

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 REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF LEGAL ISSUESiv

INTRODUCTION.....1

LEGAL ARGUMENT1

 I. THE DISTRICT COURT HAD JURISDICTION TO HOLD THAT THE AUTO-OWNERS
 POLICY DOES NOT PROVIDE COVERAGE TO GADES, AND THAT
 DETERMINATION CANNOT BE ATTACKED ON APPEAL.....1

 II. *DRAKE V. RYAN* PERMITTED THE DISSECTION OF A DEFENDANT’S
 LIABILITY IN A CASE INVOLVING A “SINGLE LIABILITY” CLAIM.....6

 III. BECAUSE ALL CLAIMS AGAINST GADES ARE EXTINGUISHED UNDER
 THE RELEASE, THE RELEASE BARS ANY CLAIMS AGAINST THE
 CITY OF CYRUS..... 10

 IV. THE BOOTHS FAILED TO PRESERVE THE CITY OF CYRUS AS A
 SOURCE OF RECOVERY 12

CONCLUSION 14

TABLE OF AUTHORITIES

Minnesota Cases:

<i>Am. Family Ins. Co. v. Walser</i> , 628 N.W.2d 605 (Minn. 2001)	3
<i>Anderson v. St. Paul Fire and Marine Ins. Co.</i> , 414 N.W.2d 575 (Minn. App. 1987)	3, 4, 5
<i>Cincinnati Ins. Co. v. Franck</i> , 644 N.W.2d 471 (Minn. App. 2002)	2
<i>Drake v. Ryan</i> , 514 N.W.2d 785 (Minn. 1994)	6-8
<i>Frey v. Snelgrove</i> , 269 N.W.2d 918 (Minn. 1978)	11
<i>Grain Dealers Mut. Ins. Co. v. Cady</i> , 318 N.W.2d 247 (Minn. 1982)	2
<i>Irwin v. Goodno</i> , 686 N.W.2d 878 (Minn. App. 2004)	3
<i>Miller v. Shugart</i> , 316 N.W.2d 729 (Minn. 1982)	6, 7, 8
<i>Naig v. Bloomington Sanitation</i> , 258 N.W.2d 891 (Minn. 1977)	6, 7, 8
<i>Northwestern Nat. Ins. Co. ex rel. Swanberg v. Carlson</i> , 711 N.W.2d 821 (Minn. App. 2006)	3, 5
<i>Pischke v. Kellen</i> , 384 N.W.2d 201 (Minn. App. 1986)	10, 11
<i>Reedon of Faribault, Inc. v. Fid. & Guar. Ins. Underwriters, Inc.</i> , 418 N.W.2d 488 (Minn. 1988)	10
<i>Rehm v. Lutheran Soc. Servs. of Minn., Inc.</i> , No. C2-97-2227, 1998 WL 268099 (Minn. App. 1998)	11, 12

Serr v. Biwabik Concrete Aggregate Co.,
278 N.W. 355 (Minn. 1938)11

Shantz v. Richview, Inc.,
311 N.W.2d 155 (Minn. 1981)6, 7, 8

Thiele v. Stich,
425 N.W.2d 580 (Minn.1988)2

Other Authorities:

22 Britton D. Weimer et. al, *Minnesota Practice* § 3.8 (2009).....2

Minn. Const. art. VI, § 33

Minn. Stat. § 466.07.....10

Minn. Stat. § 471.86.....10

STATEMENT OF LEGAL ISSUES

- I. Did the District Court had Jurisdiction to Hold that the Auto-Owners Policy does not Provide Coverage to Gades?

The district court held the Auto-Owners Policy did not provide coverage. The Court of Appeals did not decide the issue.

Apposite Authority: *Grain Dealers Mut. Ins. Co. v. Cady*, 318 N.W.2d 247 (Minn. 1982); *Cincinnati Ins. Co. v. Franck*, 644 N.W.2d 471 (Minn. App. 2002); *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

- II. Did *Drake v. Ryan* Permit the Dissection of a Defendant's Liability in a Case involving a "Single Liability Claim"?

Neither the district court nor the Court of Appeals considered this issue.

Apposite Authority: *Drake v. Ryan*, 514 N.W.2d 785 (Minn. 1994)

- 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: *Serr v. Biwabik Concrete Aggregate Co.*, 202 Minn. 165, 177, 278 N.W. 355, 362 (Minn. 1938); *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. Did the Booths fail to Preserve the City of Cyrus as a "Source of Recovery"?

The district court did not reach a holding on this issue. The Court of Appeals held that the City of Cyrus remained an available source of collection.

INTRODUCTION

Appellant City of Cyrus Fire Department (“City of Cyrus”) submits this Brief in Reply the Brief of Respondents Thomas and Angela Booth (“the Booths”). The Booths argue that they did not release Defendant Ryan Gades (“Gades”) pursuant to the Drake v. Ryan Satisfaction and Release (“Release”) entered into herein, and that even if they had released Gades, that release would not result in the release of the vicariously liable City of Cyrus. Because the Booths ask this Court to ignore the procedural history of this case, conclusions of law of the district court, the language of the Release, and its own precedent, the Court should reverse the Court of Appeals and reinstate the decision of the district court.

ARGUMENT

I. THE DISTRICT COURT HAD JURISDICTION TO HOLD THAT THE AUTO-OWNERS POLICY DOES NOT PROVIDE COVERAGE TO GADES, AND THAT DETERMINATION CANNOT BE ATTACKED ON APPEAL

The Booths argue that “there is no judicial determination of ‘no coverage’ in this matter.” (Resp. Br. at 28). They further argue that such a determination is improper until they have obtained a judgment against Defendant Ryan Gades, and that therefore whether coverage exists should have no bearing on the outcome of this case. (*Id.* at 8-10).

The Booths are incorrect on both accounts. The district court specifically found that “Gades was not covered under the [City’s] Auto Owners Policy at the time the *Drake v. Ryan* release was executed, and therefore there was no ‘excess’ policy from which [the Booths] could seek damages.” (Add. 4). In fact, the lack of coverage was the very issue upon which the City moved for summary judgment below, and upon which summary

judgment was granted. (*Id.*; *see also* AA 17-20). The Booths did not contest the issue before the district court. (*See* AA 90). As such, the Booths cannot now assert that the district court lacked “jurisdiction” to consider whether Gades was afforded coverage under the Auto-Owners Policy. The issue was waived when the Booths failed to raise it below. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (“A reviewing court must generally consider only those issues that the record shows were presented and considered by the [district] court in deciding the matter before it.”).

Contrary to the Booths argument, district courts are not prohibited from determining issues of insurance coverage prior to adjudication on the merits between a plaintiff and an insured tortfeasor. In fact, where an insurer denies coverage to its insured, “coverage should ordinarily be determined prior to resolution of the main action.” 22 Britton D. Weimer et. al, *Minnesota Practice* § 3.8 (2009). Because an insurer cannot typically join in an action in order to contest coverage, a challenge by an insurer must usually take place pursuant to a declaratory judgment action. *Grain Dealers Mut. Ins. Co. v. Cady*, 318 N.W.2d 247, 250-51 & n.7 (Minn. 1982). Indeed, Minnesota Appellate Courts have previously considered cases where excess insurers commence declaratory judgment actions on the issue of coverage after an insured has entered into a *Drake v. Ryan* release. *Cincinnati Ins. Co. v. Franck*, 644 N.W.2d 471 (Minn. App. 2002).

Here, the challenge to coverage was asserted by the City of Cyrus, not its insurer. Because it is a party to the case, the City of Cyrus is not required to do so through a declaratory judgment proceeding. Instead it did so pursuant to a motion for summary

judgment. Such motions should be granted anytime that a party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03.

Therefore, the district court acted well within its jurisdiction when it answered the coverage issue, which presented a question of law. *See Irwin v. Goodno*, 686 N.W.2d 878, 880 (Minn. App. 2004) (stating that Minnesota's district courts are "courts of general jurisdiction and have the power to hear all types of civil cases, with a few exceptions.") (citing Minn. Const. art. VI, § 3). *Am. Family Ins. Co. v. Walser*, 628 N.W.2d 605, 609 (Minn. 2001) (whether coverage exists under an insurance policy is a question of law). This is particularly true here because the Booths did not contest the issue.

Moreover, the authorities the Booths cite for the proposition that the district court had no jurisdiction to resolve the coverage issue are inapposite. They cite to *Anderson v. St. Paul Fire and Marine Ins. Co.*, 414 N.W.2d 575, 576-77 (Minn. App. 1987), where the court held that plaintiffs have no standing to challenge a denial of insurance coverage until they first obtain a judgment against the insured. They also cite to *Northwestern Nat. Ins. Co. ex rel. Swanberg v. Carlson*, 711 N.W.2d 821, 822 (Minn. App. 2006), where the Court of Appeals held that "[a]n insured's cause of action against a liability insurer for breach of its contractual duty to indemnify does not accrue ... until the insured is legally obligated to pay damages as a result of a judgment or settlement."

In making this argument, Booths ignore the fact that the issue of coverage is essential to determine whether any claims against City of Cyrus remain. Booths entered into a Release which defines the claims released in terms of coverage for the same. Thus,

in order to determine whether any such claims remain, and to interpret the Release, the court was *required* to decide coverage issues.

Booths argue that if the position advanced on this issue by City of Cyrus were adopted, it would render futile any further effort to enter into a Drake/Ryan settlement in cases where the “excess carrier” denies coverage. Booths argue that, in those situations, the partially released insured would have no financial incentive to contest the coverage denial and the settling claimant would not have standing to do so, citing *Anderson*, 414 N.W.2d 575.

This contention ignores the realities of the situation. Under Booths’ hypothetical, if the “excess carrier” were to deny coverage, that would not prevent further litigation by the claimant against the partially released insured. Unless the insured defendant were to raise the coverage issues as a defense (which he or she could), the claimant could continue to pursue his or her claims and obtain a judgment against the defendant. At that point, the claimant could seek to collect against the insurer.

Alternatively, the defendant could (as City of Cyrus has here) raise the coverage issues as a defense to further litigation of the liability claims. If the defendant is able to establish the lack of coverage, the litigation would end. If the claimant could establish coverage, the litigation would continue. In fact, to hold otherwise would require the litigation of liability claims when there is no economic reason for doing so. If there is no coverage, there is no reason to litigate the liability issues and doing so would be a waste of the valuable resources of the court system. Were this Court to adopt the position

advanced by Booths on this issue, any defendant would be precluded from raising these coverage issues as a defense to further litigation following a *Drake/Ryan* settlement.

Neither *Anderson* nor *Swanberg* bars the City of Cyrus from raising a lack of coverage for Gades under the Auto-Owners Policy. Each involves an attempt by a party to a lawsuit to bring a claim against an insurance company that is not yet ripe. By contrast, the City of Cyrus did not attempt to bring a claim against an insurer denying coverage. It asked the district court to determine whether coverage existed under the Auto-Owners Policy because that issue was central to the status of Booths' claims against Gades and thus affected the status of their claims against City of Cyrus for the reasons argued elsewhere.

Finally, although not raised by Booths, there may be an issue as to whether the court's coverage determination without the participation of the "excess carrier" would estop that carrier from re-litigating the coverage issues at a later date. While this Court need not decide that issue at this time, the ultimate resolution of that issue does not undermine the arguments made by the City of Cyrus on this issue.

If the coverage determination does not bind the insurer, the only party that could be harmed by that result would be the insured. If the district court were to find coverage (and allow the litigation to continue) the insured would be forced to defend the claim at his own expense (given the coverage denial by the "excess carrier"). However, the insured always has the ability to bring coverage litigation against the insurer under these circumstances and *Anderson v. St. Paul Fire, supra*, does not prevent such claims. Thus, the insured can always implead the insurer or raise these issues in a separate declaratory

judgment action, thereby eliminating any risk of a conflicting result, post-judgment in the tort action. In short, Booths' concerns on this issue ignore reality.

II. DRAKE V. RYAN PERMITTED THE DISSECTION OF A DEFENDANT'S LIABILITY IN A CASE INVOLVING A "SINGLE LIABILITY CLAIM"

In its original Brief to this Court, the City of Cyrus cited this Court's holding in *Drake v. Ryan*, 514 N.W.2d 785, 788 (Minn. 1994), for the proposition that a defendant may "dissect" his or her liability. This permits the defendant to protect his or her personal assets, while also permitting the plaintiff to preserve that part of a claim that may be satisfied through any remaining insurance policy. (App. Br. at 14).

The Booths take issue with use of the term "dissect," arguing that a "single liability" claim cannot be dissected under Minnesota law. Instead, the Booths argue that under a release entered pursuant to *Drake v. Ryan*, the injured party agrees to "partially satisf[y]" a predetermined portion of the judgment and 'releases' the tortfeasor from any personal exposure for the remaining judgment." (Resp. Br. at 14). Therefore, the Booths contend, a *Drake v. Ryan* release can be viewed as only as an agreement to partially satisfy of any collection against the tortfeasor, not a release. *Id.*

The term "dissect" is taken directly from *Drake*. The Court stated that it had previously "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." *Drake*, 514 N.W.2d at 788. For this proposition, the Court cited to *Miller v. Shugart*, 316 N.W.2d 729 (Minn. 1982), *Shantz v. Richview, Inc.*, 311 N.W.2d 155, 156 (Minn. 1981), and *Naig v. Bloomington Sanitation*,

258 N.W.2d 891, 893-94 (Minn. 1977). *Id.* The Booths discuss each of the cited cases, arguing that in each a particular claim or claims were settled in full, while another claim or other claims were permitted to continue. (Resp. Br. at 11-13).

Regardless of whether the Booths' construction of *Miller*, *Shantz*, and *Naig* is correct, their argument ignores what happened in yet another case: *Drake* itself. Ione Drake was injured when her car was rear-ended by a car driven by James Ryan and owned by his brother Richard Ryan. *Drake*, 514 N.W.2d at 786.

Dairyland Mutual Insurance Company insured Richard Ryan's car under a policy with liability limits of \$30,000 per injury. James Ryan was an additional insured. James Ryan was also insured under his parents' State Farm Mutual Automobile Insurance Company policy. The State Farm policy had liability limits of \$50,000 per injury and provided excess coverage when its insured was operating a non-owned automobile. The Dairyland policy was primary.

Id. Ms. Drake and her husband commenced negligence action against the Ryans. *Id.* Prior to trial the Drakes entered into a release with the Ryans whereby they agreed to accept \$20,000 from the Dairyland policy. *Id.* In return, the Drakes released Dairyland and agreed that the \$20,000 would operate as "partial satisfaction" of the Drakes' claims against the Ryans to the extent of primary coverage under the Dairyland policy, and for amounts above the excess coverage provided in the State Farm policy. *Id.* At the same time, the agreement preserved the Drakes' claims to the extent of the coverage under the State Farm policy. *Id.*

After entering into the release, the Drakes stipulated to the dismissal of Richard Ryan, who had no coverage under the State Farm policy, from the suit. *Id.* at 787. At that point only one claim, negligence, remained. It was asserted against just one

defendant, James Ryan. James Ryan moved for summary judgment on the grounds that he was no longer a proper party because he had been completely released of personal liability. *Id.* The question of whether James Ryan should remain party to the suit was certified to the Court of Appeals, and eventually considered by this Court. *Id.*

This Court determined that James Ryan was not completely released from the case, specifically accepting that the Drakes' claims were reserved "up to the limits of the State Farm policy." *Id.* at 788. In an argument remarkably similar to that asserted by the Booths here, James Ryan asserted that he should be dismissed from the case because "it is not legally possible to 'dissect' his liability." *Id.* But this Court specifically applied the reasoning formerly used in *Miller*, *Shantz*, and *Naig* although the Drakes' case involved only *one* claim against *one* defendant, and held that a defendant's liability could be dissected. *Id.*

Therefore, contrary to the Booths argument, Minnesota courts do permit the dissection of a single defendant's liability for an individual claim. Specifically, they do so when an injured party enters into a *Drake v. Ryan* release with a tortfeasor. As such, a *Drake v. Ryan* release does indeed cause the *partial release* of the tortfeasor. This Court implicitly recognized as much at the close of its opinion in *Drake* when it stated:

We hold that the defendant is not entitled to dismissal of the claims against him in a negligence action *where the plaintiffs have fully released the defendant and his primary liability insurer up to the limits of the primary liability coverage but have expressly retained the right to pursue their claims against the defendant for additional damages up to the limits of the defendant's excess liability coverage.*

Drake, 514 N.W.2d at 790 (emphasis added).

Indeed, the Release in this case operates within that construction of *Drake*. It was made in “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.” (AA 81). 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.” (*Id.*)

There can be no question that this language, under the Court’s decision in *Drake*, is a partial release of Gades. There is also no question that if excess coverage existed for Gades under the Auto-Owners Policy, the Release would have partially preserved the claim against Gades to the extent of that coverage. The *Drake* decision already decided each of those issues. The novel issue for the Court is whether the fact that excess coverage does not exist under the Auto-Owners Policy results in the complete release of Gades from liability. For the reasons put forth in its initial Brief, the City of Cyrus submits that it does. (*See App. Br. at 16-23*).

Booths seem to be suggesting that their “negligence claim” against Gades cannot be divided into parts, as if to say that “whole claim” either exists or it does not. However, this simply is not the case. There is no logical flaw in saying that a claim is released to the extent that it is not covered under a specific insurance policy. While that “dissection” does not dissect the claim in terms of its legal elements, it nonetheless

dissects the claim by an objective and definable standard. Just as under a *Naig* settlement, the “whole” negligence claim of the injured party is released, except to the extent of the subrogation interests of the Workers Compensation carrier, there is and should be no prohibition against allowing parties to release “whole” tort claims to the extent not covered under an identified insurance policy.

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

The Booths argue that even if Gades has been fully released pursuant to the Release in this matter, the City of Cyrus is not entitled to summary judgment as a vicariously liable party. The Booths argue that no “circuitry of obligation” exists in this case because have not agreed to indemnify Gades in the Release, and that under Minn. Stat. § 466.07 and Minn. Stat. § 471.86, the City has no right to indemnification from Gades. (Resp. Br. at 16-23). On that basis they claim that dismissal of the vicariously liable party is not warranted under Minnesota law.

The Booths correctly point out that *Pierringer* agreements between injured parties and agent/tortfeasors include agreements to indemnify those tortfeasors, and they create a circuitry of obligation between the injured party, the agent, and the agent’s principal. See *Reedon of Faribault, Inc. v. Fid. & Guar. Ins. Underwriters, Inc.*, 418 N.W.2d 488, 491 (Minn. 1988); *Pischke v. Kellen*, 384 N.W.2d 201, 205 (Minn. App. 1986). Based on this circuitry, the principal is also released to the extent of the tortfeasor’s liability. *Id.*

However, the Booths fail to recognize that such a circuitry has never been held *necessary* in order for the release of an agent to operate as a release of the principal. It is

simply one reason why Minnesota Courts have concluded that release of an agent pursuant to *Pierringer* requires release of the principal. But long before this Court decided *Frey v. Snelgrove*, 269 N.W.2d 918, 921 (Minn. 1978), where it approved of the use of *Pierringer* releases in Minnesota, it had already established that the release of an employee also released the employer for that employee's torts committed within the scope of employment. *Serr v. Biwabik Concrete Aggregate Co.*, 202 Minn. 165, 177, 278 N.W. 355, 362 (Minn. 1938). This rule had nothing to do with the employer's right to indemnification against the employee. It was wholly based on the fact that the employer's liability is "derivative only." *Id.* *Serr* remains good law, and should be followed in this case.

Just as the Booths place undue importance on the circuitry of obligation analysis in *Pischke*, they also focus incorrectly on the circuitry of obligation analysis in *Rehm v. Lutheran Soc. Servs. of Minn., Inc.*, No. C2-97-2227, 1998 WL 268099 (Minn. App. 1999). Nothing in the *Rehm* decision suggests that the employee's supposed indemnity obligations (or lack thereof) were in any way critical to the conclusion of the Court of Appeals. The Court addressed that issue before considering vicarious liability, and used it to illustrate one reason why a contrary ruling would undermine the purpose and intent behind the *Drake v. Ryan* agreement entered into therein.

After giving due consideration to the circuitry of obligation issue, the Court moved on and held:

By settling all claims [against the employee] except those recoverable from the proceeds of the [employer's excess insurance] policy, appellant retained the right to pursue only claims recoverable from those proceeds. There are

no such claims. The district court did not err in . . . holding that appellant has no right to pursue a vicarious liability claim against [the employer].

Id. *3. This final statement of the Court of Appeals clearly establishes an independent ground for its decision: complete release of the employee in that case resulted in the complete release of the employer. As the Court stated in a footnote, “the fact that a *Pierringer* release eliminates vicarious liability does not mean that every non-*Pierringer* release preserves vicarious liability.” *Id.* at *2, n.5. Therefore, while an obligation by Gades to indemnify the City of Cyrus would put this matter on all fours with the *Rehm* decision, the lack of such an obligation does not render *Rehm* inapplicable.

As such, the circuitry of obligation analysis undertaken by courts considering *Pierringer* releases is irrelevant to the determination of whether the release of Gades operates as a release of the City of Cyrus. The analysis in this case is therefore quite simple. The Booths’ claims against the City of Cyrus are only based upon the City’s vicarious liability for the alleged tort committed by Gades. Under the Release, all of Mr. Gades’ liability was clearly extinguished, except to the extent of coverage for him under the Auto-Owners Policy. Because Gades is not covered under the Auto-Owners Policy, the Release completely extinguished his liability. As such, the vicarious liability of the City of Cyrus is also extinguished.

IV. THE BOOTHS FAILED TO PRESERVE THE CITY OF CYRUS AS A “SOURCE OF RECOVERY”

At the close of their Brief, the Booths attempt to avoid the consequences of their full release of Gades and resultant release of the City of Cyrus. Although they maintain that the Release was meant to partially satisfy a future judgment against Gades, while

preserving the Auto-Owners policy as a source of recovery, they also state that they are “not moving forward to attempt to recover from Auto-Owners for the judgment against Ryan Gades; [they are] moving forward to obtain a judgment against the City [of Cyrus].” (Resp. Br. at 29).

However, the Booths claim in this regard is belied by the fact that they named Gades as a defendant in this lawsuit. (AA 1, 2). They would not have done so unless they hoped to obtain a judgment against him. They could then collect that judgment from one of two sources: the Auto-Owners Policy, which was specifically “preserved” in the Release; or the City of Cyrus whose only exposure is based upon its vicarious liability.

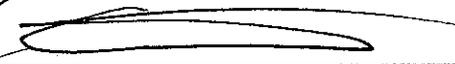
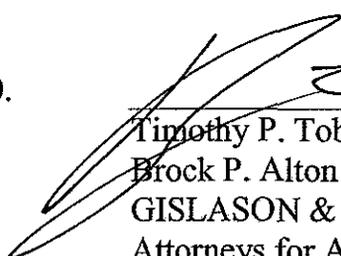
But under the Release the Booths waived any claims against Gades except to the extent those claims are covered under the Auto-Owners Policy. They did not reserve any other claims or any other part of their claim against Gades. Thus, the Booths completely released their right to collect on Gades’s liability from any source other than the Auto-Owners Policy. The City of Cyrus is simply another one of those sources. The Release therefore extinguished the possibility of recovering based on Gades’s negligence from the City of Cyrus. As such, the district court correctly granted the City of Cyrus’s motion for summary judgment.

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. It also 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 29th day of January, 2010.



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