

NO. A08-2054

State of Minnesota
In Supreme Court

THOMAS BOOTH AND ANGELA BOOTH,
Respondents,

vs.

CITY OF CYRUS FIRE DEPARTMENT,
Appellant,

and

RYAN GADES,
Defendant.

APPELLANT'S BRIEF, ADDENDUM 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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STATEMENT OF LEGAL ISSUES

- I. Is Excess Coverage Available to Gades under the Auto-Owners Policy?

The district court held yes. The Court of Appeals did not decide the issue.

Apposite Authority: *Lobeck v. State Farm Mut. Auto. Ins. Co.*, 582 N.W.2d 246 (Minn. 1998); *Am. Commerce Brokers, Inc. v. Minn. Mut. Fire & Cas. Co.*, 551 N.W.2d 224 (Minn. 1996); *Thiele v. Stich*, 425 N.W.2d 580 (Minn. 1988).

- II. Did the Booths Completely Release Gades because Excess Coverage is not Available to Support the Release entered into in this matter?

The district court held yes. The Court of Appeals reversed.

Apposite Authority: *Drake v. Ryan*, 514 N.W.2d 785 (Minn. 1994); *Rehm v. Lutheran Soc. Servs. of Minn., Inc.*, No. C2-97-2227, 1998 WL 268099 (Minn. App. 1998) (AA 84).

- III. Did the Release of Gades extinguish the Booths' claims against Respondent City of Cyrus Fire Department?

The district court held yes. The Court of Appeals reversed.

Apposite Authority: *Drake v. Ryan*, 514 N.W.2d 785 (Minn. 1994); *Rehm v. Lutheran Soc. Servs. of Minn., Inc.*, No. C2-97-2227, 1998 WL 268099 (Minn. App. 1998) (AA 84); *Reedon of Faribault Inc. v. Fid. & Guar. Ins. Underwriters, Inc.*, 418 N.W.2d 488 (Minn. 1988).

- IV. Is the Release best viewed as a Limitation on the Source of Recovery and not a True Release?

The district court did not reach a holding on this issue. The Court of Appeals held yes.

STATEMENT OF THE CASE

This case arises out of a motor vehicle accident that occurred on January 25, 2006, involving Respondent Thomas Booth and Defendant Ryan Gades (“Gades”). (AA 24). At the time of the accident, Gades was driving his personal motor vehicle and was in the course of responding to a fire in connection with his duties as a volunteer with Appellant City of Cyrus Fire Department (“the City of Cyrus”). (AA 3, 24). Mr. Booth and his wife, Angela Booth (“Booths”), have alleged that Gades was at fault in the accident and that they were damaged as a result of his negligence. (AA 2-4). Mr. Gades’ personal automobile was insured by Progressive Preferred Insurance Company (“Progressive”) and the City of Cyrus was insured for general liability through Auto-Owners Insurance Company (“Auto-Owners”). (AA 28, 81.)

Before the Booths’ claims were put into suit, the Booths released their claims against Gades and Progressive pursuant to a document entitled “Drake v. Ryan Satisfaction and Release” (“Release”), putatively entered into pursuant to *Drake v. Ryan*, 514 N.W.2d 785 (Minn. 1994). (AA 81-83.) In that Release, the Booths agreed that Progressive’s payment was a “partial satisfaction” of their “claims” and that they “specifically reserve[d] any and all claims” against Gades up to the limits of the Auto-Owners policy but agreed to “satisfy any judgment [they] . . . 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 (sic).” (AA 81). The Booths further agreed 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 coverage under the Auto-Owners policy. (AA 82.)

The City of Cyrus moved for summary judgment on the grounds that the Release eliminated the Booths’ claims against Gades in full and that, because Gades has been fully released by the Booths, no vicarious liability claim could be maintained against the City. (AA 12-21). The City of Cyrus argued that the Auto-Owners policy at issue does not provide coverage for Gades, and the Booths did not contest that fact. (AA 6-8, 88-91). The Honorable Peter A. Hoff of the Stevens County District Court agreed that the absence of “excess” coverage for Gades resulted in his complete release and therefore extinguished the vicarious liability of the City of Cyrus, and granted summary judgment. (Add. 2-9). The Minnesota Court of Appeals reversed in *Booth v. Gades*, 771 N.W.2d 69 (2009) (*see* Add. 14), and this appeal follows.

STATEMENT OF FACTS

This case arises out of a motor vehicle accident that occurred on January 25, 2006. (AA 24). On that day, Defendant Ryan Gades (“Gades”) was driving a GMC pickup that he owned. (*Id.*) Gades was a volunteer firefighter with the City of Cyrus, and was responding to a fire call when the accident occurred. (AA 2-4; AA 24). It is alleged that while traveling to the scene of the fire, Gades failed to stop for a stop sign and was hit by a vehicle driven by Appellant Thomas Booth. (AA 24). Gades had personal automobile insurance with Progressive at the time of the accident. (AA 81).

The Booths initiated this 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 was vicariously liable for the negligence of Gades. (AA 1-4). However, prior to the service of the Complaint, the Booths and Gades entered into an agreement entitled "Drake v. Ryan Satisfaction and Release" ("Release"). Pursuant to the terms of the Release, Gades was released from liability except to the extent he qualified for liability insurance under the City of Cyrus's automobile insurance policy with Auto-Owners which, purportedly, provided "excess bodily injury coverage" for Gades. (AA 81-83). 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.

(AA 81-82).

At the time of the accident, the City of Cyrus was insured under an Automobile Insurance Policy issued by Auto-Owners in January of 2006 (the "Auto-Owners Policy").

(AA 28-80). 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.

(AA 37). "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. (AA 28). The term "your automobile" is defined under the Policy to be the "automobile described in the Declarations." (AA 37). The Gades vehicle is not described in the Declarations for the Policy. (*See* AA 28-34).

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.

(AA 37). "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. (AA 36-37).

The City of Cyrus moved for summary judgment in district court 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. (AA 12-21). The City of Cyrus further submitted that, as a result of the lack of excess coverage for Gades, the Release extinguished the claims against Gades in full. (*Id.*) Finally, the City of Cyrus argued that the Booths' vicarious liability claim could not be maintained against it because the agent, Gades, had been fully released. (*Id.*) On those bases, the City of Cyrus submitted that it should be dismissed from the lawsuit. (*Id.*)

The Booths did not contest the City of Cyrus's contention that Gades was not covered under the policy before the district court. (AA 88-91). Rather, they argued that both they and Gades had believed that coverage existed when they entered the Release, and that such belief constituted a mutual mistake of fact in entering the Release. (*Id.*) The district court accordingly found that Gades did not have coverage under the Auto-Owners Policy. (Add. 5.) As such, he had been fully released by the Release, and determined that, because Gades had been fully released of liability, there could be no claim of vicarious liability against the City of Cyrus. (Add. 5-8). Based on these findings, the district court granted Respondent's Motion for Summary Judgment and dismissed the Booths' claims against it with prejudice. (Add. 2).

The Booths appealed the decision of the district court to the Minnesota Court of Appeals. (Add. 13). They argued that the Release only partially released Gades, and that the issue of whether coverage existed under the Auto-Owners Policy was a question of collectability. The Court of Appeals agreed with the Booths, holding:

The vicarious liability of a municipal employer for the employment-related alleged negligence of a firefighter-employee is not destroyed by a plaintiff's partial release of firefighter and his insurer up to the limits of firefighter's personal liability policy and for any amounts greater than the limits of excess coverage believed to be available to firefighter under city's insurance policy even if firefighter is determined not to be entitled to such excess coverage.

Booth v. Gades, 771 N.W.2d 69, 70 (2009) (Add. 15). The Court of Appeals reasoned that the Release, by specifically reserving claims against Gades up to the limit of the Auto-Owners excess Policy, "set a monetary limit on claims that may be pursued against the city but does not limit the reservation of claims to only those for which excess coverage is actually provided to" Gades. *Id.*

The Court further concluded that the Release did not release Gades from the case but rather limited the Booths' "source of recovery" from Gades, even while acknowledging that "there is no source from which Booth can collect any additional damages" from Gades. *Id.* Finally, the Court concluded that although "[a]dditional language in the release precludes [the Booths] from recovering any judgment obtained against [Gades] from any source other than excess coverage provided to him, ... this language does not prevent [the Booths] from recovering from city any judgments [the Booths] may obtain against city." *Id.* The Court concluded that although the Booths could not longer recover from Gades, the Release only constituted a partial release that limited the Booths' source of recovery. *Id.* at 72-73. The City of Cyrus petitioned this Court for certiorari review, and the petition was granted.

LEGAL ARGUMENT

I. 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). This Court 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), but 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). Summary judgment will be affirmed if it can be sustained on any ground. *Myers v. Price*, 463 N.W.2d 773, 775 (Minn. App. 1990) (citing *Brecht v. Schramm*, 266 N.W.2d 514, 520 (Minn. 1978)).

II. EXCESS COVERAGE IS NOT AVAILABLE TO GADES UNDER THE AUTO-OWNERS POLICY

As a threshold matter, the first issue the Court must decide is whether Gades is afforded any coverage under the Auto-Owners Policy. It is clear under the language of the Policy that he is not. "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, 310-11 (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.” *Am. Commerce Brokers, Inc. v. Minn. Mut. 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 28-34). 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 37). 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.

(*Id.*)

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. Accordingly, he is simply not afforded coverage under the Policy.

In fact, the Booths did not argue in district court that Gades was entitled to excess insurance coverage under the Auto-Owners Policy, and did not seriously dispute the unavailability of coverage on appeal. (AA 88-91.) The district court, seeing no opposition to the City of Cyrus's contention that Gades was not entitled to coverage under the Auto-Owner's Policy, determined that no such coverage exists. (Add. 5.) No further discussion is necessary on the point of insurance coverage for Gades under the Policy – the parties and district court agreed that no excess coverage exists. That determination cannot be challenged on appeal, and is now the law of the case. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating parties generally allowed to raise neither new issues nor new theories on appeal); *Pigs R Us, LLC v. Compton Tp.*, 770 N.W.2d 212, 217 (Minn. App. 2009) (write of mandamus unchallenged below became law of the case that could not be challenged on appeal). Therefore, the question on this appeal is whether, given the fact that Gades is not entitled to coverage under the Auto-Owners Policy, any claim has been reserved which the Booths can continue to pursue. The City of Cyrus submits that all of Gades's liability has been extinguished, and the Booths no longer have a viable claim.

III. THE RELEASE FULLY RELEASED GADES FROM THIS ACTION BECAUSE GADES IS NOT ENTITLED TO EXCESS INSURANCE COVERAGE UNDER THE AUTO-OWNERS POLICY

A. A Release Pursuant to Drake v. Ryan Partially Releases the Tortfeasor, while Preserving Liability to the Extent of Excess Coverage

In *Loy v. Bunderson*, 320 N.W.2d 175, 180, 185-86 (Wis. 1982), the Wisconsin Supreme Court considered the propriety of a release of a tortfeasor and his primary

insurer. The release stated that upon payment of \$20,000, the plaintiff would release the tortfeasor and his primary insurer for the policy limits of \$50,000, leaving intact plaintiff's cause of action against the "excess" insurer for any sums above \$50,000 and within the \$500,000 limits of the excess insurer's policy. *Id.* The plaintiff further agreed not to pursue the tortfeasor for any amounts above and beyond the excess policy. *Id.*

The *Loy* court approved of the use of the agreement and held that the tortfeasor had not been completely released pursuant to its terms. Rather, the court found that the primary insurer had been completely released, and that the tortfeasor was released from liability to the extent of the coverage afforded by his primary insurer and in amounts over the coverage afforded by his excess insurer. *Id.* at 185. The court further reasoned that, with "respect to the area of exposure falling within" the excess insurance policy, the agreement amounted to a "covenant not to sue" the tortfeasor. *Id.* at 186-87.

Moreover, the *Loy* court held that to the extent the agreement was a release of the tortfeasor, Wisconsin's direct action statute permitted the plaintiff to maintain an action directly against the excess insurer. *Id.* at 187-90. Under the direct action statute, an insured is not a necessary party to an action. Rather, plaintiffs may bring suit directly against an insurer and recover without first obtaining a judgment against the insured. *Id.* Thus, the court held that an "insurer is directly liable to the plaintiff if the underlying conditions of negligence are satisfied although, after commencement of the action, the insured is *released* or protected by an absolute covenant not to sue." *Id.* at 189 (emphasis added).

Wisconsin decisions since *Loy* have made it very clear that when plaintiffs enter into *Loy*-type agreements with tortfeasors, the tortfeasor is in fact released from the action to the extent of the portion of his or her liability covered by the primary insurer. *See, e.g., Tiegan v. Jelco of Wis.*, 367 N.W.2d 806, 810 (Wis. 1985) (stating that the primary insurer is correctly dismissed from the action because the “[Plaintiffs’] claim against [the tortfeasor] and [the primary insurer] has been satisfied, and [the primary insurer] and [the tortfeasor] have been *released* from any and all liability just as if the full [primary insurance] policy limit had been paid in settlement.”) (Emphasis added). Indeed, Wisconsin tortfeasors released pursuant to *Loy* have been entirely dismissed from actions that remain pending against their excess insurers, as permitted by Wisconsin’s direct action statute. *See Brandner by Brandner v. Allstate Ins. Co.*, 512 N.W.2d 753, 756 (Wis. 1994).

This Court considered and approved the use of *Loy*-type settlement agreements in Minnesota in *Drake v. Ryan*, 514 N.W.2d 785 (Minn. 1994). In *Drake*, the court framed the question at issue as follows: “[W]hether, if the plaintiff *fully releases* a defendant tortfeasor and the tortfeasor’s primary liability insurer up to the limits of the primary liability insurer’s coverage but expressly retains the right to pursue a claim against the tortfeasor for additional damages from the tortfeasor’s excess liability insurer, the defendant tortfeasor is entitled to dismissal from the lawsuit because he has been *released* of all personal liability.” *Id.* at 787 (emphasis added).

However, unlike a Wisconsin plaintiff, a Minnesota plaintiff may not directly pursue a tortfeasor's insurance company. *Rinn v. Transit Casualty Co.*, 322 N.W.2d 357, 358 (Minn. 1982); and *Anderson v. St. Paul Fire and Marine Ins. Co.*, 414 N.W.2d 575 (Minn. App. 1987). Therefore, if the agreement before the court in *Drake* fully released the tortfeasor and only preserved claims against the excess carrier, the plaintiff's cause of action would fail. Thus, the *Drake* court first considered "whether the agreement fully and finally releases [tortfeasor] from all liability," and concluded that it did not. *Id.* at 788.

The Court further held that 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." *Id.* at 789 (emphasis added). In coming to this conclusion, the *Drake* court noted that at least three prior Minnesota cases had approved of partial releases of a plaintiff's claim, and a defendant's liability:

[T]his 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. In *Miller v. Shugart*, 316 N.W.2d 729 (Minn. 1982), we held that when an insurer unreasonably disputes coverage, the plaintiff and the insured tortfeasor may stipulate a settlement in plaintiff's favor and agree that the judgment will be taken from the insurance policy and not from the tortfeasor's personal assets. In *Shantz v. Richview, Inc.*, 311 N.W.2d 155, 156 (Minn. 1981), we found that a *Pierringer* release permits a plaintiff to settle with one of two tortfeasors and reserve a claim against the tortfeasor who is not a party to the agreement. In *Naig v. Bloomington Sanitation*, 258 N.W.2d 891, 893-94 (Minn. 1977), we allowed an employee to settle a tort claim for damages not recoverable under workers' compensation without affecting the employer's subrogation claim against the tortfeasor for compensation benefits paid.

Id. at 788. Therefore, the court held that a defendant may “dissect” his or her liability to protect his or her personal assets while also allowing the plaintiff to preserve that part of a claim that may be satisfied through any remaining insurance policy. *Id.*

Since the Court’s decision in *Drake* (1994) this Court approved of another partial release in *Meadowbrook, Inc. v. Tower Ins. Co., Inc.*, 559 N.W.2d 411 (Minn. 1997). In *Meadowbrook*, the insurer (Tower) was allowed to obtain a release for all claims against its insured that would be covered under its policy and was thereafter permitted to withdraw from the defense. The standard “*Meadowbrook* Release” provides that all covered claims are released, meaning that the insured can obtain dismissal of any claim which is covered under the released insurer’s policy.

Ultimately, and 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 (emphasis added). However, the Court did not fully articulate what aspects of the typical *Loy* release would be included in the “modified” Minnesota version.

Despite that fact, it seems obvious that the only material difference between a Wisconsin *Loy* release and a Minnesota *Drake* release are those necessary to avoid violation of Minnesota’s direct action prohibition. The extent of that modification would then seem to be limited to avoidance of a *full* release of claims against the tortfeasor. However, that would not prevent a *partial* release of all claims *except* those covered under an identified policy, such as the Auto-Owners policy at issue in this case.

The fact that a *Drake* release is, if nothing else, a *partial* release cannot be disputed. *Drake* and *Loy* and its progeny all refer to the “release” of claims covered under the layer of coverage provided by the settling carrier. It is also clear that the release of the indemnitor constitutes the release of the indemnitee. See *U.S. v. Schwartz*, 90 F.3d 1388, 1391 (8th Cir. 1996) (United States’ release of farmer/indemnitor of claims for repayment of Farmers Home Administration loans also released the farmer/indemnitee to extent of those claims); Robert E Keeton & Alan I Widiss, *Insurance Law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices* §§ 7.6, 9.2(b) (1) (2003) (“A settlement payment by the insurer to the third-party claimant... constitutes a final resolution of the matter – that is, the tort claim and the coverage question, for all parties” and “forecloses the prospect of any liability for the insured”).

Here, the Release specifically releases Progressive, the primary carrier for Ryan Gades. (AA081 ¶3) (“The receipt of \$50,000 from Progressive shall operate to *release* Progressive from all of its obligations . . . including . . . the duties to defend and *indemnify*.”). Thus, there can be no question that a partial release has occurred.

Therefore, it follows that the only question remaining is what claims have *not* been “released.” On that issue, the Release makes clear that its intent was the “satisfaction of any claims [Booths] may have against Ryan Gades to the extent of the first \$50,000 which may be adjudged against [Gades] and as satisfaction of all claims against [Gades] in excess of the limits of the excess automobile insurance policy issued by Auto Owners.” It further provides that Booths only “reserve” those claims they have against

[Gades] “up to the limits of the excess policy issued by Auto Owners” and will satisfy any judgment “only out of the proceeds of the excess automobile insurance policy issued by Auto Owners to the extent of remaining coverage under that policy.”

Because claims can be “dissected” under *Drake*, and because there clearly has been a partial release of claims, the Release at issue has “dissected” Booths’ claims into those that are covered under the Auto-Owners policy and those that are not. Only those claims against Gades that are covered under the Auto-Owners policy have been preserved and all other claims against him have been released.

For the reasons indicated above, there is no coverage under the Auto-Owners policy. Thus, there are no covered claims against Gades and the “reserved” claims do not and never did exist. Because Booths never had any claims against Gades that were covered under the Auto-Owners policy and because they have released all claims *except* the non-existent “covered claims,” they have fully released Gades.

B. Because Excess Coverage is not Available under the Auto-Owners Policy, the Release Completely Released and the Booths’ Claims and Gades’s Liability

1. Gades has been Released in Full Pursuant to the Language of the Release

As the Court of Appeals correctly noted, the question at the crux of this dispute is whether when a plaintiff releases a defendant pursuant to *Drake*, but in fact no excess coverage exists, the plaintiff has completely released his or her claims against the defendant. *See Booth*, 771 N.W.2d at 72 (Add. 19). 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*, 242 Minn. 119, 125, 64 N.W.2d 159, 163-64 (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.* at 125, 64 N.W.2d at 164. In addition, as a general rule the release of one joint tortfeasor is a release as to all others unless the releasing instrument specifically states otherwise. *Frey v. Snelgrove*, 269 N.W.2d 918, 921 (Minn. 1978)

Courts look first to the four corners of the releasing document to determine whether it effectively releases a party's claims. *Id.*; *see also Sorenson*, 353 N.W.2d at 669. When a plaintiff executes a valid release of a defendant, the release effectively bars the plaintiff from further pursuing his or her claim against that defendant. *Sorenson*, 353 N.W.2d at 669. It will also operate to release any remaining tortfeasors unless the documents indicates otherwise. *Frey*, 269 N.W.2d at 921; *Gronquist*, 242 Minn. at 125, 64 N.W.2d at 164.

Here, it is true that 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. The Booths released their claims against Gades except to the extent that excess liability insurance coverage was available to Gades under the Auto-Owners policy. (AA 81). However, it is equally true that based on the language of the Auto-Owners Policy, Gades does not have any excess insurance coverage. It follows that when the Release and the Auto-Owners Policy are considered together, all claims against Gades have been eliminated. As discussed above, it has by now been conceded that no coverage exists under the Auto-Owners Policy. (AA 88-91; Add. 5).

The result of this lack of coverage is that the Booths' claims against Gades have been released in full. This result is dictated by *Drake*, but also by the language the parties used in the Release. Specifically, the Release provides that the receipt by the Booths 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. (AA 81, ¶ 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 the Booths' claims against Gades in full.

This conclusion is further bolstered by the fact that the Release provides that the Booths 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. (AA 81, ¶ 4). Again, since there is no excess coverage under the Policy, there are no remaining sources from which the Booths may recover on a judgment obtained against Gades. Moreover, through the Release, the Booths 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. (AA 82, ¶ 7). No excess coverage is available for Gades, so all claims against him have been waived by the Booths.

Finally, the Release provides that it is to be interpreted and construed in accordance with the holdings in *Tiegan*, *Loy*, and the Court of Appeals' decision in *Drake v. Ryan*, 498 N.W.2d 29 (Minn. App. 1993). (AA 82, ¶ 6). But as noted above, *Drake* and the cited Wisconsin cases contemplate the release of claims against the tortfeasor *except* where excess coverage exists. In each case, there was no question that excess coverage was available to the released party. *See Drake*, 514 N.W.2d at 786-87; *Tiegan*, 367 N.W.2d at 808; *Loy*, 320 N.W.2d at 403-04. Because the parties to this 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.

Considered in this fashion, the *Drake* release is most analogous to a *Meadowbrook* release. Both define the scope of released claims by reference to coverage provided by an insurance policy. While many partial releases make reference to specific "claims"

being released (e.g. *Pierringer* and *Naig* releases), there is no reason that a partial release cannot define the claims released by reference to coverage for those claims under a specific insurance policy. Just as a *Meadowbrook* defendant could seek dismissal of claims by arguing that those claims were covered under the policy of the released insurer, so too can a *Drake* defendant seek dismissal of all claims on the grounds that no excess coverage exists and that all other claims have been released. That is precisely the situation in the matter at hand.

2. **Minnesota and Foreign Legal Authorities Support the Conclusion that Gades has been Fully Released**

In addition to the fact that the language of the Release dictates the complete release of Gades from this action, legal authorities both within and outside of Minnesota support the conclusion that Gades has been fully released of liability herein. There is little question that if the case were to arise in Wisconsin, both the tortfeasor and the insurer would be completely dismissed from the case. As previously mentioned, Wisconsin Courts dismiss tortfeasors from actions even when they are only partially released pursuant to an effective *Loy*-type release. *Tiegan*, 367 N.W.2d at 810; see *Brandner*, 512 N.W.2d at 756. They would certainly be released and dismissed where in fact no excess coverage exists. In addition, insurers are entitled to dismissal from any direct action when no coverage is available. See generally *Nu-Pak, Inc. v. Wine Specialties Intern., Ltd.*, 643 N.W.2d 848 (Wis. App. 2002).

Consistent with this conclusion, the Minnesota Court of Appeals has previously considered, in an unpublished decision, whether the release of a defendant pursuant to

Drake completely releases the defendant when in fact no excess coverage is available, and concluded that it does. See *Rehm v. Lutheran Soc. Servs. of Minn., Inc.*, No. C2-97-2227, 1998 WL 268099 (Minn. App. 1998) (AA 84). In *Rehm*, the Plaintiff was injured when her vehicle was struck by a vehicle owned and driven by Diane Tinklenberg. *Id.* at *1. Tinklenberg was insured by American Family Insurance Company. *Id.* At the time of the accident, Tinklenberg was acting within the scope of her employment with Lutheran Social Services ("LSS"). *Id.* LSS was insured by Preferred Risk Insurance Company. *Id.*

The Plaintiff entered into an agreement with Tinklenberg and American Family which extinguished the liability of Tinklenberg except as to coverage under the Preferred Risk policy. *Id.* at *1-2. However, the Preferred Risk policy excluded "[y]our employee if the covered 'auto' [Tinklenberg's vehicle] is owned by that employee" *Id.* at *1. The trial court then granted LSS's motion for summary judgment on the ground that Tinklenberg was not an insured under the LSS policy and that the parties had intended in signing the agreement to release Tinklenberg from any personal liability except to the extent of coverage provided by the LSS policy. *Id.* at *2. As a corollary, the release of Tinklenberg eliminated the vicarious liability of LSS. *Id.*

The plaintiff challenged the Court's grant of summary judgment, arguing that the vicarious liability of LSS was not severed by the release. The Court of Appeals affirmed, holding that to rule otherwise would undermine the purpose and intent of a agreement. *Id.* *2-3. In short, the *Rehm* court held that 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. Where it is shown that coverage is not provided under the excess insurance policy, plaintiff has retained no viable claims. *Id.*

Furthermore, the conclusion that the Release actually effectuated the release of Gades is supported by language in decisions from other jurisdictions recognizing the validity of *Loy*-type releases. 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 Deblon v. Beaton*, 247 A.2d 172, 174 (N.J. Super. Ct. Law Div. 1968); *see also Brown v. Cooke*, 707 A.2d 231, 234 (Pa. Super. Ct. 1998); *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.

Under these authorities, there can be little question that a plaintiff is in fact releasing a defendant when entering such an agreement, not simply limiting sources for recovery. For instance the *Deblon* court held that 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). Likewise, the *Brown* court held that a *Loy*-type agreement

extinguishes all claims against all defendants *except* those expressly reserved. 707 A.2d at 234 (emphasis added).

The fact is that when plaintiffs enter into a release, they often assume certain risks. For instance, when a plaintiff enters into a *Miller-Shugart* agreement and agrees to litigate the issue of coverage against the defendant's insurance company, the plaintiff assumes the risk that he or she will lost on that coverage issue. *Miller*, 316 N.W.2d at 734. If no coverage exists, the plaintiff will not recover and the insurance company is entitled to summary judgment. *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 326-32 (Minn. 1993).

Here, pursuant to the Release, the Booths released Gades from liability except to the extent that Gades was covered by an excess liability insurance policy. (AA 81-83). Like a plaintiff to a *Miller-Shugart* release, they accepted the risk that no coverage existed under that excess policy. Although the Booths may have assumed coverage existed, the language of the Release is clear: no claims exist other than those covered by the Auto-Owners Policy. 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 Drake*, 514 N.W.2d at 790; *Rehm*, 1998 WL 268099 at * 3; *Brown*, 707 A.2d at 234. Coverage is not available to Gades under the Auto-Owners policy, and no claim has survived the release. *Rehm*, 1998 WL 268099 at * 3.

IV. BECAUSE ALL CLAIMS AGAINST GADES ARE EXTINGUISHED UNDER THE RELEASE, THE RELEASE BARS ANY CLAIMS AGAINST THE CITY OF CYRUS

It is undisputed that the only exposure the City of Cyrus has in this case is based on its vicarious liability for the actions of Gades. “It is the universally accepted rule that an employer or master is liable for the torts of his or her employee or servant committed within the scope and course of employment, based on the doctrine of respondeat superior.” Laura Hunter Dietz et al, *Imputed Negligence and Vicarious Liability: Employers or Masters*, 57B Am. Jur. 2d Negligence § 1106.

The primary policy goal behind the application of respondeat superior today is ensuring that innocent tort victims are compensated for their injuries by providing them with a defendant in an economic position to provide relief. The doctrine of “[r]espondeat superior . . . reflects the likelihood that an employer will be more likely to satisfy a judgment.” Rest. (3d) Agency § 2.04, comment b; and, see, Douglas McGhee, *Once Bitten, Twice Bitten: The Minnesota Court of Appeals Limits the Recovery of Sex Abuse Victims in Oelschlager v. Magnuson*, 15 Law & Ineq. 191, 201-03 (1997); Rhett B. Franklin, *Pouring New Wine into an Old Bottle: A Recommendation for Determining Liability of an Employer under Respondeat Superior*, 39 S.D. L. Rev. 570, 575 (1994).

Essentially, the employer represents a second, deeper pocket from which a plaintiff may attempt to recover damages that 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 for an employee is therefore 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 & Assocs., Inc.*, 633 N.W.2d 497, 504 (Minn. 2001); McGhee, *supra*, at 201-03; Franklin, *supra*, at 575. 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 Sys. Steel Div., Inc.*, 435 N.W.2d 830, 833 (Minn. App. 1989).

It is well settled that the release of claims against an agent also releases corresponding vicarious liability claims against the principal. *See Reedon of Faribault, Inc. v. Fid. & Guar. Ins. Underwriters, Inc.*, 418 N.W.2d 488, 491 (Minn. 1988). For instance, 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.*

Moreover, 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); *see also Pischke v. Kellen*, 384 N.W.2d 201, 205 (Minn. App. 1986) (release of volunteer firefighter involved in car accident also released the fire department); *Dickey v. Estate of Meier*, 197 N.W.2d 385, 388 (Neb. 1972). This is true even where the release at issue specifically attempts to reserve all claims against the employer-principal. *Dickey*, 197 N.W.2d at 388.

In fact, even in states that have enacted statutes to the effect that the release of one tortfeasor does not release other joint tortfeasors unless expressly intended, courts have held 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). 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).

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. *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*, 5th Edition, CIVSVF 30.90. This is so 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.

Here, the Booths 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 Release. 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, the Booths have released all claims in the above-entitled action, and the City of Cyrus was appropriately granted summary judgment.

V. EVEN IF THE RELEASE IS VIEWED AS A LIMITATION ON THE SOURCE OF RECOVERY AND NOT A TRUE RELEASE, BOOTHS HAVE NO VALID CLAIMS AGAINST THE CITY OF CYRUS

Despite the clear language of the Release and these authorities, the Court of Appeals concluded the Release only limited the sources of recovery of any eventual judgment that may be obtained against Gades. *Booth*, 771 N.W.2d at 73. The Court intimated that the remaining source of recovery here is the City of Cyprus. *Id.* But, as noted above, the law provides that the effect of a release be judged by the intention of the parties, as evidence by the language used in the instrument.

To that end, the Court should note that the only preserved collection source under the Release is the excess insurance coverage under the Auto-Owners Policy. The Release does not even mention the City of Cyrus, much less preserve the same as a collection source for any judgment against Gades. It provides that any judgment against Gades will be recovered *only* out of the proceeds of the Auto-Owners and then only to the *extent* of

remaining coverage under that policy (“Thomas Booth, Angela Booth specifically agree that [they] will satisfy any judgment [they] 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.” AA 20, ¶ 4).

Throughout this litigation the Booths have maintained a position closely mirroring that of the Court of Appeals. That is, that the Release only limits the *collectability* of any eventual judgment that may be obtained against Gades, and not the claims they may bring. However, the words “collection” and “collectible” are found nowhere in the Release. Rather, the Release (which is titled “Drake v. Ryan *Satisfaction and Release*”) references the “release,” “satisfaction” and “waiver” of claims. Indeed, the provision whereby the Booths 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 the argument that the intent of the agreement was to limit sources of recovery or the collectability of a judgment to anything other than the Auto-Owner’s Policy.

In addition, because vicarious liability is properly regarded as simply an expansion of the source from which liability of an employee may be recovered, recovery against the City of Cyrus is barred even if the Release at issue in this matter could be interpreted to simply limit the collectability or source of recovery of any judgment against Gades. The Release extinguished the possibility of recovering such a judgment from the City of Cyrus because it did not expressly preserve that right. Certainly the Booths could have drafted a release that expressly retained a right of action against Gades for the purposes

of trying to collect against the City of Cyrus through vicarious liability. They did not, opting instead to release Gades except to the extent he was covered under the Auto-Owners Policy.

According to the specific terms of the Release, the Booths 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, the Booths completely released their right to collect on Gades' liability from *any other* source.

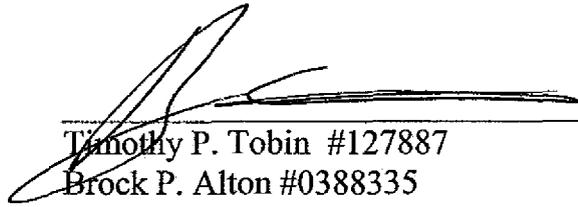
Because the vicarious liability of the City of Cyrus is correctly viewed as nothing more than a source of recovery for Gades's own liability, because that recovery source was not reserved as it could have been, the claim against the City of Cyrus must fail.

CONCLUSION

The district court did not err in granting summary judgment in favor of Respondent. The district court correctly applied the law relevant to the Release and the language of the applicable insurance policy to find that Gades had been fully released by the Booths. The trial court then correctly determined that the release of Gades extinguished any vicarious liability claim against Appellant City of Cyrus Fire Department. Accordingly, Appellant respectfully requests that this Court reverse the decision of the Court of Appeals, and affirm the trial court's decision in all respects.

Respectfully submitted,

Dated this 17th day of December, 2009.

A handwritten signature in black ink, appearing to read "Timothy P. Tobin", is written over a horizontal line. The signature is stylized and somewhat cursive.

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