

No. A12-1575 and A12-1972

STATE OF MINNESOTA

IN COURT OF APPEALS

Alice Staab,

Respondent,

vs.

Diocese of St. Cloud,

Appellant,

**APPELLANT / CROSS-RESPONDENT'S RESPONSE AND REPLY
BRIEF AND ADDENDUM**

QUINLIVAN & HUGHES, P.A.

Dyan J. Ebert (#0237966)
Laura A. Moehrle (#0348557)
P.O. Box 1008
400 South First Street, Suite 600
St. Cloud, MN 56302-1008
Telephone: (320) 251-1414

Attorneys for Appellant Diocese of St.
Cloud

KEVIN S. CARPENTER, P.A.

Kevin S. Carpenter (# 015258)
2919 Veterans Drive
St. Cloud, MN 56303
Telephone: (320) 251-3434

Attorney for Respondent Alice Staab

**PEMBERTON, SORLIE, RUFER &
KERSHNER, P.L.L.P.**

H. Morrison Kershner (#55426)
PO Box 866
Fergus Falls, MN 56538-0866
Telephone (800) 862-3651

Attorney for Respondent Alice Staab

BURKE & THOMAS, PLLP

Richard J. Thomas (#137327)
Bryon G. Ascheman (#237024)
Corinne Ivanca (#0386774)
3900 Northwoods Drive, Suite 200
St. Paul, MN 55112
Telephone: (651) 490-1808

Attorneys for Amicus Curiae Minnesota
Defense Lawyers Association

FLUEGEL LAW OFFICE

Wilbur W. Fluegel (#03429)
150 South 5th Street, Suite 3475
Minneapolis, MN 55402
Telephone: (320) 238-3540

Attorney for Amicus Curiae Minnesota
Association for Justice

TABLE OF CONTENTS

Table of Authorities..... ii

Argument.....1

I. THE PLAIN LANGUAGE OF THE STATUTE REQUIRES THE EXISTENCE OF AN UNCOLLECTIBLE JUDGMENT BEFORE REALLOCATION MAY OCCUR..... 2

II. THE PLAIN LANGUAGE OF MINNESOTA STATUTE § 604.02 SUBD. 2 CONTEMPLATES JOINT LIABILITY FOR A JUDGMENT AMONG THE PARTIES SUBJECT TO REALLOCATION 5

III. THE MINNESOTA SUPREME COURT IN STAAB HELD MINNESOTA STATUTE § 604.02 IMPOSES SEVERAL LIABILITY IN ALL CIRCUMSTANCES WHERE PERSONS WOULD OTHERWISE BE JOINTLY AND SEVERALLY LIABLE AT COMMON LAW EXCEPT THOSE CIRCUMSTANCES SPECIFICALLY ENUMERATED IN THE STATUTE 11

IV. THE PURPOSE OF THE REALLOCATION STATUTE IS TO ENSURE ALL AT FAULT PARTIES EQUITABLY SHARE THE BURDEN OF UNCOLLECTIBILITY OF A JUDGMENT FOR WHICH THEY ARE JOINTLY LIABLE14

V. THE DIOCESE IS SEVERALLY LIABLE BECAUSE THE JURY FOUND THE DIOCESE TO BE FIFTY-PERCENT AT FAULT.....16

VI. THE DIOCESE WAS NOT OBLIGATED TO PAY, AND MS. STAAB WAS NOT ENTITLED TO RECEIVE THE AMOUNT OF THE JURY VERDICT ATTRIBUTABLE TO RICHARD STAAB UNTIL THE COURT ENTERED JUDGMENT CREATING THIS OBLIGATION ON AUGUST 8, 2012 AND THEREFORE SHOULD NOT BE REQUIRED TO PAY INTEREST ON THAT AMOUNT17

Conclusion..... 20

Index to Addendum 24

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).

TABLE OF AUTHORITIES

Cases

<u>Conwed Corp. v. Union Carbide Chems. & Plastics Co.</u> , 634 N.W.2d 401 (Minn. 2001)	21
<u>Eid v. Hodson</u> , 521 N.W.2d 862 (Minn. Ct. App. 1994).....	5, 7, 9, 10, 15, 20, 21
<u>EMC v. Dvorak</u> , 603 N.W.2d 350 (Minn. Ct. App. 1999)	3
<u>Frederickson v. Alton M. Johnson Co.</u> , 402 N.W.2d 794 (Minn. 1987).....	14
<u>Gregor v. Clark</u> , 560 N.W.2d 744 (Minn. Ct. App. 1997).....	14
<u>Hahn v. Tri-Line Farmers Co-Op.</u> , 478 N.W.2d 515 (Minn. Ct. App. 1991).....	3, 7, 10, 15, 21
<u>Hosley v. Armstrong Cork Co.</u> , 383 N.W.2d 289 (Minn. 1986)	1
<u>Hosley v. Pittsburgh Corning Corp.</u> , 401 N.W.2d 136 (Minn. Ct. App. 1987)	4, 14, 20
<u>Hurr v. Davis</u> , 193 N.W. 943 (Minn. 1923)	3, 4, 20
<u>Integrity Mut. Ins. Co. v. State Farm Mut. Ins. Co.</u> , 160 N.W.2d 557 (Minn. 1968).....	18, 19
<u>Johnson v. Moberg</u> , 354 N.W.2d 613 (Minn. Ct. App. 1984)	18, 19, 20
<u>Lienhard v. State</u> , 431 N.W.2d 861 (Minn. 1988)	19
<u>Lines v. Ryan</u> , 272 N.W.2d 896 (Minn. 1978).....	16
<u>McCarty v. City of Minneapolis</u> , 654 N.W.2d 353 (Minn. Ct. App. 2002).....	15
<u>Newinski v. John Crane, Inc.</u> , A08-1715, 2009 WL 1752011 (Minn. Ct. App. June 23, 2009) (unpublished)	10, 21
<u>O'Brien v. Dombeck</u> , A12-0984, ____ N.W.2d ____ (Minn. Ct. App., December 3, 2012)	1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 15
<u>Staab v. Diocese of St. Cloud</u> , 813 N.W.2d 68 (Minn. 2012)	passim

Statutes

Minnesota Statute § 549.09 subd. 219

Minnesota Statute § 604.026, 11, 13, 14, 20

Minnesota Statute § 604.02 subd. 18, 12, 16

Minnesota Statute § 604.02 subd. 2..... 1, 2, 4, 5, 6, 9, 11, 16, 20, 21

Minnesota Statute § 604.02 subd. 1 (1988) 8

ARGUMENT

Since the submission of the principal and responsive briefs in this matter, the Minnesota Court of Appeals has issued a decision in O'Brien v. Dombeck that the Diocese anticipates Respondent will rely on in support of its argument on reallocation. The Minnesota Court of Appeals in O'Brien held Minnesota Statute § 604.02 subd. 2 authorizes reallocation of the uncollectible portion of a party's equitable share of a judgment to a severally liable defendant. O'Brien v. Dombeck, A12-0984, ___ N.W.2d ___ (Minn. Ct. App., December 3, 2012) (A Add.-01 – A. Add.-14)

The decision in O'Brien is distinguishable from the present case in important ways that compel a different result here. In O'Brien, tortfeasors Dombeck and Hareid were parties to the lawsuit and a judgment was entered against **both** defendants Dombeck and Hareid. Accordingly, Plaintiff had a legal right to collect from defendant Dombeck and Dombeck was subject to a judgment, which was later “reallocated” to Hareid¹. Id. at *2-3 (A. Add.-02 – A.

¹ The jury allocated 10% fault to Hareid and 90% fault to Dombeck. In reallocating the uncollectable share, the Court reallocated 10% of the remaining uncollectable amount to Hareid. The Court's method of reallocating the uncollectible amount “according to their respective percentages of fault,” was erroneous. In applying the reallocation provisions, the Courts have historically looked at the solvent defendants subject to reallocation and compared their respective allocations of fault, and then reallocated to total uncollectable amount proportionately. See Hosley v. Armstrong Cork Co., 383 N.W.2d 289 (Minn. 1986). For example, if three jointly liable defendants are allocated 60%, 30% and 10% fault, and if the 10% at fault party is insolvent, that remaining 10% of the judgment should be split between the remaining solvent defendants at a ratio of 2:1. If there is only one remaining solvent defendant, that defendant is required to pay the entire award. This method of reallocation is further support for the fact that reallocation only applies where two or more parties are jointly and severally liable. No Court has ever “reallocated” in the manner selected by the O'Brien Court.

Add.-03). In this case, however, Richard Staab was not a party to the lawsuit and there is no judgment against Richard Staab to be reallocated. Based on these distinguishing factors, the Court may find that reallocation is improper on separate grounds and is not required to follow the holding of the O'Brien Court in this case.

Furthermore, with all due respect to the Court of Appeals, the Court's decision in O'Brien overlooked important statutory language, statutory history, case law, and legislative intent. In doing so, the Court reached an erroneous conclusion in holding a severally liable defendant is subject to reallocation. The O'Brien Court held a severally liable defendant must pay more than its equitable share of a judgment. Id. The definition of "several liability" itself posits that a person is only obligated to contribute to an award in accordance with his or her percentage of fault. The plain language of the statute, the relevant case law, and considerations of legislative intent direct that a minimally at fault, severally liable defendant cannot be made to pay more than its fair share of a jury's award by operation of reallocation. For these reasons, and the reasons advanced in its principal brief, the Diocese requests the Court decline to adopt the analysis of the O'Brien Court and hold reallocation is improper in this case.

I. THE PLAIN LANGUAGE OF THE STATUTE REQUIRES THE EXISTENCE OF AN UNCOLLECTIBLE JUDGMENT BEFORE REALLOCATION MAY OCCUR.

As discussed at length in the Diocese's principle brief in Section I, the plain language of Minnesota Statute § 604.02 subd. 2 requires the existence of a

judgment before that judgment can be reallocated. In this case, there is but one judgment that was (or ever could be) entered. By direction of the Minnesota Supreme Court, judgment was entered in favor of Respondent for 50% of the jury's award. This judgment has been fully satisfied. There is no judgment against Richard Staab, and indeed there can be no judgment against Richard Staab as a non-party to the lawsuit. Hurr v. Davis, 193 N.W. 943, 944 (Minn. 1923) (holding that a judgment against persons not parties to the action are "clearly void for want of jurisdiction.")

The O'Brien Court in fact acknowledges the "established proposition that when only one defendant is liable on a judgment, that defendant's share cannot be reallocated among other tortfeasors who are not subject to the judgment." O'Brien, A12-0984, ___ N.W.2d ___ (Minn. Ct. App., December 3, 2012) citing EMC v. Dvorak, 603 N.W.2d 350, 353 (Minn. Ct. App. 1999) (the statute requires two or more liable tortfeasors for reallocation to occur); Hahn v. Tri-Line Farmers Co-Op, 478 N.W.2d 515, 522 (Minn. Ct. App. 1991) (noting that reallocation is only available "where there is more than one person against whom judgment can be entered.") (A. Add.-07). Although the Diocese disagrees with the O'Brien Court's overall analysis and conclusion, even the O'Brien decision, as applied to these facts, directs reallocation is not appropriate because Richard Staab is not a party and he is not subject to a judgment.

Furthermore, the portion of the jury's award attributable to the negligence of Richard Staab is not "uncollectible" within the meaning of Minnesota Statute §

604.02 subd. 2 because Respondent had no right to collect against Richard Staab in the first instance². A trial court cannot determine whether a claim is “collectible” against a non-party because there is no legal right to collect until the judgment has been entered. Hosley II, 401 N.W.2d at 140. Respondent had no legal right to collect against Richard Staab, and therefore the jury award is not “uncollectible.”

Even in light of O’Brien, there is no Minnesota case that would allow reallocation of Richard Staab’s equitable share of the jury’s award to the Diocese because there is no judgment to be reallocated. Further, there can be no determination that the amount is “uncollectible” as required by subdivision 2 because there is no right to collect in the first instance. For these reasons, the District Court’s decision regarding reallocation must be reversed.

² Respondent alleges the Diocese stipulated Richard Staab’s equitable share of the obligation is “uncollectible.” Both the District Court and Respondent confuse the factual question pertaining to Richard Staab’s ability to pay with the separate legal question regarding whether a judgment is “uncollectible.” The written submissions to the District Court clearly demonstrate two things. First, there is no discussion or debate in the written submissions from a factual standpoint about Richard Staab’s financial resources or ability to pay sums of money. Aside from representations from Respondent’s counsel, there is no discussion, argument or evidence relating to Richard Staab’s solvency or insolvency. The question of solvency was simply not in dispute and for purposes of Respondent’s motion for reallocation if not expressly, was at least implicitly, conceded. Second, and most importantly, the written submissions to the District Court demonstrate that the issue of whether a judgment could be collected from Richard Staab as a matter of law was indeed in dispute. (See e.g. AA-118 arguing “the judgment in this case is for 50% of the jury’s award. Furthermore, the only judgment is against Defendant. There is no judgment against Richard Staab and even if there was a judgment, **it would not be enforceable because Richard Staab was not a party to the case.** Hurr v. Davis, 193 N.W.2d 943, 944 (1923); AA-118 arguing “there is no portion of the judgment that is uncollectible.”) Additionally, the District Court’s Order and Memorandum acknowledges the Diocese’s position that there is no uncollectible judgment against Richard Staab to be reallocated. (A. Add.-04). Contrary to Respondent’s assertions, the issue of whether a judgment can be entered against a non-party and whether the lack of such judgment met the statutory standard of “uncollectibility” was, and remains, in dispute.

II. THE PLAIN LANGUAGE OF MINNESOTA STATUTE § 604.02 SUBD. 2 CONTEMPLATES JOINT LIABILITY FOR A JUDGMENT AMONG THE PARTIES SUBJECT TO REALLOCATION.

The Minnesota Supreme Court in Staab held the Diocese is severally liable and must only contribute to the jury's award in proportion to its allocation of fault. Staab, 813 N.W.2d 68 (Minn. 2012). Minnesota Courts have long held that joint liability is a pre-requisite for reallocation. Eid v. Hodson, 521 N.W.2d 862, 864 (Minn. Ct. App. 1994) Cf. O'Brien v. Dombeck, A12-0984; ___ N.W.2d ___ (Minn. Ct. App., December 3, 2012)(A. Add.-01 – A. Add.-14). Indeed, the plain language of the reallocation statute itself supposes joint liability. The plain language of the statute speaks of a singular "judgment." Specifically, the statute provides:

Upon motion made not later than one year after **judgment** is entered, the court shall determine whether all or part of a party's equitable share of **the obligation** is uncollectible from that party [...] a party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on **the judgment**.

Minn. Stat. § 604.02 subd. 2. (2003). The statute does not speak of a plurality of "judgments" or "obligations." The plain language of the reallocation statute does not contemplate the entry of a new judgment upon a finding of uncollectibility. Id. The plain language of the reallocation statute also does not contemplate the reassignment of a judgment from a party who is liable for that judgment to a person who was not liable for that judgment at the time the judgment was entered. Minn. Stat. § 604.02 subd. 2. The plain language of the statute, instead,

provides reallocation should occur where there is a single judgment and the responsibility for that entire judgment is shared among multiple tortfeasors – the very definition of joint liability.

In spite of the foregoing, the O'Brien Court erroneously concluded that subdivision 2 does not contain language limiting reallocation to jointly liable parties. O'Brien, A12-0984; ___ N.W.2d at _____. (A. Add.-05). In reaching this conclusion, the Court reasoned that the statute applies to the uncollectible portion of a party's "equitable share" of a judgment, and held that the term "equitable share" refers to the party's percentage of fault apportioned under subdivision 1 of the statute. Id. The O'Brien Court's analysis, however, does not go far enough. The statute does not relate to "equitable shares" abstractly, instead, the statute relates to "equitable shares of an obligation" – namely a singular judgment. Minn. Stat. § 604.02 subd. 2. Severally liable parties do not share in a judgment. By definition, when parties share in a judgment, they are jointly liable for that judgment. The plain language of the statute requires that the parties subject to reallocation be jointly liable for that judgment. Id.

The O'Brien Court posited that if the legislature had intended to limit the availability of reallocation to cases involving joint and several liability, it could have expressly provided such a limitation. Id. at *6. Importantly, however, at the time the Legislature amended Minnesota Statute § 604.02 in 2003, the plain language of subdivision 2 contemplated reallocation would occur between jointly liable defendants liable for a single judgment, a fact which the Court of Appeals

had confirmed. Eid v. Hodson, 521 N.W.2d 862 (Minn. Ct. App. 1994); Hahn v. Tri-Line Farmers Co-Op., 478 N.W.2d 515, 522 (Minn. Ct. App. 1991). The fact that the Legislature did not make any changes to the reallocation statute in 2003 is evidence of only one thing – they did not intend there to be any changes to the reallocation statute.

The O'Brien Court failed to note that, despite various changes to subdivision 1 over the years to decrease the impact of joint and several liability, the language of subdivision 2 has been untouched since the time the statute was enacted in 1978. Subdivision 1 of the joint and several liability statute **alone** has always governed the magnitude – or the “maximum amount” – of a defendant’s liability under the various iterations of Minnesota’s joint and several rule. Subdivision 1 first directed that a defendant may be jointly liable for an entire award regardless of allocated fault, and was later modified to place caps on joint liability for minimally at fault tortfeasors and governmental entities. Finally, in 2003 subdivision 1 made several liability the rule, limiting the scope of joint liability to only four enumerated circumstances. Conversely, subdivision 2 has **never** determined the magnitude – or “maximum amount” – of a defendant’s liability for a judgment. Instead, subdivision 2 has operated only to calculate the exact amount of a judgment owed by each jointly liable defendant within the “maximum amount” dictated by subdivision 1.

Since 1988, subdivision 1 has sought to protect minimally at fault defendants from the burden of joint and several liability by operation of the “4 x

15” rule. Minn. Stat. § 604.02 subd. 1 (1988). The statute provided a person whose fault is 15% or less was 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. For the 15 years leading up to the 2003 amendments, a minimally at fault but jointly liable defendant’s **maximum** contribution to a jury’s award was capped, reducing that defendant’s exposure to the full force of joint and several liability. Id. This cap included amounts subject to reallocation, evidencing the legislature’s intent to ensure that the caps provided in subdivision 1 were effective and minimally at fault defendants were not required to shoulder the burden of another tortfeasor’s insolvency, a matter entirely outside the defendant’s control. This rule was applied and upheld despite the fact that plaintiffs, from time to time, found themselves under-compensated by the operation of this rule.

When the legislature amended Minnesota Statute § 604.02 subd. 1 in 2003, it eliminated the “4 x 15” rule in favor of a scheme that would further restrict the application of joint and several liability, rendering persons with 50% or less fault severally liable and responsible only for their fair share of the jury’s award. See Staab, 813 N.W.2d at 78. In amending the statute to make several liability the default rule, the Legislature removed “4 x 15” rule language, as this language was no longer necessary. Under the amended statute, a defendant was severally liable and therefore only obligated to pay his equitable share of a judgment so long as that person was 50% or less at fault. Stated otherwise, a

severally liable defendant's contribution remained "capped" at the defendant's allocation of fault. If a defendant was jointly and severally liable as defined in the statute, that defendant would then be severally liable for its equitable share, but also jointly liable for the entire award and subject to reallocation.

Indeed, the holding in O'Brien suggesting severally liable defendants are subject to reallocation throws open the floodgates for the potential exposure for a minimally at fault (but solvent) defendant in a way that has not been seen, and has been intentionally legislated against, for the past 25 years. To strain the statutory language to allow a result that is inconsistent with the legislature's intentions where the language fully supports a result that is consistent with the intentions of the legislature (which have been recognized by the Minnesota Supreme Court in Staab) would be contrary to the accepted canons of statutory construction.

Joint liability is a pre-requisite for reallocation. Minn. Stat. § 604.02 subd. 2; Eid, 521 N.W.2d at 864. Indeed, Respondent acknowledges that joint liability is required for reallocation. In explaining why reallocation was not proper in Eid Respondent states: "[i]n Eid, the two parties were not "jointly and severally" liable as required for reallocation – they were, clearly, only "severally liable." (R. Br. p. 16). In attempting to distinguish Eid from the present case, Respondent and the O'Brien Court seem to argue that how a particular defendant becomes severally liable is relevant to the analysis of whether that defendant is subject to reallocation. There is absolutely no authority for this proposition. The manner in

which a defendant becomes severally liable is irrelevant. Severally liable defendants of every kind are not properly subject to reallocation. Indeed, the O'Brien decision is the first and only Minnesota decision that requires a severally liable defendant to pay more than its equitable share of a judgment.

When parties are jointly liable for a judgment, reallocation can occur without the entry of a new judgment against any party. Indeed, the statute does not provide any mechanism by which a judgment may be entered to allow for reallocation, and instead assumes the existence of a judgment for which multiple parties are liable. The District Court's August 8, 2012 entry of a new judgment in connection with its order for reallocation in this case is in of itself demonstrative of the Court's misinterpretation and misapplication of the reallocation statute. The statute does not provide an avenue for the imposition of a new judgment. Instead, the statute contemplates a redistribution of an existing, shared judgment between jointly liable parties.

According to both the plain language of the statute and the express holdings of the Minnesota Court of Appeals in Eid, Hahn, and Newinski and contrary to the holding in O'Brien, joint liability is a pre-requisite for reallocation. 521 N.W.2d 862, 864 (Minn. Ct. App. 1994), 478 N.W.2d 515, 522 (Minn. Ct. App. 1991); A08-1715, 2009 WL 1752011 * 7 (Minn. Ct. App. June 23, 2009) (unpublished); Cf. O'Brien, A12-0984, ___N.W.2d___ (Minn. Ct. App. 2012)(A. Add.-01 – A. Add.-14). The Diocese is not jointly liable for any judgment. Richard Staab's equitable portion of the jury's award is not subject to a judgment. The Diocese

and Richard Staab are not jointly liable for any judgment. Accordingly, reallocation is not appropriate.

III. THE MINNESOTA SUPREME COURT IN STAAB HELD MINNESOTA STATUTE § 604.02 IMPOSES SEVERAL LIABILITY IN ALL CIRCUMSTANCES WHERE PERSONS WOULD OTHERWISE BE JOINTLY AND SEVERALLY LIABLE AT COMMON LAW EXCEPT THOSE CIRCUMSTANCES SPECIFICALLY ENUMERATED IN THE STATUTE.

The Court of Appeals in O'Brien held severally liable persons are subject to reallocation. For the reasons stated above, this holding is erroneous. The District Court and Respondent here seem to acknowledge and agree that joint and several liability is required for reallocation, but claims that despite the Minnesota Supreme Court's holding in this case that the Diocese is only severally liable, the Diocese is in fact jointly and severally liable. Respondent argues the common law rule of joint and several liability applies to Minnesota Statute § 604.02 subd. 2 because both Richard Staab and the Diocese were parties to the tort and therefore jointly and severally liable. However, the 2003 amendments to Minnesota Statute § 604.02 have abrogated the common law rule of joint and several liability for purpose of enforcement of liability in all but four enumerated instances. Staab, 813 N.W.2d 68, 78 (Minn. 2012).

The **existence** of liability is fundamentally and importantly different from the **enforcement** of liability. Id. The 2003 amendments to Minnesota Statute § 604.02 modified the common law with regard to the **enforcement** of liability, namely magnitude of damages a tortfeasor must contribute once a judgment has

been entered. Id. Minnesota Statute §604.02 subd. 1 expressly modifies the common law definitions of “severally liable” and “jointly and severally liable” for purposes of determining the magnitude of a tortfeasor’s contribution to a judgment. Respondent posits that these statutory definitions only apply to determining a tortfeasor’s contribution to an award pursuant to subdivision 1, but do not apply to determining a tortfeasor’s contribution to an award pursuant to subdivision 2 of the same statute. Respondent alleges that the common law has been left untouched when it comes to reallocation, leaving all tortfeasors, regardless of allocated fault, jointly and severally liable for 100% of a plaintiff’s damages. This conclusion is unsupported by case law and directly contrary to the Minnesota Supreme Court’s holding in Staab v. Diocese of St. Cloud, 813 N.W.2d 68, 78 (Minn. 2012).

The Supreme Court’s holding in Staab provides:

[W]e conclude that the 2003 amendments to the statute clearly indicate the Legislature’s intent to limit joint and several liability to the four circumstances enumerated in the exception clause, and to apply the rule of several liability in all other circumstances. In order to give effect to this intent, the statute must be interpreted **to apply in all circumstances in which a person would otherwise be jointly and severally liable at common law**, and a person is liable at common law the moment the tort is committed, not as a result of a judgment.

Id. [emphasis added]. Notably, the Court held the statute limits common law “joint and several liability” without limit or qualification. The Court did not hold that joint and several liability was limited for purposes of determining contributions to awards or for purposes of subdivision 1 only. Id. This holding

instead clearly indicates that the 2003 amendments to Minnesota Statute § 604.02 apply to supplant several liability for common law joint and several liability in all circumstances except those specifically enumerated in the statute. In relying on the proposition that tortfeasors whose actions combine to create an injury are jointly liable at common law as a basis for reallocation, Respondent fails to acknowledge the express holding of the Minnesota Supreme Court abrogating the common law rule in favor of several liability.

As noted by the Minnesota Supreme Court in Staab, the 2003 amendments to the joint and several liability statute limit joint and several liability to **only** the four enumerated circumstances and makes several liability the rule in **all** other circumstances where a tortfeasor would otherwise be jointly and severally liable under common law. Much like the determination of a tortfeasor's contribution to a jury award, the reallocation of allocated portions of a shared judgment from one tortfeasor to another relates to the enforcement of a judgment and the magnitude of an individual tortfeasor's contribution to that judgment. There is absolutely nothing in the statutory language that indicates that rule of several liability should be limited in circumstances other than those circumstances enumerated in the statute.

IV. THE PURPOSE OF THE REALLOCATION STATUTE IS TO ENSURE ALL AT FAULT PARTIES EQUITABLY SHARE THE BURDEN OF UNCOLLECTIBILITY OF A JUDGMENT FOR WHICH THEY ARE JOINTLY LIABLE.

To date, the reallocation procedures contained in Minnesota Statute § 604.02 have been used in a relatively small number cases. In the handful of times the statute has been invoked and applied, however, the statute has been used defensively by a solvent, jointly and severally liable defendant to ensure other at-fault parties who were also jointly liable for a judgment, help carry the burden of an insolvent tortfeasor. See e.g., Gregor v. Clark, 560 N.W.2d 744 (Minn. Ct. App. 1997); Frederickson v. Alton M. Johnson Co., 402 N.W.2d 794 (Minn. 1987); Hosley v. Pittsburgh Corning Corp., 401 N.W.2d 136 (Minn. Ct. App. 1987). Most reallocation cases involve other solvent defendants or plaintiffs who bear some fault either through their own negligence or because they have assumed the negligence of other tortfeasors through operation of a Pierringer release. Id.

Invoking reallocation does not increase the amount a Plaintiff is entitled to collect pursuant to a judgment. Indeed, to the contrary, where a plaintiff bears some fault, reallocation serves to **reduce** the amount a plaintiff can collect by forcing a plaintiff to shoulder a proportionate burden of uncollectibility.

Reallocation in fact allows a jointly and severally liable defendant, who would otherwise be legally obligated to pay 100% of a judgment if a co-tortfeasor could not pay, to pay less than 100% of the judgment by asking the court to equitably distribute that uncollectible share among all solvent parties bearing fault.

Reallocation is a defensive tool to remedy some of the unfairness created by the rule of joint and several liability while still allowing a plaintiff to receive adequate compensation for her injuries. While Respondent invokes a policy of “full recovery” for plaintiffs, the Courts have routinely balanced the interests of a plaintiff against the interest of a minimally at fault defendant from paying in disproportion to its fault. Notably, there are various cases in which a plaintiff has not received “full compensation” (or 100% of a jury’s award) even where reallocation has been invoked, because full recovery was barred by operation of several liability, municipal damage caps, or other statutory provisions. See Eid, 521 N.W.2d at 864 (Minn. Ct. App. 1994); McCarty v. City of Minneapolis, 654 N.W.2d 353 (Minn. Ct. App. 2002); Hahn, 478 N.W.2d 515 (Minn. Ct. App. 1991).

More on point, with the exception of the decision in O’Brien, there is not a single Minnesota appellate case in which the Court has granted a motion for reallocation initiated by a plaintiff and there is not a single Minnesota appellate case in which a non-party’s fault has been reallocated among other at fault parties.

A plaintiff is entitled to collect on judgments entered in their favor. A plaintiff also has a right to seek payment of that judgment from any defendant who is obligated to pay it. If a defendant shares liability with other tortfeasors for a judgment (i.e., is jointly liable for the judgment) the defendant must pay that judgment, but has the right to share that burden with other at-fault parties whether by seeking contribution from solvent tortfeasors or seeking reallocation

of uncollectible shares from insolvent tortfeasors. In this case, there is no joint liability for any judgment. The Diocese is severally liable and was required to pay, and in fact paid, the only judgment in this case commensurate with its allocation of fault. The Diocese does not have any shared obligation with Richard Staab that can be reallocated pursuant to the statute. In the 34 years since the statute's enactment Minnesota Statute §604.02 subd. 2 has never been applied in the manner in which Respondent proposes in this case.

V. THE DIOCESE IS SEVERALLY LIABLE BECAUSE THE JURY FOUND THE DIOCESE TO BE FIFTY-PERCENT AT FAULT.

Respondent appears to object to the Diocese's decision to include Richard Staab on the verdict form, but not join him to the lawsuit as a third-party defendant. (R. Br. pp. 19-20). It has long been the rule in Minnesota that the fault of non-parties may be included on a verdict form for a jury's consideration and allocation of fault. Lines v. Ryan, 272 N.W.2d 896 (Minn. 1978). Aside from the fact that including Richard Staab on the verdict form as a non-party was proper, Respondent's argument in this regard suggesting the Diocese created its own joint liability by this process is erroneous. When the jury assigned 50% fault to the Diocese, the law operated to make the Diocese severally liable for its allocation of fault. Minn. Stat. § 604.02 subd. 1; Staab, 813 N.W.2d at 78. The Diocese is severally liable regardless of whether Richard Staab was a party or a non-party and regardless of whether he was included on the verdict form. As a

severally liable defendant, the Diocese is not required to pay more than its equitable share of the jury's award.

VI. THE DIOCESE WAS NOT OBLIGATED TO PAY, AND MS. STAAB WAS NOT ENTITLED TO RECEIVE THE AMOUNT OF THE JURY VERDICT ATTRIBUTABLE TO RICHARD STAAB UNTIL THE COURT ENTERED JUDGMENT CREATING THIS OBLIGATION ON AUGUST 8, 2012 AND THEREFORE SHOULD NOT BE REQUIRED TO PAY INTEREST ON THAT AMOUNT.

The Diocese disputes that any amount is owed to Respondent by the Diocese and maintains the District Court's August 8, 2012 Order for Reallocation should be reversed. Following the entry of the order for reallocation, the Respondent asked the District Court to award interest on the amount to be reallocated beginning at the time of the jury's award. The Court denied this request, holding the Diocese was only responsible for post-verdict interest running from the date of the entry of the Order for Reallocation. Respondent appealed.

To Appellant's knowledge, there is no Minnesota case in which a District Court has ordered a defendant to pay damages after the Minnesota Supreme Court expressly held that defendant did not have to pay those same damages. Consequently, there is likely no authority directing this Court on the proper procedure under this unique set of facts. Likewise, this scenario is not likely to repeat itself in future cases, and therefore this particular case can be decided on its own facts based on the purposes and policies behind the laws requiring payment of post-verdict interest.

While there is no case with the same facts, the Minnesota Court of Appeals opinion in Johnson v. Moberg may be helpful to the Court's analysis. In Johnson, plaintiff Johnson was injured in a motor vehicle accident with defendant Moberg. 354 N.W.2d 613, 614 (Minn. Ct. App. 1984). Moberg was intoxicated at the time of the accident and brought a third-party claim against defendant Betsinger who operated the establishment that served Moberg alcohol. The case was submitted to trial in 1981. Prior to trial, both defendants stipulated they were negligent and their negligence was cause of Plaintiff's injuries, but asked to jury to determine the allocation of fault. The jury determined defendant Moberg was 55% at fault and defendant Betsinger was 45% at fault. Following trial, defendant Betsinger sought an appeal with regard to the standard of conduct applicable to them as a matter of law. Id. The matter was brought to the Minnesota Supreme Court and ultimately remanded for a new trial on issues of liability. Id. Two years after the first trial, and under the correct application of the law, the jury found defendant Moberg to be 100% at fault and Betsinger 0% at fault. The trial court entered judgment that included interest on the first (1981) verdict. Defendant Moberg appealed the interest determination.

The Court of Appeals held plaintiff Johnson was not entitled to interest on the verdict for damages where the issue of liability had been submitted to a new trial. The Court reasoned that interest is recoverable for "default in a legal duty" to pay a liquidated sum. Id. citing Integrity Mut. Ins. Co. v. State Farm Mut. Ins. Co., 160 N.W.2d 557 (Minn. 1968). An obligation calling for interest does not

arise before liability is established. Id. In Integrity Mut. Ins. Co. the Minnesota Supreme Court noted its “reluctance to hold that before a defendant’s liability has been fixed in a personal injury action he is “in default of a legal duty” for failure to pay damages which have previously been established. Id. In Johnson, although defendant Moberg admitted liability, and the only issue remaining for the second trial was the degree of that liability, his legal obligation remained unsettled at the outset of the second trial. The Court declined to award interest from the time of the first trial. Id.

Post-verdict interest is intended to provide full compensation for the loss of use of money **to which a prevailing party is entitled as a result of the nonpayment** of a liquidated sum. Lienhard v. State, 431 N.W.2d 861, 865 (Minn. 1988). Minnesota Statute § 549.09 subd. 2. In this case, Respondent was entitled to \$112,100.35 (50% of the jury’s verdict) plus costs, pre-verdict interest up until the time of trial and post verdict interest up until the time of payment on July 30, 2009. The total amount paid was \$135,973.38. Between the time of the verdict and the time of the Minnesota Supreme Court’s decision, the Diocese’s legal obligation to pay the remaining 50% of the judgment remained unsettled. The Minnesota Supreme Court ultimately held Ms. Staab was **not** entitled to any additional money from the Diocese. There was no period of “non-payment” by the Diocese for which Respondent was to be compensated. Minnesota Supreme Court’s decision in Staab confirms that Respondent was not entitled to any funds from the Diocese beyond what was paid, and therefore it cannot be said that

Respondent “lost the use” of this money. Similar to Johnson, whether the Diocese had an “obligation” to pay any further amounts to Respondent was at best unsettled until the District Court entered its August 8, 2012 order for reallocation. Accordingly, the Diocese is only responsible for post-verdict interest from the date of the District Court’s Order.

CONCLUSION

Richard Staab is not a party to this case. There is no judgment against Richard Staab and no right to collect any amounts from him. There is nothing to be reallocated pursuant to Minnesota Statute §604.02 subd. 2. Additionally, the 2003 Amendments to Minnesota Statute §604.02 limited the application of joint and several liability for purposes of enforcing a judgment to only four circumstances as enumerated in the statute. Staab, 813 N.W.2d 68, 78 (Minn. 2012). None of the four enumerated circumstances apply in this case. The Diocese, as a severally liable defendant, is responsible only to pay its equitable share of the jury’s award and is not subject to reallocation. Staab, 813 N.W.2d 68 (Minn. 2012); Eid v. Hodson, 521 N.W.2d 862 (Minn. Ct. App. 1994).

In order to affirm the decision of the District Court, this Court must hold a non-party is properly subject to a judgment, overruling the Minnesota Supreme Court’s decision in Hurr v. Davis, 193 N.W. 943, 944 (Minn. 1923), and that this “judgment” is “uncollectable,” contrary to the decision in Hosley II, 401 N.W.2d at 140. The Court must hold reallocation is proper, despite the fact there is no judgment to be reallocated, contrary to the plain language of Minnesota Statute §

604.02 subd. 2. Additionally, to affirm the District Court's decision, the Court must determine that the Minnesota Supreme Court erred in finding the general rule of several liability now applies in all circumstances where a party was jointly and severally liable at common law and reverse this decision. Staab, 813 N.W.2d at 78. The Court must also hold that a severally liable defendant is required to pay more than his or her equitable share of a judgment in contravention of the express holding of the Minnesota Supreme Court in Staab v. Diocese of St. Cloud and the well-settled definition of "several liability." 813 N.W.2d 68, 78 (Minn. 2012). Furthermore, in order to affirm the District Court's decision, the Court must hold that the reallocation statute applies to severally liable defendants, overruling Eid v. Hodson, Hahn v. Tri-Line Farmers Co-Op. and Newinski v. Crane. Newinski v. John Crane, Inc., A08-1715, 2009 WL 1752011 (Minn. Ct. App. June 23, 2009) (unpublished) (AA-127), Hahn v. Tri-Line Farmers Coop., 478 N.W.2d 515, 522 (Minn. Ct. App. 1991) (holding the requisite joint liability required for reallocation was absent) overruled on other grounds by Conwed Corp. v. Union Carbide Chems. & Plastics Co., 634 N.W.2d 401, 414 (Minn. 2001). Finally, to affirm the decision of the District Court, this Court must apply the reallocation statute in a manner in which it has never, in 35 years, been applied. Conversely, by reversing the decision of the District Court, this Court may uphold and give effect to all of these authorities.

As discussed herein, the Diocese is not responsible to pay any further amount to Respondent and as such the Court need no issue a decision on the

calculation of interest. However, even if the Diocese were responsible to pay additional sums to Respondent, post-verdict interest cannot accrue while the determination of that liability is unsettled. The issue of whether the Diocese had any obligation to pay amounts owed to Respondent was unsettled until the District Court issued its August 8, 2012 Order for Reallocation. Accordingly, the District Court's determination as to interest, as articulated in the September 25, 2012 Order, should be affirmed.

QUINLIVAN & HUGHES, P.A.

Dated: 12-5-12

By: 

Dyan Jean Ebert # 0237966
Laura A. Moehrle #0348557
Attorneys for Appellant
P.O. Box 1008
St. Cloud, MN 56302-1008
Phone: (320) 251-1414

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(c), the undersigned hereby certifies, as counsel for Appellant Diocese of St. Cloud, that this brief was prepared in Microsoft Word 2010, using 13-point Georgia proportionally-spaced font, and further certifies that this brief complies with the type-volume limitation as there are 5,914 words in this brief, excluding parts of the brief exempted by Minn. R. Civ. App. P. 132.01 subd. 3, according to Microsoft Word 2010's word count.

QUINLIVAN & HUGHES, P.A.

Dated: 12-5-12

By: 
Dyan Jean Ebert # 0237966
Laura A. Moehrle #0348557
Attorneys for Appellant
P.O. Box 1008
St. Cloud, MN 56302-1008
Phone: (320) 251-1414