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Master and Servant - Release - Release of a Servant Also Releases the Master from Respondeat Superior Liability

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MASTER AND SERVANT — RELEASE — RELEASE OF A SERVANT ALSO RELEASES THE MASTER FROM RESPONDEAT SUPERIOR LIABILITY

During the summer of 1979 Wallace and Karen Horejsi employed Brenda Anderson, an eleven-year-old girl, to care for their infant son, John.[1] On July 2 Brenda beat John Horejsi, causing severe and permanent injuries.[2] William Anton was appointed guardian ad litem and brought an action on John's behalf against Brenda Anderson, Brenda's parents, and Wallace and Karen Horejsi.[3] The complaint alleged separate counts of negligence against Brenda Anderson and John's parents, and respondeat superior liability against both Brenda and John's parents.[4]

William Anton eventually settled John's claim against Brenda Anderson and her parents.[5] The Andersons obtained a full and final release, which was approved by the court and discharged them from all further claims arising out of the incident.[6] The Horejsi's

1. Horejsi v. Anderson, 353 N.W.2d 316 (N.D. 1984). Wallace and Karen Horejsi regularly employed Brenda Anderson to care for John, who was less than a year old, while they were at work. *Id.* at 317.

2. *Id.*

3. *Id.* William Anton is John Horejsi's grandfather. *Id.*

4. *Id.*

5. *Id.* The claim against Brenda Anderson and her parents was settled for $25,000.00. Appendix for Appellant at 15, Horejsi v. Anderson, 353 N.W.2d 316 (N.D. 1984).

6. Appendix for Appellant at 15, Horejsi v. Anderson, 353 N.W.2d 316 (N.D. 1984). The release discharging Brenda Anderson and her parents contained, in pertinent part, the following provision:

> This release is intended to release only the parties specifically named, and the undersigned expressly reserves any and all other claims, action, causes of action, rights and demands of whatever kind or nature not hereby released which he may have against any and all other persons, partnerships, associations, corporations, or other legal entities not hereinbefore named or released arising out of said accident or for injuries or damages resulting thereform [sic], it being intended and understood that this release shall not release or discharge any other persons, partnerships, associations, corporations or other legal entities except those hereinbefore named and released; provided, however, that in accepting the aforementioned sum of money the

then moved for summary judgment on the respondeat superior claim, asserting that the release of their employee also released them as employers.[7] The district court granted partial summary judgment.[8] The question on appeal was whether the release of a servant also released the master from respondeat superior liability.[9] The North Dakota Supreme Court *held* that the release of a servant also releases the master from vicarious liability.[10] *Horejsi v. Anderson,* 353 N.W.2d 316 (N.D. 1984).

Although a multitude of reasons have been offered to justify the vicarious liability of a master,[11] the modern justification for it is based upon a deliberate allocation of risk.[12] The losses caused by the torts of employees are placed upon the enterprise itself as a required cost of doing business.[13] Despite the occasional

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> undersigned hereby releases and discharges that fraction, portion or percentage of the total cause of action or claims for damages which the undersigned now has or may hereafter possess against any and all parties responsible in any way for his damages as may be determined by trial or other disposition to the sum of the fractions, portions or percentages of causal negligence for which the above-named parties herein and hereby released may be found to be liable to the undersigned as a consequence of the above-mentioned accident, it being intended and understood that the entire claim and all claims of the undersigned arising out of said accident against any other persons, partnerships, associations, corporations or other legal entities shall be reduced to the extent of the aforementioned amount paid to the undersigned as hereinbefore mentioned and provided.

Id. at 15-16.

7. *Horejsi,* 353 N.W.2d at 317.

8. *Id.* John's negligence claim against his parents, based upon their hiring and retaining Brenda, had not yet been tried when this appeal was heard. *Id.* at 317 n.1. The district court issued an order to enter final judgment on the respondent superior count pursuant to Rule 54(b) of the North Dakota Rules of Civil Procedure. *Id.*

9. *Id.* at 317.

10. *Id.* at 318, 320.

11. W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 69 (W. Keeton 5th ed. 1984). Some of the reasons that have been advanced to support vicarious liability for a master are that the master has the following:

> a more or less fictitious "control" over the behavior of the servant; he has "set the whole thing in motion," and is therefore responsible for what has happened; he has selected the servant and trusted him, and so should suffer for his wrongs, rather than an innocent stranger who has had no opportunity to protect himself; it is a great concession that any man should be permitted to employ another at all, and there should be a corresponding responsibility as the price to be paid for it — or, more frankly and cynically, "In hard fact, the reason for the employers' liability is the damages are taken from a deep pocket."

Id. (footnote omitted).

12. *Id.* The doctrine of vicarious liability of the employer for the torts of his employees "rests upon the sound principle that, if an employer expects to derive certain advantages from the acts performed by others for him, he, as well as the careless employee, should bear the financial responsibility for injuries occurring to innocent third parties as a result of the negligent performance of such acts." Laurie v. Mueller, 248 Minn. 1, 4, 78 N.W.2d 434, 437 (1956) (footnote omitted).

13. W. PROSSER, *supra* note 11, § 69. Losses caused by the tort of an employee are placed upon the employer because he has engaged in an enterprise that, on the basis of past experience, involves harm to others through the torts of employees. *Id.* The employer has sought to profit through the enterprise and it is just that he, rather than an innocent injured third party, should bear the losses. *Id.* The employer is better able to absorb and distribute these losses to the public through raised prices, higher rates, or liability insurance. *Id.* An employer who is held strictly liable is under the greatest incentive to exercise care in the selection, instruction, and supervision of his servants. *Id.*

condemnation of the doctrine of respondeat superior, it is usually justified as a cost of doing business, and has gradually extended the employer's liability.[14]

The question of whether the release of a servant also releases the master from respondeat superior liability has frequently been litigated in other jurisidctions; it is, however, one of first impression in North Dakota.[15] The common law rule in a respondeat superior case is that a valid release of either of the parties releases the other.[16] This rule appears to have been based either upon the theory that the recoverable tort damages are entire and not severable, or upon the theory that an injured party is entitled to only one compensation for his injury.[17] In cases in which the injured person expressly reserved his rights against another tortfeasor, some authorities gave the reservation no effect,[18] while other authorities treated the release and reservation as a covenant not to sue.[19]

Certain modern developments have ameliorated the rigidity of the common law rule and the harshness of its application.[20] The

14. *Id.*

15. *Horejsi*, 353 N.W.2d at 317.

16. *See* Caldwell v. Montgomery Ward & Co., 271 So. 2d 363, 364 (La. Ct. App. 1972) (release of a carpet salesman, who was involved in a car accident, released employer despite reservation of right against employer); Drinkard v. William J. Pulte, Inc., 48 Mich. App. 150, ____, 210 N.W.2d 137, 143 (1973) ("a valid release of either the master or servant from liability for tort operates to release the other where liability is based upon the doctrine of respondeant superior. . . .").

17. *See* Sade v. Hemstrom, 205 Kan. 514, 471 P.2d 340 (1970). In *Sade* an employee of an engineering company was injured while repairing a pipeline owned by Northern Natural Gas Company (Northern). *Id.* at ____, 471 P.2d at 341. After settling, the employee released Northern from future claims, but reserved the right against the engineering company. *Id.* at ____, 471 P.2d at 343. The Kansas Supreme Court determined that the settlement and release of Northern also operated to release its servant, the engineering company. *Id.* at ____, 471 P.2d at 349. The court's decision was "[based on the simple reasoning that an injured person can have but one satisfaction for the same wrong. . . ." *Id.* at ____, 471 P.2d at 347.

18. *See* Jacobson v. Parrill, 186 Kan. 467, ____, 351 P.2d 194, 202 (1960) (settlement and release of the driver of a car also released the owner of a car, despite plaintiff's reservation to sue owner); Erickson v. Pearson, 211 Neb. 466 ____, 319 N.W.2d 76, 83 (1982) (insured's release of insurance company also released insurance agent and agent's employee).

19. *See* Craven v. Lawson, 534 S.W.2d 653, 656 (Tenn. 1976) (a covenant not to sue the driver of a car extinguished the derivative liability of the car's owner); Comment, Torts - Vicarious Liability - Covenant Not to Sue Servant or Agent as Affecting Liability of Master or Principal, 44 Tenn. L. Rev. 188 (1976).

Section 285 of the second Restatement of Contracts provides:

> (1) A contract not to sue is a contract under which the obligee of a duty promises never to sue the obligor or a third person to enforce the duty or not to do so for a limited time.
> (2) Except as stated in Subsection (3), a contract never to sue discharges the duty and a contract not to sue for a limited time bars an action to enforce the duty during that time.
> (3) A contract not to sue one co-obligor bars levy of execution on the property of the promisee during the agreed time but does not bar an action or the recovery of judgment against any co-obligor.

RESTATEMENT (SECOND) OF CONTRACTS § 285 (1981).

20. *See* Van Cleave v. Gamboni Constr. Co., 99 Nev. 502, ____, 665 P.2d 250, 252 (covenant not to sue one tortfeasor "does not release other joint tortfeasors even if it does not specifically reserve rights against them"); Stanfield v. Laccoarce, 284 Or. 651, ____, 588 P.2d 1271, 1278

Restatement of Torts rejects the early common law rule and maintains that a valid release of one tortfeasor should not discharge another party who is liable for the same harm unless the parties to the release expressly agree that the release will discharge others.[21] In addition to the Restatement, the National Conference of Commissioners on Uniform State Laws, in 1939 and 1955, approved the Uniform Contribution Among Tortfeasors Act.[22]

(plaintiff's covenant not to execute on any judgment against employee/son did not bar a suit against employer/parents).

21. RESTATEMENT (SECOND) OF TORTS § 885 (1977). Section 885 of the Restatement provides as follows:

> (1) A valid release of one tortfeasor from liability for a harm, given by the injured person, does not discharge others liable for the same harm, unless it is agreed that it will discharge them.
> (2) A covenant not to sue one tortfeasor or not to proceed further against him does not discharge any other tortfeasor liable for the same harm.
> (3) A payment by any person made in compensation of a claim for a harm for which others are liable as tortfeasors diminishes the claim against the tortfeasors, at least to the extent of the payment made, whether or not the person making the payment is liable to the injured person and whether or not it is so agreed at the time of payment or the payment is made before or after judgment.

Id.

22. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, 12 U.L.A. 57 historical note (1955). Annot., 24 A.L.R.4th 547, 551 (1983). For a general discussion of the Uniform Contribution Among Tortfeasors Act, see Annot., 34 A.L.R.2d 1107, 1115 (1954). North Dakota's version of the Uniform Contribution Among Tortfeasors Act is codified at section 32-38-01 of the North Dakota Century Code and provides in pertinent part as follows:

> 1. Except as otherwise provided in this chapter, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.
> 2. The right of contribution exists only in favor of a tort-feasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tort-feasor is compelled to make contribution beyond his own pro rata share of the entire liability.
> 3. There is no right of contribution in favor of any tort-feasor who has intentionally (willfully or wantonly) caused or contributed to the injury or wrongful death.
> 4. A tort-feasor who enters into a settlement with a claimant is not entitled to recover contribution from another tort-feasor whose liability for the injury or wrongful death is not extinquished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.
> . . . .

N.D. CENT. CODE § 32-38-01 (1976).

Section 32-38-02 of the North Dakota Century Code, regarding pro rata shares, provides as folllows:

> In determining the pro rata shares of tort-feasors in the entire liability:
> 1. Their relative degrees of fault shall not be considered.
> 2. If equity requires the collective liability of some as a group shall constitute a single share.
> 3. Principles of equity applicable to contribution generally shall apply.

N.D. CENT. CODE § 32-38-02 (1976).

Section 32-38-04 of the North Dakota Century Code governs the treatment of a release or convenant not to sue. Section 32-38-04 provides as follows:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same

The Act was designed to change two well-established rules of law.[23] The Act first sought to change the rule that the discharge of one joint tortfeasor, either by satisfaction of a judgment or a release, discharged all other joint tortfeasors.[24] The Act also sought to change the second rule that there is no contribution among joint tortfeasors.[25]

In 1957 North Dakota adopted the 1955 revised version of the Uniform Contribution Among Tortfeasors Act, which is codified at chapter 32-38 of the North Dakota Century Code.[26] North Dakota enacted its comparative negligence statute in 1973.[27] The conflict

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wrongful death:

1. It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater.

2. It discharges the tort-feasor to whom it is given from all laibility for contribution to any other tort-feasor.

N.D. CENT. CODE. § 32-38-04 (1976).

23. Hackett v. Hyson, 72 R.I. 1132, ____, 48 A.2d 353, 355 (1946).

24. *Id.* Courts have found various purposes underlying the Uniform Contribution Among Tortfeasors Act. *See* Albert v. Dietz, 283 F. Supp. 854, 856 (D. Hawaii 1968) (created a right of contribution unknown at common law, and made the right of contribution effective in practice); Hayon v. Coca Cola Bottling Co., 375 Mass. 644, ____, 378 N.E.2d 442, 445 (1978) (achieved a more equitable contribution among those liable in tort for same injury); Rio Grande Gas Co. v. Stahmann Farms, Inc., 80 N.M. 432, ____, 457 P.2d 364, 366 (1969) (provided proportionate allocation of burden among tortfeasors).

25. *Hackett,* 72 R.I. at ____, 48 A.2d at 355. Prior to the enactment of the Uniform Contribution Among Tortfeasors Act, courts had been unwilling to provide a forum for wrongdoers. Kraft, *The North Dakota Equity for Tortfeasors Struggle — Judicial Action vs. Legislative Over-Reaction,* 56 N.D.L. REV. 67, 69 (1980). Professor Kraft stated:

> Joint tortfeasors were wrongdoers who intentionally caused injury or damage, and the judicial system was unavailable as a forum for adjudicating disputes between [sic] parties considered akin to criminals. A wronged plaintiff could proceed to judgment against any one or more of the tortfeasors of his choice, and the tortfeasor who satisfied the judgment was without recourse against his partners.

Id.

26. *See* N.D CENT. CODE § 32-38-01 (1976). See *supra* note 22 for the pertinent sections of chapter 32-38.

27. See N.D. CENT. CODE § 9-10-07 (1975). Section 9-10-07 of the North Dakota Century Code provides as follows:

> Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person recovering. The court may, and when requested by either party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of negligence attributable to each party; and the court shall then reduce the amount of such damages in proportion to the amount of negligence attributable to the person recovering. *When there are two or more persons who are jointly liable, contributions to awards shall be in proportion to the percentage of negligence attributable to each; provided, however, that each shall remain jointly and severally liable for the whole award.* Upon the request of any party, this section shall be read by the court to the jury and the attorneys representing the parties may comment to the jury regarding this section.

Id. (emphasis added).

between the contribution act and the comparative negligence statute was soon noted.[28] It was not until 1979, however, that the North Dakota Supreme Court first interpreted the two conflicting statutory enactments in *Bartels v. City of Williston.*[29]

The plaintiff in *Bartels* was a passenger who was seriously injured when a Jeep, driven by its owner, went over a cliff and landed on its roof.[30] The accident occurred on property under the control and possession of the City of Williston.[31] Bartels released the driver, Hackney, and his insurer for $50,000.00.[32] He then brought an action against the city, which brought a third-party action against the released driver.[33] The third-party defendant moved for summary judgment, seeking dismissal of the third-party complaint.[34]

In *Bartels* the United States District Court certified four questions to the North Dakota Supreme Court concerning the application of chapter 32-38 and section 9-10-07 of the North Dakota Century Code to negligence claims.[35] In resolving and answering the certified questions the North Dakota Supreme Court asserted that it would consider all the pertinent statutory provisions,[36] their source,[37] and their prior court construction.[38]

28. V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 16.7, at 262 (1974). When the 1939 Uniform Contribution Among Tortfeasors Act was revised in 1955, the legislature abandoned degree of fault as one of the factors to be considered when apportioning liability. *Id.* Instead, the legislature inserted a provision that "[the parties'] relative degrees of fault shall not be considered." *Id.* Only two of the comparative negligence states, North Dakota and Massachusetts, have adopted the 1955 version of the Uniform Act. *Id.* In North Dakota this clause appears to have been superseded, at least in part, by the provision in the comparative negligence statute that "contributions to awards shall be in proportion to the percentage of negligence attributable to each." *Id.*

29. 276 N.W.2d 113, 121 (N.D. 1979).

30. Bartels v. City of Williston, 276 N.W.2d 113, 115 (N.D. 1979).

31. *Id.* The land was being used for mining sand and gravel for Williston's use and benefit and was also leased to the city for potential use as a sanitary landfill site. *Id.*

32. *Id.* Bartels ratified the release under oath. *Id.*

33. *Id.*

34. *Id.* Hackney moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. *Id.*

35. *Id.* With regard to the effect of a release, the following question was presented to the court:

> In an action for negligence arising under North Dakota Century Code § 9-10-07, does a release given in good faith to one of two or more persons liable in tort for the same injury, pursuant to N.D.C.C. Ch. 32-38, discharge the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor?

Id.

36. *Id.* For the relevant portions of North Dakota Century Code §§ 32-38-01, 32-38-02, and 32-38-04, see *supra* note 21. For the text of § 9-10-07 of the North Dakota Century Code, see *supra* note 27.

37. 276 N.W.2d at 115. The court in *Bartels* noted that the joint tort-feasor contribution act was derived from the Uniform Contribution Among Tort-Feasor Act as devised by the Commission on Uniform State Laws. *Id.* at 116. The court noted that North Dakota's comparative negligence statute "was derived from the Minnesota comparative negligence statute enacted in 1969 which, in turn, was based upon Wisconsin's [comparative negligence] statute." *Id.* at 118 (footnote omitted). The North Dakota statute is identical to Minnesota's except for the last sentence, which was added to the North Dakota provision. *Id.*

38. *Id.* If "a statute is taken from another state and adopted without change it is taken with the construction placed upon it by the court of last resort of the state from whence it came." *Id.* (quoting

The court's examination in *Bartels* revealed that the comparative negligence act, North Dakota Century Code section 9-10-07, was enacted to eliminate the inequities of the contributory negligence act, North Dakota Century Code chapter 32-38.[39] The court noted that it had a duty to apply two canons of statutory construction:[40] construe the statute so that its goals and objectives would be met;[41] and, apply the principle that a later legislative enactment prevails over an earlier, irreconcilable provision.[42]

After analyzing section 9-10-07 of the Code, the court determined that North Dakota adopted pure comparative negligence in cases involving more than one tortfeasor when it enacted the comparative negligence act in 1975.[43] The court in *Bartels* concluded that section 9-10-07 was the later-enacted statute,[44] and thus, section 32-38-02(1) of the North Dakota Century Code had been impliedly repealed by the enactment of section 9-10-07.[45]

Following this examination the supreme court concluded as follows:

> the following language of § 32-38-04(1), NDCC, as the result of the enactment of § 9-10-07, NDCC, has been impliedly repealed: 'of any amount stipulated by the release or the covenant, or in the amount of consideration, paid for it, whichever is the greater. 'And has been substituted with the following underscored language: 'of the relative degree of fault (percentage of

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Hermanson v. Morrell, 252 N.W.2d 884, 889 (N.D. 1977)). When the legislature adopts another state's statute, a statutory construction presumption arises that the legislature also adopts the other state's judicial construction of the statute. *Id.*

The court in *Bartels* concluded that Minnesota adopted the Wisconsin statute along with the Wisconsin Supreme Court's interpretations and constructions. 276 N.W.2d at 118. The court went on to state that the North Dakota Legislature is presumed to have adopted pertinent pre-1973 Wisconsin and Minnesota case law involving comparative negligence. *Id.* at 119.

39. *Id.* at 120. The court in *Bartels* examined Minnesota and Wisconsin case law and determined that the comparative negligence act was created "to eliminate the inequities under its predecessor, the contributory negligence act, which permitted no recovery if that plaintiff was merely one percent contributorily negligent." *Id.* The court in *Bartels* interpreted North Dakota's comparative negligence act the way Minnesota and other states that have adopted the act have interpreted it. *Id.* at 121.

40. *Id.*

41. *See* N.D. CENT. CODE §§ 1-02-39 (1975) Section 1-02-39 in pertinent part provides: "If a statute is ambigious, the court, in determining the intention of the legislation, may consider . . . [t]he object sought to be obtained." *Id.*

42. *See* N.D. CENT. CODE §§ 1-02-09, 1-02-09.1, 1-02-09.2, 1-02-33 (1975 & Supp. 1985).

43. 276 N.W.2d at 121. The pure comparative negligence concept "contemplates the allocation of costs on the same percentage basis as the allocation of damages unless justice requires otherwise." *Id.*

44. *Id.*

45. *Id.*

> negligence) attributable to the released joint tort-feasors.'[46]

As a result, the North Dakota Supreme Court determined that the general release that Bartels gave to Hackney released all of Hackney's present and future liabilities, including contributions either specifically or by construction.[47] Since Hackney was a settling tortfeasor, he could not be included as a party in any further action against any of the remaining nonsettling tortfeasors.[48]

Following the judicial amendment of section 32-38-04(1) in *Bartels,* the court was asked to determine the effect of a release when the vicarious liability of the master-servant relationship was involved.[49] In *Horejsi,* the North Dakota Supreme Court noted that a majority of states which have adopted the Uniform Contribution Among Tortfeasors Act have held that a release of the servant does not release the master.[50] John Horejsi's parents, the defendants, urged the court to adopt the reasoning of the Supreme Court of Tennessee, which refused to apply the Uniform Act to the derivative or vicarious liability of masters or principals.[51]

The court in *Horejsi* agreed with the defendants that the Uniform Act applied to a master-servant relationship; as a result of the determination in *Bartels*, however, the court found that section 32-38-04(1) of the Uniform Contribution Among Tortfeasors Act

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46. *Id.* Section 32-38-04, as impliedly amended by the enactment of § 9-10-07, in pertinent part provides as follows:

> When a release or a covenant not to sue or not to enforce a judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> 1. It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of the relative degree of fault (percentage of negligence) attributable to the released joint tort-feasors.

N.D. CENT. CODE § 32-38-04 (1976).

47. 276 N.W.2d at 122. The court further concluded "that the following language in § 9-10-07, NDCC, 'provided . . . that each shall remain jointly and severally liable for the whole award' is for the benefit of the injured party and can be waived." *Id.* In *Bartels* the plaintiff waived his right to joint and several liability and discharged the third-party defendant from all liability for contribution to any other tort-feasor by executing the release. *Id.*

48. *Id.* The court noted that "Bartels' . . . recovery from the nonsettling tort-feasors is limited to the percentage of negligence attributable to the remaining nonsettling tort-feasors as may be determined by the court or jury." *Id.*

49. Horejsi v. Anderson, 353 N.W.2d 316, 317 (N.D. 1984).

50. *Id. See* Harris v. Aluminum Co. of America, 550 F. Supp. 1024, 1030 (W.D. Va. 1982) (applying Virginia law); Alaska Airlines, Inc. v. Sweat, 568 P.2d 916, 930 (Alaska 1977); Holve v. Draper, 95 Idaho 193, ____, 505 P.2d 1265, 1268-69 (1973); Smith v. Raparot, 101 R.I. 565, ____, 225 A.2d 666, 667 (1967).

51. 353 N.W.2d at 317. *See also* Craven v. Lawson, 534 S.W.2d 653 (Tenn. 1976). The court in *Craven* stated that the Uniform Act under its own terms did not apply where there was a right to indemnity. *Id.* The court reasoned that since the master had a right to indemnity from the servant, the Uniform Act's provisions regarding the effect of releases or covenants not to sue did not embrace a master whose liability was solely derivative. *Id.* at 656.

had been impliedly amended by the subsequent adoption of the comparative negligence statute.[52] Therefore, the court concluded that cases from other jurisdictions are inapposite to the situation in North Dakota.[53]

In *Horejsi* the court examined the pro rata share section of the North Dakota Century Code, which was not affected by the *Bartels* decision.[54] The court noted the Commissioners' Comment to this section, which asserts that the liability of a master for the wrong of the servant should be treated as a single share.[55] The court in *Horejsi* determined that section 32-38-04(1) requires that, when a servant is released, the claim against nonreleased tortfeasors be reduced by the percentage of negligence attributable to the released servant.[56] The servant's percentage of negligence is attributed jointly to the master and servant as a "single share" of liability.[57] Therefore, the court concluded that when the plaintiff releases the negligent servant, the plaintiff can no longer recover damages from either the master or servant.[58] The court in *Horejsi* thus held that the release of the servant also released the master from any liability based upon respondeat superior.[59]

The defendant asserted that releasing the master would discourage settlements and increase litigation, because future plaintiffs, knowing that the master's liability will be automatically discharged, will not settle with a servant.[60] While recognizing some merit to this argument, the court stated that if it were to hold that the vicarious liability of John's parents was not discharged by the release, Brenda may still be liable to them for indemnity.[61] Brenda would thus receive no protection from the settlement agreement.[62]

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52. 353 N.W.2d at 318. For the complete text of § 32-38-04(1) as impliedly amended by the enactment of § 9-10-07, see *supra* note 45.

53. 353 N.W.2d at 318.

54. *Id.* Section 32-38-02 of the North Dakota Century Code, in pertinent part, provides that "[i]n determining the pro rata shares of tort-feasors in the entire liability[,] . . . [i]f equity requires[,] the collective liability of some as a group shall constitute a single share." N.D. CENT. CODE § 32-38-02 (1976).

55. 353 N.W.2d at 318.

56. *Id.*

57. *Id.*

58. *Id.* Because the percentage of negligence attributable to the negligent conduct of the servant represents the "single share" of liability of both the master and servant, "the master is necessarily released from vicarious liabilty for the released servant's misconduct." *Id.*

59. *Id.* at 320.

60. *Id.* at 318. While the court believed there was some merit to John's argument that releasing the master would discourage settlements and encourage litigation, it also believed that the result he advocated would be even more likely to discourage settlements. *Id.*

61. *Id.* The court in *Horejsi* noted that when a party has only derivative or vicarious liability for damage, he is entitled to indemnity. *Id.* The court also stated that § 32-38-01(6) of the North Dakota Century Code does not affect the right of a master to indemnity from his servant. *Id.* at 318-19. *See* N.D. CENT. CODE § 32-38-01 (1976).

62. 353 N.W.2d at 319.

The court did not believe that the legislature intended such a circuitous result.[63]

In its decision in *Horejsi,* the court expanded and clarified the holding of *Bartels* by construing sections 32-38-02 and 32-38-04 of the North Dakota Century Code together and applying them to a situation involving the derivative or vicarious liability of masters or principals. This decision by the court that the release of a servant releases the master from vicarios liability eliminates any doubts for future plaintiffs. Plaintiffs must now take the master's potential vicarious liability into account when negotiating a settlement with the negligent servant. Regardless of whether this decision will encourage or discourage settlements in the future, the plaintiff will no longer enter into a hasty settlement with a servant without realizing that he has received the entire single share of liability attributable jointly to the master and servant.

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63. *Id.* at 320 (citing Knutson v. Morton Foods, Inc., 603 S.W.2d 805, 812-14 (Tex. 1980) (Garwood, J., concurring)). The court explained the circuity of the action by hypothesizing that John could be required to reimburse Brenda for any amounts she had to pay John's parents as indemnity. *Id.* at 319. The court stated that the release "provides that John shall indemnify the Andersons and save, protect and hold them forever harmless from all and any claims for contribution, *indemnification,* or otherwise, made by any persons. . . ." *Id.* Thus, the court noted that if a judgment were entered against John's parents and they seek indemnification against Brenda, it may be argued that John would have to reimburse Brenda for indemnity. *Id.* The court was concerned that if John would have to reimburse Brenda, he would receive no more than the amount of the settlement he received from Brenda. *Id.*