

NO. A08-2054

---

State of Minnesota  
*In Court of Appeals*

---

THOMAS BOOTH AND ANGELA BOOTH,  
*Appellants,*

vs.

CITY OF CYRUS FIRE DEPARTMENT,  
*Respondent,*

and

RYAN GADES,  
*Defendant.*

---

RESPONDENT'S BRIEF

---

FLUEGEL, HELSETH, MCLAUGHLIN,  
ANDERSON & BRUTLAG, CHTD.

Amy J. Doll (#237899)

215 Atlantic Avenue

P.O. Box 527

Morris, MN 56267

(320) 589-4151

*Attorney for Appellants*

GISLASON & HUNTER LLP

Timothy P. Tobin, Esq. (#127887)

Lynn Schmidt Walters, Esq. (#339398)

Suite 500

701 Xenia Avenue South

Minneapolis, MN 55416

(763) 225-6000

*Attorneys for Respondent*

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES.....ii

STATEMENT OF LEGAL ISSUES.....1

STATEMENT OF THE CASE.....2

STATEMENT OF FACTS.....3

STANDARD OF REVIEW.....7

LEGAL ARGUMENT.....8

I. APPELLANTS’ CLAIMS AGAINST GADES WERE RELEASED  
UNDER A *DRAKE V. RYAN* RELEASE EXCEPT TO THE EXTENT  
THAT EXCESS INSURANCE COVERAGE WAS AVAILABLE.....8

II. GADES IS NOT ENTITLED TO EXCESS INSURANCE COVERAGE  
UNDER THE AUTO-OWNERS POLICY.....9

III. THE *DRAKE V. RYAN* RELEASE EXTINGUISHED ALL CLAIMS  
AGAINST GADES.....12

IV. THE RELEASE OF GADES BARS ANY CLAIMS OF VICARIOUS  
LIABILITY AGAINST THE CITY OF CYRUS FIRE DEPARTMENT.....18

CONCLUSION.....23

## TABLE OF AUTHORITIES

### Cases:

<i>Alvarez v. New Haven Register, Inc.</i> , 735 A.2d 306 (Conn. 1999).....	19
<i>American Commerce Brokers, Inc. v. Minnesota Mutual Fire &amp; Cas. Co.</i> , 551 N.W.2d 224 (Minn. 1996).....	10
<i>Bair v. Peck</i> , 811 P.2d 1176 (Kan. 1991).....	20
<i>Bobich v. Oja</i> , 104 N.W.2d 19 (Minn. 1960).....	10
<i>Brown v. Cooke</i> , 707 A.2d 231 (Pa. Super. Ct. 1998).....	14
<i>Deblon v. Beaton</i> , 247 A.2d 172 (N.J. Super. Ct. Law Div. 1968).....	13, 14
<i>Dickey v. Estate of Meier</i> , 197 N.W.2d 385 (Neb. 1972).....	18, 19
<i>Donnay v. Boulware</i> , 144 N.W.2d 711 (Minn. 1966).....	10
<i>Drake v. Ryan</i> , 514 N.W.2d 785 (Minn. 1994).....	1, 8, 16
<i>Elias v. Unisys Corp.</i> , 573 N.E.2d 946 (Mass. 1991).....	19
<i>Employers Mut. Cas. Co. of Des Moines v Kangas</i> , 245 N.W.2d 873 (Minn. 1976).....	10
<i>Fabio v. Bellomo</i> , 504 N.W.2d 758 (Minn. 1993).....	7
<i>Gronquist v. Olson</i> , 64 N.W.2d 159 (Minn. 1954).....	12
<i>Hagen v. Burmeister &amp; Associates, Inc.</i> , 633 N.W.2d 497 (Minn. 2001).....	20
<i>Hoffmann v. Wiltscheck</i> , 411 N.W.2d 923 (Minn. App. 1987).....	18
<i>Hubred v. Control Data Corp.</i> , 442 N.W.2d 308 (Minn. 1989).....	9, 10
<i>Iowa Kemper Ins. Co. v. Stone</i> , 269 N.W.2d 885 (Minn. 1978).....	9
<i>Ismil v. L.H. Sowles Co.</i> , 203 N.W.2d 354 (Minn. 1972).....	21
<i>Jeffries v. Gillitzer</i> , 225 N.W.2d 17 (Minn. 1975).....	12

<i>Karnes v. Quality Pork Processors</i> , 532 N.W.2d 560 (Minn. 1995).....	12
<i>Kelly v. State Farm Mut. Auto. Ins. Co.</i> , 666 N.W.2d 328 (Minn. 2003).....	9
<i>Lim v. Interstate System Steel Div., Inc.</i> , 435 N.W.2d 830 (Minn. App. 1989).....	20
<i>Lobeck v. State Farm Mut. Auto. Ins. Co.</i> , 582 N.W.2d 246 (Minn. 1998).....	9, 10
<i>Loy v. Bunderson</i> , 320 N.W.2d 175 (Wis. 1982).....	8, 16
<i>Meister v. Western Nat'l Mut. Ins. Co.</i> , 479 N.W.2d 372 (Minn. 1992).....	9
<i>Nat'l City Bank of Minneapolis v. St. Paul Fire &amp; Marine Ins. Co.</i> , 447 N.W.2d 171 (Minn. 1989).....	9
<i>Pioneer Animal Clinic v. Garry</i> , 436 N.W.2d 184 (Neb. 1989).....	19
<i>Pischke v. Kellen</i> , 384 N.W.2d 201 (Minn. App. 1986).....	18
<i>Reedon of Faribault, Inc. v. Fidelity and Guar. Ins. Underwriters, Inc.</i> , 418 N.W.2d 488 (Minn. 1988).....	1, 18, 19
<i>Rehm v. Lutheran Social Services of Minnesota, Inc.</i> , 1998 WL 268099 (Minn. App. 1998) (unpublished opinion) (A 87).....	1, 8, 9, 13, 18
<i>Schmidt v. Smith</i> , 216 N.W.2d 669 (Minn. 1974).....	13
<i>Schneider v. Buckman</i> , 433 N.W.2d 98 (Minn. 1988).....	21
<i>Serr v. Biwabik Concrete Aggregate Co.</i> , 278 N.W. 355 (Minn. 1938).....	18
<i>Sorenson v. Coast to Coast Stores</i> , 353 N.W.2d 666 (Minn. App. 1984), <i>review denied</i> , (Minn. Nov. 7, 1984).....	12
<i>Sorenson v. St. Paul Ramsey Med. Ctr.</i> , 457 N.W.2d 188 (Minn. 1990).....	7
<i>Stan Koch &amp; Sons Trucking, Inc. v. Great West Cas. Co.</i> , 517 F.3d 1032 (8 <sup>th</sup> Cir. 2008).....	13
<i>State by Cooper v. French</i> , 460 N.W.2d 2 (Minn. 1990).....	7
<i>Stone v. Acuity</i> , 747 N.W.2d 149 (Wis. 2008).....	14

*Tiegan v. Jelco of Wisconsin*, 367 N.W.2d 806 (Wis. 1985).....16

*Winkler v. Magnuson*, 539 N.W.2d 821 (Minn. App. 1995),  
*review denied* (Minn. Feb. 13, 1996).....7

**Other Authority:**

4 Minnesota Practice Series, *Jury Instruction Guides – Civil*, 5<sup>th</sup> Edition,  
CIVSVF 30.90.....21

## STATEMENT OF LEGAL ISSUES

- I. Did the *Drake v. Ryan* Release of Gades extinguish Appellants' claims against Respondent City of Cyrus Fire Department?

*The trial court held yes.*

Apposite Authority: *Drake v. Ryan*, 514 N.W.2d 785 (Minn. 1994); *Rehm v. Lutheran Social Services of Minnesota, Inc.*, 1998 WL 268099 (Minn. App. 1998) (unpublished opinion) (A 87); *Reedon of Faribault Inc. v. Fidelity and Guar. Ins. Underwriters, Inc.*, 418 N.W.2d 488 (Minn. 1988).

## STATEMENT OF THE CASE

This case arises out of a motor vehicle accident that occurred on January 25, 2006, involving Appellant Thomas Booth and Defendant Ryan Gades. At the time of the accident, Gades was in the course of responding to a fire in connection with his duties as a volunteer with the City of Cyrus Fire Department. Appellants allege that Gades was at fault for causing the accident, and they initiated this lawsuit.

Prior to service of the Complaint in this matter, Appellants released their claims against Gades pursuant to a *Drake v. Ryan* Release, preserving a claim against Gades only to the extent that he is covered under an excess insurance policy issued to the City of Cyrus by Auto-Owners Insurance Company. Under the clear terms of that policy, Gades is not afforded excess coverage.

Because Gades is not entitled to coverage under the Auto-Owners Policy, the *Drake v. Ryan* Release eliminated Appellants' claims against Gades in full. Further, because Gades has been fully released by Appellants, no vicarious liability claim can be maintained against the City of Cyrus Fire Department. Respondent brought a summary judgment motion on these grounds. The trial court agreed with Respondent's analysis, and granted summary judgment in its favor. This appeal follows.

## STATEMENT OF FACTS

This case arises out of a motor vehicle accident that occurred on January 25, 2006. (A 19). On that day, Defendant Ryan Gades (“Gades”) was driving a GMC pickup that he owned. (*Id.*) Gades was a volunteer with the City of Cyrus Fire Department, and was responding to a fire call when the accident occurred. (A 1-3; A 19). In traveling to the scene of the fire, it is alleged that Gades failed to stop for a stop sign and was hit by a vehicle driven by Appellant Thomas Booth. (A 19). Gades had personal automobile insurance with Progressive Insurance Company at the time of the accident. (A 20-22).

Appellants initiated the above-entitled matter in November of 2007, alleging that Gades was negligent in the operation of his vehicle, that his negligence caused the January 25, 2006 accident, and that the City of Cyrus Fire Department was vicariously liable for the negligence of Gades. (A 1-3). However, prior to the service of the Complaint, Appellants and Gades entered into a *Drake v. Ryan* Release (“Release”), whereby Gades was released from liability except to the extent he qualified for liability insurance under the City of Cyrus automobile insurance policy with Auto-Owners which, purportedly, provided “excess bodily injury coverage” for Gades. (A 20-22). The Release provides, in relevant part, that:

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 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...

4. Thomas Booth, Angela Booth specifically reserve any and all claims they may have against the 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 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.

(A 20-22).

At the time of the accident, the City of Cyrus Fire Department was insured under an Automobile Insurance Policy ("Policy") issued by Auto-Owners Insurance Company in January of 2006. (A 23-54). The Policy provides that:

We will pay damages for bodily injury and property damage for which you become legally responsible because of or arising out of the ownership, maintenance or use of your automobile (that is not a trailer) as an automobile.

(A 32). "You" under the Policy is defined to mean the "first named insured shown in the Declarations," and the insured's spouse, if applicable. (*Id.*) The named insured under the Policy is the City of Cyrus. (A 23).

The term "your automobile" is defined under the Policy to be the "automobile described in the Declarations." (A 32). The Gades vehicle is not described in the Declarations for the Policy. (*See* A 23-29).

Finally, the Policy provides that damages will be paid:

- (1) on your behalf;
- (2) on behalf of any relative using your automobile (that is not a trailer);
- (3) on behalf of any person using your automobile (that is not a trailer) with your permission or that of a relative; and
- (4) on behalf of any person or organization legally responsible for the use of your automobile (that is not a trailer) when used by you, a relative, or with your permission or that of a relative.

(A 32). "Relative" under the Policy means a person who resides with you and who is related to you by blood, marriage, or adoption, and includes a ward or foster child who resides with you. (A 31-32),

Respondent brought a motion for summary judgment at the trial court level on the basis that that Gades is not a person on whose behalf damages are payable under the Auto-Owners Policy issued to the City of Cyrus. (A 9-18). Respondent further submitted that, as a result of the lack of excess coverage for Gades, the *Drake v. Ryan* Release extinguished the claims against Gades in full. (*Id.*) Finally, Respondent argued that the Appellants' vicarious liability claim cannot be maintained against the City of Cyrus because the agent, Gades, has been fully released. (*Id.*) On those bases, Respondent submitted that it should be dismissed from the lawsuit. (*Id.*)

The trial court agreed, finding that Gades had been fully released by the *Drake v. Ryan* Release. (A 80). The trial court then determined that, because Gades had been fully released of liability, there could be no claim of vicarious liability against the City of Cyrus Fire Department. (A 82). Based on these findings, the trial court granted Respondent's Motion for Summary Judgment and dismissed Appellants' claims against it with prejudice. (A 76-77). This appeal follows.

## STANDARD OF REVIEW

On appeal from summary judgment, this Court must determine whether there are any genuine issues of material fact and whether the trial court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). The Court of Appeals reviews a district court's interpretation of the law *de novo*. *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 190 (Minn. 1990). The Court must view the evidence in the light most favorable to the party against whom summary judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). However, the Minnesota Court of Appeals will affirm a grant of summary judgment if it can be sustained on any ground. *Winkler v. Magnuson*, 539 N.W.2d 821, 828 (Minn. App. 1995), *review denied* (Minn. Feb. 13, 1996).

## LEGAL ARGUMENT

### I. APPELLANTS' CLAIMS AGAINST GADES WERE RELEASED UNDER A *DRAKE v. RYAN* RELEASE EXCEPT TO THE EXTENT THAT EXCESS INSURANCE COVERAGE WAS AVAILABLE.

In *Drake v. Ryan*, 514 N.W.2d 785 (Minn. 1994), the Minnesota Supreme Court adopted the rationale of the Wisconsin Supreme Court in *Loy v. Bunderson*, 320 N.W.2d 175 (Wis. 1982), and approved a settlement structure under which a plaintiff can recover benefits from a defendant's primary liability insurance carrier and, at the same time, reserve a claim against a defendant's excess liability carrier for damages exceeding the limits of the primary policy. After a thorough discussion of public policy considerations, the *Drake* court concluded that "[o]n balance, public policy considerations favor the enforcement of modified *Loy* releases in Minnesota." *Id.* at 790. Thus, in Minnesota, a plaintiff may release his or her claim against a defendant/tortfeasor to the extent of the applicability of primary insurance coverage, while at the same time reserving a claim against the defendant/tortfeasor to the extent that excess liability insurance coverage applies. *See id.*

By settling all claims except those recoverable from the proceeds of an excess insurance policy, a plaintiff retains only the right to pursue claims recoverable from those insurance proceeds. *Rehm v. Lutheran Social Services of Minnesota, Inc.*, 1998 WL 268099 (Minn. App. 1998) (unpublished opinion) (A 87). Where it is shown that coverage is not provided under the excess insurance policy, plaintiff has retained no viable claims. *Id.*

Pursuant to *Drake v. Ryan*, Appellants effectively released Gades from liability except to the extent that Gades was covered by an excess liability insurance policy. (A 20-22). Under such a release, the *only* claim that remains after the execution of the release is one for any benefits payable under the excess insurance policy. *See Rehm*, 1998 WL 268099 at \* 3. If coverage is not available, no claim has survived the release. *Id.* Thus, in order to determine whether Appellants retained a viable cause of action, it must be determined whether any excess coverage is available for Gades under the Auto-Owners Policy issued to the City of Cyrus.

## II. GADES IS NOT ENTITLED TO EXCESS INSURANCE COVERAGE UNDER THE AUTO-OWNERS POLICY.

"General principles of contract interpretation apply to insurance policies." *Lobeck v. State Farm Mut. Auto. Ins. Co.*, 582 N.W.2d 246, 249 (Minn. 1998). An insurer's liability is determined by the insurance contract as long as the insurance contract does not omit coverage required by law or violate applicable statutes. *Kelly v. State Farm Mut. Auto. Ins. Co.*, 666 N.W.2d 328, 331 (Minn. 2003).

The interpretation of an insurance policy is a question of law for the court to decide based on the language of the policy. *Iowa Kemper Ins. Co. v. Stone*, 269 N.W.2d 885, 887 (Minn. 1978); *Meister v. Western Nat'l Mut. Ins. Co.*, 479 N.W.2d 372, 376 (Minn. 1992) (citing *Nat'l City Bank of Minneapolis v. St. Paul Fire & Marine Ins. Co.*, 447 N.W.2d 171, 175 (Minn. 1989)). In the insurance context, summary judgment is appropriate where the language of an insurance contract is clear and unambiguous. *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310-311 (Minn. 1989). Faced with such

language, a reviewing court should not read ambiguity into the contract, but instead should give the contract its plain and ordinary meaning. *Id.* In fact, a court should "fastidiously guard against the invitation to create ambiguities where none exist." *American Commerce Brokers, Inc. v. Minnesota Mutual Fire & Cas. Co.*, 551 N.W.2d 224, 227 (Minn. 1996) (citations omitted) (emphasis added).

In construing an insurance policy, the paramount question is what hazards the parties intended to cover. *Employers Mut. Cas. Co. of Des Moines v. Kangas*, 245 N.W.2d 873, 875 (Minn. 1976). Where the intention of the parties is clear from the face of a contract, construction of the contract is a question of law for the court. *Donnay v. Boulware*, 144 N.W.2d 711, 716 (Minn. 1966). When insurance policy language is clear and unambiguous, "the language used must be given its usual and accepted meaning." *Lobeck*, 582 N.W.2d at 249. With regard to policy exclusions, a court should keep in mind that exclusions are as much a part of the policy as the insuring language and must be given equal consideration in determining coverage. *Bobich v. Oja*, 104 N.W.2d 19, 24-25 (Minn. 1960).

The Auto-Owners Insurance Policy issued to the City of Cyrus provides that:

We will pay damages for bodily injury and property damage for which you become legally responsible because of or arising out of the ownership, maintenance or use of your automobile (that is not a trailer) as an automobile.

(A 32). "You" under the Policy refers to the City of Cyrus, the named insured under the Policy. (*Id.*) "Your automobile" under the Policy refers only to the named vehicles on the Declarations under the Policy, which include fire trucks and other utility vehicles, all

owned by the City of Cyrus. (A 23-32) The vehicle driven by Gades at the time of the accident is not considered “your automobile” under the Policy.

Damages under the Policy are only payable on behalf of the City of Cyrus, its relative, or a person using “your automobile” with permission. (A 32). Specifically, the Policy provides that damages will be paid:

- (1) on your behalf;
- (2) on behalf of any relative using your automobile (that is not a trailer);
- (3) on behalf of any person using your automobile (that is not a trailer) with your permission or that of a relative; and
- (4) on behalf of any person or organization legally responsible for the use of your automobile (that is not a trailer) when used by you, a relative, or with your permission or that of a relative.

(A 32).

Gades is not the named insured under the Policy. Thus, the Policy does not provide coverage for bodily injury and property damage for which Gades is found legally responsible. Further, Gades is not otherwise listed as a person on whose behalf damages are payable under the Policy. Obviously, Gades is not a relative or spouse of the named insured. Gades was not using a vehicle owned by the City of Cyrus Fire Department. Accordingly, he is simply not afforded coverage under the Policy. In fact, Appellants do not seem to dispute the unavailability of coverage for Gades under the Auto-Owners Policy. Thus, no further discussion is necessary on the point of insurance coverage for Gades under the Policy – the parties appear to agree that no excess coverage exists.

### III. THE *DRAKE V. RYAN* RELEASE EXTINGUISHED ALL CLAIMS AGAINST GADES.

The law encourages the settlement of disputes, and generally presumes an agreement settling a dispute is valid. *Sorenson v. Coast to Coast Stores*, 353 N.W.2d 666, 669 (Minn. App. 1984), *review denied*, (Minn. Nov. 7, 1984). A release is governed by rules of contract construction. *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. Generally, a release is valid unless it was executed under circumstances showing that it was not what the parties intended. *See Sorenson*, 353 N.W.2d at 669.

A release has been defined as a relinquishment, concession, or giving up of a right, claim, or privilege, by the person in whom it exists, to the person against whom it might have been enforced. *Gronquist v. Olson*, 64 N.W.2d 159, 163-64 (Minn. 1954) (citations omitted). A release can have the effect of extinguishing a right of action, and if so, it may be pleaded as a defense to any suit on the action. *Id.* It is well settled that the intention of the parties is determinative as to the type of agreement they executed. *Id.*

Whether an agreement and settlement with one joint tort-feasor constitutes full satisfaction or full reparation so as to release the other or others is to be determined from the facts of the particular situation. *Id.* If the parties are found to have intended the release to be final and complete, then the release will be held binding. *Jeffries v. Gillitzer*, 225 N.W.2d 17, 19 (Minn. 1975).

Courts have used a variety of factors to determine a claimant's intent to release his claims. *Sorenson*, 353 N.W.2d at 669. Among factors to be considered in determining

the validity and extent of a release are the following: (a) The length of period between the injury and the settlement; (b) the amount of time elapsed between the settlement and the attempt to avoid the settlement; (c) the presence or absence of independent medical advice of plaintiff's own choice before and at the time of the settlement; (d) the presence or absence of legal counsel of plaintiff's own choice before and at the time of the settlement; (e) the language of the release itself; (f) the adequacy of consideration; (g) the competence of the releasor; and (h) whether the injury complained of by the releasor was an unknown injury at the time of the signing of the release or merely a consequence flowing from a known injury. *Schmidt v. Smith*, 216 N.W.2d 669, 673 (Minn. 1974) (citations omitted).

As noted above, a *Drake v. Ryan* Release preserves a plaintiff's claim only to the extent that coverage is available under an excess liability policy. Again, a *Drake v. Ryan* release allows a plaintiff to fully release a defendant and his primary liability insurer up to the limits of the primary liability coverage but expressly retain the right to pursue his or her claims against the defendant for additional damages up to the limits of the defendant's excess liability insurance coverage. *See Stan Koch & Sons Trucking, Inc. v. Great West Cas. Co.*, 517 F.3d 1032, 1039 (8<sup>th</sup> Cir. 2008). Where coverage is not provided under any excess policy, no claim has been preserved. *See Rehm*, 1998 WL 268099 at \* 3. Thus, because Gades is not eligible for coverage under the Auto-Owners Policy, all claims against him were released by Appellants. (*See* A 20-22).

Other jurisdictions recognize the validity of *Drake*-type releases. *See Deblon v. Beaton*, 247 A.2d 172 (N.J. Super. Ct. Law Div. 1968). States that have recognized the

validity of such settlements agree that the validity and scope of a release are to be determined by the intent of the parties as expressed by the language employed in the release. *See id.* at 174.; *see also Stone v. Acuity*, 747 N.W.2d 149, 163 (Wis. 2008). Even if there is any doubt as to the meaning of the words, the intent may be clear and ascertainable when the general tenor and purpose of the instrument are considered in the light of the surrounding circumstances. *Deblon*, 247 A.2d at 174. Where a plaintiff has claims against an owner and driver of a vehicle, both covered by a primary insurer up to a certain amount, and the plaintiff has recovered that amount from the primary insurer, the intent of the parties is “crystal clear.” *Id.* The covenant in question *released* the owner and driver to the extent of their primary insurance coverage and with regard to their personal assets, while reserving the right to pursue any coverage provided by the excess insurer. *Id.* (emphasis added).

Again, jurisdictions that do recognize the validity of *Drake*-type releases rely on the language of the documents to evidence the intent of the parties. *Brown v. Cooke*, 707 A.2d 231, 234 (Pa. Super. Ct. 1998). Courts interpret these instruments to give meaning to all the terms of the contract. *See id.* Where the agreement is drafted using language typical of a release, the instrument *extinguishes* all claims against all defendants *except* those expressly reserved. *Id.* (emphasis added).

In this case, as discussed above, Appellants released their claims against Gades except to the extent that excess liability insurance coverage was available for Gades. Based on the language of the only potential excess insurance policy, the Auto-Owners Policy, it is apparent that Gades is not covered. Appellants’ argument regarding the

effect of the Release is faulty because the argument considers only the Release on its face. Granted, if one were to look only at the Release, ignoring the terms of the Auto-Owners Policy, it would appear that the potential for a claim against Gades survived the Release. However, when the Release and the Policy are considered together, that potential is eliminated. Again, no excess insurance coverage is available for Gades. As a result, Appellants' claims against Gades have been released *in full*.

This result is dictated by the language the parties used in the Release. Specifically, the Release provides that the receipt by Appellants of the proceeds from Gades' Progressive policy operates as a satisfaction of any claims against Gades to the extent of the first \$50,000 adjudged against Gades, and further as satisfaction of all claims against Gades in excess of the limits of the excess automobile insurance policy issued by Auto-Owners. (A 20, ¶ 2). Because there is no coverage for Gades under the Auto-Owners Policy, there is no gap between the first \$50,000 liability and any liability in excess of the coverage provided by the Policy. Therefore, the terms providing for the satisfaction of claims against Gades converge, eliminating Appellants' claims against Gades in full.

The Release further provides that Appellants may recover against Gades in addition to the first \$50,000 paid by Progressive *only* out of the proceeds of the excess automobile insurance policy issued by Auto-Owners. (A 20, ¶ 4). Again, since there is no excess coverage under the Policy, there are no remaining sources from which Appellants may recover on a judgment obtained against Gades.

Moreover, through the Release Appellants agreed to *waive* any action of any kind arising from the 1/25/06 motor vehicle accident against Gades, except to the extent of excess coverage provided to Gades by Auto-Owners. (A 21, ¶ 7). No excess coverage is available for Gades, so all claims against him have been waived by Appellants.

Finally, the Release provides that it is to be interpreted 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. App. 1993). (A 21, ¶ 6). As noted above, and as observed in Appellants' brief, these cases contemplate the *release* of claims against the tortfeasor except to the extent that excess insurance coverage applies. Because the parties to the Release specifically expressed their intention that the Release be construed in accordance with these cases, it must follow that the claims against Gades were released unless excess insurance coverage was available. Since no such coverage exists, the claims against Gades were released in full.

Despite the clear language of the Release, Appellants take the position that the Release only limited the *collectibility* of any eventual judgment that may be obtained against Gades. As noted above, the law provides that the effect of a release be judged by the intention of the parties, as evidenced by the language used in the instrument. With regard to Appellants' argument, the Court should note that the words "collection" and "collectible" are found nowhere in the Release. Rather, the Release references the "satisfaction" and "waiver" of claims. As noted above, the Release clearly and unequivocally satisfies and/or waives any claims against Gades other than those which

may be collected from an excess liability insurance policy. Reading the terms of the Release, it is evident that the parties intended to agree to limit the potential *claims*, not to limit the collectibility of any judgment against Gades. The provision whereby Appellants agreed “to waive *any action of any kind* arising from the 01/25/06 motor vehicle accident against Progressive and Ryan Gades” is wholly inconsistent with Appellants’ suggestion that the intent of the agreement was to limit collectibility of any future judgment against Gades. Based on the language of the Release, it is clear that the Release was intended to limit the claims that Appellants were allowed to pursue.

Furthermore, even if the Release can be interpreted to limit only the collectibility of any judgment against Gades, it remains clear that the only preserved collection source is the excess insurance coverage under the Auto-Owners Policy.<sup>1</sup> Again, the Release provides that any judgment against Gades will be recovered *only* out of the proceeds of any excess automobile insurance policy issued by Auto-Owners to the extent of remaining coverage under that policy. (A 20, ¶ 4).

Notwithstanding the foregoing analysis, Respondent maintains that the Release did effectively *release* all claims against Gades due to of the non-existence of the only claims that were expressly preserved. Obviously, a release cannot preserve claims that do not exist. The language used in the Release preserved *only* a claim against Gades to the extent that he was entitled to excess insurance coverage under the Auto-Owners Policy. Because he is not entitled to such insurance coverage, all claims against him were

---

<sup>1</sup> Notably, the Release does not even mention the City of Cyrus Fire Department, much less does it preserve the same as a collection source for any judgment against Gades.

satisfied and/or waived. Thus, Appellants' argument that the Release somehow preserves a claim against Gades is illogical. Appellants' claims against Gades were waived in full by the execution of the Release.

**IV. THE RELEASE OF GADES BARS ANY CLAIMS OF VICARIOUS LIABILITY AGAINST THE CITY OF CYRUS FIRE DEPARTMENT.**

It is settled law that a valid release of a servant also releases the master. *Serr v. Biwabik Concrete Aggregate Co.*, 278 N.W. 355, 362 (Minn. 1938). Thus, the release of claims against an agent also releases corresponding vicarious liability claims against the principal. *See Reedon of Faribault, Inc. v. Fidelity and Guar. Ins. Underwriters, Inc.*, 418 N.W.2d 488, 491 (Minn. 1988). More specifically, an injured party's release of the driver and registered owner of a vehicle precludes the injured party from recovering against the non-settling owner-in-fact of the vehicle who consented to the driver's use of the vehicle. *Hoffmann v. Wiltscheck*, 411 N.W.2d 923 (Minn. App. 1987). Because the non-settling owner's liability would be vicarious only, the release of the driver also released the owner in fact. *Id.* Comparatively, the release of an employee also extinguishes vicarious liability claims against the employer. *See Pischke v. Kellen*, 384 N.W.2d 201, 205 (Minn. App. 1986); *see also Rehm v. Lutheran Social Services of Minnesota, Inc.*, 1998 WL 268099 (Minn. App. 1998) (unpublished opinion) (A 87).

Other jurisdictions also follow the general rule that the release of an agent releases claims against the principal. *See Dickey v. Estate of Meier*, 197 N.W.2d 385, 388 (Neb. 1972). This has been held true even where the release at issue specifically reserves all claims against the employer-principal. *Id.* In fact, although some states have enacted

statutes to the effect that the release of one tortfeasor does not release other joint tortfeasors unless expressly intended, some have gone on to hold that such statutes do not apply to preserve claims of vicarious liability where the agent has been released. *See Elias v. Unisys Corp.*, 573 N.E.2d 946 (Mass. 1991); *see also Alvarez v. New Haven Register, Inc.*, 735 A.2d 306 (Conn. 1999).

These decisions barring vicarious liability claims where the employee has been released are based not on the “circuitry of obligations,” but rather on the idea that a vicarious liability claim fails to exist where the claims against the negligent employee have been released. *Dickey*, 197 N.W.2d at 388. Because the liability of a principal is “secondary” to the liability of the agent, the elimination of the primary liability also extinguishes any secondary liability. *See Pioneer Animal Clinic v. Garry*, 436 N.W.2d 184, 188 (Neb. 1989).

In this case, Appellants released all claims against Gades except to the extent that he was covered under the Policy issued by Auto-Owners to the City of Cyrus. However, as noted above, no coverage is available for Gades under the Auto-Owners Policy. Therefore, the claims against Gades were released in full by the purported *Drake v. Ryan* Release. Further, because all claims against Gades have been released, all claims for the vicarious liability of Gades’ principal, the City of Cyrus, were also released. A claim for vicarious liability does not survive the release of claims against the negligent agent. *See Reedon*, 418 N.W.2d at 491. Therefore, Appellants have released all claims in the above-entitled action, and Respondent City of Cyrus Fire Department was appropriately granted summary judgment.

Vicarious liability expands the field of potential sources from which liability of an employee may be collected. *See Bair v. Peck*, 811 P.2d 1176, 1182 (Kan. 1991) (“As a practical matter vicarious liability was recognized as a method of providing a source of recovery for the innocent victim of another’s negligence when the actual tortfeasor was unable to respond financially for the damage caused.”) Vicarious liability is *not* based on any wrongdoing of the employer; rather, it is a cost of doing business that has been imposed on employers through a policy decision. *Hagen v. Burmeister & Associates, Inc.*, 633 N.W.2d 497, 504 (Minn. 2001). Vicarious liability cannot exist unless the employee is found liable, and unless there is some connection between the tort of the employee and the business of the employer such that the employer in essence assumed the risk when it chose to engage in the business. *Id.* Only when these conditions are met is the negligence of the employee imputed to the employer, and only then may a plaintiff recover from the employer for his or her injuries caused by the employee. *See Lim v. Interstate System Steel Div., Inc.*, 435 N.W.2d 830, 833 (Minn. App. 1989).

Thus, vicarious liability is properly regarded as an expansion of the source from which liability of an employee may be recovered. Therefore, even if the Release at issue in this matter could be interpreted to simply limit the collectibility of any judgment against Gades, the Release extinguished the possibility of recovering such a judgment from Respondent City of Cyrus Fire Department because it did not expressly preserve that right. Thus, under either interpretation of the Release, any claim against the City of Cyrus Fire Department was eliminated.

Appellants suggest that the only rationale for the elimination of vicarious liability through the release of an agent is the potential for an indemnity claim by the employer against the employee, destroying the main purpose of the release. While that rationale may have influenced the *Rehm* court's analysis of that case, the rule providing for the elimination of vicarious liability of a principal upon release of the agent is a well-established tenet that does not rely solely on the indemnification rationale. Indeed, it has long been recognized that the failure to prove an agent liable in negligence also extinguishes any vicarious liability claim against the principal.<sup>2</sup> See *Ismil v. L.H. Sowles Co.*, 203 N.W.2d 354, 357 (Minn. 1972); see also 4 Minnesota Practice Series, *Jury Instruction Guides – Civil*, 5<sup>th</sup> Edition, CIVSVF 30.90. This is so, not because of any possibility for indemnity, but simply because there is no basis for holding an employer vicariously liable where negligence is not found on the part of the agent. See *id.* Without a finding of negligence on the part of the employee, there is no fault to impute to the employer.

Similarly, where an injured party has released an agent from all claims, indicating that the injured party's claim against the agent is fully satisfied, there remains no basis for

---

<sup>2</sup> In comparison, Appellants argue that the *dismissal of an agent does not prevent the maintenance of a vicarious liability claim against a principal, relying on *Schneider v. Buckman*, 433 N.W.2d 98 (Minn. 1988). However, in *Schneider*, the agent was dismissed based on the failure of proper service. There was neither a finding of no negligence, nor was there a release of that party's liability. Absent a finding or stipulation with regard to the merits of the claim against the agent, the allowance of a vicarious liability claim without a corresponding claim against the agent is understandable. That situation is distinguishable from the one in the present matter, since here the Appellants voluntarily released their claims against Gades, preserving only those which ultimately failed to exist.*

a claim against the principal in vicarious liability. As noted herein, the concept of employer vicarious liability has been adopted to expand the field of sources from which the liability of an employee may be collected. Unsatisfied liability on the part of the employee is a necessary prerequisite to recovery against the employer. Thus, when a claimant has no valid claim against the employee, or when through voluntary action by the claimant the employee's liability has been satisfied, waived, or released, the sole purpose behind the rule of vicarious liability (an alternative recovery source) ceases to exist.

According to the specific terms of the *Drake v. Ryan* Release, Appellants satisfied and waived any claims against Gades except to the extent those claims are covered under the Auto-Owners Policy, and did not reserve any other claims. Thus, Appellants completely released their right to collect Gades' liability from *any other* source. The vicarious liability of the City of Cyrus is nothing more than a source of recovery for Gades' liability. Because that recovery source was not reserved (which it could have been in the Release), and because it was waived, that source (and the claim against the City of Cyrus) must fail.

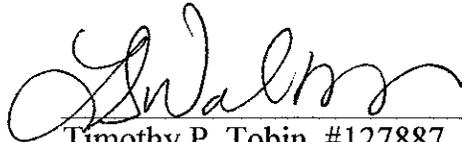
Whether or not the City of Cyrus could bring an indemnity action against Gades is of no effect on this analysis. Because Gades has been released in full, the vicarious liability claim against Respondent simply fails to exist. Thus, the trial court's decision in that regard was entirely correct, and should be affirmed.

CONCLUSION

The trial court did not err in granting summary judgment in favor of Respondent. No genuine issues of material fact remain for determination in this matter. The trial court correctly applied the law relevant to the *Drake v. Ryan* Release and the language of the applicable insurance policy to find that Gades had been fully released by Appellants. The trial court then correctly determined that the release of Gades extinguished any vicarious liability claim against the City of Cyrus Fire Department. As a result, Appellants have no claims against Respondent. Accordingly, Respondent respectfully requests that this Court affirm the trial court's decision in all respects.

Respectfully submitted,

Dated this 23<sup>rd</sup> day of January, 2009.



---

Timothy P. Tobin #127887  
Lynn Schmidt Walters #339398  
GISLASON & HUNTER LLP  
Attorneys for Respondent  
701 Xenia Avenue South, Suite 500  
Minneapolis, MN 55416  
Phone: (763) 225-6000  
Fax: (763) 225-6099