

NO. A12-0538

State of Minnesota
In Court of Appeals

Kolberg-Pioneer, Inc.,

Appellant,

vs.

Belgrade Steel Tank Co.,

Respondent.

RESPONDENT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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ISSUE

When a Montana citizen, employed by a Montana company, is injured on a Montana work site, collects workers' compensation benefits under Montana law, brings product liability claims against a South Dakota and a Minnesota company in a Montana Court, and separately settles with each such company, should Montana law govern a claim for common law indemnity eventually made by one of the product liability defendants against the other, whether that claim is litigated in Montana or Minnesota?

Trial court held: Montana law governs and KPI's claim for common law indemnity against Belgrade is barred.

Apposite cases:

Milkovich v. Saari, 295 Minn. 155, 203 N.W.2d 408 (1973)

Nodak Mutual Insurance Company v. American Family Mutual Insurance Company, 604 N.W.2d 91 (Minn. 2000)

Boatwright v. Budak, 625 N.W.2d 483 (Minn. App. 2001)

Schumacher v. Shumacher, 676 N.W.2d 685 (Minn. Ap. 2004).

STATEMENT OF CASE

On June 2, 2009, Judy Ficek brought suit in Montana against Kolberg-Pioneer, Inc. (“KPI”) and others for damages arising out of injuries she sustained at a Montana work site on October 3, 2006. In due course, Belgrade Steel Tank Company (“Belgrade”) was added as an additional party defendant. Ficek’s sole claim against KPI and Belgrade was that they were strictly liable because of an alleged defective “pug mill” furnished by KPI to her employer which, in turn, was a cause of the accident resulting in her injuries.¹ Ficek’s claims against Belgrade and KPI were eventually resolved in separate settlements in February and April 2011, respectively.

In the present action, KPI’s sole claim against Belgrade is for common law indemnity. The parties cross-moved for summary judgment and the matter came on for hearing before the District Court, Honorable Skipper J. Pearson presiding, on November 2, 2011. On January 26, 2012, the District Court filed its decision granting summary judgment to Belgrade on the basis that Montana law applied and that KPI’s claim is barred as a matter of law. On March 23, 2012, KPI timely served and filed its Notice of Appeal.

STATEMENT OF FACTS

With all due respect, KPI’s nine page “Statement of Facts” goes far beyond what is necessary to resolve the single issue before this Court: Does Montana law govern the present dispute or not? Belgrade offers the following narrative to more succinctly set out the controlling and undisputed facts, including just a few that were omitted in KPI’s own

¹ A pug mill is a mixing device and may or may not be used with a silo. AA-284.

rendering.

A. Belgrade Steel Tank Company.

Belgrade is a small Minnesota company that dates back to 1963 and is engaged in the business of building silos of different shapes and dimensions. It began selling such products to KPI as early as 1988.² Its practice was to submit drawings of proposed tanks for KPI's written approval. It welcomed input from KPI on design and other issues. AA-12-13, 19. KPI instructed that the silos come with decals bearing the name "Portec Environmental Products" and that the color for the silo be "Portec beige." When KPI resold the silos to its own customers, it furnished a manual titled "Portec, Construction Equipment Division" and referenced the silo as its own product. AA-19-20, 91-98.

B. 1996: KPI Purchases Silos From Belgrade.

In April 1996, KPI submitted a purchase order to Belgrade for the purchase of eleven silos for delivery to KPI's principal place of business in Yankton, South Dakota. Belgrade submitted proposed drawings to KPI and received its written approval soon afterward. AA-13, 18 and 47. KPI made additions to the silo at issue in this case and then sold it to a customer, Hall Perry, for re-sale and delivery to Envirocon, Inc. in Montana. AA-18, 46-54. There were no written warranties or indemnification agreements. AA-18. KPI also sold a used pug mill to a company in Spokane, Washington for resale to Envirocon. AA-18-19, 55. A KPI employee then traveled to Livingston, Montana in September 1996 to inspect the

² The company was then known as Portec.

machines and to oversee the connecting of the pug mill to the silo. AA-20, 103.

After that, Envirocon used the pug mill and silo for the next ten years in different places throughout the country. AA-252-253, 261-262.

C. Montana Accident and Montana Lawsuit.

Ficek, a Montana resident, sustained significant injuries while working for her Montana employer, Envirocon, Inc., at a Montana job site on October 3, 2006. She applied for and received workers' compensation benefits under Montana law and treated for her injuries in Montana and in points west. AA-28-42.

How and why Ms. Ficek actually sustained her injuries are not critical issues at this stage. Instead, the focus is on the claims that she eventually made in the lawsuit that she filed in Montana on June 2, 2009. She sued several entities, including KPI. Her sole complaint as to the latter was that it had manufactured and sold a defective "pug mill," which played a role in causing her injuries. AA-32, 40. Sometime after the filing of the suit, KPI asked Belgrade to defend and indemnify it and Belgrade declined on the basis that there was no indemnification agreement between KPI and Belgrade and on the further basis that KPI was being sued for its personal fault and on account of defects in the "pug mill." AA-18. During discovery, Envirocon's "Pug Mill Incident Report" was furnished to Ficek's lawyers. The report indicated that the injuries to Ficek may have resulted from defects in the silo furnished by Belgrade. AA-104-106. Ficek amended her Complaint to assert a claim against Belgrade, which dovetailed with her claim against KPI. Belgrade rejected KPI's renewed

request for a defense and indemnification on the basis that more than just vicarious liability was being asserted as to KPI. AA-20. KPI did not crossclaim against Belgrade.

Prior to the completion of discovery and on the eve of mediation efforts and trial, plaintiffs furnished expert witness disclosures indicating that KPI, among other things, had failed to give proper warnings and instruction concerning the use of the “pug mill.” AA-127-149, esp. 138-140.

D. Belgrade and KPI Make Separate Settlements with Ficek.

After failed multi-party mediation efforts in late 2010, Belgrade and KPI went their separate ways in attempting to settle with Ficek. AA-21. In February 2011, Belgrade made a substantial offer (notwithstanding its belief that the silo was not defective) which Ficek promptly accepted. AA-21; RA-1. Not long afterwards, KPI made its own separate peace with Ficek. AA-235-236.

At all times, Belgrade believed that Montana law would apply to all issues including any putative claims of KPI for indemnification after any settlement with Ficek. AA-22.³

SUMMARY OF ARGUMENT

A choice-of-law analysis was required after the trial court’s determination that KPI’s indemnification claim stands or falls depending on whether Minnesota or Montana law controls. The trial court’s nod in favor of Montana law squares perfectly with Minnesota

³ Belgrade did assert a jurisdictional challenge at the outset but it involved solely Montana case law in making its unsuccessful motion to dismiss. AA-332-353.

jurisprudence calling for a consideration of five “choice-influencing factors” in resolving the issue. Having paid a substantial sum to resolve the claims asserted against it by Ms. Ficek, Belgrade is properly relieved of any indemnification obligations to KPI under Montana law.

A. Standard of Review.

Choice-of-law questions are questions of law and are reviewed *de novo*. *Danielson v. National Supply Company*, 670 N.W.2d 1, 4 (Minn. App. 2003). *Christian v. Birch*, 763 N.W.2d 50, 56 (Minn. App. 2009).

B. Threshold for Choice-of-Law Analysis Satisfied.

For a conflict-of-law issue to exist, it must first appear that the outcome of the dispute will be different depending on which state’s law controls and it must also be demonstrated that application of a state’s law will pass constitutional muster. Neither side has posited a constitutional barrier to the application of Montana versus Minnesota law. Likewise, the trial court has determined that KPI’s indemnity claim is barred by Montana law but permissible under Minnesota law.⁴ Add. 7-8. Thus, the choice-of-law question is outcome determinative. Although Belgrade argued below that the indemnity claim (at least for defense costs) would be barred under Minnesota, as well as Montana law, it does not challenge the lower court’s ruling to the contrary on this appeal.

⁴ KPI’s common law claim for indemnity is barred in Montana pursuant to *Durden v. Hydro Flame Corp.*, 983 P.2d 943 (Mont. 1999); Add-10; and Appellant’s Brief, at p. 17.

C. Choice-of-Law Rules in Minnesota: A Brief Exegesis.

Once upon a time, the nearly universal rule was that in a tort action, the law of the place of the accident would control on all matters of substantive law. *Milkovich v. Saari*, 295 Minn. 155, 157, 203 N.W.2d 407, 408 (1973). That certainly was true in Minnesota. *Phelps v. Benson*, 252 Minn. 457, 90 N.W.2d 533 (1958).

As early as 1966, though, the Minnesota cases began to deviate from the familiar *lex loci* rule in favor of a “more rational choice-of-law methodology.” *Milkovich, supra*, 295 Minn., at 162, 203 N.W.2d at 536, citing *Balts v. Balts*, 273 Minn. 419, 142 N.W.2d 66 (1966); *Kopp v. Rechtzigel*, 273 Minn. 441, 141 N.W.2d 526 (1966); and *Schneider v. Nichols*, 280 Minn. 139, 158 N.W.2d 254 (1968). In *Milkovich*, the Court ordained that a proper choice-of-law analysis includes a consideration of five “choice-influencing factors”:

- (1) Predictability of results;
- (2) Maintenance of interstate order;
- (3) Simplification of the judicial task;
- (4) Advancement of the forum’s governmental interests; and
- (5) Application of the better rule of law.

Milkovich, supra, 295 Minn., at 161, 203 N.W.2d, at 411. See, also, *Jepson v. General Casualty Company of Wisconsin*, 513 N.W.2d 467 (Minn. 1994).

Belgrade, of course, agrees with the trial court’s conclusion that Montana law applies but voices just mild disagreement with some of its analysis. Each of the “choice-influencing

factors” will now be considered.

(1) **Predictability of Results: A Non-Factor ... Mostly.**

The first of the five factors for consideration is predictability of results. “The factor applies primarily to consensual transactions where the parties desire advance notice of which state law will govern in future disputes.” *Myers v. Government Employees Insurance Company*, 225 N.W.2d 238, 242 (1974). This factor is not ordinarily of any consequence in a tort case. *Jepson, supra*, 513 N.W.2d, at 470; *Danielson v. National Supply Company*, 670 N.W.2d 1, 7 (Minn. App. 2003); and *Boatwright v. Boudak*, 625 N.W.2d 483, 489 (Minn. App. 2001).

The trial court’s view was that the predictability of results factor weighed in favor of application of Minnesota law “because the record does not show either party had any reason to believe at the time of the sale that the silo would eventually end up in Montana or result in injury to a Montana resident” Add. 9. Belgrade dissents. Neither party had reason to believe that there would be an accident anywhere and there is no evidence in the record that either side had expressed any desire for advance notice of what state law might apply in any future dispute. It is for that precise reason that this Court refused to accord any significance to the predictability of results factor in *Danielson, supra*, when making the call on which state’s law would apply in a tort case. *Danielson*, 670 N.W.2d, at 7.

It must ever be borne in mind that KPI’s sole claim against Belgrade is for common law indemnity arising out of Belgrade’s alleged tortious conduct. The right to indemnity

between joint tortfeasors is “exceptional and limited” and an equitable remedy that does not lend itself to hard and fast rules. *Hendrickson v. Minnesota Power and Light Co.*, 258 Minn. 368, 372, 104 N.W.2d 843, 845 (1960) and *Larson v. City of Minneapolis*, 262 Minn. 142, 114 N.W.2d 68 (1962). If KPI had been concerned about the law that might govern in a future dispute between it and Belgrade, then it could and should have spelled that out in a written contract which might appropriately have included Belgrade’s indemnification obligations towards KPI in the event of a tort claim. But that didn’t happen.

Cases in which the first factor has held sway have most often involved claims *ex contractu*. This is not such a case. Indeed, more recent cases suggest that in a tort case, the only relevant factors are the last two elements of the five-point methodology for resolving conflict questions. *Danielson, supra*, 670 N.W.2d, at 7; and *Boatwright, supra*, 625 N.W.2d, at 489.

Accordingly, the predictability of results factor is, at best, neutral and not helpful in the resolution of the choice-of-law issue.⁵

(2) **Maintenance of Interstate and International Order: Chalk One for Montana.**

The second of the factors asks whether the application of the forum state’s law would

⁵ Arguably, this factor weighs in favor of Montana law, given Belgrade’s belief as of February 2011 that in making a substantial payment to Ficek, it would be immune from further liability to any other parties. As Belgrade’s representative in control of settlement discussions has indicated, “it was my belief that controlling Montana case law provided that all claims against a settling defendant, including claims for contribution or indemnity, would be extinguished.” AA-22.

“manifest disrespect” for that of another jurisdiction. *Jepson, supra*, 513 N.W.2d, at 471; *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438, 455 (Minn. App. 2001). The trial court believed this to be a factor “strongly” favoring application of Montana law. Add. 10. Belgrade agrees.

As indicated in *Jepson*, the second factor is primarily concerned with maintaining a coherent legal system in which the courts of different states strive to sustain, rather than subvert, each other’s interests in areas where their own interests are less strong. *Jepson, supra*, 513 N.W.2d, at 471. Condonation of forum shopping is an example of the “disrespect” that a state may show for another. *Id.* Minnesota does not encourage forum-shopping “because it frustrates the maintenance of interstate order.” *Reed v. University of North Dakota*, 543 N.W.2d 106, 109 (Minn. App. 1996). The interstate order factor weighs in favor of the state that has the most significant contacts with a case.

There is no reason why KPI could not have asserted its indemnification claim in the Montana lawsuit. In now asserting it in Minnesota, it seeks to invoke a state’s law presumably more favorable to it than that of Montana. Just as in *Schumacher v. Schumacher*, 676 N.W.2d 685 (Minn. App. 2004), such forum shopping must be disapproved. The trial court said it best:

Allowing KPI to pursue indemnity in Minnesota in the face of Montana’s clearly stated public and economic policy against such a claim would similarly manifest disrespect for Montana law and promote forum shopping.

Add. 10.

(3) **Simplification of the Judicial Task: Fuhgeddaboudit.**

This is not a factor that weighs in favor of one side or the other.

(4) **Advancement of the Forum's Governmental Interest: Game Belgrade.**

The fourth of the choice-influencing factors is whether the forum state's interests are advanced by the application of the forum state's law. However, in weighing the importance of this factor, the forum court is to consider the public policies of the non-forum state and the interest in maintaining interstate order as well. *Jepson, supra*, 513 N.W.2d, at 472 and *Danielson, supra*, 670 N.W.2d, at 8. That is just what this Court did in *Schumacher v. Schumacher*, 676 N.W.2d 685 (Minn. App. 2004), when it refused to countenance a Minnesota tort claim against a Minnesota defendant for an injury that occurred in Iowa and for which immunity existed under Iowa law.

To be sure, Minnesota has a strong interest in seeing that there will be both fair compensation for tort victims and full access, for its citizens, to enforce their fully vested rights. *Myers, supra*, 225 N.W.2d, at 243; *Jepson, supra*, 513 N.W.2d, at 472. But this state's strong policy favoring settlements and the finality of settlements must also be taken into account in considering the fourth choice-influencing factor.

After considering all of these policies and in light of Montana's public policy giving immunity to a product manufacturer after it has settled with an injured party, the trial court concluded that the fourth factor "slightly favors" application of Montana law. Add. 11. Belgrade submits that this factor is more than just "slightly" favorable to the application of

Montana law. First, Ficek has been fully compensated on her claims. Second, KPI is not a Minnesota citizen which has been denied effective access to Minnesota's courts. Third, Belgrade has made a substantial payment to her in fulfillment of any possible exposure it had for her injuries. Fourth, permitting a further claim to be made against Belgrade would be contrary to the public policies of both Montana and Minnesota in promoting settlements ... settlements that should be final.

Once again, the contacts that Minnesota, as the forum state, has had in the aftermath of Ficek's accident pale in comparison to those with the state of Montana where Ficek lived, worked, was injured, and received treatment for such injuries along with workers' compensation benefits, and where, also, she brought suit against a number of defendants, one of which happens to hail from Minnesota. It is Montana, and not Minnesota, that has had the far greater contacts with the Ficek claim. That, by itself, is a reason why Montana law controls.

(5) Application of the Better Rule of Law: Not In Play.

When consideration of the other choice-of-law factors resolves the issue, then the last factor - the "better rule of law" - is not taken into account:

Regarding the fifth factor, application of the better rule of law, we note that this court has not placed any emphasis on this factor in nearly twenty years and conclude that it is likewise unnecessary to reach it here.

Nodak Mutual Insurance Company, supra, 604 N.W.2d, at 96; *Danielson, supra*, 670 N.W.2d, at 9; and *Medtronic, Inc., supra*, 630 N.W.2d, at 455.

(6) Lex Loci Redux ... In Manner of Speaking.

The Minnesota Supreme Court has made it clear that when all other relevant choice-of-law factors favor neither state's law, then "the state where the accident occurred has the strongest governmental interest" and it is that state's law that should be applied. *Nodak Mutual Insurance Company, supra*, 604 N.W.2d, at 96. Judge Pearson found that a *Milkovich* analysis favors Montana law. But even if the choice-making factors were all "neutral," the lower court's call was still correct and the law of the place where Ficek was injured controls.

CONCLUSION

The judgment of the lower court that Montana law applies in respect to KPI's common law indemnity claim against Belgrade and that such claim is barred and must be affirmed.

Dated: 6-29-12

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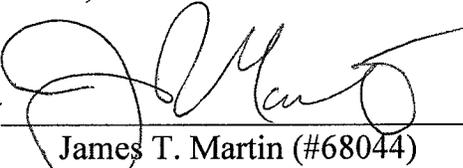
CERTIFICATE OF COMPLIANCE

I certify that this Brief conforms to RCAP 132.01 and was prepared as follows:

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Dated: 6/29/17

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