

Nos. A05-0800 and A05-1533

State of Minnesota
In Court of Appeals

LAKE SUPERIOR CENTER AUTHORITY, et al.,
Appellants,

v.

HAMMEL, GREEN AND ABRAHAMSON, INC.,
defendant and third-party defendant,
Respondent,

v.

MELANDER, MELANDER & SCHILLING, INC.,
MARCY CONSTRUCTION COMPANY, et al.,
Third-Party Defendants,

and

RUTHERFORD & CHEKENE, a California corporation,
Defendant and Fourth-Party Plaintiff,

v.

CONCRETE RESTORERS, INC.,
Fourth-Party Defendant.

BRIEF OF THIRD-PARTY DEFENDANT MARCY CONSTRUCTION COMPANY

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STATEMENT OF LEGAL ISSUES

1. Issues not briefed on appeal are waived. Appellants appealed the summary-judgment order dismissing Third-Party Defendant Marcy Construction but did not brief the issue. Is that issue now waived?

This court should answer "yes."

Apposite authority:

State Dept. of Labor & Indus. v. Wintz Parcels Drivers, Inc., 558 N.W.2d 480, 480 (Minn. 1997);
Balder v. Haley, 399 N.W.2d 77, 80 (Minn. 1987);
Schoepke v. Alexander Smith & Sons Carpet Co., 290 Minn. 518, 519, 187 N.W.2d 133, 135 (1971).

STATEMENT OF THE CASE

This is a construction-defect case arising out of the design and construction of a giant fish tank at the Great Lakes Aquarium in Duluth. In a prior, separate litigation, Third-Party Defendant and Fourth-Party Plaintiff Marcy Construction obtained a release from Appellant Lake Superior Center Authority (Lake Authority). In that litigation, Marcy Construction asserted a claim against Lake Authority for additional compensation in connection with its fish-tank repairs. Lake Authority counterclaimed. Ultimately, Lake Authority settled with Marcy for \$465,000. Lake Authority executed a Pierringer release releasing Marcy Construction. Lake Authority and Lake Superior Center (Lake Center) later sued Respondents Hammel, Green, and Abrahamson (HGA), an architectural engineering firm, and Defendant and Fourth-Party Plaintiff Rutherford & Chekene (R&C), a structural engineering firm.

HGA and R&C then brought a third-party action against Marcy Construction, and Marcy moved for summary judgment based upon the release. In May 2004, the Sixth

Judicial District, County of St. Louis, the Honorable Terry Hallenbeck, ordered summary judgment in Marcy Construction's favor based on the Pierringer release between Lake Authority and Marcy. The district court concluded that Lake Center had authorized Lake Authority to include both parties' claims in the counterclaim and to ultimately settle all claims by both parties with Marcy Construction via the Pierringer release. Accordingly, the district court determined that the Pierringer release obligated both Lake Authority and Lake Center to indemnify Marcy for all claims against it in this matter. The district court therefore dismissed Marcy from the case.

Prior to trial, HGA and R&C settled with one another and HGA withdrew its claims against three of the third-party defendants: Peterson, Inc./Johnson Wilson Construction Management, Inc., American Engineering Testing, Inc., and Krech/Ojard & Associates, P.A. The case then proceeded to trial with the remaining parties in October 2004. The jury rendered a defense verdict for HGA and R&C. Lake Authority and Lake Center timely filed post-trial motions, which the district court denied. Appellants then appealed several orders and the judgment, including the May 5, 2004 order granting summary judgment to Marcy Construction.

ARGUMENT

While Appellants Lake Superior Center Authority and Lake Superior Center's notice of appeal included the district court's order granting summary judgment in Marcy's favor, they have failed to brief the issue in any manner. Accordingly, this court cannot review the district court's order granting summary judgment to Marcy because the issue has been waived. *See State Dept. of Labor & Indus. v. Wintz Parcels Drivers, Inc.*,

558 N.W.2d 480, 480 (Minn. 1997)(declining to reach issue in absence of adequate briefing); *see also* Minn. R. Civ. App. P. 128.02, subd. 1(d) (requiring each issue in brief to be separately presented). Any arguments related to the district court's dismissal of Marcy Construction have been waived and cannot be revived by addressing them in a reply brief. *See Balder v. Haley*, 399 N.W.2d 77, 80 (Minn. 1987), Minn. R. Civ. App. P. 128.02, subd. 3 (stating that reply brief must be confined to new matter raised in respondent's brief).

In sum, it is appellants' burden to show error on appeal and it may not rely on mere assertion to do so. *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519, 187 N.W.2d 133, 135 (1971) ("assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection"); *see also, Ganguli v. Univ. of Minnesota*, 512 N.W.2d 918, 924 (Minn. App. 1994) (refusing to address allegations not supported by analysis or citation). This court should deem appellants' appeal of the summary-judgment order dismissing Marcy Construction waived because they did not brief the issue.

CONCLUSION

Respondent Marcy Construction respectfully requests this court to deem appellants' appeal of the summary-judgment order dismissing Marcy from the case waived because it failed to brief the issue on appeal.

Respectfully submitted,

Dated: October 10, 2005

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