

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

December 19, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0943

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

WISCONSIN PATIENTS COMPENSATION
FUND, WISCONSIN HEALTH CARE
LIABILITY INSURANCE PLAN and
MT. SINAI MEDICAL CENTER,

Plaintiffs-Respondents,

v.

CNA INSURANCE COMPANY and
AMERICAN CASUALTY COMPANY,

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL J. SKWIERAWSKI, Judge. *Affirmed.*

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. CNA Insurance Company and American Casualty Company appeal from a judgment denying their summary judgment motion and holding that they were subject to a claim of contribution and/or

indemnification by the Wisconsin Patients Compensation Fund (“the Fund”), Wisconsin Health Care Liability Insurance Plan (“the Plan”) and Mt. Sinai Medical Center. The appellants argue that the release executed by the plaintiffs in the underlying medical malpractice lawsuit bars the respondents' contribution/indemnification suit. We disagree and affirm.

In the underlying lawsuit, Bryan Straub and his parents sued Dr. Morris Sable, The Professionals Insurance Co., and the respondents for injuries sustained by Bryan Straub during and immediately after his birth. The complaint alleged that Dr. Sable and “agents, employees and servants” of Mt. Sinai, who included the appellants' insureds, nurses Cindy Gruchalski and Diane Zavadil, “ignored” signs of fetal distress during the intrapartum period and failed to render adequate neonatal care.

Attorney Wayne Van Ert of the law firm of Otjen, Van Ert, Stangle, Leib & Weir, S.C., was hired to represent Mt. Sinai and its employees. Gruchalski and Zavadil were also insured by American Casualty under separate professional liability insurance policies. American Casualty retained separate law firms to represent its interests in the underlying medical malpractice action.

Instead of the Straub action proceeding to trial, a settlement was reached where the Plan contributed \$200,000 and the Fund paid \$2,700,000. Prior to execution of the release, Attorney Van Ert sought to have American Casualty and CNA insurance contribute to the settlement. American Casualty refused to contribute toward the settlement and demanded that the matter be settled without subsequent contribution/indemnification claims against Gruchalski, Zavadil, or American Casualty. The respondents settled the matter with the Straubs without American Casualty and obtained a release of all of the Straubs' claims. The release provided in part:

For the sole consideration of the sum of Two Million Nine Hundred Thousand and no/100 (\$2,900,000.00) dollars paid to the undersigned [Robert H. Straub, Ione Straub, and Randall E. Reinhardt, Guardian ad Litem for Brian Straub], the receipt of which is hereby acknowledged, Brian Straub, by his Guardian

ad Litem, Randall E. Reinhardt, Robert H. Straub, and Ione Straub hereby release and forever discharge the defendants, Mt. Sinai Medical Center, Sinai Samaritan Medical Center, Aurora Health Care, Morris Sable, M.D., Wisconsin Health Care Liability Insurance Plan, The Professionals Insurance Company of Ohio, and Wisconsin Patients Compensation Fund, *their respective agents, servants, and employees*, from any and all claims arising out of alleged negligent acts or omissions occurring prior, during and subsequent to the birth of Brian Straub ...

The undersigned further acknowledge and agree that the term "claims" includes demands, actions and claims and causes of action and also includes all claims of which the undersigned now has/have or hereafter may have arising out of or in consequence of or on account of said incident....

The undersigned further acknowledges and agree it is the intention of the parties to this Release, that the Release applies to all claims arising out of the incident.

(Capitalization and bold in original omitted; emphasis added.)

Subsequent efforts to persuade American Casualty to contribute to the settlement were unsuccessful and the Fund eventually sued American Casualty. American Casualty moved for summary judgment arguing that the release executed by the Straubs, which released nurses Gruchalski and Zavadil as "agents, servants, and employees" of Mt. Sinai, also operated to release American Casualty. The trial court denied American Casualty's summary judgment motion.

Prior to trial of the Fund's action against American Casualty, the Fund and American Casualty entered into a high/low settlement agreement. The high/low settlement agreement provided that American Casualty would pay the Fund \$200,000 if American Casualty successfully appealed from the trial

court's denial of American Casualty's summary judgment motion relating to the effect of the Straubs' release. The agreement further provided that if American Casualty was unsuccessful on appeal, then American Casualty would pay the respondents an additional \$300,000 plus \$75,000 in interest on the offer of settlement. After execution of the high/low settlement, American Casualty moved the trial court for an *in camera* inspection of the files of the Otjen law firm "to determine the propriety of the attorney/client privilege and work product privilege asserted with respect to the documents related to the release in the *Straub* action." American Casualty also sought production of documents and to supplement the trial court record. American Casualty further requested that "[u]pon production of the documents, the court is asked to reconsider the order denying summary judgment to American Casualty Company. The trial court denied all of American Casualty's motions. American Casualty appeals.

Section 802.08, STATS., governs summary judgment. The methodology for reviewing summary judgment motions has often been stated, *see, e.g., Green Spring Farms v. Kersten*, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987), and need not be repeated. Our review is *de novo*. *Id.*

"A release is a contract and is construed as such." *St. Clare Hospital of Monroe, Wis. v. Schmidt, Garden, Erickson, Inc.*, 148 Wis.2d 750, 755, 437 N.W.2d 228, 230 (Ct. App. 1989). Interpretation and construction of a contract is a question of law that we review *de novo*. *See Bank of Barron v. Gleseke*, 169 Wis.2d 437, 454-455, 485 N.W.2d 426, 432 (Ct. App. 1992). "Where the terms of a contract are plain and unambiguous, we construe the contract as it stands." *Id.* at 455, 485 N.W.2d at 432. Whether a contract is unambiguous is a question of law, which we independently review. *Id.*

This release is, on its face, plain and unambiguous. The release clearly releases only those claims the Straubs may have had. The Straubs did not and could not extinguish claims that did not belong to them. Further, because a principal can recover damages from its agent as a result of the agent's negligence, *Dombeck v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 24 Wis.2d 420, 437, 129 N.W.2d 185, 194 (1964), and because a claim for indemnification is not barred by a release between the injured party and the party seeking indemnification, *see Perkins v. Worzala*, 31 Wis.2d 634, 638-639, 143 N.W.2d 516, 518-519 (1966), the release did not bar the respondents' claim against the appellants.

Additionally, the appellants argue that Gruchalski and Zavadil were wrongfully deprived of materials from the file of Attorney Van Ert that related to the release. The trial court refused to render production of any such documents and refused to conduct an *in camera* inspection of the documents to determine the validity of privilege and work-product arguments. We decline to review this issue, however, because the high/low settlement agreement only preserved the issue of the effect of the release.

By the Court. – Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.