

*State Of Minnesota*  
*In Supreme Court*  
No. A08-2054

OFFICE OF  
APPELLATE COURTS

SEP -1 2010

FILED

Thomas Booth and Angela Booth,

*Petitioners,*

vs.

City of Cyrus Fire Department

*Respondent,*

and

Ryan Gades,

*Defendant.*

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**BOOTH'S' PETITION FOR REHEARING**

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TO: THE SUPREME COURT OF THE STATE OF MINNESOTA

Petitioners Thomas and Angela Booth, pursuant to Minn. R. Civ. App. Proc. 140, request the Supreme Court GRANT REHEARING of the decision of this court in Case No. A08-2054, issued August 19, 2010.

### ARGUMENT

In an attempt to isolate and clarify the parties' underlying "intent," this Court has overlooked an inconsistent intent clearly expressed throughout the parties' written contract. This Court has concluded that pursuant to Paragraph 7 of the *Drake v. Ryan* settlement, the parties intended to release any and all claims relating to the underlying collision. Yet throughout the remainder of the parties' agreement, the intent was clearly expressed that certain claims and rights were to be retained by Petitioner. With all due respect to the Supreme Court, the decision issued in this matter has misconceived a material question, i.e., the legal impact of the parties' agreement, and in so doing, has failed to consider a material fact, i.e., the parties' intent.

The Court's decision rests on its conclusion on pages 10 and 11 that Paragraph 7 of the settlement Agreement "clearly and unambiguously" expressed the intent of the parties to release all claims of any kind that arose from the accident with Gades. This is not, however, what Paragraph 7 states. The parties agreed that:

*In the event* the courts of the State of Minnesota do not give effect to this Agreement pursuant with the holdings in [*Tiegen*], *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.

(*Emphasis added*). Thus, the release language of Paragraph 7 is activated only if the courts do not treat the entire agreement as a *Drake*-type agreement.

The Court agrees that a *Drake*-type agreement was the intent of the parties. The Court does not overturn the validity of *Drake*-type agreements in Minnesota. But-for the Court's

conclusion that Paragraph 7 releases all claims, the Agreement would be one to which the court would give effect to pursuant to the holding in *Drake* and Paragraph 7 would never come into play. Thus, the release in Paragraph 7 cannot serve to defeat the Agreement's being considered a *Drake*-type agreement unless the agreement fails to be enforced pursuant to *Drake* on the basis of terms beyond those contained in Paragraph 7.

Throughout the document, with the exception of Paragraph 7, the clearly stated intent of the parties was to allow Gades and Progressive to limit the extent of their liability and to limit the source of recovery to those outside of the settling parties — as is always the case in a *Drake*-type agreement. With the exception of Paragraph 7, which only comes into play if the agreement is not enforced as a *Drake v. Ryan*, there is no stated intent to release any party. There is, instead, a stated intent to release the underlying liability carrier after it has paid its policy limit and a stated intent to limit the source of recovery as it relates to Ryan Gades.

At Paragraph 2, the parties agree to accept \$50,000 as partial satisfaction “of all claims against Ryan Gades in excess of the limits of the excess automobile insurance policy issued by Auto Owners” i.e. \$300,000. This language does not say Auto Owners is the only source of this \$300,000, just that any award in excess of the \$300,000 will not be pursued against Ryan Gades personally. Similarly, at Paragraph 4, Booths “reserve” all claims against Gades up to \$300,000 and further agree that they will only collect a claim *against Gades* from the Auto Owners policy. Finally, at Paragraph 8, the parties specifically state the agreement is “not a *Perringer* release, a *Bartels* Release, or a general release.” (*Emphasis added*). Because all terms of a contract must be given effect, and these terms are irreconcilable with a total release, the document is either something less than a total release of any and all claims, or it is ambiguous.

If the document is ambiguous, then the Court may look beyond the language of the parties' agreement and may consider extrinsic evidence. In this situation, there is clear extrinsic

evidence of the parties' intent in the form of an affidavit submitted on the record by the City of Cyrus. The affidavit reflects the intention of Claims Representative Jennifer Meier, who negotiated the settlement agreement on behalf of the Cyrus Employee, Ryan Gades. "A reargument should be granted where, as here, an important fact controlling decision has been entirely overlooked." *Briggs v. Kennedy Mayonnaise Products*, 209 Minn. 312, 320-321, 297 N.W. 342, 347 (Minn. 1941).

The assertion that the intent of the parties' agreement was to release all claims is rebutted by Ms. Meier. As Ms Meier explains:

I understood the Release to be a settlement of the [Appellant's] claims against Mr. Gades to the extent that he was entitled to coverage from Progressive Insurance Company. . . . I agreed to enter into the *Drake v. Ryan* Satisfaction and Release in order to fully extinguish the claim against our insured, Mr. Gades, *to the extent* that he was entitled to insurance coverage under his policy with Progressive Insurance as well as to *extinguish any personal financial exposure* of Mr. Gades.

*See* Appellant's Addendum 110; *also* attached hereto. (*Emphasis added*). The intent of the underlying agreement was clearly to limit Mr. Gades' personal exposure; no intent has been shown to release any and all claims against Mr. Gades or to release any claims against other parties. Indeed, this reading is more consistent with the actual language of the contract than the interpretation applied by this Court.

The intent of the parties at the time of entering into the Settlement Agreement was clearly to preserve all claims, and to further agree that if successful on those claims, Progressive and Gades would not pay more than \$50,000. This meant that any judgment against any party in excess of \$300,000 would be satisfied only by a party not party to the settlement agreement—at the time such party was assumed to be Auto-Owners. Nothing in the agreement, however, limited Booths' from collecting from a party other than Auto Owners if the judgment was against a party other than Gades.

For the Court to state that Paragraph 7, only intended to be effectual if the agreement was otherwise defeated as a *Drake*-type agreement, in itself defeats the operation of the agreement as a *Drake*-type agreement runs contrary to the clear and unambiguous intent of the parties as embodied in the agreement. Clearly the agreement is a valid *Drake*-type agreement and Gades is not released pursuant to Paragraph 7. Because Gades is not released, Booths can pursue claims against the vicariously liable party — the City — and, to the extent the award is in excess of \$300,000, it will not be pursued against Gades individually as per Paragraph 2. Further, to the extent that an award is less than \$300,000 and against Gades individually, it can only be collected against Auto Owners but nothing limits the ability of Booths' to obtain a judgment and collect against the City.

The Court has erroneously allowed Paragraph 7 to defeat the operation of the agreement as a *Drake*-type agreement and then stated that since the agreement is not a *Drake* Agreement paragraph 7's release comes into effect. The effect is to sow uncertainty into the settlement of cases in Minnesota pursuant to a *Drake*-type agreement and thus promote litigation rather than settlement of these types of cases.

Finally, this court asserts that the intent of a *Drake v. Ryan* settlement is to "allow an injured party to settle with the tortfeasor but preserve the ability to continue the action against an excess liability insurer." See Supreme Court Opinion at page 10. But such an action is a fallacy in Minnesota: Minnesota does not recognize a direct action against an insurer. See *Anderson v. St. Paul Fire and Marine Ins. Co.*, 414 N.W.2d 575 (Minn. App. 1987). Without the ability to retain the action against the settling party, the *Drake v. Ryan* would have no purpose. In this regard, a *Drake v. Ryan* must be distinguished from the type of settlement that creates in a party the right to enter a judgment and enforce it without first obtaining a verdict against the settling party. Such a settlement exists in the State of Minnesota, recognized as a *Miller v. Shugart*

settlement. This court has never held, and indeed the legal principals recognized in Minnesota reject, an interpretation of the *Drake v Ryan* as a similar vehicle for pursuing a claim against an insurance company. Rather, the party to a *Drake v. Ryan* settlement does not preserve the ability the bring an action against *an excess insurer*, instead, he necessarily preserves the ability to bring the original action against the underlying tortfeasor, and with judgement in hand, then acquires legal standing to bring an action against any liability insurer that may have an obligation to indemnify. This Court's misapplication of the controlling principals behind the *Drake v. Ryan* lead to a result that is inconsistent with existing precedent and will create confusion and increase litigation going forward.

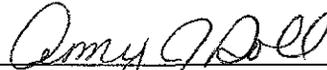
For the reasons expressed herein, Petitioners hereby request this Court GRANT REHEARING of this matter.

Respectfully submitted,

FLUEGEL, ANDERSON, MCLAUGHLIN,  
& BRUTLAG, CHARTERED

Dated

8/30/2010



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