismissed from the current action. Public policy favors mediated agreements. See *Voicestream Minneapolis, Inc. v. RPC Properties, Inc.*, 743 N.W. 2d 267 (Minn. 2008), *Gronquist*, 64 N.W. 2d at 166 ("Compromises are favored generally in the law, and it would be inconsistent to regard such arrangements with disfavor"). *Frey v. Snelgrove*, 269 N.W. 2d at 922 ("The courts should encourage settlements openly made with prompt and adequate notice"). Mediated agreements are favored because they promote finality in the resolution of a dispute. *Snesrud v. Elbers*, 374 N.W. 2d 830, 832 (Minn.App. 1985). Here, Superior and the Dykes reached a mediated agreement whereby Superior was released from further liability. If Sukup is allowed to maintain a claim for contribution rather than simply severing the liability, Superior is forced back into litigation on a dispute that was properly settled six years ago. In order to encourage mediation and alternative dispute resolution, public policy demands

that parties to a mediation be assured of the finality of mediated settlements and not hesitate to resolve reach a mediation resolution for fear that a remaining claim could be lingering against an outlying defendant, forcing the settling party back into subsequent litigation.

**CONCLUSION**

For the above-named reasons, Superior respectfully requests that the decision of the Court of Appeals be reversed and that the matter be remanded to the trial court for entry of an order dismissing the Complaint or, alternatively, dismissing Superior from the action.

Respectfully submitted this 27<sup>th</sup> day of July, 2009.

BY:   
Robert G. Manly  
MN Attorney ID No. 0289681  
VOGEL LAW FIRM  
215 30th Street North  
P.O. Box 1077  
Moorhead, Minnesota 56561-1077  
(218) 236-6462  
ATTORNEYS FOR RESPONDENT,  
SUPERIOR, INC.