CASE NO. A08-583

MINNESOTA STATE LAW LIBRARY

State of Minnesota
In Supreme Court

VIRGIL DYKES AND CONNIE DYKES, D/B/A DYKES FARMS,
Respondents,

vs.

SUKUP MANUFACTURING COMPANY,
Defendant &
Third-Party Plaintiff-Appellant,

vs.

SUPERIOR, INC.,
Third-Party Defendant-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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STATEMENT OF THE ISSUES

1. Does the release of one tortfeasor automatically release the non-settling tortfeasor in the absence of any intent to do so and where the releasor is not fully compensated?

   The Court of Appeals correctly applied long-standing precedent when it determined that a release of one joint tortfeasor releases all others only if the parties intended such a result or if the releasor was fully compensated.

   AUTHORITY:

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

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

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

   MSK Eyes Ltd. v. Wells Fargo Bank, Nat. Ass'n., 546 F.3d 533 (8th Cir. (Minn.) Nov 03, 2008)

2. Is a non-Pierringer release with one of two tortfeasors, as a matter of law, a general release?

   The Court of Appeals correctly ruled that the Trial Court misapplied the law by presuming a release of joint tortfeasors in the absence of contrary intent expressed by the injured party to a settlement agreement. When a settlement agreement does not contain a *Pierringer* release, the 'release of one tortfeasor will release all others only if the settlement agreement manifests such an intent or if the Plaintiff receives full compensation in law or in fact for damages against the remaining tortfeasors." Johnson v. Brown, 401 N.W.2d 85, 88 (Minn.Ct.App. 1987), *rev. denied Apr. 23, 1987.*

   AUTHORITY:

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

Bixler by Bixler v. J.C. Penney Co., Inc., 376 N.W.2d 209 (Minn. 1985)

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

3. Does a non-*Pierringer* release coupled with a Stipulation of Dismissal constitute a general release?

The Court of Appeals implicitly ruled in the negative by rejecting the argument raised again in this appeal by Sukup. A Stipulation of Dismissal affects only the parties to the action dismissed

AUTHORITY:

Hentschel v. Smith, 153 N.W.2d 199 (Minn. 1967)

In re Bush's Estate, 224 N.W.2d 489 (Minn.1974)

4. Do fact issues relating to the issue of full compensation preclude Summary Judgment?

The Court of Appeals ruled in the affirmative and noted that the District Court states in its memorandum 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 compensation is in dispute.'" See: Add-15.

AUTHORITY:

5. Can Sukup seek contribution from Superior?

Both Sukup and Superior have common liability to Dykes and Minn.Stat §604.02 Sub. 1 (2002) imposes joint and several liability on Sukup and Superior. Therefore Sukup's third party claim for contribution is viable and insures that it will not pay more than its fair share.

AUTHORITY:

Employers Mut. Cas. Co. v Chicago, St. Paul, Minneapolis & Omaha Ry. Co., 235 Minn. 304, 50 N.W.2d 689 (Minn. 1951)

Hart v. Cessna Aircraft Co., 276 N.W.2d 166 (Minn. 1979)

Minn.Stat. §604.02 Sub. 1 (2002)

STATEMENT OF THE CASE

Respondents Virgil and Connie Dykes purchased a grain moving system designed and manufactured by Appellant Sukup and sold and installed by its dealer, Superior, Inc. The system failed and caused substantial damage to the Dyke's 2002 corn crop.

When the Dykes refused to pay for the equipment, Superior filed a mechanics lien and sued Dykes for the purchase price. The Dykes counterclaimed for damages. That lawsuit was settled at mediation. The mediation agreement required Superior to remove its equipment and release its mechanic's lien in exchange for Dyke's dismissal of their counterclaim which only alleged that the system was not installed in a workmanlike manner. No compensation was paid to Dykes. In the release, Dykes only released Superior and it expressed no intent to release others.

Subsequently, Dykes sued Sukup alleging consumer fraud, negligence and breach of warranty. Sukup served a Third Party Complaint against Superior. See: RA-1.

Shortly after the pleadings were served, Sukup brought a Summary Judgment motion on the grounds that the release between Dykes and Superior had the effect of releasing Sukup. The Wabasha District Court granted Sukup's motion reasoning that because the release did not specifically reserve a right to sue another tortfeasor, the rule that "a release of one, releases all" applied.

The Court of Appeals reversed the District Court on the grounds that the District Court misapplied the law by presuming the release of joint tortfeasors in the absence of contrary intent expressed by the injured party to a settlement agreement. The Court held that the appropriate inquiry is whether the injured party, by settling with and releasing

one tortfeasor, intended to release other tortfeasors from joint and several liability. In addition, the Court of Appeals found that the record did not support a conclusion that Appellants received full compensation for their injury.

Only Sukup petitioned this Court for review of the Court of Appeal's decision. Superior did not. The Minnesota Defense Lawyer's Association filed an amicus brief raising for the first time in this litigation the issue of allocation of fault and damages

STATEMENT OF 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: AA- 016 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: AA-017 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: RA-33. 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: AA-017 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. Id. 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: Id. at ¶9.

Finally, on November 13, 2002, Sukup's 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: AA-018 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 and AA-026 – AA-034.

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. AA-018. 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: RA-70. 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: AA-018 at ¶¶ 14-15 and AA-079 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: AA-018 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.

Sukup's characterization of the Guscette letter as placing all the blame on Superior is incorrect.[1] (Appellant's Brief, pp. 7-8). Guscette points to the fact that the Sukup equipment could not function properly without a surge tank. The Sukup equipment is not manufactured, advertised or sold with a surge tank. This is evidence of a design flaw. Sukup failed to recommend a surge tank when Dykes first contacted it about the damaged

[1] The Guscette letter was simply filed with the Trial Court by Sukup in support of its Motion for Summary Judgment. There is nothing in the record that Guscette was designated as Plaintiffs' "expert" or was even used by Dykes.

corn problem. It also apparently failed to train its dealers (ie: Superior) about the need to install surge tanks.

ARGUMENT

Sukup seeks to evade responsibility for its acts of consumer fraud, negligence and breach of warranty by attempting to resurrect a legal concept that has been dead for 54 years in Minnesota. The simplistic and harsh rule that "the release of one tortfeasor is the release of all others" is catchy and easy to remember but is not the rule of law to be followed. It is not the rule of law because such a rule "offends the basic principle of law that an injured party should be wholly compensated for his injury where liability exits." Couillard v. Charles T. Miller Hospital, Inc., 92 N.W.2d 96 (Minn.1958).

Sukup cites no authority for its incorrect claim that "there is only one recognized type of partial release involving joint tortfeasors under Minnesota law, and that is the *Pierringer* release." (Appellant's Brief, p.10) Whereas *Pierringer* releases can greatly facilitate settlement where one defendant sees the light but the other doesn't, settling tortfeasors have the obligation to take advantage of its protection by negotiating its use in a settlement agreement. Contrary to Appellant's position, it is not the injured party's obligation to protect a party that has caused it damage by insisting that a *Pierringer* release be used.

Sukup is also incorrect by implying that a *Pierringer* release is somehow designed for the protection of an injured party. To the contrary, this type of release is intended to protect the settling tortfeasor because it allows him to fix his exposure on a claim no matter what transpires down the line. In this case, Superior failed to protect itself from potential contribution claims by failing to require either an unqualified absolute release of all known and unknown parties or a *Pierringer* release. Superior cannot now be heard to

complain that it must defend against Sukup's third party action. Apparently, Superior is not complaining because it did not join in this appeal

Sukup's third party action against Superior is alive and well and, for this reason, Sukup will never pay more than its fair share as determined by a jury.

1. THE COURT OF APPEALS CORRECTLY APPLIED THE RULE OF LAW RELATING TO RELEASES INVOLVING JOINT TORTFEASORS

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). 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) by permitting parol proof that a party to a release never was compensated for, and never intended to release, claims against other torfeasors.

> The refusal to let such parties hide behind the parol evidence rule when the documentary 'release' was not in fact intended to discharge claims against them and does not on its face purport to express such an intention, is a thoroughly justified refusal.

Couillard at 428 (quoting 4 Corbin, Contracts §934 at 760).

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 reaffirmed the holding in Gronquist 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.

Luxenburg. 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.

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: AA-016-019 and AA-079. Therefore, the Dykes "should not be denied (their) right to pursue the remaining wrongdoer until (they have) received full satisfaction." Luxenburg, supra at 807-08.

2. A NON-*PIERRINGER* RELEASE DOES NOT NECESSARILY CONSTITUTE A GENERAL RELEASE

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 District 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

[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 District Court in its memorandum from Klimek was dicta. The issue in Klimik was whether the District 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).

rights to bring an action against any other tortfeasor for the same claimed damages." In effect, the District Court ruled that, in the absence of a *Pierringer* release which specifically reserved the Dykes' right to sue a third party, the release of Superior automatically released Sukup. The Minnesota Court of Appeals specifically rejected this position.

This legal reasoning was also specifically rejected by the Minnesota Court of Appeals 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.

The Minnesota Court of Appeals discussed this issue fairly recently in Market America Corp. v. Reinert, 2007 WL 823862 (Minn. Ct. App. March 20, 2007) See: RA-73. In that case, the plaintiff settled its claim against one of two defendants. The Court of Appeals reversed the District 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 release of the settling defendant, in turn, barred any further claims, citing Johnson v. Brown, supra at 88.

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 cannot 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 notes in its brief that "Both parties to the settlement had knowledge of Sukup's role as the manufacturer of the equipment that had been installed. Moreover, the Dykes had made references to the allegedly defective nature of that equipment in its lawsuit." (Appellant's brief, p. 12) This admission further strengthens Dykes' position that Superior has no excuse for failing to address potential third party claims against it.

Sukup can claim no prejudice because it has filed a third party action against Superior for contribution and indemnity. See: RA-1. There is no legal or equitable basis to allow Sukup to avoid responsibility for its own fraud, negligence and breach of warranty. Gronquist, supra at 164.

Sukup's position is premised on the erroneous belief that the mediated settlement agreement was a general release that was unqualified and absolute. A general release contains language similar to what was held to be a general release in West American Ins. Co. v. Ford Motor Co., 759 F.Supp. 547 (D.Minn.1991). In that case, the settlement agreement signed by the plaintiff released all claims against the defendant "and all other persons, firms and corporations liable, or, whom might claim to be liable, for injuries relating to the accident." Id. at 549. The release further stated:

> Undersigned hereby declares that the terms of this settlement have been completely read and are fully understood and voluntarily accepted for the purpose of making a full and final compromise adjustment and settlement of any and all claims disputed or otherwise, on account of the injuries and damages above mentioned, and for the express purpose of precluding forever any further or additional claims arising out of the aforesaid

accident.

Id.

The plaintiff in that case argued that, despite the unqualified and absolute release of "all other persons", she did not intend to release the manufacturer of the vehicle that caused the accident. The Federal District Court judge rejected this position by holding that the plain language in the settlement agreement could not be ignored. The Court also noted that the plaintiff had been fully compensated for her injuries, therefore there was nothing inequitable about enforcing the agreement.

In the present case, there is absolutely nothing in the settlement agreement which even remotely suggests that the Dykes intended to release "all other persons, firms and corporations." The only entity that Dykes released was Superior, Inc., therefore the settlement agreement was not an absolute and general release. In West American, supra, it was noted that State Farm has a stated policy in protecting the interests of its insured to require general releases. A State Farm Bodily Injury Superintendent testified:

> "It is the standard and absolute policy of State Farm in the settlement of bodily injury claims against its insureds to obtain releases that protect the insureds from potential claims for contribution by other potential tortfeasors.... State Farm requires that the adverse parties execute general releases of all claims against State Farm's insureds and all other persons, firms and corporations. By using a general release, State Farm's insured is also protected from potential contribution claims because the release acts to release all of the adverse parties' claims.

Id. at 552.

3. THE DISMISSAL WITH PREJUDICE OF SUPERIOR'S LAWSUIT DOES NOT BAR THE PRESENT ACTION

Sukup's argument regarding the dismissal of the lawsuit between Dykes and Superior misses the mark. Appellant cites Butkovich v. O'Leary, 225 N.W.2d 847 (Minn. 1975); Schoenfield v. Buker, et al, 114 N.W.2d 560 (Minn 1962) and Mattsen v. Packman, 358 N.W.2d 48 (Minn. 1984) in support of its position. All three cases are clearly distinguishable as all involved an attempt by a plaintiff to re-litigate issues against the same defendant after the case had been settled and dismissed. Dykes make no claim that they may pursue any direct claim against Superior, nor do they seek to vacate the order of dismissal.

The dismissal of the Superior lawsuit with prejudice on the merits resulting in a consent judgment extinguished all claims either party had against each other relating to the sale and installation of the equipment. In re Bush's Estate, 224 N.W.2d 489, 500 (Minn.1974) (A judgment based on settlement agreement is a final judgment on the merits, but only with respect to those issues and claims actually settled.) Hentschel v. Smith, 153 N.W.2d 199, 206 (Minn. 1967). (The doctrine of res judicata applies only to parties and their privies. The relationship between joint tortfeasors is not such as to make the one not sued a party by either privity or representation.)

Because Sukup was not a party to the lawsuit that was dismissed, it necessarily follows that the consent judgment dismissing the Dykes/Superior action with prejudice has no bearing on the Dykes' different, independent and direct claims against Sukup alleging fraud, breach of warranty and negligence. If the settlement agreement with

Superior does not bar a claim against Sukup, then a dismissal of the first lawsuit logically would not bar a subsequent suit against a different tortfeasor alleging different causes of action.

4. DISPUTED FACT ISSUES RELATING TO WHETHER DYKES RECEIVED FULL COMPENSATION PRECLUDED SUMMARY JUDGMENT

Sukup raises for the first time in this litigation that the Dykes were fully compensated. This issue was not raised in the District Court, the Court of Appeals or the Petition for Review and, for this reason, the issue is not properly preserved.

If this Court does consider Sukup's argument, it should be rejected.

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 District 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).

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 District 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).

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 by affidavit or otherwise in the District Court that the Dykes were fully compensated and did not even discuss the issue in either its original or reply briefs in support of its motion.

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. See: AA-026-034

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 District Court in its memorandum makes clear that it did not follow the proper standards in deciding the motion. The District 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 persuaded that the 2003 settlement agreement failed to fully compensate Plaintiffs."

This was not a trial to the Court. The Dykes demanded a jury trial when this action was filed. The non-moving party in a Summary Judgment motion does not need to "persuade" the District Court of anything other than there exists disputed genuine issues of material fact. "The intent of the parties and the question of actual compensation are

questions of fact for the jury" Couillard, supra at 103. The District Court improperly decided disputed factual issues in arriving at its decision.

5. SUKUP AND SUPERIOR SHARE COMMON LIABILITY AND ARE JOINTLY AND SEVERALLY LIABLE. EACH SHOULD PAY THEIR FAIR SHARE OF DAMAGES

The issues of allocation of fault and payment of damages were not raised by Sukup in the District Court, Court of Appeals or in its brief to this Court and, for this reason, are not properly preserved on appeal.

The issues are instead raised by the Minnesota Defense Lawyer's Association over a concern that the Court of Appeals "did not offer the Trial Court any guidance as to how to proceed at trial" and asked this Court to "clarify the remand order". This concern is misplaced as there is no need to clarify the remand order because the procedure to be followed by the Trial Court is well established. The jury will determine the fault, if any, of Dykes, Sukup and Superior and the damages allocated accordingly.

The legislative intent of Minn. Stat. §604.02 governing joint and several liability is for full recovery. Ericson v. Hinkley Mun. Liquor Store, 373 N.W.2d 318 (Minn.Ct.App. 1985).

Parties whose negligence concurs to cause injury are jointly and severally liable for plaintiff's entire award. Fiedler v. Spoelhof, 483 N.W.2d 486 (Minn.Ct.App. 1992). *review denied.* The same is true although not acting in concert. Maday v. Yellow Taxi Co., 311 N.W 2d 849 (Minn. 1981); see also: Jenson v. Evelety Taconite Co., 130 F.3d

1287 (8th Cir. Minn. 1997) *rehearing en banc denied, cert denied* 118 S.Ct. 2370, 524 US 953.

Sukup and Superior are jointly and severely liable to Dykes for the entire award

MDLA correctly notes that the essential elements for contribution in a tort action are a common liability of joint tortfeasors to an injured party and payment by one of the tortfeasors of more than his share of that liability.

MDLA is incorrect in its implicit position that Superior and Sukup do not share common liability. They do. Common liability exists immediately after the acts of the tortfeasors which give rise to the action against them. Employers Mut. Cas. Co. v Chicago, St. Paul, Minneapolis & Omaha Ry. Co., 235 Minn. 304, 50 N.W.2d 689, 693 (Minn. 1951). The execution of a covenant not to sue[3] does not destroy the common liability necessary to a cause of action for contribution. Id.

Hart v. Cessna Aircraft Co., 276 N.W.2d 166 (Minn. 1979), cited by MDLA to support is position, is easily distinguishable. In Hart, the plaintiff sued the owner/pilot and the jury determined that the owner/pilot was not negligent for the death of plaintiff's husband. Plaintiff then sued the manufacturer of the plane who then brought a third party claim for contribution against the owner/pilot. The Court ruled there was no common liability shared by the owner/pilot and the manufacturer because the owner/pilot had been judicially determined to be free of negligence. For this reason, the manufacturer was not allowed to pursue its third party claim for contribution.

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[3] The distinction between a "release" and a "covenant not to sue" is entirely artificial. Gronquist, supra at 165.

In the present case, there has been no determination that Superior was not negligent. Therefore, Sukup's third party action for contribution against Superior is viable. As such, Sukup will never pay more than its fair share.

The risk to a plaintiff who elects to sue tortfeasors piecemeal is that if the first tortfeasor is found to be free of negligence at trial, the plaintiff can only recover from the second tortfeasor an amount based on the second tortfeasor's percentage of fault determined by the jury. This is the only risk assumed by a plaintiff who makes such an election.

There is no dispute that the question of fault of Dykes, Sukup and Superior will be submitted to the jury.[4] Because this action arose prior to the August 2003 amendment to Minn.Stat §604.02, the former subdivision 1 that applies to this case reads as follows:

> Subd. 1: When two or more persons are jointly liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that each is jointly and severably liable for the whole award...A person whose fault is 15% or less is liable for a percentage of the whole award no greater than four times the percentage of fault, including any amount reallocated to that person under Subd. 2.
>
> Id.

Following this statue, the District Court will simply do the math and, after reducing the award of damages to reflect any fault on the part of the Dykes, if any, it will allocate the balance based on the percentage of fault of Sukup and Superior. Each party, however. is jointly and severally liable for the whole award.

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[4] Comparative fault would not apply, however, should Dykes prevail on their fraud claims against Sukup. Florenzano v. Olson, 387 N.W.2d 168 (Minn. 1986).

If Superior is essentially let off the hook as urged by MDLA by allowing Dykes to only recover an amount equal to Sukup's negligence, there is a great risk that Superior, as Sukup's dealer, will simply "roll over" at trial and concede fault resulting in grave injustice. "Justice requests that (Superior) pay (its) fair and honest share of the underlying obligation. The later acquired defense does not alter the basic equities of the situation." Employers Mut. Cas. Co., supra at 693.

CONCLUSION

There is no legal or equitable basis to allow Sukup to evade responsibility for its acts of fraud, negligence and breach of warranty. Long-standing precedent establishes that the release between Dykes and Superior did not release Sukup. Superior could have avoided exposure to a third party claim for contribution by requiring that the release with Dykes either be absolute and unqualified or a *Pierringer*. Dykes should not be penalized by either having their lawsuit dismissed or being restricted to the amount of their recovery because of the failure of Superior to follow Minnesota law that has existed since 1954. Sukup and Superior share common liability and are jointly and severely liable for the entire award. Superior's third party action for contribution will ensure that Sukup will not pay more than its fair share. The Court of Appeal's decision should be affirmed.

Date: July 27, 2009

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Respondents Virgil Dykes and Connie Dykes certifies that this brief complies with the requirements of Minn.R.App.P. 132.01 in that it is printed in 13 point, proportionally spaced typeface utilizing Microsoft Word 2007 and contains 7,030 words, including headings, footnotes and quotations.

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