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APPELLATE COURTS

No. A08-2054

SEP. - 3 2010

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STATE OF MINNESOTA

IN SUPREME COURT

THOMAS BOOTH AND ANGELA BOOTH,

Respondents,

vs.

CITY OF CYRUS FIRE DEPARTMENT,

Appellant,

and

RYAN GADES,

Defendant.

RESPONSE TO PETITION FOR REHEARING

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INTRODUCTION

Respondent City of Cyrus (“the City”) respectfully submits this Response to the Petition for Rehearing of Petitioners Thomas and Angela Booth (“the Booths”). The Booths request that this Court grant rehearing in the above-captioned case, initially heard on May 3, 2010. The Court issued its Opinion on August 19, 2010, holding that pursuant to a “Drake v. Ryan Satisfaction and Release” entered into between the Booths and Defendant Ryan Gades (“the Release”), Mr. Gades and his vicariously liable employer were completely released of all liability to the Booths. *Booth v. Gades*, A08-2054 at 11, 16-17, __ N.W.2d __ (Minn. 2010) (“Opinion at 11, 16-17”). The Booths seek Rehearing, alleging that the Court misinterpreted the Release and the intent of the parties to that Release when it determined that Mr. Gades had been fully released of liability.

ARGUMENT

I. The Booths failed to Petition for Rehearing within 10 days

Under Minn. R. App. P. 140.01, “[a] petition for rehearing in the Supreme Court may be filed within 10 days after the filing of the decision or order unless the time is enlarged by order of the Supreme Court within the 10-day period.” The Court may consider a petition filed after the 10-day deadline only if the untimely filing is excusable. Minn. R. Civ. App. P. 126.02; *State v. Gomez*, 721 N.W.2d 871, 882 (Minn. 2006).

The Court’s Opinion in this matter was filed on August 19, 2010. The Booths’ Petition for Rehearing is dated August 30, 2010, and it was served on the City that same day by mail. It was not filed with the Court until September 1, 2010. The Booths made no mention of their tardy filing in the Petition for Rehearing, and offered no excuse for

that tardiness. Absent a discernible justification for the untimely filing, the Petition for Rehearing should be denied without further consideration.

II. The Petition for Rehearing should be denied on its merits

Even if the Court does consider the merits of the Booths' Petition for Rehearing, the Petition should be denied because the Booths fail to identify a mistake that warrants reconsideration. This Court will not grant a rehearing unless the petitioner can show a manifest error of fact forming an erroneous basis of the decision. *Derby v. Gallup*, 5 Minn. 119, 140, 5 Gil. 85 (1860). Absent such a showing, where a question of law has been fully considered, the Court "cannot admit that a party is entitled to a re-argument, on the ground that there is manifest error in the decision." *Id.*

The Booths argue that a rehearing is required because the Court misinterpreted the Release when it determined that, under Paragraph 7, Mr. Gades was completely released of liability in this case. According to the Booths, Paragraph 7 should not have been invoked by the Court because the Release was effective under *Drake v. Ryan*.

Releases are interpreted according to rules applicable to contracts generally. *Karnes v. Quality Pork Processors*, 532 N.W.2d 560, 562 (Minn. 1995). The validity of a release is a matter of law for the court. *Id.* at 563. Minnesota courts look first to the four corners of the releasing document to determine whether it effectively releases a party's claims. *Frey v. Snelgrove*, 269 N.W.2d 918, 921 (Minn. 1978). "The cardinal purpose of construing a contract is to give effect to the intention of the parties as expressed in the language they used in drafting the whole contract." *Art Goebel, Inc. v. N. Suburban Agencies, Inc.*, 567 N.W.2d 511, 515 (Minn. 1997).

Here, it is undisputed that Mr. Gades and the Booths intended to enter into a release pursuant to *Drake v. Ryan*. As this Court correctly noted, in a *Drake v. Ryan* release “the claimants ‘release[] the defendant and his primary liability insurer up to the limits of the primary liability coverage but . . . expressly retain[] the right to pursue their claims against the defendant for additional damages up to the limits of the defendant's excess liability insurance coverage.’” Opinion at 3 (alterations in the original) (quoting *Drake*, 514 N.W.2d at 786).¹

Here, the Booths intended to retain the right to pursue their claims against Mr. Gades to the extent of coverage provided by the insurer for the City, Auto-Owners Insurance Company. The key provisions of the Release state as follows:

2. Thomas Booth, Angela Booth hereby agree to accept the \$50,000 from Progressive and agrees [sic] the receipt of said \$50,000 will operate as a partial satisfaction of any claims Thomas Booth, Angela Booth may have against Ryan Gades to the extent of the first \$50,000 which may be adjudged against 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.

* * *

4. Thomas Booth, Angela Booth specifically reserve any and all claims they may have against Ryan Gades up to the limits of the excess policy issued by Auto Owners and Thomas Booth, Angela Booth specifically agree that Thomas Booth, Angela Booth will satisfy any judgment Thomas Booth, Angela Booth may recover against Ryan Gades in excess of the limits of the policy issued by Progressive only out of the proceeds of the

¹ The Booths criticize the Court for stating that *Drake v. Ryan* releases permit an injured plaintiff to continue their action against an excess liability insurer. (Pet. for Rehearing at 10.) However, the Opinion clearly demonstrates that the Court fully understands that plaintiffs have no direct action against insurers in Minnesota, and the importance of reserving the cause of action against the insured when entering *Drake v. Ryan* releases. See Opinion at 7-9, & n.5.

excess automobile insurance policy issued by Auto Owners to the extent of remaining coverage under that policy.

* * *

6. It is the intent of the parties that this Agreement be governed and construed in accordance with the holdings in Tiegan v. Jelco of Wisconsin, 367 N.W.2d 806 (Wis. 1985), Loy v. Bunderson, 320 N.W.2d 175 (Wis. 1982) and Drake v. Ryan, 498 N.W.2d 29 (Minn. Ct. App. 1993) affirmed 514 N.W.2d 785 (Minn. 1994).

7. In the event the courts of the State of Minnesota do not give effect to this Agreement pursuant with holdings in Tiegan, Loy and Drake, Thomas Booth, Angela Booth nonetheless agree to waive any action of any kind arising from the 01/25/06 motor vehicle accident against Progressive and Ryan Gades, except to the extent of excess coverage provided to Ryan Gades by Auto Owners. Thomas Booth, Angela Booth further agree to indemnify and hold Progressive harmless from any and all claims for costs and reasonable attorney's fees which may be brought against Progressive by Auto Owners during the course of providing a defense against Thomas Booth's personal injury claims.

(Appendix to the Brief of Appellant at 81-82.)

Of course, no coverage exists for Mr. Gades under the Auto-Owners Policy. Therefore, this release cannot be given effect under *Tiegen*, *Loy*, and *Drake*, all of which specifically contemplate reserving a claim against a defendant to the extent of excess coverage provided by a second insurance policy. None of those cases involve specifically reserving a claim against a vicariously liable employer, as the Booths attempt to do here. Furthermore, the Release makes no attempt to reserve claims against the City.

Therefore, Paragraph 7 of the Release is implicated. That paragraph clearly states that in the event that the Release is not given effect under *Tiegen*, *Loy*, and *Drake*, the Booths waive all claims against Mr. Gades except to the extent of coverage under the

Auto-Owners Policy. Because coverage does not exist under that Policy, Mr. Gades has been completely released from liability in this case.

Furthermore, the Court did not rely solely on Paragraph 7 in reaching its decision. Rather, the Court specifically found support for its position that the Booths completely released Gades based upon the language in Paragraphs 2 and 4 of the Release. Opinion at 11. In Paragraph 2, the Booths specifically agreed to accept \$50,000 from Progressive in satisfaction of all claims against Mr. Gades for the first \$50,000 of any judgment obtained against him, as well as for any amounts in excess of the limits of the Auto-Owners Policy. In Paragraph 4, the Booths expressly reserved claims against Mr. Gades to the extent of coverage under the Auto-Owners Policy, and agree to collect against him using only proceeds from that Policy. They do not mention collecting a judgment against Mr. Gades from the City.

Therefore, even if Paragraph 7 is discounted, the remainder of the Release, if read as a whole, reserved claims against Mr. Gades only to the extent of coverage under the Auto-Owners Policy. Because coverage did not exist, the Booths' claims against Mr. Gades were extinguished. When those claims were extinguished, so was any right of action the Booths had against the City, Mr. Gades's vicariously liable employer.

Finally, Paragraph 7 could properly be seen as an expression of the essence of the agreement between the parties. That is, *no matter what*, Booths "agree to waive any action of any kind arising from the 01/25/06 motor vehicle accident against Progressive and Ryan Gades, except to the extent of excess coverage provided to Ryan Gades by

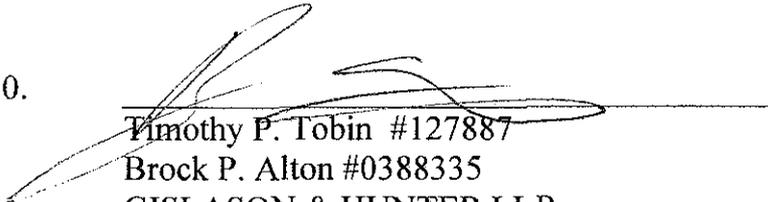
Auto Owners.” In that respect, this Court’s decision is completely consistent with the expressed intent of the parties.

CONCLUSION

Petitioners Thomas and Angela Booth have failed to show that the Court made any erroneous determination of fact or law warranting rehearing in this matter. Furthermore, their Petition for Rehearing was not filed within the 10-day deadline of Minn. R. Civ. App. P. 140.01. As such, the Petition for Rehearing must be denied.

Respectfully submitted,

Dated this 3rd day of September, 2010.



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