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State Of Minnesota
In Court Of Appeals

No. A08-2054

Thomas Booth and Angela Booth,

Appellants,

vs.

City of Cyrus Fire Department,

Respondent,

and

Ryan Gades,

Defendant.

APPELLANTS' BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUES

I. Did the Drake v. Ryan settlement agreement between Appellant and the employee tortfeasor result in a release of all claims against tortfeasor's employer, Respondent herein.

Trial Court Held: The release between Appellant and tortfeasor resulted in a complete release of all claims against Respondent.

STATEMENT OF CASE

Appellants Tom and Angela Booth commenced this personal injury action against Defendant Ryan Gades and Respondent City of Cyrus in November 2007. Defendant Ryan Gades did not file an Answer. Respondent City of Cyrus moved for summary judgment dismissing the action based upon a settlement that had occurred between Appellants and Defendant Gades. The trial court heard the motion on September 26, 2008 and entered judgment for Respondent on October 2, 2008. The court subsequently filed a Supplemental Order on November 14, 2008, wherein the court entered final judgment pursuant to M.R.C.P. 54.02.

STATEMENT OF FACTS

Appellants Tom and Angela Booth brought a claim against Ryan Gades¹ for personal injuries arising from a motor vehicle collision which occurred on 1/25/06. (A 1; A 19). At the time of the collision, Ryan Gades, a volunteer firefighter, was acting on behalf of the Cyrus Fire Department responding to an emergency call. (*Id.*). Progressive issued a policy of automobile insurance providing Ryan Gades with bodily injury limits of \$50,000/100,000. (A 20). Ryan Gades, by and through Progressive, and Tom and Angela Booth, believed that Ryan Gades had a policy of automobile insurance with Auto Owners through the City of Cyrus, providing excess bodily injury coverage limits of \$300,000, and that both the primary automobile insurance policy with Progressive and the excess automobile insurance policy were in effect at the time of the 1/25/06 motor vehicle collision. (*Id.*).

¹ Pronounced "Goddess"

The *Drake v. Ryan* settlement agreement indicated it was a “partial satisfaction of any claims . . . against Ryan Gades to the extent of the first \$50,000 which may be adjudged against the Ryan Gades, and further, as satisfaction of all claims against Ryan Gades in excess of the limits of the excess automobile insurance policy issued by Auto Owners.” (*Id.*). The *Drake v. Ryan* agreement further preserved claims against Ryan Gades, but limited recovery for those claims to insurance coverage provided by Auto-Owners. (*Id.*). The Release did not release “all claims” against Ryan Gades. Further, the Release specifically indicates that it was not a *Pierringer* release. (*Id.*). At the time of the collision, City of Cyrus was insured by Auto-Owners; however, subsequent to commencing the current action, the parties discovered that Auto-Owners did not provide coverage to Ryan Gades. (A 9; A 23).

STANDARD OF REVIEW

“On an appeal from summary judgment, the role of the reviewing court is to review the record for the purpose of answering two questions: (1) whether there are any genuine issues of material fact to be determined, and (2) whether the trial court erred in its application of the law.” *Offerdahl v. Univ. of Minn. Hosp. and Clinics*, 426 N.W.2d 425, 427 (Minn. 1988) (Citing *Minneapolis, St.P. & S.Ste. M.R.R. v. St. Paul Mercury Indem. Co.*, 268 Minn. 390, 406, 129 N.W.2d 777, 788 (1964)). Where material facts are not in dispute, the question before the appellate court is a question of law and the court need not give deference to the decision below. *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310 (Minn. 1989).

SUMMARY OF APPELLANT'S ARGUMENT

The district court below concluded that the *Drake v. Ryan* agreement between Appellant and Defendant Gades resulted in a release of all claims against the Gades, and consequentially, no legal basis remained for bringing an action against the Gades' employer, Respondent City of Cyrus. The court's analysis of the affect of the settlement agreement was erroneous; the subsequent conclusion as to the validity of the action against the employer was further erroneous. First, the plain language of the settlement agreement indicated an intention to partially release the tortfeasor, and to protect the tortfeasor's personal assets. The release did not indicate an intention to release the tortfeasor from any and all claims, but instead, specifically reserved claims against the tortfeasor. Thus, the parties to the settlement agreement kept intact the right to bring legal action against the tortfeasor. This, of course, was necessary because under Minnesota law an insurance company can not be sued directly. Thus for the Appellant to retain the ability to collect an excess judgment from an entity other than the tortfeasor, it was first necessary to obtain a judgment against that tortfeasor. The settlement then became relevant as to limitations it placed on Appellant to collect that judgment from the tortfeasor, but did not limit other collection options. Second, the legal affect of the settlement release did not result in a release of the non-settling vicariously liable employer. Neither the terms of the *Drake v. Ryan* agreement, nor any applicable law, allowed for the release of the employer, Respondent City of Cyrus.

ARGUMENT

I. Released Parties Pursuant to Drake v. Ryan Agreement

Appellants Booth and Defendant Ryan Gades entered into a *Drake v. Ryan* settlement agreement on 5/01/07. The *Drake v. Ryan* agreement was named after the case that first recognized this form of settlement in Minnesota. *See Drake v. Ryan*, 514 N.W.2d 785 (Minn. 1994) The *Drake v. Ryan* agreement was actually imported from Wisconsin and first recognized in *Loy v. Bunderson*, 107 Wis.2d 400, 320 N.W.2d 175 (Wis. 1982). The *Loy* case involved a declaratory judgment action arising out of a wrongful death suit. Decedent's husband, Ralph Loy brought the lawsuit, against the defendant drivers, Bunderson and Truesdill, Truesdill's liability carrier, General Casualty, and against Truesdill's employer's insurance carrier, Travelers. Truesdill's employer was not named as a party to the declaratory judgment action. The excess policy carried by Travelers was not a true excess policy, but was instead an additional policy providing coverage from dollar one. ("The record shows-although Travelers, in this case, considers itself as an excess insurance carrier-this is not a situation in which a particular named insured purchased basic coverage and then purchased additional coverage in excess of its primary contract. Here, the fact of excess coverage is a mere coincidence." @404; 179.) Prior to commencing the declaratory judgment action, Loy entered into a settlement agreement with Truesdill that partially released Truesdill and fully released his liability insurance carrier. Loy retained the right to pursue an action against Travelers. The circuit court approved the settlement. The court of appeals reversed, concluding that

the controversy against the liability carrier was not ripe. The supreme court in turn reversed and affirmed the district court order.

The *Loy* release dismissed any claims against General Casualty and against Truesdill's employer. It reserved any claims against Truesdill in excess of the policy limits of General Casualty. Loy further agreed not to bring any suit against Truesdill. Though initially these last two provisions may appear in conflict, they were actually appropriate under Wisconsin law: it was not necessary for the plaintiff to bring a direct action against Truesdill as Wisconsin allowed an injured party to bring the direct action against the insurer rather than the insured. As the court noted:

we see no fundamental unfairness in this agreement. General Casualty has discharged its duty under its policy and has a right to be exonerated from further liability. It has satisfied the claim of the plaintiff to the extent of its policy limits. Its insured Truesdill is not exposed to any excess liability by any conduct of General Casualty.

Loy, 107 Wis.2d at 418, 320 N.W.2d at 185-186. The Wisconsin Supreme Court thus concluded the settlement was fully enforceable and effective to limit the exposure of the insured, and to dismiss the actions against the insured's primary carrier, without limiting the right to pursue an action against the "excess" insurance carrier.²

A significant policy difference existed between Minnesota and Wisconsin. In Wisconsin, a claim could be brought directly against the liability carrier who insured the tortfeasor. It was not necessary to obtain jurisdiction over the actual tortfeasor. *See Estate*

² Subsequently in *Teigen v. Jelco of Wisc., Inc.*, 124 Wis. 1, 367 N.W.2d 806 (Wisc. 1985), the Wisconsin Supreme Court extended the *Loy* holding to cases involving primary insurers and "true" excess insurers. Thus, the settlement vehicle became known as a "Loy-Teigen" settlement. The *Teigen* case presents no other holdings significant to the case at bar.

of *Otto v. Physicians Ins. Co. of Wisconsin, Inc.*, 751 N.W.2d 805, 812 -814 (Wis. 2008). Judgment could be obtained against the insurance carrier by virtue of its contract of insurance with the insured tortfeasor. By contrast, Minnesota did not have a direct action statute allowing a claim to be brought against an insurance carrier arising out of a contract of indemnification. In order for an injured party to acquire the “right” to recover damages from an insurance company, the party had to first obtain a judgment against the insured tortfeasor. See *Anderson v. St. Paul Fire and Marine Ins. Co.*, 414 N.W.2d 575 (Minn. App. 1987). It was by virtue of the judgment against the tortfeasor that the injured party then acquired legal standing to pursue the insurance carrier in a supplemental proceeding - a collection action to acquire the assets of the at-fault tortfeasor, including the insurance policy “asset.” See *Miller v. Shugart*, 316 N.W.2d 729 (Minn. 1982). Thus, the holding in *Loy v. Bunderson*, allowing the dismissal of the insured tortfeasor without destroying the direct action against the insurance carrier, did not fit precisely into Minnesota law where a direct action was never allowed. Despite this significant policy difference, the Minnesota Supreme Court did adopt a modified form of the “Loy-Teigen Agreement” when it decided the case of *Drake v. Ryan*, 514 N.W.2d 785 (Minn. 1994).

In *Drake v. Ryan*, 498 N.W.2d 29 (Minn. App. 1993), Ione Drake suffered injury through the negligence of James Ryan, driving a vehicle owned by his brother, Richard Ryan. The vehicle was insured for primary liability through Dairyland Insurance. James Ryan was also insured under an excess policy of insurance issued to his parents by State Farm. Drake entered into a settlement agreement whereby she “fully released the defendant and his primary liability insurer up to the limits of the primary liability

coverage but . . . expressly retained the right to pursue . . . claims against the defendant for additional damages up to the limits of the defendant's excess liability coverage." *Id.* at 785. Subsequently, James Ryan attempted to be dismissed from the lawsuit. He asserted that the language of the parties' agreement fully released him and that no further action could be maintained against him. The court of appeals disagreed, finding that the "agreement does not absolve Ryan of liability . . . [r]ather, it merely serves to protect his personal assets by limiting satisfaction of any judgment against him to insurance coverage limits." *Id.* at 32-33.

The Minnesota Supreme Court agreed with the court of appeals, concluding that the language of the settlement agreement did not fully release the settling tortfeasor:

In several of the agreement's provisions, the plaintiffs specifically reserve their claims against James Ryan up to the limits of the State Farm policy. As the court of appeals recognized, in construing the agreement as a whole, it is evident that rather than fully releasing James Ryan, the agreement merely served "to protect his personal assets by limiting satisfaction of any judgment against him to the insurance coverage limits." *Drake*, 498 N.W.2d at 32.

James Ryan contends that it is not legally possible to 'dissect' his liability. However, this court has recognized other types of releases that have dissected a defendant's liability, preserved part of a claim, and agreed to take a judgment only from an insurance policy rather than from a defendant's personal assets.

. . . There also remains a justiciable controversy between the Drakes and James Ryan, despite Ryan's assertion to the contrary, because the question of his negligence has not been decided. We hold that the defendant is not entitled to dismissal from the lawsuit because the agreement did not fully and finally release him from all liability and because he remains a real party in interest in a justiciable controversy.

Drake v. Ryan, 514 N.W.2d 785, 788 (Minn. 1994).

The Minnesota Supreme Court in *Drake* then went on to recognize the validity of a modified *Loy* settlement³:

In *Loy*, the plaintiff could proceed directly against the excess insurer because of Wisconsin's direct action statute. In this case, the plaintiffs must obtain a judgment against the insured to reach the excess insurer because Minnesota does not have a direct action statute. But that is no obstacle where, as here, the defendant remains a real party in interest and where liability and damages are still to be ascertained. The absence of a direct action statute does not destroy the validity of a modified *Loy* settlement where the plaintiffs preserve part of their cause of action against the insured/tortfeasor.

. . . James Ryan argues that *Loy* settlements do not serve any useful purpose because they do not resolve any factual issues and fail to decrease the number of parties involved in the litigation. We see the matter differently. As a result of the agreement in this case Richard Ryan is no longer a party⁴; Dairyland is no longer involved; James Ryan's assets, except for the insurance contract with State Farm, are no longer available for collection from a judgment; and bad faith exposure to State Farm is eliminated. *Drake*, 498 N.W.2d at 32-33. On balance, public policy considerations favor the enforcement of modified *Loy* releases in Minnesota. We hold that the defendant is not entitled to dismissal of the claims against him in a negligence action where the plaintiffs have fully released the defendant and his primary liability insurer up to the limits of the primary liability coverage but have expressly retained the right to pursue their claims against the defendant for additional damages up to the limits of the defendant's excess liability coverage. Thus, we answer the certified questions and affirm the decision of the court of appeals.

Drake, 514 N.W.2d at 789-790.

Thus, in Wisconsin, the use of a *Loy-Teigen* settlement could properly result in a complete release of claims and a covenant not to sue against the settling insured

³ In *Cincinnati Ins. Co. v. Franck*, 644 N.W.2d 471 (Minn. App. 2002), the Minnesota Court of Appeals further adopted the holding of *Teigen v. Jelco of Wisc., Inc.*, supra..

⁴ Richard Ryan, whose insurance carrier had fully satisfied its contractual obligations to defend and indemnify, was voluntarily dismissed from the lawsuit.

tortfeasor. However, in Minnesota, where the intention was to preserve the “excess” claim, the insured tortfeasor could not be completely released nor could a covenant not to sue be used, because a finding of liability on the part of the insured tortfeasor was essential to the settlement agreement and to the plaintiff’s right through supplemental proceedings to seek recovery from the insured’s liability policy. If the insured was dismissed without any remaining right of action being retained by the plaintiff, the plaintiff would have no legal standing to pursue recovery from the “excess” carrier. Whether or not the recovery from the excess carrier was successful was of no importance to the underlying litigation.

Respondent below argued that the language of the *Drake v. Ryan* agreement released all claims against Defendant Gades (*see* A 16-A 17), and therefore also released any vicarious liability claims against the employer. In granting summary judgment to Respondent, the district court concluded that the *Drake v. Ryan* agreement between Appellant Booth and Defendant Gades resulted in a complete release of all claims against Ryan Gades because there was no policy of insurance available to collect from. This conclusion was erroneous. Under both the language of the parties settlement agreement, and pursuant to case law (*Loy v. Bunderson*, *Teigen v. Jelco* and *Drake v. Ryan*), Ryan Gades was not fully released from the action at bar. Although his personal exposure was eliminated, he was still subject to the jurisdiction of the court and faced the possibility of an adverse judgment. Whether or not that judgment was ultimately collectible did not change the fact Ryan Gades was still a viable party to the action, and Respondent still retained the right to obtain a judgment against him. The court’s conclusion that the

parties' agreement resulted in a complete release of all claims against Ryan Gades was erroneous and must be reversed.

II. Effect of Drake v. Ryan Agreement on Non-Settling Party

Once it is concluded that the language of the *Drake v. Ryan* agreement did not dismiss all claims against the settling party, the next question that must be answered is: what is the effect of the *Drake v. Ryan* agreement on a non-settling, vicariously liable party? Respondent argued below that the *Drake v. Ryan* agreement released any and all claims against the tortfeasor, Ryan Gades, and therefore all claims against Respondent City of Cyrus based upon vicarious liability were similarly dismissed. This conclusion, accepted by the district court, was both factually and legally incorrect. First, the language of the parties' settlement agreement - a valid and enforceable settlement in Minnesota - specifically retained some claims against Ryan Gades, i.e.: "partial satisfaction of any claims . . . against Ryan Gades," "reserv[ing] any and all claims . . . against the Ryan Gades up to the limits of the excess policy." Second, Respondent's argument was contrary to Minnesota's laws relating to vicarious liability.

A.

Under Minnesota law, the negligence of an employee is imputed to his employer through a principal-agent relationship (i.e. theory of respondeat superior). *See e.g. Lunderberg v. Bierman*, 241 Minn. 349, 63 N.W.2d 355 (1954); *Ismil v. L.H. Sowles Company*, 295 Minn. 120, 203 N.W.2d 354 (1972); *Kisch v. Skow*, 305 Minn. 328, 331-332, 233 N.W.2d 732, 734 (Minn. 1975).

Under the ‘well-established principle’ of respondeat superior, ‘an employer is vicariously liable for the torts of an employee committed within the course and scope of employment.’ Such liability stems not from any fault of the employer, but from a public policy determination that liability for acts committed within the scope of employment should be allocated to the employer as a cost of engaging in that business.

Fahrendorff ex rel. Fahrendorff v. North Homes, Inc., 597 N.W.2d 905, 910 (Minn. 1999)(*cites omitted*):

An injured party has the right to bring legal action against either an employee or an employer and failure to include the other in the lawsuit does not bar recovery. *See ex. Schneider v. Buckman*, 433 N.W.2d 98, 101 (Minn. 1988) (“the liability of master and servant [is] joint and several liability [and] where there is joint and several liability, a plaintiff may sue one, all, or any number of joint tortfeasors and may proceed in separate actions or one action”); *Kisch*, 305 Minn. at 331-332, 233 N.W.2d at 734 (“we have characterized the liability of master and servant and that of principal and agent as joint and several Where there is joint and several liability, plaintiffs may sue one, all, or any number of joint tortfeasors without violation of Rule 19.01 and may proceed in one action or in separate actions”). Furthermore, Minnesota courts have allowed claims to proceed against a principal/owner where the negligent agent/driver was released from the lawsuit. *See ex. Schneider*, 433 N.W.2d 98.

The language of the *Drake v. Ryan* agreement in this matter did not in any way limit the liability of the third-party employer, Respondent City of Cyrus, or even make mention of that party. Rather, the agreement indicated that “this Release and the payment made under this Release is not meant to be construed as a waiver by or as an estoppel of

any party hereby released to prosecute a claim or cause of action against any other person, firm or corporation for damages sustained as a result of the accident described herein.” The language of the parties’ settlement agreement did not provide any basis for dismissing the action against the non-settling vicariously liable party, Respondent City of Cyrus.

B.

Respondent City of Cyrus, as Ryan Gades’ employer, was vicariously liable to Appellant under a theory of respondeat superior. Thus, as an initial matter, this court must agree that Respondent was a proper party to the lawsuit unless an alternative legal theory terminated Respondent’s liability. Respondent will argue, and the district court agreed, that the legal holding supporting summary judgment was found in the unpublished case of *Rehm v. Lutheran Social Services of Minn., Inc.*, 1998 WL 268099 (Minn. App. 1998) (A 87). “The legislature has unequivocally provided that unpublished opinions are not precedential. We remind the bench and bar firmly that neither the trial courts nor practitioners are to rely on unpublished opinions as binding precedent.” *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 801 (Minn. App. 1993). Nonetheless, as this was the case relied upon by the trial court in granting summary judgment, it requires analysis.

The facts of *Rehm* were similar to the case at bar, and involved a tortfeasor driving a vehicle in the scope of employment. The plaintiff and the tortfeasor entered into a *Drake v. Ryan* agreement, allowing the plaintiff to pursue the tort claim, but agreeing to limit recovery for the tortfeasor’s negligence to a policy of insurance issued to the

tortfeasor's employer. Thereafter, the employer moved to dismiss the action against it on the basis that vicarious liability had been destroyed. The court of appeal's concluded that:

[b]efore answering the question of [employer's] vicarious liability, we must consider the effect of our answer on [the employee tortfeasor]. If she were an insured under the [employer's liability] policy, a determination that [employer] remained vicariously liable would not violate the provisions of a Loy-Teigen-type release. Because an insurer cannot maintain an indemnification action against its own insured, [tortfeasor employee], if she were an insured, would be protected from any indemnification claim by [employer]. But [tortfeasor employee] is not an insured under the [employer's] policy. Thus, if [employer] remains vicariously liable and appellant is permitted to recover, [tortfeasor employee] would be subject to indemnification claims from [employer] for amounts paid to appellant.

Rehm, 1998 WL 268099 (@ A 89) (*emphasis added*). The court then concluded that the employer in that situation was allowed to bring an indemnification claim against the employee, and such claim defeated the purpose of the *Drake v. Ryan* agreement. Thus, the court granted summary judgment dismissing the plaintiff's direct action against the employer.

The holding in *Rehm* centers on the concept of "circuitry of obligations." As already discussed, when maintaining an action for damages caused by an employee or an agent, the action can be maintained against either the responsible employee/agent, or directly against the employer/principal. Though the underlying tort may have been committed by the employee/agent, that individual was not a necessary party in an action for damages. Minnesota has further recognized the right of the employer or principal to pursue a contribution claim against its employee or agent who committed the tort and was ultimately responsible for the damages. Because of this recognized right of contribution/indemnification, if an injured party released the tortfeasor employee through

a *Pierringer* release, the practical affect was that any possible direct claims that could have been brought against the employer were also dismissed.

The *Pierringer* release was another Wisconsin invention. See *Pierringer v. Hoyer*, 21 Wis.2d 182, 124 N.W.2d 106 (1963). In *Frey v. Snelgrove*, 269 N.W.2d 918 (Minn. 1978), the Minnesota Court of Appeals recognized the validity of the *Pierringer* release and described the elements of same: a release of the settling party and discharge of settling party's share of negligence; the preservation of remaining claims against non-settling parties; an agreement by the plaintiff to indemnify the settling party for any claims of contribution made by nonsettling parties; and an agreement to satisfy any judgment against the nonsettling parties to the extent of the settling parties' release. Because of this final term, a *Pierringer* release effectively limited the right of recovery as against non-settling defendants. The limitations that arose from a *Pierringer* release did not exist in a *Loy-Teigen/Drake v. Ryan* agreement. The typical *Drake v. Ryan* agreement - and indeed, the *Drake v. Ryan* agreement present in this case - did not provide specific language indemnifying the released party for any claims brought against him/her. See *ex. Drake v. Ryan*, 514 N.W.2d 785 (Minn. 1994). Such a release would have been a *Pierringer* release - a release with a wholly different outcome than the one involved in this litigation.

The Wisconsin Court of Appeals has confirmed that a *Pierringer* release is distinct from a *Loy-Teigen/Drake v. Ryan* agreement.

In *Pierringer*, the plaintiffs initiated suits against a number of alleged joint tortfeasors. These defendants in turn cross-complained against each other for contribution. Prior to trial, all the defendants but one settled with the

plaintiffs. In exchange for these settlements, plaintiffs agreed to 'credit and satisfy that portion of the total amount of damages' caused by the negligence of the settling defendants, and to 'release and discharge' that percentage of their total claim for damages against all parties proportionate to the negligence later attributed to the settling defendants. They further agreed to indemnify the settling tortfeasors for any judgments obtained against them for contribution. Finally, while the releases reserved the balance of plaintiffs' whole cause of action against the non-settling defendant, it also contained their agreement to satisfy any judgment for the full cause it obtained against the non-settling defendant to the extent of the fraction of the cause of action released.

An issue on appeal was whether these releases extinguished the non-settling joint tortfeasor's rights to contribution. This court found that they had. Specifically, we held that the releases satisfied that portion of the plaintiffs' claims attributable to the settling joint tortfeasors' negligence. As a result, the only damages for which the non-settling joint tortfeasor remained potentially liable were those attributable to his own negligence. Since he could no longer be held liable for damages caused by the settling joint tortfeasors' negligence, the non-settler's rights to contribution against the settlers were extinguished.

The situation in *Loy* was somewhat different. . . . Prior to trial, Loy executed a 'release' in favor of General Casualty and Truesdill whereby in exchange for \$20,000, he agreed to release those parties from any liability up to \$50,000. The document reserved Loy's cause of action against Truesdill, however, for damages in excess of \$50,000 but less than the limits of any excess coverage. Loy also reserved his claims against the other tortfeasor and her insurer. Finally, under the terms of the agreement, Loy reserved his claim against Travelers, but agreed to credit any recovery he might receive from them with the sum of \$50,000.

The central issue in *Loy* was whether Travelers' rights had been adversely affected by these agreements. This court observed the following with respect to that question:

The effect of this is that General Casualty has discharged in toto the obligation to its insured because, in effect, the plaintiff Loy has been satisfied insofar as Chambers & Owen and Truesdill are concerned as if the \$50,000 limit of the General Casualty coverage had been paid . . . Moreover, General Casualty has in no way prejudiced the rights of Travelers . . . Because the plaintiff has agreed that the

payment made to him by General Casualty will be credited in the amount of \$50,000 against any possible recovery against Travelers, Travelers has received the benefit of its policy provision and is only exposed to liability for sums in excess of the policy limits of the primary carrier.

Significantly, the *Loy* court characterized the agreement in that case as essentially a 'covenant not to sue,' rather than a true release of a portion of the plaintiff's cause of action, as occurred in *Pierringer*. As we observed in a subsequent case, the critical distinction is that unlike a *Pierringer* release, a covenant not to sue preserves the plaintiff's entire cause of action against the non-settling joint tortfeasor, including that portion attributable to the settling tortfeasor's negligence. As a result, a covenant not to sue does not extinguish a non-settling joint tortfeasor's contribution rights, while a Pierringer release does.

Brandner by Brandner v. Allstate Ins. Co., 181 Wis.2d 1058, 1072-1075, 512 N.W.2d 753, 760 - 761 (Wis. 1994)(*cites omitted; emphasis added*).

In *Rehm*, the plaintiff argued that the settlement agreement she had used did not result in a complete release of her claims against the tortfeasor - similar to the argument advanced in *Brandner by Brandner, supra*. However, the Minnesota Court of Appeals rejected this argument:

Appellant argues that the agreement in this case was not intended to be a full release of Tinklenberg and that the district court erred in characterizing the agreement as a "Drake/Ryan [i.e., Loy-Teigen] release." We disagree. . . . Holding that LSS remains liable despite the absence of excess insurance would contravene the rationale of Loy and eliminate advantages the Drake court found in Loy-type settlements.

1998 WL 268099 (@ A 90). Although the court was correct in its conclusion that the agreement was a *Drake/Ryan* release, the conclusion that Appellant had given a full release to the tortfeasor was contrary to existing case law, as explained in *Brandner by Brandner, supra.*, and contrary to the very language of the parties' agreement. The court,

however, did not rely upon existing law analyzing *Loy-Teigen* and *Drake v. Ryan* agreements; instead, the court relied upon issues of indemnification.

Appellant in *Rehm* apparently tried to address the issue of indemnification by drawing a distinction between a *Pierringer* release and a *Drake v. Ryan* agreement. The court rejected this distinction in a footnote:

Appellant's reliance on *Thompson v. Brule*, 37 F.3d 1297 (8th Cir.1994), to argue that she did not intend to release Tinklenberg, is misplaced. Thompson involved indemnification of a settling defendant "except any indemnity or contribution suit by or on behalf of [the vehicle owners or their insurers]."Id. at 1300. Thus, the owner remained vicariously liable and the release in Thompson was deemed to be not a Pierringer release. Because the release in this case is also not a Pierringer release, appellant argues that LSS remains vicariously liable. However, the fact that a Pierringer release eliminates vicarious liability does not mean that every non-Pierringer release preserves vicarious liability. The release in Thompson was not a Pierringer release because the plaintiff explicitly declined to indemnify the settling defendant from claims brought by the nonsettling defendant; a Loy-Teigen release concerns not multiple defendants but multiple insurers of the settling defendant. We agree that appellant did not indemnify Tinklenberg against claims of nonsettling defendants as would have happened with a Pierringer release, but we do not share appellant's view that this has any connection to the vicarious liability of LSS.

Rehm, 1998 WL 268099 at FN5 (*emphasis added*). In fact, the issue of indemnification was critical to the court's ruling. In determining that the *Loy-Teigen* settlement agreement resulted in a dismissal of the claim against the vicariously liable employer, the court necessarily relied upon the indemnification obligations between the released party and her employer, LSS.

Thus, it was not the language of the settlement agreement that the court concluded resulted in a release of claims against the vicariously liable party, but instead, the

outcome that would result if the plaintiff had been allowed to pursue a claim against the vicariously liable party: “if LSS remains vicariously liable and appellant is permitted to recover, Tinklenberg would be subject to indemnification claims from LSS for amounts paid to appellant.” This outcome, the court concluded, could not be allowed to stand because it would be a violation of the *Loy-Teigen* agreement:

The agreement here produced the very result anticipated in *Loy* and *Drake*: LSS was no longer a party, AF, the primary insurer, was no longer involved, and Tinklenberg's assets were no longer available for collection. Denying summary judgment would have the opposite result: LSS would still be a party, AF would be asked to defend, and Tinklenberg's assets would be sought for indemnification of any judgment against LSS.

Rehm, 1998 WL 268099 (@ A 90).

Unfortunately, the court in *Rehm* misinterpreted the underlying case of *Loy* in two respects. First, as to the affect of the release on third-party liability, and second, as to the duty to indemnify. As to the first issue: although it was accurate that the plaintiff in *Loy* was not pursuing a claim against the vicariously liable employer, this reality occurred *not* because of the language of the settlement with the tortfeasors, but instead *because* “*all persons who incurred any liability by reason of [the employee's] negligence were also released,*” and the employer was freed of any liability “within the limits of [the employee's] personal policy.” *Loy*, 107 Wisc. at 405, 320 N.W.2d at 107-108. Similarly, in *Drake*, the owner of the vehicle driven by the tortfeasor, liable only under theories of vicarious liability, was specifically referenced in the *Loy-Teigen* document. The owner's insurance company paid its policy limits, leaving no further insurance available to cover his potential liability. Finally, in *Teigen*, 124 Wis.2d 1 367, N.W.2d 806, the *Loy*

agreement specifically released the at-fault driver, and driver's employer - the owner of the vehicle. In contrast, the agreement in *Rehm* provided a partial release to the employee, but did not reference any release of the employer. "When a settlement agreement does not contain a Pierringer release, but merely a covenant not to sue, the general rule is that the 'release of one alleged tortfeasor will release all others if the settlement agreement manifests such an intent, or if the plaintiff received full compensation in law or in fact for damages sought against the remaining tortfeasors.'" *Johnson v. Brown*, 401 N.W.2d 85, 88-89 (Minn. App. 1987).

The court in *Rehm* incorrectly concluded that it was through the use of a *Loy-Teigen* settlement with the tortfeasor that the vicariously liable party was released. In analyzing the *Loy* agreement in *Rehm*, the court concluded that the "very result anticipated in *Loy*" was to release the vicariously liable party. Though the *Loy* and *Drake* courts did affirm the release of the vicariously liable party, it was by virtue of the specific reference to the vicariously liable parties in the release that this "result" was achieved. The *Rehm* court's conclusion that the *Loy/Teigen/Drake* courts intended to fully release parties beyond the language of the agreements was in fact inconsistent with the holdings of those cases, and subsequent cases analyzing the issue. *See Drake*, 514 N.W.2d at 790 ("We hold that the defendant is not entitled to dismissal of the claims against him in a negligence action where the plaintiffs have fully released the defendant and his primary liability insurer up to the limits of the primary liability coverage but have expressly retained the right to pursue their claims against the defendant for additional damages up to the limits of the defendants' excess liability coverage."); *Loy*, 107 Wis.2d at 418, 320

N.W.2d at 186 (“The agreement which is denominated a ‘special release’ is an absolute release of [employee] and [employer] only for the liability below \$50,000 and in excess of \$500,000”); *Teigen*, 124 Wis.2d at 4, 367 N.W.2d at 808 (“[T]he release in this case provides for the partial release of [employer] and [employee] up to \$500,000 and for any amounts in excess of Mission’s \$2,000,000 coverage”); *Brandner by Brandner*, 181 Wis.2d at 1072-1075, 512 N.W.2d at 760-761 (A *Loy* agreement is essentially a covenant not to sue, and does not extinguish a non-settling joint tortfeasor’s contribution rights). Rather, the intent of these courts was to encourage partial settlements and “that a plaintiff be permitted to settle claims against some of the exposed parties without releasing others.” *Teigen*, 124 Wis.2d at 8, 367 N.W.2d at 810, *citing Loy*, 107 Wis.2d at 425, 320 N.W.2d at 175; *see also Drake*, 514 N.W.2d at 790.

The second misinterpretation by the court in *Rehm* was that the lack of indemnification language had no affect on the outcome of that case. While it was true that the *Loy-Teigen* agreement entered into between the plaintiff and the tortfeasor did not include any language indemnifying the released party for claims that might be brought against her, the court nonetheless concluded that the potential for an indemnification claim back against the settling party mandated that the action against the vicariously liable party be dismissed. The court did not provide any legal support for this conclusion, but appeared to rely upon a “circuitry of obligations” concept.

A circuitry of obligations arises when any right the injured party can establish to recover damages is offset by that party’s obligation to repay the same damages. *Hoffmann v. Wiltscheck*, 411 N.W.2d 923(Minn. App. 1987)

[A] finding of circuitry of obligation will defeat a plaintiff's claim as a matter of law. A circuitry of obligation is created when, by virtue of pre-existing indemnity agreements or obligations, the plaintiff is in effect obligated to indemnify the defendant for claims including the plaintiff's own claim. In such a situation, the plaintiff's right to recover damages from the defendant is offset by the plaintiff's obligation to repay the same damages to the defendant.

National Hydro Systems, a Div. of McNish Corp. v. M.A. Mortenson Co., 529 N.W.2d 690, 693 (Minn. 1995)(*cites omitted*). If the dismissal of an employee/agent includes a duty to indemnify, the plaintiff would not be able to bring any action against the employer/principal because to do so would result in the employer then pursuing the employee for contribution, and the employee then returning to the plaintiff for reimbursement of the amounts paid by the employee to the employer.

This circuitry of obligations, i.e. the alleged obligation of the plaintiff to indemnify the released party, was the sole possible basis for excluding any possible claim against the vicariously liable employer in *Rehm*, 1998 WL 268099 (@ A 89). The court thus concluded that Tinklenberg would have an indemnification claim against the plaintiff, thus resulting in a circuitry of obligations. Yet none of the release agreements used in *Loy*, *Teigen*, or *Drake* included an obligation to indemnify the released party for claims brought by third parties. Similarly, the *Rehm* settlement agreement did not include any language requiring the plaintiff to indemnify the released party for claims brought against her by other parties. The court's reliance upon an indemnification obligation, and a resulting "circuitry of obligations" concept, were erroneous. Summary judgment, also dependent upon a finding of "circuitry of obligations" should have been denied.

The district court in the case at bar committed the same error as the *Rehm* court when it concluded, “the release of the employee also extinguishes vicarious liability claims against the employer.” (A 82). The court cited to *Pischke v. Kellen*, 384 N.W.2d 201 (Minn. App. 1986) in support of this legal conclusion. In that case, the plaintiff settled the claim against the tortfeasor firefighter and entered into a *Pierringer* release. After settling with the tortfeasor, the plaintiff attempted to pursue a claim against the tortfeasor’s employer on a theory of vicarious liability. The court concluded the claim against the employer was barred by the affect of the *Pierringer* release, explaining:

[Plaintiff’s] complaint as first amended seeks recovery against respondent city based solely on vicarious liability for Kellen's actions. Where liability is solely vicarious, the vicariously liable party is entitled to full indemnity by the party who caused injury. See *Polaris Industries v. Plastics, Inc.*, 299 N.W.2d 414, 420 (Minn.1980). Here, respondent, if found vicariously liable, would be entitled to full indemnity from Kellen. But appellant by *Pierringer* release agreed to indemnify Kellen in turn. Appellant is precluded from a net recovery against respondent city. See *Simonett, Release of Joint Tortfeasors: Use of the Pierringer Release in Minnesota*, 3 *Wm. Mitchell L.Rev.* 1, 23-25 (1977).

Because appellant is precluded by law from a net recovery against respondent city, the trial court did not err in granting summary judgment to dismiss.

Id., 384 N.W.2d at 205. Thus, the conclusion that the release of the employee also released the employer was dependent upon the language of the parties’ release. As fully explained above, the effect of a *Pierringer* release on non-settling parties is distinct from the effect of a *Drake v. Ryan* on non-settling parties, as the *Pierringer* disposes of all claims that could be brought against the tortfeasor including indemnification claims. The

lower courts reliance upon this case, where the parties at bar did not enter into a *Pierringer* release, is misplaced.

Even if this court determines that an indemnification obligation can or should be assumed in a *Loy-Teigen/Drake v. Ryan* settlement agreement, the dismissal of the vicariously liable party is further dependent upon a finding that the released employee will have a potential duty to indemnify its employer. Without this duty of indemnification between the employee and the employer, the concern raised in *Rehm* does not exist, and there is no additional basis for dismissing the action against the vicariously liable party.

It is true that at common law, an employer has been held to have a right of indemnification against an employee. *See Leshner v. Getman* 30 Minn. 321, 330, 15 N.W. 309, 313 (Minn. 1883) (“When one is employed or directed by another to do an act in his behalf which is not manifestly wrong, and which the former does not know, or is not presumed to have known, to be wrong, the law implies a promise of indemnity by the principal for such damages as flow directly from the execution of the agency.”) However, the problem created by employer/employee indemnification - the circuitry of obligations principal - was completely destroyed by the enactment of M.S.A. §181.970. This statute formally established an end to the common law principal that an employer could recover contribution/indemnification from an employee⁵.

⁵ “By enacting Minn.Stat. § 181.970, subd 1, the legislature changed the common-law relationship between an employer and an employee as described in *Pfeifer* in 1976 when there was no law ‘that obligates an employer to defend his employee, absent an express agreement to do so.’ 308 Minn. at 280, 242 N.W.2d at 588.” *Ag Partners Coop v. Pommerening*, 2003 WL 22181653 FN 3 (Minn. App.) (@ A 95)

The plain language of § 181.970 imposes a statutory duty on an employer to defend and indemnify an employee for damages arising from the negligent performance of employment duties. The imposition of that duty effectively precludes a negligence action against an employee. To hold otherwise renders a circular result: An employer would have to defend and indemnify an employee for losses the employer seeks from the employee. Because such a construction is absurd, the Court finds that §181.970 precludes a claim by an employer against an employee for the negligent performance of employment duties.

Cenveo Corp. v. CelumSolutions Software GMBH & Co KG, 504 F.Supp.2d 574, 579 (D.Minn. 2007).

It is significant to note that the *Rehm* decision did not address M.S.A. §181.970. If 181.970 had been applied in *Rehm*, that case would likely have been decided in the plaintiff's favor. M.S.A. §181.970 requires an employer to indemnify an employee "for civil damages, penalties, or fines claimed or levied against the employee." Thus, the concern in *Rehm* that the released employee tortfeasor would be responsible to indemnify the employer would not have existed. The action against the tortfeasor, and resulting vicarious liability of the employer, could have been pursued without any risk that the settling tortfeasor would have been responsible for the judgment.

The timing of the passage of M.S.A. §181.970 may have contributed to lack of discussion in *Rehm*. Prior to the enactment of that statute, common law allowed employers to seek indemnification from their employees. *See, Schneider v. Buckman*, 433 N.W.2d 98, 102 (Minn. 1988); *Oelschlagel v. Magnuson*, 528 N.W.2d 895, 899 (Minn. App. 1995)("Equity precludes requiring a merely vicariously liable employer to pay all of the damages and then allow a joint tortfeasor, whose actions were a direct cause of the plaintiff's injuries, to escape all responsibility by denying the employer the right to

contribution”; lawsuit commenced in 1991). M.S.A. §181.970 was passed into law in 1993 and applied to claims or causes of action arising on or after August 1, 1993. See M.S.A. §181.970, Historical And Statutory Notes. The *Rehm* case, though decided in 1998, does not provide any details of the timing of the lawsuit, nor does it provide any insight into whether or not the employee plaintiff attempted to raise 181.970 as a defense to the employer’s claim for indemnification.⁶

As further evidence that Minnesota courts no longer allow employers to pursue claims against their employees, see *Cenveo Corp. v. CelumSolutions Software GMBH & Co KG*, 504 F.Supp.2d 574, 579 (D. Minn. 2007) (Employer precluded from bringing a direct action against employee for negligence since M.S.A. §181.970 would have required the employer to indemnify the employee for any damages that were recovered, resulting in a circuitry of obligations.); *Dochniak v. Dominionium Management Serv.*, Slip Copy, 2007 WL 2669443 (D. Minn. 2007)(A 97)(dismissing employer’s negligence counterclaim against employee, because employer would have to indemnify employee under M.S.A. §181.970); *Ag Partners Co-op v. Pommerening*, 2003 WL 22181653 (Minn. App.)(A 92)(Fn 1: “By enacting Minn. Stat. §181.970, subd. 1, the legislature changed the common-law relationship between an employer and an employee as described in Pfeifer in 1976 when there was no law ‘that obligates an employer to defend his employee, absent an express agreement to do so.’ 308 Minn. at 280, 242 N.W.2d at

⁶ This author, through a *Westlaw*© search, was only able to find 7 cases (state and federal) making reference to M.S.A §181.970 from its enactment in 1993 through the date of this brief.

588”). There is no question that M.S.A. §181.970 prevents an employer from seeking indemnification and thus changes the *Rehm* holding.

The case at bar involves a municipal employee, rather than a private employee. Three comparable statute, M.S.A. §3.736, subd. 9 (“The state shall defend, save harmless, and indemnify any employee of the state against expenses, attorneys' fees, judgments, fines, and amounts paid in settlement actually and reasonably incurred by the employee in connection with any tort, civil, or equitable claim or demand . . .”); M.S.A. §466.07 (“[A] municipality or an instrumentality of a municipality shall defend and indemnify any of its officers and employees . . . for damages, including punitive damages, claimed or levied against the officer or employee”) and M.S.A. §471.86, provide protections to state and municipal employees similar to those contained within 181.970.

M.S.A. §471.86, applying specifically to firefighters, is controlling in this case where Ryan Gades was acting within the scope of his employment as a firefighter at the time of the collision. M.S.A. § 471.86 provides:

If judgment is rendered against the firefighter, such governmental subdivision shall appropriate money from any funds available to pay such judgment, or shall levy funds for the payment thereof pursuant to law.

This statute applies equally to *volunteer* firemen while on active duty. Op.Atty.Gen., 249-B-8, April 25, 1958. As with the application of §181.970, M.S.A. §471.86 requires the employer to indemnify the employee. Allowing the employer to then seek indemnification from the employee creates a circuitry of obligations, a result not allowed

in Minnesota.. Under either statute, an employer is precluded from seeking indemnification from its negligent employee.

Pursuant to M.S.A. §471.86, Respondent herein had no legal right to pursue an indemnification claim against its settling employee, Ryan Gades. Thus, even if this court determined that a *Drake v. Ryan* agreement necessarily included an obligation on the part of the plaintiff to indemnify the settling party, the need for indemnification never materialized. The holding in *Rehm*, whether appropriate or not, did not apply to this case. *Rehm*, 1998 WL 268099 (Where there is no duty to indemnify the employer, a determination that the employer remains vicariously liable does not violate the provisions of a Loy-Teigen-type release).

Respondent may argue that even if the employer did not have a right of indemnification against the released employee, that employee may still be subject to an indemnification claim from the employer's insurance carrier, Auto-Owners. This argument fails. The Minnesota Court of Appeals in 2000 confirmed that an insurance company can not bring a subrogation claim against an employee of an insured. *See St. Paul Companies v. Van Beek*, 609 N.W.2d 256 (Minn. App. 2000). Even if the insured is not a named employee under the particular policy, because an employer acts through its employees, bringing a subrogation claim against an employee would be tantamount to bringing a subrogation claim against the insured employer - an action disallowed by Minnesota law. *See* M.S.A. §60A.41 ("An insurance company providing insurance coverage . . . may not proceed against its insured in a subrogation action where the loss was caused by the nonintentional acts of the insured.") Thus, by application of both

M.S.A. §181.970 and *St. Paul Companies v. Van Beek*, supra., an employee can not be required to indemnify its employer or its employer's insurer.

The *Rehm* court concluded that the *Loy-Teigen* release between the employee and the injured party resulted in a release of the non-settling vicariously liable employer. The language of the parties' agreement did not provide for the release of the vicariously liable employer; instead, the court concluded the release of the vicariously liable employer was necessary in order to defeat a circuitry of obligations arising from a duty to indemnify. That result was in error because both in the *Rehm* case, and in the case at bar, (a) the injured party did not have a duty under the parties' agreement to indemnify the settling employee; and (b) more importantly, the settling employee had no obligation to indemnify the non-released employer. Without a duty of indemnification to the employer, the settling employee could not be held liable to pay any amounts outside of the parties' settlement agreement. The result sought, and approved, in *Loy v. Bunderson*, *Teigen v. Jelco of Wisc., Inc.*, *Drake v. Ryan*, and even in *Rehm v. Lutheran Social Services, Inc.*, is achieved by allowing the claim in this case to go forward against the vicariously liable employer: the injured party has been permitted to settle claims against some of the liable parties without releasing others and the tortfeasor has been protected against personal exposure. The decision of the trial court granting summary judgment to Respondent employer should be reversed.

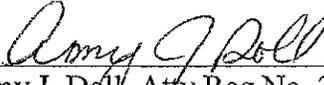
CONCLUSION

The *Drake v. Ryan* settlement agreement between Appellant and Defendant Gades did not include any language releasing claims against the vicariously liable employer, Respondent City of Cyrus. The application of the language of the agreement, relevant case law, and relevant statutes, all lead to the same conclusion: Appellant's liability claim against Respondent City of Cyrus is a valid claim that has not been released. The District Court erred in its application of the law. Summary judgment for Respondent must be REVERSED.

RESPECTFULLY SUBMITTED,

FLUEGEL, HELSETH, MCLAUGHLIN,
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Dated Dec. 23, 2008



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