STATE OF WISCONSIN
SUPREME COURT

LINA M. MUELLER,

Plaintiff-Appellant,

v.

McMILLAN WARNER INSURANCE COMPANY,

Defendant-Respondent,

Appeal #2005AP121

MERLIN A. SWITLICK and STEPHANI SWITLICK,

Circuit Court Case No. 04-CV-91

Defendants-Respondents-Petitioners,

APOLLO SWITLICK and SECURITY HEALTH PLAN OF WISCONSIN, INC.,

Defendants,

and

METROPOLITAN PROPERTY and CASUALTY INSURANCE COMPANY,

Intervenor-Defendant.

BRIEF OF DEFENDANTS-RESPONDENTS-PETITIONERS, MERLIN A. SWITLICK AND STEPHANI SWITLICK,

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APPEAL FROM THE DECISION OF THE COURT OF APPEALS, DISTRICT III, FILED AUGUST 2, 2005

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

STATEMENT OF ISSUES PRESENTED 1

STATEMENT OF THE CASE 2

A. Nature of the Case 2

B. Statement of Facts 5

C. Procedural Status of the Case 9

1. Case History 9

2. Disposition in Trial Court 12

3. Disposition in Court of Appeals 13

STANDARD OF REVIEW 15

ARGUMENT 16

I. THE ALLEGED NEGLIGENT ACTS AND OMISSIONS OF SWITLICKS WERE AT THE SCENE OF AN EMERGENCY OR ACCIDENT. 16

A. The Intended Purpose of the Statute is Well Served by the Trial Court's and Court of Appeals' Interpretation of the "Scene of Any Emergency or Accident. . 18

B. The Statute's History Supports the Conclusion that "The Scene of Any Emergency or Accident" is to Have Broad Application. 20

C. The Plain Meaning of the Words Supports an Interpretation of Broad Effect. . . 22

D. Mueller Alleges the Existence of the Scene of an Emergency in Her Complaint. 25

E. Whether the Scene of an Emergency Or Accident Exists Should not be Dependent Upon the Type of Intervention Effected by the Lay Person Samaritan. 26

II. EMERGENCY CARE AS USED IN THE STATUTE IS NOT AMBIGUOUS. IT INCLUDES EVEN SIMPLE AND UNSOPHISTICATED ACTS OF CARE IF RENDERED AT THE SCENE OF AN EMERGENCY. 30

III. IF "EMERGENCY CARE" IS AMBIGUOUS, THE TRIAL COURT'S INTERPRETATION IS MOST CONSISTENT WITH THE STATUTE'S INTENDED PURPOSE AND SHOULD BE ADOPTED BY THE SUPREME COURT. 33

A. The Court of Appeals' Interpretation of "Emergency Care" is Ambiguous Itself and Establishes a Questionable Distinction that Should not Affect Applicability of the Immunity. 34

B. The Trial Court's Interpretation of "Emergency Care" is Properly Premised and Consistent With the Intended Purpose of the Statute. 43

IV THE LAY PERSON SAMARITAN SHOULD NOT BE REQUIRED TO SATISFY A PRESCRIBED STANDARD OF CARE BEFORE IMMUNITY APPLIES. 47

V. GOOD SAMARITAN IMMUNITY APPLIES TO MERLIN SWITLICK 52

CONCLUSION 54

CERTIFICATION 57

TABLE OF AUTHORITIES

Wisconsin Cases

Anderson v. American Fam. Mut. Ins. Co.,
2003 WI 148, ¶9, 267 Wis. 2d 121, 671 N.W.2d 651 . 15

Czapinski v. St.Francis Hosp.,
2000 WI 80, ¶12, 236 Wis. 2d 316, 613 N.W.2d 120 . 16

Mueller v.McMillan Warner Ins. Co.
2005 WI 210, ¶25, ___ Wis. 2d, ___,
704 N.W.2d 613 14,17,19,22,23,34,37,42

Preston v. Meritor Hospital, Inc.,
2005 WI 122, ___ Wis. 2d ___, 700 N.W.2d 158 46

State v. Pham,
137 Wis. 2d 31, 403 N.W.2d 35 (1987) 18

Wenke v. Gehl Co.,
2004 WI 103, ¶32, 274 Wis. 2d 220, 682 N.W.2d 405 . 18

Wisconsin Statutes:

Wis. Stat.§125.035(4)(b) 10

Wis. Stat.§147.17(7) 48

Wis. Stat.§149.06(5) 20,48

Wis. Stat.§448.03(2)(i) 43,44

Wis. Stat.§448.03(4) 20,21

Wis. Stat.§895.48 4,16,22,27,30

Wis. Stat.§895.48(1) . 1,2,11,12,13,15,16,21,44,45,46,47

STATEMENT OF ISSUES PRESENTED

The Order granting the Petition for Review did not address the "Issues to be Reviewed" presented in the Petition. The "Issues Presented for Review" as set forth in the Petition are as follows:

1. **Is a person who renders care to an injured individual at or near the scene of the accident giving rise to the injury immune from civil liability pursuant to §895.48(1), Wis. Stats.?**

2. **What constitutes "emergency care" for purposes of §895.48(1), Wis. Stats.?**

3. **Is Merlin Switlick, as compared to Stephani Switlick, entitled to Good Samaritan immunity?**

A review of the Supreme Court list of pending cases omits issues 1 and 2 above and adds the following:

1. **What standard of care must be provided to**

an injured individual at or near the scene of an accident to qualify a caregiver for immunity from civil liability under Wis. Stats. §895.48(1), the "Good Samaritan" statute?

All of the issues set forth above will be addressed.

STATEMENT OF THE CASE

A. Nature of the Case

This case concerns application of §895.48(1), Wis. Stats. that sets forth the so-called Good Samaritan immunity. The relevant portion of the statute states:

> " (1) Any person who renders emergency care at the scene of any emergency or accident in good faith shall be immune from civil liability for his or her acts or omissions in rendering such emergency care." §895.48(1), Wis. Stats.

The immunity is relevant to this case based on a theory of negligence advanced by the plaintiff, Lina Mueller. As will be developed more fully below, the plaintiff was injured in an ATV accident at a location remote from where

the petitioners, Stephani and Merlin Switlick, were located. Subsequently, the plaintiff proceeded to where Stephani and Merlin Switlick were located, demonstrating "symptoms of severe injury." (R-12, ¶12). Mueller alleges that Merlin and Stephani Switlick negligently acted and omitted acts in rendering aid to her. Mueller alleges as follows:

> "11. That following the accident of October 25, 2003 plaintiff, Lina Mueller, returned to the Switlick home with facial and other injuries evident to both Merlin A. and Stephani Switlick.
>
> "12. That despite the fact that Lina Mueller had blood on her face, displayed episodes of nausea and vomiting, was combative and otherwise displayed symptoms of severe injuries, she was not conveyed to a hospital for care and treatment. That no effort was made by defendants to seek medical help for plaintiff.
>
> "13. That from the time of the accident, until the time Lina Mueller was conveyed to the hospital, on October 26, 2003, at or around 8 a.m. she was unable to care for herself, was suffering the effects of severe injuries and was unable to make decisions regarding her care and comfort.
>
> "14. That defendants, Merlin A. and Stephani Switlick, were negligent in

> failing to convey Lina Mueller to a hospital, were negligent in preventing her from obtaining medical treatment and were otherwise negligent in seeking help for Lina's injuries.
>
> "15. That the negligence of Merlin A. and Stephani Switlick was a substantial factor in causing the injuries sustained by Lina Mueller and that said negligence caused an exacerbation of her injuries and damages." (R-12, ¶11-15).

Mueller contends that in light of her condition, Stephani and Merlin Switlick should have rendered additional care.

Stephani and Merlin Switlick contend that §895.48, Wis. Stats. immunizes them from any civil liability for their acts and omissions as alleged at ¶11-15 of Mueller's amended complaint.

The nature of this appeal concerns the interpretation and application of §895.48, Wis. Stats. and in particular, interpretation of the language "scene of any emergency or accident,""emergency care" and "good faith" as used in the statute. More specifically, does §895.48, Wis. Stats., immunize Merlin and Stephani Switlick from

Mueller's claim as alleged at paragraphs 11-15 of her amended complaint.

B. Statement of Facts

Switlicks concur with Mueller that the undisputed material facts are quite simple. (See Mueller reply to Petition for Review, p. 1). The petitioners, Merlin and Stephani Switlick, are the parents of the defendant, Apollo Switlick. (R-20, Exh. C, p. 4). At the time of the ATV accident on October 25, 2003, the plaintiff, Lina Mueller, had been Apollo's girlfriend for approximately two years. (R-20, Exh. B, p. 19). On the date of the accident, both Lina Mueller and Apollo Switlick were adults, both 19 years of age. (R-19, p. 2 and R-20, Exhibit B, p. 4).

On the date of the accident, Apollo Switlick, Lina Mueller, Stephani Switlick, Merlin Switlick and others were present at property owned by the Switlicks in Lincoln County. (R-20, Exh. D, p. 4). Lina Mueller was injured while riding as a passenger on the back of an ATV operated by

Apollo Switlick. (R-1, ¶5). As Apollo was driving the ATV, he apparently encountered a downed tree, causing him to apply the ATV brakes. (R-20, Exh. B, p. 12, 17, 18). Neither Apollo Switlick nor Lina Mueller were wearing helmets. (R-20, Exh. B, p. 36). The ATV accident happened in the woods approximately a quarter of a mile from where Merlin Switlick and Stephani Switlick were located. (R-20, Exh. B, p. 16).

Following the accident, Apollo Switlick and Lina Mueller drove the ATV back to where Merlin Switlick and Stephani Switlick were located. (R-20, Exh. B, p. 15). Upon returning, Apollo parked the four-wheeler and he and Mueller walked to the cabin. (R-20, Exh. C, p. 29-30). When Lina Mueller and Apollo Switlick got into the light near where Stephani Switlick and Merlin Switlick were located, they could see that Lina Mueller was bleeding. (Id.). Stephani Switlick was able to observe blood coming out of Mueller's nose, but not anywhere else, including the lips, eyes, forehead or cheeks. (R-20, Exh. C, p. 30-31) Stephani Switlick took Lina

Mueller into the cabin located on the property. (R-20, Exh. C, p. 29-30) Stephani Switlick accompanied Lina Mueller to the bathroom in the cabin where she threw up. (R-20, Exh. C, p. 34). Lina Mueller told Stephani Switlick that she wanted to just lay there in the bathroom. (Id.). Stephani Switlick suggested that Lina Mueller lay down in an available bed and she helped Lina Mueller into the bedroom. (Id. at p. 35-36).

After assisting Lina Mueller into a bed, Stephani Switlick sat up in the living room throughout the night, checking periodically on Lina Mueller. (R-20, Exh. C, p. 38-39). Stephani Switlick would ask Lina Mueller if she knew where she was, to which Lina Mueller would say, "Yes," or "I'm at your shack." (Id. at p. 39 and 41). Stephani Switlick would also ask Mueller if she knew who she was, to which Mueller would reply, "Yeah, you're Steph." (R-20, Exh. C, p. 41) Her reason for going back to check on Lina Mueller was that she wanted to make sure that Lina's condition didn't take a turn for the worse. (Id. at p. 41).

Stephani sat up all night to continue to watch Lina Mueller to make sure her condition did not worsen. (R-20, Exh. C, p. 36, 38, 42). Lina Mueller complained of a headache and vomited several times during the course of the night. (R-20, Exh. C, p. 40,48, 49).

When Stephani checked on Lina Mueller around 6 a.m., Mueller for the first time did not respond properly to Stephani's question. (R-20, Exh. C, p. 44). At this point, Stephani called for a rescue squad. (R-20, Exh. C, p. 45).

Merlin Switlick testified that like Stephani Switlick, when Lina Mueller and Apollo Switlick entered the light at or near the cabin at which he was located, he observed blood on both Apollo Switlick and Lina Mueller. (R-20, Exh. D, p. 18-21). Merlin testified that Apollo told him that he really didn't know what had happened for sure but he said that he felt as though they collided heads. (Id.). At that point, Merlin observed Lina's bloody nose and felt her teeth to see if they were loose from hitting the back of Apollo's head.

(Id.). Merlin testified that Lina's teeth were tight upon his inspection. (Id.). At that point Merlin Switlick observed Stephani Switlick accompany Lina Mueller into the home on the premises at which time he knew that Stephani was taking care of Lina Mueller throughout the course of the night. (R-20, Exh. D, p. 24-27). Thereafter, Merlin was not involved in any care rendered to Lina Mueller until approximately 6:00 a.m. when the ambulance was called. (Id.).

C. Procedural Status of the Case

1. Case History

Lina Mueller filed this action in Marathon County on January 28, 2004. (R-1). Mueller's complaint names as defendants, Apollo Switlick, his insurer, McMillan Warner Insurance Company, and a subrogated health insurer. (Id.). Mueller's complaint sets forth a negligence claim against Apollo Switlick, alleging that he caused injury to Mueller by the negligent operation of an ATV. (Id.).

After the action was initiated, counsel for

Mueller conducted the depositions of Apollo Switlick's parents, Merlin Switlick and Stephani Switlick. (R-20, Exhibits C and D). Neither Stephani Switlick nor Merlin Switlick had legal representation at the depositions.

Shortly after the depositions were conducted, Mueller filed an amended complaint joining Merlin and Stephani Switlick as defendants. The amended complaint alleges that Merlin and Stephani Switlick were negligent for failing to convey Mueller to a hospital and that they otherwise made no effort to seek medical help for the plaintiff.[1] (R-12, ¶12).

Prior to the amended complaint being filed by Lina Mueller, McMillan Warner obtained independent counsel to address insurance coverage issues. (R-6). McMillan Warner filed a motion to stay and bifurcate proceedings. (R-8). An order bifurcating and staying proceedings was entered by the

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[1]The amended complaint alleges an additional claim against the Switlicks based on sec.125.035(4)(b), Wis. Stats. That claim is not at issue on appeal.

court on stipulation of the parties on May 28, 2004. (R-15).

Thereafter, McMillan Warner filed motions regarding the insurance coverage issues. Because of the intervening amended complaint, motions for summary judgment were filed not only with regard to insurance coverage issues but also on the merits of Mueller's claims against Merlin and Stephani Switlick. (R-18, ¶29). Merlin and Stephani Switlick filed a motion for summary judgment based on §895.48(1), Wis. Stats. (Good Samaritan immunity) seeking to have Mueller's claim as set forth at paragraphs 11-15 of her complaint dismissed.[2]

The trial court conducted oral arguments on the motion for summary judgment on October 26, 2004. The trial court issued a written decision on November 29, 2004. (R-36). The trial court granted the motion for summary judgment based on §895.48(1) and dismissed Mueller's claim against

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[2]A motion for summary judgment was also brought with regard to the other claim against Switlicks alleged in Mueller's amended complaint. That motion is not relevant to this appeal.

the Switlicks as alleged at ¶11-15 of the amended complaint.

Mueller filed a notice of appeal on January 5, 2005. The Court of Appeals issued a decision dated August 2, 2005 reversing the decision of the trial court.

On September 1, 2005 defendants-respondents-petitioners, Merlin and Stephani Switlick, filed a Petition for Review with the Wisconsin Supreme Court. The plaintiff filed a response to Petition for Review on or about September 16, 2005. The Petition seeks review of the Court of Appeals decision wherein it concludes that §895.48(1), Wis. Stats. is inapplicable and does not afford immunity to Merlin and Stephani Switlick. On October 14, 2005, the Supreme Court issued an order granting the Petition for Review.

2. Disposition in Trial Court

The trial court concluded that §895.48(1) immunizes Merlin and Stephani Switlick from liability premised on their alleged acts and omissions in providing emergency care to Mueller when they saw her "display of

symptoms of severe injury." The trial court reached this conclusion after interpreting the operative phrases "scene of any emergency or accident" and "emergency care."

With regard to "scene of any emergency," the trial court concluded that:

> ". . .'the scene of the emergency' must be deemed to follow the person in peril and in need of emergency care. It covers the farmer that answers the door to find a victim of an automobile accident who was able to make it to his door or the driver finding a hunter who, after falling from his deer stand, crawls out to a highway with his broken leg. The fact that the site of the accident is some distance away does not reduce an injured person's need for assistance." (R-36, p. 6).

With regard to "emergency care" the trial court, concluded that emergency care included "m edical assistance and first aid." (R-36, p. 6-7). Based on these interpretations, the trial court concluded that §895.48(1), Wis. Stats. applied, affording the Switlicks immunity.

3. Disposition in Court of Appeals

The Court of Appeals also engaged in statutory

interpretation. Like the trial court, the Court of Appeals focused its attention on the phrases "scene of any emergency or accident" and "emergency care." The Court of Appeals concurred with the trial court in its interpretation of "scene of any emergency or accident." The Court of Appeals stated:

> "Read together, the definitions of 'scene,' 'emergency' and 'accident' suggest a focus on the victim's state or condition rather than on the character of the action that produced that state or the particular place in which that state first manifested itself . . A child injured in a snowmobile accident may be in no less need of emergency care if he or she stumbles a half mile before he or she is found than if he or she is found right beside the snowmobile." ***Mueller v. McMillan Warner Ins. Co.*** , 2005 WI App. 210, ¶25 @ Footnote 12; ____ Wis. 2d ____, 704 N.W.2d 613.

The Court of Appeals did not concur with the trial court in its definition of "emergency care." The Court of Appeals, concluded that when the Samaritan is a lay person, the intervention protected will ordinarily be of short duration and of an interim sort. (***Id.*** at ¶29).

The Court of Appeals then concluded that

whatever Merlin and Stephani Switlick did for Mueller, it did not constitute emergency care. (See ***Id.*** at ¶34). Because the Switlicks did not provide emergency care, the Court of Appeals concluded §895.48(1) did not apply. The decision of the trial court was reversed.

STANDARD OF REVIEW

The Supreme Court is asked to review the reversal of the trial court's grant of summary judgment. Summary judgment decisions are reviewed without deference, using the same methodology as the trial court. See ***Anderson v. American Fam. Mut. Ins. Co.*** , 2003 WI 148, ¶9, 267 Wis. 2d 121, 671 N.W.2d 651. The Court of Appeals did not reverse the trial court's grant of summary judgment on the basis of disputed issues of material fact. Rather, the Court of Appeals interpreted and applied the relevant statute differently than the trial court. The summary judgment question in this case turns on the interpretation of a statute that creates immunity from civil liability. Proper interpretation and

application of the statute is a question of law subject to de novo review. ***Czapinski v. St. Francis Hosp.***, 2000 WI 80, ¶12, 236 Wis. 2d 316, 613 N.W.2d 120.

ARGUMENT

I. THE ALLEGED NEGLIGENT ACTS AND OMISSIONS OF SWITLICKS WERE AT THE SCENE OF AN EMERGENCY OR ACCIDENT.

Mueller alleges that Stephani and Merlin Switlick are liable for her damages because of how they failed to act or acted in response to her display of symptoms of severe injuries. In defense to this claim, Merlin and Stephani Switlick assert the immunity afforded by §895.48, Wis. Stats. That section provides in relevant part that:

> "Any person who renders emergency care at the scene of any emergency or accident in good faith shall be immune from civil liability for his or her acts or omissions in rendering such emergency care." §895.48(1), Wis. Stats.

For §895.48 immunity to apply, the lay person Samaritan must render "emergency care" at the "scene of any

emergency or accident" in "good faith." The immunity expressly applies to acts and omissions in rendering the emergency care.

An initial requirement for application of §895.48 immunity is that the negligently rendered or omitted emergency care is rendered at "the scene of any emergency or accident."

"The scene of any emergency or accident" is not defined in the current version of the Wisconsin Good Samaritan statute. Both the trial court and Court of Appeals concluded that the language is ambiguous as reasonably well-informed persons could clearly understand the language in a variety of ways. (See ***Mueller*** at ¶25)

Merlin and Stephani Switlick agree that the language is ambiguous and in need of interpretation. Switlicks believe that the trial court and Court of Appeals established a proper definition for "scene of an emergency or accident" by relying upon (1) the statute's purpose, (2) the statute's

history and (3) the plain meaning of the words involved. Switlicks also contend that given the trial court and the Court of Appeals' definition, the scene of an emergency or accident existed when it is alleged that the Switlicks negligently rendered and omitted emergency care for Mueller.

A. The Intended Purpose of the Statute is Well Served by the Trial Court's and Court of Appeals' Interpretation of the "Scene of Any Emergency or Accident."

As noted by both the trial court and Court of Appeals, when interpreting a statute, the goal is to ascertain and give effect to the statute's intended or legislative purpose. See ***Wenke v. Gehl Co.***, 2004 WI 103, ¶32, 274 Wis. 2d 220, 682 N.W.2d 405, and ***State v. Pham***, 137 Wis. 2d 31, 403 N.W.2d 35 (1987). Both the Court of Appeals and trial court enunciated their understanding of the statute's intended purpose.

> "Wisconsin's current Good Samaritan law encourages all citizens to respond to emergency situations by protecting them

> from liability for most acts or omissions in rendering care that have bad consequences." ***Mueller*** @ ¶29.

At Footnote 12 of its decision, the Court of Appeals expressed that the broad purpose of the Good Samaritan law is,

> "to encourage all of us to respond to human beings who need immediate medical help when and where we encounter them." ***Mueller*** @ Footnote 12.

The trial court expressed the intent of the statute by stating:

> "It is to encourage people to render medical care to those in an urgent need for such care without fear of civil liability if the aid rendered later turns out to be improper or *there is an omission due to an improper diagnosis as to the type of care required*." (R-36, p. 5) (emphasis added)

The trial court's statement of the intended purpose of the statute is particularly good as it expressly recognizes a situation in which an immunized omission may arise.

Any interpretation of "scene of any emergency

or accident" adopted by the Supreme Court should be consistent with and not defeat the intended purpose of the statute. The intervention encouraged by the statute is of benefit wherever one in need of emergency care may happen to encounter a lay person Samaritan. The anticipated desirable effect of intervention is not limited by proximity to the injury-causing event. The interpretation given the phrase by the trial court and Court of Appeals supports the intended purpose of the statute and should be adopted by the Supreme Court.

B. The Statute's History Supports the Conclusion that "The Scene of Any Emergency or Accident" is to Have Broad Application.

To interpret "scene of any emergency or accident," the trial court and Court of Appeals reviewed the statute's history. The statute's predecessors, Wis. Stats. §149.06(5) (1963) and Wis. Stats. §448.03(4) (1975) contained a definition for "the scene of an emergency." These predecessor statutes did not afford immunity to "any

person" but only to persons licensed or certified under the particular chapter in which the statute appeared (i.e. various health care professionals).

In the predecessor statutes, "scene of an emergency" was defined as "areas not within the confines of a hospital or other institution which has hospital facilities or the office of a person licensed or certified under this chapter." (See App-139-141; §448.03(4) Wis. Stats. 1975-76) When the current version of the Good Samaritan statute was codified at §895.48(1), it was amended to apply to "any person" and the definition for "scene of an emergency" was omitted. Switlicks have been unable to find any discussion or explanation in the legislative history for the omission.

The prior definition for "scene of an emergency" was drafted very broadly to effect the statute's purpose in as wide a range of circumstances as possible. The definition did not define those areas or circumstances that constituted the scene of an emergency, but rather, established

a very small exception to what otherwise constituted the scene of an emergency. This method of drafting a definition results in an extremely broad application.

There is no basis for contending that by omitting the definition of "scene of an emergency" from §895.48, Wis. Stats. the Wisconsin legislature intended to reduce, restrict or limit those areas or circumstances that constitute the scene of any emergency or accident. Instead, the prior definition highlights the expansive application that is intended for the statute. "The scene of any emergency or accident" is broad language, even if narrowly construed, that reflects the intended broad application of the statute.

C. The Plain Meaning of the Words Supports an Interpretation of Broad Effect.

The Court of Appeals referenced dictionary definitions for the words "scene," "emergency" and "accidents" to interpret "the scene of any emergency or accident" as used in the statute. (See ***Mueller*** at ¶25). Based

on this review of the plain meaning of the words, the Court of Appeals concluded that:

> "Read together, the definitions of 'scene,' 'emergency,' and 'accident' suggest a focus on the victim's state or condition rather than on the character of the action that produces that state or the particular place in which that state first manifested itself. . . . A child injured in a snowmobile accident may be in no less need of emergency care if he or she stumbles a half mile before he or she is found than if he or she is found right beside the snowmobile." (***Mueller*** @ ¶25, Footnote 12).

In a remarkably similar conclusion, the trial court, as a result of its interpretation efforts, concluded that:

> "To meet that statutory purpose, 'the scene of the emergency' must be deemed to follow the person in peril and in need of emergency care. It covers the farmer that answers the door to find a victim of an automobile accident who was able to make it to his door or the driver finding a hunter who, after falling from his deer stand, crawls out to a highway with his broken leg. The fact that the site of the accident is some distance away does not reduce an injured person's need for assistance."(R-36, p.6) .

These statements by the trial court and Court of

Appeals encompass their conclusions regarding the interpretation of "scene of any emergency or accident." These interpretations dictate a conclusion that in this case the allegedly negligent acts and omissions of Stephani and Merlin Switlick involve the scene of an emergency or accident.

The analysis of the trial court and Court of Appeals demonstrates that the statute's intended purpose, history and plain meaning of the words, all support a conclusion that Mueller was at the scene of an emergency or accident when she contends the Switlicks were negligent. There is no credible basis for contending that simply because Mueller was no longer physically located directly at the scene of the ATV accident, that the scene of an emergency did not exist.

The statute's intended purpose is well served by the interpretation of "the scene of any emergency or accident" established by the trial court and Court of Appeals. Lay person Samaritan interventions are of equal value at the

immediate scene of the accident or injury as at some distant location. The Supreme Court should adopt the logic and conclusions of the trial court and Court of Appeals in interpreting the scene of an accident or emergency as used in the statute and conclude that in this case, the scene of an emergency existed at the operative time.

D. Mueller Alleges the Existence of the Scene of an Emergency in Her Complaint.

In addition to everything stated above, Mueller should not be heard to contend that the scene of an emergency or accident did not exist. In her complaint, Mueller essentially alleges the existence of an emergency situation to which the Switlicks either negligently acted or failed to act. At ¶12 of her amended complaint, Mueller alleges that upon encountering the Switlicks after the accident, she had blood on her face, displayed episodes of nausea and vomiting, was combative and otherwise displayed symptoms of severe injuries. (R-12, ¶ 12). Mueller then contends that Stephani

and Merlin Switlick were negligent in failing to convey her to a hospital and in failing to seek medical help for her. (Id.). Implicit in the plaintiff' s allegations is that an emergency situation existed that warranted a response that was not provided. The gravamen of the plaintiff's complaint against Switlicks in this regard is that they failed to provide emergency care in an emergency situation (i.e. the scene of an emergency).

The Supreme Court should conclude that the alleged negligent acts and omissions of the Switlicks were at the scene of an emergency or accident if for no other reason than that is exactly what Mueller alleges.

E. Whether the Scene of an Emergency or Accident Exists Should not be Dependent Upon the Type of Intervention Effected by the Lay Person Samaritan.

In her reply to the Petition for Review, Mueller advances an argument that the scene of an emergency or accident did not exist in this case because the Switlicks did not

subjectively perceive the existence of an emergency.[3] Mueller argues that the contention that the Switlicks did not perceive an emergency is supported by evidence of the limited type of care provided by the Switlicks and by their alleged failure to intervene with more significant acts of care (i.e. omissions). According to Mueller, Switlicks could not have subjectively perceived the existence of an emergency situation because they did not act like one would expect a reasonable person to act in the course of intervening at the scene of an emergency.

Mueller's argument is unique in that while she brings claim against Switlicks for not doing more under emergency circumstances, she also claims that the immunity afforded by §895.48, Stats. should not apply because "the scene of an emergency" did not exist. Not only does there

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[3]In a similar manner, Mueller argues that if the Switlicks subjectively did not perceive "the scene of an emergency" to exist, they could not have provided emergency care. This logic only supports Switlicks' argument below that any care administered in the course of an intervention at the scene of an emergency constitutes "emergency care." It is the circumstances of the situation that define the care provided and not the nature of the particular act of care.

appear to be contradiction in Mueller's argument, it ignores the express language of the statute that provides that negligent omissions are immunized.

Mueller's proposed approach utilizes alleged omissions in the rendering of emergency care as a basis to exclude immunity. According to Mueller, the omissions constitute evidence that the lay person Samaritan has no subjective belief that the scene of an emergency exists which results in no immunity. Mueller is essentially arguing that an intervention consisting of "simple" care-giving acts and omissions should not be entitled to Good Samaritan immunity.

Mueller's argument is really nothing more than an indirect way to secondguess and evaluate the quality of certain interventions. Mueller's approach would apply if in hindsight, it appears as though the lay person Samaritan did not intervene enough or should have done more in the course of the intervention. In effect, Mueller contends that liability should be imposed on the lay person Samaritan because an

after-the-fact analysis of the intervention demonstrates that the extent of the intervention was not good enough. Mueller's approach constitutes a qualitative analysis. It imposes liability on the lay person Samaritan for not properly identifying the degree or extent of the emergency. That is, it imposes liability on a lay person Samaritan for having a poor quality assessment or screening of the injury at the scene of the emergency.

The scenario described above, where the contention is that not enough was done in the course of the intervention, was addressed succinctly and compelling by the trial court. The trial court stated that the statute encourages people to render care by removing the fear of civil liability if: "the aid rendered later turns out to be improper or *there is an omission due to an improper diagnosis as to the type of care required.*" (R-36, p. 5). (emphasis added) Good Samaritan immunity applies to improper diagnoses or screenings. The evaluation and screening of the condition of an injured person is as much a part of emergency care as is the subsequent acts

based on the conclusion of the evaluation and screening. If the evaluation and screening results, properly or negligently, in the rendering of "simple" acts of care vs. more significant acts, or results in a negligent omission, it is all subject to the immunity afforded by §895.48. An improper evaluation or screening by the lay person Samaritan that results in a limited intervention where hindsight demonstrates that more should have been done, should not result in the immunity not applying.

II. EMERGENCY CARE AS USED IN THE STATUTE IS NOT AMBIGUOUS. IT INCLUDES EVEN SIMPLE AND UNSOPHISTICATED ACTS OF CARE IF RENDERED AT THE SCENE OF AN EMERGENCY.

§895.48, Wis. Stats. affords immunity for "em ergency care." Mueller contends that §895.48 does not apply because the care rendered by the Switlicks to Mueller constituted something other than "emergency" care. Mueller argues that what the Switlicks rendered was something along

the lines of "first aid," "monitoring care" or "babysitting type care."

The trial court and Court of Appeals concluded that "emergency care" was ambiguous and in need of interpretation. Switlicks do not concede that "emerg ency care" as used in the statute is ambiguous. Switlicks contend that all the acts or omissions utilized in the course of the intervention by the lay person Samaritan at the scene of an emergency or accident in the course of an intervention constitute "emergency care." It is the circumstances in which the care is rendered that defines the character of the care.

The statute uses the word "emergency" care as it contemplates care rendered at the scene of an emergency. "Emergency care" was not used in reliance upon some undefined distinction between various acts or types of care. Although Mueller has on numerous occasions contended that the Switlicks' care did not constitute "emergency care," no established categorizations or recognized distinctions have

been offered to substantiate the claim.

Given the intended purpose of the statute, to encourage all persons to intervene on behalf of persons in need of care by removing the fear of liability, it would be self-defeating to define "emergency care" such that some of the acts constituting the intervention would be entitled to immunity as emergency care while other care-giving acts would subject the Samaritan to liability. If such a distinction exists, the lay person Samaritan is placed in the unenviable position of trying to assess, while in the whirlwind of an emergency situation, whether their individual acts of intervention constitute "emergency care" or some other type of care.

The care-giving acts utilized by a lay person Samaritan in the course of an intervention at the scene of an emergency or accident constitute "emergency care." If the Samaritan intervenes with the simple act of holding a hand or repositioning some other part of the body and the act unfortunately results in further harm, the simple act should be

immunized. If the Samaritan acts to place a bandage on a wound and in the process effects an infection of the wound, the simple act is immunized.

"Emergency care" as utilized in the statute is not ambiguous. It applies to the acts and conduct of the Good Samaritan that are utilized or omitted to effect the intervention. The determination that "emergency care" is ambiguous is premised on a distinction conjured up by Mueller to try to delineate between emergency care and other types of care so as to limit the intended effect of Good Samaritan immunity in this particular case.

III. IF "EMERGENCY CARE" IS AMBIGUOUS, THE TRIAL COURT'S INTERPRETATION IS MOST CONSISTENT WITH THE STATUTE'S INTENDED PURPOSE AND SHOULD BE ADOPTED BY THE SUPREME COURT.

If the Supreme Court concludes that "emer gency care" is ambiguous and in need of interpretation, it is the trial court' s interpretation that is more thorough and consistent

with the overall intended purpose of the statute.

A. The Court of Appeals' Interpretation of "Emergency Care" is Ambiguous Itself and Establishes a Distinction that Should Not Affect Applicability of the Immunity.

In the process of interpreting "emergency care," the Court of Appeals looked at the dictionary definition of the words and concluded that:

> " . . . the ordinary meaning of those terms and the policies the statute serves demonstrate that when the Samaritan is a lay person, the intervention protected will ordinarily be of short duration and of an interim sort. Nothing in the statute suggests any intention that an ordinary person should make care-giving decisions any longer than the emergency situation necessitates." ***Mueller*** @ ¶29).

The Court of Appeals establishes a sort of time frame during which lay person intervention (i.e. the emergency care rendered) will be immunized. Once the time frame expires, whenever that may be, the lay person's intervention no longer constitutes immunized "emergency care" and is subject to

liability. Additionally, the intervention needs to be of an "interim sort."

The flaw in the Court of Appeals approach is that its interpretation raises more questions than it answers and discourages the intent of the statute by subjecting the lay person Samaritan to significant liability risks.

The Court of Appeals defines "short duration" as being the period of time during which care-giving decisions are necessary given the circumstances of the emergency. But necessary for what? To prevent death? To prevent further injury? To prevent deterioration of condition? To provide comfort or peace of mind? The lay person Samaritan is placed in the difficult situation of having to determine when "necessity" ends. This is a precarious determination likely to discourage intervention for if the lay person Samaritan guesses incorrectly, liability may follow.

Further, there may be situations in which there is a delayed period of necessity as in the case of delayed

presentation of symptoms. The person in need of care may present with symptoms suggesting a low level of intervention (i.e. no necessity) only to demonstrate at a later time, a need for a high level of intervention (i.e. necessity).

Second, what is intervention of an interim sort? The Court of Appeals never attempts to expand on this concept. Intervention of an "interim sort" is much more ambiguous than an intervention of "emergency care."

A particular problem with the Court of Appeals approach in this case is that after it established that interventions of "short duration" and "interim sort" are entitled to immunity, it never applied the standard to the Switlicks' acts and omissions. The Court of Appeals never determined the period of time during which care-giving decisions were necessary for Mueller given the circumstances of the emergency in order to determine if any of the Switlicks alleged acts and omissions occurred within that time frame. Given the general thrust of Mueller's allegations, that her

condition established a necessity for emergency care which was not provided, it seems illogical that none of the Switlicks' acts and omissions would be considered to have been within the "necessity" time frame and entitled to immunity.

Nor did the Court of Appeals analyze the Switlicks acts and omissions to determine if any of them were of the "interim sort." Instead, the Court of Appeals simply and quite summarily concluded that the Switlicks intervention did not constitute "emergency care." (See ***Mueller*** at ¶34). Apparently, the care constituted some other type of care not expressly delineated by the Court of Appeals. However, a further evaluation of the Court of Appeals' decision establishes that the delineation adopted by the Court was between "simple" acts and "non-simple" acts of care .

The Court of Appeals' initial conclusion that "emergency care" is ambiguous and in need of interpretation, was generated by Mueller's contention that out of all of the types of care that one person can administer to another while

in the course of an intervention at the scene of an emergency or accident, only some of it constitutes "emergency care."

At the trial court level, plaintiff set forth the argument as follows:

> "There is absolutely nothing about what Mrs. Switlick did that would in any way comport with what is commonly understood to be 'emergency care.' She did not stop any bleeding, she did not do CPR, she did not apply a splint, she did not wrap any wounds. She did not apply any bandages, she did not start an IV, she did not position the body on a long board, she did not seek additional medical attention, she did not consult with any medical provider and she did not determine whether there was a cardiac emergency." (R-22, p. 19-20).

In her reply to Petition for Review, Mueller attempts to establish a distinction between emergency care and care that consists of things like "first aid," "monitoring" and "baby- sitting type care." (See Lina M. Mueller's response to Petition for Review, p. 7).

Mueller' s theory that only certain acts of care administered in the course of an intervention at the scene of an

emergency rise to the level of "emergency care" was apparently adopted by the Court of Appeals. However, once the Court of Appeals accepted the concept of the existence of a distinction, it had to determine how to define or establish the distinction between "emergency care" and the other types of care.

Switlicks contend that the Court of Appeals distinguished "emergenc y care" from other types of care on the basis of the simplicity of the care-giving act. According to the Court of Appeals, some care-giving acts are just too simple to be considered " emergency care," and therefore, are not entitled to immunity.

After the Court of Appeals concluded that the Switlicks' intervention did not constitute "emergency care," it stated as follows:

> "Other jurisdictions have found that *relatively simple acts*, such as providing transportation to an emergency room or asking whether accident victims need help, can constitute emergency care for the purposes of Good Samaritan statutes.

> But even if we disregard differences among Good Samaritan laws, such persuasive precedent is factually distinguishable. In those cases, individuals provided care either by transporting injured persons to a place where their injuries could be treated or by attempting to make medical help available." (***Mueller*** @ ¶34) (emphasis added).

The Court's statement sheds light on why the Court of Appeals concluded that the Switlicks' intervention did not constitute "emergency care." Its acknowledgment that some jurisdictions have found that "relatively simple" acts can constitute emergency care, demonstrates that the Court accepted Mueller's argument that some types of care are just "too simple" to be considered emergency care. That is, too "simple" to be afforded immunity.

According to the Court of Appeals, in order for the care-giving act to be afforded immunity, it must be done within the period of necessity (i.e. "short duration") and must not be too simple. As long as these two criteria are satisfied, the lay person Samaritan can rest assured that their Samaritan

efforts will be immune from legal liability.

The Court of Appeals' approach is, of course, fraught with problems. The difficulty of having application of immunity dependent upon the difficult concept of necessity has already been addressed. Now the lay person must also assess, while in the moment of the emergency, the distinction between acts that are too simple and those that rise to the level of "emergency care." The Court of Appeals did not reference any medical documentation that acknowledges or recognizes a distinction between "simple acts" and "emergency care." The statute does not define any such distinction.

The Court of Appeals' approach is also problematic in that it does not address or incorporate the fact that negligent omissions in rendering care are immunized.

The Court of Appeals' conclusion that some care-giving interventions are just too simple renders negligent omissions subject to liability. In this case, for instance, the real complaint is that Stephani Switlick didn't do enough.

That is, she negligently omitted care-giving acts that should have been provided. It is because certain care-giving acts were omitted that the Court of Appeals concluded that the intervention was just too simple to be afforded immunity. The Court of Appeals is effectively subjecting negligent omissions to liability which is in direct contradiction to the express language of the statute.

The Court of Appeals commented on certain care-giving acts that it would define as "emergency care." The Court stated that the acts of " . . . transporting injured persons to a place where their injuries would be treated or by attempting to make medical help available" would constitute emergency care. (See ***Mueller*** @ 34). These are the exact acts that Mueller alleges Switlicks negligently omitted. The Court of Appeals concluded that these acts constitute "emergency care." Section 895.48, Stats. immunizes acts omitted in rendering emergency care. By the Court of Appeals own standards, the Switlicks are immune from liability for the

claim alleged by Mueller in paragraphs 11-15 of her amended complaint.

B. The Trial Court's Interpretation of "Emergency Care" is Properly Premised and Consistent With the Intended Purpose of the Statute.

To address Mueller's argument that Stephani Switlick did not provide "emergency care," but rather, something along the lines of first aid, monitoring or baby-sitting care, the trial court was forced to examine the parameters of "emergency care" as used in the statute. The trial court, unlike the Court of Appeals, referenced a related statutory provision for guidance in defining "emergency care." The trial court noted §448.03(2)(i), Wis. Stats. that authorizes "any person to furnish medical assistance or first aid at the scene of an emergency." Section 448.03, Stats., generally establishes that no person may practice medicine without a license granted by the board.

The trial court concluded that there was an inter-

relationship between §448.03(2)(i) and §895.48(1) and concluded that what §448.03(2)(i) authorizes any person to do at the scene of an emergency is related to what §895.48(1) immunizes. "Emergency care" includes medical assistance or first aid.

The trial court also relied upon the statute's intended purpose to assist in defining the parameters of "emergency care." The trial court stated,

> "The court also finds relevant the statute's object to encourage people to render medical assistance to those in peril. If that is to be accomplished at the time of the emergency giving rise to the need for medical assistance, the ordinary lay person cannot be left to worry about some strict application of a technical legal distinction between 'emergency care' and 'medical care.'" (R-36, p. 7)

Switlicks contend that in a similar manner, lay person Samaritans should not be left to worry about some distinction between "emergency care"and care that is being too simple for immunity.

The trial court concluded correctly when it stated

that the Switlicks provided traditional first aid to Mueller and therefore immunity should apply.

One of the elements of care provided by the Switlicks was monitoring. The monitoring provided by the Switlicks resulted in a call for medical assistance as soon as the monitoring indicated worsening or more severe symptoms. Monitoring should be considered an element of emergency care. It is a common element of care provided by lay persons as well as emergency departments of hospitals. There is no reason this type of care should be excluded from the definition of "emergency care" as used in §895.48(1).

Another element of the "emergency care" provided by the Switlicks was assessment or screening. Assessment or screening should be considered an element of emergency care as it is to some degree the first step in any lay person Samaritan intervention. The lay person Samaritan must figure out what, if anything, to do. Like monitoring, screening is a basic element of the care provided at emergency

departments. In fact, it is required. (See generally***Preston v. Meritor Hospital, Inc.***, 2005 WI 122, ___ Wis. 2d ____, 700 N.W.2d 158.

Because assessment or screening is a necessary element of "emergency care," it is an act that should be afforded Good Samaritan immunity. As the trial court pointed out, Good Samaritan immunity should apply if there is negligent omission due to an improper diagnosis as to the type of care required. (See R-36, p. 5).

The alleged negligently committed or omitted acts of the Switlicks constitute emergency care rendered at the scene of an emergency or accident. As such, Switlicks are entitled to the immunity provided by §895.48(1), Wis. Stats. More specifically, Switlicks are immune from liability for the claim alleged against them in the plaintiff's amended complaint, as set forth in paragraphs 11-15 of the amended complaint.

IV. THE LAY PERSON SAMARITAN SHOULD NOT BE REQUIRED TO SATISFY A PRESCRIBED STANDARD OF CARE BEFORE IMMUNITY APPLIES.

The imposition of a standard of care for immunity from civil liability under Wis. Stats. §895.48(1) to apply, must not operate in such a way as to affect the manner in which the statute encourages intervention. Intervention is encouraged by removing the fear of liability for negligent acts or omissions during the course of the intervention. Any interpretation, rule or standard of care that injects the potential for liability into the formula threatens to destroy the intended purpose and effect of the statute.

The reasonable person standard of care cannot be imposed as a requirement for immunity. This standard would obliterate Good Samaritan immunity entirely. It is not logical to require that a lay person Samaritan intervene non-negligently in order to be afforded immunity. There is no need for immunity if the Samaritan acts non-negligently.

There is legislative history that is relevant to the issue of imposing a standard of care on Good Samaritan immunity. The history of the statute demonstrates that on at least two occasions amendments to the statute were proposed or considered that would have inserted a standard of care. Both amendments were rejected.

In 1963, Amendment 4A to Bill 88A proposed adding language to the statute that would afford immunity "except in cases of gross negligence." (See App.-142 and 1963 Chapter 94 Wis. Acts). This amendment was proposed at a time when the statute applied only to certain licensed health care professionals[4]–a group of persons perhaps best situated to avoid gross negligence in the course of an intervention at the scene of an emergency. The amendment was rejected.

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[4]The Good Samaritan statutes at that time consisted of sec. 147.17(7), Wis. Stats. relating to doctors and sec. 149.06(5), Wis. Stats. relating to nurses.

Samaritan statute that applied to "any person," language was proposed that would have excluded immunity for emergency care acts or omissions that constituted a high degree of negligence.

> "This section shall not be construed as absolving from civil liability any person whose emergency care acts or omissions amount to a high degree of negligence when compared with the emergency care which such person could reasonably have been expected to exercise even under the adverse conditions of the emergency or accident." (See App.-143 and Wis. Acts 1977, Chapter 164; Assembly Substitute Amendment 1 to 1977 Assembly Bill 96)

The language was not adopted in the final version of the Good Samaritan statute.

The legislative history establishes that requiring a certain standard of care from the lay person Samaritan before the immunity will apply has been considered and rejected. None should be added judicially.

If a standard of care is applicable to Good Samaritan immunity, it relates to the statute's requirement that the "emergency care" must be rendered in "good faith."

Switlicks contend that the requirement of good faith refers to the purpose for utilizing various acts of emergency care in the course of an intervention.

As discussed previously, Good Samaritan immunity is not and cannot be dependent upon the outcome or quality of the intervention. "Good faith" focuses not on the quality or outcome of the intervention, but rather, upon the Samaritan's purpose for utilizing various care-giving acts in the course of the intervention. Switlicks contend that as long as any care-giving act is utilized with the intent of trying to provide aid or assistance to the injured person, the standard of "good faith" is satisfied.

In this case, neither the trial court nor the Court of Appeals addressed the good faith requirement of the statute. This omission occurred for two reasons. First, Mueller never fully advanced or developed an argument before the trial court or Court of Appeals that a good faith requirement was not satisfied. Mueller's primary contentions have always been

that either "emergency care" was not provided or the "scene of any emergency or accident" did not exist. Second, Mueller did not develop an argument focusing on a "good faith" requirement because there is nothing in the record to support the contention that it was not satisfied.

It is important to remember in this regard that counsel for plaintiff deposed Stephani and Merlin Switlick before they were parties to this action and while they were unrepresented. Mueller's counsel had full and unfettered opportunity to develop a factual basis for contending that the good faith requirement was not satisfied but none was developed.

In her reply to the Petition for Review, Mueller raises new contentions that are directed at the issue of good faith, but all of these contentions are of recent development, not substantiated by any facts of record and purely speculative. This recent focus on the good faith requirement is nothing more than a speculative effort to establish a basis for the claim

when the other bases appear to be eroding.

The care-giving acts utilized by Stephani Switlick in the course of the intervention were designed to provide aid and assistance to Mueller. Although in hindsight the Supreme Court might be able to say that Stephani should have done things differently, this is the type of analysis that is inappropriate for determining application of Good Samaritan immunity. Stephani Switlick administered emergency care in good faith. As such, there is no basis for alleging that immunity does not apply due to the "good faith" requirement.

V. GOOD SAMARITAN IMMUNITY APPLIES TO MERLIN SWITLICK

At the trial court level, Stephani and Merlin Switlick jointly moved for summary judgment on the basis of Good Samaritan immunity. The Court of Appeals' review of the trial court's grant of summary judgment essentially treated Stephani and Merlin Switlick as a single entity–the "Swit licks." Stephani Switlick and Merlin Switlick are

entitled to separate evaluations regarding application of Good Samaritan immunity.

The facts in this case demonstrate that as soon as Lina Mueller and Apollo Switlick walked into a lighted area outside of the cabin such that Merlin Switlick could observe blood on them, he approached them to assist them and evaluate their conditions. Merlin Switlick examined Lina's mouth and teeth to try to determine if blood was coming from the mouth and to check if her teeth were tight. After determining that there was no blood coming from Mueller' s mouth and that her teeth were tight, Merlin allowed Stephani to accompany Mueller into the cabin for further assistance. Merlin allowed Stephani to assume care-giving responsibilities at that point.

Based on these facts, it is evident that Merlin intervened at the scene of an emergency or accident and provided emergency care (evaluation and screening) in an attempt to provide aid and assistance to Mueller (i.e. he acted in good faith). His acts and omissions in rendering emergency

care are immunized.

If the Supreme Court adopts the Court of Appeals' logic in this case, Merlin contends that his acts and omissions were of "short duration" occurring during the period of "necessity." His acts were not "too simple" to be afforded immunity as his acts constituted a screening of the injuries to determine what, if any, further emergency care could be provided. In hindsight, and for argument sake only, his screening may have been negligent and may have omitted some further screening that should have been done, but the statute obviously immunizes negligence and expressly immunizes omissions.

For these reasons, an independent evaluation of whether Good Samaritan immunity applies to Merlin Switlick results in a conclusion that it does apply.

CONCLUSION

For the reasons stated herein, the defendants-respondents-petitioners, Stephani Switlick and Merlin A.

Switlick, respectfully request that the Wisconsin Supreme Court reverse the decision of the District III Court of Appeals with regard to the issue of Good Samaritan immunity. More specifically, Switlicks request that the Supreme Court order that the Good Samaritan immunity applies, barring Lina Mueller' s claim against the Switlicks as set forth at paragraphs 11-15 of her amended complaint or any claim alleging the negligent provision or omission of care following the ATV accident. The action must then be remanded to the trial court for further proceedings consistent with the remaining, unresolved claims pending amongst the parties.

Dated this 10th day of November, 2005.

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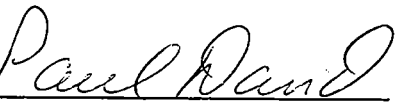
Switlick and Stephani Switlick

BY: 
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CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is:

☒ Desk Top Publishing or Other Means (proportional serif font, min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 point and max. of 60 char. per line). The text is 13 point type and the length of the brief is 9,124 words.

Dated this 10th day of November, 2005.

Signed,

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STATE OF WISCONSIN
SUPREME COURT

LINA M. MUELLER,

Plaintiff-Appellant,

v.

McMILLAN WARNER INSURANCE COMPANY,

Defendant-Respondent,

Appeal #2005AP121

MERLIN A. SWITLICK and STEPHANI SWITLICK,

Circuit Court Case No. 04-CV-91

Defendants-Respondents-Petitioners,

APOLLO SWITLICK and SECURITY HEALTH PLAN OF WISCONSIN, INC.,

Defendants,

and

METROPOLITAN PROPERTY and CASUALTY INSURANCE COMPANY,

Intervenor-Defendant.

APPENDIX OF DEFENDANTS-RESPONDENTS-PETITIONERS, MERLIN A. SWITLICK AND STEPHANI SWITLICK,

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APPEAL FROM THE DECISION OF THE COURT OF APPEALS, DISTRICT III, FILED AUGUST 2, 2005

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INDEX TO APPENDIX

Appendix Page

Trial Court Decision on Motion for Summary Judgment 101-114

Order Granting Summary Judgment, Declaratory Ruling and Judgment 115-116

Court of Appeals Decision (***Mueller v. McMillan Warner Ins. Co.***, 2005 WI 210, ___ Wis. 2d ___, 704 N.W.2d 613) 117-138

Chapter 448, Wis. Stats. (1975-76) 139-141

Amendment 4A to Bill 88A (1963 Chapter 94 Wis. Acts) 142

Assembly Substitute Amendment 1 to 1977 Assembly Bill 96 (1977 Chapter 164 Wis. Acts) 143

STATE OF WISCONSIN | CIRCUIT COURT Branch 3 | MARATHON COUNTY

LINA M. MUELLER.,
Plaintiff

v.

APOLLO SWITLICK, SECURITY HEALTH PLAN OF WISCONSIN, INC., McMILLAN WARNER INSURANCE COMPANY, MERLIN A. SWITLICK and STEPHANIE SWITLICK.,
Defendants

DECISION ON MOTION FOR SUMMARY JUDGMENT

Case #**04-CV-091**

Plaintiff Lina Mueller (Mueller) was at a party with her boyfriend, Apollo, at the home of his parents, Merlin and Stephanie Switlick (Merlin, Stephanie or the Switlicks). Mueller brings this action for head injuries she sustained that arose from an ATV accident. Defendants bring this motion claiming that the Switlicks are immune from liability under *Wis. Stat. §895.48(1)*, the Good Samaritan statute. Because the "scene of the emergency" must be interpreted as where the person in need may be found, the Switlicks shack falls under the statute. Since the term "emergency care" was originally linked with *Wis. Stats. §448.03(2)(i)* which refers to "persons providing medical assistance or first aid," the care provided by the Switlicks constitutes emergency care. Therefore, they are immune from any civil liability for their acts and omissions made in good faith. Although the Switlicks are providers, Mueller as an underage drinker is not a third person and hence cannot maintain a cause of action for providing alcohol to an underage person. Accordingly, the defense motion for a summary judgment of dismissal is hereby granted. The issue of whether there is insurance coverage is rendered moot and hence not decided.

BACKGROUND

On October 25, 2003 Merlin and Stephanie Switlick held a party for about 20-30 of their business and community friends at their "shack" (cabin). Alcohol was made available to those present. Among those present were their son, Apollo (Apollo) and his girlfriend, Lina Mueller (Mueller). After supper, the adults went outside and sat around a bon-fire at the outdoor fire pit while the children, including Apollo and Mueller, remained in the house.

Around 10 P.M. upon hearing the family ATV being used by his sister "sputtering," Apollo jumped on an ATV left on his parent's premises by Randy Van Loh to see if she needed any help. Mueller decided to join him and jumped on. Neither elected to use available helmets. He returned home by a different route using an old railroad right-of-way. Sometime between 10:30 and 11:00 p.m., about a quarter mile from his parents cabin, he suddenly came upon a tree overhanging the trail and quickly applied both front and rear brakes. Although Apollo does not remember the immediate aftermath of the breaking, he remembers returning home with blood on his shirt while Mueller had some bleeding from her nose and the back of her head.

Apollo's mother, Stephanie, had seen them both leave and return while she was outside by the bon-fire. Upon their return, as they came under the yard light, Stephanie noticed that both appeared to be bleeding. Going to the house, she found that Apollo had a cut on the back of his head while Mueller had blood on her face and sweatshirt which was coming from her nose and a head wound. Stephanie went to the bathroom with Mueller to help her clean up. While there, Mueller vomited and laid down on the floor. Stephanie told her that it would be better if she laid down on one of the beds in the "dorm" area. Apollo also laid down on one of the beds.

Stephanie admitted that she was somewhat uncertain of whether they should take the children to the hospital or let them sleep it off. Eventually, she just let them sleep since neither had any complaints about broken bones and were aware of their surroundings and circumstances. However, Stephanie stayed up that night watching television and checking on the condition of both Apollo and Mueller hourly. Both vomited about 4-5 times

before the next morning. Mueller woke up just about every time Stephanie checked on them complaining of a headache. Stephanie also asked her questions to assess her condition. Around 1-2:00 a.m. she noticed that Mueller had some bruising around her right eye and between 2-3:00 a.m. noticed that she had began to moan. Around 6:00 a.m. when she asked Mueller where she was, she referred to Stephanie as "mom." When asked if she knew where she was, Lina did not respond. After hearing that Stephanie immediately called for an ambulance and had another son, Adam, call Mueller's parents. Mueller was diagnosed as having a skull fracture at the Merrill hospital, transported to St. Joseph's Hospital in Marshfield where she was treated and hospitalized.

The requirements of summary judgment do not need a lengthy recitation as they are well known. A party is entitled to summary judgment under §802.08(2) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, **Driver v. Driver; 119 Wis.2d 65, 69; 349 N.W.2d 97 (CA 1984)**. Any doubt as to the existence of any material fact is to be resolved against the party moving for summary judgment, **Grams v. Boss; 97 Wis.2d 332; 294 N.W. 2d 473 (1980)** while all inferences from the evidence are to be viewed in the light most favorable to the non-moving party, **Wasmer v. Bamberger; 101 Wis. 2d 637; 305 N.W. 2d 158 (CA, 1981)**.

EMERGENCY CARE IMMUNITY

Emergency Care Immunity Generally

Switlick's first motion seeks dismissal of this action contending that they are immune from liability under *Wis. Stat. §895.48(1)* in that they were providing emergency treatment to Mueller following the accident. This section provides that;

> Any person who renders emergency care a the scene of any emergency or accident in good faith shall be immune from civil liability for his or her acts or omissions in rendering such emergency care.

To apply, the Switlicks must have rendered in good faith "emergency care" and must take place"at the scene of any emergency or accident." Mueller argues that the care did not occur at the site of the accident and the Switlick shack is not a site of an emergency. Moreover, that the care provided—the cleaning of wounds and giving her a place to rest—does not constitute emergency care for her more serious and internal head wounds.

Neither "scene of any emergency" nor "emergency care" are defined in *Wis. Stat. §895.48(1)* or case law. In statutory interpretation the court attempts to find the legislative purpose, **State v. Pham; 137 Wis.2d 31, 403 N.W.2d 35 (1987)** resorting to the statute's content, subject matter, scope, history and the object to be accomplished in order to arrive at its meaning, **Boltz v. Boltz; 133 Wis.2d 278; 395 N.W.2d 605 (CA, 1986)**. An interpretation which fulfills the objectives of the statute is favored over one that defeats those legislative objectives, **Belleville State Band v. Steele; 117 Wis.2d 563, 345 N.W.2d 405 (1984)**, with the spirit of the statute controlling over a literal or technical meaning of the language, **City of Madison v. Fitchburg; 112 Wis.2d 224, 332 N.W.2d 782 (1983)**.

Historically, the forerunner of *Wis. Stat. §895.48(1)* was a more limited Good Samaritan statute found at *Wis. Stat. §448.03(4)*. It covered only medical personnel licensed or certified under that chapter. It provided that "[n]o person licensed or certified under this chapter, who in good faith renders emergency care at the scene of an emergency, is liable for any civil damage as a result of acts or omissions by such person in rendering the emergency care." Hence, it too referred to "scene of an emergency" and "emergency care." More importantly, it also gave meaning to both terms. "Scene of an emergency" was defined as "areas not in the confines of a hospital or other institution which has hospital facilities or the office of a person licenced or certified under this chapter." By a reference in *Wis. Stat. §448.03(2)(i)* it also covered "[a]ny person furnishing medical assistance or first aid at the scene of an emergency" and hence a definition for "emergency care."

What is now *Wis. Stat. §895.48(1)* was adopted by the legislature as *Chapter 164, Laws of 1977*. The Analysis by the Legislative Reference Bureau noted that this Bill would repeal the special "good Samaritan" law in Chapter 448 and replace it with one that applied to "all persons who render emergency care at the scene of an emergency or accident in good faith and within the range of their professional competence." It deleted the Good Samaritan provision found at *§448.03(4)* but kept the definition of "scene of an emergency" that appeared in that subsection. It amended *§448.03(2)(i)* by deleting its reference to subsection (4). Finally, it created what is now *§895.48(1)* largely as it exists today.[1]

The subject matter of this statute is to create a privilege against civil liability for providing emergency health care. As a "Good Samaritan" law, its object or purpose is the principle that one should not be liable for negligence in the performance of a good deed, **Zelinger v. State Sand & Gravel Co.; 38 Wis.2d 98; 56 N.W.2d 466 1968)**. It is to encourage people to render medical care to those in an urgent need of such care without fear of civil liability if the aid rendered later turns out to be improper or there is an omission due to an improper diagnosis as to the type of care required. Since this statute is remedial in nature, it must also be liberally construed to advance the remedy the legislature intended to afford, **Hughes v. Chrysler Motors Corp.; 197 Wis.2d 973; 542 N.W.2d 148 (1996)**.

Scene of An Emergency

The definition for "the scene of an emergency" contained in *Wis. Stat. §448.03(4)* no longer exists. However, it did exist and was retained by the legislature when it adopted

[1] Only the language"within the scope of their usual and customary employment or practice" was added to this section later.

Wis. Stats. §895.48(1) and hence provides a glimpse as to the meaning the legislature assigned to that term at the time of adoption.[2]

But even more important is the content and objective of the current statute. Its primary statutory purpose is to provide an incentive for people to render assistance to those in peril and in need of medical assistance by giving them immunity—not to clear up the scene of the accident. To meet that statutory purpose, "the scene of the emergency" must be deemed to follow the person in peril and in need of emergency care. It covers the farmer that answers the door to find the victim of an automobile accident who was able to make it to his door or the driver finding a hunter who, after falling from his deer stand, crawls out to a highway with his broken leg. The fact that the site of the accident is some distance away does not reduce an injured person's need for assistance.

When Apollo and Mueller returned to the Switlick shack, they both were bleeding from the head wounds sustained in the accident and in need of some urgent medical care. The Switlicks left the fire pit and their friends to render that assistance. By responding to the scene of where there was a need to provide medical assistance, they responded to the scene of the emergency.

Emergency Care

The statute also refers to "emergency care." At first glance, the assistance rendered by the Switlicks was not the type of treatment one normally would considered an "emergency" in the sense of preventing death or great bodily harm. But this "first glance" is not entirely accurate. Today *§448.03(2)(i)* is merely seen as an exception to the unauthorized practice of medicine. However, it was originally linked to the original Good Samaritan statute and gave meaning to the term "emergency care" found in that statute. The legislature made a minor change to that statute when they created *§895.48(1)* and

[2] After the amendments of *Chapter 164, Laws of 1977*, only the definition of "scene of an emergency" remained in the statute but it no longer served any useful purpose in Chapter 448 dealing with the licensing and certification of medical professional. Therefore, it may have been just dropped in a statutory revision and after its original purpose was forgotten.

hence aware of it. That historical link therefore shows that the original legislative meaning assigned to that term was to provide medical assistance or first aid.

In addition to this original link, the court also finds relevant the statute's object to encourage people to render medical assistance to those in peril. If that is to be accomplished at the time of the emergency giving rise to the need for medical assistance, the ordinary layperson cannot be left to worry about some strict application of a technical legal distinction between "emergency care" and "medical care." This is a situation where the spirit of the statute must control over any literal or technical meaning of the language.

In this case, the Switlicks provided traditional first aid to Apollo's and Mueller's external and easily recognized wounds. They provided the medical assistance of stopping the bleeding, cleaning the wounds, give aspirin as needed and let them both rest. Both Switlicks knew that both Apolloa and Mueller had probably been drinking but did not know how much. At least to Merlin, the combination of alcohol and the shock from the accident might have explained the vomiting.

However, the Switlicks remained alert to the possibility of more serious head injuries. Stephanie asked both Apollo and Mueller separately if they were aware of where they were and who she was. Both knew. She then stayed up and kept them under frequent observations throughout the night. Throughout the night as she checked in with them, Mueller would often awake. Stephanie would again ask her some questions to detect any change in Mueller's condition and signs of any more serious head injuries.[3] The first sign did not occur until around 6:00 in the morning when Mueller apparently mistook Stephanie as her mother. At that point, Stephanie immediately summoned an ambulance for an emergency conveyance to the hospital.

The statute itself refers to immunity from civil liability "for acts or omissions." The Switlicks' acts constituted the treatment for the obvious bleeding cuts and their exhaustion. But it also included a constant overnight vigil to see if either of their conditions would

[3] Before the advent of MRI and other diagnostic tool, other than small changes in the eyes, the medical profession also had to rely upon observation and changes in the patient condition and responses over time.

change to indicate a more serious internal head or brain injury. Because of that, Switlicks were in a position to immediately summon the ambulance as soon as symptoms of a more serious internal head injury appeared. That treatment and observation constitutes emergency care under the circumstances. While one might argue that a more prompt trip to the hospital might have lead to more appropriate treatment earlier, the civil immunity provided in *Wis. Stat. §895.48(1)* forgives such omissions when made in good faith—all in the interest of encouraging Good Samaritans to render care to those in peril in the first place.

Because the Switlicks provided emergency care at the scene of an emergency, the Switlicks are immune from civil liability under *§895.48(1)* and therefore their motion for a summary judgment of dismissal on the negligence claim is hereby granted.

ALCOHOL PROVIDERS LIABILITY

Mueller also seeks recovery under a cause of action of providing alcohol to an underage person. Switlicks contend that *Wis. Stat. § 125.035(4)(b)* does not apply here because they were not "providers" and Mueller was not a "third person" within the meaning of that statute. Under *Wis. Stat. §125.035(2)* "[a] person is immune from civil liability arising out of the act of procuring alcohol beverages for or selling, dispensing or giving away alcohol beverages to another person." However, this immunity ...

> ... does not apply if the provider knew or should have known that the underage person was under the legal drinking age and if the alcohol beverages provided to the underage person were a substantial factor in causing injury to a 3rd party. *§125.035(4)(b).*

Are Switlick's Providers?

Switlicks first contend that they were not providers within the meaning of the this statute. *Wis. Stat. §125.035(4)(a)* defines a "provider" as a person "who procures alcohol beverages for or sells, dispenses or gives away alcohol beverage to an underage person in violation of s. 125.07(1)(a)." They contend that they did not violate this section since

subsection1 provides an exception for parents providing alcohol for their children. That subsection provides that;

> No person may procure for, sell, dispense or give away any alcohol beverages to any underage person not accompanied by his or her parent, guardian or spouse who has attained the legal drinking age. [emphasis added]

In **Anderson v. American Family Mut. Ins. Co.; 2003 WI 148; 267 Wis.2d 121; 671 N.W.2d 651** a mother, who had left a bottle of vodka for her 19 year old son on the kitchen table with a note to him that he owed her $12.00, found her liable for the injuries sustained by the third party who died of acute intoxication because she was found to be a "provider" under the statute. While she provided the alcohol to her son, she never "accompanied" him within the meaning of *§125.07(1)(a)1* but rather left the alcohol for him. *Id. at ¶ 12.* But unlike that case, here the Switlicks were on the property with their son.

This statute does not define the term "accompained" so resort to generally accepted and recognized dictionaries for the common meaning of the terms is appropriate. In *The American Heritage Dictionary, 2nd College Edition, 1982* it is defined as "to go along with; join in company." In *Black's Law Dictionary, 7th Edition, 1999* it means "[t]o go along with (another)"; to attend."[4]

The meaning of "accompanied" was discussed in **Milwaukee v. K.F.; 145 Wis.2d 24; 426 N.W.2d 329 (1988)**.[5] The curfew ordinance there also contained an exception for those "accompanied by his or her parent...or another adult person." Relying upon a dictionary definition of "accompany" as "to go with or attend as an associated or

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[4] It also notes that "In automobile-accident cases, an unlicenced driver is not considered accompanied by a licensed driver unless the latter is close enough to supervise and help the former."

[5] A City of Milwaukee ordinance made it "unlawful for persons under the age of 17 years to congregate, loiter, wander, stroll, stand or play in or upon" public places "between the hours of 11 p.m. and 5 a.m. of the following day ... unless accompanied by his or her parent, guardian or other adult person having his or her care, custody or control." The UW-Milwaukee Black Student Union was holding a dance at the War Memorial Center. About 400 persons, including approximately 70 under the age of 17, were upon the premises with some adults present.

companion," the court held that "even if it were presumed that the adults present at the dance had 'care, custody or control' of the attending youths, such individualized supervision as contemplated by the reference in the ordinance to accompaniment was absent from the event." *Ib.* at 38.

This concept of "individualized supervision" is challenged by Switlicks since **K.F.** dealt with a city ordinance and not this statute. However, the statutes contain several provisions where the word "accompany" is defined. The word "accompany" is defined in *Wis. Stat. §305.05(4)* as "to be on the same snowmobile as the operator" [regarding children less than 12 years of age]. In *§23.33(1)(a)* "'accompanied' means being subject to continuous verbal direction and control" [regarding operation of ATVs] while in *§29.193(2)(a)1* that same term "means being subject to continuous visual or voice contact without the aid of any mechanical or electronic amplifying device other than a hearing aid" [fishing permits for disabled persons]. In examining all of these statutory definitions, the common legislative concept is indeed the concept of individualized supervision.

Under the law, underage persons are not allowed to drink alcohol due to their inexperience with it, their general lack of drinking responsibly and the dangers they may face after they consume of alcohol. The exception for underage persons "accompanied" by their parents obviously indicates a legislative belief that parents would provide something to reduce the risk presented by underage drinkers. Individualized supervision would address that concern by assuring that the parents would be in a position to observe and direct their child's consumption of alcohol and their activities while under its influence.

It is uncontroverted that at the Switlicks' party alcohol was available and that it was not uncommon for Apollo to have a beer with the boys. Indeed, the Switlicks both knew that Apollo had been drinking alcohol that day but did not know how much. After supper, Apollo and Mueller stayed inside the cabin while his parents and the other adults went outside to the fire pit and sat around the fire. Although they were personally present on the premises, it cannot be said that they had individualized supervision of their son while he was consuming alcohol. Therefore, when he left the premises and drove an ATV,

neither of them knew how much Apollo had to drink and whether he should have been driving. This lack of individualized supervision means that Apollo not "accompanied" by his parents within the meaning of *§125.07(1)(a)*. Therefore the Switlicks became "providers" within the meaning of *§125.035(4)(b)*. Since they were providers and Apollo's consumption of alcohol may have been a substantial factor in causing injury, the Switlicks may be held liable under this statute.

Is Mueller a Third Person?

Even though the Switlicks may be a "provider" the statue makes then liable to a "third party." They assert that Mueller is not a "third person" since she was a party to the consumption of alcohol, citing **Meier v. Champ's Bar & Grill; 2001 WI 20; 241 Wis.2d 605; 623 N.W.2d 94.** In that case Meier was with a group of three underage drinkers at Champ's Bar who was later injured when one of them lost control of the vehicle and Meier was thrown from it. The court held that since Meier was a party who provided alcohol to the driver, he could not also be a "third party" to that same transaction.

The court's decision was "premised upon the fact that the alcohol provided by Meier was a substantial factor in causing the accident and his resulting injuries, *Id.* at ¶ 19. Mueller argues that she was not a "provider" and hence this case does not apply here. However, under **Meier** an underage drinker is also considered a party to the transaction of alcohol consumption and hence also precluded from recovery.

> The transactional focus of §125.035(4)(b) is the provision of alcohol to underage persons. The principal parties to such a transaction are: (1) providers and (2) underage drinkers. When the transaction between these principals is a substantial factor in causing the harm to a third party the statutory immunity is lifted and a third party may proceed against a provider. Thus, the common definition of third party to §125.035(4)(b) leads to the conclusion that <u>a third party is someone other than the underage drinker or a provider</u> who provides alcohol that is a substantial factor in causing the third party's injuries. *Id.* at ¶ 24 [emphasis added].

Mueller contends that this would not be in keeping with protecting underage drinkers. However, the court also disposed of that argument as follows.

> The fact that sec. 125.035 does not allow underage drinkers who themselves are injured to bring a cause of action against the person who provided the alcohol beverages does not defeat the conjectured legislative purpose of protecting underage persons. Facilitating compensation for injured underage drinkers is not the only means of attempting to protect people under the legal drinking age. The legislature may have determined that sheltering people under the legal drinking age by deterring those who might otherwise furnish alcohol beverages to them, rather than compensating the injured underage person, would best serve the goal of protecting young people. *Id.* at ¶26, quoting **Doering v. WEA Ins. Group; 193 Wis.2d 118, 142-143; 532 N.W.2d 432 (1995).**

Finally, Mueller argues that there are material issues of fact as to whether or not she had been consuming alcohol that evening. However, Apollo not only acknowledged that he had been drinking before driving the ATV (Depo at 24) but that Mueller had been consuming mixed drinks, drinks mixed with cranberry juice, as well (Depo at 66-68). Merlin, in discussing Apollo's and Mueller's vomiting, had indicated that some of his indecision concerning the seriousness of their injuries was the fact that "they" also had been drinking which might have accounted for that vomiting (Depo at 28-29). Stephanie, while aware that Apollo had been drinking beer, testified that she could not state whether or not Mueller had been drinking alcohol (Depo at 24). Mueller herself claims she lacks any independent recollection of whether she had been drinking alcohol due to her injuries.

Therefore, Apollo has a positive recollection not only that Mueller was drinking alcohol but also the types of drinks she had. Another appears to have a positive recollection that both Apollo and Mueller had been consuming alcohol as underage persons. Two other witnesses, Mueller and Stephanie, have no recollection; they are unable to say one way or the other. But once the moving party has demonstrated that there is no genuine issue on any material fact and that he would be entitled to summary judgment as a matter of law, the opposing party can avoid it only by showing specific facts that create

a genuine issue for trial, see *Wis. Stat. §802.08(3)*. Nor may a jury disregard positive, uncontradicted testimony as to the existence of some fact, or the happening of some event, in the absence of other evidence which discredits the existence of the fact or renders it against responsible probabilities, **Schulz v. St. Mary's Hospital; 81 Wis.2d 638, 650: 260 N.W.2d 783 (1978)**. Here, there is such positive and uncontradicted evidence that Mueller had been drinking. There is no evidence that discredits it or renders it against responsible probabilities. There is no material issue of fact as to Mueller's consumption. A lack of recollection do not contradict the evidence that Mueller had been drinking and therefore there are no material issues of fact presented.

Because she consumed alcoholic beverages while being an underage person, Mueller was one of the principals to the consumption of alcohol by underage persons. As a party to that transaction, even as a recipient, Mueller is not a third person within the meaning of *§125.035(4)(b)* and hence cannot recover under that statute.

Therefore, although the Switlicks are providers and might be exposed to liability to a third person, Mueller is not a third person since she was one of the principals to the transaction of providing alcohol to an underage person. Plaintiff's cause of action under *Wis. Stat. §125.035(4)(b)* must also be dismissed.

CONCLUSION

The Good Samaritan immunity provided by *Wis. Stat. §895.48(1)* requires that the person rendered "emergency care" in good faith at the "scene of any emergency or accident." Given the statute's history, scope, content and object, "scene of any emergency" must consist of any place where the person in need of medical assistance can be found—which would include the Switlicks' shack. The original, limited Good Samaritan statute included a link to *Wis. Stat. §448.03(2)(i)* and thereby provided a meaning to "emergency care" as "furnishing medical assistance or first aid at the scene of an emergency." Here, the Switlicks not only provided the first aid and medical assistance necessary to treat the external and visible injuries but also maintained an active

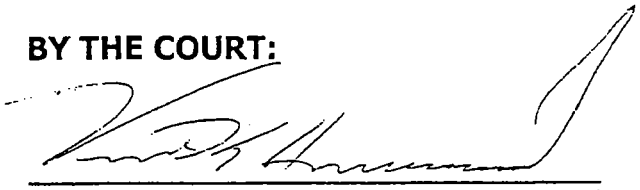
observation throughout the night so they could detect any change of condition that might indicate more serious internal injuries. Because of that, they were in a position to immediately summon an ambulance when symptoms of internal injuries to the brain were first detected. This constitutes emergency care within the meaning of the statute.

Since the Switlicks were not providing individualized supervision of their son, they are deemed to be "providers" and hence liable to third persons injured as a result of permitting underage drinkers to consume alcohol. However, because the uncontroverted evidence is that Mueller was also a participant in the underage consumption of alcohol, she is not a third party within the meaning of *Wis. Stat. §125.035(4)(b)*.

Therefore, the court finds that the Switlicks are immune from any liability for any acts or omissions within the meaning of *Wis. Stat. §895.48(1)* leading to a dismissal of the negligence cause of action. Because Mueller is not a third party to the consumption of alcohol but a participant, she cannot maintain an action against the Switlicks as providers. Accordingly, defendants are entitled and hereby granted a summary judgment dismissing plaintiff's complaint. The remaining issue of coverage is rendered moot.

Dated at Wausau, Wisconsin this 26th day of November, 2004.

BY THE COURT:



Vincent K. Howard
Judge, Circuit Court Branch 3
Marathon County, Wisconsin

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 3 | MARATHON COUNTY

COPY

LINA M. MUELLER,

Plaintiff,

v.

APOLLO SWITLICK,
SECURITY HEALTH PLAN OF WISCONSIN, INC.,
McMILLAN WARNER INSURANCE COMPANY,
MERLIN A. SWITLICK and
STEPHANI SWITLICK,

Defendants,

and

METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY,

Intervening Defendant.

ORDER GRANTING SUMMARY JUDGMENT, DECLARATORY RULING AND JUDGMENT

Case No.: 04-CV-91

THIS IS AN AUTHENTICATED COPY OF PLEADINGS FILED ON THIS DATE

CLERK OF CIRCUIT COURTS MARATHON COUNTY
04 DEC 28 AM 9:57

This matter came before the Court on motion of the Defendant, McMillan Warner Insurance Company, for summary judgment pursuant to Wisconsin Statute § 802.08, specifically requesting summary judgment dismissal of all claims of the Plaintiff against the Defendants, Merlin A. Switlick and Stephanie Switlick, and for a declaratory ruling and summary judgment with respect to insurance coverage regarding the remaining claim for negligence against Apollo Switlick, and a hearing having been held on the motion on October 26, 2004, and at the time of the hearing, the moving party, McMillan Warner Insurance Company having appeared by its attorney, John A. Kramer; the Plaintiff, Lina M. Mueller having appeared by her attorney, Carl Ricciardi; the Defendant, Apollo Switlick having appeared by his attorneys as to the merits, only, John P. Runde and Richard Kewley; the Defendants, Merlin A. and Stephanie Switlick having appeared by their attorney as to the merits, only, Paul David; the Defendants, Merlin A. and Stephanie Switlick, having appeared by their attorney, individually, Paul A. Nikolay; and the

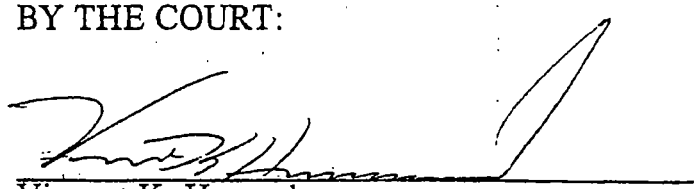
Intervening Defendant, Metropolitan Property and Casualty Insurance Company, having appeared by its attorney, Amy Wochos, and the Court having heard the arguments of counsel at the time of the hearing and having reviewed the written submissions of the parties in support of and in opposition to the motion, NOW, THEREFORE,

IT IS HEREBY ORDERED that for the reasons set forth in the Court's memorandum decisions of November 26, 2004, and December 10, 2004, the motion of the Defendant, McMillan Warner Insurance Company, is hereby granted. All claims against Merlin A. and Stephanie Switlick are dismissed on the merits. Further, it is the declaration of the Court that McMillan Warner Insurance Company provides no insurance coverage to the Defendant, Apollo Switlick based upon its policy's "recreational vehicle" exclusion. Accordingly, McMillan Warner owes no further duty to defend Apollo Switlick or indemnify him for the claims of the Plaintiff. McMillan Warner Insurance Company is therefore dismissed from this action, on the merits, and Attorney John Runde who was provided as merits counsel for Apollo Switlick by McMillan Warner is hereby discharged as counsel for Apollo Switlick.

Judgment is hereby granted in favor of McMillan Warner Insurance Company, M109 Highway 97 North, Marshfield, Wisconsin 54449 and against the Plaintiff, Lina M. Mueller, 3787 Beach Street, Fenwood, Marathon County, Wisconsin 54426 for its statutory costs pursuant to § 814.03, Stats., in the amount of $ 770.50 .

Dated at Wausau, Wisconsin this 23rd Day of December 2004

BY THE COURT:



Vincent K. Howard
Circuit Court Judge, Branch 3

COURT OF APPEALS
DECISION
DATED AND FILED

August 2, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2005AP121 | **Cir. Ct. No. 2004CV91**

STATE OF WISCONSIN | **IN COURT OF APPEALS DISTRICT III**

LINA M. MUELLER,

PLAINTIFF-APPELLANT,

V.

MCMILLAN WARNER INSURANCE COMPANY AND MERLIN A. SWITLICK AND STEPHANI SWITLICK,

DEFENDANTS-RESPONDENTS,

APOLLO SWITLICK AND SECURITY HEALTH PLAN OF WISCONSIN, INC.,

DEFENDANTS,

METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY,

INTERVENOR-DEFENDANT.

APPEAL from judgments of the circuit court for Marathon County: VINCENT K. HOWARD, Judge. *Reversed and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Lina Mueller appeals a decision granting summary judgment to Merlin and Stephani Switlick in this personal injury case. Mueller also appeals a separate declaratory judgment that the Switlicks' homeowner's policy with McMillan Warner Insurance Company did not provide coverage for the all-terrain vehicle (ATV) Mueller was riding when her accident occurred.

¶2 Mueller argues the trial court erred when it concluded she was not an injured third party for the purposes of WIS. STAT. § 125.035(4)(b), which establishes an exception to immunity from liability for those who furnish alcohol to underage drinkers.[1] Mueller also argues the court erred when it determined that what the Switlicks did for her after her accident constituted "emergency care" under WIS. STAT. § 895.48(1), Wisconsin's Good Samaritan Law. Finally, Mueller argues that McMillan's policy provides coverage because the ATV involved in her accident was not "garaged" on the Switlicks' property.[2]

¶3 We conclude that material questions of fact remain as to whether Mueller was a party to the transaction in which Merlin and Stephani provided alcohol to their nineteen-year old son, Apollo. We also conclude that Merlin and Stephani did not render "emergency care" to Mueller and are thus not immune

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] The ATV in question was owned by a family friend, Randy Van Loh.

from liability under WIS. STAT. § 895.48(1). Finally, we conclude that the ATV involved in Mueller's accident was not "garaged" on the Switlicks' property. The judgments are therefore reversed and the cause remanded for further proceedings consistent with this opinion.

BACKGROUND

¶4 In October 2003, Merlin and Stephani held a party for friends and business associates on property they owned in Lincoln County. The Switlicks used the property for a variety of recreational purposes, including hunting, and guests often spent the night at the family "shack," which had a number of bunkhouse style bedrooms.

¶5 According to Apollo's deposition testimony, he arrived at the party around 2 p.m. He drank what he described as a couple of twelve-ounce beers before 6 p.m. and a few more beers between 6 p.m. and 10 p.m. Sometime between 6 p.m. and 7 p.m., Mueller arrived at the party, went inside the shack with Apollo to play pool, and possibly to drink.[3] The adult guests stayed outside the shack, near a pit where the Switlicks had built a bonfire.

¶6 At about 10 p.m., Apollo and Mueller joined the adults outside by the fire. Apollo testified that, once outside, he heard an ATV "puttering like it was running out of gas or was having a problem." Because Apollo knew his sister and her children had taken one of the family ATVs to check a field for deer, he thought that they might be in trouble. He noticed Randy Van Loh's ATV parked

[3] The record includes no account by Mueller of the events of that evening. Her injuries, which included a skull fracture, resulted in memory loss.

near the fire.[4] He got on Van Loh's ATV and Mueller got on behind him. Neither wore a helmet. After checking on his sister, Apollo and Mueller headed back to the shack on a trail that was not on the family property.

¶7 During that return trip, the accident that gave rise to this lawsuit occurred. According to Apollo, he hit a stump or saw an overhanging branch, slammed on his brakes, and then remembered nothing until he and Mueller got back to the shack around 11 p.m.[5] Both Apollo and Mueller were bleeding and vomiting.[6] Although the details of what happened next are in dispute, the basic sequence of events is not. Apollo and Mueller talked to Stephani and Merlin. Mueller went into the bathroom and wanted to lie down on the floor. Stephani eventually convinced Mueller to lie down in one of the bedrooms instead. Apollo also lay down in the same bed. Stephani testified that she woke Apollo and Mueller approximately every hour during the evening. In the morning, after Mueller responded to Stephani's questions by addressing her as "mom," Stephani called an ambulance. Mueller was taken to a hospital in Merrill where she was diagnosed with a skull fracture. She was then transported to a facility in Marshfield where she was hospitalized and treated.

¶8 In January 2004, Mueller sued Apollo for negligence, an action that is still before the trial court. Five months later, she filed an amended complaint alleging that Merlin and Stephani were negligent in providing alcohol to minors

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[4] The Switlicks owned two ATVs, but both were in use at the time. Apollo recognized Van Loh's ATV and knew its keys were ordinarily left in the starter.

[5] Apollo remembered nothing about the ride back to the shack and, based on his deposition testimony, was unclear about the sequence of events leading up to the accident.

[6] Mueller vomited immediately upon her return to the shack. It is unclear when Apollo began vomiting, but both he and Mueller vomited before and after they lay down for the evening.

and in providing care for her after the accident. The trial court agreed to bifurcate coverage issues. In response, McMillan filed motions for summary judgment on the merits of the claims against Merlin and Stephani and on the coverage issues. After a hearing, the trial court issued a written decision concluding that Merlin and Stephani had provided traditional first aid to Mueller and were thus immune from liability under WIS. STAT. § 895.48(1); it also determined that Mueller had no cause of action under WIS. STAT. § 125.035(4)(b) because she "was one of the principals to the consumption of alcohol by underage persons." In a separate written decision, the court found that the McMillan homeowner's policy did not provide liability coverage for Mueller's accident because Van Loh's ATV was "garaged" on the Switlicks' property. Mueller now appeals.

DISCUSSION

¶9 We review summary judgment decisions without deference, using the same methodology as the trial court. *See* ***Anderson v. American Fam. Mut. Ins. Co.***, 2003 WI 148, ¶9, 267 Wis. 2d 121, 671 N.W.2d 651. Summary judgment should be granted when no genuine issue of material fact is in dispute and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). The summary judgment questions in this case turn on the interpretation of two statutes creating immunity from civil liability. The proper interpretation of those statutes is also a question of law subject to de novo review. ***Czapinski v. St. Francis Hosp.***, 2000 WI 80, ¶12, 236 Wis. 2d 316, 613 N.W.2d 120.

Liability Exemption for Alcohol Providers and Exceptions to the Exemption

¶10 Under Wisconsin law, individuals are ordinarily immune from liability for injuries that arise from "procuring ... selling, dispensing or giv[ing] away" alcoholic beverages to adults.[7] WISCONSIN STAT. § 125.035(4)(b) creates an exception to that general immunity for those who furnish alcohol to underage drinkers who are not "accompanied" by parents, guardians or spouses of legal age when that alcohol is a substantial factor in causing injury to a third party.[8] Those who serve or otherwise supply alcohol to underage drinkers thus retain their immunity from liability if the underage drinker is "accompanied" by his or her parents. Liability is further limited by our supreme court's conclusion that principals to transactions that violate WIS. STAT. § 125.07(1)(a) are not third parties under § 125.035(4)(b). ***Meier v. Champ's Sport Bar & Grill, Inc.***, 2001 WI 20, ¶17, 241 Wis. 2d 605, 623 N.W.2d 94.

¶11 Mueller argues that Merlin and Stephani are not protected "providers" because they were not "accompanying" Apollo when he drank the alcohol they procured for him. She also argues that the trial court erred when it concluded the Switlicks were immune from liability for any consequences arising from Apollo's consumption of alcohol because there are material questions of fact

[7] *See* WIS. STAT. § 125.035(2).

[8] Liability exists if the "provider knew or should have known that the ... person was under the legal drinking age and if the alcohol ... provided to the underage person [is] a substantial factor in causing injury to a 3rd party." WIS. STAT. § 125.035(4)(b). But that liability is only triggered if the provider violates WIS. STAT. § 125.07(1)(a) which states that "no person may procure for, sell, dispense, or give away any alcohol[ic] beverages to any underage person not accompanied by his or her parent, guardian or spouse who has attained the legal drinking age."

as to whether she was a party to any transaction with Merlin and Stephani. We will address Mueller's arguments in order.

¶12 The parties agree that Merlin and Stephani were not "providers" of alcohol if Apollo was "accompanied" by his parents when the alcohol in question was provided to him. The trial court concluded that "accompanied" entailed a degree of individualized supervision absent in this case. Merlin and Stephani contend it does not matter whether they were in the same room with Apollo when he was drinking. It was enough that he drank "in their proximity" and on the same premises, with their knowledge. McMillan agrees, arguing the trial court mistakenly imported the idea of individualized supervision from an opinion construing the word "accompanied" in a Milwaukee curfew ordinance. *See* ***City of Milwaukee v. K.F.***, 145 Wis. 2d 24, 37-38, 426 N.W.2d 329 (1988).

¶13 Although we agree that ***City of Milwaukee*** does not control the meaning of "accompanied" in WIS. STAT. § 125.07(1)(a), the supreme court's analysis of the curfew ordinance is instructive nevertheless. The ordinance prohibited children under the age of seventeen from being in public places after 11 p.m. unless "accompanied by his or her parents ... or other adult person having his or her care, custody or control." MILWAUKEE, WIS., CODE OF ORDINANCES § 106-23. ***City of Milwaukee***, 145 Wis. 2d at 31. The supreme court observed that parents could have care, custody and control over children they brought to a dance without necessarily "accompanying" those children. ***Id.*** at 38. "Accompanying," the court concluded, required a degree of "individualized supervision" that mere presence might not satisfy. ***Id.***

¶14 Mueller points to other statutes that allow children or juveniles to engage in otherwise prohibited activities when accompanied by adults. Children

under twelve are allowed to operate snowmobiles, for example, if they are accompanied by an adult; in that statute, accompanied is defined as being on the same snowmobile. WIS. STAT. § 350.05(1) and (4). Similarly, children under twelve may operate ATVs if they are accompanied—defined as "subject to continuous verbal direction and control"—by an adult. WIS. STAT. § 23.33(1)(a) and (5)(a). Finally, children between twelve and fourteen years old are not allowed to hunt unless they are accompanied by an adult. WIS. STAT. § 29.304(2)(a). McMillan argues that the Milwaukee ordinance and these statutes are distinguishable in two ways from the statute we interpret here. First, they apply to younger children, not to older teens or adults. Second, accompany is defined in the other statutes, but not in WIS. STAT. § 125.07(1)(a).[9] We are not persuaded.

¶15 The Milwaukee ordinance and the statutes Mueller cites share a basic presumption and serve similar public policies. Certain instrumentalities, such as hunting rifles, are dangerous enough that the people of Wisconsin ordinarily restrict their use or enjoyment to those with a certain level of maturity. But the legislature has determined that the risks associated with immature users can, in certain cases, be limited if those users are under adult control. Similarly, the legislature has decided that those under twenty-one cannot buy or consume alcohol legally because it is a dangerous instrumentality that most people under twenty-one are too immature to handle. To support that prohibition, the legislature has made those who provide underage drinkers with alcohol liable for third party injuries arising out of the prohibited transaction. The legislature has also

[9] The statute regulating youthful hunters does not, contrary to both Mueller's and McMillan's arguments, define accompany.

determined, however, that providers are exempt from liability if the underage drinker is accompanied by a parent because that parent is presumed to be supervising the child's consumption of alcohol, minimizing the risks associated with underage drinking.

¶16 We therefore conclude that underage drinkers are not accompanied by a parent merely because the parent and child are on the same premises. Merlin testified that he had told Apollo not to drink where he could be observed by the other guests and both Merlin and Stephani admitted they did not know how much their son drank between 2 p.m. and 10 p.m. Based on those undisputed facts, Merlin and Stephani were neither supervising nor otherwise controlling Apollo when he was drinking and were thus not accompanying him for the purposes of WIS. STAT. § 125.07(1)(a).

¶17 Mueller also argues the trial court erred when it granted summary judgment to Merlin and Stephani on the grounds that Mueller was not an injured third party under WIS. STAT. § 125.035(4)(b). We agree.

¶18 In a case involving underage drinkers in a bar, our supreme court concluded that "the transactional focus of [WIS. STAT.] § 125.035(4)(b) is the provision of alcohol to underage persons. The principal parties to such a transaction are: (1) providers and (2) underage drinkers." ***Meier***, 241 Wis. 2d 605, ¶24. Based on the ordinary meaning of the term third party—one who is not a principal—the court reasoned that a provider could not also be a third party because he or she was a principal in the transaction at issue.

¶19 Although ***Meier*** dealt with an underage drinker who was also a provider, McMillan claims its holding controls this case. According to McMillan, Mueller's allegation that the Switlicks provided alcohol to her is sufficient to make

her a principal to the transaction under ***Meier***. Merlin and Stephani similarly contend that Mueller was a principal to the transaction because they claim that it is undisputed that she consumed alcohol with Apollo at the shack. Both arguments sidestep the real issue.

¶20 Several years after ***Meier***, the supreme court returned to the third party issue in a different context. In ***Anderson***, a mother bought her nineteen-year-old son a bottle of vodka and left it on the kitchen table with a note telling him that he owed her twelve dollars. ***Anderson***, 267 Wis. 2d 121, ¶¶3, 6. Her son later took the vodka to the family's vacation home where he and underage friends drank it. ***Id.***, ¶6. One of the friends died of acute alcohol intoxication. ***Id.*** In considering whether the mother was immune from liability, the court made it clear that ***Meier*** did not stand for the proposition that underage consumers of alcohol were not automatically third parties. ***Anderson***, 267 Wis. 2d 121, ¶¶29-30.

¶21 The court reiterated that only the principals to a transaction, the provider and the underage drinker, could not be third parties. But they found no evidence that the son's companions were present when the mother bought the alcohol, or that they paid for it, or that they requested she buy it. ***Id.***, ¶19. Under those circumstances, the son's friends were not principals in the transaction between son and mother. ***Id.*** ***Anderson*** concluded that "an underage drinker who is injured or dies as a result of the consumption of alcohol that was illegally provided to a companion underage drinker is an injured third party for the purposes of the exception to immunity." ***Id***, ¶36.

¶22 Here, as in ***Anderson***, there is no evidence Mueller asked Merlin or Stephani to procure alcohol for her and no evidence she paid them for it. *See* ***id.***, ¶19. Apollo testified that Mueller drank several beers, but said nothing about

where she got them. Neither Merlin nor Stephani saw Mueller drink and there is no evidence about how, if she did drink, she obtained alcohol. We thus conclude that summary judgment was improper because there is a material question of fact as to whether Mueller was a principal to the transaction between Apollo and his parents or whether she was an underage drinker injured as a result of alcohol illegally provided to a companion underage drinker.

The Good Samaritan Law and Emergency Care

¶23 The trial court concluded that Merlin and Stephani were immune from liability under WIS. STAT. § 895.48(1) for anything they might have done, or not done, between the time Mueller returned to the shack and when she was taken to the hospital. According to that section of the Good Samaritan Law:

> Any person who renders emergency care at the scene of any emergency or accident in good faith shall be immune from civil liability for his or her acts or omissions in rendering such emergency care....

Mueller contends critical portions of the law are ambiguous because "scene of any emergency or accident," "emergency care," and "good faith" are each susceptible of more than one meaning.[10] She further contends the court erred when it determined there was no material question of fact as to whether the Switlicks' shack remained "the scene of an emergency or accident," whether the Switlicks' responses to Mueller's injuries constituted "emergency care," and whether they

[10] On appeal, Mueller claims the trial court "did not find that the statute was ambiguous." She is correct that the court's written decision never makes that finding explicit; however, its extended discussion of the statute's history indicates that it did so implicitly.

acted in "good faith." We agree the Switlicks are not immune from liability under Wisconsin's Good Samaritan Law.[11]

¶24 When we interpret a statute, our goal is to ascertain and give effect to the statute's intended purpose. *See, e.g.,* ***Wenke v. Gehl Co.***, 2004 WI 103, ¶32, 274 Wis. 2d 220, 682 N.W.2d 405. To achieve those goals, we begin with the language of the statute. ***State ex rel. Kalal v. Circuit Court***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. If the meaning of the statute is clear when we give its words their commonly accepted meanings, we ordinarily stop the inquiry. ***Id.*** A statute is ambiguous, according to the most common formulation of the test, if it is capable of being understood by reasonably well-informed persons in two or more senses. ***Id.***, ¶47.

¶25 Scene is commonly defined as "the place of occurrence or action" or "locale." WEBSTER'S THIRD NEW INT'L DICTIONARY 2028 (unabr. 1991). Emergency means both "an unforeseen combination of circumstances or the resulting state that calls for immediate action" and "a sudden bodily alteration such as is likely to require immediate medical attention." ***Id.*** at 741. Accident has an even broader meaning: "chance ... sudden event or change occurring without intent or volition ... an unexpected medical development esp. of an unfavorable or

[11] The attorney general has previously characterized certain portions of the statute as "plainly ambiguous" because they are neither "self-defining nor defined in the statute." 67 OP. ATT'Y GEN. 218 (1978).

injurious nature."[12] *Id.* at 11. Care is another general term whose definitions range from "suffering of mind" to "serious attention" to "custody ... charge, supervision, management." *Id.* at 338-39. Based on these definitions, reasonably well-informed persons could clearly understand "scene of an emergency or accident" and "emergency care" in a variety of ways.

¶26 The term good faith only complicates the matter. Good faith can mean a "belief in one's legal title or right." *Id.* at 978. But it can also mean "absence of fraud, deceit, collusion, or gross negligence." *Id.* In other words, good faith can be measured subjectively or objectively. In the context of WIS. STAT. § 895.48(1), this ambiguous phrase would appear to control the determinations involved in identifying both the scene of an emergency or accident and rendering emergency care, amplifying the ambiguity of each.

¶27 No Wisconsin appellate court has construed the contested terms. However, the history of our Good Samaritan Law provides insight into the meaning of the statutory language. In 1963, the legislature granted immunity from civil liability to a limited group of professional individuals, primarily doctors and nurses, who in good faith "render[ed] emergency care at the scene of an emergency." WIS. STAT. § 149.06(5) (1963). The statute further defined scene of an emergency as areas "not within the confines of a hospital or other institution which has hospital facilities, or a physician's office." *Id.* The legislative intent

[12] Read together, the definitions of "scene," "emergency," and "accident" suggest a focus on the victim's state or condition rather than on the character of the action that produced that state or the particular place in which that state first manifested itself. Such a reading is consistent with the broad purpose of Good Samaritan Laws: to encourage all of us to respond to human beings who need immediate medical help when and where we encounter them. A child injured in a snowmobile accident may be in no less need of emergency care if he or she stumbles a half mile before he or she is found than if he or she is found right beside the snowmobile.

was transparent: to encourage those with medical training to respond to emergency situations outside of the professional environment.[13] The statute presumably does not define emergency care because it was directed at those who were trained to understand what that term meant in a variety of contexts.

¶28 In 1977, the legislature expanded immunity to include any person who rendered emergency care in good faith at the scene of an emergency or accident.[14] *See* WIS. STAT. § 895.48 (1977). No definitions were added and the scene of emergency definition was removed.[15]

¶29 As this history indicates, Wisconsin's current Good Samaritan Law encourages all citizens to respond to emergency situations by protecting them from liability for most acts or omissions in rendering care that have bad consequences. While the statute does not define the scene of the emergency or accident or emergency care, the ordinary meanings of those terms and the policies

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[13] *See* David A. Suemnick, *Wisconsin's "Good Samaritan" Statute,* 48 MARQ. L. REV. 80, 85-89 (1964-65).

[14] WISCONSIN STAT. § 895.48 was created by 1977 Wis. Laws, ch. 164, § 3, establishing a general Good Samaritan Law.

[15] The 1977 statute does retain a distinction between ordinary individuals and trained professionals:

> [t]his immunity does not extend when employees trained in health care ... render emergency care for compensation and within the scope of their usual and customary employment or practice at a hospital or other institution equipped with hospital facilities, at the scene of any emergency or accident, enroute to a hospital ....

Early drafts of the statute included a professional competence standard (in good faith and within the range of a person's professional competence) and a more general formulation of a standard of care ("shall not be construed as absolving from civil liability any person whose emergency care acts or omissions amount to a high degree of negligence"). Dawn B. Lieb, *The Good Samaritan Statute: WIS. STAT. § 859.48*, 62 MARQ. L. REV. 469, 474-75 (1978).

the statute serves demonstrate that when the samaritan is a layperson, the intervention protected will ordinarily be of short duration and of an interim sort. Nothing in the statute suggests any intention that an ordinary person should make care-giving decisions any longer than the emergency situation necessitates.

¶30 Mueller argues that the Switlicks provided neither emergency care nor traditional first aid, which the trial court concluded satisfied the statutory requirement. She also argues alternatively that even if the first fifteen or twenty minutes after her return to the cabin constituted a period of emergency, the six or more hours after that while she slept and Stephani periodically checked on her cannot qualify as emergency care.

¶31 The Switlicks counter that it is the circumstances and not the type of care that matters. Emergency care is, they explain, "the type of care that may be provided at the scene of an emergency—regardless of what particular type of care might be provided." McMillan argues somewhat more specifically that Stephani provided attentive assistance, one definition of care, by comforting Mueller, observing her, and being vigilant for any change in symptoms that would "indicate something more serious than a bloody nose and nausea." We are not persuaded by either argument.

¶32 By her own account, Stephani went with Mueller, who was vomiting and bloody, into a bathroom where there was light. The two were going to start cleaning Mueller up when Mueller tried to lie down on the bathroom floor. Stephani's testimony was initially unclear on whether any cleaning was actually done. However, she eventually replied "yes" when asked "And you never got a chance to clean the blood off?" Stephani testified she then said, "Lina, instead of just laying there .... Why don't we take you and go lay you down in the bed."

Once Mueller was in bed, Stephani covered her with a quilt. Stephani also testified that she brought one aspirin into the bedroom for Mueller, but did not know whether she took it, and that she took water into the room, but did not believe Mueller wanted any.

¶33 At some point, Stephani left Mueller and Apollo, who was lying on the same bed, and went into the living room. She went back into the room to check on the two "about every hour." She testified that when she came in Mueller would wake up and she would ask Mueller if she knew where she was or how she was feeling. The room was dark. At 6 a.m., Stephani asked Mueller if she knew where she was. Mueller replied, "Mom?" When Stephani asked Mueller another question, she did not respond. Stephani woke up another woman who was staying at the shack and asked her to look at Mueller. Stephani then called 911.

¶34 Suggesting that a bloody and vomiting woman lie in a bed rather than on a floor, covering her with a quilt, leaving her alone in a dark room for six or more hours, and periodically asking if she felt all right does not, we conclude, constitute emergency care. Other jurisdictions have found that relatively simple acts, such as providing transportation to an emergency room or asking whether accident victims need help, can constitute emergency care for the purposes of Good Samaritan statutes.[16] But even if we disregard differences among Good Samaritan Laws, such persuasive precedent is factually distinguishable. In those

[16] In ***Swenson v. Waseca Mut. Ins. Co.***, 653 N.W.2d 796, 799-800 (Minn. App. 2002), the court found that transporting an injured child fell within the scope of the Good Samaritan Law even though the driver did not go directly from the scene of the accident to the hospital, but took a quarter-mile detour. The North Dakota Supreme Court concluded that a passerby who stopped at the scene of an accident to see if victims needed assistance was "rendering" emergency care because the person was attempting to make aid available. ***McDowell v. Gillie***, 2001 ND 91, 626 N.W.2d 666, ¶12.

cases, individuals provided care either by transporting injured persons to a place where their injuries could be treated or by attempting to make medical help available.

¶35 Here, by contrast, Stephani did nothing for Mueller she could not have done for herself, except waking her up during the night. Without cleaning Mueller's wounds, Stephani had no way of knowing what her injuries were. Questioning Mueller in the dark made it impossible for Stephani to observe any physical changes. And waking Mueller every hour or so does not indicate that Stephani treated her as someone whose state calls for "immediate action." That nothing was done to make medical help available to Mueller for over six hours only underscores the fact that Stephani was not responding as if to an emergency. Based on the undisputed facts in this case, the Switlicks thus did not provide any care that would entitle them to immunity from liability under WIS. STAT. § 895.48.

The Meaning of Garaging in a Homeowner's Policy

¶36 Finally, Mueller argues the trial court erred when it concluded the Switlicks' homeowner's policy with McMillan did not provide coverage for their son's use of a neighbor's ATV. Again we agree.

¶37 Like the interpretation of statutes, the interpretation of an insurance policy is a question of law this court reviews without deference, applying the same rules of construction we apply to contracts generally. *See* ***Wisconsin Label Corp. v. Northbrook Prop. & Cas. Ins. Co.***, 2000 WI 26, ¶¶22-23, 233 Wis. 2d 314, 607 N.W.2d 276. We interpret insurance policies as a reasonable person in the position of the insured would understand them. ***Kremers-Urban Co. v. American Employers Ins. Co.***, 119 Wis. 2d 722, 735, 351 N.W.2d 156 (1984).

¶38 Under 1c of the Exclusions section of the Switlicks' homeowner's policy, McMillan will not pay for "bodily injury" or "property damage" arising out of "the ownership ... entrustment or use of ... any 'recreational vehicle,'" if that injury or damage occurs away from the "insured premises." No one disputes that the accident in this case occurred away from the insured premises. The parties similarly agree that, for the purposes of the policy, an ATV is a recreational vehicle. This exclusion would thus deny coverage for Mueller's accident unless an exception pertaining to that exclusion reinstates it. *See* ***American Fam. Mut. Ins. Co. v. American Girl, Inc.***, 2004 WI 2, ¶24, 268 Wis. 2d 16, 673 N.W.2d 65.

¶39 Exclusion 1c includes two exceptions. The first deals with motorized golf carts; the second states: "'we' will cover: ... use of a 'recreational vehicle' which is not owned, garaged, or maintained by any 'insured person' on or off of the 'insured premises.'" The question before us is whether the exception to the exclusion for use of a recreational vehicle "which is not owned, garaged, or maintained by an insured person on or off the insured premises" applies to the facts in this case. More specifically, we must decide whether a recreational vehicle is garaged if it is left on a property for some period ranging from two and one half weeks to a single day.

¶40 Van Loh testified that he left his ATV at the Switlicks' shack some two or two and a half weeks before the accident, although he had never left it there for more than a day or two in previous years. He also testified that he left the ATV in the detached garage near the shack, but later said that when he went to visit the Switlicks on October 25, 2003, the day of the accident, it might have been pushed outside. Apollo testified that he thought Van Loh brought his ATV over on the day of the accident. Stephani could not remember when the ATV appeared, but knew it had not been there during the July 4th holiday. Merlin testified that, at

the time of the accident, all the ATVs were outside because his garage was full of lumber, a little Ford tractor, several freezers, and various barrels. The garage had been that full for around three weeks. He did not know how long Van Loh's ATV had been there. All agreed that Van Loh never paid the Switlicks for parking the ATV on their property and that there was no formal agreement or arrangement for his use.

¶41 No Wisconsin court has interpreted the term garaged when it appears in a homeowner's policy. Statutory requirements for uninsured motorist coverage typically refer to motor vehicles "registered or principally garaged in this state." *See, e.g.,* WIS. STAT. § 632.32(4). In a case that turned principally on other issues, our supreme court commented that: "it could not be said that the Buick was principally garaged in Milwaukee; it had only been in Milwaukee approximately two to three weeks." ***Handal v. American Farmers Mut. Cas. Co.***, 79 Wis. 2d 67, 77, 255 N.W.2d 903 (1977). Though ***Handal*** does not define the term garaged, it implies that garaging entails a degree of permanence associated with time. Other jurisdictions have made that link more explicit. "We construe the term 'principally garaged' to mean the physical location where an automobile is primarily or chiefly kept." ***Chalef v. Ryerson***, 648 A.2d 1139, 1141 (N.J. Super. 1994).

¶42 In everyday language, the word garage has several meanings when used alone: to keep or protect, a building used for housing an automobile, and a repair shop for automobile vehicles. That does not mean, however, that garage is necessarily ambiguous. All words have multiple meanings or shades of meaning, but context and other cues usually operate to save us from perpetual confusion. No reasonable person in the Switlicks' position would understand that this exclusion in a homeowner's policy would apply only to those who had a repair

shop on their premises. Nor, despite McMillan's argument, would a reasonable person believe that one garages a car anytime one parks it any place. To the extent that a homeowner's policy is expected to provide coverage for an insured home, it would thus be reasonable to expect this exception to apply when that home is the permanent or regular place where the recreational vehicle is kept.

¶43 In this case, there is no evidence that Van Loh regularly left his ATV at the Switlicks' shack for extended periods. Nor is there any evidence that, on the single occasion in question, he left the ATV there for more than two-and-a-half weeks. We do not determine exactly how long it would take to turn parking into garaging, but we conclude that casual, one-time use of a property that spans less than three weeks is not sufficient to accomplish that transformation. Because Van Loh's ATV was not garaged on the Switlicks' property, the Switlicks' homeowner's policy with McMillan provides coverage for Mueller's accident.

By the Court.—Judgments reversed and cause remanded.

Recommended for publication in the official reports.

¶44 HOOVER, P.J. (*concurring*). I concur with the result. I write separately and briefly, however, to take issue with the majority's treatment of the immunity issue under WIS. STAT. § 895.48(1), the Good Samaritan Law. First, I am not entirely convinced that Stephani Switlick's activities did not constitute providing "emergency care" to Mueller. On the one hand, it could be plausibly argued that Stephani was not providing care in the sense that she was not addressing the root cause of Mueller's symptoms. Rather, Stephani was arguably effectively preventing or delaying provision of care for an apparent traumatic head injury that caused nausea. On the other hand, while Mueller presented with a bloody nose and nausea, she was nevertheless able to ambulate and converse cogently with Stephani, until 6 a.m. Then, for the first time, Mueller responded inappropriately to the questions Stephani asked for the purpose of monitoring Mueller's cognitive functioning. I am not fully persuaded that when dealing with a person the nature of whose injuries are such that the severity is not manifest, monitoring someone's cognitive functioning on an hourly basis does *not* qualify as emergency care. However, I need not resolve this issue, because I would hold that even if Stephani provided emergency care to Mueller, she did not do so at "the scene of any emergency or accident." *See* WIS. STAT. § 895.48(1).

¶45 The trial court held, and the majority evidently agrees, that an emergency travels with the injured party, on the theory that once removed from the scene, the injured person still requires care. Unfortunately, neither of the respondents' briefs provide any further analysis on this point. In particular, they

provide no discussion on how this concept of "the scene of any emergency" pertains to the entire time after Mueller was injured until she was placed in the ambulance some eight hours later.

¶46 The language utilized by the legislature suggests to me that the scene of an emergency, similar to the scene of an accident, refers to the location where the event giving rise to the need for emergency care occurred. The statute serves to encourage strangers who happen upon the scene of an emergency to stop and render aid, rather than avert their conscience, if not their eyes, and pass by to avoid potential liability. To extend the "scene" through to wherever the injured person ends up appears to me to broaden the immunity beyond the statute's language. Such an approach could include everyone "down the line" who renders care associated with an emergency, regardless of their relationship to where the event giving rise to the need for care occurred, or their relationship to the immediacy of the care necessitated by the event.

¶47 Based upon my alternative view, I would hold that any care Stephani provided to Mueller was not provided at *the* scene of an emergency. I therefore concur with the majority that immunity does not apply under WIS. STAT. § 895.48(1).[1]

[1] I note that Mueller does not argue that if Stephani is immune under WIS. STAT. § 895.48(1), such immunity does not apply to Merlin or that the latter did or did not do anything regarding treatment to cause him to be separately liable in that regard.

Electronically scanned images of the published statutes.

CHAPTER 448

MEDICAL PRACTICES

448.01 Definitions.
448.02 Authority.
448.03 License required to practice; exceptions; use of titles; civil immunity.
448.04 Classes of license; certificate of licensure.
448.05 Qualification for licensure or certification; examinations; application.
448.06 License or certificate granted, denied.
448.07 Annual registration; fees
448.08 Fee splitting; separate billing required, partnerships and corporations; contract exceptions.
448.09 Penalty; appeal.
448.10 Previous practice.
448.11 Injunction.
448.12 Malpractice.
448.20 Council on physician's assistants; duties.
448.21 Physician's assistants.
448.40 Rules.

448.01 Definitions. In this chapter:

(1) "Board" means medical examining board.

(2) "Disease" means any pain, injury, deformity or physical or mental illness or departure from complete health or the proper condition of the human body or any of its parts.

(3) "Physical therapist" means an individual who has been graduated from a school of physical therapy, and holding a license to practice physical therapy granted by the board.

(4) "Physical therapy" means that branch or system of treating the sick which is limited to therapeutic exercises with or without assistive devices, and physical measures including heat and cold, air, water, light, sound, electricity and massage; and physical testing and evaluation. The use of roentgen rays and radium for any purpose, and the use of electricity for surgical purposes including cauterization, are not part of physical therapy.

(5) "Physician" means an individual possessing the degree of doctor of medicine or doctor of osteopathy or an equivalent degree as determined by the board, and holding a license granted by the board.

(6) "Physician's assistant" means an individual certified by the board to perform patient services under the supervision and direction of a licensed physician.

(7) "Podiatrist" means an individual possessing the degree of doctor of podiatric medicine or doctor of surgical chiropody or equivalent degree as determined by the board, and holding a license to practice podiatry or podiatric medicine and surgery granted by the board.

(8) "Podiatry" or "podiatric medicine and surgery" means that branch or system of treating the sick which is limited to the diagnosis, or mechanical, medical or surgical treatment or treatment by use of drugs, of the feet, but does not include amputations other than digits of the foot or the use of a general anesthetic unless administered by or under the direction of a person licensed to practice medicine and surgery. Diagnosis or treatment shall include no portion of the body above the feet except that diagnosis and treatment shall include the tendons and muscles of the lower leg insofar as they shall be involved in conditions of the feet.

(9) "Practice of medicine and surgery" means:

(a) To examine into the fact, condition or cause of human health or disease, or to treat, operate, prescribe or advise for the same, by any means or instrumentality.

(b) To apply principles or techniques of medical sciences in the diagnosis or prevention of any of the conditions described in par. (a) and in sub. (2).

(c) To penetrate, pierce or sever the tissues of a human being.

(d) To offer, undertake, attempt or do or hold oneself out in any manner as able to do any of the acts described in this subsection.

(10) "Reprimand" means to publicly warn the holder of a license or certificate granted by the board.

(11) To "limit" a license or certificate means to impose conditions and requirements upon the holder thereof, and to restrict the scope of the holder's practice.

(12) To "revoke" a license or certificate means to completely and absolutely terminate such license or certificate, and all rights, privileges and authority previously conferred thereby.

(13) To "suspend" a license or certificate means to completely and absolutely withdraw and withhold for a period of time all rights, privileges and authority previously conferred by a grant of a license or certificate.

(13m) "Treat the sick" means to examine into the fact, condition or cause of human health or disease, or to treat, operate, prescribe or advise for the same, or to undertake, offer,

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advertise, announce or hold out in any manner to do any of the aforementioned acts, for compensation, direct or indirect, or in the expectation thereof.

(14) "Unprofessional conduct" means those acts or attempted acts of commission or omission defined as unprofessional conduct by the board under the authority delegated to the board by s. 15.08 (5).

(15) "Warn" means to privately apprise the holder of a license or certificate of the unprofessional nature of the holder's conduct and admonish the holder that continued or repeated conduct of such nature may give the board cause to reprimand the holder or to limit, suspend or revoke such license or certificate.

History: 1975 c. 383, 421.

Note: Chapter 383, laws of 1975, which repealed and recreated chapter 448 of the statutes contains a statement of legislative policy in section 1. See the 1975 session law volume.

448.02 Authority. (1) LICENSE. The board may grant licenses, including various classes of temporary licenses, to practice medicine and surgery, to practice podiatric medicine and surgery and to practice physical therapy.

(2) CERTIFICATE. The board may certify physician's assistants.

(3) INVESTIGATION; HEARING; ACTION. The board shall investigate allegations of unprofessional conduct by persons holding a license or certificate granted by the board. A finding by a panel established under s. 655.02 or by a court that a physician has acted negligently is an allegation of unprofessional conduct. After the investigation, if the board finds that there is probable cause to believe that the person is guilty of unprofessional conduct, the board shall hold a hearing on such conduct. The board may, when it finds a person guilty of unprofessional conduct, warn or reprimand that person, or limit, suspend or revoke any license or certificate granted by the board to that person. The board shall adopt rules of procedure for such investigation, hearing and action under ch. 227.

(a) The board may limit a license or certificate for a period not to exceed 5 years. A person whose license or certificate is limited shall be permitted to continue practice upon condition that the person will refrain from engaging in unprofessional conduct; that the person will appear before the board or its officers or agents at such times and places as may be designated by the board from time to time; that the person will fully disclose to the board or its officers or agents the nature of the person's practice and conduct; and that the person will cooperate with the board during the entire period of limitation.

(b) Unless a suspended license or certificate is revoked during the period of suspension, upon the expiration of the period of suspension the license or certificate shall again become operative and effective. However, the board may require the holder of any such suspended license or certificate to pass the examinations required for the original grant of the license or certificate before allowing such suspended license or certificate again to become operative and effective.

(4) SUSPENSION PENDING HEARING. The board may summarily suspend any license or certificate granted by the board for a period not to exceed 30 days pending hearing, when the board has in its possession evidence establishing probable cause to believe that the holder of such license or certificate has violated the provisions of this chapter and that it is necessary to suspend such license or certificate immediately to protect the public health, safety or welfare. The holder of such license or certificate shall be granted an opportunity to be heard during the determination of probable cause. The board may designate any of its officers to exercise the authority granted by this subsection to suspend summarily a license or certificate, but such suspension shall be for a period of time not to exceed 72 hours.

(5) VOLUNTARY SURRENDER. The holder of any license or certificate granted by the board may voluntarily surrender the license or certificate to the secretary of the board at any time.

(6) RESTORATION OF LICENSE. The board may restore any license or certificate which has been voluntarily surrendered or revoked under any of the provisions of this chapter, on such terms and conditions as it may deem appropriate.

History: 1975 c. 383, 421.

448.03 License required to practice; exceptions; use of titles; civil immunity. (1) LICENSE REQUIRED TO PRACTICE. No person may practice medicine and surgery, podiatry or physical therapy, or attempt to do so or make a representation as authorized to do so, without a license granted by the board.

(2) EXCEPTIONS. Nothing in this chapter shall be construed either to prohibit, or to require a license or certificate under this chapter for any of the following:

(a) Any person lawfully practicing within the scope of a license, permit, registration, certificate or certification granted to practice professional or practical nursing under ch. 441, to practice chiropractic under ch. 446, to practice dentistry or dental hygiene under ch. 447, to practice optometry under ch. 449 or under any other statutory provision, or as otherwise provided by statute.

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(b) The performance of official duties by a physician of any of the armed services or federal health services of the United States.

(c) The activities of a medical student, podiatry student, physical therapy student or physician's assistant student required for such student's education and training; or the activities of a medical school graduate required for training as required in s. 448.05 (2).

(d) Actual consultation or demonstration by licensed physicians, podiatrists or physical therapists of other states or countries with licensed physicians, podiatrists or physical therapists of this state.

(e) Any person providing patient services as directed, supervised and inspected by a physician or podiatrist who has the power to direct, decide and oversee the implementation of the patient services rendered.

(f) Any person assisting a physical therapist in practice under the direct, immediate, on premises supervision of such physical therapist.

(g) Ritual circumcision by a rabbi, or the practice of Christian Science.

(h) The gratuitous domestic administration of family remedies.

(i) Any person furnishing medical assistance or first aid at the scene of an emergency as defined in sub. (4).

(3) USE OF TITLES. (a) No person not possessing the degree of doctor of medicine may use or assume the title "doctor of medicine" or append to the person's name the letters "M.D.".

(b) No person not possessing the degree of doctor of osteopathy may use or assume the title "doctor of osteopathy" or append to the person's name the letters "D.O.".

(c) No person not a podiatrist may designate himself or herself as a podiatrist or use or assume the title "doctor of surgical chiropody" or "doctor of podiatry" or "doctor of podiatric medicine" or append to the person's name the words or letters "doctor", "Dr.", "D.S.C.", "D.P.M." or "foot doctor" or "foot specialist" or any other title, letters or designation which represents or may tend to represent the person as a podiatrist.

(d) No person not a physical therapist may designate himself or herself as a physical therapist or use or assume the title "physical therapist" or "physiotherapist" or "physical therapy technician" or append to the person's name the letters "P.T.", "P.T.T." or "R.P.T." or any other title, letters or designation which represents or may tend to represent the person as a physical therapist.

(e) No person may designate himself or herself as a "physician's assistant" or use or assume the title "physician's assistant" or append to the person's name the words or letters "physician's assistant" or "P.A." or any other titles, letters or designation which represents or may tend to represent the person as a physician's assistant unless certified as a physician's assistant by the board.

(4) CIVIL LIABILITY; EMERGENCY CARE. No person licensed or certified under this chapter, who in good faith renders emergency care at the scene of an emergency, is liable for any civil damages as a result of acts or omissions by such person in rendering the emergency care. For the purpose of this subsection, "the scene of an emergency" means areas not within the confines of a hospital or other institution which has hospital facilities or the office of a person licensed or certified under this chapter.

(5) CIVIL LIABILITY; CERTAIN MEDICAL PROCEDURES. No person licensed or certified under this chapter shall be liable for any civil damages resulting from such person's refusal to perform sterilization procedures or to remove or aid in the removal of a human embryo or fetus from a person if such refusal is based on religious or moral precepts.

History: 1975 c. 383, 421.

448.04 Classes of license; certificate of licensure. (1) CLASSES OF LICENSE. (a) *License to practice medicine and surgery.* A person holding a license to practice medicine and surgery may practice as defined in s. 448.01 (9).

(b) *Temporary license to practice medicine and surgery.* 1. An applicant for license to practice medicine and surgery who has passed an examination satisfactory to the board, or who is a graduate of a medical school in this state, and who more than 30 days prior to the date set by the board for the holding of its next examination has complied with all the requirements of s. 448.05 (2) and (7) may, at the discretion of the board, be granted a temporary license to practice medicine and surgery. Such temporary license shall expire 60 days after the next examination for license is given or on the date following the examination on which the board grants or denies such applicant a license, whichever occurs first; but the temporary license shall automatically expire on the first day the board begins its examination of applicants after granting such license, unless its holder submits to examination on such date. The board may require an applicant for temporary licensure under this subdivision to appear before a member of the board for an interview and oral examination. A temporary license shall be granted under this subsection only once to the same person.

2. An applicant who is a graduate of a foreign medical school and who, because of noteworthy professional attainment, is invited to serve on the academic staff of a medical school in this state as

Amendment No. 4, A.

To Bill No. 65, A.

Offered by _____

Amend the bill, as printed, as follows:

1. In line 3, before the period, insert "except in cases of gross negligence".

2. In line 9, after "omissions", insert ", except for acts or omissions constituting gross negligence,".

3. In line 14, after "omissions", insert ", except for acts or omissions constituting gross negligence,".

(End)

1977

STATE OF WISCONSIN

LRB-2397/1
BF:ke

ASSEMBLY SUBSTITUTE AMENDMENT 1,

TO 1977 ASSEMBLY BILL 96

1 AN ACT to create 895.48 of the statutes, relating to a general "good
2 Samaritan" law.
3
4 The people of the state of Wisconsin, represented in senate and
5 assembly, do enact as follows:

6 SECTION 1. 895.48 of the statutes is created to read:
7 895.48 CIVIL LIABILITY EXEMPTION: EMERGENCY CARE. Any person
8 who renders emergency care in good faith at the scene of any emer-
9 gency or accident shall be immune from civil liability for acts or
10 omissions in rendering such emergency care. Such immunity does not
11 extend when persons trained in health care render emergency care in
12 the normal course of their duties at a hospital, institution
13 equipped with hospital facilities or physician's office. This
14 section shall not be construed as absolving from civil liability any
15 person whose emergency care acts or omissions amount to a high
16 degree of negligence when compared with the emergency care which
17 such person could reasonably have been expected to exercise even
18 under the adverse conditions of the emergency or accident.
19 (End)

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DEC 1 2 2005

CLERK OF SUPREME COURT
OF WISCONSIN

STATE OF WISCONSIN
SUPREME COURT

LINA M. MUELLER,

Plaintiff-Appellant

v.

McMILLAN WARNER INSURANCE COMPANY,

Defendant-Respondent,

MERLIN A. SWITLICK and STEPHANI SWITLICK,

Defendants-Respondents-Petitioners,

APOLLO SWITLICK and SECURITY HEALTH
PLAN OF WISCONSIN, INC.,

Defendants,

and

METROPOLITAN PROPERTY AND
CASUALTY INSURANCE COMPANY,

Intervenor-Defendant.

APPEAL FROM THE DECISION OF THE COURT OF APPEALS
DISTRICT III FILED AUGUST 2, 2005
COURT OF APPEALS No. 2005AP121
Marathon County Circuit Court Case No. 04-CV-91

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT LINA M. MUELLER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

ISSUE viii

ORAL ARGUMENT AND PUBLICATION viii

STATEMENT OF THE CASE 1

Nature of Case 1

Procedural Status 3

Disposition in Trial Court 4

Disposition in Court of Appeals 5

Undisputed Material Facts 8

ARGUMENT - OVERVIEW 13

The Statutory Limitation on Immunity to "Emergency Care at the Scene of Any Emergency Or Accident In Good Faith" Is Meaningful and Must Be Limited to Emergency Care Rendered at the Scene for Only the Period of Time Needed to Transfer Care to Medical Professionals 13

Standard of Review 19

The Switlicks Did Not Render "Emergency Care""At The Scene Of Any Emergency In Good Faith" To Lina Until, At The Earliest, Six To Seven Hours After They Undertook To Assist Her When Stephani Called 911 25

The Switlicks Interpretation Leads To Multiple Absurd Results Which Must Be Avoided 34

The Assistance Rendered By The Switlicks At Their Shack Over The Course Of Six To Seven Hours Was Not Provided At The Scene Of The Emergency 36

Either The Switlicks Did Not Act In Good Faith As A matter of Law Or There are Genuine Issues Of Material Fact As To Whether They Acted In Good Faith 38

The Switlicks Raise A Strawman Argument By Contending That Mueller's Complaint Alleges Negligence For Failure To Render Emergency Care At The Scene Of An Emergency 41

Merlin Switlick Did Not Provide Emergency Care At The Scene Of An Emergency 42

CONCLUSION 44

CERTIFICATION 46

CERTIFICATION OF MAILING OR DELIVERY . . . 47

TABLE OF AUTHORITIES

Page

Department of Transportation v. Transportation Commission,
111 Wis. 2d 80,
330 N.W.2d 159 (1983) 24

Hatleberg v. Norwest Bank Wisconsin,
2005 WI 109, ___ Wis. 2d ___,
700 N.W.2d 15 . . . . . 2, 24

Hughes v. Chrysler Motors Corporation,
197 Wis. 2d 973,
542 N.W.2d 148 (1996) 24

Kenosha Hospital & Medical Center v. Garcia,
2004 WI 105, 274 Wis. 2d 338,
683 N.W.2d 425 17

Lambrecht v. Kaczmarczyk,
2001 WI 25, 241 Wis. 2d 804,
623 N.W.2d 751 17

LePoidevin v. Wilson,
111 Wis. 2d 116,
330 N.W.2d 555 (1983) 24

Megal Development Corporation v. Shadof,
2005 WI 151, ¶8, ___ Wis. 2d ___,
____ N.W.2d ___ 20

Mueller v. McMillan Warner Insurance Company,
2005 WI App. 210, ___ Wis 2d ___,
704 N.W.2d 613 . . . . . viii, 3, 5, 15, 27, 39

Nischke v. Farmers & Merchants Bank and Trust,
187 Wis. 2d 96,
522 N.W.2d 542 (1994) 2

O'Neill v. Reemer,
2003 WI 13, 259 Wis. 2d 544,
657 N.W.2d 403 19

Reyes v. Greatway Insurance Company,
227 Wis. 2d 357,
597 N.W.2d 687 (1999) 24, 36

Smaxwell v. Bayard,
2004 WI 101, 274 Wis. 2d 278,
682 N.W.2d 923 19

State ex rel. Chain O'Lakes Protective Association v. Moses,
53 Wis. 2d 579,
193 N.W.2d 708 (1972) 24

State ex rel. Kalal v. Circuit Court for Dane County,
2004 WI 58, 271 Wis. 2d 633,
681 N.W.2d 110 . . . . . 20, 21, 25, 36

Town of Delafield v. Winkelman,
2004 WI 17, 269 Wis. 2d 109,
675 N.W.2d 470 20

Wisconsin Bankers Association v. Mutual Savings & Loan Association of Wisconsin,
96 Wis. 2d 438,
291 N.W.2d 869 (1980) 24

STATUTES

Wis. Stat. § 23.33(4c)(a) 40

Wis. Stat. § 23.33(4c)(b) 40

Wis. Stat. § 29.68 24

Wis. Stat. § 125.07(1)(a) 40

Wis. Stat. §346.67(1)(c) 26

Wis. Stat. § 802.08(2) 19

Wis. Stat. § 802.08(6) 20

Wis. Stat. § 895.045(2) 44

Wis. Stat. § 895.48(1) . . . . . vii, 3, 4, 5, 8, 15, 20,
. . . . . 24, 35, 29, 30, 31, 32, 35, 36, 39, 42, 44

Wis. Stat. § 902.01(2)(b) 17

Wis. Stat. § 902.01(3) 17

Wis. Stat. §940.34 . . . . . 26, 30, 31

Wis. Stat. §940.34(3) 31, 45

OTHER AUTHORITIES

1983 Wis. Act 14 31

1983 Wis. Act 198 30

Black's Law Dictionary
(5th 1979) at pp. 623-624 38

Gregory *Gratuitous Undertakings and the Duty of Care*,
1 De Paul L.Rev. 30 (1951) 26

Merriam-Webster On-Line Dictionary 27

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Restatement (Second) of Torts §323 (1965) 2, 24

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(1978) p. 1101 . . . . . 27, 28

W. PROSSER HANDBOOK OF THE LAW OF TORTS, §56, (4th ed. 1971) 26

ISSUE

Did Merlin and Stephani Switlick render "emergency care at the scene of an[y] emergency or accident in good faith" as this phrase is used in Wis. Stat. § 895.48(1) when they, at most, provided assistance to Lina Mueller for 6 to 7 hours **before** calling "911" after she was brought back to the Switlick property by Apollo Switlick immediately after the October 25, 2003 ATV accident?

TRIAL COURT ANSWER: "Yes."

APPELLATE COURT ANSWER: "No."

ORAL ARGUMENT AND PUBLICATION

Ms. Mueller respectfully submits that oral argument would aid this Court in analyzing the parties arguments in the context of the undisputed material facts and in developing workable definitions of the §895.48(1) terms at issue in this case.

The decision should be published because it will be this Court's first interpretation of the so-called Good Samaritan immunity statute, Wis. Stat. § 895.48(1). As the Appellate Court noted, until its decision, "[N]o Wisconsin

Appellate Court has construed the contested terms" of this statute. *Mueller v. McMillan Warner Insurance Company,* 2005 WI App. 210, ¶27, ___ Wis 2d ___, 704 N.W.2d 613.

STATEMENT OF THE CASE

Nature of Case

This case arises out of an ATV accident that occurred on the evening of October 25, 2003 while Lina Mueller was a passenger on an ATV operated by the Switlicks' son, Apollo. She sustained severe personal injuries in the accident. When she was ultimately seen and evaluated by competent and qualified health care professionals - physicians - she was diagnosed with bifrontal and left temporal edema with increasing intra-cranial pressure, extensive anterior skull base and orbital fractures and displaced bone fractures in the left optic canal and pneumocephalus. R. 22 p.40.[1]

Ms. Mueller brought common law negligence claims against Apollo Switlick and his parents Merlin and Stephani. She alleged that Apollo was negligent in the manner in which he operated the ATV including negligence for operating while under the influence of intoxicants. R.1 p. 4 and R.12. Ms.

---

[1]The Plaintiff-Appellant's citation form is as follows: R refers to the Record; the number following R refers to the specific document number in the record; and the number following that document number and proceeded by a small p refers to the page number of that particular document. Where the symbol ¶ follows a reference to a particular document in the record, the reference is to the particular paragraph or paragraphs of that document.

Mueller alleged that Merlin and Stephani Switlick were causally negligent in two principal respects: (1) they made alcohol available to their underaged son, Apollo, under circumstances where they knew he was drinking it and, with that knowledge, allowed him to operate the ATV, at night, with Ms. Mueller as a passenger, R.12 p. 4; and (2) after the accident when Apollo brought Lina back to their property, they failed to exercise reasonable care in either timely summoning qualified and competent medical care or timely transporting her to a facility that could provide qualified and competent medical care under circumstances where she could not summon such care for herself or transport herself to such a facility. R.12 ¶¶11-15.

The latter claim is based on the common law theory of liability set forth in the Restatement (Second) of Torts § 323 (1965). This provision of the Restatement is known as the "Good Samaritan" provision and liability pursuant to this theory has been recognized in Wisconsin for a very long time. *Hatleberg v. Norwest Bank Wisconsin*, 2005 WI 109, ¶¶ 26 and 27, ___ Wis. 2d ___, 700 N.W.2d 15; and *Nischke v.*

Farmers & Merchants Bank & Trust, 187 Wis. 2d 96, 113-115, 522 N.W.2d 542 (1994) and cases cited therein. Essentially, the sole issue before this Court is whether Wis. Stat. § 895.48(1) immunizes Merlin and Stephani Switlick for negligence in failing to either call 911 to summon competent and qualified medical care for Lina or transport her to a facility that could provide competent and qualified medical care within a reasonable time after they undertook to assist her. It is undisputed that Stephani **did not** call 911 until some six to seven hours later.

Procedural Status

Ms. Mueller concurs in the Switlicks' recitation of the case history at pp. 9-12 of their Brief with but one exception: she disagrees with the statement contained in footnote 1 at p. 10 that her claim against the Switlicks for negligence in providing intoxicants to their underaged son, Apollo, is not at issue on appeal. As set forth in her argument at pp. 35-36 and 39-40, *infra*, the fact that, as determined by the Appellate Court, *Mueller, supra* at ¶¶ 10-22, she has a viable claim against the Switlicks for furnishing alcohol to their underaged

son under circumstances where the provision of that alcohol is alleged to have been a substantial factor in causing the ATV accident is directly relevant to the Switlicks claim that they are entitled to immunity under §895.48(1).

Disposition in Trial Court

The Trial Court concluded that the Switlicks were entitled to Good Samaritan immunity because they provided emergency care to Ms. Mueller at the scene of an emergency in good faith. R.36 pp. 5-8. It stated, "[T]his is a situation where the spirit of the statute must control over any literal or technical meaning of the language," and concluded that the phrase "emergency care" includes "medical assistance and first aid." R.36 p. 7. It then proceeded to find that the Switlicks provided "traditional first aid and medical assistance by stopping the bleeding, cleaning the wounds, give aspirin as needed and let them both rest." R.36 p. 7. As set forth below, the Trial Court's finding that the Switlicks stopped Ms. Mueller's bleeding and cleaned her wounds are clearly erroneous and not supported by the factual record.

The Trial Court supported its conclusion that the care or assistance provided by the Switlicks was rendered at the "scene of an emergency or accident because ... 'the scene of the emergency' must be deemed to follow the person in peril and in need of emergency care." R.36 p. 7. Also, it apparently found, without discussion, that the Switlicks acted in "good faith." R.36 p. 8.

Disposition in Court of Appeals

Ms. Mueller concurs in the Switlicks statement of the disposition in the Court of Appeals as found at pp. 13-15 of their Brief. However, she adds that the Appellate Court found that §895.48(1) was ambiguous and proceeded to construe it by stating that when the alleged "Good Samaritan" is a lay person, the terms used in the statute should be given their ordinary meanings. *Mueller, supra*, at ¶29. After doing so, it stated:

> "... [W]hen the samaritan is a layperson, the intervention protected will ordinarily be of short duration and of an interim sort. Nothing in the statute suggests any intention that an ordinary person should make care-giving decisions any longer than the emergency situation necessitates."

Id.

After recounting the facts as testified to by Stephani Switlick which established that she did not take any action to stop any bleeding or clean any wounds, but merely helped lay Lina down in bed, covered her with a quilt, brought her an aspirin but did not know if she took it, brought her some water but did not believe she drank any and checked on her "about every hour over the course of six to seven hours," the Court concluded that the care or assistance provided by the Switlicks did not fall within "the ordinary meaning" of "emergency care:"

> "Suggesting that a bloody and vomiting woman lie in a bed rather than on a floor, covering her with a quilt, leaving her alone in a dark room for six or more hours, and periodically asking if she felt all right does not, we conclude, constitute emergency care. Other jurisdictions have found that relatively simple acts, such as providing transportation to an emergency room or asking whether accident victims need help, can constitute emergency care for the purposes of Good Samaritan statutes. ... . **In those cases, individuals provided care either by transporting injured persons to a place where their injuries could be treated or by attempting to make medical help available.**"[Emphasis added]
>
> "Here, by contrast, Stephani did nothing for Mueller she could not have done for herself, except waking her up during the night. Without cleaning Mueller's wounds, Stephani had no way of knowing what her injuries were. Questioning Mueller in the dark made it impossible for Stephani to observe any physical changes. And waking Mueller every hour or so does not indicate that Stephani treated her as someone whose state calls for 'immediate action.' **That nothing was done to make medical help available to Mueller for**

> **over six hours only underscores the fact that Stephani was not responding as if to an emergency.** [Emphasis added]."

Id. at ¶¶34 and 35.

We also add that in his concurrence, Judge Hoover states that he would have held that the care or assistance provided by the Switlicks was not rendered "at the scene of an emergency." *Id.* at ¶47. He stated:

> "The language utilized by the legislature suggests to me that the scene of an emergency, similar to the scene of an accident, refers to the location where the event giving rise to the need for emergency care occurred. The statute serves to encourage strangers who happen upon the scene of an emergency to stop and render aid, rather than avert their conscience, if not their eyes, and pass by to avoid potential liability. To extend the "scene" through to wherever the injured person ends up appears to me to broaden the immunity beyond the statute's language. **Such an approach could include everyone "down the line" who renders care associated with an emergency, regardless of their relationship to where the event giving rise to the need for care occurred, or their relationship to the immediacy of the care necessitated by the event.** [Emphasis added]

Id. at ¶46.

Given its conclusion on the "emergency care" issue, the Court did not address Mueller's claim that the Switlicks

did not act in "good faith". *Id.* at ¶¶23 and 35. *See also* Mueller's opening Appellate Court Brief at p. 26.[2]

Undisputed Material Facts

On October 25, 2003, Merlin and Stephani Switlick held a party for friends and business associates on property they owned in Lincoln County. R.20 p. 82-84 - S.S. depo. pp. 16-21.[3] It was not uncommon for the Switlicks' underaged son, Apollo, to have "beer with the boys" at such functions. *Id.* at 84 - S.S. depo. pp. 21 and 102 - M.S. depo. p. 22. In fact, both Merlin and Stephani knew Apollo had and was drinking alcohol after he arrived at the party. *Id.* at 84 - S.S. depo. pp. 24 and 102 - M.S. depo. p. 22.

Apollo arrived at around 2 p.m. R.20 pp. 59 and 60 - A.S. depo. pp. 19 and 22. The ATV accident occurred sometime around 10:30 p.m. *Id.* at 58-59 - A.S. depo. pp. 13-

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[2]At pages 50-52 of their Brief, the Switlicks contend that the issue of "good faith" is one of recent development. That assertion is false. In the Trial Court and in the Court of Appeals, the Plaintiff raised the issue of "good faith" contending that genuine issues of material fact existed with respect to this element of § 895.48(1) immunity and therefore the Switlicks' Motion for Summary Judgment grounded on this statute must be denied.

[3]In referencing depositions, "S.S." refers to Stephani Switlick's deposition, "M.S." refers to Merlin Switlick's deposition and "A.S." refers to Apollo Switlick's deposition.

17. Before 6 p.m. he had a couple of twelve ounce beers and had another "five" between 6 p.m. and 10 p.m. *Id.* at 60-61 - A.S. depo. pp. 24-25.

Mueller arrived around 7 p.m. R.20 p. 84 - S.S. depo. p. 22. At around 10 to 10:30 p.m. or so, Stephani and Apollo heard an ATV "puttering like it was running out of gas or was having a problem," out in the fields. R.20 pp. 65 and 70 - A.S. depo. pp. 42-43 and 61-62 and R.20 p. 85 - S.S. depo. p 26. Stephani and Apollo knew that her daughter and Apollo's sister and her children were out on one of the family's ATVs and thought that they might be in trouble. *Id.* Apollo saw a friend's ATV parked nearby and decided to use it to check on his sister and her children. *Id.* He got on this ATV and Mueller got on behind him. *Id.*. After checking on his sister, Apollo and Mueller headed back to the "shack" on an old railroad right-of-way trail that was not on the family property. R.20 pp. 59 and 72 - A.S. depo. pp. 17-18 and 69-70. The accident occurred on the return trip. R.20 p. 59 - A.S. depo. pp. 17-18.

According to Apollo, the accident occurred when he slammed on the brakes after seeing what he thought was a branch overhanging the trail. R.20 p. 59 - A.S. depo. pp. 17-18. He estimated that he was only going 15 mph at the time. R.20 p. 65 - A.S. depo. pp. 43-44. The branch overhanging the trail was only 4 feet off the ground and, with the headlight on the ATV, which was working, Apollo should have seen that branch from a distance of at least 100 feet if he was paying attention. R.20 pp. 100-101 - M.S. depo. pp. 14-17. Apollo did not remember anything after hitting the brakes until he returned and brought Lina back to the "shack" a little before 11 p.m. or so. *Id.* and R.20 p. 70 - A.S. depo. pp. 61–62.

Stephani and Merlin observed that Lina and Apollo were both bleeding when they got back to the "shack." R.20 p. 62 - S.S. depo. pp. 30-31, R-20 p. 101 - M.S. depo. pp. 18-20. Stephani saw that Lina was bleeding from her nose and had blood on her face and clothes. R.20 p. 86 - S.S. depo. pp. 29-32. Lina was wearing an Edgar Wildcat sweatshirt which was covered with blood. *Id.* - S.S. depo. pp. 31-32. Lina

said she felt sick, went to the bathroom and was throwing up. R.20 p. 87 - S.S. depo. p. 34. She told Stephani that she just wanted to lay on the bathroom floor and Stephani suggested that she lay down in bed. *Id.* - S.S. depo. pp. 34-35. Stephani helped Lina to bed and covered her with a quilt. R.20 pp. 87-88 - S.S. depo. pp. 36-37. At this point in time, Stephani stated: "We were watching her and I - we didn't know for sure if we should take her in or if we shouldn't take her." *Id.* She then clarified that what she meant by this statement was they were considering whether they should take her into the hospital. *Id.* They did not.

Over the course of the next six to seven hours until about 6:00 a.m., Stephani periodically checked on Lina about every hour or so. R.20 pp. 88-93 - S.S. depo. pp. 38-60. She kept the lights off. *Id.* - S.S. depo. p. 43. During the course of the evening she observed Lina vomit four or five times. *Id.* - S.S. depo. pp. 48-49. Apollo was laying in the same bed and he had a cut on the back of his head and threw up a number of times as well. *Id.* - S.S. depo. pp. 46-48. When Stephani checked on both Lina and Apollo she would ask

them if they knew where they were and they would say, "Yes." *Id.* - S.S. depo. p. 39. She also asked Lina how she felt and Lina would say she had a headache. *Id.* - S.S. depo. pp. 39-40. She brought in some water and did not believe that either Lina or Apollo wanted any and she also gave Lina an aspirin but she did not think that Lina took it. *Id.* - S.S. depo. p. 49. At about 1 or 2 in the morning, Stephani noticed that the whole side of Lina's right eye was bruised, swollen and black and blue and she took a cool washcloth out of the freezer and put it on Lina's forehead. *Id.* - S.S. depo. pp. 59-60. She stated she changed it every fifteen to twenty minutes or so. *Id.*

When Stephani checked on Lina at about 6 a.m. and asked her if she knew where she was, Lina answered, "Mom?" *Id.* - S.S. depo. p. 44. Stephani repeated the question and at that point Lina didn't respond. *Id.* Stephani then called 911 and thereafter Lina was transported to Merrill and ultimately to St. Joseph's Hospital in Marshfield. R.22 p. 34. Lina was diagnosed with the injuries described *infra* at p. 1. She underwent a long and complicated course of treatment

and was not discharged from the hospital until January 9, 2004. R.22 p. 43.

Merlin's contact with Lina and Apollo after the accident was limited. When they returned to the "shack" he observed that they had blood on them. R.20 pp. 101-102 - M.S. depo. pp. 18-21. He thought Lina had a bloody nose and learned that Apollo bit his tongue and had a cut on the back of his head. *Id.* - M.S. depo. p. 19. Apollo was bleeding from the mouth and the back of his head. *Id.* Apollo told Merlin that he felt they collided heads and Merlin felt Lina's teeth to see if any were loose. *Id.* - M.S. depo. p. 20. He did observe that Lina was acting out of sorts because she was using the "F - word" a lot. *Id.* - M.S. depo. pp. 20-21.

ARGUMENT - OVERVIEW

The Statutory Limitation on Immunity to "Emergency Care at the Scene of Any Emergency Or Accident In Good Faith" Is Meaningful and Must Be Limited to Emergency Care Rendered at the Scene for Only the Period of Time Needed to Transfer Care to Medical Professionals

The theme of the Switlicks argument is that when lay persons invoke Good Samaritan immunity, all care or assistance provided by them is "emergency care at the scene

of an emergency in good faith" **regardless** of whether medical professionals are summoned and **regardless** of the amount of time that elapses. This interpretation of the statute renders its limitations of immunity to "emergency" care "at the scene of any emergency in good faith" meaningless and surplusage. Further, it promotes the unauthorized practice of medicine for much longer than the time needed to secure the services of medical professionals at the time when it is most important to try and secure professional medical help - emergency situations where prompt action can and often will spell the difference between life and death or serious medical residuals.

The phrase "emergency care at the scene of any emergency or accident" is well understood by reasonably well informed lay people. It has a crucial all important temporal element which, **at most**, means the care or assistance provided to the victim of an accident for only so long as is needed to secure the services of or transfer care to medical professionals and generally involves CPR or other efforts intended to restore a heartbeat, circulation of blood and

respiration, and to stop blood loss. This is the conclusion reached by the Court of Appeals after it linked the dictionary definition of each of the words in this phrase together with the obvious intent of this statute, namely, to encourage all citizens to assist people in need of emergency care at the scene of the emergency by protecting them from liability for any acts or omissions made in rendering care of a "short duration" or "interim sort" until care is transferred to medical professionals. *Mueller* at ¶¶25 and 29.

Since Stephani's 911 call was placed at 6:34 a.m. and the professionals took over Lina's care at 6:55 a.m., it can readily be concluded that the time necessary to secure the services of and transfer care to medical professionals was 21 minutes. A-App. p. 27.[4] Therefore, §895.48(1) would, **at most**, immunize Merlin and Stephani for the care rendered during the first half hour of assistance provided by them, **if, but only if**, such care qualifies as "emergency care." It certainly does not immunize them for the six to seven hours

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[4]This information is set out on the EMT Ambulance Report. By an oversight, it was not made a part of the record and Ms. Mueller is simultaneously moving the Court for leave to supplement the record with these undisputed facts.

during which they did nothing other than babysit Lina by checking on her before they called in the medical professionals.

When lay persons are involved, the public policy underlying this statute is to encourage them to call 911 when they recognize an emergency exists to secure the services of professionals and immunize them for any acts or omissions with respect to the "emergency care" provided for only so long as is necessary for the professionals to take over. We want to encourage lay people to provide emergency care but not play doctor by trying to diagnose injuries while monitoring the injured person's status over an extended period of time. Contrary to the Switlicks assertion, Switlick brief at pp. 45-46, sophisticated medical monitoring by professionals in well equipped health care facilities can't be seriously compared to the Switlicks babysitting activities. The Switlicks admit they had no idea what they were dealing with - they apparently thought Lina and Apollo were vomiting repeatedly because they had too much to drink. Under the circumstances, all doubt about summoning medical

professionals must be resolved in favor of doing so and all doubt about the nature, severity and extent of the accident victim's injuries must be resolved by turning the victim's care over to those who are qualified and competent to diagnose and treat the injuries.

This construction of the statute comports with what has been taught to every person who has taken a life saving, life guarding, basic first aid or CPR course offered by the American Red Cross or its affiliates. *See* Plaintiff's Appendix pages 1-26 - excerpts from the American Red Cross publications entitled "First Aid Fast" and "Community First Aid and Safety."[5] Everyone who has taken such courses has had what the American Red Cross refers to as the three "**EMERGENCY ACTION STEPS**" drilled into them. A-App. pp. 7, 23 and 25.[6] Those three Emergency Action Steps

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[5]These materials were not part of the Trial Court record. However, this Court may take judicial notice of the facts recited in them pursuant to Wis. Stat. § 902.01(2)(b). *See Kenosha Hospital & Medical Center v. Garcia*, 2004 WI 105, ¶30, 274 Wis. 2d 338, 355, 683 N.W.2d 425 and *Lambrecht v. Kaczmarczyk*, 2001 WI 25, ¶11, 241 Wis. 2d 804, 812, 623 N.W.2d 751. Indeed, this Court may take judicial notice of such facts whether requested or not. Wis. Stat. § 902.01(3).

[6]The citation form "A-App." followed by a page number refers to the particular page or pages of the Appellant's Appendix.

are: (1) **CHECK - CHECK THE SCENE AND VICTIM;** (2) **CALL - CALL 9-1-1 OR YOUR LOCAL EMERGENCY NUMBER**; and (3) **CARE - CARE FOR THE VICTIM.** *Id.* Indeed, these materials also refer to Good Samaritan laws. *Id.* at pp. 8 and 26. In referring to such laws, these publications talk about the use of common sense not to go beyond the individual's level of training in emergency situations, *Id.* at p. 8, and the need to summon emergency medical personnel to the scene by calling 9-1-1 or the local emergency number and continue to provide care until more highly trained personnel arrive. *Id.* at p. 26. They also instruct lay persons on how to recognize that an emergency exists. *Id.* at pp. 6 and 25-26. This begs a very interesting question: How can the care or assistance rendered be characterized as emergency care if the provider doesn't recognize it, at some level, as an emergency?

The facts conclusively establish that the Switlicks themselves did not believe they were confronted with an "emergency" requiring "emergency care." There is absolutely no reference in either Stephani's or Merlin's testimony to a

belief on their part that they felt they were dealing with an "emergency" or that the assistance they provided constituted "emergency care." R.20 pp. 79-108. There was nothing "emergent" - "calling for prompt attention: **URGENT"** (Miriam-Webster On-Line Dictionary) - about their actions. Therefore, the assistance they rendered did not, as a matter of law, amount to "emergency care" when analyzed both subjectively and objectively as well as from a purely common sense perspective.

Standard of Review

The issue presented arose in the context of summary judgment proceedings. This Court reviews summary judgment proceedings independently and applies the same methodology as the Circuit Court. *Smaxwell v. Bayard*, 2004 WI 101, ¶12, 274 Wis. 2d 278, 682 N.W.2d 923. Summary judgment is not appropriate if there are any genuine issues as to any material facts. Wis. Stat. § 802.08(2) and *O'Neill v. Reemer*, 2003 WI 13, ¶8, 259 Wis. 2d 544, 657 N.W.2d 403. When the material facts are not in dispute, this Court is presented with a question of law which is subject to *de novo*

review. *Town of Delafield v. Winkelman*, 2004 WI 17, ¶16, 269 Wis. 2d 109, 117, 675 N.W.2d 470. If the party against whom the Motion for Summary Judgment is entitled to summary judgment, then summary judgment may be granted to that party. Wis. Stat. § 802.08(6). The Appellate Court in effect granted summary judgment in favor of Ms. Mueller when it declared that the § 895.48(1) immunity was not available to the Switlicks as a matter of law.

Within the context of the summary judgment methodology, this case involves statutory construction - the determination of whether a particular statute applies to the undisputed material facts. Statutory interpretation presents an issue of law which this Court reviews *de novo*. *Megal Development Corporation v. Shadof*, 2005 WI 151, ¶8, ___ Wis. 2d ___, ____ N.W.2d ___. Although the review is *de nevo*, this Court benefits from the analysis of the Circuit Court and the Court of Appeals. *Id.*

This Court recently clarified the rules governing statutory construction in *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶¶38-52, 271 Wis. 2d 633,

659-667, 681 N.W.2d 110. In *Kalal*, this Court made it clear that Wisconsin favors the "statutory meaning" over the "legislative intent" approach. *Id.* The bases for following the "statutory meaning" standard was concisely stated in *Sutherland* when describing the distinction between these interpretive alternatives:

> "'Generally when legislative intent is employed as the criterion for interpretation, the primary emphasis is on what the statute meant to members of the legislature which enacted it.' **On the other hand, inquiry into the 'meaning of the statute' generally manifests greater concern for what the members of the public to whom it is addressed, understand.**" [Emphasis added]

Id. at ¶40.

Thus, statutory interpretation begins with the language of the statute. *Id.* at ¶45. If the meaning of the statute is "plain" that "plain meaning" is what is given to the statute. *Id.* The plain meaning of the statute is arrived at by giving the statutory language its "common" "ordinary" "natural" "normal" and "accepted" dictionary meaning unless the words or phrases used are technical or specially defined in the statute. *Id.* at ¶¶41 and 45. Technical or specially defined words or phrases are given their technical or special definitional meaning. *Id.* at ¶45.

Intrinsic as contrasted with extrinsic aids are also important in determining the statutory meaning of unambiguous statutes. *Id.* at ¶¶42 and 46. Intrinsic aids take into account the contents and the structure of the statute. *Id.* In discussing what is meant by "intrinsic aids" and how to use them this Court stated:

> "Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely - related statutes; and reasonably, to avoid absurd or unreasonable results. [citations omitted]. Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage. [citation omitted]. 'If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning.' [citation omitted]. Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretations such as legislative history. [citations omitted]. 'In construing or interpreting a statute the Court is not at liberty to disregard the plain, clear words of the statute.' [citation omitted]."

Id. at ¶46.

Consistent with the underpinnings of the statutory meaning approach - focusing on how members of the public - the people to whom the statute is addressed - will understand it, the test for ambiguity is whether the statute is capable of being understood by reasonably well informed persons in two or more senses. *Id.* at ¶47. "It is not enough that there is a

disagreement about the statutory meaning: the test for ambiguity examines the language of the statute to determine whether 'well-informed persons *should have* [italics in original] become confused' that is, whether the statutory .... language *reasonably* [italics in original] gives rise to different meanings." *Id.* "Statutory interpretation involves the ascertainment of meaning, not a search for ambiguity." *Id.*

Generally, it is not appropriate to consult "extrinsic aids" defined as "interpretative resources outside of the statutory text" which typically are items of legislative history unless the statute has been found to be ambiguous. *Id.* at ¶¶50 and 51. However legislative history **may** be consulted to confirm or verify a plain-meaning interpretation. *Id.* at ¶51. It **may not** be used to determine that a statute is unambiguous or ambiguous and it **may not** be used to vary or contradict the plain-meaning of a statute. *Id.*

Since many words have multiple dictionary definitions, it is appropriate to look to the statutes purpose or scope as revealed by its context and its relationship to surrounding or closely related statutes to select from among them. *Id.* at ¶49.

Further, since Wisconsin has long recognized the theory of liability espoused in the Restatement (Second) of Torts §323, *Hatleberg, supra*, the statutory grant of immunity for "Good Samaritan" liability like the grant of immunity for recreational activities initially embodied in Wis. Stat. § 29.68 (the so-called berry picking statute), is in derogation of common law. *See LePoidevin v. Wilson*, 111 Wis. 2d 116, 126-133, 330 N.W.2d 555 (1983). Therefore, the provisions of §895.48(1) must be strictly construed and limited to their terms. *LePoidevin, supra*; *Reyes v. Greatway Insurance Company,* 227 Wis. 2d 357, 370-72, 597 N.W.2d 687 (1999); and *State ex rel. Chain O'Lakes Protective Association v. Moses*, 53 Wis. 2d 579, 582-84, 193 N.W.2d 708 (1972).[7]

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[7]We note that the Trial Court characterized Section 895.48(1) as a "remedial" statute which must be liberally construed to advance the remedy the legislature intended to afford. R.36 p. 5. This characterization of Section 895.48(1) was clearly erroneous. A statute is characterized as "remedial" in this context only when the legislature adopts a comprehensive regulatory scheme whereby the legislation completely supplants rather than preserves previously existing common law or when the statute provides a remedy that did not exist at common law. *Wisconsin Bankers Association v. Mutual Savings & Loan Association of Wisconsin*, 96 Wis. 2d 438, 451-452, 291 N.W.2d 869 (1980) and *Department of Transportation v. Transportation Commission*, 111 Wis. 2d 80, 91-93, 330 N.W.2d 159 (1983). Indeed, the case cited by the Trial Court as authority for this proposition, *Hughes v. Chrysler Motors Corporation*, 197 Wis. 2d 973, 978, 542 N.W.2d 148 (1996) dealt with a law, the lemon law, that by its terms granted an additional remedy not recognized at common law and was, thus,

The Switlicks Did Not Render "Emergency Care""At The Scene Of Any Emergency In Good Faith" To Lina Until, At The Earliest, Six To Seven Hours After They Undertook To Assist Her When Stephani Called 911

Applying the applicable standard of review and the "statutory meaning" rule of construction, we must first look at the common, ordinary, natural, normal, accepted or dictionary definition of the phrase "emergency care." Further, we must select those meanings of this phrase which are consistent with the context in which it appears - the language which surrounds it - and in relation to the language of surrounding or closely related statutes. *Kalal* at ¶¶41, 42 and 46. In doing so we must select meanings reasonably so as to avoid attributing an absurd or unreasonable result to the interpretation. *Id.*

The phrase "emergency care" is only a part of the relevant language. The relevant language of §895.48(1) is: "any person who **renders emergency care at the scene of any emergency or accident in good faith** shall be immune from civil liability for his or her acts or omissions in

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remedial. Section 895.48(1), by its terms, purports to take a remedy recognized at common law away and is, therefore, in derogation of common law.

rendering such emergency care. [Emphasis added]"

Applying simple common sense and the plain, commonly understood meanings of each of the highlighted words in this phrase in the context of the quoted phrase as a whole leads to but one conclusion: "emergency care" as used in this context clearly means taking action in good faith very quickly with the intent to help the victim of the accident or emergency under circumstances which trigger a reasonable belief that the failure to do anything could result in death or serious harm to the victim. Indeed, one cannot "render emergency care", or for that matter, subject one self to liability by doing nothing. *See* Dawn B. Lieb, *Torts: Immunity - The Good Samaritan Statute,* Wis. Stat. § 859.48 (1977), 62 Marq. L.Rev. 469, 470, citing W. PROSSER HANDBOOK OF THE LAW OF TORTS, §56 at 340-41 (4th ed. 1971) and Gregory *Gratuitous Undertakings and the Duty of Care*, 1 De Paul L. Rev. 30 (1951). The common law did not recognize the moral obligation to aid another in peril as an affirmative legal duty. *Id.* *C.f.* Wis. Stat. §§940.34 and 346.67(1)(c).

The word "render" has multiple dictionary definitions. It is an action word - a verb. In this context, it means: "2. To give or make available; *render assistance*," [Emphasis in original], *The American Heritage Dictionary of the English Language* (1978) p. 1101 **or** "5: To direct the execution of: **ADMINISTER** [Emphasis in Original]", *Merriam-Webster On-line Dictionary*. Therefore, action not omission, rendering emergency care, is necessary to trigger application of the statute.

As the Appellate Court noted, "emergency" also has multiple definitions. *Mueller, supra* at ¶25. In the context of this statute, however, it is clear that when used to describe the type of care that will be immunized, it means: "'the resulting state that calls for immediate action' and 'a sudden bodily alteration such as is likely to require immediate medical attention.'" *Id.*

"Care" also has multiple meanings. Again, however, in the context of this statute, it is clearly intended to mean, "3a: painstaking or watchful attention", *Merriam-Webster On-Line Dictionary* **or** "5. Protection; supervision; *charge in*

the care of a nurse [Emphasis in original]." *The American Heritage Dictionary*, supra at p. 203.

Reading these three words, "renders emergency care" in the context of the statute leads to the plain meaning that the person claiming Good Samaritan immunity must take immediate action to attend to the victim pending transport to or the arrival of people who can provide professional and competent medical attention. To a reasonably well informed person, the whole concept of rendering "emergency care" in this context - "at the scene of any emergency or accident in good faith" involves, at a minimum the recognition that an emergency which necessitates immediate medical attention exists and action which demonstrates this recognition on behalf of the caregiver and which is consistent with that recognition. If that action is to be characterized as having been taken in "good faith" it must always involve an attempt to secure the services of competent medical professionals - call 911 - or transport the victim to a facility that is believed to offer such services - a hospital, emergent or urgent care center or trauma center. The care or assistance rendered by a

lay person cannot be characterized as "emergency care" under this statute unless that lay person has recognized that an "emergency" which necessitates the provision of immediate medical attention exists and has taken action consistent with that recognition.

As the Switlicks recognize, an emergency often involves a "whirlwind" of activity. Switlick brief at p. 32. That "whirlwind" of activity evinces the recognition of an "emergency." Today, and in October of 2003, the *sine qua non* of the recognition of the potential existence of an emergency which may necessitate the provision of emergency care is either a call to 911 or an attempt to transport the victim to an emergency care center. Conduct which consists of little more than monitoring or babysitting activity for an extended period of hours conclusively negates any claim by the caregiver of a recognition on his or her part of an "emergency." Therefore, any attempt on that caregiver's part to characterize such "care" as "emergency care" within the grant of §895.48(1) immunity is meritless.

Does §895.48(1) permit a construction which leads to the conclusion that a lay person can provide a form of assistance to the victim of an accident which does not amount to "emergency care"? The simple answer must be "yes" because any other answer would require this Court to redraft the statute to delete the word "emergency" whenever it is used to modify the word "care" and render the use of that word mere surplusage. The redrafted statute would, in relevant part read:

> "Any person who renders care at the scene of any emergency or accident in good faith shall be immune from civil liability for his or her acts or omissions in rendering such care."

Do related statutes support the plain meaning construction which Lina advances? Again, the answer is "yes." Lina submits that Wis. Stat. § 940.34 is a "closely-related" statute. It is entitled: **"Duty to aid victim or report crime."**

Section 940.34 was created by 1983 Wis. Act 198. At that time it read:

> "**940.34 Duty to Aid Endangered Crime Victim.** (1) whoever violates sub. (2) is guilty of a Class C misdemeanor.

> (2) Any person who knows that a crime is being committed and that a victim is exposed to bodily harm shall summon law enforcement officers or other assistance or shall provide assistance to the victim. A person need not comply with this subsection if any of the following apply:
>
> (a) Compliance would place him or her in danger.
>
> (b) Compliance would interfere with duties the person owes to others.
>
> (c) Assistance is being summoned or provided by others.
>
> (3) **If a person renders emergency care for a victim, s. 895.48 applies. Any person who provides other reasonable assistance under this section is immune from civil liability for his or her acts or omissions in providing the assistance. This immunity does not apply if the person receives or expects to receive compensation for providing the assistance.** [Emphasis added]."

After the "Good Samaritan" immunity set forth in §895.48 was amended to §895.48(1), a number of other statutes which previously referred to §895.48 immunity were also amended to specifically refer to §895.48(1). Section 940.34(3) was one of those statutes. 1983 Wis. Act 14 and specifically §6. Since §940.34 actually imposes a duty to aid crime victims and provides immunity for emergency care, it must be viewed as a "closely related" statute. This is particularly so since it directly refers to and incorporates §895.48(1) immunity. The import of this statute is, however, that it clearly and unambiguously recognizes a difference

between "emergency care" and "other reasonable assistance." Therefore, the Switlicks repeated claims and the Trial Court's apparent conclusion that all assistance or care provided by lay persons to the victims of accidents or emergencies including so-called "simple" acts constitute "emergency care" under §895.48(1) are clearly wrong. "Other reasonable assistance" which does not amount to "emergency care" is clearly not immune under §895.48(1).

The broadest and most inclusive interpretation that can be given to the phrase "emergency care" within the context of §895.48(1) and closely related statutes is the care or assistance that is provided to the victim of an accident or emergency for only the amount of time needed to transfer care to competent medical professionals. If the alleged "Good Samaritan" can not meet this test, then there is no need to look at the specific "acts or omissions" of the caregiver because the statute simply does not apply. In other words, no analysis of the "quality" of the care given is necessary because the alleged "Good Samaritan" cannot bring his or her conduct within the broadest and most expansive interpretation

that can be given to the phrase "renders emergency care at the scene of any emergency or accident in good faith."

In this case, there is no reason to proceed any further because Lina's care could have been transferred to competent medical professionals within one half hour of her return to the "shack." However, application of the "statutory meaning" rule of interpretation in conjunction with the precept that laws in derogation of common law must be strictly limited to their plain meaning lead to the inescapable conclusion that the phrase "emergency care" within the context of this statute can only be construed to apply to the type of care that is commonly and normally associated with "emergency care."

"Emergency Care" at the scene of any emergency or any accident is commonly and normally understood to mean action intended to stabilize the victim's condition or prevent it from getting worse pending transfer of care to competent medical professionals and usually consists of: calling 911; attempts to stop bleeding; attempts to clear the airway; CPR; rescue breathing; splint application; tourniquet application, etc. When Lina was brought back to the "shack" after the

accident, the Switlicks did not attempt to perform any of these or similar "emergency care" activities, the most important of which would have been to call 911. Indeed, the act of calling 911 is the *sine qua non* of the recognition of the fact that an emergency may exist. Therefore, all assistance or lack thereof provided by the Switlicks from approximately 11 p.m. to when Stephani made the call to 911 at 6:34 a.m. does not constitute "emergency care" within the context of this statute and the Switlicks are not immune for any of the acts or omissions which occurred during this time.

The Switlicks Interpretation Leads To Multiple Absurd Results Which Must Be Avoided

The suggestion that an "emergency" necessitating the rendering of "emergency care" by **lay persons** can drag on for six to seven hours during which those **lay persons** do little more than monitor or babysit an accident victim under circumstances where they could have readily called 911 at the time they first encountered the accident victim defies rational explanation. The common and ordinary meaning of an "emergency" brings to mind a situation that necessitates prompt and immediate action to prevent harm. When

engaged in by lay persons, monitoring or babysitting activities are the antithesis of emergency care. The "wait and see" approach taken by the Switlicks for six to seven hours under the circumstances of this case have no rational or ordinary relationship to the common or ordinary human life experience with conduct consistent with the existence of an emergency. Therefore, granting immunity under the facts of this case would lead to the absurd result of extending §895.48(1) immunity for hours and perhaps days of monitoring activity by lay persons whose conduct has absolutely no semblance to the type of conduct that every well informed person associates with the existence of an emergency.

Further, it would be absurd to conclude that this statute was intended to apply to a person whose conduct contributed to "cause" the accident that produced the injuries in the first instance. Stephani and Merlin Switlick allowed their underaged son, Apollo, to consume alcohol beverages for approximately eight hours before he caused the ATV accident that produced Lina's injuries. Their claim for good samaritan immunity is tantamount to that of a bartender who, after

knowingly serving an underaged patron alcohol beverages, comes upon the scene of an accident caused by that underaged patron and provides care to the injured victims of that underaged patron's tortious conduct which includes monitoring their condition for several hours before calling for qualified emergency medical care. It is patently obvious that none of the language chosen by the legislature in fashioning this immunity applies to anyone whose negligent conduct contributed to cause the accident that gives rise to the need for "emergency care." Any construction of §895.48(1) that could immunize tortfeasors whose conduct contributed to cause the accident which gives rise to the injuries for which the tortfeasor provides care would be absurd and must be avoided. *Kalal, supra* and *Reyes, supra.*

The Assistance Rendered By The Switlicks At Their Shack Over The Course Of Six To Seven Hours Was Not Provided At The Scene Of The Emergency

Mueller agrees that the plain meaning of §895.48(1) requires the conclusion that the language chosen by the legislature to depict the place where the care is given - "scene of any emergency or accident" clearly means more than the

place where the accident occurred. Otherwise, the use of the word "emergency" in this phrase would be mere surplusage. Therefore, the scene of an emergency can follow the victim. However, in the context of the statute as a whole, as Judge Hoover recognized, *Mueller, supra*, at ¶46 (last two lines) there are temporal limits on how the scene of an emergency can follow the victim. In context, and consistent with the plain meaning of the phrase "renders emergency care," when care or assistance is provided away from the physical site of an accident, the scene of the emergency follows the victim for only that period of time needed to transfer care to medical professionals. This construction recognizes the fact that accidents and emergencies often occur, like the proverbial tree falling in the forest, when no one is around to hear or observe them. If the victim is able to secure transportation or transport him or herself to a location where lay persons undertake the rendering of assistance, that location constitutes a scene of an emergency but only for the length of time needed to transfer care to competent medical professionals.

In this case, when Apollo brought Lina back to the Switlicks' shack, the Switlicks' shack was a "scene of an emergency," but only for the next half hour. Consistent with the plain meaning of this statute, it did not and could not continue to be the scene of an emergency for any period of time greater than the first half hour that Stephani and Merlin assisted Lina. We hasten to add that during that first half hour of assistance, the Switlicks did not render emergency care.

Either the Switlicks Did Not Act In Good Faith As A Matter of Law Or There are Genuine Issues Of Material Fact As To Whether They Acted In Good Faith

Although the phrase "good faith" is ubiquitous in the law, a good definition is hard to find outside of Black's Law Dictionary. *Blacks,* (5th 1979) at pp. 623-624 states:

> "Good faith is an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or deceit and unconscionable advantage, and an individual's personal good faith is concept of his own mind and inner spirit and, therefore, may not conclusively be determined by his protestations alone. [citation omitted] Honesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry. An honest intention to abstain from taking an unconscientious advantage of another, even through technicalities of law, together with absence of all information, notice, or benefit or belief of facts which render transaction unconscientious. **In common usage, this term is ordinarily used to describe that**

> **state of mind denoting honesty of purpose, freedom from intention to defraud and, generally speaking, means being faithful to one's duty or obligation.** [Emphasis added]."

The Appellate Court found a similar relevant definition of good faith: "Absence of fraud, deceit, collusion or gross negligence." *Mueller* at ¶26.

In the context of §895.48(1) good faith, to reasonably well informed people, must, at a minimum, mean the rendering of care consistent with the recognition of the existence of an emergency. As repeatedly described above, such conduct is clearly lacking in this case. Therefore, using this definition of the absolute minimum standard that must be met in order to characterize the care as having been rendered in "good faith" the Switlicks conduct falls woefully short as a matter of law.

Further, in the very least, there exists a genuine issue of material fact on whether the Switlicks rendered care in "good faith." Stephani testified that when they first started providing assistance to Lina, they considered taking her to the hospital. R.20 pp. 87-88 - S.S. depo pp. 36-37. They decided against this course of action and did not make an effort to

secure competent medical professional care for another six to seven hours. Under the circumstances, the Switlicks choice to monitor or babysit Lina rather than calling 911 to involve the authorities gives rise to the rather obvious and strong inference that this decision was motivated by a desire to avoid discovery of a basis for prosecution for supplying alcohol beverages to underaged persons in violation of Wis. Stat. § 125.07(1)(a) **and** prosecution of their son Apollo for: (1) operating an ATV while under the influence of intoxicants in violation of Wis. Stat. § 23.33(4c)(a); and/or (2) operating an ATV in violation of the absolute sobriety law, Wis. Stat. § 23.33(4c)(a); and/or (3) causing injury by the intoxicated use of an ATV in violation of Wis. Stat. § 23.33(4c)(b).

Therefore, if this Court accepts any of the Switlicks "emergency care" and "scene of an emergency" arguments, then, genuine issues of material fact as to whether the assistance provided by them was rendered in "good faith" exists and Lina is entitled to a trial on that issue. *See also Lieb, supra* at pp. 473-476, stating that in many cases, the

question of whether the alleged good samaritan acted in "good faith" will present a factual issue for trial.

The Switlicks Raise A Strawman Argument By Contending That Mueller's Complaint Alleges Negligence For Failure To Render Emergency Care At The Scene Of An Emergency

After the quoting the relevant paragraphs from Mueller's Amended Complaint, Switlick brief at pp. 3 and 25-26, the Switlicks assert that, "Mueller essentially alleges the existence of an emergency situation to which the Switlicks either negligently acted or failed to act." A close reading of paragraphs 11-15 of Mueller's Amended Complaint reveals that she never once used the word "emergency." The sum and substance of those allegations are that a reasonable person, exercising reasonable care after undertaking to provide assistance would have resolved all doubt in favor of securing professional medical care to prevent further harm and therefore would have called 911. Although, as previously argued, calling 911 is, **at a minimum**, the *sine qua non* of a recognition of the potential existence of an emergency situation necessitating emergency care, the claim that someone was negligent for not calling 911 does not mean they

were negligent for failing to provide emergency care. It does mean that they were negligent for failing to recognize Lina likely needed professional medical attention to determine the severity and extent of her injuries and that they did not have the training, education and experience needed to do so.

Merlin Switlick Did Not Provide Emergency Care At The Scene Of An Emergency

At pages 52-54 of their brief, the Switlicks claim that for purposes of §895.48(1) immunity, Merlin's conduct must be assessed on its own accord separate and distinct from Stephani's and that when his conduct is so analyzed, he is entitled to §895.48(1) immunity. Merlin's conduct conclusively establishes that he did not recognize the existence of a potential emergency much less render emergency care. At most, he provided assistance to Lina which fell far below that required to amount to "emergency care."

Further, in testifying, Stephani referred to her and her husband repeatedly by stating "We." Specifically, Stephani stated that at the outset, she and Merlin didn't "know for sure" if they should take Lina to the hospital. R.20 pp.87-88 -

S.S. depo. pp. 36-37. Since Merlin did not call 911 at this time, he did not recognize the potential that an emergency existed and therefore any assistance he rendered fell far short of emergency care.

In any event, Merlin and Stephani clearly acted in concert. Although it is premature, Lina respectfully submits that Stephani and Merlin will be jointly and severally liable under Wis. Stat. § 895.045(2).

CONCLUSION

The lynch pin for the application of §895.48(1) immunity is, at a minimum, recognition of the existence of an emergency which necessitates the provision of emergency care at the scene of the emergency. The common and accepted understanding of an emergency in the context of this statute is a situation which necessitates prompt and immediate action - it is temporal. The closely related statute, §940.34(3) clearly delineates emergency care from "other reasonable assistance." Therefore, at an absolute minimum, emergency care at the scene of an emergency requires the recognition of the existence of an emergency and the provision of care for only that period of time needed to transfer care to competent medical professionals. As a result, under the plain meaning of this statute, the Switlicks did not render emergency care at the scene of an emergency.

Likewise, because they did not call 911 shortly after they undertook to provide assistance to Lina, the care that they provided cannot be characterized as having been rendered in good faith. At a minimum, a genuine issue of

material fact exists as to whether the care or assistance provided by the Switlicks was rendered in good faith.

Therefore, Lina Mueller respectfully requests affirmance of the Appellate Court's decision in all respects. Alternatively, she asks that the case be remanded to the Trial Court for a trial on all genuine issues of material fact including whether the Switlicks acted in good faith.

Respectfully submitted this 9th day of December, 2005.

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SKRENES & GOLLA

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CERTIFICATION

I certify that this response meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is:

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Dated: December 9, 2005

Signed,

Russell T. Golla
Attorney

CERTIFICATION OF MAILING OR DELIVERY

Pursuant to Wis. Stat. § 809.80(3) and (4), I certify that this brief was delivered to United Parcel Service on the 9th day of December, 2005 for next day delivery to Ms. Cornelia G. Clark, Clerk of the Supreme Court, 110 East Main Street, #215, Madison, Wisconsin 53703, and all counsel of record.

Dated: December 9, 2005.

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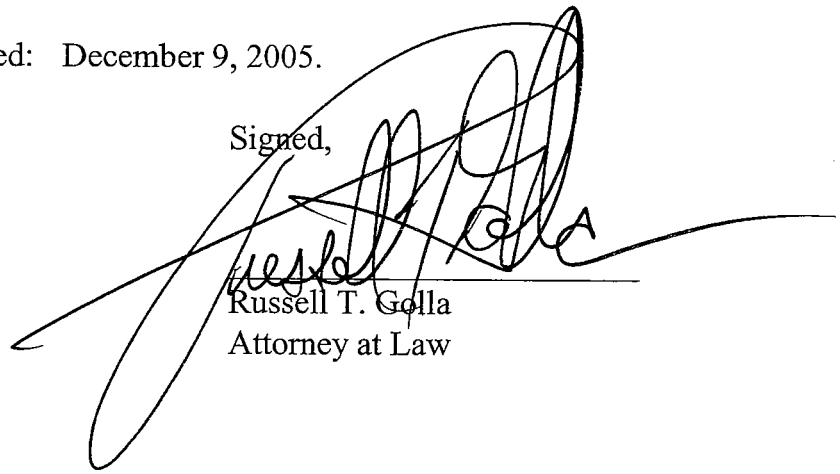

Russell T. Golla
Attorney at Law

APPENDIX OF PLAINTIFF-APPELLANT
LINA M. MUELLER

APPENDIX OF PLAINTIFF-APPELLANT
LINA M. MUELLER

TABLE OF CONTENTS

Document	Record	Appendix
1. "First Aid Fast", American Red Cross		1-8
2. "Community First Aid and Safety", American Red Cross		9-26
3. EMT Ambulance Report		27-29

American Red Cross

Together, we can save a life

FIRST AID *Fast*

This booklet is not a substitute for materials used in American Red Cross courses in which First Aid or CPR certification is given.

QUICK-REFERENCE

Abdominal pain or discomfort 76
Abrasions 70-77
Allergic reactions 57
Back or neck pain 50-53
Bee sting 58
Bites 58-59
Bleeding 72-73
Breathing trouble 11-15
Broken bone 44-49
Bruise 74
Burns 16-20
Cardiac arrest 24-29
Chemical burns 20
Chest pain or pressure 23
Choking 30-39
Cramps, Heat 42
Cuts 70-77
Diabetic emergency 69
Dislocation 44-49
Dizziness, Feeling faint 66-69
Drowning 14
Electrical burns, Electrocution 19
Fainting 69
Fracture 44-49
Frostbite 41
Head, neck, or back injury 50-53

QUICK-REFERENCE

Heart attack 21-29
Heat cramps, illness, or stroke 42-43
Heat burns 16-19
Hypothermia 40
Imbedded objects 74
Infection 77
Insect bite 58
Jellyfish sting 59
Loss of sensation 50-53
Poisoning 54-61
Scrapes 70-77
Seizures 68
Severed body parts 74
Smoke inhalation 20
Snake bite 59
Spider bite 58
Sprains 44-49
Sting, Stingray, Jellyfish, Scorpion, Bee, Wasp 58-59
Strains 44-49
Stroke 68
Sudden illness 66-69
Sunburn 19
Teeth, Knocked out 76
Tick bite 61

MISSION OF THE AMERICAN RED CROSS

The American Red Cross, a humanitarian organization led by volunteers and guided by its Congressional Charter and the Fundamental Principles of the International Red Cross Movement, will provide relief to victims of disasters and help people prevent, prepare for, and respond to emergencies.

PRINCIPLES OF THE INTERNATIONAL RED CROSS

Humanity
Impartiality
Neutrality
Independence
Voluntary Service
Unity
Universality

www.redcross.org

American Red Cross

AMERICAN RED CROSS

FIRST AID FAST

First Aid Fast is intended to give you the basic information you need to effectively respond to an emergency. *This book is not a substitute for training!* An American Red Cross course gives you an opportunity to learn and practice life-saving skills and allows you to have all of your questions answered by a knowledgeable instructor. *First Aid Fast* should be your first step — not your only step — toward becoming a valuable first aider.

This booklet is not intended to replace current manuals being used in American Red Cross courses resulting in First Aid or CPR certification. Only courses conducted by American Red Cross certified instructors in accordance with American Red Cross policies and procedures are considered formal American Red Cross training.

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This book, by itself, does not constitute complete and comprehensive training.

The emergency care procedures outlined in this book reflect the standard of knowledge and accepted emergency practices in the United States at the time this book was published. It is the reader's responsibility to stay informed of changes in the emergency care procedures.

The Care Steps for CPR outlined within this product are consistent with the Guidelines 2000 for Cardiopulmonary Resuscitation and Emergency Cardiovascular Care.

Printed in the United States of America.

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03 04 05 06 / 9 8 7 6 5 4 3 2

HOW TO USE THIS BOOK

First Aid Fast can be used two ways. First, it can be read to help familiarize yourself with the emergencies that can happen wherever you may be — home, workplace, school, or vacation. By looking at the book before an emergency, you can be better prepared to react. Second, it provides a quick source of information in emergencies. Each section guides your actions, step-by-step.

ORGANIZATION

A Quick Reference — that provides an alphabetical listing of signals and conditions — can be found at the front of this book. The Quick Reference is designed to get you to the care you need quickly. For example, if someone at your dinner table begins choking, search for "Choking." If someone is experiencing pain or pressure in the chest, look up "Chest pain."

HOW TO USE THIS BOOK

DESIGN

Information and step-by-step actions for problems requiring first aid are presented both as text and pictures. Signals are listed first. A list of care steps follows. Pictures have been included where they are most helpful.

USAGE

***First Aid Fast* needs to be everywhere an accident or emergency could happen. Keep one in:**

- Home pool areas
- First aid kits (home and workplace)
- Automobile glove compartments
- Backpacks
- Briefcases

***First Aid Fast* is a thoughtful gift for:**

- Parents
- Babysitters or caregivers
- Teachers
- Scout leaders
- Coaches
- Neighbors

This booklet is not a substitute for materials used in American Red Cross courses in which First Aid or CPR certification is given.

AMERICAN RED CROSS

HEALTH AND SAFETY PROGRAMS

The American Red Cross offers a variety of community programs, some of which are available in Spanish, that teach life-saving skills and safety information. Contact your local American Red Cross for information on these and other programs.

American Red Cross Adult CPR
American Red Cross Community CPR
American Red Cross Community First Aid and Safety
American Red Cross Sport Safety Training
American Red Cross First Aid for Children Today (FACT)
American Red Cross Infant & Child CPR
American Red Cross Workplace Training: Standard First Aid
American Red Cross Adult CPR/AED
American Red Cross Basic Aid Training (for children)
American Red Cross Babysitter's Training
American Red Cross Community Water Safety
American Red Cross Learn to Swim Programs
American Red Cross GuardStart: Lifeguarding Tomorrow
American Red Cross Longfellow's Whale Tales (for children)
American Red Cross HIV/AIDS Programs

You can make a difference by presenting life-saving information in your community. Contact your local American Red Cross for more information about instructor training.

RESPONDING TO EMERGENCIES

Despite best efforts, emergencies can occur any place or time. In fact, at some time in your life, it is likely that you will witness a situation in which someone you know will require first aid...THAT SOMEONE MIGHT BE YOU!

Your community's emergency medical services (EMS) system depends on people like you to recognize and respond to emergencies for it to work effectively. This requires that you be able to:

- Recognize that an emergency exists
- Decide to act
- Call 9-1-1 or the local emergency number
- Provide care until help arrives

This booklet is not a substitute for materials used in American Red Cross courses in which First Aid or CPR certification is given.

HOW WILL I KNOW —

IF SOMEONE NEEDS MY HELP

Your senses — **hearing, sight, and smell** — may help you recognize an emergency. Emergencies are often signaled by something unusual that catches your attention.

UNUSUAL NOISES

- Screams, yells, moans, or calls for help
- Breaking glass, crashing metal, or screeching tires
- Changes in machinery or equipment noises
- Sudden, loud voices

UNUSUAL SIGHTS

- A stalled vehicle
- An overturned pot
- A spilled medicine container
- Broken glass
- Downed electrical wires
- Smoke or fire

UNUSUAL ODORS

- Strong or unrecognizable odors

UNUSUAL APPEARANCES OR BEHAVIOR

- Trouble breathing
- Clutching the chest or throat
- Slurred or confused speech
- Unexplainable confusion or drowsiness
- Sweating for no apparent reason
- Unusual skin color

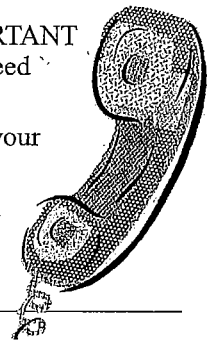
EMERGENCY ACTION STEPS

In the excitement of an emergency, you may be frightened or confused about what to do. STAY CALM — you can help. An emergency scene might look complicated at first but the three EMERGENCY ACTION STEPS will help you organize your response to the situation.

1	**CHECK**	*Check the scene and the victim.*
2	**CALL**	*Call 9-1-1 or your local emergency number.*
3	**CARE**	*Care for the victim.*

This booklet is not a substitute for materials used in American Red Cross courses in which First Aid or CPR certification is given.

HOW AND WHEN TO CALL 9-1-1



Calling for help is often the MOST IMPORTANT action you can take to help the person in need of aid.

If the person is unconscious, call 9-1-1 or your local emergency number immediately.

Sometimes a conscious person will tell you not to call 9-1-1, and you may not be sure what to do.

Call anyway if the person:

- Is or becomes unconscious
- Has trouble breathing or is breathing in a strange way
- Has chest pain or pressure
- Is bleeding severely
- Has pressure or pain in the abdomen that does not go away
- Is vomiting or passing blood
- Has seizures, a severe headache, or slurred speech
- Appears to have been poisoned
- Has injuries to the head, neck, or back
- Has possible broken bones

Also call for any of these situations:

- Fire or explosion
- Downed electrical wires
- Swiftly moving or rapidly rising water
- Presence of poisonous gas
- Vehicle collisions
- Persons who cannot be moved easily

HOW AND WHEN TO CALL 9-1-1

WHEN YOU ARE ALONE

Call First, that is, call 9-1-1 or the local emergency number before providing care for:

- An unconscious adult or child 8 years old or older
- An unconscious infant or child known to be at high risk for heart problems

Call First situations are likely to be cardiac emergencies, such as sudden cardiac arrest, where *time is critical.*

Call Fast, that is, provide 1 minute of care, then call 9-1-1 or the local emergency number for:

- An unconscious victim less than 8 years old
- Any victim of submersion or near drowning
- Any victim of cardiac arrest associated with trauma
- Any victim of drug overdose

Call Fast situations are likely to be related to breathing emergencies, rather than sudden cardiac arrest. In these situations, provide support for airway, breathing, and circulation through rescue breaths or chest compressions as appropriate.

This booklet is not a substitute for materials used in American Red Cross courses in which First Aid or CPR certification is given.

WHAT YOU SHOULD KNOW ABOUT —

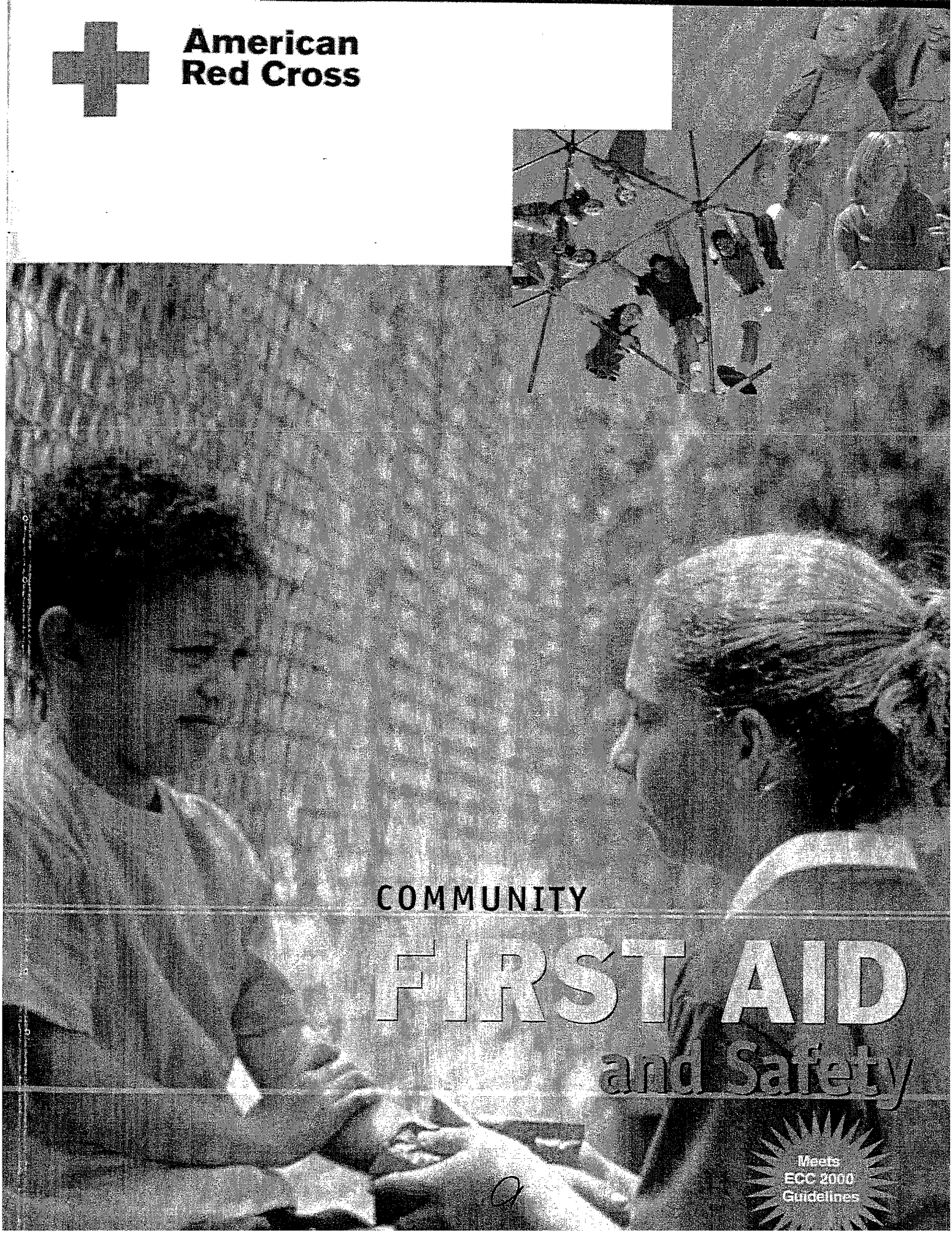
GOOD SAMARITAN LAWS

Good Samaritan laws were developed to encourage people to help others in emergency situations. These laws give legal protection to people who provide emergency care to ill or injured persons. They require that the "Good Samaritan" use common sense and a reasonable level of skill, not to go beyond the individual's level of training in emergency situations. They assume each person would do his or her best to save a life or prevent further injury.

If you are interested in finding out about your state's Good Samaritan laws, contact a legal professional or your state attorney general's office, or check with your local library.

Remember to get consent (the victim accepts your offer to help) before caring for a conscious victim. For an unconscious victim, consent is implied.

American Red Cross



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Meets ECC 2000 Guidelines

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COMMUNITY FIRST AID & SAFETY

Important certification information

American Red Cross certificates may be issued upon successful completion of a training program that uses this textbook as an integral part of the course. By itself, the text material does not constitute comprehensive Red Cross training. In order to issue American Red Cross certificates, your instructor must be authorized by the American Red Cross and must follow prescribed policies and procedures. Make certain that you have attended a course authorized by the Red Cross. Ask your instructor about receiving American Red Cross certification, or contact your local chapter for more information.

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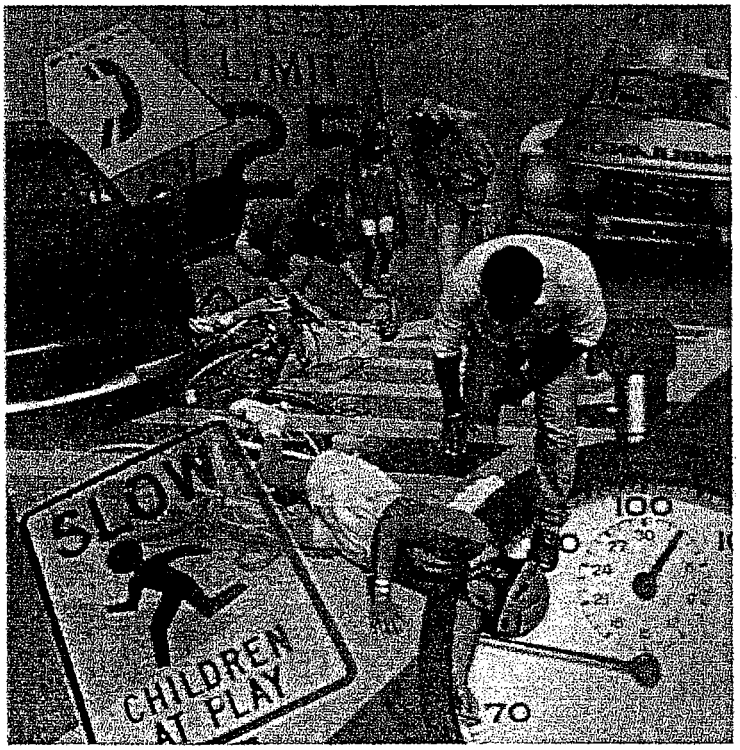
COMMUNITY FIRST AID & SAFETY



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This participant's textbook is an integral part of American Red Cross training. By itself, it does not constitute complete and comprehensive training.

The emergency care procedures outlined in this book reflect the standard of knowledge and accepted emergency practices in the United States at the time this book was published. It is the reader's responsibility to stay informed of changes in the emergency care procedures.

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ABOUT THIS COURSE

People need to know what to do in an emergency before medical help arrives. Since you may be faced with an emergency in your lifetime, it is important that you know how to recognize an emergency and how to respond. The intent of this course is to help lay responders feel more confident in their ability to act appropriately in the event of an emergency.

After you complete this course, you will be able to—

- Identify ways to prevent injury or illness.
- Recognize when an emergency has occurred.
- Follow three emergency action steps in any emergency.
- Provide basic care for injury or sudden illness until the victim can receive emergency medical help.

To help you achieve this goal, you will read information in this manual, view a series of video segments and participate in a number of learning activities designed to increase your knowledge and skills.

In addition, this course emphasizes the value of a safe and healthy lifestyle. It attempts to alert you to behavior and situations that contribute to your risk of injury or illness and to motivate you to take precautions and make any necessary lifestyle changes.

This manual contains material you learn in class in a form you can keep and refer to whenever you wish. Information is highlighted and condensed in lists to make it easy for you to identify the critical points and to refresh your memory quickly. Photos, drawings, graphs and tables also present information in an easy-to-find form. Skill sheets give step-by-step directions for performing the skills taught in the course. Questionnaires provide a way for you to evaluate certain risks in your lifestyle. Informational sidebars enhance the material you have learned.

You may be taking this course because you feel a need to learn what to do if faced with an emergency. You also may be taking this course because of a job (whether as an employee or volunteer) requirement specifying that you complete training and achieve a specific level of competency on both skill and written evaluations. In either case, the American Red Cross provides a course completion certificate. You will be eligible to receive a certificate if you—

- Perform required skills competently and demonstrate the ability to make appropriate decisions for care.
- Pass a final written exam(s) with a score of 80 percent or higher for each section.

If you do not have a requirement to achieve a specific level of competency on both skill and written evaluations, you will not need a course completion certificate.

CONTENTS

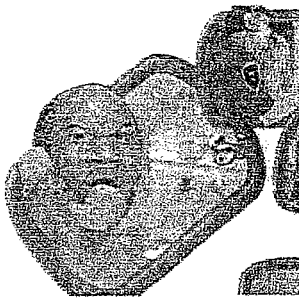
1 **IF NOT YOU...WHO?**

4 Recognizing Emergencies

5 Deciding to Act

10 Be Prepared

11 Preparing for Emergencies



3 Chain of Survival

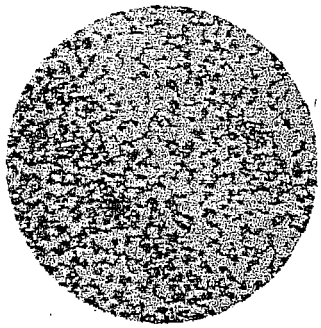
12 **TAKING ACTION: Emergency Action Steps**

14 Check

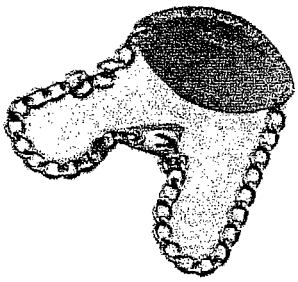
15 Call

23 Care

26 First Aid Challenge



6 First Aid and Disease Transmission

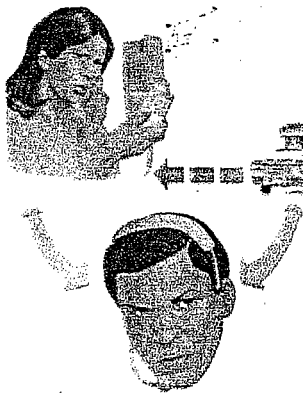


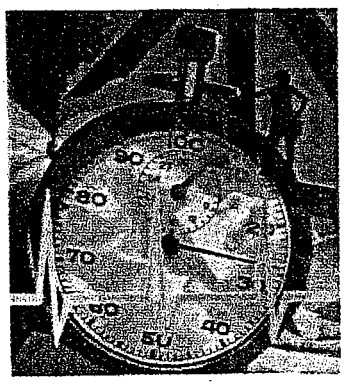
28 **CHECKING THE VICTIM**

30 Checking an Unconscious Adult/Child

31 Checking a Conscious Victim

37 Healthy Lifestyle IQ Quiz





38 **WHEN SECONDS COUNT: Adult Life-threatening Emergencies**

42 Breathing Emergencies

43 If a Person Has Trouble Breathing

45 If a Conscious Person Is Choking

48 If a Person Is Not Breathing

21 What Happens When You Call EMS

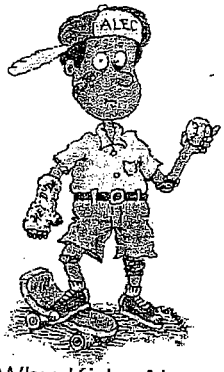
56 THE HEART OF THE MATTER

58 Signals of Heart Problems
61 In Case of a Heart Attack
61 When the Heart Stops Beating
64 Cardiac Chain of Survival
66 Cardiopulmonary Resuscitation (CPR)
70 Two-rescuer CPR
71 Automated External Defibrillation
71 Preventing Coronary Heart Disease
74 If Air Does Not Go In

78 Preventing Heart Disease

82 WHEN SECONDS COUNT: Children and Life-Threatening Emergencies

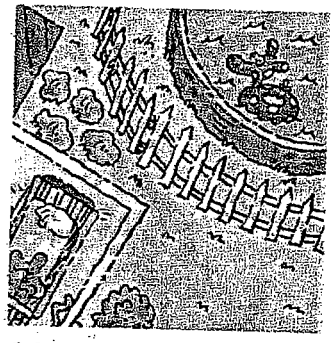
86 Breathing Emergencies
89 Recognizing Breathing Emergencies



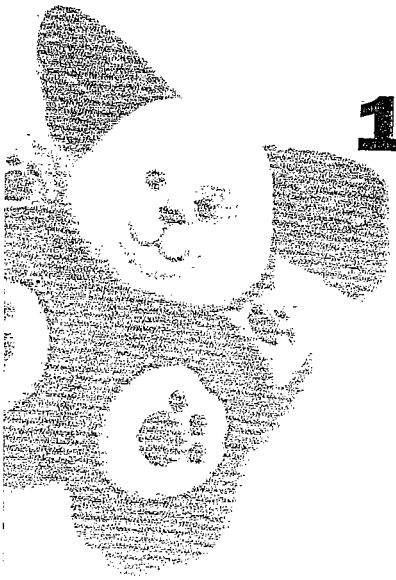
85 Why Kids Always Get Hurt

92 CARING FOR CHILDREN WITH BREATHING EMERGENCIES

94 If a Child or Infant Has Trouble Breathing
95 If a Conscious Child Is Choking
99 If a Child Is Not Breathing
104 If a Child Does Not Show Signs of Circulation
105 Two-rescuer CPR
108 If Air Does Not Go In



90 Make Your Home Safe for Kids



112 CARING FOR INFANTS WITH BREATHING EMERGENCIES

114 If a Conscious Infant Is Choking
117 If an Infant Is Not Breathing
120 If an Infant Does Not Show Signs of Circulation
125 If Air Does Not Go In

124 SIDS

128 INJURIES

130 Causes of Injury

131 Reducing Your Risk of Injury

138 CUTS, SCRAPES & BRUISES

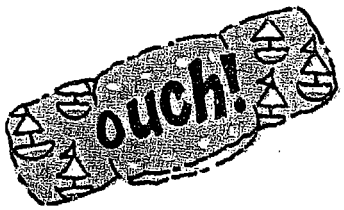
144 Dressings and Bandages

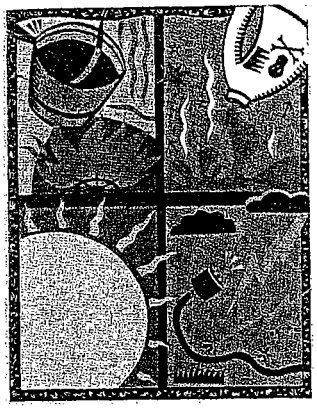
147 Caring for Soft Tissue Injuries

152 Shock

155 Special Situations

153 Shock: The Domino Effect





160 BURNS

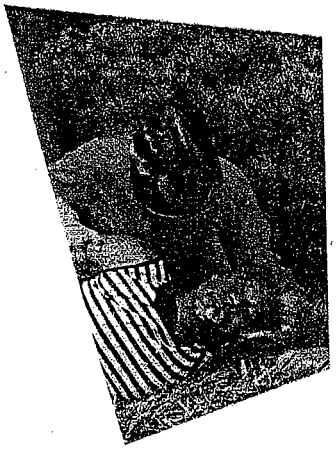
163 Care for Burns

163 Special Kinds of Burns

166 Within Striking Distance

170 INJURY TO MUSCLES, BONES AND JOINTS

190 Special Situations

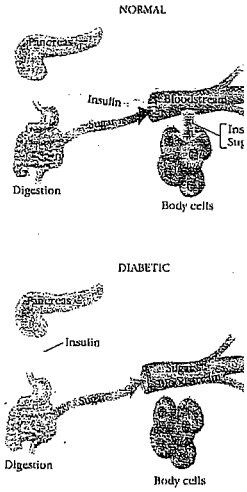


196 SUDDEN ILLNESS

198 Recognizing Sudden Illness

199 General Care for Sudden Illness

200 Special Conditions

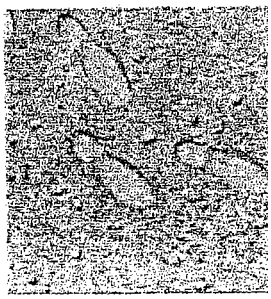


206 POISONING

212 Bites and Stings

220 Preventing Poisoning

202 Diabetes: A Sil Killer

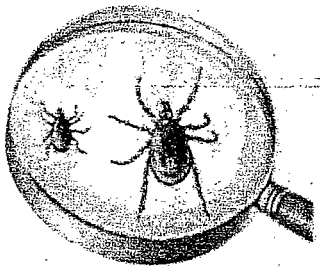


208 Watch Your Ste

222 **BATTLING THE ELEMENTS**

224 **Heat-related Illness**

227 **Cold-related Illness**



213 Lyme Disease

232 **THE YOUNG AND THE ELDERLY**

235 **Kids Have Special Problems**

238 **Older Adults**

230 The High-Tech War Against Cold

SKILL SHEETS

32 Checking the Unconscious Adult/Child

34 Checking an Unconscious Infant

47 Conscious Choking—Adult

50 Rescue Breathing—Adult

68 CPR—Adult

76 Unconscious Choking—Adult

98 Conscious Choking—Child

102 Rescue Breathing—Child

106 CPR—Child

110 Unconscious Choking—Child

116 Conscious Choking—Infant

118 Rescue Breathing—Infant

122 CPR—Infant

126 Unconscious Choking—Infant

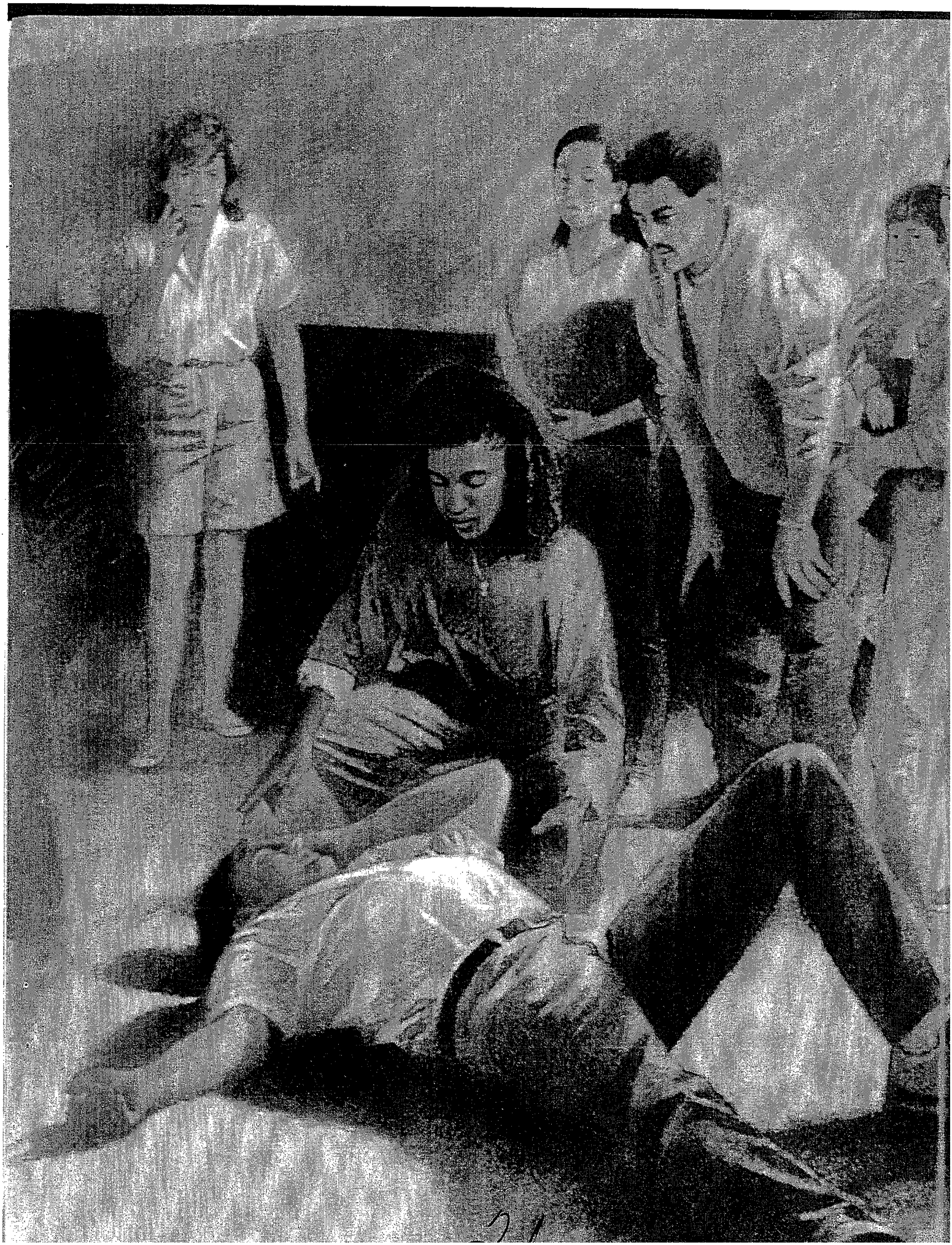
150 Controlling Bleeding

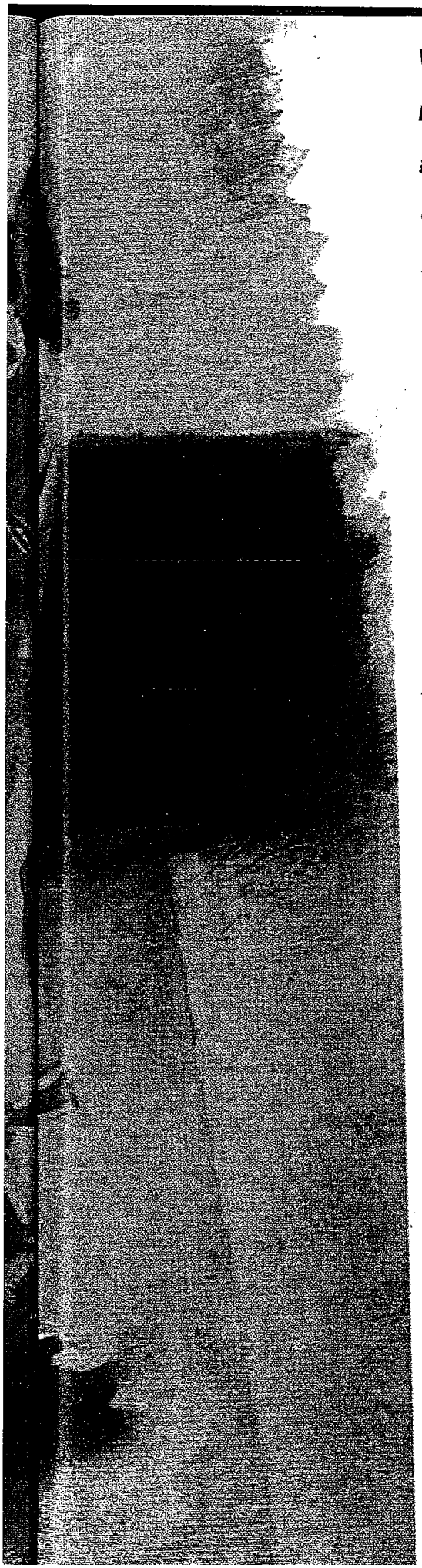
182 Apply a Soft Splint

184 Apply an Anatomic Splint

186 Apply a Sling

188 Apply a Rigid Splint





Why did you say you'd get to the party by seven o'clock? It's a good thing you stopped at the convenience store now and not later. Only a couple of things to buy. Why are all those people standing around over there? Oh no! It's the person who works here... You leave the car and see the young man lying on his back, looking dazed and holding his head. Even though a crowd has gathered, no one is helping him. They are just looking at each other. He needs help from someone. That someone could be you.

If not YOU... Who?

GET INVOLVED

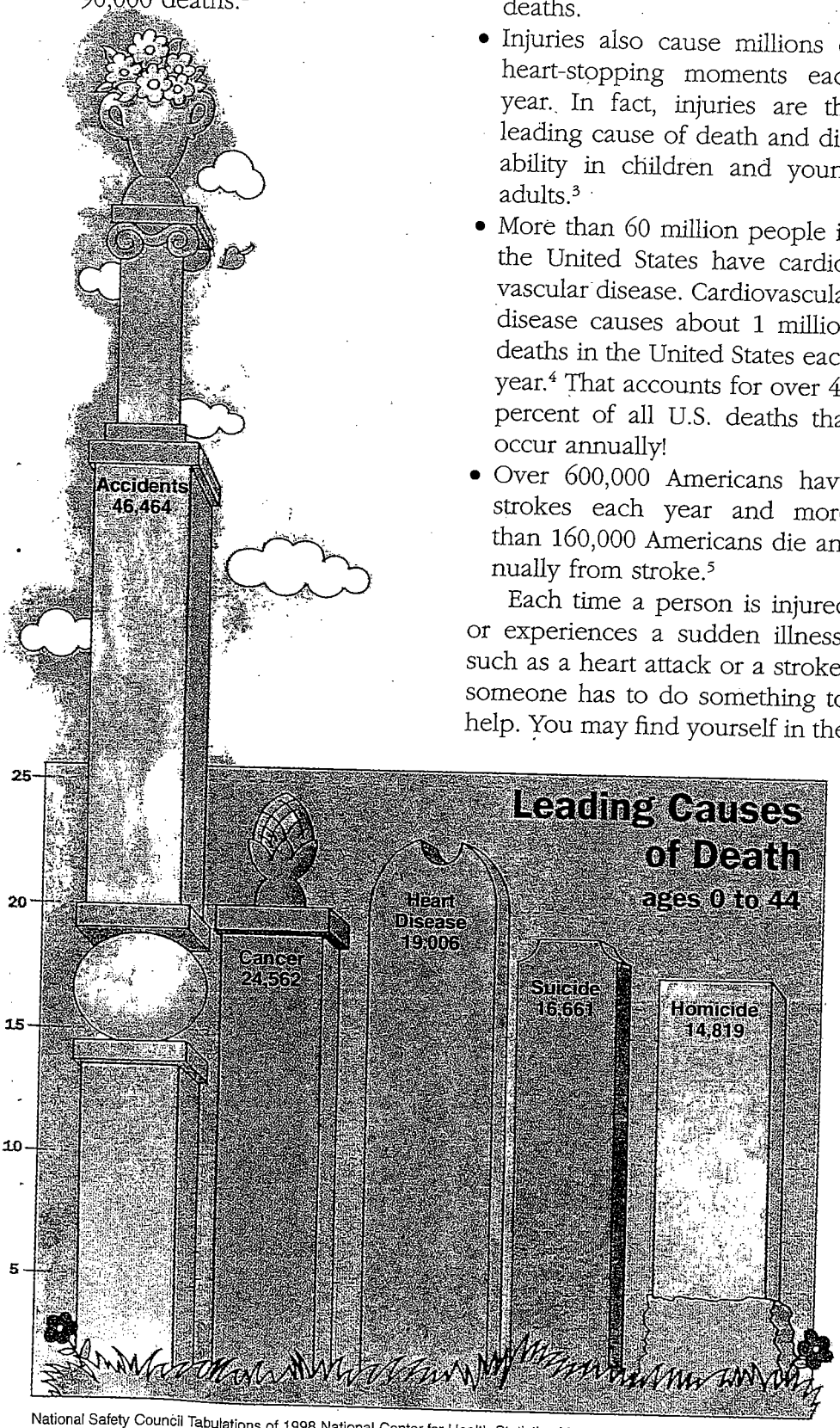
If placed in the above situation, would you step forward to help? "I hope I never have to," is what you are probably saying to yourself. However, given the number of injuries and sudden illnesses that occur in the United States each year, you might well have to deal with an emergency situation someday.

Consider the following:

- Over 37 million injury-related visits[1] were made to U.S. hospital emergency departments in 1998; injuries resulted in almost 90,000 deaths.[2]
- Previously, infectious diseases caused the greatest risk to the health and well-being of children, but now, unintentional injuries cause most childhood deaths.
- Injuries also cause millions of heart-stopping moments each year. In fact, injuries are the leading cause of death and disability in children and young adults.[3]
- More than 60 million people in the United States have cardiovascular disease. Cardiovascular disease causes about 1 million deaths in the United States each year.[4] That accounts for over 40 percent of all U.S. deaths that occur annually!
- Over 600,000 Americans have strokes each year and more than 160,000 Americans die annually from stroke.[5]

Each time a person is injured or experiences a sudden illness, such as a heart attack or a stroke, someone has to do something to help. You may find yourself in the position of having to provide help someday.

Everyone should know what to do in an emergency. You should know who to call and what care to provide. Providing care involves giving first aid until emergency medical help arrives. Everyone should know first aid, but even if you have not had any first aid training you can still help in an emergency.



National Safety Council Tabulations of 1998 National Center for Health Statistics Mortality Data.

Everyone Should Know What to Do in an Emergency...

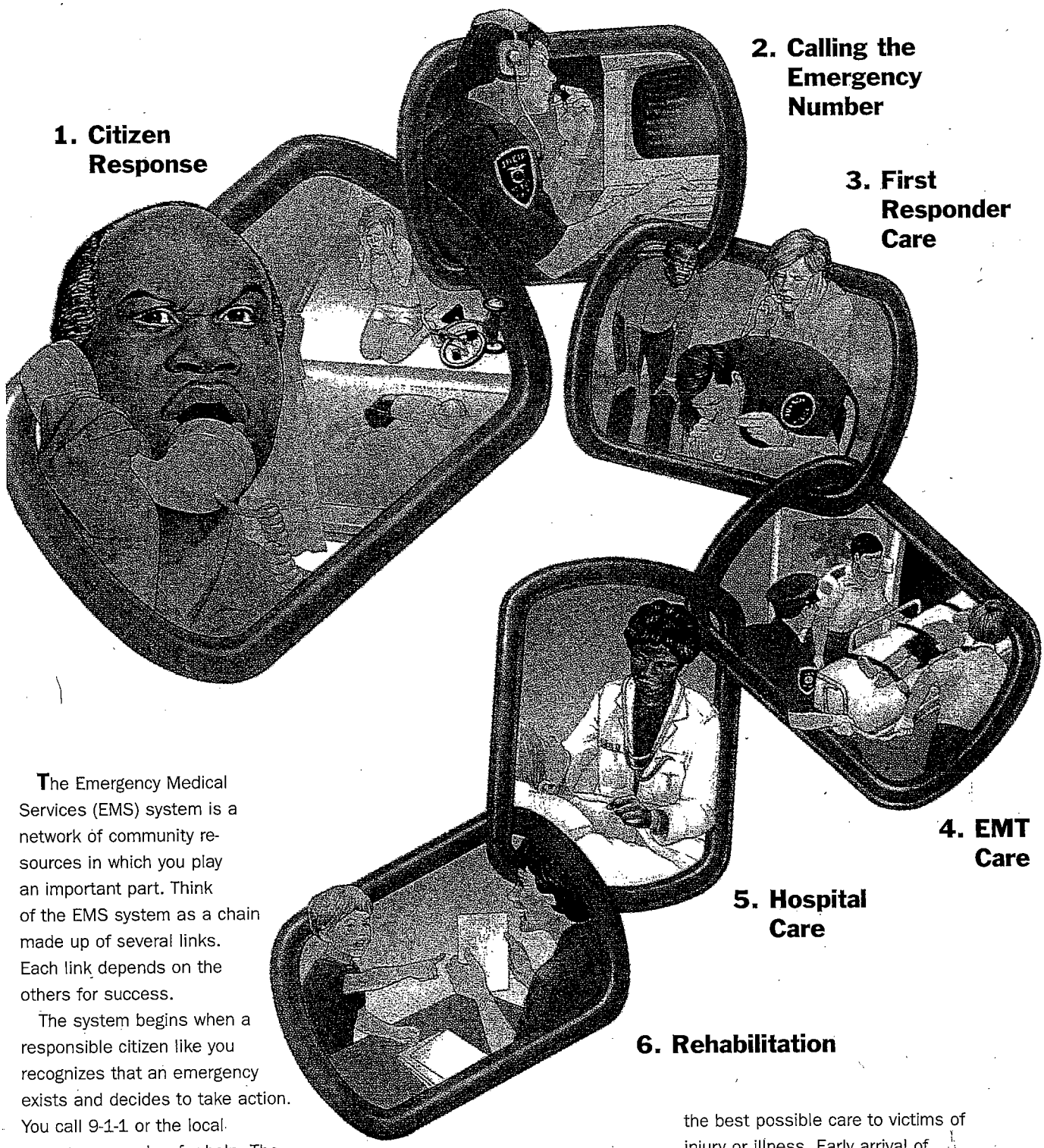
Everyone Should Know First Aid.

Calling 9-1-1 or the local emergency number is the most important step you can take in an emergency. The sooner emergency medical help arrives, the better a person's chance of surviving a life-threatening emergency. You play a major role in making the emergency medical services (EMS) system work effectively. The EMS system is a network of police, fire and medical personnel, as well as other community resources.

Your role in the EMS system includes four basic steps:

1. *Recognize* that an emergency exists.

CHAIN OF SURVIVAL



The Emergency Medical Services (EMS) system is a network of community resources in which you play an important part. Think of the EMS system as a chain made up of several links. Each link depends on the others for success.

The system begins when a responsible citizen like you recognizes that an emergency exists and decides to take action. You call 9-1-1 or the local emergency number for help. The EMS dispatcher answers the call and uses the information you give to determine what help is needed. A team of emergency personnel gives care at the scene and transports the victim to the hospital where emergency department staff and a variety of other professionals take over.

Ideally, a victim will move through each link in the EMS system. All the links should work together to provide the best possible care to victims of injury or illness. Early arrival of emergency personnel increases the victim's chances of surviving a life-threatening emergency. Whether or not you know first aid, calling 9-1-1 or the local emergency number is the most important action you can take.

74

2. *Decide* to act.
3. *Call* 9-1-1 or the local emergency number for help.
4. *Provide* care until help arrives.

Of course, steps 3 and 4 will not happen if you do not take steps 1 and 2. By recognizing an emergency and taking action to help, you give injured or ill persons the best chance for survival. Know your local emergency number. The rapid arrival of emergency medical help increases the victim's chances of surviving a life-threatening emergency.

RECOGNIZING EMERGENCIES

Emergencies can happen to anyone and they can happen anywhere. But before you can give help, you must be able to recognize an emergency. You may realize that an emergency has occurred only if something unusual attracts your attention. For example, you may become aware of unusual noises, sights, odors and appearances or behaviors.

Noises that may signal an emergency include screaming or calls for help; breaking glass, crashing metal or screeching tires; a change in the sound made by machinery or equipment; or sudden, loud noises, like those made by collapsing buildings or falling ladders or when a person falls.

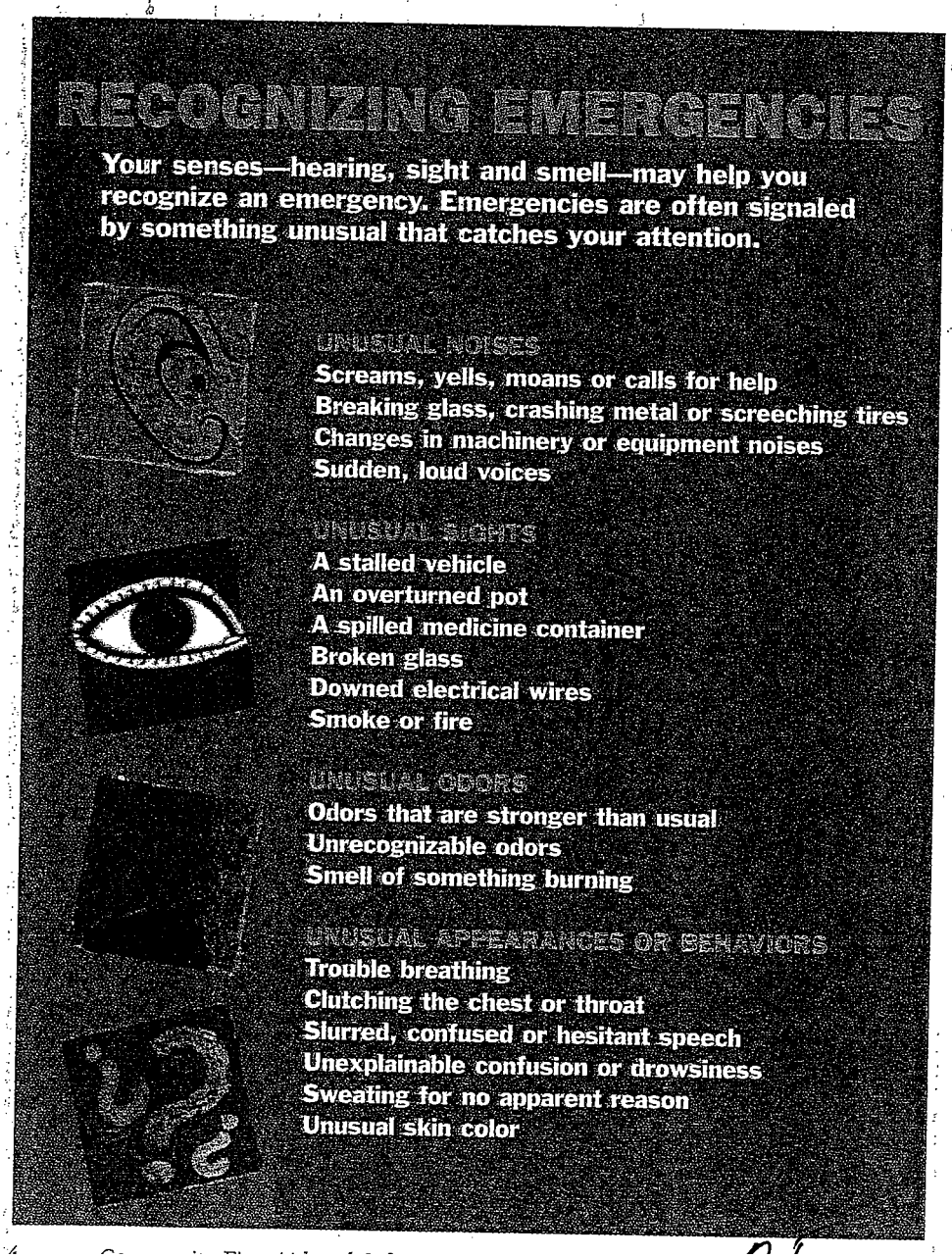
Signals of an emergency that you may see include a person lying motionless, spilled chemicals, fallen boxes, a power failure or downed electrical wires, smoke or fire.

Many odors are part of our everyday lives; for example, gasoline fumes at the gas station, the smell of chlorine at a swimming pool and the smell of chemicals at a refinery. However, when these are stronger than usual, there may be an emergency. Also, an unusual odor may mean something is wrong. Put your own safety first. Leave the area if there is an unusual or very strong odor, since some fumes are poisonous.

It may be difficult to tell if someone is behaving strangely or if something is wrong, especially if you do not know the person. Some actions leave little doubt that something might be wrong. For example, if you see someone suddenly collapse or slip and fall, you have a fairly good idea that the person might need some help.

Other signals of a possible emergency might not be as easy to recognize. They include signals of trouble breathing, confused behavior, unusual skin color, signs of pain and discomfort such as clutching the chest or throat, being doubled over or facial expressions indicating something is wrong.

Sometimes it is obvious that something is wrong; at other times it is more difficult to be sure. For example, a person having a heart attack may clutch his



or her chest, begin to perspire and have trouble breathing. Another heart attack victim may only feel mild chest discomfort and not give any obvious signals of distress. The important thing is to recognize that an emergency might have occurred.

DECIDING TO ACT

Once you recognize an emergency has occurred, you must decide whether to help or how you can help. There are many ways you can help in an emergency. *In order to help, you must act.*

There are Many Ways to Help in an Emergency. In Order to Help, You Must Act.

Whether or not you have had first aid training, being faced with an emergency will probably cause you to have mixed feelings. Besides wanting to help, you may have other feelings that make you hesitate or back away from the situation. These feelings are personal and very real. The decision to act is yours and yours alone.

Sometimes, even though people recognize that what has happened is an emergency, they fail to act. There are many reasons

What Everyone Should Know About Good Samaritan Laws

Are there laws to protect you when you help in an emergency situation?

Yes, most states have enacted Good Samaritan laws. These laws give legal protection to people who gratuitously provide emergency care to ill or injured persons.

When a citizen responds to an emergency and acts as a *reasonable* and *prudent* person would under the same conditions, Good Samaritan immunity generally prevails. For example, a reasonable and prudent person would—

- **Move a victim only if the victim's life was endangered.**
- **Ask a conscious victim for permission before giving care.**
- **Check the victim for life-threatening conditions before providing further care.**
- **Summon emergency medical personnel to the scene by calling 9-1-1 or the local emergency number.**
- **Continue to provide care until more highly trained personnel arrive.**

Good Samaritan laws were developed to encourage people to help others in emergency situations. They require that the "Good Samaritan" use common sense and a reasonable level of skill, not to exceed the scope of the individual's training in emergency situations. They assume each person would do his or her best to save a life or prevent further injury.

Lay responders are rarely sued for helping in an emergency. However, Good Samaritan laws protect the responder from financial responsibility. In cases where an individual lay responder's response was deliberately negligent or reckless or when the responder abandoned the victim after initiating care, the courts have ruled Good Samaritan immunity did not apply.

If you are interested in finding out about your state's Good Samaritan laws, contact a legal professional or check with your local library.

DEPARTMENT OF HEALTH & FAMILY SERVICES
Division of Public Health
DPH 7119 (Rev. 10/01)

AMBULANCE REPORT

Completion of this form meets the requirements of administrative rule HFS 110.04(3)(b).
Some client information in this document is confidential under Wis. Stat. 146.82(1).

STATE OF WISCONS
Adm. Code HFS 110.04(3

RESPONSE

Date Incident Reported (Mo/Day/Yr)	Service Name and ID No.	Responding Unit	Station	Patient Care Record / Alarm
10/26/2003	Merrill FD EMS #121	Med #1	#1	1054

Incident Address / Location	Incident Municipality	Incident County
End of Otto Rd	Town of Corning	Lincoln

Destination Address / Facility Name	Destination Municipality	Destination County
Good Samaritan H.C.	City of Merrill	Lincoln

Mileage: (Loaded) End ____ Begin ____ Total 17

Lights And Siren To Scene:
- ☐ Non-Emergent, No Lights or Siren
- ☐ Emergent, Lights and Siren
- ☐ Initial Emergent, Downgrade To No Lights and Siren
- ☒ Initial Non-emergent, Upgrade To Lights and Siren
- ☐ N/A

Crash Report No.

(Use Military Times)

Pt. Det. ____ Call Rec. 0634 En Route 0634 At Scene 0655 At Pt. 0655 Lv. Scene 0718 At Dest. 0741 In Service

Crew Member Name / License No.
1. Graveen 2. Weagner 3. Klug 4.

Location Type
- ☐ Airport
- ☐ Clinic / Medical
- ☐ Educational Inst.
- ☐ Farm
- ☐ Highway / Street
- ☐ Home / Residence
- ☐ Hospital
- ☐ Industrial
- ☐ Mine / Quarry
- ☐ Nursing Home
- ☐ Public Building
- ☐ Public Outdoors
- ☐ Recreational / Sport
- ☐ Residential Inst.
- ☐ Restaurant / Bar
- ☐ Waterway
- ☐ Unspecified
- ☒ Other hunting shacks

Response Type
- ☐ Mutual Aid
- ☐ Intercept
- ☒ Response To Scene
- ☐ Scheduled Interfacility Transfer
- ☐ Standby
- ☐ Unscheduled Interfacility Transfer
- ☐ Unknown

DEMOGRAPHICS

Patient Last Name / First / M.I.	Mailing Address	City	State	Zip Code	Phone
~~Mueller~~ JK Mueller, Lina M	B3787 Beach St	Fenwood	WI	54426	(715) none 352-32

Emergency Contact Name	Address	City	State	Zip Code	Phone
Self					( )

Personal Physician	Date of Birth	Age	Weight	Gender
Dr Zimbric - ED Dr (☐ N/A)	08/24/1984	19 Y	95 ☒ lbs ☐ kg	☐ Male ☒ Female

Social Security No. (Optional): 397-92-8094

Race: ☒ White ☐ Hispanic ☐ Asian/Pacific Islander ☐ Black ☐ American Indian/Alaska Native ☐ Other ____ ☐ Unknown

Work Related Injury: ☐ Yes ☒ No

Employer	Address	City	State	Zip Code	Phone
Student					( )

Insurance 1	Group No.	Insured No.

Insurance 2 If MVA, Agency	Address	Phone	Group No.	Insured No.

Medicare	HMO	Medicaid

HISTORY

Signs / Symptoms
- ☐ Abdominal Pain
- ☒ Back Pain
- ☒ Bleeding
- ☐ Bloody Stool
- ☐ Breathing Difficulty
- ☐ Cardiac Arrest
- ☐ Chest Pain
- ☐ Choking
- ☐ Diarrhea
- ☐ Dizziness
- ☐ Ear Pain
- ☐ Eye Pain
- ☐ Fever/Hyperthermia
- ☒ Headache
- ☐ Hypertension
- ☐ Hypothermia
- ☒ Nausea
- ☐ Numbness
- ☐ Paralysis
- ☐ Palpitations
- ☐ Pregnancy / Childbirth
- ☐ Respiratory Arrest
- ☐ Seizures / Convulsions
- ☐ Syncope
- ☒ Trauma
- ☐ Unresp. / Unconscious
- ☐ Vaginal Bleeding
- ☒ Vomiting
- ☐ Weakness
- ☐ Unknown
- ☒ Other head inj.
- ☐ None

Allergies: ☒ None

Patient's Current Medications: ☒ None

Dose	Dose	Dose	Dose	Dose	Dose

Last Oral Intake: Alcoho Last Ni (☐ N/A)

Pre-Existing Medical Condition – **Medical**
- ☐ Asthma
- ☐ Bleeding Disorders
- ☐ Cancer ____
- ☐ Chronic Renal Failure
- ☐ Chronic Resp. Failure
- ☐ CVA / TIA
- ☐ Diabetes
- ☐ Gastrointestinal
- ☐ Headaches
- ☐ Hepatitis
- ☐ Hypotension
- ☐ Seizures / Convulsions
- ☐ Tuberculosis

Cardiac
- ☐ Angina
- ☐ Arrhythmia
- ☐ Congenital
- ☐ Congestive Heart Failure
- ☐ Hypertension
- ☐ Myocardial Infarction
- ☐ Cardiac Surgery

Other
- ☐ Developmental Delay / MR
- ☐ Psychiatric
- ☐ Substance Abuse
- ☐ Tracheostomy
- ☐ Other ____
- ☒ None

ASSESSMENT

Vitals ☐ Vital Continued with Advanced Skills ☐ N/A

Time	BP	Pulse Rate	Pulse Qual.	Resp. / SPO2	Resp. Effort	Level of Consciousness
0700	130/70	120	☐ Reg ☐ Irr	20 / 98	~~1 Normal~~ ~~2 Labored~~ 3 Shallow 4 Absent 5 Assisted	~~A - Alert~~ V - Verbal P - Pain U - Unresp
			☐ Reg ☐ Irr			
			☐ Reg ☐ Irr			
			☐ Reg ☐ Irr			
			☐ Reg ☐ Irr			

Mental Status/Behavior
- ☐ Normal
- ☐ Acute Confusion
- ☐ Usually Confused
- ☐ Incoherent
- ☐ Intermittent Consciousness
- ☒ Combative
- ☐ N/A

Eyes
- ☒ PERRL
- R Reactive L
- R Nonreactive L
- R Constricted L
- R Dilated L
- R Blind L
- R Cataracts L
- R Glaucoma L
- ☐ N/A

Breath Sounds
- R Clear L
- R Wet L
- R Decreased L
- R Wheeze L
- R Absent L
- ☐ Stridor
- ☒ N/A

Skin Temp: ☐ Normal ☐ Cool/Cold ☐ Warm/Hot

Moisture: ☐ Normal ☐ Dry ☐ Moist ☐ Diaph

Color: ☐ Normal ☐ Cyanotic ☐ Pale-Ashen ☐ Cherry ☐ Flushed ☐ Jaundice

Capillary Refill: ☐ Normal ☐ Delayed ☐ N/A

Pain Provoke: Movement

Quality: ☐ Sharp ☐ Dull ☐ Cramp ☐ Crushing ☒ Constant

Radiate: ☒ No ☐ Yes

Severity: ☐ (1-10) 7

Time (Onset): ☐ 0-15Min ☐ 15-60 Min ☐ 1-12 Hr ☐ 12-24 Hr ☐ Other: ____ ☐ N/A

CPR

CPR Provider: ☐ Bystander ☐ First Responder Unit ☐ EMS Unit ☐ Unkn

Defib Provider: ☐ PAD ☐ First Responder Unit: ____ ☐ EMS Unit:

CPR Start Time ____ Discontinue ____

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AMBULANCE REPORT

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STATE OF WISCONS
pag

Service Name and ID No.: MF0121

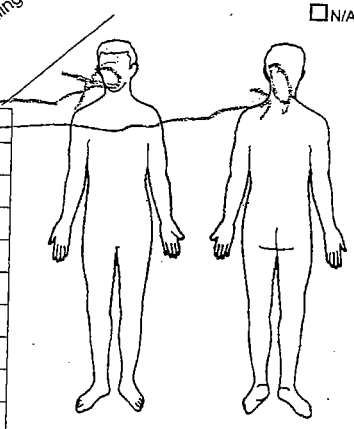
Patient Last Name / First / M.I.: Mueller Lina M.

Patient Care Record / Alarm I: 1054

PHYSICAL EXAMINATION

Physical Examination ☐N/A

Injury / Pain Location	Pain (No Trauma)	Blunt	Dis / FX	Gunshot	Laceration / Abrasion	Puncture / Stab	Soft Tissue Swelling	Burn
Head / Face		X						
Neck	X							
Chest / Axilla								
Abdomen								
Back / Flank								
Pelvis / Hip								
L Arm U L J								
R Arm U L J								
L Leg U L J								
R Leg U L J								



Glasgow Coma Scale

		Scene	Enroute
A.	Eye Opening		
	Spontaneous	4	4
	To voice	3	3
	To pain	2	2
	None	1	1
B.	Verbal Response		
	Oriented	5	5
	Confused	4	4
	Inappropriate words	3	3
	Incomprehensible Words	2	2
	None	1	1
C.	Motor Response		
	Obeys commands	6	6
	Purposeful movement	5	5
	Withdraws to pain	4	4
	Flexion to pain	3	3
	Extension to pain	2	2
	None	1	1
A. + B. + C. =		15	15

Time: 6:5

TRAUMATIC INJURY

Motor Vehicle Crash ☒N/A

Rear

P = Patient Location in Vehicle
X = Location of Damage to Vehicle

Type ☐N/A: ☐ Car ☐ Motorcycle ☐ Truck ☒ ATV ☐ Van ☐ Snowmobile ☐ Semi ☐ Watercraft ☐ Bus ☐ Aircraft

Exterior Damage ☒N/A: ☐ None ☐ Minor ☐ Moderate ☐ Major ☐ Rollover

Interior Damage ☒N/A: ☐ None ☐ Spidered Window ☐ St. Wh. Bent ☐ Compart. Intrusion ☐ Patient Ejected

Restraints ☒N/A

	Obs	Rprt
Airbag	☐	☐
Lap Belt	☐	☐
Shoulder Belt	☐	☐
Child Seat	☐	☐

Safety Equipment ☒N/A: ☐ None ☐ Helmet ☐ Eye Prot. ☐ Prot. Clothing ☐ Float. De ☐ Unknown

Cause of Injury ☐N/A

☐ Aircraft Related ☐ Athletic Event ☐ Bicycle Crash ☐ Bite
☐ Chemical Exposure ☐ Child Battering Suspected ☐ Drowning ☐ Drug Ingestion ☐ Electrocution (Non-Light.) ☐ Excessive Cold
☐ Excessive Heat ☐ Fall ☐ Fire / Flames ☐ Firearm Self-Inflicted ☐ Firearm Accidental ☐ Firearm Assault
☐ Lightning ☐ Machinery Injury ☐ Mechanical Suffocation ☐ Motor Vehicle (Non-Traff.) ☐ Motor Vehicle (Traffic) ☐ Pedestrian Traffic
☐ Physical Assault ☐ Poison, Not Drugs ☐ Radiation Exposure ☐ Sexual Assault ☐ Smoke Inhalation ☐ Stabbing
☐ Stings (Plant / Animal) ☐ Water Transport Incident ☐ Unknown ☒ Other ATV accide

COMMENT

Provider Impression — If more than one impression is checked, Circle Primary One

☐ Abd. Pn. / Problems ☐ Airway Obstruction ☐ Allergic Reaction ☐ Altered L.O.C. ☐ Behavioral / Psych
☐ Cardiac Arrest ☐ Cardiac Rhythm. Disturb. ☐ Chest Pn. Discomfort ☐ Congestive Heart Failure ☐ Diabetic Symptoms
☐ Electrocution ☐ GI Bleed ☒ Headache ☐ Hypertension ☐ Hyperthermia / Fever
☐ Hypothermia ☐ Hypovolemia / Shock ☒ Intoxication Suspected / Alcohol Ingestion ☐ Obvious Death ☐ Poison / Drug Ingestion ☐ Pregnancy / Ob Delivery
☐ Respiratory Arrest ☐ Respiratory Distress ☐ Seizure ☐ Sexual Assault / Rape ☐ Toxic Inhalation ☐ Stings / Bites ☐ Stroke / CVA / TIA
☐ Syncope / Fainting ☒ Traumatic Injury ☐ Vaginal Hemorrhage ☐ Unknown ☐ Other _____

Chief Complaint / Mechanism of Injury: Head + Neck Pain ATV accident

Time of Onset: 1:00 am

Comments:

Upon arrival pt was laying on bed in vomit. Pt. was complaining of head + neck pain. Pt. had raccoon eyes. Pt was complaining of nausea + that she had to go to bathroom. Pt was colored. We then attempted to allow her to excrite/urinate into a bed pan. Pt was unable. Pt then ripped off neck colar + would not allow us to reapply. Pt was then back boarded. Pt vitals were taken (see chart)

Procedure or Treatment	EMT	EMT
☐ Assisted Ventilation		
☒ Backboard	DG	JK TW
☐ Bleeding Control		
☐ Burn Care		
☐ CPR		
☒ Cervical Immobilization	DG	JK TW
☐ DNR Protocol		
☐ Glucose Administration		
☐ Nasopharyngeal Airway		
☐ Obstetric Care / Delivery		
☐ Oropharyngeal Airway		
☐ O2 By Mask _____ liters		
☐ O2 By Cannula _____ liters		
☒ Physical Exam	DG	TW
☒ Radio. / Phone Report	DG	TW
☐ Splint of Extremity		
☐ Traction Splint		
☒ Vital Signs	DG	TW
☐ OTHER: _____		
☐ None		

If an advanced skill is performed, complete form DPH 7300

MISCELLANEOUS

Incident Disposition
☒ Treated / Transported by EMS

Destination Type - AND - Destination Determination
☐ Home / Residence ☐ Police / Jail ☐ Medical Office / Clinic ☐ Skilled Nursing Facil. ☐ Hospital Direct Admit ☒ Hospital ED ☐ Morgue ☐ Other
☒ Closest Facility ☐ Diversion ☐ EMT Choice ☐ Law Enforce. Choice ☐ Managed Care ☐ On Line Med. Direction ☐ Patient / Family Choice ☐ Patient / Phys. Choice ☐ Protocol ☐ Specialty Center ☐ Other

☐ Treated / Transferred Care: ☐ To Aero-Medical Unit ☐ To ALS Unit ☐ To BLS Unit ☐ To Law Enforcement
☐ Treated / No Transport: ☐ Treat. / Trans. by Priv. Veh. ☐ Treat. / Trans. by Other Means ☐ Treated and Released ☐ Patient Refused Care
☐ No Treat. Needed ☐ Dead at Scene ☐ Cancelled ☐ Unknown ☐ No Patient Found

Lights And Siren During Transport: ☐N/A
☐ Non-Emergent, No Lights or Siren
☒ Emergent, Lights and Siren
☐ Initial Emergent, Downgrade To No Lights and Siren
☐ Initial Non-emergent, Upgrade To Lights and Siren

Patient Transported
☐ Prone ☒ Supine ☐ Sitting ☐ Patient Restrained ☐ Head Elevated ☐ Feet Elevated ☐ In _____ Lateral Position ☐ Other _____

Other Services on Scene
☒ Law Enforcement La Co. Deputy ☐ Fire _____ ☐ Other _____ ☐ None ☐ Physician ☐ First Responder _____ ☐ Nurse / Physician Assistant

Arrival Status ☐N/A: ☒ Unchanged ☐ Better ☐ Worse ☐ DOA ☐ Unknown

PPE Used ☐N/A: ☒ Gloves ☐ Gown ☐ Goggles ☐ Mask ☐ Other _____

Facility Notified By ☐N/A: ☒ Radio ☐ Phone ☐ Unable* ☐ No Need* ☐ Direct ☐ EKG Telemetry
* Explain _____

Difficulties Encountered: ☐ Dispatch ☒ Other Pt ☐ Extrication ☐ Hazardous Material ☐ Language Barrier ☐ Road ☐ Unsafe Scene ☐ Vehicle Problems

Time Report Received: By: ☐N/A

Report Given To: ER Room #9 ☐N/A

EMT Signature: [signature]

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AMBULANCE RUN REPORT (Page 3) Skills / Extended Comments

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STATE OF WISCONSIN
Adm. Code HFS 110.04(3)(b)

Date Incident Reported	Patient Last Name / First / MI	Service Name and ID No.	Responding Unit	Patient Care Record / Alarm No.
10/26/03	Mueller Lina M	MFD 121	M-1	1054

ADVANCED SKILLS

Time	EMT	Blood Pressure	Pulse Rate	Pulse Quality	Resp Rate	Resp Quality	SPO2	Cardiac Rhythm Interpretation	Cardiac Rhythm Blocks	Procedure	No. of Attempts (Joules for Defib)	Success	Medications	Dose	Route

Airway complications ☐ Nasal ☐ None ☐ Dental ☐ Pharyngeal ☐ Other ☐ Esophagus ☐ Trachea ☒ N/A

Airway Placement verified by EMT ☐ Auscultation ☐ Tube Check ☐ Visualization ☐ End Tidal CO_2 ☒ N/A

Airway Placement verified by MD ☐ Yes ☐ No ☒ N/A

Prehospital Outcome Arrived at Hospital w/ Pulse ☒ Yes ☐ No

ER Outcome ☐ Discharged ☐ Discharged AMA ☐ Admitted to Hospital ☐ Transferred ☐ Died ☒ Unknown

Hospital Outcome ☐ Transferred ☐ Discharged ☐ Died ☒ Unknown ☐ N/A

Equipment Failure ☐ Yes ☒ No Explain: ☐ N/A

ALS Provider Arrival: ☒ N/A

Differential Diagnosis
Head + Neck Pain

Additional Comments
Pt. was uncooperative. Pt, ~~was~~ c-spine was secured w/CIDS. Pt was pulling at the chin strap + refused to let go. Pt. then managed to pull it lose. It was resecured. Pt. then stated she needed to vomit Pt was tipped on board to allow vomiting into tub. Pt. then was tipped back when she finished vomiting. Pt. then proceded to remove straps that was securing her to the board. They were resecured. Radio report was given to G5HC ER. Upon arrival Pt care was transfered to G5HC ER staff.

SIGNATURE AND NUMBER -- EMT

SIGNATURE -- Medical Control Physician

SIGNATURE AND NUMBER -- EMT

STATE OF WISCONSIN
SUPREME COURT

LINA M. MUELLER,

Plaintiff-Appellant,

v.

McMILLAN WARNER INSURANCE COMPANY,

Defendant-Respondent,

Appeal #2005AP121

MERLIN A. SWITLICK and STEPHANI SWITLICK,

Circuit Court Case No. 04-CV-91

Defendants-Respondents-Petitioners,

APOLLO SWITLICK and SECURITY HEALTH PLAN OF WISCONSIN, INC.,

Defendants,

and

METROPOLITAN PROPERTY and CASUALTY INSURANCE COMPANY,

Intervenor-Defendant.

REPLY OF DEFENDANTS-RESPONDENTS-PETITIONERS, STEPHANI SWITLICK AND MERLIN SWITLICK, TO BRIEF OF PLAINTIFF-APPELLANT, LINA M. MUELLER

APPEAL FROM THE DECISION OF THE COURT OF APPEALS, DISTRICT III, FILED AUGUST 2, 2005

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Wausau, WI 54402-1144
(715)845-1151

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 1

I. APPLICATION OF THE GOOD SAMARITAN STATUTE IS NOT DEPENDENT UPON WHETHER THE SWITLICKS' INTERVENTION WAS NEGLIGENT. 1

II. SECTION 940.34(3), STATS. DOES NOT SUPPORT MUELLER'S PROPOSED INTERPRETATION FOR §895.45(1). 2

III. STEPHANI AND MERLIN SWITLICK INTERVENED ON BEHALF OF MUELLER FOR THE PURPOSE OF PROVIDING AID AND ASSISTANCE. ALLEGATIONS TO THE CONTRARY ARE PURELY SPECULATIVE. . . . 6

IV. NEGLIGENT TORTFEASORS SHOULD BE ENCOURAGED TO PROVIDE EMERGENCY CARE. 9

V. MUELLER'S PROPOSED RESTRICTIONS ON THE APPLICATION OF THE IMMUNITY ARE NOT SUPPORTED BY THE LANGUAGE OR PURPOSE OF THE STATUTE 10

CONCLUSION 11

CERTIFICATION 13

AUTHORITIES

Wisconsin Statutes:

Wis. Stat.§895.45(1) 2

Wis. Stat.§895.48(1) 3,4,5,11

Wis. Stat.§895.48(1)(a) 11

Wis. Stat.§895.48(1)(m) 10

Wis. Stat.§940.34 3

Wis. Stat.§940.34(2) 4

Wis. Stat.§940.34(2)(a) 4

Wis. Stat.§940.34(3) 2

INTRODUCTION

This brief is submitted on behalf of the defendants-respondents-petitioners, Stephani and Merlin Switlick (hereinafter "Switlicks") as a reply to the Brief of plaintiff-appellant, Lina Mueller (hereinafter "Mueller").

ARGUMENT

I. APPLICATION OF THE GOOD SAMARITAN STATUTE IS NOT DEPENDENT UPON WHETHER THE SWITLICKS' INTERVENTION WAS NEGLIGENT.

Many of the arguments raised in Mueller's brief condemn the Switlicks for the manner in which they provided and omitted care to Mueller. However, as pointed out in Switlicks' Petition for Review, an examination of the quality of the Switlicks' intervention (i.e. qualitative review) is inappropriate for determining application of Good Samaritan immunity. The Good Samaritan statute affects its intended purpose (i.e. to encourage all people to render emergency care to those in need of care) by removing the fear of a subsequent qualitative analysis and the potential for the imposition of

liability based on that analysis.

Any argument premised on the proposition that the immunity should not apply because the Switlicks' acts and omissions were negligent is inherently and logically incorrect. The Good Samaritan statute immunizes negligent acts and omissions. The immunity's existence is relevant only in circumstances in which negligent acts and omissions are alleged or exist. Application of Good Samaritan immunity in this case is not dependent upon whether the Switlicks' acts and omissions were negligent.

II. SECTION 940.34(3), STATS. DOES NOT SUPPORT MUELLER'S PROPOSED INTERPRETATION FOR §895.45(1).

Mueller's interpretation of §895.45(1) requires that a distinction be established between care that rises to the level of "emergency care" and care that is alleged to be of some lesser degree. In support of this proposed distinction, plaintiff cites to §940.34(3) which she alleges recognizes a difference between "emergency care" and "other reasonable assistance."

The alleged distinction between "emergency care" and "other reasonable assistance" in §940.34, Stats. is due to the overall scope of §940.34, which is much broader than §895.48(1), Stats.

Section 895.48(1) addresses itself to the manner in which a lay person Samaritan interacts with a person that has suffered an injury. Section 940.34 addresses itself not only to the manner in which a lay person may provide care to a person injured by a crime but also to the manner in which a lay person may assist a noninjured person who is exposed to the commission of a crime. Therefore, when the legislature chose to immunize the conduct that could fall within the scope of §940.34, it made sure to immunize both the emergency care rendered for the bodily injuries of the victim as well as the other assistance rendered to a person exposed to the commission of a crime.

Defendants concur with plaintiff that §940.34 is a "closely related" statute. The structure and language of

§940.34(2) may be significant for purposes of interpreting §895.48(1).

Section 940.34(2)(a) applies when a lay person knows that a crime is being committed and that a victim is exposed to bodily harm. The statute does not restrict the type of assistance required to calling 911, law enforcement officers or other professionally-trained personnel. Although §940.34(2)(a) expressly allows for the summons of law enforcement officers, the requirements of §940.34(2)(a) are satisfied by providing reasonable assistance other than the calling of law enforcement.

Section 940.34(2)(a) suggests that reading a requirement into §895.48(1) that the immunity applies only if the lay person Samaritan calls 911 or otherwise transfers care of the injured person to trained medical personnel, is not appropriate. If the summons of law enforcement officers is not the sine qua non of providing reasonable assistance to a crime victim, calling 911 is not, as suggested by plaintiff, the sine qua

non of providing emergency care.

Mueller contends that the public policy underlying §895.48(1) is to encourage lay persons to call 911. Mueller cites to what she defines as the well understood and universally known "**Emergency Action Steps**" of the American Red Cross. Mueller contends that since one of the emergency action steps is to call 911, §895.48(1) should be interpreted to apply only if 911 is called.

Mueller's argument fails for several reasons. First, if the public policy underlying §895.48 were simply to encourage people to call 911, the statute would be drafted to more accurately reflect this rather simple and narrow purpose.

Second, if the Emergency Action Steps of the American Red Cross are in fact universally understood, it is reasonable to assume the Wisconsin legislature was fully aware of the three steps while drafting §895.48(1). If what the legislature intended was to immunize only conduct that is consistent with the three steps, the statute would reflect the

three-step procedure.

The statute does not reflect or reference in its wording or structure, the three-step procedure. These procedures should not be read into the statute by judicial process when they were not included via the legislative process.

III. STEPHANI AND MERLIN SWITLICK INTERVENED ON BEHALF OF MUELLER FOR THE PURPOSE OF PROVIDING AID AND ASSISTANCE. ALLEGATIONS TO THE CONTRARY ARE PURELY SPECULATIVE.

Mueller contends that Good Samaritan immunity cannot apply in this case as the statutory requirement of good faith is not satisfied. At page 28 of her brief, Mueller states that if the lay person Samaritan intervention "is to be characterized as having been taken in 'good faith' it must always involve an attempt to secure the services of competent medical professionals - call 911 - or transport the victim to a facility that is believed to offer such services." (Plaintiff-Appellant's Brief, p. 28) Mueller's interpretation of "good

faith" is closely related, if not identical, to the principal theme or proposition of her entire argument; that Good Samaritan immunity applies only if the lay person Samaritan calls 911 or otherwise transfers the injured person to medical personnel. As discussed previously, Mueller attempts to impose a requirement on the application of Good Samaritan immunity that simply is not substantiated by the language or purpose of the statute.

As a fall-back position, Mueller contends that the good faith issue presents a genuine issue of material fact. In an effort to create the alleged issue of material fact, Mueller, at page 40 of her brief, makes several allegations inferring that there was improper motivation for the Switlicks' conduct. The allegations, however, are pure speculation, absolutely unsubstantiated by any record citation.

As pointed out in the initial brief, it is important to note that the record in this case consists, in large part, of the deposition testimony of Stephani Switlick and Merlin Switlick which was taken by plaintiff's counsel while Merlin and

Stephani Switlick were unrepresented. Ample opportunity existed to develop or to remove from the realm of speculation the accusations now made. Genuine issues of material fact are not created by speculative allegations.

Switlicks have contended throughout that the gravamen of Mueller's claim against them is that in hindsight, they failed to recognize the severity of her injuries and to act in accordance with that recognition. At page 18 of her brief, Mueller states that,

> "The facts conclusively establish that the Switlicks themselves did not believe they were confronted with an emergency requiring emergency care."

Given these conclusively-established facts, it is difficult to understand how or why any of Mueller's allegations at page 40 would arise. The allegations are speculative conjecture.

Hindsight demonstrates that Stephani and Merlin Switlick did not appreciate the severity of Mueller's injury. However, there is nothing in the record to support a contention that the conduct undertaken by the Switlicks to assess

Mueller's condition was motivated by any reason other than a desire to provide aid and assistance.

IV. NEGLIGENT TORTFEASORS SHOULD BE ENCOURAGED TO PROVIDE EMERGENCY CARE.

Mueller argues that it would be absurd to conclude that Good Samaritan immunity was intended to apply to a person whose conduct was a cause of the injuries. The allegation in this case is that of a negligent tort. There is no element of intent required or pled. There is absolutely no reason to condemn or dissuade subsequent care-giving intervention by a negligent tortfeasor. In fact, care-giving intervention by the negligent tortfeasor should be encouraged as much as intervention by any other lay person Samaritan.

The statutory element of "good faith" applies to the negligent tortfeasor Samaritan to assure the proper motivation for the caregiving. Further, the injured party's right to seek recovery for injuries is unaffected by the application of immunity as there remains a viable bodily injury claim based

on the negligent tort that initially caused the injury.

V. MUELLER'S PROPOSED RESTRICTIONS ON THE APPLICATION OF THE IMMUNITY ARE NOT SUPPORTED BY THE LANGUAGE OR PURPOSE OF THE STATUTE.

At page 32 of her brief, Mueller summarizes her primary contention by stating that "emergency care" is the care that is provided for only the amount of time needed to transfer care to competent medical professionals. Mueller proposes to impose a temporal limitation on the application of Good Samaritan immunity.

Mueller's proposal reads far too much into the language of the statute as it effectively mandates that the lay person Samaritan transfer care to a competent medical professional in order for the immunity to apply. This is a requirement not drafted into the language of the statute.

On the other hand, §895.48(1)(m) is drafted with express temporal and spatial restrictions that define the application of that statute. This subsection immunizes health

care rendered "at the site of the event or contest (spatial) during transportation to a health care facility (temporal and spatial) . . . or in a locker room or similar facility (spatial) immediately before, during or after the event or contest (temporal). (§895.48(1)(a) Wisconsin Statutes 2003-04) (Comments added). Similar, express, restrictive language is not found in §895.48(1) and its omission is instructive.

Whereas the temporal restriction proposed by Mueller works well to accomplish her desired result in this case, Mueller does little to establish how the restriction serves to achieve the intended purpose of the statute. Achieving the intended purpose of the statute is the ultimate goal of any interpretation. Result-oriented interpretations will often fail to achieve the legislative purpose.

CONCLUSION

For the reasons set forth herein, and in Switlicks' original brief, Switlicks respectfully request that the Wisconsin Supreme Court grant the relief requested in the conclusion

section of their original brief.

Dated this 26th day of January, 2006.

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CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is:

☒ Desk Top Publishing or Other Means (proportional serif font, min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 point and max. of 60 char. per line). The text is 13 point type and the length of the brief is 1,872 words.

Dated this 26th day of January, 2006.

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STATE OF WISCONSIN
SUPREME COURT

LINA M. MUELLER,

Plaintiff-Appellant,

vs.

MCMILLAN WARNER INSURANCE CO.

Defendant-Respondent,

Appeal No. 2005AP121

MERLIN A. SWITLICK and
STEPHANI SWITLICK,

Circuit Court Case
No. 04-CV-91

Defendants-Respondents-Petitioners,

APOLLO SWITLICK and SECURITY
HEALTH PLAN OF WISCONSIN, INC.,

Defendants,

METROPOLITAN PROPERTY and
CASUALTY INSURANCE CO.,

Intervenor-Defendant.

APPEAL FROM THE DECISION OF THE COURT OF APPEALS, DISTRICT III, FILED AUGUST 2, 2005

AMICUS CURIAE BRIEF OF THE WISCONSIN ACADEMY OF TRIAL LAWYERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

Introduction 1

I. At Common Law, while a Bystander generally does not have a Duty to Provide Affirmative Aid to an Injured Person, a Bystander who comes to the Rescue of another is Required to Exercise Reasonable Care 2

A. Wis. Stats. §895.48(1) Operates in Derogation of the Common Law 4

B. Wis. Stats. §895.48(1) should be Narrowly Construed Both Because it is in Derogation of the Common Law and Because it is a Statute Designed to Afford Immunity to Tortfeasors 4

1) Wis. Stats. §895.48(1) should be Narrowly Construed because it is in Clear Derogation of the Common Law Duty of Reasonable Care 4

2) Wis. Stats. §895.48(1) should be Narrowly Construed because it is a Statute that Immunizes Individuals from Liability for Breach of the Common Law Duty of Reasonable Care 5

II. The Defendants were not Responding to an Emergency during the Six Hours the Plaintiff Slept at their Property 8

III. By Reference to the Doctrine of *in pari materia,* the words "Scene of any Emergency or Accident" ought to be given a very narrow Interpretation 9

Conclusion 11

§809.19(8) Certification 12

TABLE OF AUTHORITIES

WISCONSIN CASES

American Mut. Liability Ins. Co. v. St. Paul Ins.,
48 Wis. 2d 305, 179 N.W.2d 864 (1970) 3

Fuchsgruber v. Custom Accessories,
2001 WI 81, 244 Wis. 2d 758, 628 N.W.2d 833 5

Georgina G. v. Terry M.,
184 Wis. 2d 492, 516 N.W.2d 678 (1994) 10

Grube v. Moths,
56 Wis. 2d 424, 202 N.W.2d 261 (1972) 5

Jeremiah C., 2003 WI App 40, 260 Wis. 2d 359,
659 N.W.2d 193 10

LePoidevin v. Wilson,
111 Wis. 2d 116, 330 N.W.2d 555 (1983) 6

McDonough v. Dept. of Workforce Development,
227 Wis. 2d 271, 595 N.W.2d 686 (1999) 9

Mueller v. McMillan Warner Ins. Co., (the case below),
2005 WI App 210, __Wis. 2d __,
704 N.W.2d 613 1

NBZ, Inc. v. Pilarski,
185 Wis. 827, 520 N.W.2d 93 (Wis. App. 1994) 5

State v. Deetz, 66 Wis. 2d 1,
224 N.W.2d 407 (1974) 2

State v. Lloyd,
104 Wis. 2d 49, 310 N.W.2d 617 (Ct. App. 1981) 10

State v. Swatek,
178 Wis. 2d 1, 502 N.W.2d 909 (Ct. App. 1993) 10

State v. Williquette, 129 Wis. 2d 239,
385 N.W.2d 145 (1986) 2

Wirth v. Ehly, 93 Wis. 2d 433,
287 N.W.2d 140 (1980) 7

Waters v. Pertzborn, 2001 WI 62,
243 Wis. 2d 703, 627 N.W.2d 497 2

Waukesha County v. Johnson,
107 Wis. 2d 155, 320 N.W.2d 1 (Ct. App. 1982) 5

Zillmer v. Miglautsch,
35 Wis. 2d 691, 151 N.W.2d 741 (1967) 9

FOREIGN STATE CASES

Beckerman v. Gordon,
614 N.E.2d 610 (Ind. App. 1993) 4

Bragg v. Valdez, 111 Cal App 4th 421,
3 Cal Rptr 3d 804 (Cal. App. 2003) 5

Breazeal v. Henry Mayo Memorial Hospital,
234 Cal App 3d 1329, 286 Cal Rptr 207 (Cal. Ct. App. 1991) 8

Buck v. Greyhound Lines, Inc.,
783 P.2d 437 (Nev. 1989) 8

Chadha v. Charlotte Hungerford Hospital,
865 A.2d 1163 (Conn. 2005) 5

De Tarquino v. City of Jersey City,
800 A.2d 255 (N.J. App. 2002) 6-7

Gundy v. Ozier,
409 So.2d 764 (Ala. 1981) 6

Harrison v. Middlesex Water Co.,
403 A.2d 910 (N.J. 1979) 7

Hirpa v. IHC Hospitals,
948 P.2d 785 (Utah 1997) 4

Hutton v. Logan,
566 S.E.2d 782 (N.C. App. 2002) 4

Jackson v. Mercy Hospital,
864 P.2d 839 (Okla. 1993) 4

Lambert v. State,
912 So. 2d 426 (La. Ct. App. 2005) 6

McDowell v. Gillie,
626 N.W.2d 666 (N.D. 2001) 2

Rehn v. Fischley,
557 N.W.2d 328 (Minn. 1997) 6

Rivera v. Arana,
749 N.E.2d 434 (Ill. App. 2001) 8

Schisler v. Merchants Trust Co.
94 N.E.2d 665 (Ind. 1950) 6

Street v. Superior Court, 224 Cal App 3d 1397,
274 Cal Rptr 595 (Cal. App. 1990) 4

Todd v. Dow, 19 Cal App 4th 253,
23 Cal Rptr 2d 490 (Cal. Ct. App. 1993) 3

Velázquez v. Jiminez,
798 A.2d 51 (N.J. 2002) 7

FEDERAL CASES

Mangold v. Analytic Services, Inc.,
77 F.3d 1442 (4th Cir. 1996) 7

WISCONSIN STATUTES

WIS. STAT. §346.67 ..... 9, 10

WIS. STAT. §346.67(1)(c) 10

WIS. STAT. §895.48(1) ..... PASSIM

WIS. STAT. §895.52(6)(d) 2

OTHER AUTHORITIES

3 SUTHERLAND ON STATUTORY CONSTRUCTION §63.02
(Clark Boardman Callaghan 1992) 6

RESTATEMENT OF TORTS 2d §322 & ILLUSTRATION 3 3

RESTATEMENT OF TORTS 2d §324 3

RESTATEMENT OF TORTS 2d §324A 3

Veilleux, *Construction and Application of Good Samaritan Statutes,* 68 A.L.R.4th 294 4

ARGUMENT

Introduction

This case involves a negligence action arising from an ATV accident. In relevant part, plaintiff [hereafter, "Mueller"] complains that the defendants negligently failed to procure competent medical assistance in the hours following the accident, thus significantly exacerbating her injuries. The Trial Court granted summary judgment against Mueller because the defendants had allegedly provided traditional first aid to Mueller and were thus immune from liability under Wis. Stat. §895.48(1),[1] Wisconsin's Good Samaritan immunity statute. *See* 2005 WI App 210, at ¶8. The defendants now seek review of a Court of Appeals decision reversing the Trial Court.

It is important to note that Muller was clearly a guest, i.e., an invitee, of the defendants and their son on property owned by the defendants at the time of the ATV accident and at all relevant times following that accident. *See* Petitioners' Brief-in-Chief, pp. 5-6; 2005 WI App ¶¶4-7. The Court of Appeals found that the defendants did not provide any first aid at the place where the accident occurred (2005 WI App 210, at ¶7), did not attempt to observe or clean her wounds and, in the words of the Court of Appeals, "did nothing for Mueller [that] she could not have done for herself, except waking her up during the night" for over six hours after the ATV accident. *See* 2005 WI App 210, at ¶¶34 & 35.

[1] This statute provides in part: "Any person who renders emergency care at the scene of any emergency or accident in good faith shall be immune from civil liability for his or her acts or omissions in rendering such emergency care."

The defendants seek to use a very limited immunity statute, Wis. Stats. §895.48(1), in order to escape the consequences of Common Law negligence. By reason of and pursuant to Common Law analysis, public policy considerations and established rules of statutory construction, the defendants should not be afforded protection under the terms of Wis. Stats. §895.48(1).

I. At Common Law, while a Bystander generally does not have a Duty to Provide Affirmative Aid to an Injured Person, a Bystander who comes to the Rescue of another is Required to Exercise Reasonable Care.

Under the Common Law[2] a bystander generally has no duty to provide affirmative aid to an injured person, even if the bystander has the ability to help, unless there is some relationship between the parties that creates a special responsibility[3] to render assistance not owed to the general public. *See, e.g., McDowell v. Gillie,* 626 N.W.2d 666, 669 (N.D. 2001). According to *State v. Williquette,* 129 Wis. 2d 239, 385 N.W.2d 145 (1986):

> [O]ne has no legal duty to aid another person in peril, even when that aid can be rendered without danger or inconvenience... He need not shout a warning to a blind man headed for a precipice ... He need not pull a neighbor's baby out of a pool of water or rescue an unconscious person stretched across the railroad tracks, though the baby is drowning or the whistle of an approaching train is heard in the distance.

Id. at 252.

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[2] According to this Court in *State v. Deetz,* 66 Wis. 2d 1, 224 N.W.2d 407 (1974): "The common law is judge-made law...." *Id.* at 15.

[3] In evaluating the defendants' extravagant claim of immunity during the six hours following the accident it must be remembered that there *was* a special relationship between Mueller and the defendants. Mueller was not a stranger in distress that the defendants suddenly happened upon following an automobile accident. Instead, Mueller was a social guest of the defendants before and for the relevant six hours following the accident. *Cf.* Wis. Stats. §895.52(6)(d) and *Waters v. Pertzborn,* 2001 WI 62, 243 Wis. 2d 703, 627 N.W.2d 497.

However, at Common Law, once a Good Samaritan comes to the aid of an injured person, a duty is imposed upon that Good Samaritan to protect and care for the injured person in a reasonable manner. This Common Law doctrine was expressed in the following terms in the case of *Todd v. Dow,* 19 Cal App 4th 253, 23 Cal Rptr 2d 490 (Cal. Ct. App. 1993):

> Liability may not be premised on a defendant's nonfeasance if the defendant did not create the peril.... One is not obligated to act as a 'good Samaritan.' ... Under the common law rule, liability is often imposed for misfeasance, but rarely imposed for nonfeasance absent a special relationship.

Id. at 260, n. 2.

The Common Law Doctrine applicable to the actions of a Good Samaritan who aids another has found expression in the Restatement of Torts. According to Restatement of Torts 2d §324,[4] where a Good Samaritan who has no duty to do so takes charge of a victim who is helpless, he or she may be subject to liability to that victim for any bodily harm caused by the failure of the Samaritan to exercise reasonable care to secure the safety of the other while within the Samaritan's charge. This Court discussed a variation of the foregoing Restatement section in *American Mut. Liability Ins. Co. v. St. Paul Ins.,* 48 Wis. 2d 305, 313-314, 179 N.W.2d 864 (1970), where this Court recounted the Common Law Doctrine using the following language:

> The oft-quoted rule was aptly and simply stated by Judge Cardozo in Glanzer v. Shepard ... (1922), 'It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all.'

---

[4]*See also* Restatement of Torts 2d §324A and *cf.* §322, Illustration 3. According to the Harvard Law School, "[R]estatements [of the law] are highly regarded distillations of common law. ... They 'restate' existing common law." *See* the Harvard Law School's web page located at: www.law.harvard.edu/library/services/research/guides/united_states/basics/restatements.php

A. Wis. Stats. §895.48(1) Operates in Derogation of the Common Law.

While Good Samaritan statutes may have a different focus from jurisdiction to jurisdiction,[5] they all attempt to eliminate the perceived inadequacies of the *Common Law* by granting varying degrees of immunity to Good Samaritans. *See, e.g., Hutton v. Logan,* 566 S.E.2d 782, 787 (N.C. App. 2002); *Beckerman v. Gordon,* 614 N.E.2d 610, 612 (Ind. App. 1993); *Jackson v. Mercy Hospital Center,* 864 P.2d 839 (Okla. 1993) (the Oklahoma statute "abrogates the common law rescue doctrine ..." *Id.* at 843); *Hirpa v. IHC Hospitals,* 948 P.2d 785, 789 (Utah 1997); and *Street v. Superior Court,* 224 Cal App 3d 1397, 1402, 274 Cal Rptr 595 (Cal. App. 1990). Section 895.48(1) is no different. It grants limited immunity to the Good Samaritan for a breach of the Common Law duty of reasonable care. As a consequence, §895.48(1) operates in clear derogation of the Common Law.

B. Wis. Stats. §895.48(1) should be Narrowly Construed Both Because it is in Derogation of the Common Law and Because it is a Statute Designed to Afford Immunity to tortfeasors.

1. Wis. Stats. §895.48(1) should be Narrowly Construed because it is in Clear Derogation of the Common Law Duty of Reasonable Care.

Statutes are not to be extended so as to impose any duty beyond that imposed by Common Law unless the statute clearly and beyond any reasonable doubt expresses its purpose by language that is clear, unambiguous and peremp-

[5] For example, §895.48(1) applies to lay persons, but not to medical personnel, whereas statutes in other jurisdictions often apply to medical personnel. *See, e.g.,* Veilleux, *Construction and Application of Good Samaritan Statutes,* 68 ALR 4th 294.

tory. *Grube v. Moths*, 56 Wis. 2d 424, 437, 202 N.W.2d 261 (1972). Further, a statute in derogation of the common law "must be strictly construed *so as to have minimal effect on the common law rule* [Emphasis supplied]." *NBZ, Inc. v. Pilarski,* 185 Wis. 2d 827, 836, 520 N.W.2d 93 (Wis. App. 1994); *Waukesha County v. Johnson,* 107 Wis. 2d 155, 162, 320 N.W.2d 1 (Ct. App. 1982).

As the Supreme Court of Connecticut observed last year in *Chadha v. Charlotte Hungerford Hospital,* 865 A.2d 1163 (Conn. 2005): "... [W]hen a statute is in derogation of common law ... it should receive a strict construction and is not to be extended, modified, repealed or enlarged in its scope *by the mechanics of [statutory] construction...* [Emphasis supplied]" *Id.* at 1172. This Court agreed when it stated in *Fuchsgruber v. Custom Accessories,* 2001 WI 81, 244 Wis. 2d 758, 628 N.W.2d 833 that "[t]o accomplish a change in the common law, the language of the statute must be clear, unambiguous, and peremptory." *Id.* at ¶25, 244 Wis. 2d at 773.

2. Wis. Stats. §895.48(1) should be Narrowly Construed because it is a Statute that Immunizes Individuals From Liability for Breach of the Common Law Duty of Reasonable Care.

In addition to being a statue in derogation of the Common Law, §895.48(1) is also, without question, an immunity statute. "Conceptually, the question of the applicability of a statutory immunity does not even arise until it is determined that a defendant ... owes a duty of care to the plaintiff and ... would be liable in the absence of such immunity." *Bragg v. Valdez,* 111 Cal App 4th 421, 430, 3 Cal Rptr 3d 804 (Cal. Ct. App. 2003). Beyond that, "[i]t is an estab-

lished principle that legislative grants of rights, powers, privileges, immunities or benefits should be construed strictly against claims of the grantee." 3 SUTHERLAND ON STATUTORY CONSTRUCTION §63.02, pp. 229-230 (Clark Boardman Callaghan 1992).

All statutes that grant immunities not available to the general public should be strictly construed against any alleged grantee of immunity.[6] *Lambert v. State,* 912 So. 2d 426 (La. Ct. App. 2005) ("It is an established principle that legislative grants of ... rights, powers, privileges, immunities or benefits as against the general public ... should be construed strictly against the claim of the grantee." *Id.* at 432.). *See also Gundy v. Ozier,* 409 So.2d 764, 766 (Ala. 1981).

This Court has stated that "the trend in the Common Law has been to expand the areas of tort liability [and] to decrease tort immunity;" thus, statutes that seek to reverse this trend are in derogation of the Common Law. *LePoidevin v. Wilson,* 111 Wis. 2d 116, 129, 330 N.W.2d 555 (1983). In fact, many cases have recognized that there is a close relationship between strictly construing statutes that are in derogation of the Common Law and strictly construing statutes that provide an immunity. As the Court reasoned in *De Tarquino v. City of Jersey City,* 800 A.2d 255 (N.J. App. 2002):

> All of the statutes providing qualified immunity for negligence in the rendering of emergency medical services are in derogation of common law negligence

[6]It has also been said that "...a defendant relying upon an immunity bears the burden of proving he or she fits within the scope of the immunity." *Rehn v. Fischley,* 557 N.W.2d 328, 333 (Minn. 1997) *Cf. Schisler v. Merchants Trust Co.,* 94 N.E.2d 665 (Ind. 1950): "One who claims a ... privilege in derogation of the common rights ... must prove his title thereto ... clearly and definitely..., and cannot enlarge it by equivocal or doubtful provisions or probable inferences." *Id.* at 669.

> principles. ... Where a statute alters the common law, the most circumscribed reading of it that achieves its purpose is the one that should be adopted. Application of this principle to statutes that confer immunity for negligence in rendering emergency medical services furthers this State's 'tradition of giving narrow range to statutes granting immunity from tort liability because they leave 'unredressed injury and loss resulting from wrongful conduct.'

Id. at 258.

According to the New Jersey Supreme Court in *Velázquez v. Jiminez,* 798 A.2d 51 (N.J. 2002), a narrow interpretation of a Good Samaritan statute "does the least violence to our citizens' common-law right to institute tort actions against those whose negligence injures them. It thus conforms to our rules regarding the interpretation of statutes in derogation of the common law and statutes granting immunity." *Id.* at 63. The very concept of "immunity ... tends to undermine the basic tenet of our legal system that individuals be held accountable for their wrongful conduct." *Mangold v. Analytic Services, Inc.,* 77 F.3d 1442, 1447 (4th Cir. 1996).

Other courts have reached similar conclusions. In *Harrison v. Middlesex Water Co.,* 403 A.2d 910 (N.J. 1979), a case cited with approval by this Court in *Wirth v. Ehly,* 93 Wis. 2d 433, 445, 287 N.W.2d 140 (1980), the New Jersey Supreme Court concluded that "Statutes ... granting immunity from tort liability should be given narrow range." *Id.* at 914-915. Wis. Stats. §895.48(1) is an immunity statute that operates in direct derogation of the Common Law rule that holds individuals seeking to render aid to others in an emergency liable for the breach of the duty of reasonable care. Because it is both in derogation of the Common Law and an immunity statute, the scope §895.48(1) must be interpreted

by this Court in the narrowest manner possible. The Court of Appeals did just that in its decision. That decision should be affirmed by this Court.

II. The Defendants were not Responding to an Emergency during the Six Hours the Plaintiff Slept at their Property.

Interpreting §895.48(1) in the narrowest manner possible, an emergency can exist only when there is an urgent medical circumstance of so pressing a character that some kind of action must be taken. *Breazeal v. Henry Mayo Memorial Hospital,* 234 Cal App 3d 1329, 1338, 286 Cal Rptr 207 (1991).

When considering Good Samaritan statutes, other courts have observed that an emergency "is an unforeseen combination of circumstances that calls for immediate action *without time for full deliberation* [Emphasis supplied]." *Rivera v. Arana,* 749 N.E.2d 434, 441 (Ill. App. 2001). In *Buck v. Greyhound Lines, Inc.,* 783 P.2d 437 (Nev. 1989) the Court observed:

> [T]he critical ingredients of an emergency situation include: suddenness, ... and lack of time for a measured evaluation of alternative courses of action, their respective efficacy and priority. ... In insulating ... 'Good Samaritans' from liability for damages or injuries resulting from their ... negligence, the statute recognizes that in emergency situations there are factors operating that militate against calm, orderly reasoning that persons of ordinary care and intelligence would normally exercise under emergency-free circumstances.

Id. at 440-441.

Guidance with regard to what constitutes an "emergency" can also be found in the Wisconsin cases interpreting the application of the "emergency doctrine" in tort actions. The law in Wisconsin requires that one who would claim benefit of an emergency Jury Instruction must "be free from negligence which contributed to the emergency" and must also face a circumstance with a "time

element in which action is required [which is] short enough to preclude deliberate and intelligent choice of action." *Zillmer v. Miglautsch,* 35 Wis. 2d 691, 702, 151 N.W.2d 741 (1967). It is very difficult to understand how conduct over a six hour period, during which the defendants did nothing more than wake Mueller every hour to see how she was doing, could ever constitute an "emergency" response under a narrow interpretation of §895.48(1).

III. By Reference to the Doctrine of *in pari materia,* the words "Scene of any Emergency or Accident" ought to be given a very Narrow Interpretation.

The Defendants assert that "scene of any accident or emergency" is to have a broad meaning, and point out that the Legislature deleted a prior definition of "scene of an emergency" found in a predecessor to §895.48(1). *See* Petitioner's Brief-in-Chief, pp. 20-22. The defendants then contend that §895.48(1) is not ambiguous.

Statutes, however, may be rendered ambiguous by their interaction with other statutes. *McDonough v. Dept. of Workforce Development,* 227 Wis. 2d 271, 278, 595 N.W.2d 686 (1999). The defendants concede that the purpose of §895.48(1) is to encourage people to render emergency care to those who are in urgent need of care. This is also the purpose of Wis. Stats. §346.67, which provides in pertinent part that an operator of a vehicle who is involved in an accident "shall render to any person injured in such accident reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such person to a physician, surgeon or hospital for medical or surgical treatment if it is appar-

ent that such treatment is necessary." §346.67(1)(c). In effect, §895.48(1) and §346.67 deal with the same subject or have a similar purpose.

When two statutes deal with the same subject matter or have the same common purpose a court is at liberty to apply the doctrine of *in pari materia*. *Georgina G. v. Terry M.,* 184 Wis.2d 492, 512 n. 13, 516 N.W.2d 678 (1994). "The statutory construction doctrine of *in pari materia* requires a court to read, apply and construe statutes relating to the same subject matter together. It is our duty to construe statutes on the same subject matter in a manner that harmonizes them in order to give each full force and effect." *Jeremiah C.,* 2003 WI App 40, ¶ 17, 260 Wis. 2d 359, 367-368, 659 N.W.2d 193.

Comparing §895.48(1) and §346.67 clearly sheds light on what the Legislature intended when it used the language "scene of any emergency or accident" in §895.48(1). To avoid being charged with leaving "the scene of an accident" under §346.67 an operator must stay in the immediate vicinity of an accident. *Cf. State v. Swatek,* 178 Wis. 2d 1, 9, 502 N.W.2d 909 (Ct. App. 1993). One could not perform the statutorily required duties under §346.67, including rendering reasonable assistance to an accident victim, if one were more remote than the immediate vicinity of an accident. *State v. Lloyd,* 104 Wis. 2d 49, 55-56, 310 N.W.2d 617 (Ct. App. 1981).

Therefore, the Legislature's use of the term "scene of any emergency or accident" in §895.48(1) should be read in a similar fashion to §346.67 as apply-

ing narrowly in time and place to the immediate vicinity of an emergency or accident.

Conclusion

For the foregoing reasons, WATL respectfully requests that this Court affirm the Court of Appeals decision in this case.

Dated at Milwaukee, Wisconsin this 12th day of January, 2006.

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§ 809.19(8) CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that the foregoing Brief conforms to the rules contained in § 809.19(8) (b) and (c), Wis. Stats., for a Brief produced using the following font: Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this Brief is 2997 words.

Dated this 12th day of January, 2006.

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STATE OF WISCONSIN
SUPREME COURT

LINA M. MUELLER,

Plaintiff-Appellant,

v.

McMILLAN WARNER INSURANCE COMPANY,

Defendant-Respondent,

Appeal #2005AP121

MERLIN A. SWITLICK and STEPHANI SWITLICK,

Circuit Court Case No. 04-CV-91

Defendants-Respondents-Petitioners,

APOLLO SWITLICK and SECURITY HEALTH PLAN OF WISCONSIN, INC.,

Defendants,

and

METROPOLITAN PROPERTY and CASUALTY INSURANCE COMPANY,

Intervenor-Defendant.

REPLY OF DEFENDANTS-RESPONDENTS-PETITIONERS, STEPHANI SWITLICK AND MERLIN SWITLICK, TO AMICUS CURIAE BRIEF OF WISCONSIN ACADEMY OF TRIAL LAWYERS

APPEAL FROM THE DECISION OF THE COURT OF APPEALS, DISTRICT III, FILED AUGUST 2, 2005

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. §895.48(1), STATS. MUST BE INTERPRETED TO ACHIEVE ITS INTENDED PURPOSE. 1

II. THE WISCONSIN GOOD SAMARITAN LAW SHOULD NOT BE INTERPRETED BASED ON DECISIONS FROM FOREIGN JURISDICTIONS THAT INTERPRET DISSIMILAR GOOD SAMARITAN STATUTES. 6

CONCLUSION 8

CERTIFICATION 11

TABLE OF AUTHORITIES

Cases

DeTarquino v. City of Jersey City,
808 A. 2d 255 (N.J. App. 2002) 2

Breazeal v. Henry Mayo New Hall Memorial Hospital,
234 Cal. App. 3d 1329 (1991) 6,7

Mueller v. McMillan Warner Ins. Co.,
2005 WI App. 210 5,7

Wisconsin Statutes:

Wis. Stat.§346.67 4,5,6,9

Wis. Stat.§895.48(1) 1,2,3,4,5,6,8,9

INTRODUCTION

This brief is submitted on behalf of the defendants-respondents-petitioners, Stephani and Merlin Switlick (hereinafter "Switlicks") as a reply to the Amicus Curiae Brief of Wisconsin Academy of Trial Lawyers (hereinafter "WATL").

I. §895.48(1), STATS. MUST BE INTERPRETED TO ACHIEVE ITS INTENDED PURPOSE.

The vast majority of WATL's brief addresses whether §895.48(1), Stats. operates in derogation of the common law and therefore should be narrowly interpreted. Switlicks do not generally disagree that a narrow interpretation of the statute's language is appropriate. Switlicks, however, disagree with WATL's proposed method of interpretation as well as the ultimate interpretation it asserts.

Even though a statute is to be narrowly interpreted, the interpretation must still achieve the statute's purpose. WATL acknowledges, and in fact emphasizes this

point, when it cites to the case of ***De Tarquino v. City of Jersey City***, 808 A. 2d 255 (N.J. App. 2002) that provides in pertinent part that, "where a statute alters the common law, the most circumscribed reading of it ***that achieves its purpose*** is the one that should be adopted." Id. at 258 (emphasis added).

The problem with the method of interpretation attempted by WATL is that it never establishes a purpose for the statute. Without an established purpose, it is difficult to propose an interpretation that achieves that purpose.

At only one point does WATL even reference an apparent purpose for §895.48(1), Stats. At page 9 of its brief, WATL states, "The defendants concede that the purpose of §895.48(1) is to encourage people to render emergency care to those who are in urgent need of care." By suggesting that this represents "defendant's concession," it is fair to assume that this constitutes WATL's intended purpose for the statute.

After recommending that the purpose of the statute is to encourage people to render care to those in need of

care, WATL devotes the remainder of its brief contending that §895.48(1) should apply only to care provided at the immediate vicinity of the accident or injury-causing event. WATL's proposed interpretation does not fully encompass the intended purpose of the statute as it encourages emergency care for only some persons in need of care, that being, persons who still happen to be at the immediate scene of the accident or injury-causing event.

The statute should be interpreted to apply to circumstances in which a lay person Samaritan may encounter a person in need of care. These encounters may occur at locations distant and remote from the immediate scene of the accident or injury-causing event.

WATL's proposed interpretation is inconsistent with the trial court's and Court of Appeals' concurrence on the issue of "scene of an emergency." Both the trial court and Court of Appeals concluded that the scene of an emergency existed when the Switlicks encountered Mueller following the

ATV accident. Neither the trial court nor the Court of Appeals was concerned that the Switlicks encountered Mueller at a location remote or distant from the scene of the ATV accident. Neither court was concerned because their interpretation achieved what they identified as the intended purpose of the statute.

The trial court stated, "To meet the statutory purpose, 'the scene of the emergency,' must be deemed to follow the person in peril and in need of emergency care." (R-36, p. 6) The trial court's interpretation accomplishes the purpose of the Good Samaritan statute by correlating "scene of an emergency" with the presence of the person in need of care rather than with the particular location of the injury causing event.

The Court of Appeals stated that:

> "Read together, the definitions of 'scene,' 'emergency,' and 'accident' suggest a focus on the victim's state or condition rather than on the character of the action that produced that state or the particular place in which that state first manifested

> itself. Such a reading is consistent with the broad purpose of the Good Samaritan laws: to encourage all of us to respond to human beings who need immediate medical help when and where we encounter them." (Cite ***Mueller*** case, Footnote 12)

Like the trial court, the Court of Appeals achieves the purpose of the statute by focusing the application of the statute on the injured person in need of care rather than on the location of the injury-causing event.

If the WATL interpretation is adopted, the lay person Samaritan, upon encountering an injured person in need of emergency care, must first convince themselves that the temporal and spatial restrictions of the immunity are not exceeded for fear that they may expose themselves to liability. Ascertaining these restrictions may in many cases require information unavailable to the lay person Samaritan. The practical effect is that the provision of care is discouraged.

Finally, WATL's reliance on §346.67 as a basis upon which to propose a restricted application for §895.48(1) ignores the fact that §346.67 expressly applies to "the scene of

the accident" whereas §895.48(1) expressly applies to "the scene of an emergency or accident." Interpreting §895.48(1) consistent with §346.67 renders the word "emergency" in §895.48(1) superfluous.

II. THE WISCONSIN GOOD SAMARITAN LAW SHOULD NOT BE INTERPRETED BASED ON DECISIONS FROM FOREIGN JURISDICTIONS THAT INTERPRET DISSIMILAR GOOD SAMARITAN STATUTES.

WATL proposes that §895.48(1), Stats. be interpreted such that an emergency (presumably the "scene of an emergency or accident") can exist only where there is an urgent medical circumstance of so pressing a character that some kind of action must be taken. (WATL Brief, p. 8) This proposed interpretation appears to be borrowed from a California Court of Appeals case interpreting California's Good Samaritan Statute. (See ***Breazeal v. Henry Mayo New Hall Memorial Hospital***, 234 Cal. App. 3d 1329, 1332 (1991). WATL does not set forth the California Good Samaritan

Statute, to allow for a comparison to the Wisconsin statute.

The Good Samaritan Statute at issue in ***Breazeal*** applies to physicians who render emergency care. ***Breazeal v. Henry Mayo New Hall Memorial Hospital***, 234 Cal. App. 3d 1329, 1332 (1991). The California statute can even apply to care provided in the emergency room of a hospital. Id. at 1332, Footnote 2.

There are obvious differences between the Wisconsin and California statutes that reflect different purposes underlying the statutes. Given the different purposes, different interpretations will and should apply.

The Wisconsin Court of Appeals made reference to the difficulty presented in relying on case law that interprets Good Samaritan Statutes from other jurisdictions when it noted that in order to rely on those cases as permissive precedent, it would have to disregard differences among Good Samaritan laws. (See ***Mueller v. McMillan Warner Ins. Co.***, 2005 WI App. 210 at ¶34). The difficulty lies in the differences that

exist in the wording, purpose and application of Good Samaritan Statutes. There is no uniform Good Samaritan law.

The obvious problem with relying on case law from other jurisdictions highlights the importance of establishing an intended purpose for the Wisconsin Good Samaritan Statute before engaging in an effort to interpret the statute. The interpretation must then achieve the purpose of Wisconsin's statute, not the purpose of California's Good Samaritan Statute.

As indicated above, the purpose of the statute is to encourage people to render emergency care to those who are in need of care. The statute accomplishes its purpose by removing the fear of civil liability if the aid rendered later turns out to be improper or there is an omission due to an improper diagnosis as to the type of care required.

CONCLUSION

WATL's proposed interpretation of §895.48(1), Stats. fails to achieve the intended purpose of the statute.

WATL's reliance on foreign jurisdiction authority is particularly inappropriate given the obvious differences in the applicable Good Samaritan statutes. Finally, WATL's reliance on §346.67, Wis. Stats. as a guide by which to interpret §895.48(1), Stats. is not persuasive given the different wording and application of the statutes.

The Supreme Court should interpret the "scene of an emergency or accident" as did the trial court and Court of Appeals, both of which advanced well-reasoned decisions regarding why the "scene of an emergency or accident" existed when the plaintiff encountered the Switlicks following the ATV accident.

The Supreme Court should allow §895.48(1), Stats. to operate as intended by concluding that the alleged negligent acts and omissions of the Switlicks, as alleged at ¶11-15 of plaintiff's Amended Complaint are entitled to immunity.

Dated this 26th day of January, 2006.

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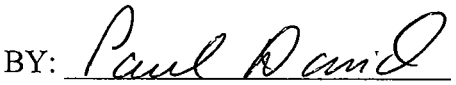
BY: 
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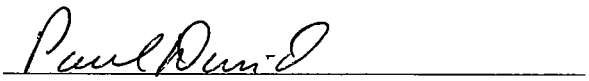
CERTIFICATION

I certify that this brief meets the form and length requirements of the Order of the Supreme Court allowing for a reply to the Amicus Curiae Brief of the Wisconsin Academy of Trial Lawyers.

☒ Desk Top Publishing or Other Means (proportional serif font, min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 point and max. of 60 char. per line). The text is 13 point type and the length of the brief is 1,551 words. The brief does not exceed 10 pages.

Dated this 26th day of January, 2006.

Signed,



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