

**ORIGINAL**

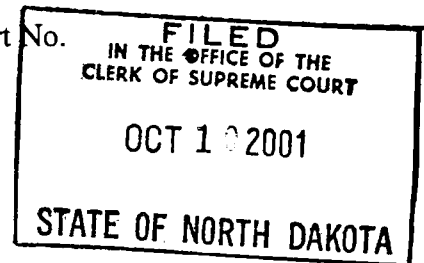
20010256

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Kenda Rubber Industrial Company, Ltd., )  
)  
Petitioner, )  
vs. )  
Frank L. Racek, Judge of District Court, )  
East Central Judicial District, )  
Respondent. )  
)  
)  
)

Supreme Court No.



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**FROM THE DISTRICT COURT  
CASS COUNTY, NORTH DAKOTA  
EAST CENTRAL JUDICIAL DISTRICT  
HONORABLE FRANK L. RACEK  
Civil No. 99-1274**

---

**PETITION FOR SUPERVISORY WRIT**

---

Adele Hedley Page  
Lynn Block  
Attorneys for Petitioner  
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Dakota Center  
51 North Broadway, Suite 402  
PO Box 1344  
Fargo, ND 58107-1344

Petitioner Kenda Rubber Industrial Company, Ltd., moves the Court for an Order in the form of a supervisory writ, directed to respondent district judge, directing him to vacate his Orders of December 8, 2001, and June 27, 2001, which denied petitioner's motions to dismiss and summary judgment. This petition is brought pursuant to this Court's supervisory jurisdiction over its inferior courts and is directed to the Court to be

determined in its discretion either on briefs or on such hearing as the Court may order.

This petition is brought for the reasons stated in the Brief served with this Motion.

Dated: October 9, 2001

DORSEY & WHITNEY LLP



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Lynn Block (#05288)

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ATTORNEYS FOR PETITIONER

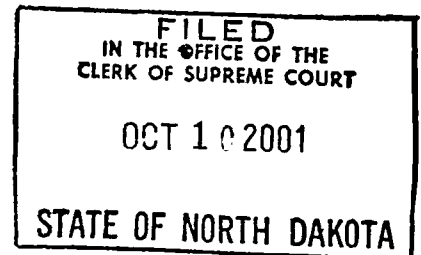
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Petitioner. )  
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vs. ) Supreme Court No.  
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Frank L. Racek, Judge of District Court, )  
East Central Judicial District, )  
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Respondent, )



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FROM THE DISTRICT COURT  
CASS COUNTY, NORTH DAKOTA  
EAST CENTRAL JUDICIAL DISTRICT  
HONORABLE FRANK L. RACEK  
Civil No. 99-1274

---

PETITIONER'S BRIEF IN SUPPORT OF  
PETITION FOR SUPERVISORY WRIT

---

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The District Court refuses to decide the fundamental issue of whether Petitioner, Kenda Rubber Industrial Company, Ltd. ("Petitioner"), was properly served, and thus, whether the District Court has authority over Petitioner. Despite Petitioner bringing its defense of insufficiency of service of process by motion, the District Court refuses to decide if, and if so when, Plaintiffs' action was commenced against Petitioner. See N.D.R.Civ.P. 3; N.D.C.C. § 28-01-38. Trial is scheduled for January 15, 2002. Petitioner requests the Court to take original jurisdiction consistent with its general superintending control over district courts.

According to N.D.R.Civ.P. 12(b) of the North Dakota Rules of Civil Procedure, a party raising the defense of insufficiency of service of process may do so by raising the defense by motion. Such motion constitutes a request for a hearing. Wright and Miller, Federal Practice and Procedure, Civil 2d, Vol. 5A, § 1373. Under N.D.R.Civ.P. 12(d), such a defense "shall be heard and determined before trial." Production Credit Ass'n v. Obrigewitch, 443 N.W.2d 304, 307 (N.D. 1989). Here, the District Court refuses to decide this fundamental issue as required by N.D.R.Civ.P. 12. Instead, the District Court hands over this nonrelinquishable responsibility to the jury. Absent issuance of a supervisory writ, Petitioner faces draconian options: Whether to submit questions of sufficiency of service of process to a jury or to accept a default judgment and move to vacate the judgment on the basis of lack of jurisdiction.

### **JURISDICTION**

The Supreme Court has authority to issue a supervisory writ under N.D. Const. Art. VI, § 2. Traynor v. Leclerc, 1997 ND 47, ¶ 6, 561 N.W.2d 644; see also N.D.C.C. § 27-02-04. "The authority is discretionary; [the Court] will invoke it only to rectify errors and prevent injustice when no adequate alternative remedies exist." Reems on

Behalf of Reems v. Hunke, 509 N.W.2d 45, 47 (N.D. 1993); e.g., State ex rel. Dep't of Corrections and Rehabilitation v. Haskell, 2001 ND 14, ¶ 4, 621 N.W.2d 358 (citations omitted). Petitioner seeks a supervisory writ as the District Court's Orders create an injustice, and Petitioner has no adequate alternative remedy. The District Court must be required to hear and decide fundamental issues of law regarding its authority over Petitioner. See N.D.R.Civ.P. 12(d); see also Van Slooten v. Estate of Schneider-Janzen, 623 N.W.2d 269, 270-72 (Minn. Ct. App. 2001); Unicon Management Corp. v. Koppers Co., Inc., 38 F.R.D. 474, 476 (S.D.N.Y. 1965).

### **STATEMENT OF THE CASE**

The underlying action involves a motorcycle accident that occurred on September 27, 1994. The accident resulted in immediate perceptible personal injury to plaintiff Maynard Magnuson. Plaintiffs Donna Lee Magnuson and Maynard Magnuson brought this action naming Petitioner, as well as Northern Improvement Company, d/b/a Ames Sand & Gravel, Ltd., American Kenda Rubber Industrial Company, Ltd.,<sup>1</sup> and the City of Fargo, Inc., as defendants. Petitioner's Appendix ("P.App.") 2, p. 8-15. Petitioner manufactures motorcycle tires. Plaintiffs' claims against Petitioner are based in products liability under N.D.C.C. Ch. 28-01.3.

Plaintiffs commenced this action against defendants Northern Improvement Co., d/b/a/ Ames Sand & Gravel, American Kenda Rubber Industrial Co. Ltd., and The City of Fargo, Inc. in 1996.

On November 1, 2000, after the expiration of the six-year products statute of limitations, Plaintiffs attempted service on Petitioner's U.S. Department of

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<sup>1</sup> American Kenda Rubber Industrial Company, Ltd., is incorporated in Ohio. It is a wholly-owned subsidiary of Petitioner.



Transportation (“D.O.T.”) agent for service of process, James J. Marlin. P.App. 3, p. 16. Accordingly, on November 3, 2000, Petitioner brought a Motion to Dismiss, based on the defenses of insufficiency of service of process and statute of limitations. P.App. 1, Docket No. (“Doc.No.”) 34-39; 51; 58. That Motion was scheduled to be heard on January 3, 2001, before the District Court.

On November 22, 2000, Defendant American Kenda Rubber Industrial Company, Ltd. filed a Motion for a Protective Order to prevent the second deposition of its president in Columbus, Ohio. P.App. 1, Doc.No. 45-50; 52-58; 69. During the hearing on the Motion for Protective Order, which took place on December 6, 2000, Plaintiffs argued the second deposition of defendant American Kenda Rubber’s president was necessary to respond to Petitioner’s Motion to Dismiss. At the December 6, 2000, Protective Order hearing, the District Court, ruling from the bench, denied defendant American Kenda Rubber Industrial Company, Ltd.’s Motion for a Protective Order, denied Petitioner’s Motion to Dismiss – which was not yet before it – ordered Petitioner to answer the Complaint, and directed Petitioner not to bring a Motion for Summary Judgment on the same issues.<sup>2</sup> P.App. 9, p. 54, l. 18 to p. 55, l. 21. The District Court never found that there was valid service of process on Petitioner.

On December 14, 2000, Petitioner answered the Complaint, alleging insufficiency of service of process and affirmatively defending that the claim was barred by the statute of limitations. P.App. 6, p. 20-23. Petitioner also filed a preservation of the defenses it raised in its Motion to Dismiss. P.App. 5, p. 18-19. Petitioner then proceeded to file a

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<sup>2</sup> The Court stated at the hearing on American Kenda Rubber Industrial Company, Ltd.’s Motion for a Protective Order that “We’ll spare both parties their resources to focus on the merits of the case here. [Petitioner’s] Motion to Dismiss is denied. There was service admittedly, even if it was November or some day prior. Taiwanese Kenda has to file an Answer. They’ve been served.” P.App. 9, p. 55, l. 9-13.

Motion for Summary Judgment on the same issues that were denied by the District Court. P.App. 1, Doc.No. 62-79; 84-86; 88; 96; 98; 100 and Doc.No. 116-118; 124-125; 130; 135-139. The Court in its Order denying Petitioner's Motion for Summary Judgment stated:

A material question of fact remains at issue with respect to when valid service of process was effected upon [Petitioner], and whether service upon Defendant American Kenda Rubber Industrial Company, Ltd. can constitute valid service upon [Petitioner].

P.App. 7; see also P.App. 8 (Order entered October 2, 2001, P.App. 1, Doc.No. 138; 139); P.App. 10, p. 58, l. 25 to p. 60, l. 18; P.App. 11, p. 63, l. 15 to p. 64, l. 20.) The practical effect of this order is to place questions of law – relating to the court's jurisdiction over Petitioner and the commencement of an action – with the jury. The question before the District Court was not whether there was service, but whether there was proper service under N.D.R.Civ.P. 4. Petitioner concedes that its D.O.T. agent for service of process was served on November 1, 2000, after the running of the limitations period. Petitioner does not concede that such service was proper or valid service. Had the District Court fulfilled its responsibility and identified a service as proper or valid and as commencing this action against Petitioner, this Petition would not be before the Supreme Court.

### **LAW AND ARGUMENT**

#### **I. The District Court Cannot Relinquish to the Jury its Responsibility to Decide If or When an Action is Commenced Against Petitioner.**

The question of whether a party is subject to the jurisdiction of the court is one of law for the District Court, not the jury. N.D.R.Civ.P. 12; Production Credit Ass'n, 443 N.W.2d at 307. If the District Court believed that there were questions of fact left unresolved by Petitioner's Motion to Dismiss and Plaintiffs' response, it should have

requested oral testimony to decide those issues.<sup>3</sup> Wright and Miller, Federal Practice and Procedure, Civil 2d, Vol. 5A, § 1353.

A civil action is commenced by the service of a summons. N.D.R.Civ.P. 3; see also N.D.C.C. § 28-01-38. N.D.R.Civ.P. 4 defines when service of process is proper or valid. Service of process must be made upon a foreign corporation, such as the Petitioner, “by delivering a copy of the summons to an officer, director, superintendent or managing or general agent, or partner, or associate, or to an agent authorized by appointment or by law to receive service of process in its behalf, or to one who acted as an agent for the defendant with respect to the matter upon which the claim of the plaintiff is based and who was an agent of the defendant at the time of the service ... or any form of mail ... addressed to any of the foregoing persons and requiring a signed receipt and resulting in delivery to that person.” N.D.R.Civ.P. 4(d)(2)(D); see also N.D.R.Civ.P. 4 (d)(3).

Additionally, here the U.S. Department of Transportation (D.O.T.), by regulation, has a specific methodology whereby Petitioner could have been served in this country. 49 C.F.R. § 551.45; 15 U.S.C. § 1399c; 49 U.S.C. § 30164, Service of Process. Plaintiffs failed to utilize the D.O.T. methodology.

Valid service of process is necessary to assert personal jurisdiction over a defendant. Gessner v. City of Minot, 1998 ND 157, ¶ 5, 583 N.W.2d 90. “Specific requirements for service of process must be strictly complied with, and a judgment based on service where the procedural requirements of the rule have not been followed is void.” Id.

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<sup>3</sup> In this case, Plaintiffs, despite having the burden of proof, never interposed a response. The District Court denied Petitioner's Motion to Dismiss before Plaintiffs' filed a response.

No valid service of process was obtained upon Petitioner, nor has the District Court held that proper service has been effected.<sup>4</sup> Instead, the District Court has refused to decide if Petitioner has been properly served. The District Court evaded its duty by stating in its Order on denying Petitioner's Motion for Summary Judgment that a "material question of fact remains at issue with respect to when valid service of process was effected upon [Petitioner]." P.App. 7, p. 24. Petitioner knows of no disputed facts; nevertheless, if such facts exist, the District Court has an obligation to decide them.

Petitioner should not have been ordered to answer the Complaint without even hearing the Petitioner's Motion to Dismiss. The District Court should have heard Petitioner's Motion to Dismiss, and decided if, and if so when, it obtained jurisdiction and authority over Petitioner. Any factual question raised by evidence relating to these issues should have been determined by the District Court on Petitioner's Motion to Dismiss or in a preliminary hearing. See Wright and Miller, Federal Practice and Procedure, Civil 2d, Vol. 5A, § 1353.

## **II. The Supreme Court Should Grant a Supervisory Writ to Avoid A Grave Injustice.**

This Court will grant a supervisory writ to rectify errors or to prevent injustice when no adequate alternative remedy exists. North Dakota Comm'n on Medical Competency v. Racek, 527 N.W.2d 262, 264 (N.D. 1995). Here, the District Court's refusal to decide if, and if so when, this action commenced against Petitioner is an injustice for which no reasonable alternative remedy exists. The District Court's Orders abdicate the decision on these questions of law to the jury. P.App. 4, p. 17; P.App. 7, p. 24; P.App. 8, p. 25. Regardless of when the issue of the validity of service of process is

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<sup>4</sup> Plaintiffs have identified up to seven different attempts at delivery or deliveries of documents as

decided, it must be decided by the District Court, and not the jury. N.D.R.Civ.P. 12(d); Production Credit Ass'n., 443 N.W.2d at 307.

Petitioner has no viable alternative remedy to a supervisory writ. Petitioner is aware of the remedies available when valid service of process is in question, but the District Court has refused to hear Petitioner's Motion to Dismiss and has refused to decide the issue in Petitioner's Motion for Summary Judgment and Motion to Reconsider. The denials of motions to dismiss and motions for summary judgment are non-appealable. Dimond v. State, 1999 ND 228, ¶ 12, 603 N.W.2d 66, 69. The District Court and Plaintiffs wish to relinquish this issue of the validity of service of process to the jury.

Petitioner is forced to seek a supervisory writ in order to obtain determinations on questions of law relating to the District Court's jurisdiction over it. In the absence of such a writ, it appears that Petitioner would be in the untenable and manifestly unreasonable position of having to present arguments on issues of law to a jury, or Petitioner would be forced to accept a default judgment and move to vacate the judgment based upon insufficiency of service of process and statute of limitations. Petitioner should not have to face such draconian options. Consequently, there is no reasonably adequate remedy short of a supervisory writ.

### **CONCLUSION**

The fact that questions of law exist or that the parties differ on the legal conclusions to be drawn from the facts does not obviate a court's obligation to make a difficult decision relating to its authority over a defendant. For the above reasons, Petitioner respectfully requests that this Court direct The Honorable Judge Frank L.

---

service of process on Petitioner.

Racek to vacate his orders on Petitioner's Motions to Dismiss and Summary Judgment and to carry out his judicial duty and determine if this action has been commenced against Petitioner and, if so, when.

Dated: October 9, 2001

DORSEY & WHITNEY LLP

A handwritten signature in blue ink, appearing to read 'Adele Hedley Page', is written over a horizontal line.

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ATTORNEYS FOR PETITIONER

**AFFIDAVIT OF SERVICE BY MAIL**

STATE OF NORTH DAKOTA    )  
  ) ss  
COUNTY OF CASS            )

Kim Swanson, being first duly sworn, on oath, deposes and states that on the 9th day of October, 2001, she did deposit in the United States mail an envelope properly sealed and with postage prepaid thereon, addressed to:

The Honorable Frank L. Racek  
Judge of the District Court  
Cass County Courthouse  
P.O. Box 2806  
Fargo, ND 58108-2806


Maurice McCormick  
Vogel Law Firm  
P.O. Box 1389  
Fargo, ND 58107-1389

Ronald H. McLean  
Serkland Law Firm  
P.O. Box 6017  
Fargo, ND 58108-6017

Garylle B. Stewart  
Solberg, Stewart, Miller, Johnson & Tjon  
P.O. Box 1897  
Fargo, ND 58107-1897

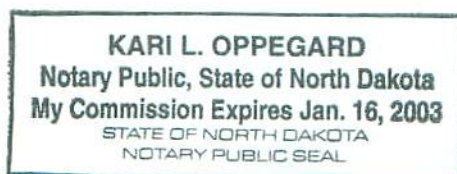
the last known address of said addressees in which envelope she had first placed a true and correct copy of the attached:

1.     **Petition for Supervisory Writ;**
2.     **Petitioner's Brief in Support of Petition for Supervisory Writ; and**
3.     **Appendix.**

  
\_\_\_\_\_  
Kim Swanson

Subscribed and sworn to before me  
this 9 day of October, 2001.

  
\_\_\_\_\_  
Kari L. Oppegard



IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

OCT 10 2001

Kenda Rubber Industrial Company, Ltd., )  
)  
Petitioner, )  
vs. )  
Frank L. Racek, Judge of District Court, )  
East Central Judicial District, )  
Respondent. )  
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Supreme Court No.

STATE OF NORTH DAKOTA

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FROM THE DISTRICT COURT  
CASS COUNTY, NORTH DAKOTA  
EAST CENTRAL JUDICIAL DISTRICT  
HONORABLE FRANK L. RACEK

---

APPENDIX

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FACEK, FRANK L.

MAGNUSON, MAYNARD

MAGNUSON, DONNA LEE

- VS -

KENDA RUBBER INT. COMPANY INC.

AMERICA KENDA RUBBER INC.

NORTHERN IMPROVEMENT COMPANY

LIES SAND &amp; GRAVEL

CITY OF FARGO

PLT. ATTORNEY  
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PLT. ATTORNEY  
MCLEAN, RONALD H

DEF. ATTORNEY  
HERMAN, SARAH A  
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PAGE, ADELE HEDLEY  
DEF. ATTORNEY  
BLOCK, LYNN  
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HERMAN, SARAH A  
DEF. ATTORNEY  
PAGE, ADELE HEDLEY  
DEF. ATTORNEY  
BLOCK, LYNN  
DEF. ATTORNEY  
MCCORMICK, MAURICE G  
DEF. ATTORNEY  
MCCORMICK, MAURICE G

\*\* CASE TYPE/SUBTYPE: CIVIL / PERSONAL INJURY

MAY 3, 1999

1. SUMMONS & COMPLAINT
2. SERVICE DOCUMENT
3. AMENDED SUMMONS AND COMPLAINT
4. SERVICE DOCUMENT (2)
5. POSTCARD  
MCLEAN, RONALD H

MAY 5, 1999

6. SERVICE DOCUMENT

MAY 6, 1999

7. STIPULATION TO AMEND COMPLAINT

MAY 10, 1999

8. ORDER (GRANTING MOTION TO AMEND COMPLAINT)

MAY 19, 1999

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JUNE 11, 1999

10. NOTICE OF ENTRY OF ORDER
11. SERVICE DOCUMENT
12. SECOND AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

JUNE 25, 1999

13. ANSWER TO SECOND AMENDED COMPLAINT OF AMERICAN KENDA RUBBER INDUSTRIAL COMPANY, INC. (GENERAL CIVIL AND DIVORCE)
14. SERVICE DOCUMENT

ACEK, FRANK L.

CV-99-01274

=====

MAYNARD MAGNUSON ET AL VS. KENDA RUBBER INT. COMPANY INC. ET A

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APRIL 27, 2000

- 15. NOTICE OF INTENT TO DISMISS
- 16. SERVICE DOCUMENT

MAY 11, 2000

- 17. LETTER FROM RONALD H. MCLEAN REQUESTING FILE REMAIN OPEN AND A RULE 16 SCHEDULING CONFERENCE BE SET

MAY 22, 2000

- 18. NOTICE OF RULE 16 SCHEDULING CONFERENCE
- 19. SERVICE DOCUMENT

SEPTEMBER 14, 2000

- \*\* RULE 16 CONFERENCE
- COMPLETION: 9/18/00 - COURT TRIAL/HEARING ENDED (CIVIL)

SEPTEMBER 18, 2000

- 20. RULE 16 ORDER
- 21. SERVICE DOCUMENT
- 22. TAPE 500-77 INDEX 9-346 HRG HELD 9-14-00

SEPTEMBER 19, 2000

- 23. NOTE OF ISSUE - JT6
- COMPLETION: 7/01/01 -
- 24. SERVICE DOCUMENT

SEPTEMBER 28, 2000

- 25. MOTION TO STRIKE AFFIRMATIVE DEFENSE
- 26. NOTICE OF MOTION TO STRIKE AFFIRMATIVE DEFENSE
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- 30. SERVICE DOCUMENT

OCTOBER 30, 2000

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- 32. AFFIDAVIT OF LYNN BLOCK
- 33. SERVICE DOCUMENT (2)

NOVEMBER 6, 2000

- 34. NOTICE OF MOTION
- 35. MOTION TO DISMISS
- 36. KENDA RUBBER INDUSTRIAL COMPANY, LTD.'S BRIEF IN SUPPORT OF MOTION TO DISMISS
- 37. AFFIDAVIT OF ADELE HEDLEY PAGE
- 38. AFFIDAVIT OF JAMES J. MARLIN, JR.
- 39. SERVICE DOCUMENT
- 40. TAPE 500-98 (2659-3540) HEARING HELD 11-6-00

00002

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MAYNARD MAGNUSON ET AL VS. KENDA RUBBER INT. COMPANY INC. ET A

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NOVEMBER 6, 2000 (CONTINUED)

\*\* MOTION TO STRIKE AFFIRMATIVE DEFENSE  
COMPLETION: 11/06/00 - MOTION HEARING COMPLETED

NOVEMBER 9, 2000

41. ORDER  
42. SERVICE DOCUMENT

NOVEMBER 17, 2000

43. NOTICE OF ENTRY OF ORDER  
44. SERVICE DOCUMENT

NOVEMBER 22, 2000

45. AMERICAN KENDA RUBBER INDUSTRIAL COMPANY, LTD'S NOTICE OF MOTION AND  
MOTION FOR PROTECTIVE ORDER  
46. AMERICAN KENDA RUBBER INDUSTRIAL COMPANY, LTD'S BRIEF IN SUPPORT OF  
MOTION FOR PROTECTIVE ORDER  
47. AFFIDAVIT OF ADELE HEDLEY PAGE, EXHIBITS  
48. SERVICE DOCUMENT

NOVEMBER 27, 2000

49. AFFIDAVIT OF LYNN BLOCK W/ AMENDED EXHIBIT C  
50. SERVICE DOCUMENT

NOVEMBER 29, 2000

51. AMENDED NOTICE OF MOTION W/ ATTACHED SERVICE

DECEMBER 4, 2000

52. PLAINTIFF'S RESPONSE TO AMERICAN KENDA RUBBER INDUSTRIAL COMPANY,  
LTD.'S MOTION FOR PROTECTIVE ORDER  
53. AFFIDAVIT OF TIMOTHY G. RICHARD  
54. SERVICE DOCUMENT

DECEMBER 5, 2000

55. AMERICAN KENDA RUBBER INDUSTRIAL COMPANY, LTD.S' REPLY BRIEF TO  
PLAINTIFF'S RESPONSE TO AMERICAN KENDA RUBBER INDUSTRIAL COMPANY,  
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56. SERVICE DOCUMENT

DECEMBER 6, 2000

\*\* MOTION TO DISMISS  
COMPLETION: 11/22/00 - RESCHEDULE  
\*\* MOTION FOR PROTECTIVE ORDER

DECEMBER 7, 2000

57. TAPE 500-114 (494-2010) (HEARING ON DECEMBER 6, 2000)

DECEMBER 8, 2000

58. ORDER

DECEMBER 15, 2000

59. KENDA RUBBER INDUSTRIAL COMPANY, LTD.'S NOTICE OF INTENT TO PRESERVE

ACEK, FRANK L.

CV-99-01274

=====

MAYNARD MAGNUSON ET AL VS. KENDA RUBBER INT. COMPANY INC. ET A

=====

DECEMBER 15, 2000 (CONTINUED)

DEFENSES MADE BY MOTION

60. ANSWER TO SECOND AMENDED COMPLAINT OF KENDA RUBBER INDUSTRIAL COMPANY

61. SERVICE DOCUMENT

JANUARY 3, 2001

\*\* MOTION TO DISMISS

COMPLETION: 1/02/01 - CANCELLED

JANUARY 25, 2001

62. NOTICE OF MOTION

63. MOTION FOR SUMMARY JUDGMENT

64. KENDA RUBBER INDUSTRIAL COMPANY, LTD.'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

65. AFFIDAVIT OF LYNN BLOCK W/ ATTACHED EXHIBITS AND AFFIDAVIT OF JAMES J. MARLIN JR.

66. SERVICE DOCUMENT

JANUARY 30, 2001

67. AMENDED NOTICE OF MOTION

68. SERVICE DOCUMENT

FEBRUARY 5, 2001

69. TRANSCRIPT OF PROCEEDING

(DECEMBER 6, 2000)

FEBRUARY 26, 2001

\*\* MOTION FOR SUMMARY JUDGMENT

COMPLETION: 1/29/01 - RESCHEDULE

FEBRUARY 28, 2001

70. PLAINTIFF'S RESPONSE TO KENDA RUBBER INDUSTRIAL COMPANY, LTD.'S MOTION FOR SUMMARY JUDGMENT

71. AFFIDAVIT OF MAYNARD MAGNUSON

72. AFFIDAVIT OF WENDY S. BREKKE

73. AFFIDAVIT OF TIMOTHY G. RICHARD

74. SERVICE DOCUMENT

\*\* MOTION FOR SUMMARY JUDGMENT

COMPLETION: 1/29/01 - RESCHEDULE

MARCH 23, 2001

75. AMENDED NOTICE OF HEARING

76. SERVICE DOCUMENT

MARCH 27, 2001

\*\* MOTION FOR SUMMARY JUDGMENT

COMPLETION: 3/06/01 - RESCHEDULE

MAY 14, 2001

77. PLAINTIFFS' AMENDED RESPONSE TO KENDA RUBBER INDUSTRIAL COMPANY, LTD.'S MOTION FOR SUMMARY JUDGMENT

78. AFFIDAVIT OF TIMOTHY G. RICHARD W/ ATTACHED EXHIBITS

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MAYNARD MAGNUSON ET AL VS. KENDA RUBBER INT. COMPANY INC. ET A

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MAY 14, 2001 (CONTINUED)

79. SERVICE DOCUMENT

MAY 17, 2001

80. NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

81. BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

82. AFFIDAVIT OF LYNN BLOCK W/ATTACHMENTS

83. SERVICE DOCUMENT

84. KENDA RUBBER INDUSTRIAL COMPANY, LTD.'S REPLY TO PLAINTIFFS' AMENDED  
RESPONSE W/ATTACHMENTS

85. AFFIDAVIT OF LYNN BLOCK W/ATTACHMENTS

86. SERVICE DOCUMENT

MAY 24, 2001

\*\* MOTION FOR SUMMARY JUDGMENT

COMPLETION: 5/24/01 - MOTION HEARING COMPLETED

MAY 25, 2001

87. CONFIDENTIALITY STIPULATION AND PROTECTIVE ORDER

88. TAPE 201 75 & 76 (1119-3875) (1-93) HEARING HELD 5-24-01

JUNE 19, 2001

89. PLAINTIFFS' RESPONSE TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT

90. AFFIDAVIT OF TIMOTHY G. RICHARD W/ ATTACHED EXHIBITS

91. SERVICE DOCUMENT

JUNE 20, 2001

92. REPLY BRIEF TO PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY  
JUDGMENT

93. AFFIDAVIT OF LYNN BLOCK W/ ATTACHED EXHIBITS

94. SERVICE DOCUMENT

JUNE 21, 2001

95. TAPE 201-89 (1043-2575) HEARING HELD 6-21-01

\*\* MOTION (MISCELLANEOUS-CIVIL)

COMPLETION: 6/21/01 - MOTION HEARING COMPLETED

JUNE 22, 2001

96. TRANSCRIPT OF PROCEEDING TAKEN BEFORE JUDGE RACEK ON MAY 24, 2001

JUNE 25, 2001

97. COPY - DEPOSITION OF MARIUSZ ZIEJEWSKI, PH.D

98. ORDER (DEFT KENDA RUBBERS MOTION FOR SUMMARY JUDGMENT - DENIED)

99. ORDER (DEFT KENDA RUBBER AND AMERICAN KENDA RUBBERS MOTION FOR SUMMARY  
JUDGMENT - DENIED)

100. SERVICE DOCUMENT

JUNE 26, 2001

101. AFFIDAVIT OF LYNN BLOCK WITH ATTACHMENT

102. SERVICE DOCUMENT

JUNE 27, 2001

103. AFFIDAVIT OF MAURICE G. MCCORMICK WITH ATTACHMENTS

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MAYNARD MAGNUSON ET AL VS. KENDA RUBBER INT. COMPANY INC. ET A

=====

JUNE 27, 2001 (CONTINUED)

- 104. BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
- 105. NOTICE OF MOTION AND MOTIN FOR SUMMARY JUDGMENT
- 106. SERVICE DOCUMENT

JUNE 28, 2001

- 107. NOTICE OF ENTRY OF ORDER
- 108. NOTICE OF ENTRY OF ORDER
- 109. SERVICE DOCUMENT (2)

JULY 25, 2001

- 110. ORDER FOR PRETRIAL CONFERENCE
- 111. NOTICE OF TRIAL

JULY 30, 2001

- 112. PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
- 113. AFFIDAVIT OF TIMOTHY G. RICHARD W/EXHIBITS ATTACHED
- 114. AFFIDAVIT OF MAYNARD MAGNUSON
- 115. SERVICE DOCUMENT

AUGUST 6, 2001

- 116. DEFENDANT KENDA RUBBER INDUSTRIAL COMPANY, LTD'S NOTICE OF MOTION AND MOTION TO RECONSIDER
- 117. DEFENDANT KENDA RUBBER INDUSTRIAL COMPANY, LTD'S BRIEF IN SUPPORT OF ITS MOTION TO RECONSIDER
- 118. SERVICE DOCUMENT

AUGUST 10, 2001

- 119. DEFENDANT NORTHERN IMPROVEMENT COMPANY'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
- 120. SUPPLEMENTAL AFFIDAVIT OF MAURIE G. MCCORMICK W/ATTACHMENTS
- 121. AFFIDAVIT OF DAVID W. JOHNSON W/ATTACHMENTS
- 122. AFFIDAVIT OF JEFF REINHOLZ
- 123. SERVICE DOCUMENT
- 124. DEFENDANT KENDA RUBBER INDUSTRIAL COMPANY, LTD'S AMENDED NOTICE OF MOTION AND MOTION TO RECONSIDER
- 125. SERVICE DOCUMENT
- 126. TAPE 501-110 (1001-2191) (8-15-01)

AUGUST 15, 2001

- \*\* MOTION FOR SUMMARY JUDGMENT
- COMPLETION: 8/15/01 - MOTION HEARING COMPLETED

AUGUST 20, 2001

- 127. ORDER

AUGUST 24, 2001

- 128. NOTICE OF ENTRY OF ORDER
- 129. SERVICE DOCUMENT

AUGUST 27, 2001

- 130. PLAINTIFF'S REPOSENSE TO DEFENDANT'S MOTION TO RECONSIDER

ACEK, FRANK L.

CV-99-01274

MAYNARD MAGNUSON ET AL VS. KENDA RUBBER INT. COMPANY INC. ET A

AUGUST 27, 2001 (CONTINUED)

131. SERVICE DOCUMENT

AUGUST 29, 2001

132. DEFENDANT KENDA RUBBER INDUSTRIAL COMPANY, LTD'S REPLY TO PLAINTIFFS'  
RESPONSE TO DEFENDANT'S MOTION TO RECONSIDER

133. SERVICE DOCUMENT

SEPTEMBER 10, 2001

\*\* MOTION TO RECONSIDER  
COMPLETION: 8/08/01 - RESCHEDULE

SEPTEMBER 14, 2001

134. TAPE 501-128 #0-412 (9-14-01)

\*\* MOTION TO RECONSIDER  
COMPLETION: 9/14/01 - MOTION HEARING COMPLETED

SEPTEMBER 19, 2001

135. TRANSCRIPT OF PROCEEDINGS (9-14-01)

136. ORDER (MOTION TO RECONSIDER IS DENIED)

137. SERVICE DOCUMENT

OCTOBER 2, 2001

138. NOTICE OF ENTRY OF ORDER

139. SERVICE DOCUMENT

DECEMBER 3, 2001

\*\* PRETRIAL CONFERENCE

JANUARY 15, 2002

\*\* JURY-6 PERSON (4-5 DAYS)

OFFICIALS  
FILED



## IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA

Maynard Magnuson and Donna Lee,  
Magnuson,

Plaintiffs,

v.

Kenda Rubber Industrial Company, Ltd.,  
American Kenda Rubber Industrial  
Company, Ltd., Northern Improvement  
Company, d/b/a Ames Sand & Gravel, and  
the City of Fargo,

Defendants.

Civil No. 99-1274

SECOND AMENDED COMPLAINT  
AND DEMAND FOR JURY TRIAL

### GENERAL FACTS

The Plaintiffs, Maynard Magnuson (Maynard) and Donna Lee Magnuson (Donna Lee), hereinafter jointly referred to as "the Magnusons", for their cause of action against the Defendants state and allege to the Court as follows:

1. That Maynard and Donna Lee are residents of the County of Cass, State of North Dakota.
2. That Kenda Rubber International Company, Ltd. and America Kenda Rubber, Inc., hereinafter jointly referred to as "Kenda" are corporations transacting business in the United States and selling motorcycle rubber tires to distributors and suppliers in the County of Cass, State of North Dakota.
3. That Defendant, Northern Improvement Company, d/b/a Ames Sand & Gravel (Northern Improvement), is a North Dakota corporation.
4. That the City of Fargo (Fargo) is a political subdivision of the State of North Dakota and is situated in the County of Cass.
5. That on September 27, 1994, Maynard was driving his 1978 Honda motorcycle on 36th Street North between the intersections of First Avenue North and Main Avenue (hereinafter referred to as "the roadway") when he encountered a dangerous quantity of loose

sand and gravel on the roadway.

6. Maynard was operating his motorcycle within the speed limits and in a safe and reasonable manner on September 27, 1994, when his motorcycle began to lose control due to the sand and gravel on the roadway.

7. Because of the roadway configuration, Maynard was unable to observe the loose sand and gravel on the roadway until he came upon it.

8. That despite Maynard's attempt to maneuver his motorcycle through the loose sand and gravel, Maynard's motorcycle lost control and skidded sideways.

9. Maynard and the motorcycle slid off the roadway and into a highway fence thereby causing Maynard to fracture his cervical spine and causing him to suffer severe, permanent and disabling injuries.

10. Besides suffering severe, permanent and disabling injuries, Maynard has incurred substantial medical bills for hospitalization, surgery, rehabilitation and lost wages.

11. Donna Lee has suffered damages as a result of Maynard's injuries. Donna Lee lost and will continue to suffer a loss of the support, society, services, comfort, guidance, consortium and companionship of the plaintiff, Maynard. In addition, Donna Lee has incurred various expenses that she would not have incurred but for the injuries suffered by Maynard.

## COUNT I

### KENDA (NEGLIGENT DESIGN, MANUFACTURE AND WARNING)

12. In the spring of 1994, Cheney Motors of West Fargo, North Dakota, and upon information and belief a Kenda distributor and supplier, sold Maynard a single Kenda motorcycle tire and mounted the same on Maynard's motorcycle.

13. Kenda knew or in the exercise of reasonable care should have known that the sale and mounting of only one of its new tires on a motorcycle may cause the motorcycle to lose the traction necessary to operate in a safe and reasonable manner. Kenda knew or should have

known that for safe motorcycle operation a motorcycle's tires must have similar side traction handling characteristics and that its motorcycle tires should not be utilized with motorcycle tires made by another motorcycle tire manufacturer. Kenda knew or should have known that selling and mounting one of its tires with the tire of another manufacturer was likely to cause serious injury.

14. Kenda was negligent in the design, assembling, manufacturing, testing, labeling, inspection, distribution, marketing, and selling of its motorcycle tires. Kenda's breach includes but is not limited to failing to warn or instruct the Magnusons of the danger of using Kenda tires with other tires, failing to place a warning on the tire purchased by the Magnusons, by failing to place a warning in sales brochures and invoices, and by failing to inform its distributors of this danger, and otherwise failing to alert the Magnuson's of the danger of mounting Kenda tires with non-Kenda tires.

15. Kenda's negligence was a proximate cause of the accident and injuries suffered by the Magnuson's.

16. Due to Kenda's negligence, the Magnusons have suffered injuries and damages in excess of \$50,000.00.

## COUNT II

### KENDA (STRICT LIABILITY)

17. Defendants are in the business of designing, assembling, manufacturing, testing, labeling, inspecting, distributing, marketing, selling and providing proper warnings and instructions for their motorcycle tires and so produced, wrote, edited, published, printed and distributed books, manuals, brochures, operating instructions, warnings and advertising materials pertaining to its motorcycle tires and placed upon the market motorcycle tires in a defective condition which were unsafe for their intended use when the motorcycle tires were sold singly, not as pairs, and without proper warning and instructions to consumers regarding the

inherent dangers of its product used in such a fashion.

18. Defendant Kenda placed its motorcycle tires upon the market knowing they would be purchased one at a time instead of in pairs as done by the plaintiff. Such consumer activity and use was reasonably foreseeable to the defendants.

19. As a result of the defects in the Kenda tire the Magnusons have suffered injuries and damages in excess of \$50,000.00.

### COUNT III

#### KENDA EXPRESS AND IMPLIED WARRANTIES

20. The Kenda defendants are in the business of designing, assembling, manufacturing, testing, labeling, inspecting, distributing, marketing, selling and providing proper warnings and instructions for its motorcycle tires and warrant to the general public including the plaintiff that their motorcycle tires were merchantable and reasonably fit, safe and suitable for the purpose of their intended use.

21. The intended use of the motorcycle tires was known to the Kenda defendants. The Kenda defendants impliedly warrant to the merchantability and fitness of the motorcycle tires for such purpose.

22. The Magnusons were in the class of persons reasonably expected to be affected by or use the motorcycle tire.

23. The Magnusons relied upon the Kenda defendants and understood that the motorcycle tire was safe for its intended use when only one tire was purchased and it was utilized on a motorcycle where the other motorcycle tire was a tire produced by a competing manufacturer.

24. The motorcycle tire sold by Kenda was defective and not fit for the ordinary purposes for which motorcycle tires were used and was not of merchantable quality when sold

singly.

25. The Kenda defendants were notified of the breach within a reasonable time after the breach was discovered and in the event that the defendants claim that the notice was inadequate or lacking in some formality, this Complaint will serve as reasonable notice of the breach.

26. Due to Kenda's breach of express and implied warranties, the Magnusons have suffered injuries and damages in excess of \$50,000.00.

#### COUNT IV

##### NORTHERN IMPROVEMENT (NEGLIGENCE)

27. Northern Improvement, through its employees and agents, is in the business of supplying sand and gravel for various construction projects throughout the City of Fargo and outlying areas.

28. Northern Improvement has a sand and gravel plant located on First Avenue North in Fargo, North Dakota, just blocks east of the Magnuson collision site. No other sand and gravel plants are located in the vicinity. Numerous trucks haul sand and gravel materials on 36th Street on their way to the Northern Improvement plant on First Avenue and did so on September 27, 1994.

29. Upon information and belief, on or before September 27, 1994 Northern Improvement deposited a large amount of loose sand and gravel on the roadway (36th Street North between Main Avenue and First Avenue).

30. Upon information and belief, Northern Improvement knew or should have known that its employees, agents, and those under its control would and did deposit dangerous amounts of sand and gravel on the roadway due to a treacherous curve in the road and the tendency for sand and gravel to shift on the curve.

31. Northern Improvement has a duty to the general public and to those who use

Fargo roadways to secure its loads of sand and gravel in a manner to prevent sand and gravel from falling off its trucks onto Fargo streets, to operate its vehicles in a way to prevent sand and gravel from being deposited on Fargo streets, to remove sand and gravel that it deposits on Fargo streets, and to warn motorists of hazards created by its depositing sand and gravel on Fargo streets.

32. Upon information and belief Northern Improvement negligently failed to properly load, secure and' operate its trucks hauling sand and gravel on the roadway, failed to remove the sand and gravel that it deposited on the roadway, and failed to warn motorists of the hazards created by the sand and gravel which it deposited on the roadway.

33. The loose sand and gravel that upon information and belief Northern Improvement negligently deposited on the roadway was a proximate cause of the motorcycle accident and injuries suffered by Maynard.

34. Due to Northern Improvement's negligence, Maynard and Donna Lee Magnuson have suffered injuries and damages in excess of \$50,000.00.

#### COUNT V

#### NORTHERN IMPROVENENT (STATUTORY LIABILITY)

35. Northern Improvement is liable under a theory of statutory liability by placing and failing to remove debris on the roadway in violation of North Dakota Law, including but not limited to N.D.C.C. §§ 39-21-44.1 and 39-10-59 and Fargo City Ordinances § § 11-0901 through 11-0905.

36. Due to Northern Improvement's actions Maynard and Donna Lee have suffered injuries in excess of \$50,000.00.

#### COUNT VI

CITY OF FARGO (NEGLIGENCE)

37. The City of Fargo knew or in the exercise of reasonable care should have known that a large amount of sand and gravel had been placed on the roadway by Northern Improvement and that such debris created a hazard to the motoring public, especially to motorcyclists.

38. The City of Fargo has non-discretionary duties to detect hazards created by contractors who leave debris on City streets, to prevent contractors from spilling debris on City streets, to force contractors to clean up debris deposited on City streets, to clean and maintain City streets, and to warn motorists of hazards created by the accumulations of sand and gravel and other debris on City streets.

39. The City of Fargo was negligent in performance of the duties described in the preceding paragraph.

40. The City of Fargo's negligence is a proximate cause of the damages the Magnusons have suffered.

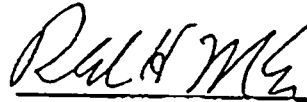
41. The Magnusons have incurred injuries in excess of \$50,000.00 due to the City of Fargo's breach.

WHEREFORE, the Magnusons respectfully request that this court enter judgment in favor of the Magnusons and against the Defendants, jointly and severally:

1. In an amount in excess of \$50,000.00;
2. Awarding the Magnusons their costs, disbursements and if applicable, attorney's fees;
3. Allowing the Magnusons to amend their complaint to allege punitive damages;
4. Granting the Magnusons such other and further relief as the court deems just and equitable.

A JURY OF SIX (6) IS HEREBY REQUESTED.

Dated this 9<sup>th</sup> of June, 1999.



Ronald H. McLean, of  
SERKLAND, LUNDBERG, ERICKSON,  
MARCIL & McLEAN, LTD.  
10 Roberts Street  
P.O. Box 6017  
Fargo, North Dakota 58108-6017  
ATTORNEYS FOR THE PLAINTIFFS



## IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA

Maynard Magnuson and Donna Lee,  
Magnuson,

Plaintiffs,

v.

Kenda Rubber Industrial Company, Ltd.,  
American Kenda Rubber Industrial  
Company, Ltd., Northern Improvement  
Company, d/b/a Ames Sand & Gravel, and  
the City of Fargo,

Defendants.

Civil No. 99-1274

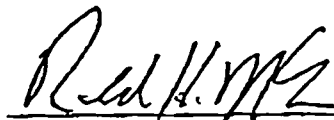
SUMMONS

1031

James J. Marlin Jr.  
2066 W. Henderson RD  
Suite 102  
Cals. OHIO

THE STATE OF NORTH DAKOTA TO THE ABOVE NAMED DEFENDANT:

You are hereby summoned and required to appear and defend against the Second Amended Complaint in this action, which is herewith served upon you, by serving upon the undersigned an answer or other proper response within twenty (20) days after the service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

Dated this 30<sup>th</sup> of October, 2000.Ronald H. McLean, of  
SERKLAND LAW FIRM  
10 Roberts Street  
P.O. Box 6017  
Fargo, North Dakota 58108-6017  
(701) 232-8957  
ATTORNEYS FOR THE PLAINTIFFS

## IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA

Maynard Magnuson and Donna Lee,  
Magnuson,

Plaintiffs,

v.

Kenda Rubber International Company,  
Ltd., American Kenda Rubber, Inc.,  
Northern Improvement Company, d/b/a  
Ames Sand & Gravel, Inc. and The  
City of Fargo,

Defendants.

Civil No. 99-01274

## ORDER

On December 6, 2000, at 1:45 P.M., Defendant American Kenda Rubber Industrial Company, Ltd.'s Motion for Protective Order and Defendant Kenda Rubber Industrial Company, Ltd.'s Motion to Dismiss came on for hearing before the Court. After hearing oral argument on said motions and considering the submissions of the parties and the entire file in the above matter,

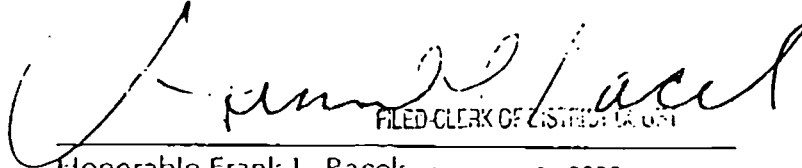
## IT IS HEREBY ORDERED:

1. Defendant American Kenda Rubber Industrial Company, Ltd.'s Motion for Protective Order is DENIED;

2. Defendant Kenda Rubber Industrial Company, Ltd.'s Motions to Dismiss is DENIED.

Dated this 8 day of DEC, 2000.

BY THE COURT:

  
FILED CLERK OF DISTRICT COURTHonorable Frank L. Racek  
Judge of the District Court

DEC

8 2000

CAS

00017

IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA

Maynard Magnuson and Donna Lee	)	
Magnuson,	)	Civil No. 99-1274
	)	
Plaintiffs,	)	
	)	
vs.	)	KENDA RUBBER INDUSTRIAL
	)	COMPANY, LTD.'S NOTICE OF
	)	INTENT TO PRESERVE DEFENSES
Kenda Rubber Industrial Company,	)	MADE BY MOTION
Ltd., American Kenda Rubber Industrial	)	
Company, Ltd., Northern Improvement	)	
Company, d/b/a Ames Sand & Gravel,	)	
Ltd.. and The City of Fargo,	)	
	)	
Defendants.	)	

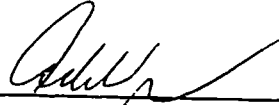
**PLEASE TAKE NOTICE** that Defendant Kenda Rubber Industrial Company, Ltd. (Kenda Rubber) hereby preserves all defenses made by motion pursuant to Rule 12 of the North Dakota Rules of Civil Procedure in its Motion to Dismiss served on November 3, 2000.

On December 8, 2000, the Court entered an Order denying Defendant American Kenda Rubber Industrial Company, Ltd.'s Motion for Protective Order and Kenda Rubber's Motion to Dismiss. Kenda Rubber's Motion to Dismiss, to which no response brief was served or filed by Plaintiffs, was noticed to be heard on January 3, 2001. No hearing on the merits of Kenda Rubber's Motion to Dismiss was held.

In filing an answer to the Second Amended Complaint, Kenda Rubber does so on the direction of the Court and does not waive any defense made by motion in its prior Motion to Dismiss.

Dated this 13<sup>th</sup> day of December, 2000.

DORSEY & WHITNEY LLP



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Adele Hedley Page (#05075)

51 Broadway, Suite 402

PO Box 1344

Fargo ND 58107-1344

(701) 235-6000

ATTORNEYS FOR DEFENDANT KENDA  
RUBBER INDUSTRIAL COMPANY, LTD.

IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA

Maynard Magnuson and Donna Lee	)	
Magnuson,	)	
	)	Civil No. 99-1274
Plaintiffs,	)	
	)	
vs.	)	
	)	<b>ANSWER TO SECOND AMENDED</b>
Kenda Rubber Industrial Company,	)	<b>COMPLAINT OF KENDA RUBBER</b>
Ltd., America Kenda Rubber	)	<b>INDUSTRIAL COMPANY, LTD.</b>
Industrial Company, Ltd., Northern	)	
Improvement Company, d/b/a	)	
Ames Sand & Gravel, Ltd., and	)	
The City of Fargo, Inc.,	)	
	)	
Defendants.	)	

Kenda Rubber Industrial Company, Ltd.. (Kenda Rubber) for its Answer to Plaintiffs' Second Amended Complaint, respectfully alleges and shows to the Court as follows:

1. Denies each and every allegation contained in plaintiffs' Second Amended Complaint, except those that are expressly admitted, qualified or otherwise explained.
2. Alleges that plaintiffs' Second Amended Complaint fails in whole or in part to state a claim against it upon which relief can be granted.
3. Alleges that this answering defendant is without knowledge or information sufficient to form a belief as to the truth of the matters asserted in ¶¶ 1, 3, 5, 7, 8, 9, 10, 11, 12, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40 and 41 of plaintiffs' Second Amended Complaint and puts plaintiffs to their strict proof.
4. Admits the allegations in ¶ 4 of plaintiffs' Second Amended Complaint.

5. Specifically denies the allegations in ¶¶ 6, 13, 14, 15, 16, 19, 22, 23, 24, 25 and 26 of plaintiffs' Second Amended Complaint.

6. Alleges that it is without information or belief regarding the corporations named in ¶ 2; assumes that the corporations named in ¶ 2 are named in error; assumes that plaintiffs are referring to defendants, Kenda Rubber Industrial Company, Ltd. and American Kenda Rubber Industrial Company, Ltd., names learned by plaintiffs through the discovery process since commencing this action and that appear in the caption of plaintiffs' Second Amended Complaint pursuant to a Stipulation to Amend Complaint and Order; and that based upon these assumptions, admits the allegations in ¶ 2 insofar as American Kenda Rubber is a distributor of motorcycle tires. Denies that Kenda Rubber has any knowledge or belief as to what corporate entity was the distributor of the tire at issue in this lawsuit.

7. Alleges that Kenda Rubber is a manufacturer of tires but has no knowledge whether it manufactured the tire at issue in this case. Admits that Kenda Rubber is in the business of manufacturing motorcycle tires.

8. Denies that any tires that it manufactured were in a defective condition unsafe for its intended use. Denies that customers received inadequate warnings or instructions when purchasing its tires.

9. Denies the allegations in ¶ 18 except to the extent that defendant Kenda Rubber is aware that the tires may be purchased singly.

10. Alleges that it is without information or belief regarding the allegations in ¶ 20 insofar as the allegations relate to American Kenda Rubber: specifically admits the allegations of ¶ 20 insofar as the allegations relate to Kenda Rubber to the extent that Kenda Rubber is in the business of manufacturing motorcycle tires.

11. Admit the allegations of ¶ 21 to the extent that defendant Kenda Rubber is aware that motorcycle tires are used on motorcycles.

12. Affirmatively alleges that defendant Kenda Rubber is a manufacturer of motorcycle tires but does not know if it manufactured the tire at issue in this case.

13. Affirmatively alleges that a substantial contributing cause of the injury alleged was an alteration or modification of the motorcycle tire occurring subsequent to the sale of the tire.

14. Affirmatively alleges that if any defective condition existed in a product distributed or manufactured by Kenda Rubber, the condition did not exist at the time the product was sold.

15. Affirmatively alleges that defendant Kenda Rubber is without information or belief as to whether it sold or distributed tires to Cheney Motors of West Fargo and puts plaintiffs to their strict proof.

16. Affirmatively alleges that plaintiff Maynard Magnuson's accident was caused by his own negligence in whole or in part.

17. Affirmatively alleges that Kenda Rubber had no obligation to warn that motorcycle tires should be utilized with motorcycle tires made by the same manufacturer or that tires should be bought as pairs.

18. Affirmatively alleges that plaintiff Maynard Magnuson knowingly assumed the risk of purchasing one tire from one manufacturer and utilizing the tire from another manufacturer.

19. Affirmatively alleges that it had no duty to warn arising from the single sale of a motorcycle tire.

20. Affirmatively alleges that it complied with all applicable warranties arising from the alleged sale of the Kenda motorcycle tire owned by plaintiff Maynard Magnuson.

21. Affirmatively alleges that plaintiffs' claims are barred by the operation of the relevant statutes of limitations.

22. Affirmatively alleges that this Court lacks jurisdiction over this defendant in that there was insufficiency of process and insufficiency of service of process.

WHEREFORE, this answering defendant respectfully prays that plaintiffs' Second Amended Complaint be in all things dismissed with prejudice and that this answering defendant be awarded its costs and disbursements, together with such other and further relief as the Court may deem just and equitable in the circumstances.

Dated this 13<sup>th</sup> day of December, 2000.

DORSEY & WHITNEY LLP



Adele Hedley Page (#05075)

Lynn Block (#05288)

51 Broadway, Suite 402

PO Box 1344

Fargo ND 58107-1344

(701) 235-6000

ATTORNEYS FOR DEFENDANT KENDA  
RUBBER INDUSTRIAL COMPANY, LTD.



IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA

Maynard Magnuson and Donna Lee,  
Magnuson,

Plaintiffs,

v.

Kenda Rubber Industrial Company, Ltd.,  
American Kenda Rubber Industrial  
Company, Ltd., Northern Improvement  
Company, d/b/a Ames Sand & Gravel, and  
the City of Fargo,

Defendants.

Civil No.: 99-1274

**ORDER**

On May 24, 2001, at 2:30 p.m., Defendant Kenda Rubber Industrial Company, Ltd.'s Motion for Summary Judgment came on for hearing before the Court. After hearing oral argument on said motion and considering the submissions of the parties and the entire file in this matter, the Court makes the following findings:

1. A material question of fact remains at issue with respect to when valid service of process was effected upon Defendant Kenda Rubber Industrial Company, Ltd., and whether service upon Defendant American Kenda Rubber Industrial Company, Ltd. can constitute valid service upon Defendant Kenda Rubber Industrial Company, Ltd.; and
2. A material question of fact remains at issue with respect to when the statute of limitations applicable to Plaintiffs' claims commenced.

THEREFORE, IT IS HEREBY ORDERED:

1. Defendant Kenda Rubber Industrial Company, Ltd.'s Motion for Summary Judgment is DENIED.

Dated this 25 day of June, 2001.

BY THE COURT:

/s/ Frank L. Racek

Honorable Frank L. Racek  
Judge of the District Court

IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA

Maynard Magnuson and Donna Lee, )  
Magnuson, )

Plaintiffs, )

v. )

Civil No.: 99-1274

Kenda Rubber Industrial Company, Ltd., )  
American Kenda Rubber Industrial )  
Company, Ltd., Northern Improvement )  
Company, d/b/a Ames Sand & Gravel, and )  
the City of Fargo, )

Defendants. )

**ORDER**

On September 14, 2001, at 10:00 a.m., Defendant Kenda Rubber Industrial Company, Ltd.'s Motion to Reconsider came on for hearing before the Court. After hearing oral argument on said motion and considering the submissions of the parties and the entire file in this matter, IT IS  
HEREBY ORDERED:

1. Defendant Kenda Rubber Industrial Company, Ltd.'s Motion to Reconsider is DENIED.
2. Defendant Kenda Rubber Industrial Company, Ltd. is sanctioned \$350.00, payable to the Serkland Law Firm.

Dated this 19 day of Sept, 2001.

BY THE COURT:

LSI

Honorable Frank L. Racek  
Judge of the District Court

IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA.

Maynard Magnuson and Donna  
Lee Magnuson,

Plaintiffs,

vs.

Kenda Rubber Industrial  
Company, Ltd., American Kenda  
Rubber Industrial Company,  
Ltd., Northern Improvement  
Company, d/b/a Ames Sand &  
Gravel, Ltd., and the City of  
Fargo,

Defendants.

File No. CV-99-01274

MOTION FOR  
PROTECTIVE ORDER

TRANSCRIPT

OF

PROCEEDING

Taken at  
Cass County Courthouse  
Fargo, North Dakota  
December 6, 2000

BEFORE THE HONORABLE FRANK L. RACEK  
- - - DISTRICT JUDGE - - -

00026

COPY

A P P E A R A N C E S

Ronald H. McLean  
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For the Plaintiff

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For the Defendant

1 P R O C E E D I N G S

2 (The following proceedings were had, commencing at  
3 1:45 p.m., on December 6, 2000, as follows:)

4 THE COURT: 99-1274, Magnuson through Ron McLean  
5 versus Kenda Rubber through Adele Page. These -- let's see,  
6 the best I can figure out, three motions. One alleging  
7 improper service, one moving to dismiss for the statute of  
8 limitations and then the resistance to the Plaintiffs' attempt  
9 to take a deposition of somebody here? Is that's what's at  
10 issue?

11 MR. McLEAN: Your Honor, we have -- we're only going  
12 to decide one motion today.

13 THE COURT: Okay.

14 MR. McLEAN: We're not going to get to the motion on  
15 the merits of dismissing. So the only thing here today is  
16 Adele's motion seeking, I don't want to say it, Protective  
17 Order, or the deputy may show up again.

18 MS. PAGE: We just had law enforcement -- Your  
19 Honor, --

20 MR. McLEAN: We had law enforcement looking at me.

21 MS. PAGE: We agreed to delay the motion to dismiss  
22 until next month.

23 MR. McLEAN: So it will be just Adele's Motion for  
24 Protective Order trying to bar the depositions that I've  
25 noticed.

1           THE COURT:   Okay.   Somebody can speak to it if they  
2   want to go ahead.

3           MS. PAGE:   Your Honor, I'm here on behalf of  
4   American Kenda and I just -- Kenda Rubber Industrial Company.  
5   The Plaintiffs have noticed a deposition of James Yang who is  
6   the President of American Kenda and another corporate  
7   deposition of American Kenda.   Those depositions -- a  
8   deposition of James Yang and a 30(b)6 was taken in October of  
9   1998.   Also at that time a deposition was noticed of American  
10   Kenda's Vice President and National Motorcycle Sales Manager.  
11   Not only -- that today, that we have noticed for actually last  
12   month, Your Honor, and that's what spurred the filing of this  
13   Motion for a Protective Order, a 30(b)6, which cites very  
14   similar requests for information as the original 30(b)6 in  
15   October of 1998, as well as another deposition of Mr. Yang.  
16   And it is the protection from moving forward on those repeat  
17   depositions that have spurred this Motion for a Protective  
18   Order.

19           Mr. McLean and I met to discuss whether we could  
20   resolve this.   In fact, just prior to this hearing, we're  
21   still discussing ways to resolve this.   And frankly, we've  
22   been unable to agree and I'm uncomfortable bringing this to  
23   the Court, but nevertheless, I think it's quite important not  
24   to go ahead and let my client be deposed on issues that have  
25   already been raised prior to -- or dealt with earlier by the

1 Plaintiffs in this case and even more importantly, were or  
2 will issue in a real subject of those earlier depositions.  
3 Mr. McLean, in his 30(b) -- in the Plaintiffs' 30(b)6  
4 deposition, cited very nicely all the areas he was interested  
5 in and that's what spurred us putting together this amended  
6 Exhibit C, to really show Your Honor that those issues have  
7 been discovered in this action. They have been dealt with  
8 through both Mr. Yang's deposition, Mr. Wittington's  
9 deposition and Mr. Well's deposition and those are the  
10 officers that I just cited. With very few exceptions, they've  
11 been explored and they were explored with all three deponents.

12 Plaintiffs are now indicating that a telephone  
13 deposition would be acceptable. At the time that these were  
14 originally noticed, they were not noticed as a telephone  
15 deposition. They did notice the deposition of the attorney  
16 for American Kenda and we did allow that to go forward as a  
17 telephone deposition.

18 At this point in time, I can't even say I would be  
19 agreeable to a telephone deposition. I think I would be very  
20 uncomfortable with my client being deposed by telephone, the  
21 President of the company and expense really is a huge issue  
22 here. It's expensive to fly to Ohio, it's expensive to go  
23 through these depositions again and in addition, you don't  
24 allow your own client to be cross examined on issues that he  
25 has already been asked direct questions on, and I think Mr.

1 McLean would agree, gave truthful testimony. He indicated  
2 that even at the time, that he felt that Mr. Yang was a very  
3 truthful deponent. There were no -- there are no new claims  
4 in this case to justify a repeat deposition. There's no new  
5 facts. Plaintiffs attempt to defend the renoticing of these  
6 repeat depositions claiming that Kenda Rubber Industrial  
7 Company, the Taiwanese company who is named in the caption of  
8 this case and who we have the dispute involving the motion to  
9 dismiss that we renoticed, Your Honor, for January to give Mr.  
10 McLean and the Plaintiffs an opportunity to resolve these  
11 issues. We'd originally had it set for today, but did agree  
12 to delay that and agreed to an extension of time for that  
13 brief. But the motion to dismiss, Your Honor, is about  
14 service of process primarily. There is a statute of  
15 limitations issue there and I don't know what Plaintiffs are  
16 going to say about that, but I think that they would agree  
17 that justification they give for renoticing these depositions  
18 or asking for these repeat depositions is a way in which to  
19 meet the service of process issue. In other words, they want  
20 to claim that service on American Kenda was in essence the  
21 same as service on Kenda Rubber Industrial Company and they  
22 cite to an alter ego theory. This is all despite the fact  
23 that they were provided with the DOT registered agents name,  
24 that the DOT requires be available, they had this information  
25 before the statute of limitations ran and in addition, the CFR



1 gives very clear ways if there is no designee, how one is to  
2 then follow through and go through the Department of  
3 Transportation's federal statutes for service. In other  
4 words, when an entity is putting transportation things into  
5 the commerce in this country, the Department of Transportation  
6 has done some very clear regulatory statutes and regulations  
7 to ensure that those folks can be properly served. Despite  
8 the fact that the Taiwanese company is not a signatory to the  
9 Hague convention, there was indeed a very clear regulatory  
10 framework for the Plaintiffs in this case to follow.

11 More importantly, the legal basis claim this alter  
12 ego theory has no relevancy to our motion to dismiss. There's  
13 no North Dakota case law on that theory, despite the statement  
14 in a case that Kenda Rubber, the Taiwanese company, the parent  
15 of its wholly owned subsidiary, American Kenda, completely  
16 controls American Kenda. In fact, the depositions taken by  
17 Mr. McLean in this case in October of 1998 plainly show that  
18 that's not the case. American Kenda's President testified  
19 that they distribute products other than the products of Kenda  
20 Rubber Industrial Company, Ltd., the Taiwanese company. And  
21 American Kenda testified that the Taiwanese company produces  
22 products and has distributors in this country that are other  
23 than American Kenda. In other words, there are other sources  
24 of distribution besides American Kenda. They are independent  
25 companies with proper corporate formalities and those issues

1 were explored in discovery earlier.

2 American Kenda is a wholly owned subsidiary of  
3 Kenda. It's a separate corporation. It's an Ohio corporation  
4 and it distributes products from numerous manufacturers other  
5 than Kenda Rubber. Clear North Dakota case law on this issue  
6 tells a Plaintiff how to serve in a situation such as this.  
7 Not only is there the DOT regulation, Your Honor, there's Rule  
8 4(f), which tells a Plaintiff how to serve a foreign person or  
9 a foreign entity. An entity or a person that resides in a  
10 foreign country. It sets through clear guidelines to tell you  
11 if there isn't an international law, then what do you do if  
12 there isn't an international law. It tells you to use other  
13 applicable law, which in this case would likely be the  
14 Department of Transportation's regulations.

15 Moreover, Your Honor, the Eggl case that's cited in  
16 our briefs, walks through very carefully that even if you were  
17 to look at American Kenda, the American corporation, that is  
18 an Ohio corporation, as this line of alter ego cases that Mr.  
19 McLean and the Plaintiffs have cited to, that there simply is  
20 no applicability. Even if that case law was in this state's  
21 law, it has no applicability to this case. Those cases are  
22 all about foreign corporations meaning American subsidiaries  
23 transacting business in the State. And North Dakota law has  
24 very clearly, through the Eggl case, explained it through our  
25 statutes explained that we, in fact, have two different types

1 of foreign corporations in this state. We have one type that  
2 transact business within the state and have to follow under  
3 the old statute, the 10-22 statute. In our code, a set of  
4 certification requirements and if a foreign corporation had  
5 transacted business in this state, in North Dakota, failed to  
6 comply with those rules, which include setting up a registered  
7 agent for service of process, then in fact, there was an  
8 alternative way to serve them. And Eggl goes on and says  
9 there's another subset of cases of foreign corporations that  
10 do not transact business in the State of North Dakota, and the  
11 service rules are different for them. You have to follow  
12 either 4(f) or the service rules in 4(d), 3 -- I'm not sure, I  
13 have the citation exactly, but it's for foreign corporations  
14 and it's clearly laid out in 4 and that requires service on  
15 officer, manager or director of that corporation.

16           There's no question that American Kenda nor Kenda  
17 have ever transacted business in this state. They transact  
18 business in this country, but Eggl makes it clear that  
19 transacting business in this state requires contacts with this  
20 state. And it requires to be one of those transacting  
21 business within-the-state corporations. It requires having  
22 agents or dealerships. And in fact, in this case, it's  
23 undisputed the facts show that the tire at issue was purchased  
24 from a West Fargo dealership, Cheney Motors, and Mr. Cheney  
25 himself testified, he's a sole proprietor, that that tire was

1 purchased from another distributor other than American Kenda  
2 or Kenda Rubber. In the depositions it was explored whether  
3 in deed there was any specific contacts with this state and  
4 the answers were in the negative. Egql makes it clear that  
5 American Kenda would be in that subset of foreign corporations  
6 that do not transact business within the state. Now part of  
7 the problem with that language, Your Honor, and Egql discusses  
8 this, is the transacting business within the state can get  
9 confused with the long arm personal jurisdiction concept of  
10 transacting business. And that for purposes of the old 10-22  
11 statute and now the new foreign corporations statute, that  
12 that term has no relevancy to personal jurisdiction. It's  
13 simply used in a completely different context than the long  
14 arm personal jurisdiction context of Rule 4.

15 And so this whole line of cases is talking about two  
16 completely different things. But even if we were to follow  
17 that line of cases, there has been no service and there is no  
18 argument to be made that American Kenda, even if it were under  
19 the control of Kenda Rubber, which it's not, that any service  
20 on American Kenda where you simply mail something there, not  
21 directed to anyone, would be service on Taiwanese company.  
22 Rule 4 plainly gives us the road map as to how to get there.  
23 The Department of Labor gives us the road map as to how to get  
24 there and Egql gives a road map as to how to get there. And  
25 in fact, the corporation statute also gives a road map as to

1     how to get there and none of those road maps were followed.

2                 THE COURT:   Okay, let me ask you some stuff here.

3     Kenda, the Taiwanese Kenda, they have a registered agent for  
4     service in the United States?

5                 MS. PAGE:   Yes, they do, Your Honor.

6                 THE COURT:   Okay.  And your complaint is the  
7     Plaintiffs served the Second Amended Complaint but not the  
8     Summons after -- there was some confusion as to how many  
9     Kendas there were in the world, and then we amend the  
10    Complaint to say that there's two, Kenda and American Kenda,  
11    and then he sent a copy of the Complaint to the registered  
12    agent of service for Kenda and you say no Summons, right?  I  
13    read that part.

14                MS. PAGE:   That's not quite the way it works, but if  
15    the bottom line is, Your Honor, after the running of the  
16    statute of limitations was the registered agent served?  Yes.

17                THE COURT:   Okay.

18                MS. PAGE:   That happened in November.

19                THE COURT:   In November, you admit that he gets  
20    served personally and that's the registered agent for this  
21    Taiwanese company?

22                MS. PAGE:   Yes, Your Honor.

23                THE COURT:   Okay.

24                MS. PAGE:   That's in the Motion to Dismiss.  Yes.

25    That's not questionably -- and before the statute of limit --

1 well, we don't even know if it's before the statute of  
2 limitations runs because we don't know the precise date.

3 THE COURT: Okay, so did Kenda --

4 MS. PAGE: But there's --

5 THE COURT: -- so did -- has Kenda ever answered the  
6 Taiwanese company?

7 MS. PAGE: No, Your Honor.

8 THE COURT: Okay.

9 MR. McLEAN: But they've done discovery.

10 MS. PAGE: They have not done discovery, Your Honor.  
11 I would disagree with that.

12 MR. McLEAN: Read your most recent interrogatories  
13 to me.

14 THE COURT: So Kenda's appeared, Kenda eventually  
15 gets served unquestionably in November of whatever year,  
16 although you allege it's passed the time of the running of the  
17 statute of limitations, but they were served?

18 MR. McLEAN: 200 (sic).

19 THE COURT: Yeah, so --

20 MS. PAGE: 200.

21 MR. McLEAN: This year. We agreed. November, 2000.

22 MS. PAGE: November, 2000, okay. I thought you said  
23 200.

24 THE COURT: So they were served in November of 2000

25 --

1 MS. PAGE: February.  
2 THE COURT: -- they haven't answered?  
3 MS. PAGE: No, Your Honor.  
4 THE COURT: Okay, they were --  
5 MS. PAGE: They responded by filing the Motion to  
6 Dismiss.  
7 THE COURT: Alright. Now their Motion to Dismiss  
8 alleges that they missed the statute of limitations because  
9 they didn't serve a Summons the first time it got mailed out.  
10 MS. PAGE: There were documents mailed to the  
11 registered agent for service of process that do not identify  
12 to what corporate entity they are served -- what corporate  
13 entity they are served upon.  
14 THE COURT: Okay.  
15 MS. PAGE: And because those were served within two  
16 weeks of the time we had given, the Plaintiffs, the  
17 identification of the registered agent, we thought perhaps  
18 those were an attempt to serve the Taiwanese company.  
19 THE COURT: Alright. And now --  
20 MS. PAGE: No Summons was in that set of documents.  
21 THE COURT: Alright, that was -- the prior 30(b)6  
22 stuff was back in '98 before any of these two Kendas, Taiwan,  
23 American, all this has ever been raised is any kind of claim?  
24 MS. PAGE: Your Honor, back in October of 1998, both  
25 corporate entities had been identified. American Kenda has

1 always identified Kenda Rubber Industrial Company, Ltd. as the  
2 manufacturer of Kenda tires and has provided the Plaintiffs  
3 with the relevant information. Both entities have been on the  
4 pleadings as far as I know from the very beginning.

5 THE COURT: I know, but they never raised statute of  
6 limitations before right now apparently.

7 MS. PAGE: There has never been service on Kenda  
8 Rubber Industrial Company, Ltd.

9 THE COURT: Until November of 2000.

10 MS. PAGE: Until November of 2000.

11 THE COURT: Okay.

12 MS. PAGE: Can I say a few -- couple more things,  
13 Your Honor, just briefly? In essence, this attempt to depose  
14 Mr. Yang and do another 30(b)6 deposition is a wild goose  
15 chase. Albeit one the Plaintiffs have already explored.  
16 They're saying they want more information about the minute  
17 book, they're saying they want more facts to explain  
18 statements that were made in the depositions. Obviously, it  
19 appears to American Kenda that Plaintiffs are interested in  
20 doing further cross examination of its client on issues that  
21 they have already been deposed on, which is exactly the  
22 purpose of not permitting repeat depositions so they can go  
23 back and try and trip people. The facts are the facts.

24 We have told the Plaintiffs that if they will serve  
25 interrogatories asking for specific facts, although we



1 disagree that this information is relevant to any issue before  
2 this Court, that we will provide that information to the  
3 Plaintiffs. We've also told Plaintiffs, and this is right  
4 before this hearing, Your Honor, so Mr. McLean couldn't have  
5 put this in anything and nor could I, but I told Plaintiffs'  
6 counsel that we would do so on an expedited basis so he could  
7 meet his motion at his briefing schedule that is currently in  
8 place. It is a wild goose chase. It doesn't have anything to  
9 do with any issue before this Court. The issues of service  
10 are well laid out in North Dakota law. Nevertheless, there  
11 are other discovery devices that are cheaper, less burdensome  
12 and effective for obtaining this kind of information and for  
13 reasons that I think have to do with direct cross examination  
14 of a client on exactly an issue that he's been deposed on.  
15 And Mr. McLean has agreed that he felt he was giving truthful  
16 testimony on. If there is information he didn't know, that  
17 appears like perhaps someone knows, we'll figure it out  
18 through response to interrogatories. He asks the question,  
19 we'll try and give an answer. And we're happy to do so on a  
20 relatively short basis so that he can respond to the motion,  
21 but to go back out to Ohio and subject this corporation to  
22 another deposition on issues that it was already deposed on.  
23 The relationship between Kenda Rubber and American Kenda was a  
24 prime issue in those depositions. In fact, it was more than  
25 half of the deposition testimony that was given. And I say

1 that as an estimate. I haven't counted pages, Your Honor, but  
2 it was a large part of the deposition testimony. There were  
3 questions about sales and tires, it's obviously, but the prime  
4 issues, particularly with the President James Yang had to do  
5 with this particular issue of the relationship between the two  
6 corporations. And those issues have been explored and we ask  
7 this Court grant this Motion for Protective Order.

8 MR. McLEAN: I'm going to go up here because I'm  
9 going to use this little chart. The issue, Your Honor, is  
10 whether under North Dakota Rule of Civil Procedure 26(c), that  
11 a second deposition of James Yang would be an annoyance. And  
12 whether a specific 30(b)6, which sets off I think about 13  
13 different subject areas where the other one had about 13 and  
14 only two of them regarded -- three of them regarded the  
15 relationship between American Kenda and Kenda International.

16 The real issue is is this annoyance? And that's  
17 where their grounds are. Their motion is based upon  
18 annoyance. I guess it's not embarrassment or pressure or  
19 undue burden or expense, but in their motion they say it's  
20 annoyance. I just urge that I be allowed to take a one hour  
21 deposition, no longer than an hour, I will vouch that no  
22 questions I will make and would agree to a Court Order that no  
23 questions I would ask would be repetition of information  
24 already secured. In addition to that one hour deposition of  
25 Mr. Yang, I think I have the rights under the rules to do

1 30(b)6 depositions. I don't know if it's going to be Mr.  
2 James Yang that appears at this 30(b)6 deposition. I don't  
3 know who's going to appear. But I have the right to do  
4 discovery pursuant to 30(b)6. There may be somebody more  
5 knowledgeable and 30(b)6 also envisions that the person  
6 designated go and found out some information about what I have  
7 that I'm seeking information about so that they cannot just  
8 say they don't know.

9 Well, I think Your Honor is kind of aware of the  
10 background. Kenda Taiwan is the manufacturer of this tire.  
11 It has a wholly owned subsidiary called American Kenda. James  
12 Yang is the President of American Kenda and he's a family  
13 member of the family that controls Kenda Taiwan. Maynard  
14 Magnuson broke his neck on 9-27-94. He's in the hospital  
15 through the middle of November with a broken neck. '94. We  
16 determine and find out in the summer of '95, this is not a  
17 situation where it comes to your attention right away that  
18 there's a problem in the tires. That the Dunlop tire and the  
19 Kenda tire -- there should have been a warning about using  
20 mismatched tires. He doesn't know anything about that until  
21 the summer of '95 when Doctor Mariusz Ziejewski, doing studies  
22 and looking at this matter determines that could be one of the  
23 reasons why he lost control. After that, the lawsuits started  
24 in the -- I think it's June of '96. We served by certified  
25 mail American Kenda. A person signs for it. At this point in

1 time we serve them also -- we serve Kenda Taiwan at the  
2 address in the phone book, Kenda Rubber Industrial Company,  
3 Ltd. That's the Taiwanese name. We serve them at 7133  
4 Americana Parkway. That's what they say their address is in  
5 the phonebook. Somebody different accepts the certified mail.  
6 And there's two separate Summons and Complaints and two  
7 separate receipts. Thereafter, an Answer comes in from  
8 American Kenda and some discovery goes out and sometimes it's  
9 in the name of Kenda Rubber Industrial. I take in the  
10 depositions in 1998 the depositions of James Yang and the two  
11 other individuals. The depositions totally don't last over  
12 half a day. I traveled to Columbus to do the depositions. I  
13 think they're 90 pages, 60 pages, 60 pages. And I have to  
14 cover failure to warn, I have to cover the identification of  
15 the tire, that it did come from Bell, it did go to Cheney, it  
16 did come out of Columbus and all of those issues. And I also  
17 am aware of this service issue and generally cover those  
18 areas, but at that time there is no Motion to Dismiss on  
19 statute of limitations, no Motion to Dismiss on jurisdiction.  
20 It's my innocent hope that Kenda Industrial Rubber will wake  
21 up to its actual service back in '96 and will finally put in  
22 an Answer and recognize that it's doing discovery and it's  
23 Kenda Rubber Industrial Company's name that that occasionally  
24 appears.

25 I then -- and at this point in time, I checked the

1 DOT. They have a name and it's Son Yang, Jimmy's brother.  
2 When he was a graduate student in Seattle he was the  
3 Department of Transportation agent. He moves back to Taiwan.  
4 I send it out there, it comes back undelivered. I take the  
5 deposition of James Yang, just what's going on here? Do you  
6 have a DOT representative? No, we don't have one. Do you  
7 keep up a corporate minute book? Nope. Do you file annual  
8 reports? Nope. Well, I mean, I'm fairly confident that this  
9 thing is going to be a shell and that this is Kenda Industrial  
10 besides my actual service.

11 Right after the deposition in November of 1998, it  
12 come -- of course, they learn they have no DOT, they have no  
13 corporate minute book. I have awakened them to that and what  
14 do they do in November of '98? They get a DOT representative.  
15 They have their lawyer in Columbus named as their DOT  
16 representative. There's no question there's a duty to  
17 supplement a deposition answer where the information you've  
18 given is false as it now stands. Did they supplement in '98?  
19 No. Did they supplement in '99? No. Finally in September,  
20 2000, September 15th about, they give us the name.

21 That's the background of what happens here. And a  
22 Complaint goes out, they say no Summons, I don't argue, that I  
23 think it appears that it was a mistake that there's no Summons  
24 in it. And then they're actually served late October or  
25 November, I'm not sure of the exact date, of this year. We of

1 course take the position that it's six years from time of  
2 discovery, but I've had this company served. And I served  
3 them even in -- I served them again in May of 2000, and they  
4 accept delivery of Kenda Rubber Industrial Company, Ltd. They  
5 accepted that delivery -- no, I serve them with a private  
6 process server in May of 2000.

7 But the issue really isn't here in any of those  
8 issues, but I have to bring them up to give you the background  
9 of what has gone on here. And now I have face a Motion to  
10 Dismiss and clearly it is time that I be able to do some  
11 discovery about the DOT representative. What happened here  
12 and then why don't you tell me? Or was it maybe going on  
13 earlier and you didn't tell me? I don't know, but I should  
14 have the right to do discovery about that. What about this  
15 May of 2000 service that I did upon you? Mr. Yang, you're a  
16 director of the corporation, I served your business place.  
17 What did you do with that? I bet you took it right to the  
18 same lawyers, the lawyers that represent you in both matters.  
19 I should be able to do discovery about all of the new facts  
20 regarding service that have happened since 1998 and what's  
21 gone on since 1998.

22 Again, my Motion today and our argument shouldn't be  
23 on the merits, but I have to go into these issues because  
24 these are the kinds of things I need to question about at the  
25 deposition. This deposition was taken two years ago. I only

1 seek a second deposition to go into these areas of new facts  
2 and to go back to some areas not questioned about. Even the  
3 chart of American Kenda identifies that there is no  
4 information secured in those depositions regarding dealer  
5 relationships, there's no information received between Kenda  
6 and Kenda Rubber -- Kenda USA and Kenda Taiwan about sales and  
7 income objections. And additionally, there are areas where  
8 the chart is fairly suspicious and I don't mean that in any  
9 kind of evil way. I only mean that I don't know that it's  
10 quite accurate. As to 19, location of Board of Director's  
11 meetings. If you would read Lonny Wells testimony and Butch  
12 waived his testimony in those pages, all they talk about is  
13 that Jimmy Yang runs the company. They don't identify where  
14 Board of Director's meetings take place. And marketing and  
15 assistance and advice, they claim that there were answers  
16 given to that on Page 49 to 51. If you go back to that you'll  
17 see it really regards a brochure.

18           There is now a Motion to Dismiss over my head. It  
19 wasn't pending back in '98. It is pending now. I should be  
20 able to ask questions that are not repetitious and be able to  
21 handle this motion.

22           In addition, not only do these new facts, you now  
23 have Mr. Yang and their most recent 'discovery responses saying  
24 we do have a corporate minute book. We've kept it up. Well,  
25 I think they've kept it up by answering -- by just filling it

1 all out after 1998, every word is the same page and the same  
2 pen, the same person. But I need to find out how -- what  
3 happened there? What happened with -- who is this Director of  
4 American Kenda? Now I find out Mr. Yang didn't know who the  
5 only Director of American Kenda was. Now we find out that  
6 there is indeed a person and at the deposition he didn't know  
7 who it was. Now we know it's Ben Chu (phonetic) Yang, I'm  
8 sure another family member. Didn't know that at his  
9 deposition.

10           These are the things that have to come up. I have  
11 these blanks to ask about, I have these new service facts to  
12 ask about and clearly, under 30(b)6 designation, I have the  
13 right to find out this information in a 30(b)6 designation  
14 even beyond having taken Mr. Yang deposition. I believe that  
15 good lawyering usually requires a lawyer not only to serve  
16 those knowledgeable, but to do a 30(b)6 just in case there's  
17 someone else more knowledgeable. I need to be able to find  
18 that out and should not be absolutely barred as Plaintiffs  
19 urge me to do. Even Plaintiffs' own case law says this about  
20 depositions and Protective Orders: Although Court's have  
21 demonstrated -- this is the Swift Brothers case, although  
22 Court's have demonstrated some willingness to deny discovery  
23 in cases of interrogatories and document production request.  
24 According to Wright and Miller, "It is difficult to show  
25 grounds for ordering that discovery not be had when it is a



1 deposition that is sought and most requests of this kind for  
2 Protective Order are denied." That's their own case.

3 I would urge that I should be able to go forward  
4 with this deposition. I also intend to ask questions at the  
5 deposition about what's taken place in the last two years  
6 regarding warnings about mismatching tires. These two years  
7 have passed and I'd like to take that deposition. This matter  
8 I believe would have been a lot better handled by us just  
9 having done this hour deposition. Defense counsel would have  
10 the ability under 30(d) to stop it if I'm repetitious,  
11 burdensome or annoying and go to Court. This is done in a  
12 vacuum where we haven't even asked the questions and they're  
13 trying to get this protection before we even know what my  
14 questions are.

15 This has been an expensive procedure if expense was  
16 the primary issue, I would think a better way to handle this  
17 would have been the telephone deposition I urge and will still  
18 continue to agree to.

19 And in summary, I will accept in this case a one  
20 hour limit on both depositions, that they not cover any area  
21 where I've already secured information about. Thank you, Your  
22 Honor.

23 MS. PAGE: Your Honor, if I may respond just  
24 briefly?

25 THE COURT: Sure.

1 MS. PAGE: One of the things that creates concern  
2 for me is Mr. McLean is giving information to the Court is  
3 that unfortunately in a number of instances there again have  
4 been confusion in this information between American Kenda and  
5 Kenda Rubber Industrial Company, a Taiwanese company. Until  
6 November of 2000, there had been no Summons and Complaint  
7 served on any agent of the Taiwanese company and it never  
8 answered, it never made an appearance and I don't think Mr.  
9 McLean or his client were confused about that. There were  
10 open discussions between counsel on that issue. Obviously he  
11 indicates he made an attempt to send by certified mail a  
12 Summons and Complaint to Kenda Rubber Industrial Company at  
13 American Kenda's address some time in 1996. He explored those  
14 issues in the depositions that were done in 1998. Mr. McLean  
15 learned that the signature on his card, something that we were  
16 completely unaware of, was signed by his secretary. No  
17 manager, no agent, no director, no officer and obviously a  
18 complete lack of information. More importantly, in May of  
19 2000, once again he indicates that he tried to serve Kenda  
20 Rubber Industrial Company and he indicates that he did it with  
21 a process server. However, -- and he did it at the American  
22 Kenda address. The first knowledge that I, as counsel and I  
23 would assume my client would have sent it to me if my client  
24 had known about it, first knowledge we had about that was we  
25 saw that service document attached to the affirmative defense

1 papers with the motion the Plaintiff filed several months ago  
2 and was heard by this Court last month, Your Honor. There was  
3 no knowledge even of that service.

4           So now we're up to the statute of limitations. Your  
5 Honor, Mr. McLean indicates there's an absolute obligation to  
6 supplement information in a deposition. Well, he's talking  
7 about the DOT registered agent of another corporate entity.  
8 There isn't an obligation for a deponent to investigate who  
9 the registered agent of another corporate entity is. That  
10 question was asked of Mr. Yang in his deposition. He gave  
11 truthful testimony and he had no obligation to investigate.  
12 There was an investigation done by counsel in an effort to  
13 have American Kenda dismissed through proper service of Kenda  
14 Rubber Industrial Company. So we tried to facilitate that  
15 process. We did the investigation, counsel, and provided that  
16 information to Plaintiffs' counsel. There's no obligation of  
17 American Kenda to have done that. Yes, that information was  
18 passed along by counsel after we found the relevant  
19 information.

20           The basis of this motion is not simply annoyance if  
21 you turn to the second page of our opening papers. It plainly  
22 says oppression, unduly burdensome and expensive. I don't  
23 think I need to tell Your Honor that, but that is the citation  
24 to the basis for this motion. There was a secretary in '96,  
25 Mr. McLean learned that in the deposition. Nobody knew about

1 the service in May of 2000 and then when the information was  
2 provided to counsel in an attempt to have American Kenda  
3 dismissed from this action, there was no Summons served on the  
4 registered agent. There has been only good faith and an  
5 effort to cooperate with Plaintiff in this action. It has  
6 always been clear to all parties that American Kenda had been  
7 the only party that had been served in this action and the  
8 only party participating in this action.

9 If there is some notation on a discovery document, I  
10 don't know about it, but it is not an appearance. There has  
11 never been an appearance by Kenda Rubber and counsel has been  
12 very clear in all discussions that he's understood that.

13 Your Honor, you don't file a Motion to Dismiss until  
14 you're served. Service on the registered agent happened after  
15 the statute of limitations and it happened in November of  
16 2000. There was no reason for Kenda Rubber Industrial Company  
17 to file any document with this Court. The entity that Mr.  
18 McLean wants to do a repeat deposition of is not the entity  
19 making the Motion to Dismiss. They are separate corporate  
20 entities. If he's got questions about American Kenda's  
21 documents, although we insist that they have absolutely no  
22 relevance to this case, I've already indicated to him we will  
23 explore those issues. And as always we will explore it with  
24 the intention of getting absolutely truthful information. I  
25 don't think Mr. McLean believes that he's not gotten truthful

1 information and I will tell you, Your Honor, I'm offended by  
2 the suggestion that American Kenda would fabricate a corporate  
3 minute book. There's absolutely nothing, as an officer of  
4 this Court, that we would ever do to urge a client to do that  
5 nor did we urge a client to do that nor do I from all my  
6 interactions with this client, would this client ever consider  
7 doing such a thing. And so I have to take objection to even  
8 that suggestion to this Court without any evidence at all.  
9 The only evidence Mr. McLean has is he asked somebody about  
10 it, he didn't know about it and then when he served discovery  
11 requests we had them find it. They found it. If he has more  
12 questions, we will try and respond to them in paper format.  
13 Repeat depositions are not permitted absent new claims or new  
14 basis for additional discovery. It is clear in looking at  
15 these earlier depositions that Mr. McLean was well aware that  
16 he wanted to explore the relationship between these two  
17 corporate entities. And he did. And he didn't just do it  
18 through noticing personal depositions with people's names. He  
19 did it through noticing a 30(b)6 that looks very much so like  
20 the 30(b)6 that's been noticed again.

21 We ask you to grant our Protective Order. Thank  
22 you, Your Honor.

23 THE COURT: Okay. So if I understand this  
24 correctly, the Dorsey Firm's made the Motion to Dismiss on  
25 behalf of Kenda Rubber, the Taiwanese Company, that's true?

1 MS. PAGE: That's true, Your Honor.

2 THE COURT: Okay and you've answered on behalf of  
3 American Kenda, the Ohio company?

4 MS. PAGE: That's correct, Your Honor.

5 THE COURT: And the Yang family's involved in both  
6 of them?

7 MS. PAGE: American Kenda is a wholly owned  
8 subsidiary of a publicly held Taiwanese company, --

9 THE COURT: Right.

10 MS. PAGE: -- Kenda Rubber Industrial Company.

11 THE COURT: Okay, with the same lawyer representing  
12 both companies and the same family owning both places, the  
13 right hand doesn't know the left hand, that's what we're  
14 talking about here?

15 MS. PAGE: This isn't about the right hand not  
16 knowing what the left hand is doing. If someone sends service  
17 documents to a corporation, Your Honor, they don't generally  
18 go anywhere. Unless it gets to a manager, an official or a  
19 director, someone in authority, it's not going to get  
20 anywhere.

21 THE COURT: Okay.

22 MS. PAGE: As soon as any service documents got to  
23 an agent, they got to a lawyer, no matter who they were  
24 addressed to. But that's just because -- and to be perfectly  
25 frank, Your Honor, even the September service was not directed

1 to Kenda Rubber Industrial Company, Ltd. I don't know what  
2 the May, 2000 service looked like. We never heard about it.  
3 We only have a process servers document. And the only thing I  
4 know about the '96 service was what Mr. McLean explored in the  
5 depositions. So yes, I suppose these are separate corporate  
6 entities and no, they don't know what's going on with each  
7 other. And unless a manager is served, no one knows what's  
8 going on. That's the usual case in a corporation. And it's  
9 the usual case in two separate corporations.

10 THE COURT: Okay, but -- that's great, but I don't  
11 think the Plaintiff necessarily has to take anybody's word for  
12 that. They're entitled to explore that. But it's a given  
13 here from how I read your papers even Taiwan Kenda concedes  
14 that they were properly served with the Complaint as of  
15 November of 2000. That's a given?

16 MS. PAGE: The registered agent for service of  
17 process for Kenda was served in November of 2000.

18 THE COURT: Okay, so I don't want you coming back on  
19 this now, as I read these papers here once you're served,  
20 you're served. You can't say lack of process. We were  
21 served, but we weren't served. You were served as of  
22 November. Now you might have a defense, statute of  
23 limitations. You can plead it, but in North Dakota, that's a  
24 question of fact. And I've already heard enough to see here  
25 we're going to have a contested issue of fact here that's not

1 going to resolve this as a matter of law. You now raise this  
2 defense at least notify the Plaintiff of it by making this  
3 Motion to Dismiss, he has the right to perform discovery on it  
4 whether he does discovery by going back to Ohio or going to  
5 Taiwan, if he can get his information either place, he has the  
6 right to inquire as to those matters. It's a new defense  
7 raised by this company that wasn't known before. So  
8 everything is right to adjudicate here and there's no need to  
9 come back next month. We'll spare both parties their  
10 resources to focus on the merits of the case here. The Motion  
11 to Dismiss is denied. There was service of process  
12 admittedly, even if it was November or someday prior.

13 Taiwanese Kenda has to file an Answer. They've been served.

14 Statute of limitations, they can plead that as a  
15 defense, but based on what I've heard, that's a disputed issue  
16 of fact that's not going to be able to be resolved either on a  
17 Motion to Dismiss or on a Motion for Summary Judgment. That  
18 issue having now come to the Plaintiffs' attention, they have  
19 the right to do discovery on that and the Motion for the  
20 Protective Order is denied. The Plaintiff will submit Orders  
21 accordingly. Anything else?

22 MR. McLEAN: Thank you.

23 THE COURT: Court's in recess.

24 (Proceedings adjourned.)

25



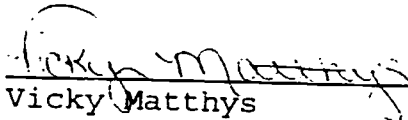
C E R T I F I C A T E

State of North Dakota     )  
                                  ) ss.  
County of Cass             )

I, Vicky Matthys, do hereby certify that the foregoing proceedings were mechanically recorded and a record made thereof at the time and place indicated.

I do hereby further certify that the foregoing and attached 30 typewritten pages contain an accurate transcription of said mechanical recording then and there taken.

Dated at Fargo, North Dakota, this 5th day of February, 2001.

  
Vicky Matthys

IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA.

Maynard Magnuson,

Plaintiff,

vs.

City of Fargo, Kenda Rubber  
Industrial Company,

Defendants.

File No. CV-99-01274

MOTION FOR SUMMARY  
JUDGMENT

TRANSCRIPT

OF

PROCEEDING

Taken at  
Cass County Courthouse  
Fargo, North Dakota  
May 24, 2001

BEFORE THE HONORABLE FRANK L. RACEK  
- - - DISTRICT JUDGE - - -

00057

1 our brief. The discovery rule isn't about discovering a cause  
2 of action. It's about discovering latent injuries and we do  
3 see it being triggered often when there are injuries that one  
4 does not know about. You forgot about a sponge. You don't  
5 know why you have the belly ache, therefore, you don't know  
6 about the sponge, therefore you don't know that you're even  
7 injured there. Those latent injuries create the fairness of  
8 the discovery rule. It does not say that you have six years  
9 to figure out what your best cause of action -- then that's  
10 when it starts to tick. You have those six years for a very  
11 specific reason under the statute of limitations rules and  
12 that's to give a party time. It's a significant period of  
13 time. Time to determine they're injured, now what are their  
14 causes of action and for one reason or another, I'm sure Mr.  
15 McLean was indeed very busy. This party, Kenda Rubber, was  
16 never properly served within the statute of limitations and  
17 therefore, this Court has no authority over it. We ask for  
18 this Court to do what is indeed difficult for a court to do,  
19 but to dismiss a party for failure to serve it properly.  
20 There is no evidence that Kenda Rubber had any proper service  
21 on

22 [Audible transmission not received so, the remaining argument  
23 of Ms. Page and possibly the beginning of the Judge's ruling  
24 was not recorded.]

25 THE COURT: Material issues of fact remain to be

1 resolved. First is to when the Plaintiff in this case  
2 discovered his cause of action under the unique circumstances  
3 of this case, which involves a theory of products liability  
4 that arguably a lay person, at the time of his injury, given  
5 the nature of his injury, would not have realized.

6 Two, there's material issues of fact concerning the  
7 adequacy of service on Kenda Rubber. It's undisputed that  
8 American Kenda, a wholly owned subsidiary of Kenda Rubber, was  
9 served in March of 1996. It's also clear that Kenda was  
10 served at what was referred to as Kenda Tire in the State of  
11 Ohio. They had a business address listed in the phone  
12 directory. It's disputed as to whether that's service on  
13 Kenda Rubber or not, but certainly the adequacy of service  
14 there is a question of fact on.

15 Three, there's a substantial issue of fact as to  
16 NDCC 28-01-32. Kenda wishes -- Kenda Rubber wishes to claim  
17 for its own benefit the fact that it had failed to comply with  
18 DOT regs in nominating a agent for service in the United  
19 States claiming that there were alternative methods of service  
20 available. The fact remains there was no agent for service.  
21 Not as a result of the Plaintiff's actions, but as the result  
22 of the actions of the Defendant. And being here, the only  
23 allegation is a 34-day -- the issue is to whether or not the  
24 Plaintiff missed the statute of limitation involves a period  
25 of 34 days. The fact that Kenda didn't have a registered

1 agent of service for approximately 20 years, seems to make  
2 that a question of fact as to whose fault is it that the Court  
3 couldn't obtain jurisdiction over American Kenda -- as to  
4 Kenda Rubber rather.

5           Number four, there is material issue of fact as to  
6 whether there's been -- already been a voluntary appearance by  
7 Kenda Rubber. They've had the same counsel appear for them as  
8 well as American Kenda. Discovery's been served, which  
9 indicates it was served on behalf of Kenda Rubber and they may  
10 have subjected themselves voluntarily to the jurisdiction of  
11 the Court. That, also with the fact that there's the same  
12 officers and directors of both corporations, they were  
13 deposed, various people were deposed as far back as 1998.  
14 We're well aware of this litigation. There doesn't seem to be  
15 any compelling reason to grant relief to the Defendant given  
16 the circumstances of this case with all these unresolved  
17 issues of fact. The motion's denied. The Plaintiff will  
18 submit an order accordingly. Anything further?

19           (Proceedings adjourned)

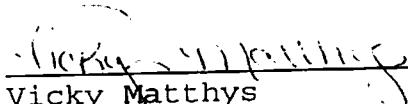
C E R T I F I C A T E

State of North Dakota     )  
                                  ) ss.  
County of Cass             )

I, Vicky Matthys, do hereby certify that the foregoing proceedings were mechanically recorded and a record made thereof at the time and place indicated.

I do hereby further certify that the foregoing and attached 42 typewritten pages contain an accurate copy of the transcription of said mechanical recording then and there taken.

Dated at Fargo, North Dakota, this 19th day of June,  
2001.

  
\_\_\_\_\_  
Vicky Matthys

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IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA.

Maynard Magnuson and Donna  
Lee Magnuson,

Plaintiffs,

vs.

Kenda Rubber Industrial  
Company, Ltd., American Kenda  
Rubber Industrial Company,  
Ltd., Northern Improvement  
Company, d/b/a Ames Sand &  
Gravel, Ltd., and The City of  
Fargo, Inc.,

Defendants.)

File No. CV-99-01274

TRANSCRIPT

OF

PROCEEDING

Taken at

Cass County Courthouse

Fargo, North Dakota

September 14, 2001

BEFORE THE HONORABLE FRANK L. RACEK

- - - DISTRICT JUDGE - - -

1 MS. PAGE: Your Honor, only to reiterate, we simply  
2 ask the Court to make a decision that's exclusively within  
3 its domain not a question for the jury and that is if and  
4 when there was valid service of process on Kenda Rubber.  
5 Absent that determination, this Court has to make the  
6 determination as to when it has jurisdiction and if it has  
7 jurisdiction over this Defendant. If there are questions of  
8 fact in the statute of limitations issue, those are  
9 questions that we would appreciate being identified because  
10 we have reviewed the briefs, reviewed the rule and see none.  
11 Moreover, if there is a question on equitable tolling of the  
12 statute for any reason, that is exclusively by case-law a  
13 question for this Court and not for the jury. And we simply  
14 ask that this Court make that determination. Thank you.

15 THE COURT: Well, we've been through this before.  
16 There's two ends to the statute of limitations, when it  
17 begins and when it ends. And that's what the Court was  
18 asked to address and the Court's previously found that  
19 there's issues of fact. The Supreme Court says it's a fact  
20 question as to when the Plaintiff would have discovered  
21 their cause of action in this rather unique claim on the  
22 mismatched tires. We have an issue as to whether the  
23 statute was tolled because the Defendant wasn't complying  
24 with the United States Code and having an agent for service  
25 in this country.



1           We've got an issue as to whether both of these  
2 entities are one in the same, which raises issues of fact.  
3 We've got a question whether there was voluntary appearance.  
4 Previously the Court's denied the motion to dismiss and I  
5 believe informed the Defendant to file an answer, but  
6 there's no issue that the Court -- because we have four or  
7 five questions of fact as to when the statute began, there's  
8 not an issue before the Court as to when the statute ended  
9 other than whether it's going to require the Defendant to  
10 answer. And the Court's previously ruled that it is  
11 requiring the Defendant to answer. And whether the  
12 significance of one of these many times that Mr. McLean  
13 served the Defendant, it's not necessary for the Court to  
14 make any determination at this point other than the  
15 Defendant has to answer, that they're properly before the  
16 Court. Because it wouldn't be dispositive of anything. So  
17 the motion to reconsider is denied. The Court's assessing  
18 costs of \$350 against the Defendant and the Plaintiff will  
19 submit an order accordingly. These proceedings were not  
20 appropriate. Court's in recess.

21           (Proceedings adjourned)  
22  
23  
24  
25

C E R T I F I C A T E

State of North Dakota     )  
                                  ) ss,  
County of Cass             )

I, Vicky Matthys, do hereby certify that the foregoing proceedings were mechanically recorded and a record made thereof at the time and place indicated.

I do hereby further certify that the foregoing and attached 13 typewritten pages contain an accurate copy of the transcription of said mechanical recording then and there taken.

Dated at Fargo, North Dakota, this 18th day of September, 2001.

  
Vicky Matthys