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STATE OF MINNESOTA
IN COURT OF APPEALS

Alice Ann Staab,

Plaintiff/Respondent,

vs.

Diocese of St. Cloud,

Defendant/Appellant.

BRIEF OF RESPONDENT ALICE ANN STAAB

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RESPONDENT STAAB'S TABLE OF CONTENTS

Respondent Staab's Table of Authorities iv

Respondent Staab's Statement of Legal Issue 1

Respondent Staab's Statement of the Case and the Facts 2
Respondent Staab's Statement of the Case 2
Respondent Staab's Statement of Facts 3

Respondent Staab's Argument 5
Scope of Review/Standard of Review 5

I. The trial court correctly ruled pursuant to Minn. Stat. § 604.02, Subd. 1, that where a party and a non-party are each found 50% at fault for the plaintiff's injury, the party is 100% liable for the injury because the court lacks jurisdiction to hold the non-party liable. 5

Introduction 5

[1] Use of the word "persons" rather than "parties" in § 604.02, Subd. 1, does not, as Appellant Diocese contends, make the statute applicable to non-parties [to the lawsuit] as well as to parties [to the lawsuit] 9

[2] Substitution of the word "severally" for the word "jointly" in § 604.02, Subd. 1, does not, as Appellant Diocese contends, mean that a non-party may be "severally" liable with a party. 23

[3] "Severally liable" under § 604.02, Subd. 1, does not, as Appellant Diocese argues, mean liable for a plaintiff's "*injuries,*" but not liable for a "*judgment.*" 23

[4] § 604.02, Subd. 1, does not require, as Appellant Diocese argues, that a party found 50% or less at fault is only obligated to pay the percentage of fault allocated to it even if the remaining fault is allocated to a non-party. 27

[5] Appellant Diocese argues that amendments to § 604.02, Subd. 1, reflect the legislature's intent that a party not more than 50% at fault may not be held liable for more than her/his share of fault. 27

[6] Appellant Diocese argues that the 2003 amendment to § 604.02, Subd. 1, is consistent with the legislature's ongoing effort to further narrow the scope of joint liability. 28

[7] Appellant Diocese argues that the 2003 amendment to § 604.02, Subd. 1, was intended to remedy the "inherent unfairness" of earlier versions of the statute. 28

[8] Appellant Diocese incorrectly argues that the Minnesota Supreme Court's ruling in *Schneider v. Buckman,* 433 N.W.2d 98 (Minn. 1988), does not apply here because at that time § 604.02, Subd. 1, applied to "joint liability," and the statute as amended in 2003 applies to "several liability." 28

[9] Amicus Curiae MDLA's assertion that affirmance of the trial court's holding will produce inconsistent and arbitrary results when applied in practice overlooks the simple fact that § 604.02, Subd. 1, clearly applies only in cases where two or more persons are "severally liable." 29

II. Adoption of the interpretation of § 604.02, Subd. 1, advocated by Appellant Diocese would promote the pursuit of numerous questionable claims and crossclaims by plaintiffs concerned about being able to collect the portion of an award allocated to the fault of a non-party. 30

Respondent Staab's Conclusion 31

Respondent Staab's Certification of Brief Length 32

RESPONDENT STAAB'S APPENDIX AND ITS INDEX

Defendant/Appellant Diocese of Saint Cloud's Motion in Limine to Establish Joint Enterprise R.A.1
Defendant/Appellant Diocese's Memorandum of Law in Support of Motion in Limine to Establish Joint Enterprise R.A.2

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).

RESPONDENT STAAB'S TABLE OF AUTHORITIES

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Minn. Stat. § 604.02, Subd. 1 .....6, 9, 11, 17, 29, 30
Minn. Stat. § 604.02, Subd. 2 .....12, 16, 17-20, 22, 28
Minn. Stat. § 604.02, Subd. 3 17
Minn. Stat. § 645.08 (1).....9-10

Cases:

Connar v. West Shore Equipment of Milwaukee,
68 Wis.2d 42,227 N.W.2d 660 (1975) 15

Employers Mut. Casualty Co. v. Chicago St. P., M. & O. Ry. Co.,
50 N.W.2d 689 (Minn. 1951) 23, 23-24

Flaherty v. Minneapolis & St. L. Ry.,
39 Minn. 328, 40 N.W. 160 (1888) 6

Frey v. Snelgrove,
269 N.W.2d 902, (Minn. 1978) 12, 12-13, 14, 20

Hosley v. Armstrong Cork Co.,
383 N.W.2d 289, (Minn. 1986) 12, 13, 15-21, 22

Hosley v. Armstrong Cork Co.
364 N.W.2d 813, (Minn.App. 1985).....17

Hurr v. Davis,
155 Minn. 456, N.W. 943 (1923) 11

Kisch v. Skow,
305 Minn. 328, N.W.2d 732 (1975) 7

Lines v. Ryan,
272 N.W.2d 896, (Minn. 1978) 12, 13-15, 19, 20

Pierringer v. Hoger, 21 Wis.2d 182,
124 N.W.2d 106 (Wis. 1963).....12

Rowe v. Munye,
702 N.W.2d 729 (Minn. 2005) 28

Schneider v. Buchman,
433 N.W.2d 98 (Minn. 1988) 11, 12, 21-22, 28

Schneider v. Buchman
412 N.W.2d 787 (Minn.App. 1987) 21

Spitzack v. Schumacher
241 N.W.2d 641 (Minn. 1976) 23, 26

State v. Larivee, 656 N.W.2d 226 (Minn. 2003) 9

White v. Johnson
137 N.W.2d 674 (Minn. 1965) 23, 24-25, 26

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Black's Law Dictionary (6th Ed. 1990) 10

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1986 c 444 23
1986 c 455 s 85 23
1988 c 503 s 3 23
1989 c 209 art 1 s 44 23
2003 c 71 s 1 23

Restatement (Second) of Torts (1969), § 5 ..... 10, 24, 25, 26-27

Simonett, Justice John E., *Release of Joint Tortfeasors: Use of the Pierringer Release in Minnesota,* 3 Wm. Mitchell L. Rev. 1 (1977) 13

Steenson, Michael K., *Joint and Several Liability in Minnesota: the 2003 Model*, 30 Wm. Mitchell L. Rev. 845 (2004) 6-8, 9

Steenson, Michael K., *Joint and Several Liability Minnesota Style*,
15 Wm. Mitchell L. Rev. 969 (1989) 6-7

Uniform Comparative Fault Act § 2 (d) comm'r's cmt., 12 U.L.A. 123 (1996) (Reallocation) 7

Uniform Comparative Fault Act Sec. 2, comment, 12 U.L.A. 39,
43 (Supp.1985) 18-19

RESPONDENT STAAB'S STATEMENT OF THE LEGAL ISSUE

Did the trial court err in ruling pursuant to Minn. Stat. § 604.02, Subd.1, that where a party and a non-party are each found 50% at fault for the plaintiff's injury the party is 100% liable for the injury because the court lacks jurisdiction to hold the non-party liable?

> The trial court held: because the non-party cannot be held liable, the party, Appellant Diocese of St. Cloud, is liable for 100% of Respondent Ann Staab's damages.

List of most apposite cases:

Schneider v. Buchman, 433 N.W.2d 98, 103 (Minn. 1988)
Hurr v. Davis, 155 Minn. 456, 459, 193 N.W. 943, 944 (1923)
Frey v. Snelgrove, 269 N.W.2d 918 (Minn. 1978)

List of most apposite constitutional and statutory provisions:

Minn. Stat. § 604.02, Subd. 1 (2003)

RESPONDENT STAAB'S STATEMENT OF THE CASE AND THE FACTS

RESPONDENT STAAB'S STATEMENT OF THE CASE

The trial court in this case was the Stearns County District Court, Seventh Judicial District, the Honorable John H. Scherer presiding.

Respondent Alice Ann Staab initially brought this lawsuit against Holy Cross Parish to obtain compensation for injuries from a fall at the parish on April 9, 2005. Just before trial of the lawsuit began, Respondent Staab moved to amend the caption to name Appellant Diocese of St. Cloud, which owns and operates Holy Cross Parish, as the defendant instead of Holy Cross Parish. The Diocese did not object to the motion and it was granted.

Following trial a jury by its verdict found both Appellant Diocese and Richard Staab negligent and a cause of Respondent Staab's injury; and the jury assigned 50% fault to Appellant Diocese and 50% fault to Richard Staab. Richard Staab is Respondent Staab's husband and is not a party to this lawsuit. The trial court entered judgment against Appellant Diocese for the full amount of the damages found by the jury, $224,200.70, plus interest, costs and disbursements.

Appellant Diocese moved the trial court for an order amending its findings and judgment to provide that the Diocese is only liable for 50% of the damages found by the jury. The trial court denied this motion and the Diocese now appeals.

RESPONDENT STAAB'S STATEMENT OF FACTS

On April 9, 2005, Respondent Ann Staab and her husband Richard Staab attended an open house celebration in the cafeteria/gymnasium of the parochial school where their daughter teaches kindergarten, the Holy Cross Parish School. The School is part of Holy Cross Parish, and the Parish is owned and operated by Appellant Diocese of St. Cloud.

At the time of her injury Ann Staab was in a wheelchair because she has multiple sclerosis. Complaint, ¶ 2, AA-003. After attending the open house celebration, Ann and Richard Staab noticed that the doorway through which they had entered the school's cafeteria/gymnasium was crowded but there was another doorway marked as an exit with its doors propped open. As Richard Staab pushed his wife Ann's wheel chair through the open doorway the wheel chair went over an unmarked 4-5 inch drop-off. Ann fell forward out of her wheel chair and onto a concrete sidewalk. Complaint, ¶ 3, AA-003. As a result of the fall, Ann Staab fractured her leg. AA-039. Ann Staab's recuperation from her leg fracture was complicated by Ann developing three bed sores which took about 18 months to heal. AA-039.

Ann Staab's husband Richard Staab has <u>never</u> been a party to this lawsuit.

In Answer to the Complaint, Appellant Diocese did not specifically allege that Richard Staab had been negligent at the time of his wife's injury. The Diocese alleged that Respondent Ann Staab "...may have been contributorily negligent..." and the Diocese alleged that "...others over whom this answering Defendant had no control

may have been contributorily negligent ..." Answer of Defendant Holy Cross Parish, ¶ VI and ¶ VII, AA-008.

Shortly before trial Appellant Diocese moved the trial court in limine for an order holding that any causal negligence found by the jury on the part of Richard Staab would be aggregated with any causal negligence found by the jury on the part of Respondent Ann Staab. *See* Defendant's Motion in Limine to Establish Joint Enterprise, Respondent's Appendix, R.A.1. This motion was denied.

Before the case was argued and submitted to the jury, Appellant Diocese withdrew its allegation that Respondent Ann Staab had been negligent at the time of her injury and asked the trial court to submit to the jury questions of whether Richard Staab had been negligent and, if so, whether his negligence had been a cause of Ann Staab's injury. Respondent Ann Staab did not object to these requests. In closing argument counsel for Appellant Diocese told the jury that the evidence and the court's instructions warranted finding that neither Appellant Diocese nor Richard Staab was negligent at the time of Respondent Ann Staab's injury.

The jury by its verdict found both Appellant Diocese and Richard Staab causally negligent, and the jury assigned 50% as the percentage of causal negligence attributable to each. Add.-02. The trial court made Findings of Fact, Conclusions of Law, and an Order for Judgment adopting the jury's verdict as its Findings of Fact and concluding that the Appellant Diocese is liable for the damages determined by the jury, plus costs and disbursements. Add.-06 through Add.-07. Appellant Diocese moved the trial court for amended findings and that motion was denied. Add.-12 through Add.-

16. Appellant Diocese now appeals only from the trial court's refusal to hold Appellant Diocese liable for 50%, rather than 100%, of Respondent Ann Staab's damages.

RESPONDENT STAAB'S ARGUMENT

Scope of Review/Standard of Review

Respondent Staab concurs with the Standard of Review stated at page 4 of Appellant's Brief.

I. The trial court correctly ruled pursuant to Minn. Stat. § 604.02, Subd. 1, that where a party and a non-party are each found 50% at fault for the plaintiff's injury, the party is 100% liable for the injury because the court lacks jurisdiction to hold the non-party liable.

INTRODUCTION

Appellant Diocese argues that the trial court should have held that under Minn. Stat. § 604.02, Subd. 1, as amended in 2003, Appellant is liable for only 50% of the jury's damage award to Respondent Ann Staab. Specifically, Appellant argues:

> [1] Because § 604.02, Subd. 1, uses the term "persons," rather than "parties," the statute applies to non-parties [to the lawsuit] as well as to parties [to the lawsuit]
>
> [2] Substitution of the word "severally," which means "separately," for the word "jointly" in § 604.02, Subd. 1, means that a non-party may be "severally" [separately] liable with a party
>
> [3] "Severally liable" under § 604.02, Subd. 1, means liable for a plaintiff's "*injuries*," not liable for a "*judgment*"

[4] § 604.02, Subd. 1, requires that a party found 50% or less at fault is only obligated to pay the percentage of fault allocated to it, even if the remaining fault is allocated to a non-party

[5] Amendments to § 604.02, Subd. 1, reflect the legislature's intent that a party not more than 50% at fault may not be held liable for more than her/his share of fault

[6] The 2003 amendment to § 604.02, Subd. 1, is consistent with the legislature's ongoing effort to further narrow the scope of joint liability

[7] The 2003 amendment to § 604.02, Subd. 1, was intended to remedy the "inherent unfairness" of earlier versions of the statute

[8] The Minnesota Supreme Court's ruling in *Schneider v. Buckman*, 433 N.W.2d 98 (Minn. 1988) does not apply here because at that time § 604.02, Subd. 1, applied to "joint liability," and the statute as amended in 2003 applies to "several liability"

All of Appellant Diocese's arguments pertain to the interpretation of § 604.02, Subd. 1, and, specifically, interpretation of the 2003 amendment to that statute. In Steenson, Michael K., *Joint and Several Liability in Minnesota: the 2003 Model*, 30 Wm. Mitchell L. Rev. 845 (2004), Professor Steenson outlined "The Evolution of Joint and Several Liability in Minnesota" [*Id.*, at 850] and discussed how joint and several liability was modified by the 2003 amendment to § 604.02, Subd. 1. Steenson's article is mentioned in Amicus Curiae MDLA's Brief [footnote 1, page 1].

In an earlier article, Steenson, Michael K., *Joint and Several Liability Minnesota Style*, 15 Wm. Mitchell L. Rev. 969 (1989), Professor Steenson explained that the Minnesota Supreme Court adopted the rule of joint and several liability in *Flaherty v. Minneapolis & St. L. Ry.*, 39 Minn. 328, 40 N.W. 160 (1888). 15 Wm. Mitchell L. Rev. at 970. Summarizing joint and several liability, Steenson wrote:

> The rule of joint and several liability results in the imposition of liability on multiple defendants whose fault combined to cause a single, indivisible injury or damage to the plaintiff. When defendants have acted jointly, concurrently, or successively in causing the injury to the plaintiff, but the injury or damage sustained by the plaintiff cannot be apportioned, the defendants are individually and jointly responsible for the entire damage sustained by the plaintiff. The plaintiff is entitled to enforce the claim for damages against any or all of the defendants. Under the rule of joint and several liability, if any defendant's share of the judgment is uncollectible it becomes the responsibility of the remaining party or parties to the litigation.

Id., at 969.

Under the original rule of joint and several liability, a plaintiff had the option of suing one, all, or any number of those parties jointly and severally liable for plaintiff's claim. *Kisch v. Skow*, 305 Minn. 328, 331, 233 N.W.2d 732, 734 (1975).

The Minnesota legislature modified joint and several liability three times before the 2003 amendment. Steenson, 30 Wm. Mitchell L. Rev. 845, at 846, and at 850-853. In 1978 it was modified by the addition of a loss reallocation provision that reallocated any uncollectible share of a judgment among all the remaining parties found at fault, including plaintiff. *Id.*, at 851. This reallocation provision "was a middle position between full retention of the rule of joint and several liability and complete abolition of the rule in favor of several liability only." *Id.*, citing Uniform Comparative Fault Act § 2 (d) comm'r's cmt., 12 U.L.A. 123 (1996) (Reallocation). The 1978 amendment excluded from the reallocation rule product liability defendants in the chain of manufacture and distribution. *Id.*, at 851.

In 1986, joint and several liability was modified by an amendment that limited the liability of the state or municipalities to no more than two times their percentage of fault

in cases where the fault of either is less than 35%. *Id.*, at 852. In 1988, the legislature adopted a new cutoff for joint and several liability that applied to all other tort cases, save certain cases involving statutorily based environmental liability and products liability, providing that "a person whose fault is 15% or less is liable for a percentage of the whole award no greater than four times the percentage of fault, including any amount reallocated to that person under subdivision 2." *Id.*, at 852.

In contrast to the three earlier modifications of joint and several liability, Professor Steenson wrote that

> The 2003 amendment is a more serious limitation of the rule of joint and several liability. The new starting assumption is that the liability of two or more tortfeasors will be several, rather than joint, subject to four exceptions where joint and several liability will apply.

30 Wm. Mitchell L. Rev. at 846. But, Steenson added:

> ... it is important to note that the amendment leaves subdivisions 2 and 3 of section 604.02 unaffected. That means that the loss reallocation provision in subdivision 2 and the special rule that applies to reallocation in products liability cases in subdivision 3 have to be accommodated in any interpretation of the new joint and several liability amendment. It is also important to understand that the amendment did nothing to change the definition of "fault" in section 604.01, subdivision 1a of the Comparative Fault Act, nor did it change the types of claims for damages that are covered by the Act. The Act continues to apply to personal injury and wrongful death claims, as well as claims for property damage and economic loss. However, those claims have to be based on "fault," which is limited to tort claims based on negligence, recklessness, strict liability, or breach of warranty other than express warranty.

Id., at 858-859.

With this background in mind, Respondent Ann Staab now addresses the specific arguments raised by Appellant Diocese and Amicus Curiae MDLA.

[1] Use of the word "persons" rather than "parties" in § 604.02, Subd. 1, does not, as Appellant Diocese contends, make the statute applicable to non-parties [to the lawsuit] as well as to parties [to the lawsuit].

Minn. Stat. § 604.02 is titled "Apportionment of Damages," and Subdivision 1 of that statute is titled "Joint liability." As amended in 2003, subdivision 1 of § 604.02, through subpart (1), states:

> **When two or more persons are severally liable**, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that the following persons are jointly and severally liable for the whole award:
>
> (1) a person whose fault is greater than 50 percent; ...

Emphasis added.

Subdivision 1 used the term "persons" rather than the term "parties" before the 2003 amendment. The 2003 amendment's only change to the first paragraph was to substitute the word "severally" for the word "jointly" in the first line. As Professor Steenson explained, "several liability," rather than "joint liability," is now the general rule. 30 Wm. Mitchell L. Rev. at 892. "This means that each defendant is responsible only for his or her own percentage of damages, and not the damages caused by any other defendant." *Id.*, at 892. Steenson outlined six exceptions to the general rule of several liability, the first being "A defendant who is more than 50% at fault." *Id.*, at 892.

Appellant argues that the phrase "two or more persons" should be construed to include a party found at fault by a jury and a non-party found at fault by a jury. But a statute must be construed to give effect to all of its provisions; it must be read as a whole. *State v. Larivee*, 656 N.W.2d 226, 229 (Minn. 2003). Words and phrases in

statutes are to be construed according to their common and approved usage. Minn. Stat. § 645.08 (1).

Black's Law Dictionary (6th Ed. 1990) defines "liable" as "Bound or obligated in law or equity; responsible; chargeable; answerable; compellable to make satisfaction, compensation, or restitution." Defining the term "severally," Black's Law Dictionary (6th Ed. 1990) notes: "When applied to a number of persons the expression *severally liable* usually implies that each one is liable alone."

In the Definitions section of the Restatement (Second) of Torts (1969), Section 5, titled "Subject to Liability," states:

> The words "subject to liability" are used throughout the Restatement of this Subject to denote the fact that the actor's conduct is such as to make him liable for another's injury, if
> (a) the actor's conduct is a legal cause thereof, and
> (b) the actor has no defense applicable to the particular claim.

In the Comment to § 5, the authors of the Restatement explained that "the actor may be subject to liability, but the liability may never accrue." *Id.*, at p. 10. For example, a careless driver whose vehicle strikes a pedestrian may escape liability if the pedestrian is contributorily negligent. *Id.* A statute of limitations may prevent the bringing of an action against a defendant whose conduct had undoubtedly satisfied all the conditions for liability, and against whom a timely action could have been maintained. *Id.*

The concept of an actor who may be "subject to liability" but against whom "liability" may never accrue aptly fits Richard Staab in this case. In a case to which he was not a party, a jury found Richard Staab 50% at fault for his wife's 4/9/2005 injury. If

Appellant Diocese were to now bring a lawsuit against Richard Staab for contribution, and if another jury found Richard Staab at fault, he would become "liable" rather than merely "subject to liability."

In this case, at the request of Appellant Diocese the trial court submitted to the jury questions of negligence and causation on the part of a non-party, Richard Staab. In response to those questions the jury found Richard Staab 50% at fault. But because Richard Staab was not a party to the lawsuit, the trial court ruled that he is not "liable," that is, not "bound or obligated in law or equity; responsible; chargeable; answerable; compellable to make satisfaction, compensation or restitution."

Long ago, in *Hurr v. Davis*, 155 Minn. 456, 459, 193 N.W. 943, 944 (1923), the Minnesota Supreme Court observed that a "judgment" against persons not parties to the action is "...clearly void for want of jurisdiction and open to attack by persons not parties to the action." And more recently in *Schneider v. Buckman*, 433 N.W.2d 98 (Minn. 1988), the Supreme Court refused to attach legal consequences to an apportionment of fault to a non-party:

> The fact that a jury, in its task of apportioning liability among the various tortfeasors, has determined that Buckman's individual negligence was 35% of the total is of no practical consequence when there are no other defendants against whom judgment can be entered.

433 N.W.2d at 103.

The plain language of § 604.02, Subd. 1, states that it applies in cases when "two or more persons are severally liable." This is not such a case.

As part of its argument that "the plain language" of § 604.02, Subd. 1, makes it applicable to all "persons," non-parties as well as parties, Appellant Diocese argues that the Minnesota Supreme Court's analysis in *Hosley v. Armstrong Cork Co.*, 383 N.W.2d 289 (Minn. 1986) is "instructive on the interpretation of the word 'persons' as used in Minnesota Statute § 604.02." Appellant Diocese's Brief at 7-8.

The *Hosley* decision does not apply to this case because: [1] in *Hosley*, the Supreme Court interpreted the word "party" as used in Subd. 2 of § 604.02, not the word "persons" as used in Subd. 1 of § 604.02; and [2] in the subsequent case of *Schneider v. Buckman*, 433 N.W.2d 98 (Minn. 1988), the Supreme Court expressly refused to apply the *Hosley* analysis to Subd. 1 of § 604.02. But because the Supreme Court in *Hosley* did interpret the word "party" as including non-parties to the lawsuit, we will examine the Supreme Court's analysis.

In *Hosley v. Armstrong Cork Co.*, the Supreme Court interpreted the word "party" in Subdivision 2 [not 1] of § 604.02 as including not just parties to the lawsuit but also any party to the "transaction" or event which is the subject of the lawsuit. The Supreme Court in *Hosley* wrote that its broader reading of the term "parties" came from its earlier decision in *Lines v. Ryan*, 272 N.W.2d 896 (Minn. 1978). *Hosley*, 383 N.W.2d at 293.

Lines v. Ryan was an extension of the Supreme Court's ruling in *Frey v. Snelgrove*, 269 N.W.2d 918 (Minn. 1978), so we will begin our analysis there. In *Frey v. Snelgrove*, the Minnesota Supreme Court first recognized and approved the use of Pierringer releases, named for *Pierringer v. Hoger*, 21 Wis.2d 182, 124 N.W.2d 106 (1963). Through a Pierringer release a plaintiff releases claims against one or more

settling defendants, reserves the right to proceed against any nonsettling defendant, and agrees to indemnify settling defendants against contribution claims made by nonsettling defendants. *See Hosley v. Armstrong Cork Co.*, 383 N.W.2d at 292. A plaintiff settling with one or more defendants pursuant to Pierringer release does not waive joint liability among nonsettling defendants. *Id.*

In *Frey*, the Supreme Court wrote:

> We therefore hold that where the plaintiff has entered into a Pierringer-type release, settling his claims with some defendants and agreeing to pay any cross-claims of the nonsettling defendants, the settling defendants usually should be dismissed, but their negligence should nevertheless be submitted to the jury. If the release so provides, the indemnity cross-claims between all defendants should also be dismissed. 269 N.W.2d at 922.

The decision in *Frey v. Snelgrove* was based upon what the Supreme Court in *Frey* described as "a definitive article ... on the use of the Pierringer release in Minnesota," Simonett, Justice John E., *Release of Joint Tortfeasors: Use of the Pierringer Release in Minnesota,* 3 Wm. Mitchell L. Rev. 1 (1977). *See Frey*, 269 N.W.2d at 922.

In *Lines v. Ryan*, 272 N.W.2d 896 (Minn. 1978), the Minnesota Supreme Court expanded its ruling in *Frey* about submitting the fault of non-parties to a jury. In *Frey*, the Supreme Court had ruled that, in addition to submitting to the jury questions about the fault of parties to the case, the trial court must also submit to the jury questions about the fault of non-parties who have been released by Pierringer releases. In *Lines v. Ryan* the Court ruled that the trial court must submit to the jury questions of fault pertaining to not only parties to the lawsuit and parties that have been released by

Pierringer release, but all parties to the "transaction," the event which is the subject of the lawsuit.

Lines v. Ryan involved claims arising from a three-car collision. Lines had been following Jones and Ryan had been following Lines [Ryan→Lines→Jones]. Lines rear-ended Jones and Ryan rear-ended Lines. Lines made a claim only against Ryan; after settling an uninsured motorist's claim with its insured, Jones, State Farm [in Jones' name] made claims against both Lines and Ryan; and Ryan made a claim only against Lines.

After trial, the jury found Jones not negligent and found both Lines and Ryan negligent. The jury found that Lines' negligence caused 60% of Lines' own injuries and 60% of the damages sustained by Jones. The jury found that Ryan's negligence caused 40% of Lines' injuries and 40% of Jones' damages. That would mean that Lines, whose claim had only been against Ryan, would recover nothing, as Lines' negligence was 60% and Ryan's only 40%; State Farm [in Jones' name] would recover 60% from Lines and 40% from Ryan; and Ryan would recover 60% of his damages from Lines.

On appeal, Lines argued that the trial court erred in instructing the jury in the Lines v. Ryan action to compare Jones' negligence with that of Lines and Ryan because Jones was not a party to the Lines v. Ryan case. The Supreme Court disagreed. Citing *Frey v. Snelgrove*, the Supreme Court in *Lines* first wrote that

> ... where some, but not all, of the defendants have settled with the plaintiff, the settling defendants' negligence must be submitted to the jury even though they have been dismissed from the lawsuit. 272 N.W.2d at 902.

Then, citing *Connar v. West Shore Equipment of Milwaukee*, 68 Wis.2d 42, 45, 227 N.W.2d 660, 662 (1975), a case that had been relied upon by the Court in *Frey*, the Supreme Court in *Lines v. Ryan* wrote:

> "*** It is established without doubt that, when apportioning negligence, a jury must have the opportunity to consider the negligence of all parties to the transaction, whether or not they be parties to the lawsuit and whether or not they can be liable to the plaintiff or to the other tort-feasors either by operation of law or because of a prior release.' [68 Wis.2d at 44, 227 N.W.2d at 662].

272 N.W.2d at 902-903.

But it is important to note that the trial court did not submit issues of Jones' fault in the claim of Lines against Ryan because of a need for the jury to consider possible fault on the part of "all parties to the 'transaction'" in order to properly determine the issues involved in Lines' claims. Undoubtedly the trial court had sought the least confusing approach to submitting to the jury all of the issues raised by all of the claims that arose from one three-car collision. And it is difficult to see how Ryan may have been prejudiced by the jury considering Jones' fault along with his. Significant to our discussion here is the fact that no one in *Lines v. Ryan* sought to have their share of liability reduced by a percentage of fault attributed to a non-party.

The *Lines v. Ryan* ruling that a trial court must submit to the jury the issue of fault on the part of all parties to the "transaction" was reiterated in *Hosley v. Armstrong Cork Co.*, 383 N.W.2d 290 (Minn. 1986). Plaintiff Hosley had claimed that wrongful conduct by 13 manufacturers of asbestos-containing products caused Hosley to contract asbestosis. Two of the manufacturers filed bankruptcy petitions, so all claims involving them were stayed. But the trial court severed those claims and allowed Hosley to

proceed with his claims against the other 11 manufacturers. Ten of the 11 settled with Hosley using Pierringer releases.

Hosley's claim against the sole remaining defendant, Pittsburgh Corning, proceeded to trial. The trial court submitted to the jury questions concerning the fault of nine parties, including Hosley and Pittsburgh Corning. The jury allocated 7% fault to Hosley, 10% to Pittsburgh Corning, 25% to one of the two bankrupt companies, Johns-Manville [the fault of the other bankrupt company was not submitted], 5% to each of two parties, 9% to each of two parties, and 15% to each of two parties. The trial court reduced the $350,000 damage award by $227,500, representing 7% for the fault of plaintiff Hosley and 58% for the fault of the Pierringer-released parties. The trial court concluded that Pittsburgh Corning was jointly liable with bankrupt Johns-Manville, and Pittsburgh Corning was ordered to pay 35%, representing the 10% fault of Pittsburgh Corning and the 25% fault of Johns-Manville, of the $350,000 damage award, a total of $122,500. The trial court also stayed $8,166.67 of the $122,500 judgment, determining this to be the maximum that might be reallocated against Hosley under the reallocation statute, § 604.02, Subd. 2, if the portion of the award attributable to Johns-Manville [25%] was uncollectable.

On appeal, the Minnesota Court of Appeals ruled that Hosley did not destroy joint and several liability between Pittsburgh Corning and Johns-Manville by settling with some of the defendants via Pierringer releases, but because Johns-Manville was severed from the suit it was not a "party" within the meaning of the reallocation provision of § 604.02 [Subd. 2] and the percentage of fault attributed to Johns-Manville

could not be reallocated. *See* discussion of *Hosley v. Armstrong Cork Co.*, 364 N.W.2d 813 (Minn.App. 1985), by Minnesota Supreme Court in *Hosley v. Armstrong Cork Co.*, 383 N.W.2d 289, 291 (Minn. 1986).

On review of the Court of Appeals' decision the Minnesota Supreme Court first agreed that plaintiff Hosley's settling with some defendants using Pierringer releases did not destroy joint and several liabilty. The Supreme Court wrote that the comparative negligence statute, enacted in 1969, and the comparative fault statute, enacted in 1978, were codifications of the common law doctrine that "parties whose negligence concurs to cause an injury are jointly and severally liable." 383 N.W.2d at 292.

Concerning Pittsburgh Corning's claim that by settling with some of the defendants plaintiff Hosley had destroyed joint and several liability between Pittsburgh Corning and Johns-Manville, the Minnesota Supreme Court concluded:

> We affirm the court of appeals and hold that the plaintiff's settlement with some defendants through Pierringer releases does not waive joint liability between all defendants. The retention of the doctrine of joint and several liability in the comparative fault statute demands such a result.

Hosley, 383 N.W.2d at 292.

The second main issue in *Hosley* was the interpretation of subdivision 2 of Minnesota's comparative fault statute, Minn. Stat. § 604.02. Subdivision 1 of § 604.02 pertains to joint and several liability; subdivision 2 pertains to the reallocation of uncollectible obligations in non-product liability cases; and subdivision 3 pertains to the reallocation of uncollectible obligations in product liability cases. *Hosley*, 383 N.W.2d at

292-293. In the present case Appellant Diocese argues that the Minnesota Supreme Court's analysis and holding in *Hosley* is "instructive on the interpretation of the word 'persons' as used in Minn. Stat. § 604.02." *See* Appellant's Brief at 7-8. Actually, in *Hosley* the Supreme Court, after noting that distinctions in language used by the legislature are presumed intentional, interpreted only the term "parties" as used in § 604.02, Subd. 2, and offered no analysis regarding the term "persons" as used in subdivisions 1 and 3. 383 N.W.2d at 292-293.

With respect to reallocation, the Supreme Court in *Hosley* reversed the Court of Appeals' ruling that reallocation pursuant to subdivision 2 of § 604.02 applies only to the uncollectible obligation of a party to the lawsuit, ruling that

> The word "party" in the reallocation statute need not, however, be limited to the restrictive definition "a party to a lawsuit," but instead can be more broadly defined as "a person whose fault has been submitted to the jury," or, in other words, "parties to the transaction." 383 N.W.2d at 293.

In other words, the Supreme Court in *Hosley* interpreted the word "party" in § 604.02, Subd. 2, as not merely including named parties to the lawsuit but also any "party to the transaction," which in turn means any "person whose fault has been submitted to the jury." *Id.*

In *Hosley*, the Minnesota Supreme Court discussed the Uniform Comparative Fault Act, on which the reallocation provision of section 604.02 is based. The Court noted that the more restrictive definition of "parties," limited to "parties to the lawsuit" rather than what the Court referred to as "parties to the 'transaction,'" may have been

implied in the Uniform Comparative Fault Act. The authors of the Uniform Act had expressed a rationale for using a more limited definition of the term "party":

> The limitation to parties to the action means ignoring other persons who may have been at fault with regard to the particular injury but who have not been joined as parties. This is a deliberate decision. It cannot be told with certainty whether that person was actually at fault or what amount of fault should be attributed to him, or whether he will ever be sued, or whether the statute of limitations will run on him, etc. An attempt to settle these matters in a suit to which he is not a party would not be binding on him. Both plaintiff and defendants will have significant incentive for joining available defendants who may be liable. The more parties joined whose fault contributed to the injury, the smaller the percentage of fault allocated to each of the other parties, whether plaintiff or defendant. Uniform Comparative Fault Act Sec. 2, comment, 12 U.L.A. 39, 43 (Supp.1985). 383 N.W.2d at 293.

Even though it cited the above comment from the authors of the Uniform Act, the Supreme Court in *Hosley* opted for a broader interpretation of "party" for purposes of Minnesota's general reallocation statute [§ 604.02, Subd. 2]. The Supreme Court included Johns-Manville as a "party" for purposes of reallocation. Before its bankruptcy filing, Johns-Manville had been a named party in the lawsuit; and at trial Johns-Manville's fault, as well as the fault of named parties and parties who had settled through Pierringer releases, had been submitted to the jury.

The Minnesota Supreme Court wrote in *Hosley* that concerns about applying findings of fault to a non-party in a non-Pierringer situation are not applicable in Minnesota because the Court's ruling in *Lines v. Ryan* "solves any problems that may result from a broader reading of the word 'parties' in the reallocation statute." 383 N.W.2d at 293. The Supreme Court explained:

> Under *Lines*, courts submit to the jury the fault of all "parties to the transaction." Because a percentage of fault is assigned to such a party (Johns-Mansville in

> this case), and because the percentage assigned represents the maximum amount chargeable against such a party (the figure can be used defensively by the party in a future suit), Minnesota courts can calculate the reallocation of this assigned fault pursuant to the statute. Thus, the concerns expressed in the comment to the Uniform Act have no applicability here.

383 N.W.2d at 293. The Supreme Court concluded that "In enacting the reallocation provision of section 604.02 the legislature recognized that reallocation of an uncollectible obligation should take place among all individuals at fault, including a claimant." 383 N.W.2d at 293.

In *Frey* the Minnesota Supreme Court had approved the practice of a trial court submitting to a jury issues of fault on the part of non-parties who had been released using Pierringer releases. In *Lines v. Ryan*, the Supreme Court expanded the approved practice, writing that the trial court should submit to the jury issues of fault on the part of parties to the "transaction," the incident which is the subject of the lawsuit. In *Lines*, the parties to the "transaction" whose fault was submitted to the jury were all parties to at least one of several claims that had been joined for trial and, as such, were represented in the lawsuit. In *Hosley*, the non-party whose fault was submitted to the jury and who was included as a "party" for purposes of reallocation was a corporate entity, Johns-Manville, which had been a party to the lawsuit before filing for bankruptcy.

Though the appellate opinion does not expressly say it, the Supreme Court's decision in *Hosley* to hold as binding the jury's determination of Johns-Manville's fault may have been based in part upon the apparent agreement of the involved parties that Johns-Manville was at fault and its fault was appropriately decided by the jury. Plaintiff

Hosley had named Johns-Manville as a defendant in the case, and presumably Pittsburgh Corning had cross-claimed against Johns-Manville. The claims of both Hosley and Pittsburgh Corning against Johns-Manville would have proceeded to trial but for the automatic stay put in place when Johns-Manville filed for bankruptcy.

The critical difference between this case and *Hosley* is that in *Hosley* the Supreme Court was addressing reallocation of the obligation of a non-party found at fault by the jury, with reallocation occurring among the other parties found at fault, including the plaintiff. If we were to reallocate the fault found on the part of the non-party in this case, Richard Staab, among the other parties found at fault by the jury, we would be limited to reallocating fault to Appellant Diocese of St. Cloud.

This critical difference between the present case and *Hosley* was specifically addressed by the Supreme Court in *Schneider v. Buckman*, 433 N.W.2d 98 (Minn. 1988). The jury had found Defendant Buckman 35% at fault, his daughter and employee 25% at fault, and "two other tortfeasors who were not parties to the lawsuit" 40% at fault. 433 N.W.2d at 99. The trial court had held Buckman liable for his employee's fault as well as his own, and also held Buckman liable for the 40% fault found on the part of non-parties. The Court of Appeals reversed the trial court, holding that Buckman was only liable for the 35% fault found against him. *See Schneider v. Buckman*, 412 N.W.2d 787 (Minn.App.1987).

On review of the decision of the Court of Appeals, the Supreme Court first held that Buckman was vicariously liable for the fault of his employee under the doctrine of

respondeat superior. 433 N.W.2d at 102. The Court then addressed the issue of reallocating the fault attributed by the jury to non-parties:

> It is our view that the reallocation procedures of Minn.Stat. Sec. 604.02, subd. 2, as interpreted in Hosley I [*Hosley v. Armstrong Cork Co.*, 383 N.W.2d 289 (Minn.1986)], are not implicated where, as here, there is but one defendant against whom judgment can be or has been entered. The fact that a jury, in its task of apportioning liability among the various tortfeasors, has determined that Buckman's individual negligence was 35% of the total is of no practical consequence when there are no other defendants against whom judgment can be entered.

433 N.W.2d at 103.

Appellant Diocese's argument, that the Supreme Court's ruling in *Hosley* should be applied to reduce the fault of a party by the percentage of fault of a non-party, was expressly rejected by the Supreme Court in *Schneider v. Buckman*. Appellant Diocese argues that *Schneider v. Buckman* is "inapposite" because in it the Court "applied the 1986 version of Minn. Stat. § 604.02." Appellant's Brief at 25. Actually, in both *Hosley* and in *Schneider v. Buckman* the Supreme Court addressed subdivision 2 of § 604.02. And even though § 604.02 has been amended five times since the *Hosley* decision [on March 14, 1986], none of the amendments changed the wording of Subd. 2. *See* Laws of Minnesota: 1986 c 444; 1986 c 455 s 85; 1988 c 503 s 3; 1989 c 209 art 1 s 44; and 2003 c 71 s 1.

[2] Substitution of the word "severally," for the word "jointly" in § 604.02, Subd. 1, does not, as Appellant Diocese contends, mean that a non-party may be "severally" liable with a party.

The flaw in Appellant's reasoning is succinctly stated at page 11 of Appellant's Brief: "Here, the Diocese and Mr. Staab are separately liable for Respondent's injuries." Mr. Staab may be "subject to liability," as discussed earlier in this brief, but as a non-party he is not liable, separately or otherwise.

[3] "Severally liable" under § 604.02, Subd. 1, does not, as Appellant Diocese argues, mean "liable" for a plaintiff's "*injuries*," but not "liable" for a "*judgment.*"

Appellant Diocese cites *White v. Johnson*, 137 N.W.2d 674, 679 (Minn. 1965), *Spitzack v. Schumacher*, 241 N.W.2d 641, 643 (Minn. 1976), and *Employers Mut. Casualty Co. v. Chicago St. P., M. & O. Ry. Co.*, 50 N.W.2d 689 (Minn. 1951) as holding that "liability" for a tort, and common "liability" if the tort is committed by more than one person, is "created at the instant the tort is committed." Appellant's Brief, at 11-12.

In the oldest of the cited cases, *Employers Mut. Casualty Co. v. Chicago, St. P., M. & O. Ry. Co.*, the Supreme Court wrote that "common liability" between two joint tort-feasors exists "immediately after the acts of the tort-feasors which give rise to a cause of action." 50 N.W.2d at 693. Following a collision between an automobile and a railroad tank car, the insurer for the auto's driver settled with an insured passenger and brought a lawsuit seeking contribution from the tank car's owner, a railway company. The Supreme Court ruled that the auto insurer did not have to have a

judgment against it before making a contribution claim because "common liability" between the auto driver and the railway company existed from the time when their tortious conduct combined to cause the accident. On behalf of its auto driver, the auto insurer simply needed to have paid more than its insured's fair share of the loss before seeking contribution.

Appellant Diocese's cite to the "common liability" language used in the *Employers Mut. Casualty Co.* case is taken out of context. The Supreme Court's use of the term "common liability" in *Employers Mut. Casualty Co.* is another good example of what the Restatement (Second) of Torts, § 5, refers to as "subject to liability" rather than "liable." *See* earlier discussion of § 5 in this brief, at 10-11. The railway car company became "subject to liability" when the accident occurred, and it became "subject to liability" for contribution when its co-tortfeasor [through an insurer] paid more than his fair share of the loss. But the railway car company did not, as Appellant Diocese suggests, become "liable" to the auto insurer for contribution without being a party to a lawsuit.

White v. Johnson arose from a three car collision. A truck driven by Johnson collided with a car driven by Alfred White and occupied by his wife Eva White as a passenger. After that collision the White car collided with a car driven by Mary Lou Urman. Both Whites and Urman sued Johnson for injuries. Johnson then made a third party complaint against the City of St. Paul, alleging that the highway had not been properly maintained. The trial court granted the City's motion for summary judgment on the ground that none of the injured plaintiffs had given the City notice of a claim as

required by statute, and if the City could not be liable to the injured plaintiffs because of lack of notice it also could not be liable for contribution.

The Supreme Court reversed the summary judgment in favor of the City, ruling that even though direct claims against the City by the injured plaintiffs were barred by failure to give statutory notice, that failure did not preclude the defendant and third party plaintiff from giving notice of and pursuing a claim for either contribution or indemnity. The Court noted that the statute requiring that notice be given to a municipality does two things: it creates a *duty* on the part of the plaintiff by compelling notice to a municipality and it also creates a *right* in favor of plaintiff by destroying the municipality's common-law immunity from liability for negligence. Responding to the assertion that the City could not be liable without notice, the Court explained that giving notice does not create the City's liability; the City is subject to liability if its negligent conduct causes injury because the statute destroyed the municipality's common-law immunity. Because of being subject to liability, the City may very well chose to settle a claim arising from its negligence before the time for giving statutory notice has lapsed. 137 N.W.2d at 679.

Appellant Diocese takes the Supreme Court's words in *White v. Johnson* out of context. The Court ruled that the City became liable [actually, subject to liability—again, *see* discussion of Restatement (Second) of Torts, § 5, above in this brief] not because of statutory notice of a claim but because of causally negligent conduct. The Court in *White v. Johnson* did not, as Appellant Diocese suggests, rule that a non-party could be considered legally "liable."

The third case cited by Appellant Diocese, *Spitzack v. Schumacher*, 241 N.W.2d 641 (Minn. 1976), originated from a wrongful death claim arising from a car striking a pedestrian. Trustee Spitzack, for the next of kin of Decedent Spitzack, sued the car's driver, LuAnn Campbell, and the car's owner, Dick Campbell. The Campbells tried to implead Schumacher, doing business as Irv's Bar, alleging that Schumacher's illegal sale of intoxicants to Decedent Spitzack was a cause of Spitzack's death. The trial court dismissed the third party claim, and the claim of Trustee Spitzack versus the Campbells went to trial. The jury found Decedent Spitzack 95% at fault and the Campbells 5% at fault.

After the Spitzack trustee versus Campbells trial, the Spitzack trustee sued Schumacher [d/b/a "Irv's Bar] and Schumacher named the Campbells as third party defendants in the second lawsuit. The trial court dismissed the third party claim on the ground that the Campbells could have no common liability with Schumacher because the Campbells had been found not liable to plaintiff Trustee Spitzack.

The Supreme Court did write, as Appellant Diocese contends, that "Common liability 'is created at the instant the tort is committed.'" [Citing *White v. Johnson*]. *Spitzack*, 241 N.W.2d at 643. But in the very next sentence, the Supreme Court added:

> Even though a joint tortfeasor may subsequently acquire a particular defense against an injured party, that tortfeasor may still be held liable to a cotortfeasor for contribution.

241 N.W.2d at 643. The combined language of these two sentences tells us that what the Supreme Court was referring to in the first sentence, the sentence quoted by Appellant Diocese, is yet another example of what the authors of the Restatement

(Second) of Torts in the comment to § 5 called "subject to liability"; because in the second sentence the Court wrote that the tortfeasor "may still be held liable to a cotortfeasor for contribution." This language does not support Appellant Diocese's contention that a nonparty becomes legally "liable" without becoming a party to a lawsuit.

[4] § 604.02, Subd. 1, does not require, as Appellant Diocese suggests, that a party found 50% or less at fault is only obligated to pay the percentage of fault allocated to it, even if the remaining fault is allocated to a non-party.

Appellant Diocese's argument is premised upon allocation of fault to a non-party having the same legal effect as allocation of fault to a party. Appellant argues that it was one of two "persons" found to be separately at fault, or "severally liable" for Respondent's damages. Appellant's Brief at 15. But because he was not a party to the lawsuit, Richard Staab is not "liable" for Respondent's damages, "severally" or otherwise.

[5] Appellant Diocese argues that amendments to § 604.02, Subd. 1, reflect the legislature's intent that a party not more than 50% at fault may not be held liable for more than its share of fault.

This is true "when two or more persons are severally liable" and none of the exceptions to several liability exist. That is not the case here.

[6] Appellant Diocese argues that the 2003 amendment to § 604.02, Subd. 1, is consistent with the legislature's ongoing effort to further narrow the scope of joint liability.

Respondent Staab would not categorize the 2003 Amendment as part of an "ongoing effort," but it did narrow the scope of joint liability.

[7] Appellant Diocese argues that the 2003 amendment to § 604.02, Subd. 1, was intended to remedy the "inherent unfairness" of earlier versions of the statute.

Proponents of the 2003 amendment may have argued this, but Respondent Staab has not found any documentation confirming it. The principle behind holding two at-fault defendants jointly liable for a faultless plaintiff's injury is that a faultless plaintiff's right to full compensation trumps an at-fault defendant's right to full contribution from a co-tortfeasor. *See* dissenting opinion of Justice Meyer in *Rowe v. Munye*, 702 N.W.2d 729, at 748 (Minn. 2005). Amendments curtailing joint and several liability reflect more concern for at-fault parties who have impecunious co-tortfeasors than for faultless parties who are wrongfully injured.

[8] Appellant Diocese incorrectly argues that the Minnesota Supreme Court's ruling in *Schneider v. Buckman*, 433 N.W.2d 98 (Minn. 1988) does not apply here because at that time § 604.02, Subd. 1, applied to "joint liability," and the statute as amended in 2003 applies to "several liability."

Schneider v. Buckman is discussed earlier in this brief as part of Respondent Staab's analysis of the Supreme Court's interpretation of the word "parties" in § 604.02, Subd. 2 [not Subd. 1]. *See* pages 21-22.

[9] Amicus Curiae MDLA's assertion that affirmance of the trial court's holding will produce inconsistent and arbitrary results when applied in practice overlooks the simple fact that § 604.02, Subd. 1, clearly applies only in cases where two or more persons are "severally liable."

Amicus Curiae MDLA acknowledges that if Appellant Diocese had added Richard Staab to the lawsuit as a third party defendant, and if Respondent Ann Staab had not made a direct claim against her husband, and if the jury had found the same percentages of fault with Richard Staab as a party as they did with him as a non-party, Appellant Diocese would be limited to making a contribution claim against Richard Staab. Appellant Diocese could only limit its responsibility to 50% if Respondent Staab had made Richard Staab a party and the jury had made the same findings of fault. *See* Brief of Amicus Curiae MDLA, p. 4.

Amicus Curiae MDLA completely overlooks the plain language of § 604.02, Subd. 1, which states that it applies where two or more persons are "severally liable." MDLA does not argue, or even suggest, that Richard Staab is somehow "severally liable" in this case. As discussed earlier in this brief, Professor Steenson has explained that the main change resulting from the 2003 amendment to § 604.02, Subd. 1, is that two or more defendants found at fault are severally, rather than jointly, liable, except in certain circumstances.

Amicus Curiae MDLA obviously wishes, as does Appellant Diocese, that the 2003 amendment would make § 604.02, Subd. 1, apply to hold non-parties found at fault and defendants found at fault "severally liable" with each other. But non-parties are not liable, severally or otherwise.

II. Adoption of the interpretation of § 604.02, Subd. 1, advocated by Appellant Diocese would promote the pursuit of numerous questionable claims and crossclaims by plaintiffs concerned about being able to collect the portion of an award allocated to the fault of a non-party.

Appellant Diocese asks the Court of Appeals to rule that Appellant's obligation to Respondent Ann Staab is reduced by the jury's allocation of fault to a non-party. If this argument is successful it will lead to plaintiffs suing every possible actor connected with the event which is the subject of the claim out of fear that one or another such actor would be found at fault and the named defendants' obligations would be reduced by any such fault. And defendants would intentionally avoid adding to the lawsuit others believed at fault because it is easier for a defendant to reduce her/his/its potential obligation to the plaintiff by making a claim against a defenseless party. Neither Minn. Stat. § 604.02, Subd. 1, nor common sense warrants such a result.

RESPONDENT STAAB'S CONCLUSION

Because the trial court appropriately ruled that Minn. Stat. § 604.02, Subd. 1, does not apply when only one party is liable, the judgment of the trial court must be affirmed.

Respectfully submitted,

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RESPONDENT STAAB'S CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 8,393 words. This brief was prepared using Microsoft Office Word 2007.

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