STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1715

Dennis Newinski, et al.,
Respondents,

vs.

John Crane, Inc.,
Appellant.

Filed June 23, 2009
Affirmed in part, reversed in part, and remanded
Larkin, Judge

Ramsey County District Court
File No. 62-C1-07-050672

Richard A. LaVerdiere, Michael R. Strom, Briana Chatelle, Sieben Polk, P.A., 1640 South Frontage Road, Suite 200, Hastings, MN 55033 (for respondents)

James R. Gray, William A. Celebrezze, Aafedt, Forde, Gray, Monson & Hager, P.A., 150 South Fifth Street, Suite 2600, Minneapolis, MN 55402-4242; and

Michael A. Pollard, (pro hac vice), Baker & McKenzie LLP, One Prudential Plaza, 130 East Randolph Drive, Chicago, IL 60601 (for appellant)

Considered and decided by Ross, Presiding Judge; Schellhas, Judge; and Larkin, Judge.

U N P U B L I S H E D O P I N I O N

LARKIN, Judge

In this appeal from judgment entered after a jury trial in a products-liability case, appellant claims that (1) the jury's apportionment of the majority of fault to appellant was speculative and contrary to the weight of the evidence; (2) the district court improperly restricted appellant's closing argument; (3) the district court erred by failing to enforce the requirements of its case management order; and (4) the district court erred by reallocating to appellant a portion of the judgment that is attributable to fault of non-party entities. We conclude that the jury's apportionment of fault is not contrary to the weight of the evidence, that the district court did not improperly restrict appellant's closing argument, and that the district court did not err by failing to enforce the requirements of its case management order. Accordingly, a new trial is not warranted. But because reallocation is premature, the district court erred by reallocating the portion of the judgment that is attributable to the fault of non-party entities. We therefore reverse and remand for entry of judgment against appellant for the whole award, less the *Pierringer*-released defendants' share.

FACTS

Respondent Dennis Newinski (Newinski) was diagnosed with mesothelioma, a cancer associated with exposure to asbestos. Respondents Dennis and Sharon Newinski (Newinskis) filed suit against appellant John Crane, Inc. (Crane), A.W. Chesterton Co. (Chesterton), and Garlock Sealing Technologies, Inc. (Garlock) alleging claims of

negligence, strict liability, and breach of warranty.[1] Prior to trial, the Newinskis settled with Chesterton and Garlock pursuant to a *Pierringer* release.[2] The case proceeded to a jury trial, and the jury returned a special verdict in favor of the Newinskis. The special verdict form included Crane, the *Pierringer*-released defendants, and the following non-party entities: Anchor Packing, Asbestos Spray, Pittsburgh Corning, and Owens-Corning. The jury awarded total damages in the amount of $4,611,492 and apportioned fault as follows:

Anchor Packing	10%
Asbestos Spray	5%
Chesterton	10%
Crane	55%
Garlock	10%
Owens-Corning	5%
Pittsburgh Corning	5%

The district court filed its initial findings of fact, conclusions of law, and order for judgment on April 22, 2008; amended findings of fact, conclusions of law and order for judgment on May 28, 2008; and final findings of fact, conclusions of law and order for judgment on August 6, 2008. The district court ultimately held that Crane is jointly and severally liable for the whole damage award ($4,611,492), but deducted the *Pierringer*-

[1] The Newinskis filed suit against 22 other defendants alleging the same claims. All of these claims were dismissed prior to trial.

[2] Pursuant to the *Pierringer* release, the Newinskis agreed to indemnify and hold Chesterton and Garlock harmless from any claims, cross-claims, and counterclaims for contribution or indemnity.

released defendants' 20% share ($922,298). The district court also concluded that the portion of the judgment attributable to the fault of non-party entities (25%) is uncollectible and reallocated those damages to Crane and the *Pierringer*-released defendants, thereby further reducing the judgment against Crane;[3] final judgment against Crane is for $3,381,722. This appeal follows.

D E C I S I O N

I. There was sufficient evidence to sustain the jury's apportionment of fault.

Crane moved the district court for a new trial on several grounds, and the district court denied Crane's motion. The first ground was Crane's assertion that the jury's assignment of fault was erroneous and speculative because the jury's apportionment of the majority of liability to Crane was contrary to the weight of the evidence. Specifically, Crane argues that the jury was left to speculate regarding Newinski's comparative exposure to Crane's products and that the jury failed to properly account for evidence concerning Newinski's exposure to large amounts of asbestos products early in his career.

The decision whether to grant a new trial rests in the discretion of the district court, and the district court's decision will be reversed only for a clear abuse of that discretion. *Boschee v. Duevel*, 530 N.W.2d 834, 840 (Minn. App. 1995), *review denied* (Minn. June 14, 1995). "On review, answers to special verdict questions will not be set

[3] The district court calculated Crane's reallocation reduction as follows: the portion of the judgment attributable to the non-party entities (25% of $4,611,492) multiplied by the *Pierringer*-released defendants' proportionate share of fault as compared to Crane (20/75th or 26.67%) for a total of $3,381,722.

aside unless they are perverse and palpably contrary to the evidence or where the evidence is so clear to leave no room for differences among reasonable people." *Karnes v. Milo Beauty & Barber Supply Co., Inc.*, 441 N.W.2d 565, 567 (Minn. App. 1989), *review denied* (Minn. Aug. 15, 1989); *see Navarre v. S. Wash. County Schs.*, 652 N.W.2d 9, 21 (Minn. 2002) (stating this court "will not set aside a jury verdict on an appeal from a district court's denial of a motion for a new trial unless it is manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict" (quotations omitted)). The decision whether to grant a new trial because the evidence does not justify the verdict is within "the broadest possible discretionary power in the trial court." *Grorud v. Thomasson*, 287 Minn. 531, 534, 177 N.W.2d 51, 53 (1970).

The evidence provides adequate support for the jury's apportionment of fault. Newinski testified that he worked for Northern States Power Co. (NSP) from 1964 until 2000 and that he worked with valve- and sheet-packing products sold by Crane. The evidence showed that Crane's valve- and sheet-packing products contained asbestos. Newinski testified that he worked "often" with Crane's valve-packing product. Newinski testified that he used Crane's valve-packing product on steam valves and that 90% of the valves he worked on were steam valves. Newinski testified that he worked with Crane's valve-packing product from the beginning until the end of his career. With regard to sheet-packing products, Newinski acknowledged that he used sheet-packing products supplied by companies other than Crane, including Anchor Packing, Chesterton, and Garlock. But Newinski could not specify the amount of time he spent using each company's product. Newinski testified that throughout his career, he worked with sheet

packing about 1,000 times and that he was within proximity of other people working with sheet packing about 300 times. Based upon this evidence the jury could reasonably have attributed 50% of the fault for Newinski's mesothelioma to his exposure to valve packing and 50% of the fault to his exposure to sheet packing.

Crane contends that the jury's apportionment of fault was against the weight of the evidence because Newinski testified that early in his career he worked with or near other products that contained asbestos and because Newinski testified that he believed that other manufacturers supplied NSP with valve packing. But the jury's apportionment of fault to Asbestos Spray, Owens-Corning, and Pittsburgh Corning indicates that the jury agreed with Crane's theory that Newinski's early exposure to asbestos partially caused his mesothelioma. And the jury's apportionment of only a small percentage of fault to Asbestos Spray, Owens-Corning, and Pittsburgh Corning reflects the evidence that Newinski's early exposure to asbestos was limited and Newinski's testimony that he only used Crane's valve-packing product and that this use was "often." Likewise the jury's apportionment of fault to Anchor Packing, Chesterton, and Garlock indicates that the jury considered Newinski's testimony that he worked with sheet-packing products sold by companies other than Crane.

Crane also contends that the jury's apportionment is against the weight of the experts' testimony. But it was within the jury's purview to accept or reject any of the experts' conclusions. *See McKay's Family Dodge v. Hardrives, Inc.*, 480 N.W.2d 141, 147 (Minn. App. 1992) (explaining that "[a]lthough the parties' experts reached different

conclusions as to the . . . [causation], it was for the jury to resolve the conflicting testimony"), *review denied* (Minn. Mar. 26, 1992).

Crane cites *Lamb v. Jordan* in support of its assertion that the evidence was insufficient to sustain the jury's special verdict. 333 N.W.2d 852 (Minn. 1983). In *Lamb*, the Minnesota Supreme Court reversed the district court's denial of a new trial motion because of "exceptional instances" in which "the evidence, with its collection of inconsistencies, improbabilities and contradictions, preponderates against the plaintiff to the extent that a new trial is justified." *Id.* at 856-57. The inconsistencies, improbabilities, and contradictions were contained within the plaintiff's testimony. *Id.* Crane has not identified any inconsistencies, improbabilities, and contradictions within Newinski's testimony. The supreme court also emphasized that the plaintiff in *Lamb* lacked corroboration for his improbable testimony. *Id.* Corroboration is not lacking in the present case; experts testified that working with valve- and sheet-packing material (and asbestos-based products generally) can expose an individual to asbestos, which in turn can cause the individual to develop mesothelioma.

Because the jury's apportionment of fault is not manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict, the district court did not abuse its discretion by refusing to grant a new trial.

II. The district court did not abuse its discretion by restricting Crane's closing argument.

Crane also requested a new trial on the ground that the district court's limitation on its closing argument erroneously prevented it from articulating to the jury that certain

admitted evidence was relevant to the state of the art for the manufacture of asbestos products.

The district court has the primary responsibility to determine whether an argument is legitimate or overreaching. *Eklund v. Lund*, 301 Minn. 359, 362, 222 N.W.2d 348, 351-52 (1974). We review a district court's rulings regarding the scope of closing arguments for abuse of discretion. *See State v. Davidson*, 351 N.W.2d 8, 13 (Minn. 1984) (concluding that the district court did not abuse its discretion by restricting defense counsel's closing argument).

Prior to trial, the district court ordered that Crane was prohibited from mentioning, offering, or suggesting, directly or indirectly, that its compliance with governmental safety standards absolved it of liability as a matter of law. The district court also ruled that any claim that Crane had complied with Occupational Safety and Health Administration (OSHA) requirements, or were exempted from OSHA requirements, must be proved to the court before it could be argued to the jury.

While experts generally referenced OSHA requirements and exemptions at trial, Crane did not offer proof of the specific regulation that governed its claimed exemption from OSHA requirements. The district court therefore found that the evidence was inadequate to demonstrate that Crane was exempt from compliance with OSHA requirements. Accordingly, the district court restricted Crane's closing argument as follows:

> You can talk about the numbers [testified to at trial]. You cannot state that [Crane is] exempt. I don't think that you

> have shown—I don't know where you get any evidence that [Crane is] exempt. . . .
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> You can argue numbers. You can argue, you know, the way you want to argue, providing it's based upon the facts that have come in regarding those numbers which different people have testified to. The number, you know, [Dennis] Newinski testified to the number that he worked on over the course of a year, over the course of average per year and you can refer to that and extrapolate from there the numbers that the experts have talked about as far as the release of the fibers. But to say that it falls within an exemption, anymore than [the Newinskis] could argue that it's a violation of the OSHA standards, which they can't do.

The district court did not abuse its discretion by prohibiting Crane from arguing that it was exempt from compliance with OSHA requirements. The district court simply limited closing arguments to the evidence presented and held that neither party could make arguments regarding evidence that was not presented at trial. *See Hall v. Stokely-Van Camp, Inc.*, 259 Minn. 101, 104, 106 N.W.2d 8, 10 (1960) (stating that counsel may not introduce into his argument to the jury statements and conclusions unsupported by the evidence). Moreover, the transcript reflects that the district court did not restrict Crane's ability to make arguments regarding the state of the art of the manufacture of asbestos products. Because the district court did not abuse its discretion by restricting Crane's closing argument, a new trial is not warranted.

III. Crane was not prejudiced by the district court's decision not to enforce its case management order.

The final ground for Crane's new trial motion was its claim that because valve packing was the only product identified in the Newinskis' statements of factual basis, the

district court erred by allowing admission of evidence regarding Newinski's exposure to Crane's sheet-packing products. *See In re Minn. Asbestos Litig.*, No. C4-94-2875 (Ramsey County Dist. Ct. Jan. 25, 1999) (stating, "a plaintiff may not introduce . . . evidence of exposure to any defendant's products from a source that was not identified in either the original or supplemental Factual Basis Form relating to the defendant").

Rulings on discovery-related motions "will not be disturbed on appeal unless the [district] court abused its discretion, exercised its discretion in an arbitrary or capricious manner, or based its ruling on an erroneous view of the law." *EOP-Nicollet Mall, L.L.C. v. County of Hennepin*, 723 N.W.2d 270, 275 (Minn. 2006) (quotation omitted). "Evidentiary rulings . . . are committed to the sound discretion of the [district] court and those rulings will only be reversed when that discretion has been clearly abused." *Pedersen v. United Servs. Auto. Ass'n*, 383 N.W.2d 427, 430 (Minn. App. 1986).

Crane argues that it was justified in relying on the Newinskis' factual-basis statements and was prepared to defend a valve-packing claim at trial. Crane's argument implies that Crane was not prepared to defend a claim related to its sheet-packing products. Crane's argument is without merit. More than three months prior to trial, after the Newinskis had filed all of their factual-basis statements and the parties had conducted discovery depositions, Crane filed a motion in limine to exclude evidence regarding Newinski's exposure to Crane's sheet-packing products at trial based on the Newinskis' failure to identify sheet-packing products in their factual-basis statements. The district court rejected Crane's argument and denied its motion. Thus, Crane clearly knew that the

Newinskis would be allowed to present evidence of Newinski's alleged exposure to Crane's sheet-packing products.

Even if the Newinskis failed to specifically identify Crane's sheet-packing products in their factual-basis statements, admission of such evidence does not constitute reversible error.

> The trial court has a duty to suppress . . . evidence or testimony where counsel's dereliction is inexcusable and results in unjust surprise and prejudice to his opponent. However, . . . failure to suppress is not an abuse of discretion where the opposing party does not seek a continuance and fails to show prejudice from having had only brief notice . . . .

Phelps v. Blomberg Roseville Clinic, 253 N.W.2d 390, 394 (Minn. 1977). If Crane believed it was prejudiced by the district court's pretrial ruling, it should have requested additional time to prepare its defense. *Gunhus, Grinnell v. Engelstad*, 413 N.W.2d 148, 153 (Minn. App. 1987) (citing Minn. R. Civ. P. 59.01, subd. 3 and stating that "[a] defendant seeking to establish surprise must show he exercised ordinary prudence and did everything possible to prevent the asserted surprise from occurring"), *review denied* (Minn. Nov. 24, 1987). But Crane did not request a continuance of trial after the district court made its pretrial ruling. And Crane fails to specify how it was prejudiced by the district court's ruling and the resulting admission of evidence. Given Crane's advance notice that evidence regarding Newinski's alleged exposure to its sheet-packing products would be admissible at trial, any error in admitting such evidence is not a ground for reversal. *See* Minn. R. Civ. P. 61 (establishing that "[n]o error in either the admission or the exclusion of evidence . . . is ground for granting a new trial . . . unless refusal to take

such action appears to the court inconsistent with substantial justice"). Because there was no prejudice to Crane, the district court did not abuse its discretion by refusing to grant a new trial.

IV. The district court erred by reallocating the portion of judgment that is attributable to the fault of non-party entities.

Crane's final argument concerns the amount of judgment entered against Crane. Crane contends that judgment against it should be limited to 55% of the whole damage award, consistent with the jury's apportionment of fault to Crane, and that the district court erred by reallocating a portion of the judgment attributable to the fault of non-party entities to Crane. Crane raises both procedural and substantive challenges to the judgment. We address each in turn.

Crane argues that the district court committed procedural errors by amending its initial April 22, 2008 judgment sua sponte. The Newinskis argue that this issue is moot because they filed a notice of review that encompassed the judgments entered on April 22, May 28, and August 6, 2008. *See* Minn. R. Civ. App. P. 106 (establishing that "[a] respondent may obtain review of a judgment or order entered in the same action which may adversely affect respondent by filing a notice of review . . . .").

Appellate courts "decide only actual controversies and avoid advisory opinions." *In re McCaskill*, 603 N.W.2d 326, 327 (Minn. 1999). A case is moot if there is no justiciable controversy for a court to decide. *Kahn v. Griffin*, 701 N.W.2d 815, 821 (Minn. 2005). Generally, when an event makes an award of effective relief impossible or

a decision on the merits unnecessary, the case should be dismissed as moot. *In re Application of Minnegasco*, 565 N.W.2d 706, 710 (Minn. 1997).

The district court's April 22 judgment did not make a finding of joint and several liability. Instead, the district court limited Crane's liability to 55% of the whole damage award and declined to reallocate any portion of the award that was attributable to the fault of the non-parties. After the first order for judgment was entered by the district court, the Newinskis filed a request for reconsideration. The district court denied the Newinskis' request, but amended its April 22 judgment sua sponte. The Newinskis later filed a motion for reallocation and modification of judgment. The district court granted the Newinskis' motion for reallocation and, in its final judgment, held Crane jointly and severally liable for the whole award less the portion of damages attributable to the fault of the *Pierringer*-released defendants. Crane filed its notice of appeal and the Newinskis filed their notice of review, which stated:

> Please take notice that [the Newinskis] will seek review of the judgment of the Ramsey County District Court, which was entered on August 6, 2008, including but not limited to the court's Findings of Fact, Conclusions of Law, and Order for Judgment dated April 22, 2008, and the trial court's amended Findings of Fact, Conclusions of Law, and Order for Judgment dated May 28, 2008.

If this court were to conclude that the district court erred by amending its April 22 judgment, effective relief would be impossible given the Newinskis' request for review of the April 22 judgment. Even if we were to vacate the August 2008 judgment based on procedural errors, we would still review the April 22 judgment and the related joint-and-several-liability and reallocation issues. Our review of the April 22 judgment makes an

award of effective relief on Crane's alleged procedural error impossible and renders the claim moot. *Id.*

We next consider Crane's substantive challenge to the amount of judgment entered against it. Crane asserts that the district court erred in its reallocation determination. Reallocation is governed by Minn. Stat. § 604.02 (1988),[4] which provides:

> Subd. 1. When two or more persons are jointly liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that each is jointly and severally liable for the whole award. Except [as provided elsewhere], a person whose fault is 15 percent or less is liable for a percentage of the whole award no greater than four times the percentage of fault, including any amount reallocated to that person under subdivision 2.
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> . . . .
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> Subd. 2. Upon motion made not later than one year after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. A party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.
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> Subd. 3. In the case of a claim arising from the manufacture, sale, use or consumption of a product, an amount uncollectible from any person in the chain of manufacture and distribution shall be reallocated among all other persons in the chain of manufacture and distribution but not among the claimant or others at fault who are not in the

[4] When the Newinskis filed their suit, Minn. Stat. § 604.02 applied to "claims arising from events that occur on or after August 1, 2003." Minn. Stat. § 604.02 (2006). Thus, this court applies the prior version of the statute.

> chain of manufacture or distribution of the product. Provided, however, that a person whose fault is less than that of a claimant is liable to the claimant only for that portion of the judgment which represents the percentage of fault attributable to the person whose fault is less.

Minn. Stat. § 604.02, subds. 1-3.

Crane argues that the district court erroneously relied on subdivision 2 instead of subdivision 3 when reallocating. Crane also contends that reallocation was premature and that the district court should not have reallocated any amount.

The starting point for our review of the district court's reallocation decision is to determine whether "two or more persons are jointly liable" for the damage award. Minn. Stat. § 604.02, subd. 1. There is no basis for reallocation unless joint liability is established. *EID v. Hodson*, 521 N.W.2d 862, 864 (Minn. 1994) (stating that "[u]nless joint liability is established . . . Minn. Stat. § 604.02, subd. 2 does not apply and there is no basis for reallocating any uncollectible amount of a judgment to another party"); *Hahn v. Tri-Line Farmers Co-op*, 478 N.W.2d 515, 522 (Minn. App. 1991) (stating that Minn. Stat. § 604.02, subd. 3 was inapplicable because the requisite joint liability required for reallocation was absent), *review denied* (Minn. Jan. 27, 1992), *overruled on other grounds by Conwed Corp. v. Union Carbide Chems. & Plastics Co.*, 634 N.W.2d 401, 414 (Minn. 2001) (declining to adopt the *Hahn* opinion's interpretation of Minn. Stat. § 176.061, subd. 6(d) (2000)).

Crane concedes that it is jointly and severally liable under section 604.02, subdivision 1, but argues that subdivision 1 does not impose an immediate payment

obligation for the entire net damages award. Crane's contention is inconsistent with precedent. As explained by the supreme court:

> It has always been the law of this state that parties whose negligence concurs to cause injury are jointly and severally liable although not acting in concert. This common-law rule has been incorporated into our comparative negligence statute [Minn. Stat. § 604.02, subd. 1]: "When there are two or more persons who are jointly liable, contributions to awards shall be in proportion to the percentage of negligence attributable to each, provided, however, that each shall remain jointly and severally liable for the whole award." We have consistently applied [section 604.02] to hold each defendant liable for a plaintiff's total recoverable damages even when a jury finds that defendant [was] only partially at fault. The defendants' remedy is contribution from codefendants in accordance with the jury's apportionment of fault.

Maday v. Yellow Taxi Co. of Minneapolis, 311 N.W.2d 849, 850 (Minn. 1981) (citations omitted).

An exception to the general rule of joint and several liability applies when there are "independent consecutive acts of negligence and it is reasonably possible to determine which injuries were caused by which act."[5] *Id.* But where it is not possible to make a division of the damage caused by separate acts of negligence, negligent actors are jointly and severally liable. *Mills*, 288 Minn. at 20, 178 N.W.2d at 844. "Once the individual liability of each defendant has been established, all defendants liable to compensate the plaintiff for an indivisible injury are jointly liable and, therefore, pursuant

[5] The exception is referred to as the "single divisible injury" exception. *Maday*, 311 N.W.2d at 850. When a district court decides, as a matter of law, that an injury is divisible among multiple contributing tortfeasors (i.e., capable of apportionment), the question of actual apportionment becomes one of fact for the jury. *Mathews v. Mills*, 288 Minn. 16, 23, 178 N.W.2d 841, 845 (1970). The burden of establishing that an injury is capable of apportionment rests upon the defendant so claiming. *Id.*

to the statute each remains jointly and severally liable for the entire award." *Ruberg v. Skelly Oil Co.*, 297 N.W.2d 746, 752 (Minn. 1980). Thus, the district court correctly determined that Crane is jointly and severally liable for the damages awarded by the jury. *See* Minn. Stat. § 604.02, subd. 1.

Crane argues that section 604.02, subdivision 1, cannot be construed to impose an immediate payment obligation for the entire net damage award given that "contributions to awards shall be in proportion to the percentage of fault attributable to each" liable person. Crane argues that in order to give effect to the percentage contribution mandate, the court must limit its initial judgment against Crane to its proportionate share of liability and that its proportionate share may be increased upon proper reallocation of the non-party entities' share of the damage award. Crane argues that this application of section 604.02 gives effect to all of the statutory language within the section and reflects the proper "interplay" between joint and several liability and reallocation. Again, Crane's assertion finds no support in caselaw. The supreme court has consistently applied the comparative negligence statute, currently codified in section 604.02, to hold each defendant liable for a plaintiff's total recoverable damages even when a jury finds that a defendant is only partially at fault. *See, e.g.*, *Maday*, 311 N.W.2d at 850.

The fact that the jury determined that Crane's fault was 55% of the total award is of no practical consequence when there are no other defendants against whom judgment can be entered. *Schneider v. Buckman*, 433 N.W.2d 98, 102-03 (Minn. 1988) (holding that the reallocation provision was inapplicable and that the sole defendant was liable for 100% of the jury's damage award even though defendant's proportionate share of fault

was only 35%, where 40% of fault was attributable to non-party entities and the remaining 25% of fault was attributable to a dismissed party). Crane is the only remaining defendant subject to judgment. The non-party entities are not subject to judgment, and the district court erred by entering "judgment" against those entities. *See Hurr v. Davis*, 155 Minn. 456, 459, 193 N.W. 943, 944 (1923) (holding that a judgment against persons not parties to the action was "clearly void for want of jurisdiction and open to attack by persons not parties to the action"). Crane shares liability only with the *Pierringer*-released defendants. *See Hosley v. Armstrong Cork Co.*, 383 N.W.2d 289, 292 (Minn. 1986) (holding that plaintiff's settlement with some defendants through *Pierringer* releases does not waive joint and several liability between all defendants) (*Hosley I*); *Hosley v. Armstrong Cork Co.*, 364 N.W.2d 813, 817-18 (Minn. App. 1985) (holding that a non-settling defendant who pays more than the amount proportionate to his or her fault has a right to seek contribution from settling defendants and the plaintiff is obligated, under a *Pierringer* release, to satisfy the contribution claim, reasoning that because joint liability is a prerequisite for contribution, the use of a *Pierringer* agreement does not waive joint liability), *aff'd in part, rev'd in part, and remanded*, 383 N.W.2d 289. The district court correctly determined that Crane is jointly and severally liable for the whole damage award, less the *Pierringer*-released defendants' share.

We next consider Crane's argument that plaintiff did not establish a basis for reallocation. This court has previously held that reallocation under section 604.02 is premature as applied to a non-party entity because the district court cannot determine whether a claim is collectible when there is no legal right to collect. *Hosley v. Pittsburgh*

Corning Corp., 401 N.W.2d 136, 140 (Minn. App. 1987) (holding that where a party to the transaction is not a party to the lawsuit, the trial court cannot determine whether a claim is collectible against that party because there is no legal right to collect until judgment against that party has been entered), *review denied* (Minn. Apr. 23, 1987) (*Hosley II*). Moreover, the supreme court has held that the reallocation procedures of section 604.02 are not implicated where there is but one defendant against whom judgment can be entered. *Schneider*, 433 N.W.2d at 103.

In this case, there is only one defendant against whom judgment can be entered—Crane. Pursuant to the *Pierringer* releases, the Newinskis are responsible for the portion of the damage award that is attributable to the fault of Garlock and Chesterton. The Newinskis presently have no legal right to collect from the non-party entities. Because the non-party entities' legal obligations to the Newinskis have not been established, the district court had no occasion to determine their uncollectibility. *See Hosley II*, 401 N.W.2d at 140. Thus, the district court erred by reallocating the portion of judgment attributable to the fault of non-party entities. Because we conclude that a determination of uncollectibility was premature and reallocation was improper, we do not address Crane's claim that the district court erroneously relied on subdivision 2 of section 604.02 instead of subdivision 3 when reallocating.

Because reallocation of the portion of judgment attributable to the fault of the non-party entities was premature, we reverse the district court's reallocation determination and resulting final judgment and remand for entry of judgment consistent with this opinion. Judgment against Crane shall be in the amount of $3,689,193 (the total

judgment of $4,611,492 minus the *Pierringer*-released defendants' 20% share of liability).

Finally, we take no position regarding whether any portion of the judgment against Crane should be stayed pending the potential entry of judgment against the non-party entities and a subsequent decision regarding uncollectibility and reallocation. The district court did not consider and determine whether a stay is appropriate given its premature decision to reallocate. Accordingly, the issue of a stay is not properly before us for review. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1998) (stating that this court will generally not consider matters not argued to and considered by the district court). On remand, the district court may consider and decide any request to stay a portion of the judgment.

Affirmed in part, reversed in part, and remanded.

Dated: _____

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The Honorable Michelle A. Larkin