

NO. A040615

State of Minnesota
In Supreme Court

KEVIN KELLY, as Trustee for the heirs and next-of-kin
of KELLY ANN KELLY, deceased, *Appellant,*

vs.

JASON ELLEFSON, *Respondent,*

STEVE EIDEMILLER, *Defendant,*

and

SUPREME TRANSPORT SERVICES, L.L.C., DAVID L. WHITE,
DIANA WHITE, and D.L. ENTERPRISES, INC., *Respondents.*

APPELLANT'S REPLY BRIEF

RIDER BENNETT, LLP
Patrick J. Sauter (#95989)
Stephen P. Watters (#122737)
Paula D. Vraa (#219137)
33 South Sixth Street, Suite 4900
Minneapolis, Minnesota 55402
(612) 340-8900

Attorneys for Appellant Kevin Kelly

LABORE, GIULIANI, COSGRIFF
& VILTOFT, LTD.
Emilio R. Giuliani (#158677)
Post Office Box 70
Hopkins, Minnesota 55343-0070
(952) 933-3371

Attorneys for Respondent Jason Ellefson

KATHERINE L. MacKINNON, ESQ.
(#170926)
3744 Huntington Avenue
Saint Louis Park, Minnesota 55416-4918
(952) 915-9215

and

MEAGHER & GEER, L.L.P.
James F. Roegge (#92678)
Katherine A. McBride (#168543)
33 South Sixth Street, Suite 4200
Minneapolis, Minnesota 55402-3788
(612) 338-0661

*Attorneys for Respondents Supreme Transport
Services, L.L.C., et al.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION.....	1
ARGUMENT	1
I. THE WRITTEN RULES OF EVIDENCE SUPERCEDE THE COMMON LAW DEVELOPED BEFORE NOTICE PLEADING.....	1
A. The Rules Of Evidence Codify The Admissibility Of Party- Opponent Admissions And Supercede Carlson And Its Progeny	2
B. Carlson And Its Progeny Are Outdated In This Era Of Notice Pleading.....	4
II. THE RULE PROPOSED BY SUPREME WOULD TAKE THE FOCUS OFF THE RELEVANT ISSUES IN THE CASE AND INHIBIT THE USE OF PARTIAL SETTLEMENTS	5
A. The Relevant Issues In This Case Are Fault And Damages, Not Pretrial Procedural Choices.....	5
B. The Rule Proposed By Supreme Would Inhibit The Use of Partial Settlements	8
III. THE DOCTRINE OF JUDICIAL ESTOPPEL HAS NOT BEEN RECOGNIZED AND HAS NO APPLICATION TO THIS CASE.....	9
CONCLUSION	11

TABLE OF AUTHORITIES

CASES

Carlson v. Fredsall, 228 Minn. 461, 37 N.W.2d 744 (Minn. 1949).....	passim
Dornberg v. St. Paul City Railway Co., 253 Minn. 52, 91 N.W.2d 178 (Minn. 1958).....	5
Illinois Farmers Ins. Co. v. Glass Service Co., 683 N.W.2d 792 (Minn. 2004)	9
In Re Petition of Disciplinary Action Against Perry, 494 N.W.2d 290 (Minn. 1992)	3
Johnson v. Lorraine Park Apts., Inc., 268 Minn. 273, 128 N.W.2d 758 (Minn. 1964).....	5
Larion v. City of Detroit, 149 Mich. App. 402, 386 N.W.2d 199 (Mich. Ct. App. 1986)	4
Lines v. Ryan, 272 N.W.2d 896 (Minn. 1978)	5
Lytle v. Stearns, 250 Kan. 783, 830 P.2d 1197 (Kan. 1992)	4
Nelson v. Austin Transit, Inc., 271 Minn. 377, 135 N.W.2d 886 (Minn. 1965).....	5
Whatley v. Armstrong World Indus., Inc., 861 F.2d 837 (5th Cir. 1988)	4
Wilson Storage & Transfer Co. v. Geurkink, 242 Minn. 60, 64 N.W.2d 9 (1954)	7

STATUTES

Minn. Stat. § 480.0591, subd. 6 (2004).....	3
---	---

OTHER AUTHORITIES

Order Promulgating the Rules of Evidence (Minn. April 1, 1977), <u>reprinted in</u> 50 Minn. Stat. Ann. VII-VIII (West 1980).....	2
--	---

RULES

Minn. R. Civ. P. 8.01.....	9
----------------------------	---

Minn. R. Evid. 101	2, 3
Minn. R. Evid. 408	8
Minn. R. Evid. 801	1
Minn. R. Evid. 801(d)(2).....	passim

INTRODUCTION

Supreme proposes an arcane and unworkable rule that would permit complaints and expert disclosures to be introduced as substantive proof of the fault of settling parties. Such a rule goes against accepted trial practice in Minnesota, since a party has never been able to prove their claim through complaints and written expert opinions. If such a rule were adopted, the proceedings in the trial court would be all about procedural choices made at the pleading, discovery, and motion stages of a civil case, and not about the relevant issues in the case, liability and damages. In addition, such a rule would greatly inhibit partial settlements in multiparty cases. The rule proposed by Supreme is apparently intended to rescue Supreme from its choice to not develop its own expert testimony to support its cross-claim against a party who ultimately chose to settle.

ARGUMENT

I. THE WRITTEN RULES OF EVIDENCE SUPERCEDE THE COMMON LAW DEVELOPED BEFORE NOTICE PLEADING.

As outlined in Plaintiff's principle brief, the complaint and written expert opinions that Supreme seeks to submit to the jury are clearly hearsay under the Minnesota Rules of Evidence ("the Rules"). See Plaintiff's opening brief pp. 9-23; Minn. R. Evid. 801. Nor do these documents fall within the definition of "non-hearsay" as a party admission under Rule 801(d)(2). First, complaints and expert opinions are not statements within the purview of Rule 801(d)(2), but are mere allegations and disclosures that require competent and admissible testimony to be admitted at trial. Second, the documents were not "offered against a party", i.e., Plaintiff, but were offered by Supreme to prove the

substantive fault of a settling party, Lidos. See Plaintiff's opening brief pp. 9-23. Admission of the complaint and written expert opinions as substantive evidence would represent a fundamental change in accepted trial practice in Minnesota.

In response, Supreme cites to several old common law decisions addressing the admissibility of complaints as admissions. This recitation is not helpful. First, the Minnesota Rules of Evidence codify and supercede any common law precedent on the admission of statements by party-opponents. Second, with the advent of notice pleading, these common-law decisions are outdated and of no precedential value.

A. The Rules Of Evidence Codify The Admissibility Of Party-Opponent Admissions And Supercede Carlson And Its Progeny

The Rules of Evidence address the admissibility of party-opponent admissions. See Minn. R. Evid. 801(d)(2). Of course, this Court is free to interpret and expound on the meaning and application of the Rule governing party-opponent admissions. See Order Promulgating the Rules of Evidence (Minn. April 1, 1977), reprinted in 50 Minn. Stat. Ann. VII-VIII (West 1980) (this Court is free to "modify, supercede, or otherwise amplify" the specific Rules "by subsequent decisions" of this Court without following general rulemaking procedures). But Supreme's claim that common-law decisions such as Carlson v. Fredsall, 228 Minn. 461, 37 N.W.2d 744 (1949) and its progeny have continued validity and provide an independent basis for admission of the complaint and written expert opinions is unsupported by any subsequent decisions of this Court, and does not make logical sense. The Rules affirmatively state that they "govern proceedings in the courts of this state." Minn. R. Evid. 101. In addition, the enabling statute provides

that the Rules supercede conflicting statutes, except in certain limited areas. Minn. Stat. § 480.0591, subd. 6 (2004) (Rules of Evidence cannot conflict with statutes relating to witness competency, prima facie evidence, presumptions, statistical probabilities, and admissibility of certain documents). Where a Rule of Evidence directly addresses party-opponent admissions, prior common law decisions are not binding and provide only limited persuasive guidance to this Court.

In support of the continued validity of Carlson v. Fredsall despite the adoption of Rule 801(d)(2), Supreme cites the decision of In Re Petition of Disciplinary Action Against Perry, 494 N.W.2d 290 (Minn. 1992). But Perry was a disciplinary action before a referee and not a proceeding in a trial court. The Rules of Evidence only apply to proceedings in Minnesota state courts. Minn. R. Evid. 101. In considering whether a referee incorrectly relied upon pleadings from prior lawsuits as evidence of whether an attorney acted with his mother's consent, this Court in Perry did not discuss or consider the Minnesota Rules of Evidence. 494 N.W.2d at 293-94. In addition, this Court considered the use of prior pleadings as impeachment, not as substantive evidence. Id.

In essence, Supreme seeks to use Carlson v. Fredsall and its progeny to rescue it from its failure to generate evidence to support its cross-claim against Lidos. Plaintiff developed a prima facie case against Lidos and survived summary judgment. Plaintiff then evaluated all lay and expert testimony disclosed before the trial and agreed to settle with Lidos for a sum that represented the strength of its claim. Once Plaintiff settled with Lidos, Plaintiff was under no burden to prove its claim against Lidos. In contrast, Supreme had the opportunity to develop its own evidence to prove the fault of Lidos but

failed to do so. Supreme should not be permitted to rely upon a complaint and written expert opinions to prove its cross-claim against Lidos, where such evidence does not meet any of the evidentiary criteria of the Rules of Evidence.

B. Carlson And Its Progeny Are Outdated In This Era Of Notice Pleading

While this Court may choose to look to Carlson and its progeny for guidance in interpreting and applying Rule 801(d)(2), this line of cases has limited value in the modern-day era of notice pleading. As fully addressed in Plaintiff's opening brief, notice pleading permits parties to make broad conclusory statements and multiple, inconsistent, and alternative claims. See Plaintiff's opening brief, pp. 13-16. Notice pleading serves the purpose of putting a party on notice of the claims against it, and under notice pleading rules, a complaint is nothing more than an allegation that requires competent and admissible evidence to back it up.

Other jurisdictions have concluded that pleadings lack the character of an "admission" and should not be allowed into evidence. See Lytle v. Stearns, 250 Kan. 783, 792-800, 830 P.2d 1197, 1204-09 (Kan. 1992); Larion v. City of Detroit, 149 Mich. App. 402, 386 N.W.2d 199 (Mich. Ct. App. 1986); Whatley v. Armstrong World Indus., Inc., 861 F.2d 837, 839 (5th Cir. 1988).

In addition, many of the Carlson progeny have emphasized the use of pleadings in cross-examination for impeachment purposes if a specific fact stated in a pleading contradicts the testimony made by a party at trial, as opposed to a "party admission" that may be used as substantive evidence to prove the liability of a party. See Dornberg v. St.

Paul City Railway Co., 253 Minn. 52, 58, 91 N.W.2d 178, 184 (Minn. 1958); Johnson v. Lorraine Park Apts., Inc., 268 Minn. 273, 280, 128 N.W.2d 758, 763 (Minn. 1964); Nelson v. Austin Transit, Inc., 271 Minn. 377, 384, 135 N.W.2d 886, 891 (Minn. 1965); Lines v. Ryan, 272 N.W.2d 896, 901, n. 4 (Minn. 1978). In short, under the notice pleading rules, the Carlson line of cases is not helpful.

II. THE RULE PROPOSED BY SUPREME WOULD TAKE THE FOCUS OFF THE RELEVANT ISSUES IN THE CASE AND INHIBIT THE USE OF PARTIAL SETTLEMENTS

The rule of law proposed by Supreme also has very real and undesirable practical implications. First, the rule would take the focus off the relevant issues in this case, i.e., fault and damages, and extend and complicate future trials by making pretrial procedural choices into relevant issues for trial. Second, the rule would greatly inhibit the incentive for the Plaintiff to settle with one or more of the at-fault parties in the case.

A. The Relevant Issues In This Case Are Fault And Damages, Not Pretrial Procedural Choices

The rule proposed by Supreme would extend and complicate trial procedures by turning pretrial allegations and expert disclosures into relevant trial issues. If Supreme is permitted to introduce the complaint and written expert opinions at trial, Plaintiff will be forced to explain his decision to sue and ultimately settle with Lidos. Presumably, this testimony would include how his lawyers evaluated the case and whether his lawyers recommended settlement, which raises a myriad of collateral issues inappropriate for the jury. In addition, faced with written expert opinions from its own expert, Plaintiff would be forced to call and impeach his own expert. This would greatly lengthen and

complicate future trial proceedings and shift the focus from the relevant issues in the case, i.e., liability and damages.

In its arguments, Supreme ignores the life cycle of a civil case, and ignores the fact that documents generated during other phases of a civil case are not “admissions” under Rule 801 (d)(2). Generally, a civil case proceeds through the pleadings stage, the discovery stage, the motion stage, and the trial stage. At the pleading stage, the plaintiff determines which parties to include and the defendants are free to add additional parties or to bring cross claims against other defendants. The purpose of the pleadings stage is to put all parties on notice as to what claims are being made against them.

The case then proceeds to discovery phase, where the parties use interrogatories and depositions to discover the factual and expert basis for the claims. In this case, there were multiple interrogatories directed to all the parties, and the parties disclosed fact evidence and numerous depositions were taken of both fact and expert witnesses.

The case then proceeds to motion stage, where the parties may challenge the claims brought against them through the use of summary judgment motions. At this point, some of the claims will drop out because there is not sufficient evidence to support the claims. In this case, Lidos brought a summary judgment motion claiming that the evidence against it on obvious intoxication was not sufficient to bring to a jury. Contrary to Supreme’s position in its responding brief, it is not surprising or alarming (or even inconsistent) that Plaintiff chose to resist this motion and file its expert’s affidavit for the purpose of opposing the summary judgment motion. But avoiding summary judgment is a long way from prevailing at trial, and a party who succeeds in defeating a summary

judgment motion may still have legitimate reasons to settle some part of his or her case before trial.

Once the case proceeds to trial, however, the procedural choices and discovery disclosures of a party during the prior phases do not constitute relevant and competent evidence of issues presented at trial. The trial focuses on relevant and competent evidence from lay and expert witnesses called by the parties to provide admissible testimony on the particular issues at trial—in this case, fault and damages.

Of course, the party's actions in the prior stages of a civil case can influence the evidence presented at trial. For example, if a party fails to disclose an expert during the discovery phase, a party may be prevented from presenting expert testimony at the trial. Or a party cannot raise an additional claim at trial that has not been pled in the complaint. However, it is not the jury's role to hear about such procedural issues that occurred before the trial. That is essentially what Supreme is trying to do here. Supreme wants to let the jury know that Plaintiff brought claims against Lidos and use that as substantive proof of the fault of Lidos.

Even the Carlson line of cases recognized the potential for abuse in permitting pretrial pleadings into evidence. In Wilson Storage & Transfer Co. v. Geurkink, 242 Minn. 60, 67, 64 N.W.2d 9, 15 (1954), the defendant attempted to offer the entire district court file into evidence, claiming it was admissible for impeachment, to show inconsistencies, and to establish the assertion of “stale claims”. Id. at 65, 64 N.W.2d at 13-14. The trial court refused to allow the file into evidence. This Court upheld the trial court, noting that the district court file contained “numerous documents such as motions,

affidavits, orders and amended orders” that were not admissible, and further, the fact that plaintiff did not sue a second defendant until four months later (clearly a procedural issues), was not admissible for impeachment. Id.

In essence, Supreme wants to circumvent Minn. R. Evid. 408 that prevents evidence of one party compromising a disputed claim for purposes of proving liability for the claim. Supreme has no right to introduce evidence that Plaintiff settled with Lidos (or the amount of such settlement), but wishes to use his complaint to alert the jury that he sued Lidos. Of course, if there were fact witnesses or if Supreme themselves had chosen to support their cross-claim against Lidos by asking its own expert to comment on the issue of “obvious intoxication”, Supreme would be able to call the fact witnesses or their own expert to comment on the fault of Lidos. But having failed to do so, Supreme cannot do this through the back door.

B. The Rule Proposed By Supreme Would Inhibit The Use of Partial Settlements

Perhaps more importantly, the admission of complaints and expert disclosures would clearly inhibit (if not eliminate) partial settlements. Plaintiffs will be reluctant to release parties before trial when complaints and expert disclosures are permitted into evidence without an evidentiary basis. Plaintiffs would essentially be required to call their own expert retained to comment on the fault of the settling party and subject their own expert to cross-examination in order to weaken the effect of the non-settling party reading the expert disclosure to the jury. This result does not encourage settlement, but instead relieves the non-settling party from its appropriate burden of proving its cross-

claim against settling parties. Pleading allegations and written expert disclosures have never been permitted to establish a prima facie case against a settling party. If this is allowed, a plaintiff may be likely to forego the use of a partial settlement.

III. THE DOCTRINE OF JUDICIAL ESTOPPEL HAS NOT BEEN RECOGNIZED AND HAS NO APPLICATION TO THIS CASE

Supreme also makes an attempt to request this Court to adopt the doctrine of judicial estoppel to prevent a great injustice in this case. In short, Supreme claims that Plaintiff took an “inconsistent position” in this lawsuit by bringing claims against Lidos, developing expert evidence to support his claim, and then successfully resisting Lidos’ attempt at summary judgment.

This Court has not recognized the doctrine of judicial estoppel, see Illinois Farmers Ins. Co. v. Glass Service Co., 683 N.W.2d 792, 800-01 (Minn. 2004), and this case does not present any basis for adoption of this doctrine. But even if this Court adopts the doctrine of judicial estoppel as proposed by Supreme in its brief on page 50, this case would not meet the proposed application of the doctrine, as Plaintiff has not adopted “inconsistent positions” within the meaning of the proposed doctrine, nor was the Plaintiff “successful” in the assertion of the first position. Instead, Plaintiff brought multiple claims against multiple defendants as clearly allowed by the pleading rules. Minn. R. Civ. P. 8.01 et seq. Plaintiff developed evidence to support those claims and the trial court agreed the evidence was sufficient to proceed to trial. Plaintiff chose to settle with one of the parties based upon the strengths (and weaknesses) of its case against Lidos. There is nothing underhanded or unethical about how this case proceeded and the

procedural choices that Plaintiff made. The adoption and application of judicial estoppel should be rejected.

CONCLUSION

In sum, the complaint and written expert opinions are not admissible to prove the substantive fault of Lidos. These documents are hearsay and do not fall within the definition of "non-hearsay" under Rule 801(d)(2). The trial court correctly refused to admit them.

Respectfully submitted,

Dated: August 1, 2005

RIDER BENNETT, LLP

By



Paula Duggan Vraa (219137)

Attorneys for Plaintiff
33 South Sixth Street
Suite 4900
Minneapolis, MN 55402
(612) 340-8900