NO. A09-1617

State of Minnesota
In Court of Appeals

Doug Dammann and Pipestone Plumbing & Heating, Inc.,
Appellants,

v.

Master Blaster, Inc.,

Respondent.

BRIEF AND APPENDIX OF RESPONDENT MASTER BLASTER, INC.

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STATEMENT OF LEGAL ISSUES

1. Does Master Blaster's claim satisfy the requirements for common-law indemnity because the South Dakota verdict was based solely on Pipestone's fault, for which Master Blaster was held vicariously liable as Pipestone's principal?

   The district court ruled that Pipestone must indemnify Master Blaster.

   Apposite authority:

   Polaris Indus. v. Plastics, Inc. v. 299 N.W.2d 414 (Minn. 1980);
   Restatement (Second) of Torts, Indemnity § 22;
   Hendrickson v. Minnesota Power & Light Co., 258 Minn. 368, 104 N.W.2d 843 (1960), *overruled in part on other grounds by Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362 (Minn. 1977).

2. Did the district court correctly apply Minnesota law of "vouching" to conclude that Master Blaster's right to indemnity follows as a matter of law from the South Dakota verdict, the resulting judgment, and the other undisputed facts of record?

   The district court ruled that the undisputed facts establish Master Blaster's right of indemnity as a matter of law.

   Apposite authority:

   State Bank of New Prague v. American Sur. Co. of N.Y., 206 Minn. 137, 288 N.W. 7 (1939);
   Liberty Mut. Ins. Co. v. J.R. Clark Co., 239 Minn. 511, 59 N.W.2d 899 (1953);
   Universal Amer. Barge Corp. v. J-Chem, Inc., 946 F.2d 1131 (5th Cir. 1992);
   Washington Gaslight Co. v. District of Columbia, 161 U.S. 316 (1896);
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   Apposite authority:

   Polaris Indus. v. Plastics, Inc. v. 299 N.W.2d 414 (Minn. 1980);
   Restatement (Second) of Torts, Indemnity § 22;
   Minn. Stat. § 336.2-607(5)(a) (2009).

STATEMENT OF THE CASE

This is an action for indemnity by a contractor (Master Blaster, Inc.) who was held vicariously liable for the fault of its sub-contractor (Pipestone Plumbing & Heating, Inc.) for damage from a fire at a Lake Benton, Minnesota hog operation owned by the plaintiff in the underlying action (Supreme Pork, Inc.). The March 2002 fire caused extensive damage to farrowing rooms and resulted in substantial loss of sows, piglets, and other property.

Supreme Pork, a South Dakota corporation, commenced the underlying action against Master Blaster (but not Pipestone) in South Dakota state court, alleging Master Blaster's liability for Pipestone's allegedly faulty installation of a ventilation system used to vent extremely hot vapors from a building at the Lake Benton hog operation. Master Blaster impleaded Pipestone seeking indemnity, but Pipestone successfully sought dismissal based upon a lack of personal jurisdiction.

Thereafter, Master Blaster thrice tendered the defense of Supreme Pork's suit to Pipestone, because Supreme Pork sought recovery against Master Blaster solely on grounds for which Pipestone would be obligated to indemnify Master Blaster. Pipestone refused. Master Blaster then vigorously defended the South Dakota action through trial. The South Dakota court applied Minnesota law. The jury determined that Master Blaster's agent, Pipestone, was solely at fault for the fire and awarded approximately $1.3 million in damages. Master Blaster appealed and the South Dakota Supreme Court affirmed. Master Blaster has satisfied the judgment.

Master Blaster then commenced this action seeking indemnity from Pipestone, together with its cost of defense. Master Blaster moved for summary judgment on the ground that Pipestone's refusal of the tender of defense establishes under Minnesota law that any resulting judgment is conclusive evidence of Pipestone's fault and the damages. The Washington County District Court, Hon. Gregory Galler presiding, agreed that the undisputed material facts, together with the settled Minnesota law of indemnity, establish that Master Blaster is entitled to indemnity from Pipestone for the full amount of the South Dakota judgment, plus its cost of defense. Pipestone appeals.

STATEMENT OF THE FACTS

This appeal arises out of an indemnification claim between a contractor and its agent-subcontractor following a fire caused by the agent's work.

Respondent-plaintiff Master Blaster, Inc. is a South Dakota corporation owned by Paul Miersma. (T1 55-56).[1] Master Blaster is in the business of selling and servicing commercial-grade pressure washers, which are used by various businesses, including livestock producers. (T6 132). A pressure washer uses an engine to increase water pressure for industrial cleaning. (T6 132). Pressure-washers that use heated water (like those here) produce a tremendous amount of heat—480,000 or more BTU— thereby instantly transforming large quantities of water from cold to hot. (T3 173-74).[2]

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[1] "T# ##" refers to the volume and page(s) from the June 2007 South Dakota trial transcript, which consists of seven separately paginated volumes. Master Blaster submitted the entire trial transcript with its motion for summary judgment.

[2] BTU (British Thermal Unit) is a unit measure of heat. (T3 174). For comparison, a residential water heater produces only about 40,000 BTU. (*Id.*).

In 1999, Master Blaster installed two pressure washers for Supreme Pork.

In October 1999, Master Blaster sold two pressure washers to Supreme Pork, Inc.—a South Dakota corporation that owns feed and hog operations in eastern South Dakota and western Minnesota. (App.30).[3] All American Pressure Washers manufactured the pressure washers. (T1 56; T3 134,173, 207).[4]

Supreme Pork purchased these two new pressure washers to replace a then-inoperable pressure-washer system at Supreme Pork's hog facility near Lake Benton, Minnesota. (App.23,31-32). Master Blaster installed the two pressure washers in the southeast corner of what was commonly referred to as the "pressure-washer room" (a.k.a. the "mechanical room") at the Lake Benton hog facility. (T3 155,160). Modern hog confinement facilities, like those owned and operated by Supreme Pork, are equipped with industrial pressure washers to handle the problem of continuous animal waste. For example, Supreme Pork uses pressure washers daily to clean the gestation barn and farrowing rooms. (T1 29).

Because of the tremendous heat produced by pressure washers in converting cold water to hot, pressure washers require a chimney flue (pipe) vent that extends upward from the pressure-washer unit, through the attic space above the ceiling, and out of the roof of the hog building in which it is installed. Its purpose is to vent the extremely hot gases to the outside. (App.44).

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[3] "App.#" refers to appellant Pipestone's appendix.

[4] All American Pressure Washers was never a party to the underlying litigation.

Master Blaster hired appellant Pipestone Plumbing & Heating, Inc. to select and install chimney flue vents (the venting system) for the pressure washers.

Although Master Blaster sold and installed the pressure-washer units themselves, Master Blaster did not engage in selecting, providing, or installing the necessary chimney flues to vent the heat produced by the pressure washers. (T1 60; T6 104,134-135). Instead, Master Blaster hired appellant-defendant Pipestone Plumbing & Heating, Inc.—a Minnesota corporation—to supply and install two chimney vents for the newly installed pressure washers at the Supreme Pork Lake Benton hog facility. (R.A.13; T6 134-135). Pipestone was known for installing such chimney flue vents at hog facilities, and Pipestone's owner, Doug Dammann, estimates that Pipestone installed these vents in approximately 15 hog facilities over the past five years. (App.44-45).[5] Therefore, at the time Master Blaster sold the two pressure washers to Supreme Pork in October 1999, Pipestone—not Master Blaster—supplied and installed the chimney venting system for these two pressure washers. (T3 187, 203; R.A.13). While installing the chimney venting system for the pressure washers, Pipestone "field-constructed"—fabricated on site—certain venting components that Pipestone did not purchase from the chimney manufacturer. (T3 187-88).

In February 2002, Master Blaster made repairs to one of Supreme Pork's frozen pressure washers, which Supreme Pork then reconnected.

About two years later, in February 2002, one of the pressure washers froze as a result of cold temperatures, and Supreme Pork called Master Blaster to repair the broken

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[5] Mr. Dammann's deposition was read aloud at the South Dakota trial. (T2 104-105; T5 2).

pressure washer. (T2 19-20). Master Blaster removed the pressure washer, took it to its shop where it performed repairs, and then returned the repaired pressure washer to the Lake Benton facility. (T2 19-23; 69). Because disconnecting and reconnecting the pressure washers is uncomplicated, taking about 20 minutes, Supreme Pork reconnected the pressure washer. (T2 22-23).

In March 2002, fire broke out at the Supreme Pork facility in Lake Benton.

On March 21, 2002, a fire erupted in the pressure-washer room at Supreme Pork's Lake Benton facility, causing substantial property damage. (App.31-33; T3 160-162). Specifically, the fire started in the southeastern corner of the pressure-washer room/mechanical room, in the attic space directly above the pressure washers. (T3 155,160-162,168-169; T6 69).

Supreme Pork's attorneys notified Master Blaster, Pipestone, and All American Pressure Washers of the fire and of Supreme Pork's potential claim. (T3 19-20; *see, e.g.,* R.A.1).[6] Supreme Pork also notified these parties that it had retained an expert fire investigator, Chris D. Rallis, to investigate the cause of the fire and to schedule site inspections. (*See id*). Mr. Rallis scheduled a joint inspection for April 4, 2002. (T3 20).

In response to Supreme Pork's notice, Pipestone hired fire investigator Terry Parks to investigate the fire and attend the inspection. (App.168). All American hired fire investigator Richard Cox. (T6 92-98,101). Master Blaster hired fire investigator Jeffrey Washinger, but not until later in 2002. (App.130, 134; T3 147-148). Mr. Rallis (for Supreme Pork), Mr. Parks (for Pipestone), Mr. Cox (for All American), as well as

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6 "R.A.#" refers to Master Blaster's attached appendix.

Pipestone president Doug Dammann and Master Blaster owner Paul Miersma, attended the April 4 site inspection. (T3 20-21; T6 95-98,101; App.168). Supreme Pork discovered, however, that it had failed to notify another potential party—LB White, a space-heater manufacturer—so Mr. Rallis stopped the inspection, which he rescheduled for April 18, 2002. (T3 21,154-155; T6 97; App.168). The investigators, including LB White's investigator, Dr. Robert Schroeder, reconvened for the site inspection on April 18, with the exception of Mr. Cox, who arrived a day later. (T3 21,154-155; T6 97,113-114; App.168). Mr. Washinger did not inspect the site until August 2002. (App.130,132,134).

In 2004, Supreme Pork sued Master Blaster in South Dakota based solely on its theory that Pipestone improperly installed the venting system.

In January 2004, Supreme Pork commenced an action against Master Blaster in South Dakota state court, alleging property and other damages sustained as a result of the fire. (App.30,33-34). Supreme Pork did not name Pipestone (a Minnesota corporation) as a defendant to its South Dakota action.

In its complaint, Supreme Pork asserted only two claims: Negligence and breach of implied warranty. (App.31-33). In general terms, Supreme Pork's complaint alleged that Master Blaster negligently "install[ed] the new pressure washer system, *including the venting system*; * * * fail[ed] to perform the contract skillfully, carefully, diligently, and in a workmanlike manner; [and] * * * fail[ed] to supervise its employees, subcontractors and their agents and employees, and other persons performing under a contract with

[Supreme Pork]. (App.31-32)(emphasis added);(*see* Br.7).[7] Its complaint also generally alleged that Master Blaster "breached its implied warranty by negligently installing the new pressure washer system, *including the venting system.*" (App.33)(emphasis added).

But the specific language of the complaint showed that Supreme Pork based its negligence and breach-of-implied-warranty claims solely on its theory that Pipestone's negligent installation of the pressure washers' chimney venting system caused the fire:

> An investigation of the March 21, 2002 fire revealed that Defendant *failed to properly install the vents* in a manner so as to maintain proper separation between heat from the flue gases and the materials that formed in the building. The use of the washers allowed the expulsion of these gases in a manner and duration that lowered the ignition temperature of the building materials to a point where they became heated to a smoldering ignition state. This condition progressed to a free-burning fire during the early morning hours of March 21, 2002.

(App.31 ¶8)(emphasis added). The preceding paragraph in Supreme Pork's complaint is taken almost verbatim from the May 2002 report of Supreme Pork's expert, fire investigator Chris Rallis, who opined that Pipestone's venting-system installation was the sole cause of the fire:

> The proximate cause of this fire in my professional opinion was the *failure to properly install the subject vents in a manner so as to maintain proper separation between heat from the flue gases and the materials, which formed in the building.* Those building materials included wood framing members as well as cellulose type insulation.
>
> *The use of the washers allowed the expulsion of these gases in a manner and duration, which lowered the ignition temperature of the building materials to a point, which they became heated to a smoldering ignition state. This condition progressed to a free-burning fire during the early morning hours* of the fire day.

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7 "Br.#" refers to appellant Pipestone's brief.

(R.A.3) (emphasis added).

Master Blaster's South Dakota third-party complaint against Pipestone.

In May 2004, Master Blaster brought a third-party complaint in South Dakota against Pipestone, based on the claims in Supreme Pork's complaint, which Master Blaster attached to its third-party complaint. (App.73). Master Blaster's third-party complaint stated that is was Pipestone's "installation of this venting that [Supreme Pork] alleges was improper" and caused the fire. (App.74). Master Blaster "s[ought] complete indemnity" from Pipestone. (*Id*).

Months later, in February 2005, Pipestone's owner, Doug Dammann, testified during his deposition that Pipestone was solely responsible for the selection, fabrication, and installation of the Supreme Pork chimney flue vents:

> Q. Insofar as the work that you do for Master Blaster, Inc., installing vents, chimney vents on these power washers, would you agree that insofar as the installation of the vents are concerned, that's entirely your responsibility?
>
> A. Yeah. I -- I think when we install the chimney, the chimney part of it, not any of the rest of it. I don't do the gas piping. I don't do any of the electrical on them [i.e., the pressure washers]. I don't do anything else. I would say, yea, if we install the chimneys, that, yeah, that it's our responsibility.
>
> * * *
>
> Q. The work on the chimney is entirely your responsibility, right?
>
> A. Yes.

(App.52).

In June 2005, Pipestone successfully moved to dismiss Master Blaster's third-party complaint, based on lack of personal jurisdiction.

Despite Mr. Dammann's admission of Pipestone's responsibility for the venting system, Pipestone moved the South Dakota circuit court to dismiss Master Blaster's third-party complaint against it for lack of personal jurisdiction. (App.76-77). On June 6, 2005, the South Dakota circuit court concluded that it did not have personal jurisdiction over Pipestone (or Mr. Dammann), and dismissed Master Blaster's third-party action. (App.76-77).

Although Supreme Pork based its claim solely on Pipestone's improper vent installation, Pipestone rejected Master Blaster's June 2005 tender of defense.

The same day that the South Dakota circuit court ruled that it did not have personal jurisdiction over Pipestone, Master Blaster tendered the defense of Supreme Pork's suit and made a claim for indemnity against Pipestone. (App.88-89). In its June 6, 2005 tender letter, Master Blaster wrote that "[t]he only claim made [by Supreme Pork] is that the vents installed were not properly installed." (App.88). Master Blaster reminded Pipestone that "[t]his [vent installation] was Pipestone's responsibility as [Mr. Dammann] admitted in his deposition." (App.88). As a result, Master Blaster wrote that it "is entitled to common law indemnity against [Pipestone]," and made its "claim for indemnity * * * against Pipestone" for any damages that Supreme Pork might recover from it. (App.88).

Pipestone refused Master Blaster's tender and denied liability.

Pipestone rejected Master Blaster's *second* tender of defense and indemnity.

Eighteen months later, in November 2006, Master Blaster tendered a second defense to Pipestone. (App.90-91). In its November 16, 2006 tender letter, Master Blaster explained that it was currently defending against Supreme Pork's South Dakota action, which was set for trial in 2007. (App.90). Reiterating its previous June 2005 position, Master Blaster again explained that the only basis for Supreme Pork's suit against Master Blaster was improper vent installation, which Supreme Pork asserted was the exclusive cause of the fire:

> Plaintiff's suit is based upon claims that the exhaust vents for the pressure washers were improperly installed by Pipestone Plumbing and Heating, Inc., and that this was the cause of the fire * * *.

(App.90). Because Pipestone admitted that the venting installation was its sole responsibility (App.52), but the South Dakota court had no personal jurisdiction over Pipestone, Master Blaster explained that Supreme Pork sought only "to hold Master Blaster *vicariously* responsible for the work of its subcontractor, Pipestone." (App.90) (emphasis added). For these reasons, Master Blaster again warned Pipestone that

> [i]n the event that a judgment is rendered against Master Blaster in the South Dakota Court [Master Blaster] anticipate[s] filing suit against Pipestone for indemnity in Minnesota.

(App. 91). Pipestone again refused.

The second tender letter also informed Pipestone that Supreme Pork had expressed its willingness to mediate the matter, but "such a mediation require[d] the active participation of Pipestone" and its insurer, Acuity. (App.91). With Pipestone's participation, "it c[ould] be shown that the actual damages of Supreme Pork [are]

considerably less than the amount claimed," and thus "this case could be very reasonably settled." (*Id.*). Therefore, Master Blaster invited Pipestone to join in settling the case at a pre-trial conference scheduled for February 26, 2007. (*Id.*). Master Blaster also advised that settlement would avoid Pipestone's exposure to indemnification "claim[s] for attorney fees, court costs, expenses incurred to defend this claim and any judgment rendered in the South Dakota court." (*Id.*). Pipestone refused to settle, and trial was set for June 2007.

Before trial, Pipestone prevented Master Blaster from deposing its expert.

At the same time Pipestone refused Master Blaster's tenders of defense, Master Blaster sought to depose Pipestone's expert fire investigator, Terry Parks, to learn what it could from his testimony and prepare a defense against Supreme Pork in the upcoming South Dakota trial. But Mr. Parks—represented by Pipestone's counsel—responded with a motion to quash, alleging that Mr. Parks's testimony was not discoverable because he was a non-testifying expert witness whose privileged work product was created in anticipation of litigation. (R.A.7).

In May 2007, the Minnesota district court (the Honorable Herbert Lefler presiding) ruled that because Pipestone was a party who hired Mr. Parks to investigate the fire in anticipation of litigation, Master Blaster could not discover his opinions. (R.A.8-10). This deprived Master Blaster an opportunity to discover his testimony, which might have helped in the defense at trial.

At trial, Supreme Pork based its claims of negligence and implied breach of warranty solely on the venting installed by Master Blaster's agent, Pipestone.

Beginning June 11, 2007, Supreme Pork's suit went to trial in South Dakota state circuit court. At trial, Master Blaster defended Pipestone against Supreme Pork's claims, which were set forth in this summary of the jury instructions:

- That Master Blaster's "agent" Pipestone "negligently installed the flue vents," which "caused a fire," and that Pipestone's "negligence was the legal cause of [Supreme Pork]'s damages." (App.138 ¶23)

- That Pipestone's flue vents carried an implied warranty that they were fit for the particular purpose of Supreme Pork's hog operation, and that this warranty was breached. (App.140 ¶¶32-33).

By contrast, Supreme Pork made no claim at trial that the pressure washers or any conduct by Master Blaster caused the fire:

> [Supreme Pork's counsel]. And there is no allegation from us that the power washers themselves had any problem with respect to this fire, right?
>
> [Paul Miersma, owner of Master Blaster]. Right.

(T2 57). The same is true regarding Supreme Pork's claim for breach of implied warranty, which, at trial, Supreme Pork based exclusively on Pipestone's conduct:

> One of the claims in this case is for an implied warranty of fitness for a particular purpose. [Master Blaster] said [it] knew a plumber [Pipestone] and we [Supreme Pork] relied on [Master Blaster's] judgment and skill and [it] picked [Pipestone] who provided the materials in this case, and [Pipestone] warranted impliedly that they were going to provide a system that was fit for a particular purpose.

(T3 178-79). Also, the trial transcript is devoid of any mention of any claim against Master Blaster for negligent supervision.

Supreme Pork's experts testified that Pipestone's improperly installed vent system caused the fire.

Supreme Pork called two experts in support of its case: Fire investigators Chris Rallis and Dr. Robert Schroeder.

Mr. Rallis testified that Pipestone's improper installation of the venting system was the sole cause of the fire at Supreme Pork's facility.

Fire investigator Chris Rallis worked as a police arson investigator before starting a company that investigates fires and explosions. (T3 11-12). Mr. Rallis estimates that he has investigated roughly 1,700 fires involving "product or workmanship issues." (T3 12-13). Mr. Rallis testified that the March 2002 fire originated in the pressure-washer room ("mechanical room")—specifically at the ceiling level, in the attic space above the pressure-washer room, around the venting for the chimneys. (T3 32-36, 38, 88). When Supreme Pork's counsel asked Mr. Rallis's opinion on the source of ignition, he testified:

> It was really quite easy in this fire. It was easy because there was only one source of heat capable of generating ignition for this fire and that source of heat was provided by the vent stacks for the pressure washers.

(T3 38). He ruled out any other cause of the fire, including electrical wiring or the space heater in the pressure-washer room. (T3 38-39). Mr. Rallis blamed the fire solely on improper installation of the flue vents:

> [T]he construction of the vent system for the power washers was not proper and that it allowed the separation between the cellulose insulation and the chimney to be violated. In other words, the cellulose insulation encroached upon the space that was supposed to be present to keep that from igniting and that's the cause of this fire.

(T3 53,70). Mr. Rallis testified that because Pipestone failed to properly secure the attic shield, which prevents chimney flues from coming into contact with surrounding

combustible cellulose insulation, this permitted the vent that Pipestone installed to move, allowing cellulose insulation to come into contact with the vents that were expelling the hot gases, thereby causing the fire. (T3 49,53). Mr. Rallis also criticized the attic shields that Pipestone "field constructed," describing them as "flimsy," poorly designed pieces. (*Id.*). In sum, Mr. Rallis testified that Pipestone's improper venting caused the fire:

> [Supreme Pork's counsel]. Do you have an opinion, Mr. Rallis, based on a reasonable degree of probability in your field, that the ignition of this fire was caused by the improper venting?
>
> [Mr. Rallis]. Yes, I do.

(T3 54). Even under intense cross-examination by Master Blaster's counsel, Mr. Rallis maintained that had Pipestone properly secured the attic shield, "[t]hen we would not have had a fire." (T3 60).

Consistent with Mr. Rallis's testimony, Dr. Schroeder testified that the sole cause of the fire was Pipestone's improper installation of the venting system.

Supreme Pork also called fire investigator Dr. Robert Schroeder to testify in support of its theory that Pipestone's improper venting installation caused the fire. (T3 148). Since 1979, Dr. Schroeder has been investigating fires full-time, receiving a B.S. in fire protection, and later earning a PhD in engineering, writing a thesis on post-fire analysis of construction materials. (T3 149-152).

Dr. Schroeder was among the investigators called to investigate the Supreme Pork site shortly after the March 2002 fire. (T3 153-155). Unlike Mr. Rallis, who was hired by Supreme Pork, Dr. Schroeder investigated the fire on behalf of LB White—a manufacturer of space heaters. (T3 153-154,167). At the time of the fire, Supreme Pork

kept an LB White space heater in the pressure-washer room (mechanical room). (T3 153,155,168-169).

Like Mr. Rallis, Dr. Schroeder testified that the fire started at the ceiling level, above the two pressure washers, in the southeast corner of the mechanical room. (T3 169-170). At trial, Dr. Schroeder ruled out all other ignition sources, including the gas line to the pressure washers, the electrical wiring, and the LB White heater, which was not at ceiling level. (T3 169-172). He testified, "[m]y opinion is that the heat going through the flue ignited combustibles; i.e.; the most likely is cellulose insulation," which is "nothing more than ground up newspapers." (T3 169,196; T6 49-50).

Dr. Schroeder testified that Pipestone used attic shields that were not approved, designed, or manufactured for their intended purpose of preventing the hot chimney flues from coming into contact with the combustible cellulose insulation. (T3 188-190; T3 176-78). Rather, Pipestone fabricated or "field-constructed" these attic shields at the Supreme Pork facility, using nothing more than sheet metal and tin cutters. (*Id.*). Dr. Schroeder testified that Pipestone's "field-crafted" attic shields were substantially inferior in many ways to those created by the manufacturer, from whom Pipestone bought the chimney flues. (T3 176-178, 187-88). Dr. Schroeder testified that factory-manufactured attic shields are "the building blocks for [a] properly installed flue system." (T3 177).

Under questioning by Supreme Pork, Dr. Schroeder testified that Pipestone's failure to adequately secure the attic shields allowed the flue vents to dislodge and come in contact with the insulation:

> They [Pipestone] haven't secured it. I've examined the feet. I've examined the gaps between the feet. I'm not finding any TEK screws going through to secure it to what would be the backside of the ceiling to [e]nsure that this has no movement. This is the shield. This keeps things [the cellulose insulation] away from this hot pipe.
>
> * * *
>
> Doctor, do you believe that the shield that was used in this case by the subcontractor [Pipestone] – do you believe that that shield was adequately secured?
>
> No.
>
> Tell the jury why.
>
> It's not secured. There is no physical holding. There is no physical securing of this shield to the base that it is sitting on. There is no drill holes in it. There is no screw remains in it. There is no dimpling showing somebody had nailed it through. Nothing.

(T3 191; T3 189,195). Dr. Schroeder concluded by agreeing with Mr. Rallis that the fire originated in the attic space above the pressure washers, and that it was the result of Pipestone's improper venting installation. (T3 199-200).

Master Blaster's experts Terry Kern and Richard Cox.

Unable to use testimony of Pipestone's expert Terry Parks, Master Blaster called two other experts: Terry Kern and Richard Cox.

Terry Kern testified that he was unable to rule out other causes for the fire, and therefore the cause of the fire was undetermined.

Master Blaster hired fire investigator Terry Kern, a former police fire investigator and member of the National Fire Academy who had investigated more than 100 fires since 1978, to evaluate the Supreme Pork fire. (T6 6-12). Although Mr. Kern did not investigate the site of the fire, he studied the investigators' site photographs, deposition testimony, and background on the fire. (T6 12,64,77).

Mr. Kern testified that Supreme Pork's experts had initially opined that the attic shields were absent, but upon discovering them, they came up with a theory that the shields' and/or flue's movement caused the fire. (T6 13-15). Mr. Kern also took issue with Dr. Schroeder's criticism of Pipestone's installation and fabrication of the attic shields, testifying that "they appear to be flimsy, but yet that 28-gauge steel should be sufficient" to keep the cellulose insulation from contacting the flue pipe. (T6 16). This led Mr. Kern to opine that other "potential fire causes [] were not satisfactorily eliminated." (T6 15). Mr. Kern testified that a stapled electrical cord running from the LB White heater could have caused the fire—an opinion shared by the fire chief—or that the fire could have resulted from electrical wiring. (T6 27-34,59-61). Mr. Kern also cited a wall-mounted air-intake fan as a possible suspect. (T6 35,57). Mr. Kern therefore told the jury that "the cause of this fire is actually undetermined." (T6 15,54-55).

Like Mr. Kern, Richard Cox testified that he was unable to rule out other causes for the fire, and therefore the cause of the fire was undetermined.

At trial, Master Blaster also called expert fire investigator Richard Cox to testify against Supreme Pork's theory of the case. (T6 90,101-102). Mr. Cox, who has a B.S. in

mechanical engineering and is a member of a number of fire-investigation organizations, has investigated "over a thousand" fires. (T6 91-93). The manufacturer of the pressure washers, All American Pressure Washers, initially retained Mr. Cox to investigate the fire scene (T6 94,71), but he testified on behalf of Master Blaster at trial. (T6 101).

Mr. Cox testified that after he visited the site in April 2002, he reported to All American that the "pressure washers were not being implicated as a cause of the fire." (T6 95,97,109). Mr. Cox also testified that although he did not know what caused the fire, he concluded that it was not the venting. (T6 99,103). He opined that Pipestone's attic shields "were perfectly adequate for the job," "they were perfectly fine." (T6 104-105). In his opinion, there was no evidence to support the theory that Pipestone installed the flue vents incorrectly. (T6 104).

Mr. Cox also testified that he agreed with Mr. Kern, in that the evidence failed to rule out other causes of the fire. (T6 103,105). Specifically, he testified that the evidence had failed to rule out an electrical cause of the fire. (T6 105).

Jeffrey Washinger testified in a discovery deposition that he was unable to determine the fire's cause because he did not visit the site until August 2002 and by then Supreme Pork had removed the structure where the fire occurred.

Master Blaster originally retained Jeffrey Washinger, a certified fire investigator and fire instructor, to inspect the site of the fire. (App.130, 134). But Mr. Washinger's inspection was unhelpful because by the time he visited the site in late August 2002—five months after the fire—Supreme Pork had already removed the entire building where the fire had occurred. (App.131-132,134-135). Mr. Washinger testified during his deposition that he "had no structure to look at" or inspect and therefore could not

determine what caused the fire; rather, "there was only one conclusion [he] could reach, and that was undetermined. The fire was undetermined." (App.134). Therefore, Mr. Washinger testified that he had no basis upon which to disagree with Mr. Rallis and Dr. Schroeder. (App.134). Given that Mr. Washinger's inspection was effectively a non-inspection, Master Blaster decided not to call him as a witness at trial. Nevertheless, Supreme Pork elected to read Mr. Washinger's deposition testimony to the jury. (T3 147-148).

The South Dakota circuit court instructed the jury that Pipestone was Master Blaster's agent for purposes of deciding negligence and breach of warranty.

At the close of evidence, the South Dakota trial court instructed the jury that Pipestone was Master Blaster's agent:

> In this case, Pipestone Plumbing and Heating was the agent of defendant [Master Blaster] for the purposes of installing flue vents for plaintiff [Supreme Pork].

(App.138 ¶22). On Supreme Pork's negligence claim, the court instructed the jury that Pipestone had a duty to properly install the flue vents for Supreme Pork:

> [Master Blaster] and [its] agent [Pipestone] had a duty to use reasonable care under the circumstances to install the flue vents for [Supreme Pork] so that [its] property would not be damaged.

(App.139 ¶25). The court also instructed that Pipestone's implied warranty is breached if its flue vents were not fit for Supreme Pork's particular purpose:

> An implied warranty of fitness for a particular purpose is breached if the flue vents are not fit for the particular purpose specified by the plaintiff at the time of sale.

(App.140 ¶33).

The jury returned a verdict in favor of Supreme Pork, awarding it over $1 million, plus interest, against Master Blaster, based on Pipestone's negligence.

The jury returned its verdict June 20, 2007, finding that "agent [Pipestone]" was negligent, and that "defendant's agent's negligence" was a "legal cause of plaintiff's injuries." (App.35). It also found that "defendant's agent [breached] the implied warranty of fitness for a particular purpose." (App.36).

The jury computed Supreme Pork's damages at $744,039 and also awarded $351,457.98 in prejudgment interest. (App.37-40). After offsetting the damages by 5% for comparative fault,[8] Master Blaster had a judgment against it for $1,058,295.03, plus post-judgment interest at a rate of 10%. (App.40). The court also awarded Supreme Pork $11,266.62 in costs and disbursements. (App.40).

After the verdict, Master Blaster sent a third tender letter to Pipestone.

A month later, in July 2007, Master Blaster wrote Pipestone regarding the jury verdict "that Pipestone Plumbing and Heating, as the agent of Master Blaster, was negligent in the installation of the flue vents at Supreme Pork." (R.A.11). Master Blaster also advised Pipestone of Supreme Pork's million-dollar judgment, on which interest "continues to accrue at $193.65 per day." (*Id.*). Master Blaster not only tendered its defense and demanded indemnity for a third time, it again invited Pipestone to consider settlement, given that "there [wa]s still an opportunity to settle this case for less than that judgment." (*Id.*).

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[8] The jury assessed Supreme Pork with 5% of the fault not on the ground that it caused the fire, but based on the evidence that its employees were slow to report the fire.

Master Blaster attached a copy of its unexecuted complaint seeking indemnification from Pipestone, as well as copies of its first and second tender letters, dated June 6, 2005 and November 14, 2006, the jury instructions, jury verdict, and the June 21, 2007 judgment entered against Master Blaster. (R.A.12). Again, Pipestone refused Master Blaster's requests.

Master Blaster appealed the Supreme Pork judgment to the South Dakota Supreme Court, which affirmed.

In September 2007, Master Blaster appealed the Supreme Pork judgment to the South Dakota Supreme Court. Master Blaster argued that the circuit court committed a number of errors, which deprived it (and Pipestone) of a fair trial. *See Supreme Pork, Inc. v. Master Blaster, Inc.*, 764 N.W.2d 474 (S.D. 2009). On April 1, 2009, the South Dakota Supreme Court affirmed. (*See id.*).

ARGUMENT

I. Standard of review for summary judgment.

On appeal from summary judgment, this Court conducts a *de novo* review to determine "whether there are any genuine issues of material fact, whether either party is entitled to judgment as a matter of law, and whether the lower court erred in its application of the law." *Housing & Redev. Auth. v. Lambrecht,* 663 N.W.2d 541, 547 (Minn. 2003). "On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). But the "nonmoving party cannot defeat a summary judgment motion with unverified and conclusory allegations or by postulating evidence

that might be developed at trial." *Gradjelick v. Hance*, 646 N.W.2d 225, 230 (Minn. 2002). To establish a genuine issue of material fact, "[m]ere speculation, without some concrete evidence, is not enough to avoid summary judgment." *Bob Useldinger & Sons, Inc. v. Hangsleben,* 505 N.W.2d 323, 328 (Minn. 1993). And this Court will "affirm a district court's grant of summary judgment if it can be sustained on any ground." *Winkler v. Magnuson,* 539 N.W.2d 821, 827 (Minn. App. 1995).

II. The district court correctly ruled as a matter of law that Master Blaster is entitled to indemnity from Pipestone.

A. Master Blaster's claim satisfies the requirements for common-law indemnity because the South Dakota verdict was based solely on Pipestone's fault, for which Master Blaster was held vicariously liable as Pipestone's principal.

The object of indemnification "is to place the charge where it ought to rest, by compelling the payment of the debt by him who ought in equity to pay it." *Westendorf v. Stasson,* 330 N.W.2d 699, 703 (Minn. 1983). As it applies in this case, the right to indemnity attaches when one party discharges another's liability, either through vicarious liability or as a conduit for the other party's product. The Restatement of Torts explains:

> (a) When two or more persons are or may be liable for the same harm and one of them discharges the liability of another in whole or in part by settlement or discharge of judgment, the person discharging the liability is entitled to recover indemnity in the amount paid to the plaintiff, plus reasonable legal expenses, if:
>
> * * *
>
> (2) the indemnitee (i) was not liable except vicariously for the tort of the indemnitor, or (ii) was not liable except as a seller of a product supplied to the indemnitee by the indemnitor and the indemnitee was not independently culpable.

Restatement (Second) of Torts, Indemnity § 22. Minnesota law, like the *Restatement*, holds that where a party is only derivatively or vicariously liable – or in effect is a legal conduit for the active tortfeasor's fault – the vicariously liable party is entitled to indemnity to the extent it has discharged the active tortfeasor's liability. *Polaris Indus. v. Plastics, Inc. v.* 299 N.W.2d 414, 420 (Minn. 1980) (ruling that indemnity applies "where the one seeking indemnity has only a derivative or vicarious liability for the damage caused by the one sought to be charged") (citing *Hendrickson v. Minnesota Power & Light Co.,* 258 Minn. 368, 104 N.W.2d 843 (1960), *overruled in part on other grounds by Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362 (Minn. 1977)).

In the underlying case, the South Dakota trial court ruled as a matter of law that Pipestone acted as Master Blaster's agent, instructing the jury that Pipestone "was the agent of defendant [Master Blaster] for the purposes of installing flue vents for plaintiff [Supreme Pork]." (App.138 ¶22). The South Dakota jury determined that "defendant's agent" was negligent and that "defendant's agent's" negligence caused damage to Supreme Pork. (App.35). The jury further determined that "defendant's agent breached the implied warranty of fitness for a particular purpose," and that the breach caused damage to Supreme Pork. (App.36). This verdict led to a judgment against Master Blaster for just less than $1.06 million, plus postjudgment interest and costs. (App.40). As to each item of damage comprising this amount, the special verdict told the jury that if Supreme Pork had "failed to prove that any item of damage was legally caused by defendant's agent, enter 0 for that item." (App.37).

Master Blaster appealed. The South Dakota Supreme Court affirmed the judgment, holding (among many other things) that "Master Blaster is vicariously liable for [Pipestone's] negligence through their contractor/sub-contractor relationship." *Supreme Pork, Inc. v. Master Blaster, Inc.*, 764 N.W.2d 474, 480 (S.D. 2009). Thereafter, Master Blaster paid the South Dakota judgment in full. In this case, therefore, Pipestone logically concedes that Master Blaster was held liable to Supreme Pork "on the basis of vicarious liability for the acts of its unnamed agent." (Br. p. 11).

Thus, the undisputed material facts as a matter of law establish the requirements for common-law indemnity – that Master Blaster's liability to Supreme Pork was based solely upon its status as principal for Pipestone, making Master Blaster's liability purely vicarious; that Pipestone's fault was the sole basis for Master Blaster's liability to Supreme Pork; and that Master Blaster has fully discharged Supreme Pork's underlying judgment. *See, e.g., Liberty Mut. Ins. Co. v. J.R. Clark Co.*, 239 Minn. 511, 519, 59 N.W.2d 899, 905 (1953) (stating that pleadings, charge, and judgment in the prior action serve to establish necessary factual basis for indemnity). The district court was correct in ruling that Master Blaster's claim satisfies the requirements for common-law indemnity. (Add.9).

B. The district court correctly applied the Minnesota law of "vouching" to conclude that Master Blaster's right to indemnity follows as a matter of law from the South Dakota verdict, the resulting judgment, and the other undisputed facts of record.

1. Master Blaster gave proper notice and tendered defense of the Supreme Pork action to Pipestone.

Minnesota has long followed the vouching procedure in actions seeking indemnity. *State Bank of New Prague v. American Sur. Co. of N.Y.*, 206 Minn. 137, 288 N.W. 7 (1939). Under that procedure, a judgment recovered against an indemnitee [e.g., the South Dakota judgment recovered against Master Blaster] is *conclusive* against the indemnitor [e.g., Pipestone] in an action for indemnity [e.g., this action] if the indemnitee [Master Blaster] gave the indemnitor [Pipestone] notice of the pendency of the action in which the judgment was recovered [the South Dakota action] and requested that it assume the defense. 206 Minn. at 141, 288 N.W. at 9.[9] Here, on the very day that the South Dakota court dismissed Pipestone from the Supreme Pork action, Master Blaster's counsel tendered the suit to Pipestone and requested that it assume the defense:

> The only claim made [by Supreme Pork] is that the vents installed were not properly installed. This was Pipestone's responsibility as your client

[9] The vouching procedure is said to date to the Seventh Century A.D. 1 B. Thorpe, *Ancient Laws and Institutes of England* 31, 35 (1840). Under the original practice, the process resulted in the responsible persons being "vouched in as parties of record." *State Bank of New Prague*, 206 Minn. at 146, 288 N.W. at 11. In modern practice, responsible persons now "are notified to defend, which long ago superseded the technical voucher." *Id.* Regardless of its label, the Minnesota Supreme Court has observed that the practice "has persisted as the law of the land for well nigh five centuries, if not longer." *Id.*

> admitted in his deposition.[[10]]. * * * We hereby tender the defense of Master Blaster to your client, Pipestone, and its insurance carrier. This tender is irrevocable.

(App.88). Pipestone refused.

As the trial approached, Master Blaster updated Pipestone on the proceedings, telling it that Supreme Pork claimed $972,000 in damages, together with an additional $455,000 in potential prejudgment interest. (App.90). Further, Master Blaster again reminded Pipestone that Supreme Pork's "suit is based upon claims that the exhaust vents for the pressure washers were improperly installed by [Pipestone], and that this was the cause of the fire . . . . [Supreme Pork] seeks to hold Master Blaster vicariously responsible for the work of its subcontractor, [Pipestone]." (*Id.*). Therefore, Master Blaster again tendered the defense to Pipestone:

> Please consider this once again to be a Tender of Defense of this claim. Failure to accept the Tender will of course expose Pipestone to the claim for attorney fees, court costs, and expenses incurred to defend this claim and any judgment rendered in the South Dakota Court.

(App.91). Pipestone again refused.

After the South Dakota jury returned its verdict, Master Blaster provided Pipestone with copies of the jury instructions, the jury verdict, and the judgment and "once again demand[ed] that Pipestone Plumbing and Heating and their insurance company honor the tender and demand for indemnity." (R.A.12). Yet again, Pipestone refused. As a matter of law and undisputed fact, Master Blaster satisfied the notice and tender requirements for vouching.

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[10] Recall that Doug Dammann, Pipestone's owner, testified that "[t]he work on the chimney is entirely [Pipestone's] responsibility." (App.52).

2. No conflict of interest existed between Master Blaster and Pipestone in the defense of Supreme Pork's suit for damages.

The existence of a conflict of interest between the indemnitee (Master Blaster) and the indemnitor (Pipestone) limits the effect of the vouching procedure. But such a conflict exists only "when the *injured person's claim* against the indemnitee is such that it could be sustained on different grounds, one of which is within the scope of the indemnitor's obligation to indemnify and another of which is not." *Restatement (Second) of Judgments* § 57 (3) (1982) (emphasis added). *See also, Universal Amer. Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131, 1140 (5th Cir. 1992) (applying same concept from Restatement). The injured person in this case is Supreme Pork. And the undisputed facts establish that Supreme Pork made one claim and one claim only – that the proximate cause of the March 21, 2002 fire (and therefore all of Supreme Pork's ensuing damages) was improper installation of the venting system, something for which Pipestone was undisputedly and solely responsible. Therefore, no conflict existed between Master Blaster and Pipestone, and the district court correctly so ruled.

Supreme Pork's claim could not be sustained on different grounds because Supreme Pork asserted no different grounds. Supreme Pork's complaint alleged that "[a]n investigation of the March 21, 2002 fire revealed that Defendant failed to properly install the vents in a manner so as to maintain proper separation between heat from the flue gases and the materials that formed in the building. The use of the washers allowed the expulsion of these gases in a manner and duration that lowered the ignition temperature of the building materials to a point where they became heated to a

smoldering ignition state. This condition progressed to a free-burning fire during the early morning hours of March 21, 2002." (App.31 ¶8). The basis for Supreme Pork's allegations was a May 5, 2002 report authored by Chris Rallis, Supreme Pork's expert, who opined that the "proximate cause of this fire in my professional opinion was the failure to properly install the subject vents in a manner so as to maintain proper separation between heat from the flue gases and the materials, which formed in the building." (R.A.3). Thus, barely more than six weeks after the fire, Supreme Pork had developed its theory of liability for the fire, and it asserted that theory consistently and exclusively through discovery, trial, and appeal. Supreme Pork never asserted or pursued a claim other than one for which Master Blaster would be vicariously liable.

Pipestone knew all of this first hand because Master Blaster served a third-party complaint against Pipestone in May 2004, just a few months after Supreme Pork had commenced its suit. (App.73). The third-party complaint attached Supreme Pork's complaint and also stated: "Master Blaster contracted with [Pipestone] to install the venting in the building for use with the power washer. It is the installation of this venting that [Supreme Pork] alleges was improper and which led to the fire causing it damage." (App.74 ¶4). Pipestone remained a party when its owner, Doug Dammann, testified that "the work on the chimney [was] entirely [Pipestone's] responsibility." (App.52). Thus, Pipestone not only knew the basis for Supreme Pork's claim, it admitted sole responsibility for that claim should a fact finder agree with Supreme Pork's allegations.

And although Pipestone remained a party to the South Dakota action for more than a year, it has not pointed to a single fact in the record even hinting that Supreme Pork

pursued any other ground as a basis for recovery against Master Blaster. It's true, as Pipestone points out, that Supreme Pork's complaint refers to negligent supervision, but this allegation raised no conflict for at least three reasons. First, given its firsthand participation in the underlying litigation, Pipestone does not even pretend that Supreme Pork ever pursued such a theory, much less on matters unrelated to the venting system. Liability cannot be sustained on grounds that a plaintiff never pursues. Second, Pipestone knew – and its owner so testified under oath – that it was solely responsible for the venting installation. Therefore, Pipestone also knew that any claim relating to supervision of the installation process was solely a claim directed at Pipestone, for which Master Blaster would only be vicariously liable. Third, in addition to and regardless of the first two reasons, Minnesota law is settled that indemnity applies as a matter of law when "a party fails to discover or prevent another's fault and, consequently, pays damages for which the other party is primarily liable." *City of Willmar v. Short-Elliott-Hendrickson, Inc.*, 512 N.W.2d 872, 874 (Minn. 1994) (citation omitted). In short, Pipestone's argument on this point is both factually unsupported and legally irrelevant. No conflict existed because Supreme Pork's claim could not be sustained on any ground other than one for which Pipestone would be obligated to indemnify Master Blaster.[11]

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[11] Pipestone also refers to an allegation in the Supreme Pork complaint that Master Blaster "[n]negligently fail[ed] to perform the contract . . . ." (App.32). But Minnesota law – which the South Dakota courts applied to Supreme Pork's suit – does not recognize a cause of action for "negligent breach of contract." *Lampert Lumber Co. v. Joyce*, 405 N.W.2d 423, 424 (Minn. 1987). The Supreme Pork complaint could not more clearly have alleged that it sought to recover from Master Blaster on the grounds that (1) Master Blaster would be liable as the contractor; and (2) that its liability was premised on the failure of the venting system due to improper installation. Given the undisputed facts,

In addition to knowing the details of Supreme Pork's allegations first hand, Master Blaster's tender letters expressly reminded Pipestone of the basis for the claim. The June 6, 2005 tender told Pipestone that "[t]he only claim made is that the vents installed were not properly installed. This was Pipestone's responsibility as your client admitted in his deposition." (App.88). Similarly, the November 14, 2006 tender told Pipestone that Supreme Pork's "suit is based upon claims that the exhaust vents for the pressure washers were improperly installed by [Pipestone]. [Supreme Pork] seeks to hold Master Blaster vicariously responsible for the work of its subcontractor, Pipestone." (App.90). And the trial, which started only about six months after the last tender, bore out Master Blaster's admonitions to Pipestone – which it already knew – that Supreme Pork sought recovery solely on the basis of vicarious liability for Pipestone's improper work. The South Dakota trial court so instructed the jury:

> Plaintiff owns a hog raising facility in Minnesota. Plaintiff alleges that defendant's agent, Pipestone Plumbing and Heating, installed flue vents in the facility that later caused a fire damaging the facility. Plaintiff alleges that defendant's agent negligently installed the flue vents, and that this negligence was the legal cause of plaintiff's damages. Plaintiff also alleges that defendant is liable for breach of an implied warranty of fitness for a particular purpose, and that this breach of warranty damaged the plaintiff.
>
> Defendant denies that its agent was negligent and that there was a breach of an implied warranty and further alleges that the plaintiff was also negligent.

(App.138 ¶23). In fact, when Supreme Pork's counsel cross-examined Master Blaster's owner at trial, he stated:

Supreme Pork's complaint alleged Master Blaster's vicarious liability for Pipestone's improper installation, a matter that Pipestone's owner admitted was his company's sole responsibility.

> Question: And there is no allegation from us that the power washers themselves had any problem with respect to this fire, right?
>
> Answer: Right.

(T2 57). The evidence, the jury instructions, and the special verdict[12] all reflected the theory presented by the party asserting the claim – Supreme Pork. Under the very law on which Pipestone relies, a conflict of interest affects the vouching procedure only "when the *injured person's claim* against the indemnitee is such that it could be sustained on different grounds, one of which is within the scope of the indemnitor's obligation to indemnify and another of which is not." *Restatement (Second) of Judgments* § 57 (3) (1982) (emphasis added). Based upon the undisputed facts of record, the injured party, Supreme Pork, made no claim that could be sustained on any ground other than one for which Pipestone would be obligated to indemnify Master Blaster. The district court correctly so ruled, and it should be affirmed.

And the cases upon which Pipestone relies only help establish that the district court reached the correct result. The first case, discussed at great length in Pipestone's opening brief (Pipestone at 21-25), is the one about the failed coupling device that contributed to the plaintiff's injury from hot-asphalt spray. *See Barber-Greene Co. v. Bruning Co.*, 357 F.2d 31 (8th Cir. 1966). In that case, Barber-Green stood in Master Blaster's position; Bruning stood in Pipestone's. The coupling was this case's ventilation

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[12] Recall that the South Dakota jury determined that "defendant's agent" was negligent and that "defendant's agent's" negligence caused damage to Supreme Pork. (App.35-37). Recall further that the special verdict told the jury that if Supreme Pork had "failed to prove that any item of damage was legally caused by defendant's agent, enter 0 for that item." (App.37).

system. Barber-Greene tendered plaintiff's suit to Bruning, but after Bruning declined and the jury found for the plaintiff, the federal district court declined to bind Bruning to that verdict in Barber-Greene's suit for indemnity. In affirming, the appellate court wrote: "The situation might have been different had Barber[Greene's] notice and demand upon Bruning been restricted to a defense of the coupling." *Id.* at 35. But those are the very facts of *this* case. The tender was restricted to defending the ventilation selection and installation, because that was Supreme Pork's sole theory.

The *Barber-Greene* court further reasoned that the tender to Bruning was "not at all restricted to the area of its coupling responsibility" and that if Bruning had accepted the tender "and successfully defended its coupling, a judgment in Barber[Greene's] favor would not necessarily be the result." *Id.* Those things, however, are the very things that differ from *this* case. The jury's verdict makes this conclusion inescapable. Not only did the verdict determine liability only in terms of "defendant's agent," it told the jury that if plaintiff "has failed to prove that any item of damage was legally caused by defendant's agent, enter 0 for that item." (App.37). In other words, had Pipestone appeared and successfully defended its venting selection and installation, the judgment would have been zero for all defendants, including Pipestone's principal, Master Blaster. *Barber-Greene* reinforces the district court's decision.

The other cases upon which Pipestone relies merely reflect the same rule. *See Universal Amer. Barge Corp., supra*, 946 F.2d at 1140 (discussing "the existence in the first proceeding of any *liability claims against the indemnitee* which fall outside the scope of indemnification, thus raising issues tainted by conflict of interest and requiring

relitigation") (citing *Humble Oil & Refining Co. v. Philadelphia Ship Maint. Co.*, 444 F.2d 727, 735 (3d Cir. 1971)) (other citation omitted) (emphasis added); *Dixon v. Fiat-Roosevelt Motors, Inc.*, 509 P.2d 86, 90-91 (Wash. App. 1973) (pointing out that "[t]he tender in the instant case did not demonstrate that [the party in Pipestone's position] would eventually be liable for plaintiff's injury if [the party in Master Blaster's position] was found liable"). In this case, Supreme Pork made no claim that could be sustained on any ground other than one for which Pipestone would be obligated to indemnify Master Blaster. Therefore, the above cases serve only to distinguish this case and to demonstrate why the district court was correct in reaching a different result.

And the Minnesota collateral estoppel cases Pipestone cites have no application here, either. *See Schumann v. McGinn,* 307 Minn. 446, 240 N.W.2d 525 (1976); *Pirrotta v. Independent Sch. Dist. No. 347, Willmar,* 396 N.W.2d 20 (Minn. 1986). *Schumann* involved a question about the legal basis for a *plaintiff* to hold two defendants liable for the loss, one of whom was not a party. But that question is irrelevant here, because this case is not about Pipestone's liability to Supreme Pork. It is about one defendant's liability to the other for indemnity. The opposite of the facts here, the *agent* in *Schumann* was alone in the case as a party, and the question was whether the *plaintiff* had a legal basis to hold the non-party principal liable for the verdict rendered against the agent. By definition, principles of indemnity could never be used to hold a non-party liable *to the plaintiff.* The *Schumann* case centered around how the plaintiff would obtain money from the two defendants, *not* about how one defendant who paid a judgment on another's

behalf is allowed to recoup those costs from the agent/defendant. *Schumann* does not change or affect the law of indemnity.

Similarly, in *Pirrotta* the Minnesota Supreme Court held that collateral estoppel did not apply to prevent a non-party (Pirrotta) from relitigating issues affecting his interests, because the school district had pursued its own interests in the first proceeding and had acted solely on its own behalf without any accountability to Pirrotta. *Pirrotta* merely illustrates the rule that *notice* must be afforded and an opportunity to be heard before a party can be bound by the outcome of prior proceedings. *Pirrotta,* 396 N.W.2d at 22. A non-party who has no notice and no *opportunity* to be heard will not be bound by a judgment. But that principle is the very bedrock of the established Minnesota law requiring indemnity in these circumstances. Pipestone was afforded such notice on at least three separate occasions. (App.88-91; R.A.11-12). Once Master Blaster provided notice to Pipestone and tendered the defense, it was Pipestone's *choice* to allow Master Blaster to continue alone in defending Pipestone's actions and interests. Moreover, unlike the school district and Mr. Pirotta, Master Blaster's and Pipestone's interests were entirely aligned – by defending the sole claim asserted by Supreme Pork, Master Blaster would equally defeat liability for Pipestone as for itself. *Schumann* and *Pirotta* do not support Pipestone's position.

In sum, no conflict of interest existed between Master Blaster and Pipestone in the defense of Supreme Pork's suit for damages. Master Blaster had no role in the South Dakota action except to defeat the claims against Pipestone so that both Master Blaster and Pipestone could avoid all liability to Supreme Pork. Therefore, the district court was

correct as a matter of law in ruling that nothing about the South Dakota action limited Master Blaster's right to tender the defense to Pipestone and, if Pipestone refused, to use the resulting South Dakota judgment as conclusive evidence in this suit for indemnity. This court should affirm.

3. After providing proper notice and tender, Master Blaster conducted the South Dakota defense with due diligence and reasonable prudence.

Pipestone implies that Master Blaster somehow failed to earnestly defend Supreme Pork's South Dakota suit. Nothing in the record could support such a contention. For example, Pipestone implies that its dismissal from the South Dakota action – based upon a lack of personal jurisdiction – somehow had a causal relationship with Supreme Pork's theory of the fire. Pipestone argues: "With Dammann-Pipestone absent, Supreme Pork focused its case solely on Dammann-Pipestone's work of installing chimney vents." (Br. p. 9). But Supreme Pork's complaint, filed some 18 months before Pipestone's dismissal, alleged that "[a]n investigation of the March 21, 2002 fire revealed that Defendant failed to properly install the vents in a manner so as to maintain proper separation between heat from the flue gases and the materials that formed in the building. The use of the washers allowed the expulsion of these gases in a manner and duration that lowered the ignition temperature of the building materials to a point where they became heated to a smoldering ignition state. This condition progressed to a free-burning fire during the early morning hours of March 21, 2002." (App.31). Supreme Pork at no time alleged any other cause of the fire, a fact that Pipestone plainly understood after months as an actual party to the case. Supreme Pork's "focus" was the same before Pipestone's

dismissal as it was after. The desired implication that Pipestone's dismissal jumpstarted a conspiracy between the remaining parties to blame Pipestone for the fire is simply untrue, and the court will search the record in vain to find any support for such a contention.

Pipestone also implies that Master Blaster defended at trial by calling an expert witness who did not disagree with Supreme Pork's expert. (Br. p. 9). But Pipestone neglects to mention that Master Blaster did not call that expert (Washinger) as a witness at trial, because his discovery testimony turned out to be unfavorable to Pipestone. Nevertheless, Pipestone suggests to the contrary, stating as a fact that "[a]side from [Washinger], Master Blaster apparently[[13]] presented testimony from two *more* cause and origin experts, ..." (Br. p. 9) (emphasis added). Later, Pipestone argues that "[w]ith one eye on the Minnesota indemnity action, Master Blaster was more than content to *present expert testimony that concurred with Supreme Pork's expert*." (Br. p. 34) (emphasis added). In fact, Supreme Pork presented Washinger's testimony, via deposition, at trial. (T3 147-48). Pipestone's attack on Master Blaster's defense contradicts the record.

Moreover, Pipestone implies that Master Blaster's retained expert witnesses – the two experts that Master Blaster actually called at trial as a defense to Pipestone's venting work – did not provide testimony helpful to the defense because they did not testify "to alternative fire sources." (Br. p. 9). But in addition to the constraint that trial testimony is given under oath, Master Blaster's experts offered trial testimony that is entirely

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[13] It is difficult to understand why Pipestone feigns to be unaware of the South Dakota trial proceedings. The full South Dakota trial transcript is in the record of this case. (*See* R.A.15 ¶14).

consistent with what Pipestone's own retained expert, Terry Parks, has revealed about his opinions concerning the fire. (*Compare* T6 15,27-34,59-61 (Master Blaster's expert Mr. Kern testifying that several other "potential fire causes [] were not satisfactorily eliminated," including electrical wiring, a stapled electrical cord, or a fan motor) *and* T6 99,103 (Master Blaster's expert Mr. Cox testifying that although he did not know what caused the fire, he concluded that it was not the venting) *with* (App.169) (affidavit of Pipestone's expert, Terry Parks, stating that "I do not agree that the available evidence proves that the fire originated in the attic space above the power washers . . .") (*See also* Add.13)(stating the same comparison of expert opinions). Pipestone's attempt to imply that Master Blaster failed to vigorously defend again contradicts the record.

Pipestone also tries to imply a less-than-vigorous defense by inventing a "notion" that the pressure washer itself caused the fire. Therefore, Pipestone twice argues that Master Blaster never "bothered to refute the notion that any part of the pressure washer system caused the fire." (Br. pp. 10, 32). Pipestone never identifies who had this "notion" or what evidence supported it. In fact, no one and nothing supported such a notion. As the district court noted, "Pipestone's own expert brings forth not even a general opinion as to the power washers themselves as being a potential cause of the fire." (Add.13).[14] Moreover, the party with the greatest incentive to pursue every potential alternative theory of liability – Supreme Pork, the party with a million-dollar

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[14] Recall that Pipestone's expert visited the fire scene on April 18, 2002, the same day as most of the experts who testified at trial. Pipestone had every opportunity to produce evidence of another cause; it simply failed to do so.

loss – could not even provide a good-faith basis to advance such a theory. (T2 57). Master Blaster presented a vigorous expert defense on Pipestone's behalf. Pipestone had notice and an opportunity to present its own defense, but it refused.

And Pipestone has failed to mention another critical fact. After Pipestone had been dismissed from the South Dakota action, and Master Blaster was left to defend Pipestone's venting installation as Supreme Pork's sole theory of recovery, Master Blaster attempted to obtain Pipestone's cooperation in putting on a successful defense. Therefore, Master Blaster sought access to Pipestone's expert, Terry Parks, as an aid to defeating Supreme Pork's claim. When Pipestone refused, Master Blaster sought access to Mr. Parks by subpoena. Pipestone had the subpoena quashed! (R.A.6). In short, while Master Blaster was earnestly attempting to defend Pipestone, Pipestone was actively trying to thwart Master Blaster's efforts.

Pipestone also questions whether Master Blaster had an incentive to defend Pipestone. But Pipestone forgets that Supreme Pork recovered nearly $1.3 million from Master Blaster, and those dollars are real. Master Blaster has no guarantees, even now, that Pipestone has the ability to respond with full indemnity. Master Blaster indeed had every incentive to defend, and the record emphatically establishes that it did. Master Blaster engaged in extensive discovery, retained its own experts, attempted to procure the help of Pipestone's expert, defended vigorously at trial, and took an appeal to the South Dakota Supreme Court. In that appeal, Master Blaster raised one issue that would have negated the entire verdict, and five more issues that would have allowed it to defend another trial on Pipestone's behalf. 764 N.W.2d at 479.

Pipestone's attempts to discredit Master Blaster's defense, as chronicled above, amount to no more than second guessing. But when a non-party has notice and is content to stand idly by while another party defends its interests, the non-party cannot later complain about how its actions were defended. As one court has pointed out, "[t]he way to correct this problem was to join in, or take over, the defense" not to "wait until the dust settles and poke holes" in the defense. *The Hertz Corp. v. Century Prods, Inc. & Century Prods Co.*, No. C.A. 97C-05-039 WTQ, 1999 WL 459291 at *3 (Del. Super. April 1, 1999) (citing *Washington Gaslight Co. v. District of Columbia,* 161 U.S. 316, 330 (1896)) (R.A.19). The Restatement requires no more than that the indemnitee defend with due diligence and reasonable prudence, while the U.S. Supreme Court, which addressed the procedure more than a century ago, requires that the judgment was "obtained without fraud and collusion." *Restatement (Second) of Judgments* § 57 (1) (b) (ii) (1982); *Washington Gaslight*, 161 U.S. at 330. Here, the district court ruled that "after a thorough review of the extensive South Dakota trial proceedings, no rational person would infer or conclude other than that Master Blaster pursued a diligent and prudent defense of Pipestone's interests, given the circumstances." (Add.14).

Pipestone does not argue on appeal that Master Blaster failed to use due diligence and reasonable prudence in its defense. Nor does it challenge the district court's ruling that the South Dakota trial court record could not support a contrary ruling. Nor does it cite to any authority suggesting that Master Blaster's defense somehow fell below that

standard.[15] As such, this issue is waived and not subject to review on appeal. *See Melina v. Chaplin,* 327 N.W.2d 19, 20 (Minn. 1982) (holding issues not briefed on appeal are waived); *see also Frank v. Winter*, 528 N.W.2d 910, 913 (Minn. App. 1995) ("If an issue has not been addressed in a party's principal brief, the issue cannot be revived by raising it in a reply brief."), *review denied* (Minn. April 27, 1995). The above analysis was still necessary, however, because Pipestone's brief is littered with unsupported innuendo suggesting that Master Blaster conducted a suspicious defense. Pipestone's various attacks on Master Blaster's trial defense provide no legal or factual basis to avoid the effects of the South Dakota judgment under Minnesota's law of indemnity. The district court's unchallenged ruling on this issue should be affirmed.

4. The district court's ruling comports with due process.

Pipestone seems to raise two aspects of due process – the lack of an opportunity to defend the South Dakota action, and a combination of personal jurisdiction and privity. Neither provides a basis for overturning the district court's ruling.

Pipestone invokes a common due process theme in arguing that "Dammann-Pipestone had no meaningful opportunity to litigate fully the issue of Master Blaster's fault, because the Minnehaha Circuit Court dismissed Dammann-Pipestone from the

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[15] In the district court, Pipestone did argue this point, citing to a single case, *Falcon v. Beverly Hills Mortgage Corp.,* 168 Ariz. 527, 531-532, 815 P.2d 896, 899-900 (1991). In that case, the trial court determined that there was a question whether the indemnitee had defended the action with due diligence where the facts showed that "the complex underlying action was 'tried' in one or two hours, there was no discovery, the parties stipulated to the causes of the Investors' claimed losses, no court reporter was present or requested; the defendants called no witnesses; and the findings of fact and conclusions of law were written by the Investors' counsel and adopted word for word without objection by [the indemnitee]." 815 P.2d at 899. The contrast with this case needs no explanation.

action on personal jurisdiction grounds." (Br. p. 34). This argument confuses two concepts – the concept of the *right* to appear and defend the action against the indemnittee versus the *obligation* to become an actual party. With the right to appear comes the opportunity that is an essential element of due process. The Minnesota Supreme Court has expressly so held in this precise vouching context: "The practice of concluding a person responsible over by notice to defend, which has persisted as the law of the land for well nigh five centuries, if not longer, *is not lacking in due process.* It affords the notice and opportunity for hearing, which are requisite." *State Bank of New Prague*, 288 N.W. at 9 (emphasis added).

This holding necessarily follows because it is not the court's power to *compel* the indemnitor to appear – the issue in a personal jurisdiction analysis – that controls, but the indemnitor's choice to avail itself of the *opportunity* to appear and defend with full notice of the action and with knowledge of the consequences under the law of indemnity if the indemnitee becomes liable for the indemnitor's actions. In *State Bank of New Prague,* therefore, the supreme court defined what is necessary for due process in these specific circumstances, stating that "due process of law *in this connection* requires that a party have notice of the proceedings, that the trial be had according to the settled course of judicial proceedings and the parties be afforded a full opportunity to be heard." *Id.* at 11 (emphasis added). The court went on to explain that "[i]t is not important that the notice and hearing were had in an action to which the indemnitor was not a party. Where the indemnitor or party responsible over appears and defends the action, it is held that he has been accorded due process, *not because of his participation in the proceedings, but*

because he had the notice and was afforded the ***opportunity of hearing****, which are essential to due process*." *Id.* (citations omitted) (emphasis added). Therefore, concluded the supreme court, when the indemnitor has received proper notice, "he shall not afterwards be heard to say that he did not have an opportunity to be heard in opposition to the claim asserted against [the party in Master Blaster's position]." *Id.* at 10. *See also, Liberty Mut. Ins. Co. v. J. R. Clark Co.*, 239 Minn. 511, 518-19, 59 N.W.2d 899, 904 (1953) (ruling that due process is satisfied in the vouching procedure by virtue of the notice, "thereby affording [the indemnitor] the opportunity of asserting his defenses . . . ."); *Washington Gaslight Co.*, 161 U.S. at 330 (stating that "[i]t is sufficient that the party against whom ultimate liability is claimed is fully and fairly informed of the claim, and that the action is pending, with full opportunity to defend or to participate in the defense"). Pipestone's due process argument contradicts Minnesota law.

Moreover, given modern third-party practice procedures, common-law vouching would be superfluous if the lack of personal jurisdiction defeated its use. But instead of prohibiting its use when personal jurisdiction is lacking, case law and legal commentators alike have recognized that vouching remains a viable procedure for the very reason that personal jurisdiction is not always available to support third-party joinder. *See SCAC Transp. (USA) Inc. v. S.S. "DANAOS"*, 845 F.2d 1157, 1162-63 (2d Cir. 1988) (stating that "[c]ommon-law vouching is a superfluous procedure where impleader is available" and that a party can "be vouched into a judicial proceeding when there is neither personal jurisdiction nor consent"); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4452 at 445-46 (1981) (stating that "[v]ouching need be preserved only for

cases in which lack of personal jurisdiction or other limitations make impleader unavailable"); *Humble Oil, supra*, 444 F.2d at 735 & n.15 (suggesting that vouching procedure could even be "limited to those cases in which process on the indemnitor cannot be obtained"); *Universal Amer. Barge,* 946 F.2d at 1138 (stating that vouching is used where the vouchee cannot be impleaded because of defects in personal jurisdiction).

These decisions recognize that due process is satisfied when the indemnitor has a choice to avail itself of the *opportunity* to appear and defend with full notice of the action. It is true that Pipestone could choose – and did choose – not to remain a party in the South Dakota action through its assertion of a personal-jurisdiction defense. It is not true that Pipestone can "opt out" of the principal/agent relationship merely because Master Blaster was subject to suit elsewhere. The settled law of indemnity is a business risk an agent takes when it enters into an agent/principal contract with a principal that may have to answer for the agent's conduct in a different jurisdiction. Pipestone exercised its due process rights by declining the opportunity to participate in the defense of the South Dakota action. Instead of assuming the defense and cooperating with Master Blaster in the defense of the South Dakota action, Pipestone elected to stonewall the use of its expert witness and allow Master Blaster to defend Pipestone's fault. While Pipestone had the right to pursue that course as its legal strategy, it cannot use that strategy as a means to avoid the settled law of indemnity. As the U.S. Supreme Court long ago stated, if the indemnitor "neglects or refuses to make any defense he may have, the judgment will bind him in the same way and to the same extent as if he had been made a party to the record." *Washington Gaslight Co.,* 161 U.S. at 330.

Pipestone also disputes due process by repeating its conflict-of-interest argument. It asserts that the existence of a conflict establishes a lack of privity, and that a lack of privity violates due process. (Br. pp. 35-38). This is difficult to understand, since Pipestone had already argued that the conflict-of-interest requirement is synonymous with privity: "This 'no conflict' requirement is synonymous with collateral estoppel's privity requirement. Any difference between the two concepts in this regard [is] purely one of semantics." (Br. p. 18). Given this, Pipestone's due process argument can take it no further than its conflict-of-interest argument. Master Blaster will not, therefore, repeat its conflict-of-interest argument here. It should be sufficient to point out that the undisputed facts of record establish that the injured party, Supreme Pork, made no claim that could be sustained on any ground other than one for which Pipestone would be obligated to indemnify Master Blaster. Therefore, the district court was correct as a matter of law in applying Minnesota's vouching procedure under which Master Blaster is entitled to indemnity from Pipestone.[16] This court should affirm the district court's ruling in all respects.

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[16] Pipestone's reference to the full-faith-and-credit clause is a red herring. This is not a proceeding to levy on Pipestone's assets, nor is the South Dakota judgment even one entered against Pipestone. This is an action in which Master Blaster seeks to use the South Dakota judgment as *evidence* to establish the elements of indemnity. Were full faith and credit in play here, Master Blaster would not need to show notice, it would not need to show that Supreme Pork's claim was limited to matters for which Pipestone is liable back to Master Blaster, and it would not need to show that it defended with due diligence.

5. The district court properly rejected Pipestone's spoliation argument.

The effect of the vouching procedure can be limited if procedural differences "'might be likely to cause a different result.'" *Universal Amer. Barge,* 946 F.2d at 1138 (quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 332 (1979)). But when a party like Pipestone rejects the opportunity to appear and defend, after notice, it cannot escape the use of the prior judgment as conclusive evidence of its liability and the amount unless it makes "a particularized showing of harm to establish the prejudicial effect of procedural differences." *Universal Amer. Barge*, 946 F.2d at 1138.

Pipestone criticizes the district court on this point, stating that it "never bothered to address this issue." (Br. p. 38). In fact, however, the district court expressly ruled that Pipestone had failed to make a particularized showing as to why any changes in the fire scene prejudiced Pipestone's ability to defend allegations that its venting caused the fire. (Add.14). In fact, Pipestone's expert, Terry Parks – the same Mr. Parks whom Pipestone refused to allow Master Blaster to use in defense of Supreme Pork's allegations – merely makes the broadest possible assertion that "relevant" evidence was lost. (App.168). He provided no "particularized showing" as to what was changed or why it compromised his ability to reach an opinion. Indeed, Mr. Parks visited the site on the same day as the other experts who testified at trial, and no one else has come forward to suggest that the fire scene was compromised. The district court was correct in ruling that such sweeping and generalized contentions are too speculative to meet the "particularized-showing" requirement. (Add.14).

Moreover, Pipestone forgets that the supposed spoliator in this case was Supreme Pork. Pipestone has never come forward with any particularized showing that the so-called relevant evidence would have implicated Supreme Pork as a cause of its own fire. In other words, Pipestone has done nothing more than establish that Minnesota and South Dakota treat spoliation somewhat differently; it has not shown how that difference would *likely* have lead to a different result in Minnesota. As the district court rightly concluded, nothing but speculation supports the notion that a Minnesota "district court judge likely would have excluded Supreme Pork's expert's opinion resulting in a dismissal of the entire case for spoliation . . . ." (Br. p. 39). The differences between Minnesota and South Dakota do not support Pipestone's refusal of Master Blaster's tender of defense. The district court correctly so ruled, and it should be affirmed.

C. The South Dakota jury's implied-warranty verdict equally supports Master Blaster's right of indemnity.

Recall that Pipestone's owner, Mr. Dammann, testified that "the work on the chimney [was] entirely [Pipestone's] responsibility." (App.52). One thing Pipestone did was fabricate – i.e., manufacture – the so-called "attic shields" used as part of the ventilation system. (T3 176-78, 188-90). Pipestone did this on the site using sheet metal and tin cutters. (Id.). Supreme Pork's expert, Dr. Schroeder, testified that these attic shields were not approved, designed, or manufactured consistent with their intended purpose of preventing hot chimney flues from coming into contact with combustible cellulose insulation. (Id.).

Under the law, indemnity attaches when the indemnitor "was not liable except as a seller of a product supplied to the indemnitee by the indemnitor and the indemnitee was not independently culpable." *Restatement (Second) of Torts*, Indemnity § 22. *See also*, *Polaris Indus.*, 299 N.W.2d at 420 (ruling that indemnity applies "where the one seeking indemnity has only a derivative or vicarious liability for the damage caused by the one sought to be charged"). The facts supporting indemnity are undisputed, and it matters not that Pipestone claims not to be directly liable to Supreme Pork under the law of implied warranty. The jury found that Pipestone's field-manufactured attic shields were not fit for use as such on a pressure-washer system that generates 480,000 BTU of heat. Pipestone had notice of that claim, has admitted that it had sole responsibility for the venting system, and chose not to appear and defend.[17] Indemnity applies to the entire South Dakota judgment as a matter of law.

Moreover, Pipestone has identified no damages that are different in kind or amount that Supreme Pork recovered under its warranty theory that it did not recover under its negligence theory. Thus, Pipestone's warranty argument not only provides no legal basis to escape its indemnity obligation, it provides no factual basis either. The district court was correct in holding that Master Blaster is entitled to indemnity for the entire judgment, because the entire judgment was based upon Pipestone's conduct, for which Master Blaster was held vicariously liable.

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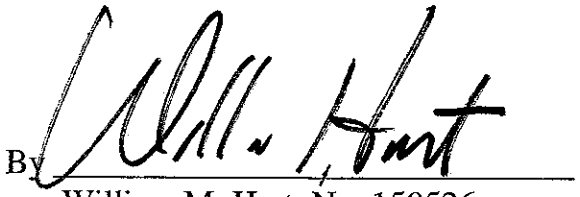
[17] Minnesota has codified the vouching procedure for warranty claims. *See* Minn. Stat. § 336.2-607 (5) (a) and Comment ("Subsection (5) (a) codifies for all warranties the practice of voucher to defend").

CONCLUSION

The purpose of the vouching procedure is to avoid duplicative litigation and the attendant possibility of inconsistent results. *Duferco Intern. Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 386 (2d Cir. 2003) (stating that "vouching-in is used where the vouchee cannot be impleaded because of defects in personal jurisdiction. The purpose of this legal device is to avoid duplicative litigation and the attendant possibility of inconsistent results"). Yet the very premise of Pipestone's appeal is the contention that it is "entitled [on remand] to a full trial on liability and damages." (Br. p. 16). In other words, Master Blaster has paid more than $1.3 million based solely on Pipestone's fault, and Pipestone now wants to engage Master Blaster in more litigation at still greater expense to Master Blaster, all for the purpose of leaving Master Blaster holding the $1.3 million bag for what has already been determined to be a fire solely caused by Pipestone's fault. The district court correctly applied the settled law of vouching and indemnity to reject that result and to hold that Master Blaster's right to indemnity follows as a matter of law from the South Dakota verdict, the resulting judgment, and the other undisputed facts of record in this case. Respondent Master Blaster, Inc. therefore respectfully requests that the judgment of the district court be affirmed in all respects.

Respectfully submitted,

Dated: November 4, 2009

By 

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FORM AND LENGTH CERTIFICATION

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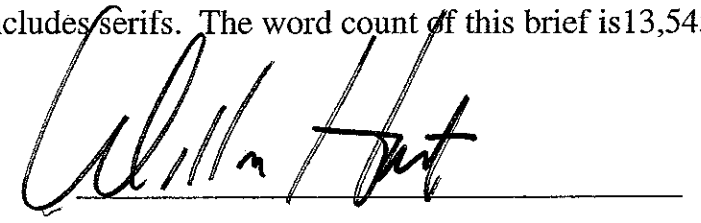
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