
State of Minnesota
In Court of Appeals

VIRGIL DYKES AND CONNIE DYKES, d/b/a DYKES FARMS,
Appellants,

vs.

SUKUP MANUFACTURING COMPANY,
*Defendant & Third Party Plaintiff-
Respondent.*

vs.

SUPERIOR, INC.,

Third Party Defendant, Respondent.

APPELLANTS' BRIEF AND APPENDIX

WILL MAHLER LAW FIRM

William D. Mahler, Esq. (#66539)
202 Ironwood Square
300 Third Avenue S.E.
Rochester, Minnesota 55904
(507) 282-7070

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

ERSTAD & RIEMER, P.A.

Leon Erstad (#27534)
Patrick Reilly (#90451)
8009 34th Avenue South, Suite 200
Minneapolis, Minnesota 55425
(952) 896-3700

*Attorneys for Respondent
Sukup Manufacturing Co.*

VOGEL LAW FIRM

Robert Manly (#0289681)
215 30th Street North
P.O. Box 1077
Moorhead, Minnesota 56561
(218) 236-6462

*Attorneys for Respondent
Superior, Inc.*

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).

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUES..... 1

STATEMENT OF THE CASE..... 2

STATEMENT OF THE FACTS 4

ARGUMENT..... 9

1. THE DISTRICT COURT ERRED BY GRANTING SUMMARY JUDGMENT
BECAUSE GENUINE ISSUES OF MATERIAL FACT ARE IN DISPUTE
REGARDING INTENT AND COMPENSATION..... 9

 A. STANDARD OF REVIEW 9

 B. GENUINE ISSUES OF MATERIAL FACT ARE IN DISPUTE PRECLUDING
SUMMARY JUDGMENT..... 9

2. THE TRIAL COURT ERRED AS A MATTER OF LAW REGARDING THE EFFECT
OF THE RELEASE..... 13

 A. STANDARD OF REVIEW 13

 B. THE TRIAL COURT ERRED WHEN CONCLUDING THAT, IN THE ABSENCE
OF A *PIERRINGER* RELEASE, SUKUP WAS RELEASED. 13

CONCLUSION..... 18

TABLE OF AUTHORITIES

CASES

<u>Anderson v. Mikel Drilling Co.</u> , 102 N.W.2d 293(Minn 1960) -----	10
<u>Antone v. Mirviss</u> , 720 N.W.2d 331 (Minn. 2006) -----	1, 9
<u>Benesh v. Garvais</u> , 20 N.W.2d 532 (Minn. 1945) -----	14
<u>Couillard v. Charles T. Miller Hospital, Inc.</u> , 92 N.W.2d 96 (Minn.1958) -----	1, 13, 14
<u>Culberson v. Chapman</u> , 496 N.W.2d 821 (Minn.Ct.App. 1993).-----	13
<u>Dempsey v. Jaroscak</u> , 188 N.W.2d 779 (Minn. 1971) -----	1, 9
<u>Gronquist v. Olson</u> , 64 N.W.2d 159 (Minn. 1954) -----	passim
<u>Hauser v. Mealey</u> , 263 N.W.2d 803 (Minn. 1978) -----	9
<u>Johnson v. Brown</u> , 401 N.W.2d 85 (Minn.Ct.App.1987), <i>rev. denied Apr. 23, 1987</i> -	1, 16
<u>Johnson v. Winthrop Laboratories Div. of Sterling Drug, Inc.</u> , 198 N.W.2d 77 (Minn. 1971) -----	10
<u>Klimek v. State Farm Mut. Auto. Ins. Agency</u> , 348 N.W.2d 103 (Minn. Ct. App.1984)	16
<u>Luxenburg v. Can-Tex Ind.</u> , 257 N.W.2d 804 (Minn. 1977)-----	1, 10, 14, 15
<u>Market America Corp. v. Reinert</u> , 2007 WL 823862 (Minn. Ct. App. March 20, 2007)	16
<u>Nord v. Herreid</u> , 305 N.W.2d 337 (Minn. 1981)-----	10
<u>Smith v. Mann</u> , 239 N.W.2d 23 (Minn.1931)-----	14
<u>State Farm Fire and Cas. v. Aquila Inc.</u> , 718 N.W.2d 879 (Minn. 2006)-----	1, 9
<u>Wall v. Fairview Hospital</u> , 584 N.W.2d 395, 403 (Minn. 1998) -----	16

STATEMENT OF THE ISSUES

1. Did the Trial Court err by granting Summary Judgment when genuine issues of material fact are clearly in dispute as to 1) Appellants' intent to release all other tortfeasors when it released one tortfeasor and 2) whether Appellants were fully compensated in the settlement with one of the tortfeasors.

Respondents offered no affidavit or other evidence to challenge the Affidavits submitted by Appellants stating that they did not intend to release Respondent, nor were they fully compensated in the settlement with the first tortfeasor.

AUTHORITY:

Antone v. Mirviss, 720 N.W.2d 331 (Minn. 2006)

Couillard v. Charles T. Miller Hospital, Inc., 92 N.W.2d 96 (Minn.1958)

Dempsey v. Jaroscak, 188 N.W.2d 779 (Minn. 1971)

State Farm Fire and Cas. v. Aquila Inc., 718 N.W.2d 879 (Minn. 2006)

2. Did the District Court err by concluding as a matter of law that, in the absence of a *Pierringer* release, a release of one tortfeasor releases all other tortfeasors?

A release of one tortfeasor releases all other tortfeasors only if that was the intention of the parties and the Plaintiffs were fully compensated.

AUTHORITY:

Couillard v. Charles T. Miller Hospital, Inc., 92 N.W.2d 96 (Minn.1958)

Gronquist v. Olson, 64 N.W.2d 159 (Minn. 1954)

Johnson v. Brown, 401 N.W.2d 85 (Minn.Ct.App.1987), *rev. denied Apr. 23, 1987*

Luxenburg v. Can-Tex Ind., 257 N.W.2d 804 (Minn. 1977)

STATEMENT OF THE CASE

Appellants Virgil and Connie Dykes, d/b/a Dykes Farm (“Dykes”) asserted in their Complaint that the pneumatic grain moving equipment manufactured by Respondent Sukup Manufacturing Company (“Sukup”), called the “Cyclone”, severely damaged Appellants’ corn as it was being transferred from the corn dryer to the storage bins. Appellants raised corn on approximately 2,500 acres in Wabasha County in 2002. They purchased the Cyclone equipment in the fall of 2002. This equipment is basically a pneumatic blower that blows corn through pipes from the corn dryer to very large, steel storage bins. The corn was blown at such a high velocity that it severely damaged approximately 75,000 bushels of Appellants’ corn and caused a significant disruption in the 2002 corn harvest while repair attempts were unsuccessfully made. Sukup’s dealer, Respondent Superior, Inc. (“Superior”), sold and installed the equipment. It filed a mechanic’s lien action against Dykes when Dykes refused to pay for the equipment.

That lawsuit was settled at mediation. In the settlement, Superior agreed to remove the equipment and discharge the mechanic’s lien. Appellants received no compensation for the substantial damage to their cropping enterprise. The Dykes agreed to dismiss their Counterclaim against Superior but the agreement makes no mention of any intent to release other tortfeasors.

The Dykes then commenced the present action against Sukup alleging fraud, negligence and breach of warranty. The Wabasha County District Court granted Sukup’s Summary Judgment motion on the grounds that the settlement with Superior, Inc. had the

effect of releasing Sukup. The District Court based its decision on its finding that there was no reservation of rights to bring an action against any other tortfeasor or that the settlement with Superior failed to fully compensate the Dykes.

STATEMENT OF THE FACTS

Virgil Dykes is 63 years old and has been a crop farmer all of his life. He married his wife, Connie, in 1964. The Dykes have 6 sons who, in 2002, three were involved in the family's cropping operation. In 2002 the Dykes owned 1,480 acres of land and rented 1,030 acres, almost all of which were planted to corn. Dykes enjoyed good credit and each year prior to 2003, they were able to obtain a crop and operating loan for the next year. The Dykes customarily would pay off the crop and operating loan for a particular year from proceeds from grain sales in the fall. In December 2002, the Dykes owed \$28,294.30 to ADM for the 2002 operating loan. See: A-43 at ¶¶ 1-5.

In 2002 Dykes Farms owned three 42,785 bushel capacity steel bins as well as a 6,000 bushel bin and a 3,000 bushel bin that were located on the home farm in addition to a 670 MC 510 bu/hr capacity corn dryer. The bins were leased to the Dykes by Wells Fargo Financial Leasing, Inc. Prior to 2002, the Dykes transferred their harvested corn from the grain dryer to the bins by use of portable auger equipment. Use of this equipment never damaged the corn and the Dykes were never docked when the grain was sold. See: A-44 at ¶6.

The Dykes were first introduced to the Sukup grain transfer equipment called "The Cyclone" in the summer of 2001 during Farm Fest when they visited a Sukup booth and read sales brochures. Id. at ¶ 7.

The Cyclone is basically a blower that has three standard components – airlock, blower and control panel. See: A-80. From the grain dryer, the dried grain is dumped into a 'jump auger" which then augers corn into the "air lock" which sits on skids. The

“blower” – which also sits on skids – creates the velocity and blows air into the airlock which drops the corn into the piping or air line. The corn is then blown in the piping up the side of the bins and into cyclone distributors that swirl the corn into the bins by the velocity of the pneumatic blower. Rather than using augers to transfer the grain, the blower moves the grain with air pressure.

On June 1, 2002 the Dykes contacted Superior, Inc. of Kindred, North Dakota, which was a Sukup dealer, to further discuss the equipment and to request a bid. The Dykes and Superior entered into a Purchase Agreement dated September 10, 2002 for the purchase of the Cyclone equipment. Date of delivery of the equipment was not stated in the contract, but the parties discussed the need to have the equipment prior to the 2002 harvest.

By October 14, 2002 the equipment was functioning and the Dykes began their harvest. The Dykes contacted Sukup directly to ask for an Operators Manual and were told by a Sukup employee, John Johansson, that one was not needed because it was “so simple to operate.” See: A-44 at ¶9.

Shortly after the equipment was put into use, it became apparent that the corn was being blown through the tubes at a very high rate of speed with no way to slow it down. The Dykes again called John Johansson at Sukup who assured them that the equipment was “gentler than an auger” and that they “should not worry.” Id. Because of concern that the equipment was damaging the corn as it was blown through the tubes at such high velocity and into the bin, the Dykes stopped using the equipment on October 20, 2002. Id. at ¶10. It was later determined that at least 75,000 bushels of corn had been damaged.

Id. During the timeframe of October 17, 2002 through November 13, 2002, the Dykes repeatedly made phone calls to Superior, Inc. and were told “no one is available to talk.”

Id. Dykes also made 35 phone calls to Sukup and Mankato Farm Systems, who was Sukup’s representative assigned to take care of the Dykes’ problems. See: A-52-59. Virgil Dykes was continually talking to John Johansson, an engineer for Sukup, about slowing down the velocity of the corn and who always assured him not to worry. See: A-44 at ¶9.

Finally, on November 13, 2002, Sukups’ representative, Mankato Farm Systems, came to inspect the equipment on November 15, 2002. Mankato Farm System made some modifications to the piping leading to the bins by adding a CA-Select distributor and a velocity compensator valve which helped slow down the grain. The velocity compensator valve and the CA-Select distributor were obtained from a different manufacturer who also manufactured pneumatic grain moving equipment. In 2002, the Cyclone equipment sold by Sukup did not have a velocity compensator valve or a CA-Select distributor, to the Dykes knowledge, but has since incorporated them into its design. Id. at ¶11. Despite these modifications, the Sukup representative indicated the system “was still not right”. Id.

The malfunctioning grain moving equipment caused tremendous disruption in the 2002 harvest of corn acres. See: A-45 at ¶12.

Because of this disruption in getting their corn to market and the damage to the corn, the Dykes experienced a serious cash flow crisis in November and December 2002. The Dykes could not pay the balance due to ADM for the 2002 crop loan. Unfortunately,

ADM had made a business decision not to provide crop and operating loans to farmers after 2002, therefore the Dykes had to obtain credit elsewhere. ADM held a “blanket lien” and would not release it until they received the balance owed to them. Id. at ¶14.

On February 5, 2003, Superior filed a mechanic’s lien and commenced a lawsuit to enforce it. The lawsuit named not only the Dykes but the Security State Bank of Pine Island and Wells Fargo Financial Leasing, Inc. as Defendants. Because of the lawsuit filed by Superior and the Dykes’ disastrous harvest and serious cash flow problems, both the Security State Bank of Pine Island and Wells Fargo Financial Leasing, Inc. foreclosed on the land and the grain bins. Further attempts to obtain financing elsewhere were turned down which ultimately led to the total destruction to the Dykes’ cropping enterprise as more fully outlined in correspondence to Respondent Sukup’s attorney dated March 13, 2007. Id. at ¶ 12.

After being served with the mechanic’s lien suit, the Dykes hired Rochester attorney, Steven Rolsch, to respond to the suit and take all necessary steps to have the mechanic’s lien removed. Mr. Rolsch was paid on an hourly basis plus expenses. It was the Dykes’ belief that once the mechanic’s lien was removed they would be able to regain their once excellent credit so that further deterioration of their business could be avoided. Id. at ¶14.

The mechanic’s lien claim was mediated on August 29, 2003 resulting in an agreement whereby the Sukup equipment would be removed from the Dykes’ property and the mechanic’s lien discharged. See: A-77-79. In addition, the Dykes would not be charged for the equipment. The mediation agreement made no mention of any damages

incurred by the Dykes as a result of the use of the equipment and the Dykes received no compensation for the substantial losses suffered to their cropping enterprise. There was no discussion about any potential liability on the part of Sukup or any other third party at the mediation. The settlement agreement makes no mention of any intent on the part of the Dykes to release any other known or unknown tortfeasors. See: A-45 at ¶¶ 14-15 and A-75 at ¶1.

At the time of mediation, the Dykes were still reeling from the financial nightmare that they had experienced for 11 months. They neither had money nor emotional strength to pursue a claim for damages against anyone at that time. The Dykes never intended the mediated settlement, which resulted in the release of the mechanic's lien, would prevent them from seeking damages against any other party from losses arising from the use of the Cyclone equipment. See: A-45 at ¶¶12, 14 and 15.

Following the mediation, the attorneys for the parties filed the standard Stipulation of Dismissal and the District Court dismissed the lawsuit brought by Superior to enforce its mechanic's lien. Sukup was notified by Dykes' attorney on June 6, 2005 of their intention to pursue a claim for damages.

ARGUMENT

1. THE DISTRICT COURT ERRED BY GRANTING SUMMARY JUDGMENT BECAUSE GENUINE ISSUES OF MATERIAL FACT ARE IN DISPUTE REGARDING INTENT AND COMPENSATION.

A. STANDARD OF REVIEW

In reviewing a grant of Summary Judgment the Supreme Court determines whether there are any genuine issues of material fact in dispute and whether the District Court erred in its application of the law. Antone v. Mirviss, 720 N.W.2d 331 (Minn. 2006).

On appeal from a Summary Judgment, the Supreme Court views the evidence most favorable to the party against whom Summary Judgment was granted. State Farm Fire and Cas. v. Aquila Inc., 718 N.W.2d 879 (Minn. 2006).

Where action was dismissed by District Court on Summary Judgment, facts asserted by plaintiffs had to be taken as true for purposes of appeal. Hauser v. Mealey, 263 N.W.2d 803 (Minn. 1978).

Neither the Trial Court's opinion nor the reviewing Court's opinion, as to the chance of plaintiffs prevailing on trial, would be proper criteria in deciding whether to grant Summary Judgment to defendants. Dempsey v. Jaroscak, 188 N.W.2d 779 (Minn. 1971).

B. GENUINE ISSUES OF MATERIAL FACT ARE IN DISPUTE PRECLUDING SUMMARY JUDGMENT.

Respondent Sukup, as the moving party in the Summary Judgment motion, had the burden of proof to establish that no genuine issues of material fact existed. Johnson v.

Winthrop Laboratories Div. of Sterling Drug, Inc., 198 N.W.2d 77 (Minn. 1971). The Trial Court's function was to determine whether genuine issues of material fact existed and not to resolve factual questions. Anderson v. Mikel Drilling Co., 102 N.W.2d 293 (Minn 1960); Nord v. Herreid, 305 N.W.2d 337 (Minn. 1981).

To prevail on its Summary Judgment motion regarding the effect of the settlement with Superior, Sukup was required to prove that there was no factual dispute that 1) the Dykes intended to release all other tortfeasors and 2) the Dykes were fully compensated. Luxenburg v. Can-Tex Ind., 257 N.W.2d 804 (Minn. 1977).

a) No evidence was submitted to indicate, much less conclusively establish, that Dykes intended to release all other tortfeasors.

Sukup submitted no evidence to the District Court whatsoever to even remotely establish that the Dykes intended to release all known and unknown tortfeasors when it entered into the mediated settlement agreement with Superior. The settlement agreement with Superior makes no mention of any release of other parties. The stipulation of dismissal necessarily involves only the parties to the lawsuit commenced by Superior. No affidavits by the participants to the settlement agreement on behalf of Superior were offered to support a claim that the Dykes intended to release third parties. Numerous exhibits were attached to the affidavit of Sukup's attorney offered in support of its motion, but none of them reflected in any way on the issue of the Dykes' intention to release third parties.

Sukup's motion was premised on the simple, but erroneous, proposition that "a release of one tortfeasor releases all tortfeasors." This premise has not been the law in

Minnesota since Gronquist v. Olson, 64 N.W.2d 159 (Minn. 1954) was decided over a half century ago.

Absent any proof on the issue of intention to release all other tortfeasors¹, the District Court should have dismissed the motion even without a response from the Dykes. The Dykes, however, did respond by affidavits from Virgil Dykes and his attorney at the time of the settlement, Steven Rolsch. Both affidavits make clear that the Dykes only intended to release Superior and did not intend to release any other tortfeasor.

Based on the evidence before the District Court, the District Court should have made a finding that the Dykes did not intend to release third parties when it settled with Superior. At the very least, however, a genuine issue of material fact existed on this matter which precludes Summary Judgment.

b) The Dykes were not compensated, much less fully compensated, in the settlement with Superior.

It is undisputed that the Dykes received no compensation when they settled with Superior. As the mediated settlement agreement makes clear, the upshot of the litigation was that the equipment was removed from the property, the mechanic's lien was discharged and the purchase price was refunded. Equally clear is the fact that the Dykes suffered very substantial financial loss as a result of the defective equipment.

Again, Sukup offered no evidence that the Dykes were fully compensated and did not even discuss the issue in either its original or reply briefs.

¹ As mentioned below, the Trial Court erroneously focused on Dykes' failure to reserve a right to sue other tortfeasors rather than Dykes' intent to release other tortfeasors.

Because Sukup utterly failed to meet its burden of proof by failing to offer any evidence or argument, the District Court should have made a finding that the Dykes were not fully compensated when it settled with Superior, even without a response from Dykes. The Dykes did, however, submit a detailed summary of the substantial losses they suffered as a result of using the Sukup equipment in the Fall of 2002.

Even the District Court noted in its memorandum that “in the case now under consideration, the parties are 2 ½ million dollars apart on their opinions as to what amount would render Plaintiffs fully compensated. It is not clear, as it was in Gronquist, that the consideration given for the release fails to fully compensate Plaintiffs.” The Court went on to state that “as previously noted, however, the matter of what constitutes full compensation is in dispute.” This critical acknowledgement by the District Court should have precluded Summary Judgment.

Other language used by the Trial Court in its memorandum makes clear that it did not follow the proper standards in deciding the motion. The Trial Court stated that “the evidence does not persuade this Court that the parties intended that there be a reservation of rights to bring an action against any other tortfeasor for the same claimed damages. Nor is the Court is persuaded that the 2003 settlement agreement failed to fully compensate Plaintiffs.”

This was not a trial to the Court. The non-moving party in a Summary Judgment motion does not need to “persuade” the Trial Court of anything other than there exists disputed genuine issues of material fact. The Dykes demanded a jury trial when this

action was filed. The Trial Court improperly decided disputed factual issues in arriving at its decision.

2. THE TRIAL COURT ERRED AS A MATTER OF LAW REGARDING THE EFFECT OF THE RELEASE.

A. STANDARD OF REVIEW

The Appellate Court conducts an independent review of the record in light of relevant law to determine if the lower court made a proper legal conclusion in granting Summary Judgment. Culberson v. Chapman, 496 N.W.2d 821 (Minn.Ct.App. 1993).

B. THE TRIAL COURT ERRED WHEN CONCLUDING THAT, IN THE ABSENCE OF A *PIERRINGER* RELEASE, SUKUP WAS RELEASED.

The long recognized rule in Minnesota is that in determining whether a release of one tortfeasor will operate to release remaining tortfeasors, the determining factors are the intention of the parties to the release and whether the injured party has, in fact, received full compensation for his injury. Gronquist v. Olson, 64 N.W.2d 159 (Minn. 1954). The equitable principle upon which the rule that the release of one tortfeasor releases the rest is based on a concern that the Plaintiff might receive a double recovery. In the present case, the Plaintiffs did not intend to release any third party nor will they receive a double recovery.

In Couillard v. Charles T. Miller Hospital, Inc., 92 N.W.2d 96 (Minn.1958) the Minnesota Supreme Court reaffirmed its decision in Gronquist by stating:

“We think that considerations of practical justice require us to say that a plaintiff should not be compelled to surrender his claim for relief against a

wrongdoer unless he has intentionally done so, or unless he has received full compensation for his claim.”

Id. at 102.

In Couillard, the plaintiff was injured first as a passenger in a bus when she fell and was further injured by the doctors treating her. The Court ruled that the plaintiff’s release of the bus company did not release the doctors because the plaintiff did not intend to do so and she was not fully compensated in the first settlement. The decision also overruled Smith v. Mann, 239 N.W.2d 23 (Minn.1931) and Benesh v. Garvais, 20 N.W.2d 532 (Minn. 1945).

In Luxenburg v. Can-Tex Ind., 257 N.W.2d 804 (Minn. 1977) the plaintiff settled with one of three concurrent tortfeasors for an amount less than his actual damages. In rejecting the non-settling tortfeasor’s claims that the release of one tortfeasor released all tortfeasors, the Minnesota Supreme Court stated:

We believe that the factors determinative of whether a release of one of several joint tortfeasors 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 tortfeasor 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. at 807-808.

The mediation agreement that led to dismissal of Superior’s lawsuit to enforce its mechanic’s lien was focused solely on getting the equipment removed and the mechanic’s lien discharged. The Dykes received absolutely no compensation for any

losses resulting from the use of the Cyclone equipment. The Dykes hoped that, with the mechanic's lien discharged and the lawsuit dismissed, they could restore their once good credit with their lenders and suppliers. At the time of mediation, the Dykes had just gone through 11 months of financial hell. They had just witnessed their once very large and successful family cropping enterprise take a dramatic tailspin. This experience took an enormous emotional toll on the Dykes. In addition, they had no money to pursue a damage claim against anyone. All the Dykes knew for certain was that the Cyclone equipment had not functioned as promised and therefore they refused to pay for it. Fault for this situation as between the dealer and the manufacturer had not been established in the minds of the Dykes at this time.

A plain reading of the mediated settlement between the Dykes and Superior, along with the Affidavits of Virgil Dykes and his then attorney, Steven Rolsch, clearly establish that the release does not constitute an accord and satisfaction or an unqualified or absolute release of all other tortfeasors nor is there any manifestation of any intention to release all other tortfeasors. See: A-45 and A-75-79. Therefore, the Dykes "should not be denied (their) right to pursue the remaining wrongdoer until (they have) received full satisfaction." Luxenburg, supra., at 807 and 808.

Sukup's Summary Judgment motion was based on the simplistic and long-overruled notion that the release of one tortfeasor automatically releases all tortfeasors without exception. Though the Trial Court apparently adopted this position by quoting from and citing Klimek v. State Farm Mut. Auto. Ins. Agency, 348 N.W.2d 103 (Minn.

Ct. App.1984)², it used a different rationale by improperly granting Sukup's motion because it was not "persuaded that the parties intended that there be a reservation of rights to bring an action against any other tortfeasor for the same claimed damages." In effect, the Trial Court ruled that, in the absence of a *Pierringer* release which specifically reserved the Dykes' right to sue Sukup, the release of Superior automatically released Sukup.

This legal reasoning was specifically rejected by this Court in Johnson v. Brown, 401 N.W.2d 85 (Minn.Ct.App.1987), *rev. denied Apr. 23, 1987*. In order for a release to act as a bar to the pursuit of another tortfeasor, the settlement agreement must evidence an intent to release other tortfeasors, not a reservation to sue another tortfeasor.

This Court recently discussed this issue in Market America Corp. v. Reinert, 2007 WL 823862 (Minn. Ct. App. March 20, 2007) See: A-81. In that case, the plaintiff settled its claim against one of two defendants. The Court of Appeals reversed the trial court's grant of summary judgment after rejecting the non-settling defendant's argument that if the settlement was not obtained with a *Pierringer* release, then the general release of the settling defendant, in turn, barred any further claims, citing Johnson v. Brown, *supra*, at 88.

² The Court in Klimek (*supra* at 106) appears to have simply misread the holding in Gronquist as that case stands for just the opposite principle for which it was cited. In any event, the language quoted by the Trial Court in its memorandum from Klimek was dicta. The issue in Klimik was whether the Trial Court properly affirmed an arbitration award. See: Wall v. Fairview Hospital, 584 N.W.2d 395, 403 (Minn. 1998) "Moreover, more than 40 years ago, we held that partial satisfaction from one tortfeasor does not prevent recovery from another tortfeasor." (citing Gronquist).

Had Superior desired to avoid a suit for contribution and indemnity, it could have demanded the settlement with the Dykes include either *Pierringer* language or an absolute release of all known and unknown tortfeasors. It did neither. A *Pierringer* release protects the settling party from further liability or exposure to pay additional money on a claim. Superior can not now be heard to complain that it must defend against Sukup's third party action because of its failure to properly protect itself when settling with the Dykes.

Sukup can claim no prejudice because it has filed a third party action against Superior for contribution and indemnity. See: A-38-42. There is no legal or equitable basis to allow Sukup to avoid responsibility for its own fraud, negligence and breach of warranty. As stated in Gronquist:

Liability in tort is several as well as joint, and this is so, whether the tortfeasors act separately or in conjunction. Warren v. Westrup, 44 Minn. 237, 46 N.W. 347; Wrabek v. Suchomel, 145 Minn. 468, 177 N.W. 764. Each is responsible for the whole, although the injured person may not have more than full satisfaction except as punitive damages. The just and true rule should be, and we believe is, that, if the injured 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; but if he has not received full satisfaction, or that which the law considers such, he is not barred until he has received full satisfaction. If he receives a part of the damages from one of the wrongdoers, the receipt thereof not being understood to be in full satisfaction of the injury, he does not thereby discharge the others from liability.

supra at 164.

Since each tort-feasor is liable for the entire damage, if one sees fit to secure acquittance for himself by compromise with the injured person, he does no wrong to the other tort-feasor jointly liable with him. How can the appellant complain if the other party jointly liable has paid part of the damages? He has not been prejudiced by the settlement but on the contrary

has been benefited, for he is entitled to have the amount of the judgment reduced by the amount paid by his co-tort-feasor. Furthermore, it must be noted that in most jurisdictions there is no right of contribution between joint wrongdoers, and although Minnesota does allow contribution to a joint tort-feasor whose liability is based only on simple negligence, there is no right of contribution in this state between tort-feasors such as in the instant case where the tort was proved intentional and the tort-feasors were held liable for a known and meditated wrong. See, Warren v. Westrup, 44 Minn. 237, 46 N.W. 347.

We are not aware of any compelling reason to justify precluding a person who has sustained an injury through the wrongful act of several persons from agreeing with one of the wrongdoers who desires to avoid litigation to accept a sum by way of partial compensation and to discharge that wrongdoer from further liability without releasing his right of action as against the other wrongdoers for the remainder of the judgment. Compromises are favored generally in the law, and it would be inconsistent to regard such arrangements with disfavor.

supra at 165-166.

CONCLUSION

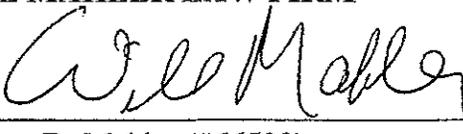
The Trial Court not only improperly decided a genuine issue of material fact that was in dispute, it also decided the wrong question. The question at issue is not whether the release between Dykes and Superior reserved a right to sue Sukup, but whether the release expressed an intent to release all other tortfeasors.

Because the release did not express such an intent, and the Dykes clearly were not compensated, the release is not a bar to the present action.

Appellants respectfully request this Court to reverse the Trial Court's grant of Summary Judgment, reinstate this action in the trial court, and find that the settlement agreement with Superior does not release Sukup because it expresses no intent on the part of the Dykes to release other tortfeasors and that the Dykes were not fully compensated.

Dated: April 30, 2008

WILL MAHLER LAW FIRM

By: 

William D. Mahler (#66539)

300 Third Avenue SE

Suite 202

Rochester MN 55904

(507) 282-7070

Attorney for Appellants