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Caveat Emptor, Indeed: Eighth Circuit Bars Strict Liability Recovery from Subsequent Property Owners in Minnesota. Kennedy Building Associates v. Viacom, Inc.

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CASE NOTE

CAVEAT EMPTOR, INDEED: EIGHTH CIRCUIT BARS STRICT LIABILITY RECOVERY FROM SUBSEQUENT PROPERTY OWNERS IN MINNESOTA

Kennedy Building Associates v. Viacom, Inc.[1]

I. INTRODUCTION

The doctrine of *caveat emptor* has long served to place buyers on notice that deficiencies in the item being purchased are their own to discover. Presented with an opportunity to lessen this burden for property owners in Minnesota, the Eighth Circuit chose to decline the invitation in a resounding and unanimous voice.

In *Kennedy Building Associates v. Viacom, Inc.*, the Eighth Circuit Court of Appeals limited the breadth of strict liability recovery available to subsequent property owners in Minnesota for soil and groundwater contamination by a prior owner. The court held that the *Rylands* rule, which governs such strict liability cases, requires harmful instrumentalities to escape the property upon which they are being held before strict liability damages will attach. Applying Minnesota law, the Eighth Circuit took the first step in limiting *Rylands* liability in Minnesota, a state with a long precedent of expanding the rule. The court's ruling stripped Kennedy Building Associates, who purchased contaminated property from Viacom's predecessor, of a five million dollar verdict, leaving them virtually empty-handed for contamination they had no role in creating. Buyer beware, indeed.

II. FACTS AND HOLDING

Kennedy Building Associates ("Kennedy"), the present owner of environmentally contaminated property in Minneapolis, brought a state court action in Minnesota against Viacom, Inc. ("Viacom"), the corporate successor to prior property owner Westinghouse Electric Corporation.[2] Kennedy sought relief under the Minnesota Environmental Response and Liability Act (MERLA)[3] and the Minnesota Environmental Rights Act (MERA).[4] Kennedy also brought claims of negligence, nuisance, and strict liability.[5] Viacom removed the action to federal court, at which point Kennedy asserted additional claims for Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)[6] relief and punitive damages.[7] Viacom counterclaimed under CERCLA, MERLA, and MERA.[8]

The property, currently owned by Kennedy, was owned by Westinghouse from the 1920s until 1980, and was used to house an electrical transformer repair facility.[9] Many of the transformers repaired on the site used an insulation product containing polychlorinated biphenyls ("PCBs"),[10] which are now known to be a highly toxic substance. The PCBs were thinned to the necessary consistency by using chlorobenzenes as a

[1] Kennedy Bldg. Assocs. v. Viacom, Inc., 375 F.3d 731 (8th Cir. 2004).
[2] *Id.* at 735.
[3] *Id.* at 737; MINN. STAT. § 115B (2003).
[4] *Kennedy*, 375 F.3d at 737; MINN. STAT. § 116B.
[5] *Kennedy*, 375 F.3d at 737.
[6] *Id.*; 42 U.S.C. §§ 9601-9675 (2000).
[7] *Kennedy*, 375 F.3d at 737.
[8] *Id.*
[9] *Id.* at 735.
[10] *Id.*

solvent.[11] Both MERLA and CERCLA now classify PCBs and chlorobenzenes as hazardous substances; as such, sites contaminated with the substances are subject to remediation under federal and state law.[12]

From 1971-73, Westinghouse conducted a study of the sites where it used PCBs to determine whether the PCBs were leaking off of those sites and onto adjoining property, and, if so, "whether the PCBs were likely to be detected by others and traced back to Westinghouse."[13] Dr. Thomas Munson, the head of the study, later testified that, "We found PCBs everywhere we looked."[14] Munson stated that an initial sampling of four locations showed clearly that PCBs were leaving the properties.[15] Though the site in question was not tested, Munson indicated that "it was a given" that all repair facilities using PCBs were contaminated.[16]

Westinghouse sold the Minneapolis property to Hillcrest Development Company in 1980 without investigating or decontaminating the property.[17] Furthermore, Westinghouse failed to make any type of disclosure as to the nature of its work at the site.[18] Kennedy came into possession of the property in 1982,[19] without any knowledge that Westinghouse had disposed of hazardous substances at the site.[20]

Kennedy prepared to sell the property back to Hillcrest in 1997.[21] Prior to making the purchase, Hillcrest hired an environmental consultant and discovered that the site was contaminated with PCB.[22] After Hillcrest withdrew its offer, "Kennedy reported the contamination to the Minnesota Pollution Control Agency (MPCA) and entered the [MPCA's] voluntary clean-up and investigation program."[23] Kennedy was required to investigate the contamination of the soil and groundwater in order to avoid referral to the federal Superfund program.[24]

In 1999, Kennedy filed suit against Viacom, the successor to Westinghouse, seeking relief under MERLA, MERA, and under the common law doctrines of nuisance, negligence, and strict liability.[25] Viacom removed the action to federal court claiming diversity of citizenship and Kennedy added claims for CERCLA relief and punitive damages.[26] Viacom counterclaimed under CERCLA, MERLA, and MERA.[27]

By the time of trial, Kennedy had expended $106,393.23 investigating the contamination on its property.[28] The Minnesota Pollution Control Agency also ordered Kennedy to file a deed restriction indicating that the land was contaminated.[29] Immediately preceding the trial, Viacom and the MPCA entered into an

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[11] *Id.*

[12] *Id.* at 736. *See* 42 C.F.R. § 116.4 (2004) (listing PCBs and cholorbenzenes as hazardous substances); *see also* 42 U.S.C. § 9604 (2000) for CERCLA relief and MINN. STAT. § 115B.04 (2003) for MERLA relief.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* at 736-37.

[18] *Id.*

[19] *Id.* at 737. "Gerald Trooien, a partner in Kennedy Building Associates, bought the property from Hillcrest . . . and transferred [ownership] to Kennedy." *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.* The Kennedy Building site was added to the MPCA's list of priorities on September 27, 2000. *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.* In addition, the deed restriction prohibited Kennedy from doing anything to the land that would disturb the soil without first gaining approval from the Minnesota Pollution Control Agency ("MPCA"). *Id.*

administrative consent order.[30] Under the terms of the agreement, Viacom would conduct a remedial investigation, submit a feasibility study, and develop and implement a response action plan.[31]

At trial, the district court found that Westinghouse contaminated the property with PCBs and chlorobenzenes through spillage, overflow of an oil-storage tank, and burning of PCB-contaminated oil.[32] The punitive damages claim and the common law claims of negligence, nuisance, and strict liability were submitted to the jury.[33] The jury returned a verdict for Viacom on the negligence and nuisance claims, but awarded Kennedy $225,000 in actual damages and $5,000,000 in punitive damages under the strict liability claim.[34] "[T]he CERCLA, MERLA, and MERA claims invoked the court's equitable jurisdiction," and, as such, were decided by the court.[35] The court determined that "Kennedy proved its CERCLA and MERLA claims against Viacom," and that Viacom failed to do so in its claims against Kennedy.[36] "The court awarded Kennedy $106,393.23 for . . . costs already incurred and [held] Viacom liable for future response costs."[37] In regard to the MERA claim, the court ruled for Kennedy and required Viacom to "remediate the site's soil, groundwater, and building interior so that the previously-placed deed restriction may be removed . . . ."[38] Post-trial motions by Kennedy for prejudgment interest and attorneys' fees were granted, resulting in an award of $41,677.89 in prejudgment interest for the CERCLA claim and $1,113,915 for attorneys' fees and costs.[39]

Following the judgment, Viacom appealed.[40] The Eighth Circuit Court of Appeals reversed the judgment for strict liability and punitive damages, reversed and remanded the award of injunctive relief, and remanded the award of attorneys' fees for segregation and removal of the hours spent in furtherance of the MERA claim.[41] The Eighth Circuit also affirmed the prejudgment interest award only as it pertained to the CERCLA and MERLA claims and reversed the portion corresponding to strict liability damages.[42]

III. LEGAL BACKGROUND

Strict liability law in the United States is as varied as the jurisdictions that recognize it. One theory of imposing strict liability, holding a party responsible for any damages without regard to negligence or fault, arises from the English case of *Rylands v. Fletcher*,[43] a case that has divided jurisdictions throughout the country.

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[30] *Id.*
[31] *Id.*
[32] *Id.* at 736. Evidence at trial revealed that the site's soil was contaminated with PCB concentrations as high as 9,100 mg/kg and that groundwater concentrations were as high as 37,000 mg/liter. *Id.* Allowable concentrations are 1.2 mg/kg for soil and .04 mg/liter for groundwater. *Id.* Expert witness testimony indicated that approximately 18,000 pounds of PCBs had been spilled at the site, resulting in the contamination of 25,000 tons of soil. *Id.* Furthermore, testimony was introduced that" because the site was contaminated with mineral oil, which is a solvent for PCBs," the PCBs are presently migrating and contaminating soil and groundwater of neighboring properties. *Id.* Moreover, the water-soluble chlorobenzenes also appeared to have left the site and were continuing to migrate. *Id.*
[33] *Id.* at 737.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.* at 750.
[41] *Id.*
[42] *Id.*
[43] Rylands v. Fletcher, L.R. 3 H.L. 330 (1868).

The facts behind the *Rylands* case are relatively simple. John Rylands, the owner of a successful steam-powered textile mill, constructed a reservoir on nearby land to power his mill.[44] On December 11, 1860, one of the walls of Rylands' reservoir collapsed, causing extensive damage to Thomas Fletcher's coal mining operation.[45] Fletcher initially brought suit at the Liverpool Summer Assizes and then appealed to the Exchequer Chamber.[46] Justice Blackburn reversed, and held Rylands liable for the damage.[47] Rylands appealed to the House of Lords, who affirmed the ruling of the Exchequer Chamber and articulated what has become known as the Rylands rule:

> We think that the rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is prima facie answerable for all the damage which is the natural consequences of its escape.[48]

Two American courts almost immediately adopted the Rylands rule. The Massachusetts Supreme Court relied on *Rylands* in *Ball v. Nye*,[49] and the Supreme Court of Minnesota adopted the rule in *Cahill v. Eastman*.[50] In *Ball*, the Massachusetts court found the defendant liable when animal manure seeped out of its storage vault and into the plaintiff's adjoining land, causing damage to his well and cellar.[51] The court held that the defendant's inability to control the manure was "of itself negligent."[52] Like *Rylands*, *Cahill* involved an escape of water.[53] The defendants dug a tunnel near the Mississippi River, which was subsequently flooded by the river, causing extensive damage to the plaintiff's adjoining land.[54] The court held the plaintiffs liable, "without regard to . . . the motives of the aggressor."[55]

Almost as instantaneously as Massachusetts and Minnesota adopted the *Rylands* rule, other jurisdictions began rejecting it. New York,[56] New Hampshire,[57] and New Jersey[58] were among the first to expressly refuse to apply it. These courts all refused to assign liability without some proof of fault or negligence on the part of the defendant. In *Brown v. Collins*, the New Hampshire court concluded that the *Rylands* rule was simply incompatible with the industrial age.[59] The New York courts held that "be[ing] a member of civilized society" necessarily requires sacrificing some "natural rights" and suggested that taking responsibility for damage one inadvertently caused is possibly an unavoidable risk.[60]

Jurisdictions in the Eighth Circuit are equally split on the application – and even the exact definition – of the Rylands rule. Iowa has subscribed to a rather broad application of the rule, noting that an "abnormally

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[44] Frank C. Woodside III et al., *Why Absolute Liability Under Rylands v. Fletcher is Absolutely Wrong!*, 29 U. DAYTON L. REV. 1, 3 (2003) (internal citations omitted).
[45] *Id.* at 3-4 (internal citations omitted).
[46] *Id.* at 4 (internal citations omitted).
[47] *Id.* (internal citations omitted).
[48] *Id.* at 5 (internal citations omitted).
[49] Ball v. Nye, 99 Mass. 582 (1868).
[50] Cahill v. Eastman, 18 Minn. 324 (1872), *overruled in part by* Berger v. Minneapolis Gaslight Co., 62 N.W. 336 (Minn. 1895).
[51] *Ball*, 99 Mass. at 584.
[52] *Id.*
[53] *Cahill*, 18 Minn. at 329-30.
[54] *Id.*
[55] *Id.* at 343-44.
[56] *See* Losee v. Buchanan, 51 N.Y. 476 (1873).
[57] *See* Brown v. Collins, 53 N.H. 442 (1873).
[58] *See* Marshall v. Welwood, 38 N.J.L. 339 (N.J. 1876), *overruled by* N.J. Dep't. of Envtl. Prot. v. Ventron Corp., 468 A.2d 150 (N.J. 1983).
[59] *Brown*, 53 N.H. at 450.
[60] *Losee*, 51 N.Y. at 484.

dangerous" or "ultrahazardous activity" is not required.[61] Though South Dakota has declined to either adopt or reject the rule on numerous occasions, the jurisdiction has taken the position that the rule applies "only to the thing out of place, the abnormally dangerous condition or activity which is not a 'natural' one where it is."[62] Missouri, on the other hand, appears to have completely rejected the rule.[63]

Following Minnesota's initial application of the *Rylands* rule in *Cahill*, the Minnesota Supreme Court clarified its definition of the rule in *Berger v. Minneapolis Gaslight Company*.[64] Noting that the *Cahill* court extended strict liability for damage caused by *anything* kept on a person's property not naturally belonging there, the *Berger* court issued an opinion limiting that proposition.[65] Finding the prior rule "too broad," the holding in *Berger* limited application of the *Rylands* rule to incidents in which the things that escaped had the "natural tendency . . . to become a nuisance or to do mischief."[66]

By the early twentieth century, Minnesota's reliance on the Rylands rule was well settled.[67] *Wiltse v. City of Red Wing* articulated the rule as the Minnesota courts routinely applied it: "[A] party who, for his own profit, keeps on his premises anything not naturally belonging there, the natural tendency of which is to become a nuisance, and to do mischief if it escapes, is liable if it escapes, without proof of negligence, for all damages directly resulting there from."[68]

In a historical context, Minnesota has been unwavering in its requirement that two elements in particular be met before *Rylands* will apply: (1) the natural tendency of the instrumentality causing the harm must be to become a nuisance and cause mischief if it escapes; and (2) the instrumentality must have been in the exclusive control of the defendant. Nuisance and mischief-causing instrumentalities have included among other things water[69] and petroleum.[70] Furthermore, the Supreme Court of Minnesota has expressly stated that a review of past cases imposing the Rylands rule reveals that in each case "the instrumentality causing the harm was under the *exclusive control*, as those words are commonly understood, of the party charged."[71] In *Mahowald v. Minnesota Gas Company*, the Minnesota Supreme Court refused to apply *Rylands* to a natural gas company, in part because it could not be proven that the gas mains were under the exclusive control of the defendant.[72]

IV. INSTANT DECISION

In the instant case, Viacom presented a number of different arguments on appeal.[73] Viacom first argued, and the Eighth Circuit agreed, "that the district court erred in interpreting Minnesota common law to hold a land owner strictly liable to its successor for contamination of the land."[74] Viacom's next contention was that due to the consent order signed with the Minnesota Pollution Control Agency (MPCA), the MERA injunction was moot.[75] The court remanded the injunction for clarification, citing the need for a "more precise definition" of

[61] Nat'l Steel Serv. Ctr. v. Gibbons, 693 F.2d 817, 818-19 (8th Cir. 1982).
[62] Chicago & N. W. Ry. Co. v. Tyler, 482 F.2d 1007, 1009 (8th Cir. 1973).
[63] Frank v. Envtl. Sanitation Mgmt., 687 S.W.2d 876, 887 (Mo. 1985) (Welliver, J., dissenting).
[64] Berger v. Minneapolis Gaslight Co., 62 N.W. 336 (Minn. 1895).
[65] *Id.* at 338.
[66] *Id.*
[67] *See* Wiltse v. City of Red Wing, 109 N.W. 114 (Minn.1906) and Bridgeman-Russell Co. v. City of Duluth, 197 N.W. 971 (Minn. 1924).
[68] *Wiltse*, 109 N.W. at 115.
[69] *Bridgeman-Russell*, 197 N.W. at 972.
[70] *Berger*, 62 N.W. at 336.
[71] Mahowald v. Minn. Gas Co., 344 N.W.2d 856, 860 (Minn. 1984) (emphasis in original).
[72] *Id.*
[73] Kennedy Bldg. Assocs. v. Viacom, Inc., 375 F.3d 731, 735 (8th Cir. 2004).
[74] *Id.* at 738.
[75] *Id.* at 742.

the acts required under the consent order.[76] Viacom also argued that the award of attorneys' fees and costs was inappropriate to the extent that the award contained hours expended in furtherance of the MERA claim, under which attorneys' fees are not recoverable.[77] Again the court agreed, remanding the issue for segregation of the fees attributable to MERA.[78] Finally, Viacom contended that a settlement offer made prior to trial should have stopped the accrual of prejudgment interest.[79] The court determined that the offer did not meet the statutory requirements and affirmed the award of prejudgment interest as it pertained to the CERCLA and MERLA claims.[80]

A. Strict Liability

In reviewing the strict liability claim for damages, the Eighth Circuit applied Minnesota law.[81] In strict liability cases, the English case of *Rylands v. Fletcher*[82] controls.[83] As construed by the Minnesota Supreme Court, the *Rylands* rule is as follows: "[A] party who, for his own profit, keeps on his premises anything not naturally belonging there, *the natural tendency of which is to become a nuisance, and to do mischief if it escapes*, is liable if it escapes, without proof of negligence, for all damages directly resulting therein."[84] The Eighth Circuit noted that though Minnesota has a long history applying the *Rylands* rule,[85] the Minnesota Supreme Court has yet to entertain the question of whether the rule applies to the case of a landowner suing its predecessor in title for damage the predecessor caused.[86]

Following a review of Minnesota law and *Rylands* decisions in other jurisdictions, the Eighth Circuit focused its analysis on the "escape" requirement of the Minnesota version of the rule.[87] The court acknowledged that other jurisdictions do not limit strict liability to cases involving an escape.[88] However, the court held that Minnesota has strictly adhered to its own version of the *Rylands* rule.[89] Under this rule, the Eighth Circuit declared that an escape is indeed required in Minnesota.[90]

Kennedy argued that the act of releasing the PCBs and chlorobenzenes was by definition an escape and enough to invoke the *Rylands* rule.[91] The Eighth Circuit rejected this contention, relying on a Minnesota Supreme Court decision[92] and characterizing the tort as one in which the "defendant in effect spreads his dominion past his own property."[93] Because this action was strictly for damage caused to Westinghouse's, and now Kennedy's, own property and because Minnesota's version of the *Rylands* rule requires an escape from the property, the Eighth Circuit held that this case does not fit the pattern of *Rylands* liability under Minnesota

[76] *Id.* at 748.
[77] *Id.*
[78] *Id.* at 749.
[79] *Id.* at 749-50.
[80] *Id.* at 750.
[81] *Id.* at 738.
[82] LR 3 H.L. 330 (1868). *Rylands* involved a reservoir of water which burst and flooded a series of neighboring coal mines. *Id.* The owner of the mines brought suit and successfully recovered damages from the owner of the reservoir. *Id.*
[83] *Kennedy*, 375 F.3d at 738-39.
[84] *Id.* at 739 (quoting Wiltse v. City of Red Wing, 109 N.W. 114, 115 (Minn. 1906) (emphasis in original)).
[85] *Id. See* Sachs v. Chiat, 162 N.W.2d 243 (Minn. 1968); Bridgeman-Russell Co. v. City of Duluth, 197 N.W. 971 (Minn. 1924); and Hannem v. Pence, 41 N.W. 657 (Minn. 1889).
[86] *Kennedy*, 735 F.3d at 739.
[87] *Id.* at 739-42.
[88] *Id.* at 742.
[89] *Id.*
[90] *Id.*
[91] *Id.* at 741.
[92] *Id.* at 741-42; Hannem v. Pence, 41 N.W. 657, 659 (Minn. 1889).
[93] *Kennedy*, 375 F.3d at 741-42 (quoting *Hannem*, 41 N.W. at 659).

law.[94] Accordingly, the court reversed the $225,000 strict liability award and the accompanying $5,000,000 award of punitive damages.[95]

B. MERA Injunction

In regard to Viacom's claim that the MERA injunction is moot, the court performed a multi-step analysis.[96] Viacom argued that because they entered into an administrative consent order with the Minnesota Pollution Control Agency prior to trial, the order was "entitled to some sort of preemptive effect" over the MERA injunction.[97] The court, however, held that when a consent order specifies only general actions that a defendant must take to clean up a site, preemption of a MERA injunction will not occur.[98] On the other hand, MERA does not authorize an injunction that conflicts with an existing order from the MPCA.[99] Whether any conflict will arise between the MERA injunction and the MPCA consent order is "completely speculative" at this point, due to the fact that Viacom and the MPCA have yet to agree upon the substantive terms of the remediation.[100]

Viacom further argued that the administrative consent order rendered the MERA claim moot.[101] The court found that the terms of the consent order between Viacom and the MPCA provide Kennedy with no method of enforcing the decree.[102] To deprive Kennedy of the MERA claim would leave them with no enforceable clean-up rights against Viacom.[103] Noting that if the MERA claim were dismissed and some "impediment arises" in Viacom's performance of the consent decree, Kennedy would be back "at square one,"[104] the court held that the MERA claim was not moot because the agreement between Viacom and the MPCA has not "irrevocably eradicated the effects of the alleged violation."[105]

The Eighth Circuit's analysis, however, was not yet complete. Relying on prior case law, the court interpreted MERA to authorize injunctive relief to clean up hazardous substances only when the substances create ongoing pollution of natural resources.[106] Accordingly, the court examined the district court's injunction, and held that the order exceeded the relief authorized by MERA because it ordered complete clean-up of the site without any reference to what would be necessary to forestall ongoing pollution in the future.[107] Since the injunction was inconsistent with the scope of MERA, the issue was remanded for the injunction to be redrawn to include a more precise definition of Viacom's requirements.[108]

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[94] *Id.* at 742.
[95] *Id.*
[96] *Id.* at 742-48.
[97] *Id.* at 743.
[98] *Id.* at 744.
[99] *Id.*
[100] *Id.* at 744-45.
[101] *Id.* at 745. "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Id.* (quoting County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979)).
[102] *Id.*
[103] *Id.*
[104] *Id.* (internal citations omitted).
[105] *See id.* at 745-46.
[106] *Id.* at 747. *See* Werlein v. United States, 746 F.Supp. 887, 898 (D.Minn. 1990), *vacated in part on other grounds by* Werlein v. United States, 793 F.Supp. 898 (D.Minn. 1992).
[107] *Kennedy*, 375 F.3d at 747.
[108] *Id.* at 747-48.

C. Attorney's Fees

In the district court, Kennedy was awarded attorneys' fees, expert witness fees and costs pursuant to authorizing provisions of MERLA.[109] Viacom argued that when the amount of attorneys' fees were determined, the total number of hours included hours that were spent in furtherance of the MERA claim, under which attorneys' fees are not allowed.[110] The Eighth Circuit held that when a determination of whether to separate hours for differing claims must be made, two elements should be considered: (1) "whether the claims involve a common core of facts and were based on related legal theories;" and (2) "whether the plaintiff's level of success justifies basing the fee award on the hours reasonably expended."[111]

After considering the relationship between the MERLA and CERCLA claims and comparing them with the facts surrounding the MERA claim, the court held that the distinction in the "aims and purposes" of the claims was sufficient to require the district court to separate out the fees extended in furtherance of the MERA claim.[112] Accordingly, the issue was remanded for a reduction of the fee award.[113]

D. Settlement Offer and Prejudgment Interest

Viacom's final argument was that a settlement offer it proposed before trial should have stopped the accrual of prejudgment interest pursuant to Minnesota law.[114] The district court rejected this contention, holding that the offer was "not sufficiently precise" to afford it the statutory protection.[115] The Eighth Circuit agreed with the ruling and affirmed the judgment as entered.[116] The court noted that only the interest pertaining to the strict liability award must be vacated, while the CERCLA and MERLA awards should be affirmed.[117]

V. COMMENT

Ruling that strict liability recovery under the *Rylands* rule requires the harmful instrumentality to escape onto other pieces of property,[118] the Eighth Circuit has expressly limited the scope of the rule. Presented with an opportunity to expand the reach of strict liability in Minnesota, the court instead held that land owners are not strictly liable to subsequent purchasers for contaminating the purchased land.[119] Instead, land owners can escape *Rylands* liability by ensuring that any harm-causing instrumentalities in their possession affect only the land they own. Application of the Eighth Circuit's decision has the possibility of resulting in a seemingly inconsistent situation. For instance, in a group of landowners with property contaminated fifteen years before any of the individuals purchased the land, all of them could recover under the *Rylands* rule except for the individual upon whose land the contamination originated. In this situation, the current owner of the land, where

[109] *Id.* The authorizing MERLA statute is MINN. STAT. § 115B.14 (2003).
[110] *Kennedy*, 375 F.3d at 748.
[111] *Id.* The court went on to note that "[n]o fee can be awarded on unsuccessful claims that were not related to the successful claim." *Id.*
[112] *Id.* at 749.
[113] *Id.*
[114] *Id.* at 749-50. The applicable statute is MINN. STAT. § 549.09 (2003).
[115] *Kennedy*, 375 F.3d at 750.
[116] *Id.*
[117] *Id.*
[118] *Id.* at 741-42.
[119] *See id.*

the contamination originated, has no more responsibility for the contamination than any of the other owners. Nevertheless, the owner is denied the option of using the strict liability doctrine to recover damages.

The Eighth Circuit Court of Appeals reviewed the district court's state law rulings de novo.[120] Because the Minnesota Supreme Court had yet to consider the question of whether an escape was required for *Rylands* liability to attach, the Eighth Circuit's analysis of the issue was one of first impression.[121] As such, the court is required to consider "related state court precedents, analogous decisions, considered dicta, and other reliable sources in an effort to determine what the Minnesota Supreme Court's decision would be."[122] A review of these persuasive authorities indicates that in a majority of other jurisdictions following the *Rylands* rule, courts have held that subsequent owners may not attempt to hold their predecessors in title strictly liable.[123] As a result, these jurisdictions require that the harmful instrumentality must escape the property for recovery to be available.

Minnesota, however, has long remained independent in its application of *Rylands*. Minnesota was one of the first American jurisdictions to adopt the *Rylands* rule and consistently apply it.[124] Prior to the instant decision, Minnesota state courts have chosen to give the rule a broad and expansive interpretation. After adopting the rule, Minnesota courts expanded *Rylands* from simply a recovery mechanism for damage caused by an escape of natural resources to cover pollution, ground water contamination, and even damage caused by pile driving.[125]

Similarly, Minnesota also expanded *Rylands* by allowing non-neighboring landowners to recover under the doctrine.[126] Initially, only individuals with adjacent property could use *Rylands* to recover for damage caused by a dangerous escaping instrumentality.[127] The courts later gave the rule a broad reading, however, and allowed a plaintiff who was walking by a building and was injured by falling ice to recover under *Rylands*.[128] The court also expanded the rule and applied it to an individual who was not the owner of the land when he created the danger.[129]

The instant decision breaks with the precedent of interpreting *Rylands* broadly and swings decisively in the other direction. Given the opportunity to define the *Rylands* escape requirement in broad or narrow terms, the court unequivocally chose a narrow reading. In so doing, the court deprived a class of potential litigants of a viable and valuable remedy. Following the Eighth Circuit's holding, an individual who purchases contaminated land cannot recover in strict liability from the previous owner who created the contamination. Assuming the contamination spread to adjacent lands, however, the neighboring landowner faces no such bar. The sole distinction is whether the contaminating materials "escaped" across the boundaries of the property.

The Eighth Circuit opted to view an escape in terms of movement from one piece of property to the next.[130] Viewed more broadly, an escape also occurs when contaminating pollutants escape the control of one owner and infringe upon the rights of a subsequent owner of the same property. This broad definition not only allows a subsequent landowner to recover from his predecessor, but also parallels Minnesota's past interpretation of *Rylands* requirements. While no court has expressly adopted this approach in conjunction with the *Rylands* rule, forging new legal ground should be no deterrent for the Minnesota courts. As previously

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[120] *Id.* at 738 (citing Salve Regina Coll. v. Russell, 499 U.S. 225, 231 (1991)).
[121] *Id.* at 739.
[122] *Id.* at 738 (quoting Union Pac. R.R. v. Reilly Indus., 215 F.3d 830, 840 (8th Cir. 2000)).
[123] *Id.* at 739.
[124] *Id.* at 738.
[125] *Id.* at 738-39. *See* Cahill v. Eastman, 18 Minn. 324 (1872); Minnesota Mining & Mfg. Co. v. Travelers Indem. Co., 457 N.W.2d 175 (Minn. 1990); and Sachs v. Chiat, 162 N.W.2d 243 (Minn. 1968).
[126] *Id.* at 740.
[127] *Id.*
[128] *Id. See* Hannem v. Pence, 41 Minn. 657 (1889).
[129] *Kennedy*, 375 F.3d at 740. *See Cahill*, 18 Minn. 324.
[130] *Kennedy*, 375 F.3d at 741.

noted, Minnesota was not only one of the first jurisdictions to adopt *Rylands*, but has been a leader in expanding the scope and coverage of the rule.[131]

By allowing an escape to occur within the boundaries of a single property, the *Rylands* rule will more effectively serve its ultimate purpose of protecting individuals from property damage inflicted by others. Although a subsequent owner may bear the burden of discovering contamination on property they purchase, such procedures are not always feasible, affordable, or even warranted. This burden is more effectively borne by the owner causing the contamination and by holding property owners strictly liable for the damage they create, whether on their own property or on the property of others.

VI. CONCLUSION

When the Eighth Circuit limited the *Rylands* rule to situations in which harmful contaminants cross property boundaries, it accomplished more than simply depriving Kennedy Building Associates of five million dollars. The court effectively barred the protections of strict liability from individuals who purchase land contaminated by prior owners. This narrow reading of the escape requirement caused the court to miss an opportunity to afford a remedy to a growing class of blameless plaintiffs. Instead, the Eighth Circuit ignored this opportunity and chose to protect those with whom the fault surely lays.

Defining the escape requirement of the *Rylands* rule in broad fashion is consistent with Minnesota's past interpretation of the rule and would continue to protect those individuals who truly deserve the protections of the law. Affording the benefits of strict liability recovery to subsequent property owners who inadvertently purchase contaminated land is a step the Minnesota Supreme Court would have chosen to take. Though *caveat emptor* still stands and a buyer must almost always beware, the Eighth Circuit missed an opportunity to lessen the burden in Minnesota and failed to apply the *Rylands* rule in a manner consistent with Minnesota precedent.

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[131] *Id.* at 738 (citing Jed Handelsman Shugerman, *The Floodgates of Strict Liability: Bursting Reservoirs and the Adoption of Fletcher v. Rylands in the Gilded Age*, 110 YALE L.J. 333, 348 (2000)).