05AP2796

SUPREME COURT
STATE OF WISCONSIN

Appeal No. 2005-AP-002796

MICHELLE RICHARDS,

Plaintiff-Respondent-Petitioner,

-vs-

BADGER MUTUAL INSURANCE COMPANY

Defendant-Third-Party Plaintiff-Appellant,

DAVID SCHRIMPF,

Defendant-Third-Party Plaintiff.

-vs-

TOMAKIA PRATCHET,

Third-Party Defendant.

Appeal from the Circuit Court for Milwaukee County,
The Honorable Patricia D. McMahon, Presiding
Circuit Court Case No. 04-CV-392

PLAINTIFF-RESPONDENT-PETITIONER'S BRIEF AND APPENDIX

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ISSUE PRESENTED FOR REVIEW

Does Wis. Stat. § 895.045(2)[1] impose joint and several liability upon persons engaged in a common scheme or plan to procure alcohol for an underage drinker who becomes intoxicated and, as a result causes the death of an innocent third party by the intoxicated use of a motor vehicle?

Answered by the trial court: Yes. The trial court held that the common scheme or plan to illegally procure the alcohol resulted in the wrongful death. (A38-39.)

Answered by the court of appeals: No. The court of appeals reversed the trial court, with Judge Fine dissenting. The Majority held that that Wis. Stat. § 895.045(2) requires that the damages be the direct and particular result of the common scheme of plan, rather than merely a result of the common scheme or plan. (A2-3) 2006 WI App 257 ¶2.

STATEMENT OF THE CASE

Robert Zimmerlee, a 19-year-old intoxicated driver, ran a stop sign and collided with a vehicle driven by Christopher Richards. (A30.) Mr. Richards was fatally injured in the collision. (A30.) He was survived by his spouse, Michelle Richards, who made a claim against Zimmerlee. (A30.)

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

The claim against Zimmerlee was settled pursuant to a *Pierringer* release.[2] (A34,40.)

Richards then sued David Schrimpf and his insurer, Badger Mutual, alleging that Schrimpf helped to illegally procure beer for Zimmerlee, and that Zimmerlee's consumption of the beer resulted in his drunk driving and Mr. Richards' wrongful death. The parties stipulated to the facts agreeing, among other things, that Zimmerlee's consumption of the beer was a substantial factor in causing the collision that killed Richards (who was concededly free of any causal negligence). (A33.) It was also stipulated that Schrimpf was causally negligent in procuring and furnishing the beer to Zimmerlee. (A33-34.)

Based on these stipulated facts, the trial court found that Schrimpf, together with the third-party defendant, Tomakia Pratchet, engaged in a common scheme or plan to unlawfully procure the beer for Zimmerlee.[3] (A38.) The trial court went on to hold that Schrimpf and Zimmerlee were jointly and severally liable under Wis. Stat. § 895.045(2) for all resulting damages, including the damages attributable to Pratchet. (A38-39.) The

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[2] *Pierringer v. Hoger*, 21 Wis. 2d 182, 124 N.W.2d 106 (1963). Therefore, Zimmerlee is not a party to this appeal.

[3] Pratchet was joined in the action as a third party defendant by Schrimpf.

statute provides that "if 2 or more parties act in accordance with a common scheme or plan, those parties are **jointly and severally liable for all damages resulting from that action**, except as provided in s. 895.85(5)."[4] (Emphasis added.)

STATEMENT OF FACTS

Schrimpf and Zimmerlee decided to "get some beer." (A31.) They were both underage and unable to legally buy beer, but Schrimpf had a "plan for getting it." (A31.) Schrimpf, who worked at a restaurant, said that he would ask an older co-worker, Pratchet, to buy beer for them. (A31.) Zimmerlee drove Schrimpf to the restaurant where he contacted Pratchet, who then agreed to buy the beer. (A32.) Schrimpf also spoke with another co-worker, Jennifer Spencer, who invited Schrimpf and Zimmerlee to a party at her apartment later that evening. (A32.)

Zimmerlee drove Pratchet and Schrimpf to a nearby grocery store where, with money furnished by Zimmerlee, Pratchet bought an 18-pack of beer. (A32.) The three then split up and Schrimpf and Zimmerlee agreed to get back together later that evening and take the beer to the Spencer party. (A-32.)

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[4] Section 895.85(5) relates to punitive damages and is not relevant in this case.

Zimmerlee and Schrimpf drove to Spencer's apartment arriving about 1:00 a.m. (A33.) While at the party, Zimmerlee drank "maybe half" of the 18 beers, and Schrimpf drank some as well. (A-33.) They left together about 7:30 a.m. and Zimmerlee drove less than a block before colliding with Mr. Richards' vehicle. (A-33.)

ARGUMENT

I. Standard of Review.

Statutory interpretation and the application of a statute to a given set of facts are questions of law which this court reviews independently. *Marder v. Board of Regents of University of Wisconsin System,* 2005 WI 159, ¶19, 286 Wis. 2d 252, 706 N.W.2d 110, 117. The standard of review is *de novo. Hutson v. State of Wis. Personnel Comm'n.*, 2003 WI 97, ¶31, 263 Wis. 2d 612, 665 N.W.2d 212.

II. Because Wis. Stat. § 895.045(2) is Unambiguous, the Court May Not Look Beyond its Plain Language.

Both the trial court and Judge Fine, in his dissent, concluded that Wis. Stat. § 895.045(2) is plain and unambiguous in stating that if "2 or more parties act in accordance with a common scheme of plan, those parties are jointly and severally liable for all damages resulting from that action." (A-25.) *Richards v. Badger Mutual*, 2006 WI App 207 at ¶32. Indeed, throughout

these proceedings, Schrimpf has never argued to the contrary. The court of appeals did not expressly find the statute to be ambiguous.

The "plain meaning rule" is one of the hallmarks of statutory interpretation in Wisconsin.

> Statutory interpretation begins with the language of the statute. If the words of the statute have a plain meaning, we ordinarily stop our inquiry and apply the words chosen by the legislature. *State ex rel. Kalal v. Circuit Court for Dane County,* 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (citing *Seider v. O'Connell,* 2000 WI 76, ¶ 43, 236 Wis. 2d 211, 612 N.W.2d 659).

Pool v. City of Sheboygan, 2007 WI 38, ¶10. Where, as here, the language of the statue is plain and clearly understood, that is the meaning that must be applied. "Only when a statute is ambiguous do courts apply rules of statutory construction or look to extrinsic evidence of the legislature's intent." *Wisconsin Dept. of Revenue v. River City Refuse Removal, Inc.*, 2007 WI 27 ¶27.

There is no dispute that Zimmerlee, Schrimpf, and Pratchet acted in accordance with a common scheme or plan to buy beer for Zimmerlee who could not buy it legally for himself. (A31-32.) And, as a result of drinking the beer bought for him pursuant to his and Schrimpf's joint scheme and plan, Zimmerlee killed Mr. Richards by the intoxicated use of his vehicle. (A33.)

As Judge Fine stated in his dissent: "[Mr.] Richards would not have been killed by Zimmerlee if Zimmerlee had not been drunk as a result of drinking alcohol brought for him by Pratchet." *Richards*, ¶34. Under the plain and unambiguous language of Wis. Stat. § 895.045(2), this should have ended the court's analysis. *Id.*

Instead, the court's majority resorted to extrinsic sources – including the phrase "concerted action" in the statute's heading and three cases that discuss variants of "concerted action" – without adopting any one of them. Titles of statutes, however, are not part of the statutes. Wis. Stat. § 990.001(6). While they may be resorted to in order to resolve a doubt as to statutory meaning, the courts will not resort to them in order to create a doubt where none would otherwise exist. *Brennan v. Employment Relations Com'n of State*, 112 Wis. 2d 38, 41, 331 N.W.2d 667, 669 (Wis.App. 1983) *State v. Dahlk,* 111 Wis. 2d 287, 293-294, 330 N.W.2d 611, 615-616 (Wis.App. 1983). Since there was no finding that the statute was ambiguous, resort to the title of the statute was inappropriate.

Moreover, the statute has no helpful legislative history and the majority's interpretation contravenes its plain language.

The parties have stipulated that the beer illegally procured for Zimmerlee caused the accident that killed Mr. Richards. (A33.) Yet, the court's majority holds that when the statute states "all damages resulting from that action," it does not include Zimmerlee's drunk driving. This is contrary to the law of causation in Wisconsin, which merely requires that the action be a substantial factor in producing the damages.

III. Causation in Wisconsin is Based on the Substantial Factor Test.

The majority opinion acknowledges that Zimmerlee, Schrimpf, and Pratchet had an agreement to illegally purchase alcohol for Zimmerlee, and there is no dispute that the alcohol was a substantial factor in causing Richards' death. *Richards,* 2006 WI App 207 at ¶4. (A4.)

Contrary to the stipulation of the parties and the conclusions reached by the trial court, the majority asserts that "[t]his agreement had nothing to do with Zimmerlee driving while intoxicated some twelve hours later." *Richards*, 2006 WI App 207 at ¶27; (A18). The majority thus concludes that the "resulting damages" referred in the statue must themselves be a part of the parties' common scheme or plan. In other words, for joint and several liability to attach under the statute, Schrimpf must have specifically intended at the time the plan was initiated that Zimmerlee would, at the very least,

endanger someone's safety by driving drunk. ¶27. (A18.) And, this conclusion is contrary to Wisconsin law on causation which is grounded on the "substantial factor" test. *Morden v. Continental A G*, 2000 WI 51, ¶ 60, 235 Wis. 2d 325, 611 N.W.2d 659.

Wis. JI-Civil – 1500 makes it clear that there can be more than one cause of the damages:

> In answering question(s), you must decide whether someone's negligence caused the (accident) ... (These) question(s) ... (do) not ask about "the cause" but rather "a cause" because an (accident) ... may have more than one cause.
>
> Someone's negligence caused the (accident) ... if it was a substantial factor in producing the (accident) ... An (accident) ... may be caused by one person's negligence or by the combined negligence of two or more people.

Under Wisconsin law, the cause of the collision in this case is not to be determined by the most immediate or direct factor – in this case, Zimmerlee's drunk driving.

> It is not necessarily the immediate, near or nearest cause, but the one that acts first, whether immediate to the injury or such injury be reached by setting other causes in motion, each in order being started naturally by the one that precedes it, and altogether constituting a complete chain or succession of events. . . . *Pfeifer v. Standard Gateway Theater*, 262 Wis. 229, 55 N.W.2d 29 (1952).

Sampson v. Laskin, 66 Wis. 2d 318, 325, 224 N.W.2d 594, 597-98. Respondents have not argued that Zimmerlee's drunk driving was too remote from the act causing Mr. Richards' wrongful death to be part of the "causal chain" discussed in *Pfeifer* and similar cases.

Toeller v. Mutual Serv. Casualty Ins. Co., 115 Wis. 2d 631, 340 N.W.2d 923 (Ct. App. 1983), is instructive on this point. There, an 11-year-old child was reprimanded for his conduct on a school bus and was told by the driver that he could not ride the bus the following day. While riding his bike to school the next day, the child was struck by a truck and severely injured. The court of appeals rejected the bus driver's argument that the injuries were too remote from his negligence in barring the child from the bus, explaining:

> The injury that resulted from Kuchenbach's conduct was precisely the one that would foreseeably occur in the way that it did and at both the time and place that it did. Kuchenbach's conduct foreseeably put Toeller in a zone of danger when Toeller attempted to get to school on his own. We are not persuaded that either the fourteen-hour time lapse or the distance between the negligent conduct and the injury was sufficiently remote to preclude liability on public policy grounds. We further conclude that the other intervening events do not make Kuchenbach's conduct too remote for liability to attach. The events . . . were wholly foreseeable and consonant with the negligent conduct of Kuchenbach. If harm were to ensue at all (as it did), the harm was exactly the sort which would be expected to arise.

Toeller, 115 Wis. 2d at 638-39.

Equally instructive is *Sorenson v. Jarvis*, 119 Wis. 2d 627, 646, 350 N.W.2d 108 (1984), which, like this case, dealt with an innocent third party injured by an intoxicated underage driver. This court held in *Sorenson* that the common law rule shielding the vendor of the intoxicant from liability should be abrogated, and that the vendor's causal negligence should be decided by application of traditional substantial-factor principles – which, of course, include the *Toeller* "causal chain" analysis.

After *Sorenson*, the legislature enacted Wis. Stat. § 125.035(4)(b), which makes the provider of an intoxicant to an underage person liable for injuries to third parties if the alcohol provided to the underage person was "a **substantial factor** in causing injury to a 3rd party." (Emphasis added.) In this case, the nexus between the common scheme or plan to illegally purchase the beer for underage Zimmerlee and the resulting drunk driving that killed Mr. Richards is just as strong as the link in *Sorensen*. Indeed, *Respondents have stipulated that the alcohol was a cause of Richards' wrongful death.* (A33, ¶20.)

IV. The So-Called "Concerted Action" Cases Predating the Enactment of Wis. Stat. § 895.045 Do Not Abrogate Wisconsin's Substantial Factor Test of Causation.

In 1995 the legislature enacted Wis. Stat. § 895.045. As indicated above, subsection (1) of the statute limits the common law rule of joint and several liability to parties who are found to be 51% or more casually negligent. Subsection (2), however, creates an exception in situations where two or more parties are acting in "accordance with a common scheme or plan." In that situation, the parties remain "jointly and severally liable for all damages resulting from that action." Contrary to the majority opinion of the court of appeals, there is no reason to conclude that the statute changed Wisconsin law on causation in any way.

It is difficult to understand how the title of Wis. Stat. § 893.045(2) – "concerted action" – and the older Wisconsin cases discussing variants of this concept have any impact on this case. The "concerted action" cases, *Ogle v. Avina,* 33 Wis. 2d 125, 146 N.W.2d 422 (1966); *Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 342 N.W.2d 37 (1984); and *Bruttig v. Olson*, 154 Wis. 2d 270, 453 N.W.2d 153 (Ct. App. 1989), are inapposite.

The facts of *Ogle* – which held two drag-racing drivers equally liable even though only one of them actually collided with a third party which

caused injuries – are especially inapt, since the innocent third party, James Ogle, whose wife was killed in the accident, settled the case and recovered his damages in full. The only dispute at trial was over the respective liability of the two defendants. The case was tried to the court for that purpose, and the court found the two participants in the race to be causally negligent – and that their negligence was so closely interrelated as to constitute a concurrent cause so that they should be required to contribute equally to the settlement. The drivers appealed, and this court affirmed holding that one driver who speeds to a common destination with another may be chargeable with the latter's negligence and be found equally at fault as a matter of law.

Ogle, however, never mentioned "concerted action," "common scheme or plan," or, most importantly, "joint and several" liability. *Ogle* did not in any way change the laws of causation or joint and several liability. The case simply does not stand for the proposition that joint and several liability cannot be imposed unless, as the court's majority has said, the scheme or plan is to accomplish the immediate result that injures the plaintiff – in this case, Zimmerlee's intoxicated use of a motor vehicle and the resulting collision.

Collins involved twelve defendants who marketed a prescription drug that allegedly caused cancer in the children of mothers who had taken the drug while pregnant. It was impossible to identify the specific seller of the product that injured the plaintiff. As a result, the court considered various theories for holding the entire group of sellers responsible including alternative liability, three forms of "concerted action," civil conspiracy, and the "market share" theory of liability which the court ultimately adopted.

The *Collins* court observed that there are three variants of concerted action: pure concerted action, enterprise liability, and, as alleged in *Collins*, civil conspiracy. *Collins* at 184, 342 N.W.2d at 46. The court further noted that it has not explicitly adopted the Restatement[5] rule of concerted action. *Id.* at 185, 342 N.W.2d at 46. But, "we have applied a variant of the theory in 'drag racing' cases **which imposed joint and several liability** on all defendants participating in a drag race even if only one of the defendants actually caused the plaintiff harm." *Id.* (Emphasis added.) *Citing Ogle, supra,* 33 Wis. 2d at 134-35.

[5] Restatement (Second) Of Torts, § 876 (2006).

Collins does not adopt the Restatement rule of concerted action, nor does it change the substantial factor test of causation. And it in no way limits joint and several liability to "drag racing" cases.

In *Bruttig*, the most recent of the "concerted action" cases relied on by the majority, three minors were engaged in a game of snowmobile tag. One of the participants was injured and sued his fellow participants. The jury found that the plaintiff was more negligent than any defendant. On appeal, the plaintiff raised the theory of concerted action for the first time and the court of appeals declined to consider the issue because of his failure to raise it in the trial court. 154 Wis. 2d at 281, 453 N.W.2d at 158.

The plain and unambiguous language of Wis. Stat. § 895.045(2), is that a party engaged in a common scheme or plan is jointly and severally liable for all of the resulting damages. None of the cases relied on by the majority is helpful in construing the unambiguous statute, and they give no support to the position that the statute is somehow limited to the "drag racing" kind of cases.

V. Wis. Stat. § 895.045(1) and (2) Provide for the Apportionment of Liability; They Do Not Create a New Theory of Liability.

As indicated in the above discussion, *Ogle, Collins, and Bruttig* all address instances where a party was attempting to use "concerted action" as a theory of recovery under different circumstances. But, Wis. Stat. § 895.045 concerns the apportionment of liability, and subsection (2) of the statute merely states that parties engaged in a common scheme or plan remain jointly and severally liable for all damages resulting from that action. This is made clear in *Danks v. Stock Bldg. Supply, Inc.*, 2007 WI App 8, 727 N.W.2d 846, where an injured worker sought to use the statute as a new theory of liability[6] – which would have allowed him to circumvent the law governing the liability of an independent contractor to an employee of a subcontractor. The court of appeals held that the statute did no such thing.

> Subsection (2) simply modifies subsection (1) of the statute to provide that all defendants who are legally responsible for causing a plaintiff's damages, and who acted in concert in so doing, are **jointly and severally liable for the plaintiff's damages, irrespective of whether a given defendant's apportioned causal negligence is less than 51%.** (Emphasis added.)

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[6] *Danks* was decided by a different panel of the court of appeals after *Richards* was released.

Danks, 2007 WI App 8, ¶35.

The statute does not adopt a new theory of tort liability, a method of holding a defendant liable; its plain purpose is to apportion damages. And it is equally plain that, in enacting the statute, the legislature neither altered nor modified the long-established substantial factor test of causation.

VI. The Comment to Wis. JI-Civil 1740 is Not Helpful in Interpreting the Plain Meaning of Wis. Stat. § 895.045(2).

As indicated above, the court's majority relied heavily on Wis. JI-Civil 1740. However, the *Richards* majority erroneously quotes the instruction – and the well-established principles that underlie it – when they declare the law to be that "[p]arties engage in concerted action when they pursue a common scheme or plan to accomplish ***the*** result that injures the plaintiff." *Richards,* 2006 WI App 207 at ¶25. (A-17.) As may be seen, the majority substitutes "***the*** result" for "***a*** result" (which actually appears in the instruction); and this plainly conflicts with the long-standing rule in Wisconsin that there can be more than one cause of damage or injury.[7] It undercuts the majority's holding that the common scheme or plan must be a direct cause of the injury.

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[7] *See*, for example, Wis. JI-Civil 1500, defining "cause."

The majority's reliance on the Restatement (Second) of Torts, § 876 (2006) which is set forth in the *Comment* to Wis. JI-Civil 1740, is also misplaced. The Restatement does not refer to the substantial factor test of causation and does not discuss joint and several liability. Moreover, the Restatement section has not been adopted in Wisconsin. *Collins*, 116 Wis. 2d 166, 185, 342 N.W.2d 37, 46.

CONCLUSION

The trial court in this case correctly decided that Schrimpf was a participant in a common scheme or plan under Wis. Stat. § 895.045(2), and that, as such, he was jointly and severally liable for all the resulting damages. The trial court gave effect to the plain meaning of the statute.

It is agreed by all that Pratchet, Schrimpf, and Zimmerlee acted in accordance with a common scheme or plan to illegally buy alcohol for Zimmerlee. As a result of consuming the alcohol, Zimmerlee caused the wrongful death of Mr. Richards by the intoxicated use of a motor vehicle. Under the unambiguous language of Wis. Stat. § 895.045(2), Schrimpf is jointly and severally liable to Richards. Therefore, Plaintiff-Respondent-Petitioner Michelle Richards requests that this court reverse the decision of the court of appeals.

Dated: April 12th, 2007.

Respectfully submitted,

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CERTIFICATION OF LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3,710 words.

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PLAINTIFF-RESPONDENT-PETITIONER'S APPENDIX

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COURT OF APPEALS
DECISION
DATED AND FILED

November 14, 2006

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. 2005AP2796 Cir. Ct. No. 2004CV392

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

MICHELLE RICHARDS,

PLAINTIFF-RESPONDENT,

V.

BADGER MUTUAL INSURANCE COMPANY,

DEFENDANT-THIRD-PARTY
PLAINTIFF-APPELLANT,

DAVID SCHRIMPF,

DEFENDANT-THIRD-PARTY PLAINTIFF,

V.

TOMAKIA PRATCHET,

THIRD-PARTY DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. MCMAHON, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 CURLEY, J. Badger Mutual Insurance Company (Badger Mutual) appeals from the portion of the judgment entered in favor of Michelle Richards holding Badger Mutual, as David Schrimpf's liability insurer, jointly and severally liable for the negligence of third-party defendant Tomakia Pratchet, under WIS. STAT. § 895.045(2) (2003-04).[1] This appeal arises out of a wrongful death lawsuit brought by Richards following the death of her husband, Christopher Richards, who died in a car accident when his car was hit by a car driven by nineteen-year-old Robert Zimmerlee, who was intoxicated and had obtained alcohol from Pratchet. Badger Mutual contends that the trial court erred in determining that "procuring" alcohol for an underage person, who later causes an injury while intoxicated, can constitute a "concerted action" that makes the provider jointly and severally liability for the injury under § 895.045(2).

¶2 We hold that to be liable for concerted action under WIS. STAT. § 895.045(2) the persons must have acted in accordance with a common scheme or plan to accomplish the result that caused the injury. As a result, we conclude that procuring alcohol for an underage drinker, who later causes injury when driving while intoxicated, cannot constitute a "concerted action" within the meaning of § 895.045(2) to make the person who procured the alcohol jointly and severally

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

liable for the injury, when the procurer did not agree to act in accordance with a common scheme or plan to drive while intoxicated. Therefore, because here the conduct that caused the injury was Zimmerlee driving while intoxicated, and because Pratchet did not engage in a "common scheme or plan" to drive while intoxicated, Zimmerlee, Schrimpf and Pratchet are not jointly and severally liable and Badger Mutual is not responsible for Pratchet's share. Accordingly, we reverse the portion of the judgment that found Badger Mutual jointly and severally liable for Pratchet's negligence.

I. BACKGROUND.

¶3 According to the stipulated facts,[2] early in the evening on January 25, 2003, Zimmerlee and Schrimpf, both nineteen years old at the time, decided that they wanted to consume alcohol that evening. Because they were both under the legal drinking age of twenty-one, they were unable to purchase alcohol themselves, so Schrimpf asked Pratchet, a co-worker of his at a restaurant and thirty-one years old at the time, to purchase beer for him and Zimmerlee. Pratchet agreed. After Pratchet finished her shift at the restaurant, Zimmerlee drove Pratchet to a grocery store where she purchased an eighteen-pack of beer. Zimmerlee supplied the money. During the entire trip to the grocery store, Schrimpf was a passenger in Zimmerlee's car. The beer remained in Zimmerlee's car until later that evening when Schrimpf and Zimmerlee went to a party sometime between midnight and 1:00 a.m. They were not joined by Pratchet. Zimmerlee admitted drinking "maybe half" of the beer. At approximately

[2] The parties have stipulated to all facts and resolved all factual and legal issues, except the one that is the subject of this appeal.

7:30 a.m., Zimmerlee and Schrimpf left the party and Zimmerlee drove away, with Schrimpf as a passenger.

¶4 Minutes after leaving the party, Zimmerlee ran a stop sign while traveling at a speed in excess of the posted speed limit. Zimmerlee's vehicle collided with an automobile driven by Christopher Richards. Richards was killed in the accident. The parties have stipulated that there was no negligence on the part of Richards. It is also undisputed that Zimmerlee was intoxicated at the time of the accident, and that the beer was a substantial factor in causing the accident and Richards's death. *See* ***Sorensen v. Jarvis***, 119 Wis. 2d 627, 646, 350 N.W.2d 108 (1984) (provider of alcohol is liable for his/her share of causal negligence in providing alcohol if alcohol was "a substantial factor in causing the accident or injuries as determined under the rules of comparative negligence"). The parties have further stipulated that both Schrimpf and Pratchet "procured" alcohol for Zimmerlee, within the meaning of WIS. STAT. § 125.035(4)(a),[3] and were thus negligent under WIS. STAT. § 125.07(1)(a)1.[4] Sections 125.035(4)(a) and 125.07(1)(a)1. specifically permit recovery from an individual who "procures" alcohol for an underage drinker. According to the stipulated facts, Zimmerlee's

[3] WISCONSIN STAT. § 125.035(4)(a) provides, as relevant: "'provider' means a person, including a licensee or permittee, who procures alcohol beverages for or sells, dispenses or gives away alcohol beverages to an underage person in violation of s. 125.07(1)(a)."

[4] WISCONSIN STAT. § 125.07 provides, as relevant:

> **Underage and intoxicated persons; presence on licensed premises; possession; penalties. (1)** ALCOHOL BEVERAGES; RESTRICTIONS RELATING TO UNDERAGE PERSONS. (a) *Restrictions.* 1. 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.

share of the causal negligence was 72%, Schrimpf's share was 14%, and Pratchet's share was 14%. The parties also stipulated that Michelle Richards's (Christopher Richards's widow) total damages were $1,785,714.29.

¶5 Michelle Richards initially pursued a claim against Zimmerlee but settled, resulting in a ***Pierringer***[5] release, and it was subsequently agreed that the release satisfied Zimmerlee's 72% of Richards's damages, or $1,285,714.29. Zimmerlee is not a party to this appeal.

¶6 Richards also pursued the instant claim against Schrimpf and his liability insurer, Badger Mutual. Schrimpf's responsibility for his own 14% of the causal negligence, or $250,000, is not in dispute and has already been paid by Badger Mutual. Richards never brought a claim against Pratchet, but nonetheless sought to recover the 14% attributed to Pratchet. Because Zimmerlee was released via a ***Pierringer*** release, Zimmerlee could not be held responsible for Pratchet's share, so Richards instead sought to hold Schrimpf responsible for Pratchet's share; that is, Richards sought to recover from Schrimpf Schrimpf's own 14%, as well as Pratchet's 14%, or $500,000 instead of $250,000. To that end, among Richards's claims against Schrimpf was an allegation that the activities of Zimmerlee, Schrimpf and Pratchet at the time the beer was purchased constituted a "concerted action" within the meaning of WIS. STAT. § 895.045(2),[6] and that the three can therefore be held jointly and severally liable for the injury. The parties disagreed on whether Zimmerlee, Schrimpf and Pratchet were subject to

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[5] ***Pierringer v. Hoger***, 21 Wis. 2d 182, 124 N.W.2d 106 (1963).

[6] WISCONSIN STAT. § 895.045(2) provides, as relevant: "if 2 or more parties act in accordance with a common scheme or plan, those parties are jointly and severally liable for all damages resulting from that action, except as provided in s. 895.043(5)."

§ 895.045(2). Richards asserted there was a factual issue of whether Zimmerlee, Schrimpf and Pratchet acted "in accordance with a common scheme or plan" as required to constitute a "concerted action" under § 895.045(2); Schrimpf and Badger Mutual disagreed.

¶7 The case was to be tried to a jury. On April 18, 2005, before the start of the trial, the trial court ruled that the facts of the case created an issue of fact about whether Zimmerlee, Schrimpf and Pratchet acted "in accordance with a common scheme or plan" and agreed to instruct the jury with respect to WIS. STAT. § 895.045(2).

¶8 The jury trial began on August 22, 2005, but was terminated because the parties agreed to commence settlement negotiations. The parties ultimately settled all factual and legal issues except one, by stipulating to a detailed set of facts and conclusions, the details of which are referenced above. The parties specifically agreed that the purpose of the stipulation was to settle the case without a trial, but preserve Badger Mutual's right to appeal the trial court's ruling on the legal issue of whether WIS. STAT. § 895.045(2) was properly applied. The parties also agreed to waive their right to a jury trial and to allow the trial judge to function as the trier of fact and to resolve, based on the stipulated facts, the only remaining factual question of whether Schrimpf, Zimmerlee and Pratchet "acted in accordance with a common scheme or plan" under § 895.045(2). The trial court concluded that Schrimpf, Zimmerlee and Pratchet "acted in accordance with a common scheme or plan in procuring beer on the date in question," and that "[a]s such, the three of them are jointly and severally liable under sec. 895.045(2)." On October 10, 2005, the trial court issued a stipulation and order setting forth the stipulated facts and the court's decision. Badger Mutual now appeals.

II. ANALYSIS.

¶9 Badger Mutual contends that the trial court erred in concluding that "procuring" alcohol for an underage drinker, who later causes injury when driving while intoxicated, creates an issue of fact as to whether the procurer and the driver acted in accordance with a "common scheme or plan" under WIS. STAT. § 895.045(2).

¶10 We begin by examining the relevant statute. Prior to 1995, joint and several liability was a common-law rule that permitted an injured plaintiff to recover his or her damages from any one of two or more persons whose joint negligent acts caused the plaintiff's injury. *See* ***Bielski v. Schulze***, 16 Wis. 2d 1, 114 N.W.2d 105 (1962) (adopting joint and several liability in Wisconsin); *see, e.g,* ***Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Constr. Corp.***, 96 Wis. 2d 314, 330-31, 291 N.W.2d 825 (1980). In 1995, the legislature modified the doctrine of joint and several liability by limiting joint and several liability to persons 51% or more causally negligent, 1995 Wis. Act 17, § 1; *see* ***Matthies v. Positive Safety Mfg. Co.***, 2001 WI 82, ¶¶8-14, 244 Wis. 2d 720, 628 N.W.2d 842. Today, this general rule is set forth in WIS. STAT. § 895.045(1), entitled "Comparative Negligence."[7]

[7] WISCONSIN STAT. § 895.045(1) provides, as relevant:

(continued)

¶11 However, in a limited circumstance set forth in WIS. STAT. § 895.045(2) and entitled "Concerted Action," the pre-1995 rule still applies. Section 895.045(2), the statute at issue in this appeal, provides: "Notwithstanding sub. (1), if 2 or more parties act in accordance with a common scheme or plan, those parties are jointly and severally liable for all damages resulting from that action, except as provided in s. 895.043(5)."

¶12 At the trial court, Richards, as noted, maintained that the act of Schrimpf and Pratchet "procuring" alcohol for Zimmerlee, who later caused injury when he drove while intoxicated, presented an issue of fact as to whether Zimmerlee, Schrimpf and Pratchet were liable for "concerted action"; that is, acted "in accordance with a common scheme or plan" under WIS. STAT. § 895.045(2) for the injury. The trial court, as mentioned, agreed. Richards further maintained that the facts showed that the three did act in "accordance with a common scheme or plan." The trial court again agreed, finding that the facts supported a finding that the three acted "in accordance with a common scheme or plan," making them jointly and severally liable for Richards's damages.

> **(1)** COMPARATIVE NEGLIGENCE. Contributory negligence does not bar recovery in an action by any person or the person's legal representative to recover damages for negligence resulting in death or in injury to person or property, if that negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributed to the person recovering. The negligence of the plaintiff shall be measured separately against the negligence of each person found to be causally negligent. The liability of each person found to be causally negligent whose percentage of causal negligence is less than 51% is limited to the percentage of the total causal negligence attributed to that person. A person found to be causally negligent whose percentage of causal negligence is 51% or more shall be jointly and severally liable for the damages allowed.

¶13 The issue before us is therefore whether the trial court properly concluded that "procuring" alcohol for a minor under WIS. STAT. §§ 125.035(4)(a) and 125.07(1)(a)1., when the minor later causes an injury when driving while intoxicated, can be applied to WIS. STAT. § 895.045(2), to create an issue of fact as to whether the providers of the alcohol and the minor who later caused the injury engaged in a "concerted action"; that is, acted "in accordance with a common plan or scheme." We are, in other words, asked to explain what is required for persons to have a "common scheme or plan" that amounts to "concerted action" liability under § 895.045(2). There is no case law interpreting § 895.045(2), making this an issue of first impression.[8] The application of a statute to an undisputed set of facts is a question of law, that this court reviews *de novo*. ***Nelson v. McLaughlin***, 211 Wis. 2d 487, 495, 565 N.W.2d 123 (1997).[9]

¶14 Badger Mutual contends that the trial court erred in concluding that this case presents a factual issue of whether WIS. STAT. § 895.045(2) applies, and maintains that, consistent with the pre-1995 common-law rule on concerted action liability, concerted action liability applies only in rare circumstances like drag

[8] We note that an independent search of the legislative history of WIS. STAT. § 895.045(2) has revealed very little information about the development of the statute. Indeed, the only discussion appears to have centered around a suggestion to use the word "persons" as opposed to "parties" to refer to the relevant individuals in both § 895.045(1) and (2). This discussion is of no relevance for purposes of our analysis however.

[9] The parties disagree on the proper standard of review. Badger Mutual contends that we should analyze this case *de novo*, asserting that the question involves only the interpretation of the statutory language and the application of the statute to the undisputed facts. Richards maintains that the issue is a question of fact to be reviewed under the clearly erroneous standard. We disagree with Richards. Although the parties agreed to allow the trial court to function as the fact finder and the trial court ultimately concluded that a "common scheme or plan" did exist between Zimmerlee, Schrimpf and Pratchet, the issue before us is the propriety of the trial court's initial legal conclusion that an issue of fact existed, that is, whether WIS. STAT. § 895.045(2) applies to this case. As such, this issue is a legal question that we review independently.

racing where all parties are guilty of simultaneous and equally culpable behavior, even if only one of them actually caused the harm. Badger Mutual emphasizes that, unlike this case where negligence percentages were assigned to each defendant, in situations that involve concerted action liability, the comparative fault of the various defendants becomes a moot point because all parties share equally in the responsibility. According to Badger Mutual, § 895.045(2) "simply recognizes a limited form of liability that existed even prior to the enactment of the new joint and several liability rules" and "does not create a new cause of action, establish a new species of liability or otherwise expand concerted action liability under Wisconsin law."

¶15 We begin by examining the pre-1995 Wisconsin case law, on which Badger Mutual relies. The first case in Wisconsin to discuss and name "concerted action" liability was ***Collins v. Eli Lilly Co.***, 116 Wis. 2d 166, 342 N.W.2d 37, *cert. denied*, 469 U.S. 826 (1984). The case involved an action against manufacturers of the drug diethylstilbestrol (DES) in which the plaintiff, whose mother had taken the drug during pregnancy, developed cancer, but was unable to identify which manufacturer had supplied the drug to her mother, so she sued seventeen drug manufacturers that could have been the supplier. ***Id.*** at 174-75. The supreme court considered various theories of liability, including "concerted action" liability and market-share liability, ***id.*** at 175-76, 182-90, ultimately adopting a variation of market-share liability and declining to apply the "concerted action" liability doctrine on grounds that the facts here did not support it, ***id.*** at 182-90, 198.

¶16 With respect to "concerted action" liability, the court noted:

> The concerted action theory of liability rests upon the principle that "those who, in pursuance of a common

> plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with him. Express agreement is not necessary, and all that is required is that there be a tacit understanding."

Id. at 184 (quoting W. Prosser, *Handbook on the Law of Torts*, sec. 46 at 292 (4th ed. 1971)). The court noted that in drag racing cases, Wisconsin courts have applied a variant of the theory, imposing joint and several liability on all participants even if only one of them actually caused the harm, stressing that "the plaintiff, under the concerted action theory of liability, must also be able to prove that there was an agreement or, at least, a tacit understanding among the defendants." ***Id.*** at 184-85. The court disagreed with the plaintiffs that failing to adequately test the DES or warn patients of its potential damages satisfied the agreement requirement, and concluded that "[a]lthough there was a substantial amount of a parallel action by the defendants in producing and marketing DES for use in pregnancy ... this d[id] not rise to the level of 'acting in concert.'" ***Id.***

¶17 The second case of relevance, the drag racing case referenced by ***Collins***, is ***Ogle v. Avina***, 33 Wis. 2d 125, 146 N.W.2d 422 (1966). In ***Ogle***, the court held two drivers who had engaged in drag racing equally liable even though only one driver actually caused a fatal collision. ***Id.*** at 135. Although the case does not use the term "concerted action," as recognized by ***Collins***, it clearly discusses the same concept as ***Collins***, stating:

> We think when there is an understanding to reach a common destination and in doing so illegal speed is used and the cars are driven so closely together as to be practically in tandem, or to constitute a unit, that we have a situation of mutual stimulation where the negligence of each participant is so related to the negligence of the other participants that the participants should each be chargeable with the causal negligence of the other as to speed and their percentage of causal negligence should be equal.

Ogle, 33 Wis. 2d at 135. ***Ogle*** is the first case in Wisconsin to apply the concept of concerted action liability, and to date, the only case to actually find concerted action liability.

¶18 The most recent case to consider concerted action liability in Wisconsin is ***Bruttig v. Olsen***, 154 Wis. 2d 270, 453 N.W.2d 153 (Ct. App. 1989). In ***Bruttig***, a minor was injured while he and two other minors were involved in a game of "snowmobile tag." ***Id.*** at 273. On appeal, the injured minor sought to, among other things, utilize the concerted action theory to hold his two young playmates equally liable after the jury appointed a greater percentage of causal negligence to him (42%) than to the other two participants (4% and 9%). ***Id.*** at 274, 279-80. The injured boy asserted that the game created a situation where the negligence of each was interrelated and, as such, the three boys acted in concert to commit a tortious act, and therefore each boy should be charged with the causal negligence of the other. ***Id.*** at 279-80.

¶19 Although the court ultimately declined to decide the merits of the issue on grounds that a "concerted action" theory had not been timely argued at the trial court, ***id.*** at 281, the court nonetheless offered a discussion about the theory. Citing ***Collins*** and ***Ogle***, the court noted that "Wisconsin has never explicitly adopted the concerted action theory except in a variant form to impose joint and several liability on all defendants participating in a drag race." ***Bruttig***, 154 Wis. 2d at 280-81. The court emphasized, however, that contrary to what the jury had already done at the trial court level, under concerted action liability "the jury would not be permitted to apportion damages." ***Id.*** at 280 (citation omitted). The court added: "We question the wisdom of applying the theory so as to impose equal liability on a plaintiff 'acting in concert' with defendants, as the necessary

effect of such application is to guarantee plaintiff recovery so long as he was negligent." ***Id.*** at 281.

¶20 As noted, ***Collins***, ***Ogle*** and ***Bruttig*** were all decided prior to the 1995 revision of the doctrine of joint and several liability. On that basis, Richards maintains that the use of the term "concerted action" in WIS. STAT. § 895.045(2) does not refer to a common law theory of liability that was merely recognized by § 895.045(2), as argued by Badger Mutual. Referencing ***Collins***, ***Ogle*** and ***Bruttig***, Richards emphasizes that "[t]he 'concerted action' type of claim still has not been explicitly adopted in Wisconsin[,]" and therefore insists that it would be absurd and "unreasonable to believe that the legislature intended to limit application of § 895.045(2) to a theory of liability not yet officially recognized in Wisconsin." Richards also submits that nothing in the statute limits its application to cases like drag racing where equal liability is established, and thus essentially argues that § 895.045(2) does create an entirely new cause of action. We disagree.

¶21 We are satisfied that WIS. STAT. § 895.045(2) is a codification of the common-law rule on concerted action liability discussed, but not explicitly adopted, in ***Collins***, ***Ogle*** and ***Bruttig***, and not a new cause of action. A clear indication that "concerted action" in § 895.045(2) is indeed the same concept as "concerted action" as discussed in ***Collins***, ***Ogle*** and ***Bruttig*** can be found in the recently released jury instruction for § 895.045(2), WIS JI—CIVIL 1740. This instruction was approved by the Wisconsin Civil Jury Instruction Committee at the end of 2005, and was thus not available to the trial court in April 2005 at the time

the court made its ruling to allow the § 895.045(2) question to be presented, or when the parties settled all other issues in October 2005.[10] The instruction reads:

> Question ___ asks whether (defendant) engaged in concerted action?
>
> Parties engage in concerted action when they pursue a common scheme or plan *to accomplish a result that injures the plaintiff.* Parties engaged in concerted action do not have to intend that plaintiff be injured.
>
> Parties engage in concerted action if they either:
>
> 1. actively take part in a common scheme or plan that injures the plaintiff; or
>
> 2. further the common scheme or plan by cooperation or request; or
>
> 3. give assistance or encouragement to any of the other participants; or
>
> 4. ratify and adopt the actions of other participants for their benefit.
>
> Action in concert requires that there be *agreement about the common scheme or plan to accomplish a result that injures the plaintiff.* The agreement need not be expressed in words but may be implied and understood to exist from the conduct itself.

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[10] At the time this case was pending before the trial court, a jury instruction for WIS. STAT. § 895.045(2) had not yet been approved. The Wisconsin Civil Jury Instruction Committee had released only a short comment which included the following language: "The Committee believes that the question of whether parties have acted in accordance with a common scheme or plan is a question of fact for the factfinder. It is not evident from the language of the new law that an improper motive of unlawful act is necessary for a common scheme or plan to exist." The parties referenced this comment at the April 18, 2004 hearing, at which the trial court ruled that a question of fact did exist with respect to § 895.045(2), but appeared to acknowledge that it was of little assistance in interpreting the statute.

WISCONSIN JI—CIVIL 1740 was approved by the Committee in 2005 and according to our independent inquiry, released to the public some time in early 2006. Neither party argues from or mentions WIS JI—CIVIL 1740 in their appellate briefs, and we therefore assume that they did not have access to it until the briefing in this case was completed in the spring of 2006.

WIS JI—CIVIL 1740 (emphasis added). Even more informative is the comment that accompanies WIS JI—CIVIL 1740. The comment to the instruction first notes that no reported cases have defined the meaning of "common scheme or plan," and then relies heavily on the discussion on concerted action in ***Collins*** and quotes from the portion of ***Collins*** that mentions ***Ogle*** as an example of concerted action. Indeed, the four elements listed in WIS JI—CIVIL 1740 appear to come directly from ***Collins***'s discussion about concerted action. ***Id.***, 116 Wis. 2d 185 ("'those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with him'") (citation omitted).

¶22 The comment to WIS JI—CIVIL 1740 next quotes the RESTATEMENT (SECOND) OF TORTS § 876 (2006),[11] entitled "Persons Acting in Concert" which provides:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
>
> (a) does a tortious act in concert with the other or pursuant to a common design with him, or
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
>
> (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

[11] This version of the restatement is an updated version and not the one from 1965 quoted by the jury instruction. The substance of the two versions are the same, the only difference being that the newer one quoted here has been subdivided into three sections using letters.

The comment to WIS JI—CIVIL 1740 also quotes the following language from the comment to section (a) of RESTATEMENT (SECOND) OF TORTS § 876 above:

> Parties are acting in concert when they act in accordance with an agreement to cooperate in a particular line of conduct or to accomplish a particular result. The agreement need not be expressed in words and may be implied and understood to exist from the conduct itself. Whenever two or more persons commit tortious acts in concert, each becomes subject to liability for the acts of the others, as well as for his own acts.

¶23 WISCONSIN JI—CIVIL 1740 and its comment are a powerful indication of how WIS. STAT. § 895.045(2) should be interpreted. The jury instruction clearly connects the pre-1995 case law on concerted action to § 895.045(2). The only possible conclusion that can be drawn from the committee's extensive reliance on ***Collins*** is that it was cited for no other reason than to show that the common law concerted action theory discussed in ***Collins***, ***Ogle*** and ***Bruttig*** is indeed the exact same theory as the one set forth in § 895.045(2). Thus, we disagree with Richards that this conclusion is absurd or unreasonable.

¶24 The committee's lengthy references to RESTATEMENT (SECOND) OF TORTS § 876 and its comment further support the conclusion that although, as noted in ***Collins***, the restatement has never been explicitly adopted in Wisconsin, the theory of liability set forth in WIS. STAT. § 895.045(2) is clearly the same as the one discussed in the restatement. In light of WIS JI—CIVIL 1740 and its comment, we conclude that § 895.045(2) is not a new theory of liability, and instead, a recognition of the principles discussed in ***Collins***, ***Ogle*** and ***Bruttig***, and explained by RESTATEMENT (SECOND) OF TORTS § 876.

¶25 Consistent with ***Collins***, ***Ogle*** and ***Bruttig***, we therefore hold that in order for concerted action liability to attach under WIS. STAT. § 895.045(2), the persons held liable must have acted in accordance with "a common scheme or plan to *accomplish the result that injures the plaintiff*," WIS JI—CIVIL 1740 (emphasis added), and there must have been an agreement—tacit or express—about that common scheme or plan, ***Collins***, 116 Wis. 2d at 184. The focus ought to be on the conduct of the persons alleged to have engaged in the "common scheme or plan" and the inquiry should concentrate on whether *that conduct caused the injury*. In other words, concerted action liability attaches when two or more persons commit a *tortious* act in concert. *See* RESTATEMENT (SECOND) OF TORTS § 876. Hence, even if an agreement exists, if that agreement does not directly relate to the tortious conduct that caused the injury, that agreement is insufficient to satisfy the agreement required for concerted action. *See* ***Collins***, 116 Wis. 2d at 184. The clearest, and to date only, example of a situation involving liability for concerted action is the drag racing scenario in ***Ogle*** where both drivers engaged in the tortious conduct but where only one of them ultimately caused the fatal crash. ***Id.***, 33 Wis. 2d at 135.

¶26 We stress that the liability in a situation involving concerted action is not merely joint and several, but *equal* among all of the negligent parties, making a determination of relative negligence unnecessary. *See* ***Collins***, 116 Wis. 2d at 184. Therefore, as the court noted in ***Bruttig***, in a case where the relative negligence of each defendant is assessed individually, a concerted action inquiry would be inherently inconsistent and may not be undertaken. *See* ***id.***, 154 Wis. 2d at 280-81. We observe that the scarcity of pre-1995 Wisconsin case law addressing concerted action liability, and the eleven years it has taken since the

enactment of WIS. STAT. § 895.04(2) for an appellate court to interpret the statute, in and of itself indicate that the principle is only rarely and judiciously invoked.

¶27 Applying these conclusions to the facts of this case, it becomes apparent that the trial court erred in ruling that WIS. STAT. § 895.045(2) could be applied to this case. Although it is undisputed that Schrimpf and Pratchet are liable as providers of alcohol under WIS. STAT. §§ 125.07(1)(a)1. and 125.035(4)(a), this fact does not give Richards a cause of action for concerted action under § 895.045(2). Zimmerlee, Schrimpf and Pratchet had an agreement to purchase alcohol. This agreement had nothing to do with Zimmerlee driving while intoxicated some twelve hours later. Because the act that caused the injury was Zimmerlee driving while intoxicated, and because Pratchet did not engage in a "common scheme or plan" to drive while intoxicated, Zimmerlee, Schrimpf and Pratchet cannot be subject to concerted action liability under § 895.045(2) for the injury that resulted from Zimmerlee driving while intoxicated. Stated differently, conceded liability for procuring alcohol for an underage drinker who later causes injury when he or she drives while intoxicated cannot constitute a "concerted action" under § 895.045(2), when the common plan to purchase alcohol is not also a "common scheme or plan" to engage in the conduct that caused the injury.

¶28 Moreover, consistent with ***Bruttig***, having stipulated that the relative negligence of Zimmerlee, Schrimpf and Pratchet would be assessed individually, it would be wholly inconsistent for Richards to be allowed to hold all of the defendants equally liable. Indeed, because a comparative negligence inquiry is required under WIS. STAT. §§ 125.07(1)(a)1. and 125.035(4)(a), *see* ***Sorensen***, 119 Wis. 2d at 646 (procurer of alcohol is liable for negligence in the proportion that procurer's negligence in providing alcohol is "a substantial factor in causing the accident or injuries as determined under the rules of comparative negligence"),

allowing concerted action liability to attach via negligence for procuring alcohol is inherently inconsistent.[12]

¶29 We are troubled that the Dissent is unwilling to accept the clear and unequivocal dictates of Wisconsin courts, and claims that WIS. STAT. § 895.045(2) applies to this case. In fact, the Dissent blatantly declares that our analysis has "overly complicated a simple matter by attempting to read the tea leaves of cases and concepts that are not on point." Dissent, ¶4. In so asserting, the Dissent makes a myopic and unconvincing attempt to explain why the cases we cite are allegedly "not on point," and does not even recognize that WIS JI—CIVIL 1740 is based on those exact cases, much less explain why the Wisconsin Civil Jury Instruction Committee would have relied on them in fashioning WIS JI—CIVIL 1740 if they are "not on point." Indeed, beyond accusing us of relying on cases that are "not on point," the Dissent does absolutely nothing to justify a conclusion that directly contradicts both established case law and the newly-adopted jury instruction.

[12] We note that joint and several liability under WIS. STAT. § 895.045(1) is not to be confused with joint and several liability under § 895.045(2). Unlike § 895.045(1), where joint and several liability attaches after shares of causal negligence are individually attributed to the various tortfeasors and one tortfeasor is found to be 51% or more liable, when multiple tortfeasors are engaged in concerted action and are jointly and severally liable under § 895.045(2), shares of causal negligence are never attributed because all tortfeasors are equally liable. Here, shares of causal negligence were individually appointed to Zimmerlee, Schrimpf, and Pratchet under the rules of comparative negligence because such an appointment was a requirement for a finding of negligence under WIS. STAT. §§ 125.035(4)(a) and 125.07(1)(a)1. For this reason, it is obvious that the negligence claim in this case was inherently inapplicable to § 895.045(2). We note, however, that under the facts of this case where Zimmerlee's share of the causal negligence was 72%, had Richards not entered into a ***Pierringer*** release with Zimmerlee, she could have sought to hold Zimmerlee jointly and severally liable under § 895.045(1) because Zimmerlee alone was more than 51% liable.

¶30 Regrettably, the Dissent invites confusion into the doctrine of joint and several liability in Wisconsin, and incorrectly implies that WIS. STAT. § 895.045(2) introduces a new cause of action by concluding that joint and several liability under § 895.045(2) can be applied to cases that involve procuring alcohol for an underage person under WIS. STAT. §§ 125.035(4)(a) and 125.07. The Dissent is particularly disconcerting because, in attacking the Majority, it misleads the public without any legal justification by implying that this court is not bound by precedent, and by dismissing unquestionably relevant case law as simply "not on point."

¶31 Accordingly, because we conclude that the trial court erred in ruling that a question of fact existed as to whether Zimmerlee, Schrimpf, and Pratchet acted according to a "common scheme or plan" under WIS. STAT. § 895.045(2), the trial court's factual conclusion holding Badger Mutual jointly and severally liable was also erroneous.[13] Consequently, we reverse the portion of the judgment that found Badger Mutual jointly and severally liable for Pratchet's negligence and remand the matter to the trial court for entry of judgment consistent with this opinion.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

Recommended for publication in the official reports.

[13] Richards makes a number of other arguments, claiming that the statute is unambiguous, and that the trial court's factual finding that Zimmerlee, Schrimpf and Pratchet acted in accordance with a common scheme or plan is not clearly erroneous. Our conclusion that the trial court incorrectly applied WIS. STAT. § 895.045(2) to this case renders these arguments irrelevant. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W 663 (1938) (unnecessary to address non-dispositive issues).

¶32 FINE, J. (*dissenting*). The statute here, WIS. STAT. § 895.045(2), is plain. As material, it reads: "[I]f 2 or more parties act in accordance with a common scheme or plan, those parties are jointly and severally liable for all damages resulting from that action." The statute has two parts:

> (1) two or more persons "act in accordance with a common scheme or plan," with
>
> (2) resulting damage to someone.

Those "2 or more parties" are then "jointly and severally liable for all damages *resulting* from that action." ***Ibid.*** (emphasis added).

¶33 No one disputes that Tomakia Pratchet, David Schrimpf, and Robert Zimmerlee acted in accordance with a common scheme or plan to buy alcohol for Zimmerlee, who could not lawfully buy it himself. Also, no one disputes, that as a result of Zimmerlee's drinking the alcohol bought for him by Pratchet, he killed Christopher Richards by ramming Richards's car.

¶34 Richards would not have been killed by Zimmerlee if Zimmerlee had not been drunk as a result of drinking the alcohol bought for him by Pratchet. Under the unambiguous language of WIS. STAT. § 895.045(2), set out above, that ends our analysis. *See* ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶44, 271 Wis. 2d 633, 662, 681 N.W.2d 110, 123–124 (unless there is a constitutional infirmity or a lack of clarity, we take and apply statutes as they are written).

¶35 In my view, the Majority has overly complicated a simple matter by attempting to read the tea leaves of cases and concepts that are not on point because they pre-date what the legislature did in 1995, and thus, in my view, are inapplicable. As ***Kalal*** reminds us, "[o]urs is 'a government of laws not men,' and 'it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated.'" ***Id.***, 2004 WI 58, ¶52, 271 Wis. 2d at 667, 681 N.W.2d at 126 (quoted source omitted). WISCONSIN STAT. § 895.045(2) is plain and applies here.

¶36 I respectfully dissent and would affirm.

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
BRANCH 18

MICHELLE RICHARDS,
Plaintiff,
-vs- Case No. 04CV000392
BADGER MUTUAL INSURANCE COMPANY
and DAVID SCHRIMPF,
Defendant and
Third-Party Plaintiff,
-vs-
JENNIFER SPENCER, TOMAKIA PRATCHETT,
Third-Party Defendants.

TRANSCRIPT OF PROCEEDINGS
Motion Hearing

April 18, 2005

PROCEEDINGS HELD BEFORE THE

HONORABLE PATRICIA D. McMAHON

CIRCUIT JUDGE, BRANCH 18, PRESIDING

Shelley C. Bertermann, RPR, RMR
Official Reporter

A P P E A R A N C E S:

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Milwaukee, Wisconsin 53226
Appearing for Defendant and Third-Party Plaintiffs

Attorney William Katt
Lieb & Katt
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Milwaukee, Wisconsin 53203
Appearing for Third-Party Defendants

cause injury to a third person.

THE COURT: Well, this motion involves the interpretation of 895.045(2); and the question is whether Schrimpf, Pratchett and Zimmerlee are subject to that statute which relates to parties who acted with a common scheme or plan.

The statute, I think, is plain and unambiguous. We can talk about the background; but if the statute is plain and unambiguous on its face, then its plain meaning should be given effect.

There is an argument that it's limited to drag racing. That may be the clearest example, but I don't think it precludes others.

And if the argument is two or more who act together to commit a tortious act, that certainly fits within drag racing; except in drag racing, the parties aren't intending to strike someone. They're intending to race, and it's their conduct that caused someone injury.

In this situation, we have two or more persons who have a common scheme, may have a common scheme or plan to purchase alcohol for an underage person who then causes damage; and the Legislature has said that is something that is to be -- that is conduct that there is responsibility for.

So I think in either situation, the drag racing or the buying the alcohol, no one intended that there be an accident; but the Legislature says that is what happens -- that is what can happen when this occurs; so I think it's not inappropriate to apply it because it's their behavior with respect to procuring the alcohol that is to be examined, and it's whether they've shared responsibility for obtaining the alcohol and providing it knowingly to an underage drinker, and that is conduct to be examined. But certainly that is a jury question.

There is a reference about there is no case law. Well, this may be a case that is going to have to analyze that; but I think it is not a question of law because the facts have not been determined.

And I think the way you get to it is you analyze the negligence and the responsibility of each of the parties and then ask a question at the end of whether or not they acted in accordance with the common scheme or plan.

And so we have the facts, and then we could have -- I'm sure we would have additional argument as to how exactly it is applied; but I think on this record, there is sufficient facts that this question can go to the Jury.

So I think as a matter of law, I'm not going to preclude its application at the stage; so I think it is an appropriate question to be presented to the Jury.

I believe the plaintiff on page 8 of its initial submission has that proposed question, "Did David Schrimpf, Robert Zimmerlee and Tom Pratchett act in accordance with a common scheme or plan in purchasing beer?" I think a question like that would be appropriate.

The next one is the evidence of a settlement. There was a settlement with Mr. Zimmerlee.

Anything further from the plaintiff?

MR. MURPHY: Well, it's my motion in limine. Does the Court need to hear anything from me?

THE COURT: You've submitted information.

I believe there was -- I believe you did submit a reply also.

So is this your issue, Mr. Darling?

MR. DARLING: Both of us.

MR. KATT: I submitted the first brief. He submitted the second.

THE COURT: Okay.

Why don't you go first. You've been

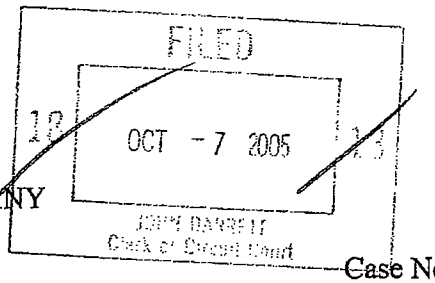
STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

MICHELLE RICHARDS,

Plaintiff,

v.

BADGER MUTUAL INSURANCE COMPANY and DAVID SCHRIMPF,



Defendants and Third-Party Plaintiffs,

Case No. 04-CV-392
Personal Injury:Auto 30101

v.

TOMAKIA PRATCHET,

Third-Party Defendant.

STIPULATION AND ORDER

INTRODUCTORY STATEMENTS

The plaintiff, Michelle Richards, and the defendants, Badger Mutual Insurance Company and David Schrimpf, have resolved all of the issues between them in this case, with the exception of one, described below. As set forth in this Stipulation, they have reached agreement on the amount of Richards' total recoverable damages, as well as on the question of whose negligence caused those damages, and in what percentages. They have therefore resolved all of the other issues in the case, leaving in dispute only the one remaining issue described below.

The disputed issue in question, which shall hereinafter be referred to as "the disputed legal issue," is as follows: Do the facts and circumstances of this case, as set forth in all of the material facts of record, including those stipulated to herein and those otherwise stipulated into the record by agreement of the parties, present a "common scheme or plan" issue of material fact

under Wisconsin law which would, if the plaintiff prevails on that fact issue, invoke the joint and several liability provisions of sec. 895.045(2), Wis. Stats?

This matter initially proceeded to jury trial on August 22, 2005. However, as a result of the settlement agreement encompassed by this Stipulation, the trial was terminated on August 23, 2005. During pretrial proceedings, the trial judge had already ruled in the plaintiff's favor with respect to the disputed legal issue. Specifically, she ruled that a verdict question and jury instruction addressing "common scheme or plan" under sec. sec. 895.045(2) was proper under the circumstances of this case. Based on that ruling, the jury would have been asked the following verdict question: "Did David Schrimpf, Robert Zimmerlee and Tomakia Pratchet act in accordance with a common scheme or plan in procuring beer? (YES or NO)."

In order to allow this matter to proceed to final judgment, the parties to this Stipulation hereby agree to waive their right to a jury trial on the "common scheme or plan" fact issue addressed by the foregoing verdict question. They hereby agree to allow the trial judge to act as trier of fact with respect to that fact issue and to make her finding of fact solely on the basis of the facts stipulated to herein and otherwise stipulated into the record by agreement of the parties. As all of the other material issues in this case are now resolved as the result of the terms of this Stipulation, the trial court will then be in a position to order judgment based on its ruling with respect to the disputed legal issue, its finding of fact with respect to the "common scheme or plan" fact issue, and the remaining facts and conclusions stipulated to herein. Assuming that the trial judge finds in the plaintiff's favor with respect to the "common scheme or plan" fact issue, the defendants intend to then appeal the trial court's decisions with respect to the disputed legal issue and the related issue of fact.

The net effect of the settlement agreement encompassed by this stipulation is that the plaintiff will be paid a minimum of $250,000, regardless of the outcome of the defendants' appeal of the disputed legal issue. If the defendants prevail in their appeal of the trial court's ruling on the disputed legal issue, no additional money will be paid to the plaintiff. If the plaintiff prevails in that appeal, she will be paid an additional $250,000, for total payments of $500,000.

Based on the foregoing, the plaintiff, Michelle Richards, and the defendants and third-party plaintiffs, Badger Mutual Insurance Company and David Schrimpf, hereby stipulate as follows:

STIPULATED FACTS

1. Christopher Richards, age 25, was killed in a two-vehicle car crash on January 26, 2003, at approximately 7:45 am. He was alone in his vehicle, driving eastbound on West Oklahoma Avenue, an arterial, when a vehicle traveling southbound on South 106th Street struck him. Robert Zimmerlee ("Zimmerlee") was driving that vehicle and was intoxicated at the time. Zimmerlee failed to stop for a stop sign before entering Oklahoma Avenue, failed to yield the right-of-way, and was speeding. Christopher Richards was killed instantly in that accident.

2. Christopher Richards is survived by his wife, the plaintiff Michelle Richards. Neither Christopher Richards nor Michelle Richards have children. The plaintiff has a claim under the Wisconsin wrongful death statute, sec. 895.04, Wis. Stats. She is the only person to whom the amount recoverable under sec. 895.04, Wis. Stats., belongs. The plaintiff has no claims arising out of this matter other than those allowed by sec. 895.04, Wis. Stats. (i.e., there is no "survival" claim for conscious pain and suffering or for any other damages).

3. Robert Zimmerlee was 19 years old at the time of the motor vehicle accident that gives rise to this lawsuit, two years short of the legal drinking age of 21.

4. Schrimpf, also 19 at the time of the accident, was Zimmerlee's longtime friend. The two had been friends since middle school, and had graduated together from Whitnall High School about seven months earlier.

5. Schrimpf worked at a restaurant and bar in West Allis, Wisconsin, called Buffalo Wild Wings.

6. The day before the crash, Schrimpf had worked from 9-5, and then returned home. He received a call from Zimmerlee, they talked, and, according to Schrimpf, "We just, you know, we wanted to do something that night, and we both decided we wanted to go get some beer."

7. Both Schrimpf and Zimmerlee knew that in Wisconsin you had to be 21 to legally purchase beer.

8. When Schrimpf was asked at his deposition: "Since neither of you were old enough to buy beer, what was your plan for getting it." His answer was: "I knew a woman at my work, and I said she could get us beer."

9. Schrimpf told Zimmerlee that he thought he could get someone he worked with, who was over 21, to buy them the beer. Her name was Tomakia Pratchet ("Pratchet"). Schrimpf knew her because he worked with her and knew she was working that evening at Buffalo Wild Wings.

10. When, at his deposition, Schrimpf was asked if it was his idea to enlist Pratchet to help buy beer, he answered: "It's more or less both of our ideas to get the beer," referring to Zimmerlee.

11. At all times material, Schrimpf and Zimmerlee were each 19 years old and Pratchet was 31 years old. Schrimpf knew that Zimmerlee was under the legal drinking age. Pratchet knew

that Schrimpf was under the legal drinking age. Pratchet knew or should have known that Zimmerlee was under the legal drinking age.

12. Zimmerlee did not work at Buffalo Wild Wings, nor had he ever met Pratchet.

13. Zimmerlee picked up Schrimpf and drove them to Buffalo Wild Wings. Schrimpf went into Buffalo Wild Wings and spoke to Pratchet, asking her to buy beer for him and his friend, Zimmerlee. Zimmerlee waited in his car. Pratchet agreed, but asked them to wait until she finished her shift.

14. Schrimpf also spoke with another co-worker while he was at Buffalo Wild Wings, Jennifer Spencer ("Spencer"). Spencer asked Schrimpf if he would buy cigarettes for her at the store. Schrimpf agreed. Spencer, who was 25 at the time, also told Schrimpf she was having a party at her apartment later that evening, and invited him. Schrimpf asked if he could bring his friend, Zimmerlee, and Spencer agreed that Zimmerlee could come too.

15. When Pratchet finished her shift, Zimmerlee (with Schrimpf also in the vehicle) drove her to a nearby Pick'n Save grocery store, where Pratchet purchased an 18 pack of Miller High Life beer. Schrimpf went in separately and bought Spencer's cigarettes. Zimmerlee paid for the beer. The beer was stored in the trunk of Zimmerlee's vehicle. The two dropped Pratchet off at a bus stop, and they stopped back at Buffalo Wild Wings to give Spencer her cigarettes. Spencer told Schrimpf to call her cell phone before coming to the party.

16. The Spencer party was not starting until later that evening, probably after midnight. Zimmerlee and Schrimpf went their separate ways for several hours. The beer remained in Zimmerlee's car. They met up later at the home of a mutual friend, where they waited to call Spencer.

17. They called Spencer sometime around midnight, and arrived at the Spencer party sometime between 12 and 1. Zimmerlee testified that he drank "maybe half" of the 18 beers that Pratchet had bought for them. Schrimpf also drank some of the beer.

18. Zimmerlee and Schrimpf were at the Spencer party until roughly 7:30 a.m. With Schrimpf as a passenger, Zimmerlee drove away from the Spencer apartment, traveling less than a block before entering Oklahoma Avenue and striking the Richards vehicle. He was driving at a high rate of speed at the time of the crash and had failed to yield the right-of-way at the stop sign. Christopher Richards was not negligent with regard to the crash.

19. Zimmerlee was negligent in the operation of his vehicle and his negligence was a cause of the accident and the death of Chris Richards.

20. The beer in question was a substantial factor in causing the car accident and the death of Chris Richards.

21. Had this matter proceeded to trial, Zimmerlee would have testified as he did at his deposition, conducted on July 29, 2005. The original transcript of that deposition is submitted to the trial court herewith and the testimony contained therein is hereby stipulated into the trial record.

22. Had this matter proceeded to trial, Schrimpf would have testified as he did at his deposition, conducted on April 8, 2004. The original transcript of that deposition is submitted to the trial court herewith and the testimony contained therein is hereby stipulated into the trial record.

23. Had this matter proceeded to trial, Pratchet would have testified as she did at her deposition, conducted on April 5, 2004. The original transcript of that deposition is submitted to

the trial court herewith and the testimony contained therein is hereby stipulated into the trial record.

REMAINING STIPULATIONS

24. A claim was made against Zimmerlee and his insurer by Michelle Richards and was settled without litigation. That claim was resolved under a *Pierringer* release. A claim was also made against Zimmerlee and his insurer by David Schrimpf, which was also settled without litigation.

25. Schrimpf was a "provider" of alcohol beverages to Zimmerlee, as defined in sec. 125.035(4)(a), Wis. Stats. He was causally negligent. As such, the immunity otherwise provided by sec. 125.035(2), Wis. Stats., does not apply to him. *See* sec. 125.035(4)(b), Wis. Stats.

26. Pratchet was a "provider" of alcohol beverages to Zimmerlee, as defined in sec. 125.035(4)(a), Wis. Stats. She was causally negligent. As such, the immunity otherwise provided by sec. 125.035(2), Wis. Stats., does not apply to her. *See* sec. 125.035(4)(b), Wis. Stats.

27. Zimmerlee's share of the total causal negligence that caused the motor vehicle accident in question is seventy-two percent (72%). Schrimpf's share of that causal negligence is fourteen percent (14%). Pratchet's share of that causal negligence is fourteen percent (14%).

28. Michelle Richards' total claim for damages under sec. 895.04, Wis. Stats., including pecuniary loss, loss of society and companionship, and funeral and burial expense, equals $1,785,714.29.

29. In 2003, the plaintiff reached a settlement with Zimmerlee and his insurers in which she received $1,312,500. In exchange for that payment, she executed a *Pierringer* release

in favor of Zimmerlee and his insurers. Pursuant to that release, the plaintiff is obligated to reduce her recoverable damages by the percentage of causal negligence attributable to Zimmerlee, now stipulated to be seventy-two percent (72%). A true and correct copy of the *Pierringer* release is attached hereto and is hereby stipulated into the trial record.

30. As set forth in the Introductory Statement, the only remaining issue that is not agreed upon is the application of joint and several liability. The plaintiff claims that Schrimpf is subject to sec. 895.045(2), Wis. Stats., based on her argument that he is one of three parties who acted "...in accordance with a common scheme or plan." If her argument is correct, Schrimpf can be held liable for the negligence of Pratchet. The defendants claim that sec. 895.045(2), concerning a "common scheme or plan," does not apply under these facts. If their argument is correct, Schrimpf cannot be held liable for the negligence of Pratchet.

31. Pursuant to the foregoing stipulations, Schrimpf's insurer, Badger Mutual Insurance Company ("Badger Mutual"), is legally obligated to the plaintiff in the amount of at least $250,000. In addition, the plaintiff's legal position is that the facts and circumstances of this case, including those stipulated herein and those set forth in the deposition testimony submitted herewith, create an issue of fact with respect to whether Zimmerlee, Schrimpf and Pratchet acted in accordance with a common scheme or plan under Wisconsin law which would, if she prevails on that fact issue, invoke the joint and several liability provisions of sec. 895.045(2), Wis. Stats. If her legal position is correct and she prevails on that issue of fact, the plaintiff is then entitled to hold Badger Mutual jointly and severally liable for the 28% share of her total damages attributable to the combined negligence of Schrimpf and Pratchet, in the amount of five hundred thousand dollars ($500,000.00), after reducing her total damages by the 72% percent share of the causal negligence attributable to Zimmerlee.

32. Schrimpf and Badger Mutual dispute the plaintiff's position and take the opposing legal position, namely, that the facts and circumstances of this case do not create an issue of fact with respect to common scheme or plan under Wisconsin law. As such, pursuant to sec. 895.045(1), Wis. Stats., the plaintiff is only entitled to hold Badger Mutual liable for the 14% share of her total damages attributable to the negligence of Schrimpf, in the amount of $250,000.

33. The parties to this Stipulation fully preserve all of their rights with respect to the disputed legal issue. The parties previously filed briefs with the trial court setting forth their positions on the disputed legal issue, in conjunction with their competing motions on the question of whether the jury verdict and jury instructions in this case should address common scheme or plan under Wisconsin law. The trial court ruled in the plaintiff's favor on the disputed legal issue and ruled that, based on the facts and circumstances of this case, a verdict question and instruction addressing common scheme or plan should be submitted to the jury. The purpose of this Stipulation is to preserve the defendants' right to appeal the trial court's ruling on the disputed legal issue, but otherwise settle the case in a way that avoids the need for a trial. The trial court having already ruled on the disputed legal issue, the parties to this Stipulation now waive their right to a jury trial on the remaining issue of fact. They agree that the trial judge may act as trier of fact with respect to the "common scheme or plan" fact issue and may make her finding of fact solely on the basis of the facts stipulated to herein and otherwise stipulated into the record by agreement of the parties. As such, it is the settlement agreement of the parties to this Stipulation that Badger Mutual will pay a total of $250,000 to the plaintiff if the trial court's ruling on the disputed legal issue has been reversed following its ultimate disposition on appeal. It is the further settlement agreement of the parties to this Stipulation that Badger Mutual will

pay a total of $500,000 to the plaintiff if the trial court's ruling on the disputed legal issue has been affirmed following its ultimate disposition on appeal.

34. In furtherance of their settlement agreement as set forth in the previous paragraph, the parties to this Stipulation agree as follows:

(a) Assuming that the trial court stands by its earlier ruling on the disputed legal issue, and further assuming that the trial judge finds for the plaintiff with respect to the "common scheme or plan" fact issue, the trial court may enter judgment in favor of the plaintiff and against Badger Mutual in the amount of $500,000, subject to the defendants' right to appeal the trial court rulings associated with "common scheme or plan" under sec. 895.045(2), Wis. Stats. As set forth above, a successful appeal will require that the judgment be reduced to $250,000 upon remand.

(b) Badger Mutual will pay the undisputed portion of the judgment, in the amount of $250,000, within ten (10) days of the date judgment is entered. In consideration of this payment, the plaintiff agrees that all taxable costs and post-judgment interest are hereby waived.

(c) In the event the disputed legal issue is affirmed on appeal, Badger Mutual will then pay the disputed portion of the judgment, in the additional amount of $250,000, within ten (10) days of the date this matter is remanded to the trial court. The plaintiff will then execute a satisfaction of judgment.

(d) In the event the disputed legal issue is reversed on appeal, Badger Mutual will be relieved from any further payment obligations to the plaintiff and the docketed judgment will be reduced to $250,000 upon remand to the trial court.

Having already received this undisputed amount, the plaintiff will then execute a satisfaction of judgment.

(e) Pratchet was duly served with an authenticated copy of the third-party summons and complaint in this matter. She has failed to answer and the time for doing so has passed. She is in default. As such, to the extent that the court's judgment against Badger Mutual is based on joint and several liability as between Pratchet and Schrimpf, Badger Mutual is entitled to a judgment for contribution against Pratchet.

MURPHY & PRACHTHAUSER
Attorneys for Plaintiff

DATED: Oct 4 2005

By: _____
James J. Murphy
State Bar No. 1007801

SCHMIDT, DARLING & ERWIN
Attorneys for Defendants and Third-Party Plaintiffs

DATED: 10-4-05

By: _____
Eric S. Darling
State Bar No. 1016775

ORDER

IT IS HEREBY ORDERED as follows:

1. The court stands by its earlier ruling on the disputed legal issue. In addition, the court now makes the following finding of fact, based on the facts stipulated to herein and otherwise stipulated into the record by agreement of the parties: David Schrimpf, Robert Zimmerlee and Tomakia Pratchet acted in accordance with a common scheme or plan in

procuring beer on the date in question. As such, the three of them are jointly and severally liable under sec. 895.045(2), Wis. Stats. Therefore, after reducing the plaintiff's total damages by the percentage of negligence attributable to Robert Zimmerlee, and pursuant to the stipulations and agreements of the parties set forth above, the court orders that judgment be entered in favor of the plaintiff and against the defendant Badger Mutual Insurance Company in the total amount of five hundred thousand dollars ($500,000.00). There shall be no post-judgment interest and no other taxable costs of any kind, as the plaintiff has waived both.

2. The court specifically orders that the judgment ordered above is a final judgment and that, upon entry of the judgment, the defendants will have the full and immediate right to appeal the judgment to the court of appeals, seeking a reversal of this court's ruling on the disputed legal issue and a reduction of the judgment to the undisputed amount of two hundred fifty thousand dollars ($250,000.00).

3. Badger Mutual is entitled to a judgment for contribution against Tomakia Pratchet in the total amount of two hundred fifty thousand dollars ($250,000.00). Judgment in favor of Badger Mutual and against Pratchet is hereby ordered in that amount, without costs. The judgment against Pratchet will be subject to statutory post-judgment interest. In the event that this court's ruling on the disputed legal issue is reversed on appeal, Badger Mutual's judgment against Tomakia Pratchet shall be vacated.

DATED: OCT - 7 2005

BY THE COURT:

CIRCUIT COURT MILWAUKEE CO. WIS. SEAL

/s/ PATRICIA D. McMAHON

Hon. Patricia D. McMahon
Circuit Judge

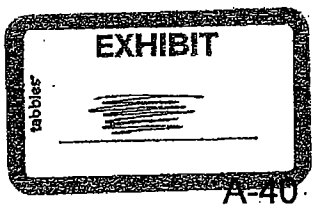
PIERRINGER RELEASE

In consideration of the sum of $1,312,500, the receipt of which is hereby acknowledged, the undersigned, Michelle Richards, for herself, individually and Edward Richards, as Special Administrator of the Estate of Christopher Richards, their assigns, heirs, legal representatives and insurers, forever releases and discharges Robert Zimmerlee, and his insurers, including MID CENTURY INSURANCE COMPANY and FARMERS INSURANCE EXCHANGE (all collectively referred to as "ZIMMERLEE or the "released parties"), from that fraction, portion or percentage of the total claim for damages that the undersigned parties now have or may hereafter possess against all parties responsible for the injuries to and the death of Christopher Richards, which shall, by trial or other disposition, be determined to be the sum of the fractions, portions, or percentages of causal negligence for which the Released Parties are found to be liable to the undersigned for the alleged accident which occurred on or about January 26, 2003, at 106th and Oklahoma in Milwaukee County, Wisconsin ("the Accident "). The undersigned agrees that the term "claim" as used in this release includes all demands, actions, and rights of action against the released parties and also includes all claims which the undersigned may now have or hereafter acquire against the released parties arising out of the Accident. The undersigned further agrees that the term "damages" as used in this release includes damages for personal injury, bodily injury, sickness, disease, death resulting from such injury, sickness or disease, injury to destruction of property, damages for care and loss of services arising out of such injury, sickness or disease, damages for loss of use of property because of its injury or destruction, and all other damages of whatever kind or nature.

The undersigned also credits and satisfies that portion of the total amount of damages of the undersigned arising out of the Accident arising from injuries to and the death of Christopher Richards, whether developed or undeveloped, caused by the negligence, if any, of the Released Parties, as may hereafter be determined to be the case in any trial or other disposition of any action which the undersigned might bring against any other person, firm or corporation.

The undersigned expressly reserves the right to make claim against others, including, but not limited to Badger Mutual Insurance Company, the insurer of David Schrimpf, , and expressly reserves the right to make claim that Badger Mutual Insurance Company, and not the released parties, are liable to the undersigned for injuries, losses, and damages.

The undersigned understands that the Released Parties are not paying the total amount of damages as would be paid if all of the tortfeasors involved in the Accident were



settling all actions and claims for damages. It is their act and intention in this matter to release and discharge that fraction and percentage of their total claim for damages which the Released Parties, by trial or other disposition of this matter are found to be liable and responsible.

In further consideration of the aforesaid payment, the undersigned agrees to indemnify and save harmless the Released Parties for any amount they will or may be required to pay on account of any judgment obtained against them by a joint tortfeasor or any other party for contribution in any way arising out of the damages of the undersigned resulting from the Accident. The undersigned also agrees to satisfy any such judgment against the Released Parties arising out of the Accident. In the event the undersigned fails to immediately satisfy any such judgment against the Released Parties, the undersigned hereby consents and agrees that, upon filing a copy of this release and without further notice, an Order may be entered by the Court in which said Judgment is entered directing that the Clerk thereof satisfy such Judgment. The undersigned authorizes her attorneys to execute a stipulation to dismiss, upon the merits, without costs to any of the Released Parties any actions brought against them growing out of the Accident.

In further consideration of the aforesaid payment, the undersigned agrees to indemnify and save harmless the Released Parties for any amount they will or may be required to pay on account of subrogation or reimbursement, by any governmental entity, health care provider, property, health or medical insurer, or that any other person or entity may assert arising out of or related to any loss, injuries or damages associated with the Accident.

All agreements and understandings between the parties hereto are embodied and expressed herein and the terms of this release are contractual. This release inures to the benefit of all of the Released Parties and all of the Released Parties are intended third-party beneficiaries of this release.

It is further agreed that this settlement is the compromise of a disputed claim of the undersigned and that payment is not to be construed as an admission of liability on the part of any persons, firms, or corporations hereby released and that all liability is expressly denied.

By her signature below, the undersigned declares and certifies that the terms of this release have been read and understood. It is expressly understood by the undersigned that, by her signature below, she is releasing forever her right to bring a claim against the Released Parties in any way as related to the Accident, even if it is later determined that the injury or damage from the Accident was more severe or of a different kind in nature than thought at the signing of this release.

Witness my hand and seal this 6th day of October, 2003.

Witness

Michelle Richards

Witness

Edward Richards as Special Administrator of the Estate of Christopher Richards

Pursuant to Wis. Stats. § 757.38, I acknowledge that the above Pierrenger Release has been read by, and the terms, meaning and effect thereof explained by the undersigned to Michelle Richards and Edward Richards, and the Pierrenger Release is hereby approved by the undersigned and entered into upon the advice and recommendation of myself as attorney for Michelle Richards.

Dated: Oct 6 2003

Attorney for Michelle Richards and Edward Richards

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: 4-12-07

Signature: Keith R. Starchowski

WISCONSIN SUPREME COURT

MICHELLE RICHARDS,

Plaintiff-Respondent-Petitioner,

-vs-

BADGER MUTUAL INSURANCE COMPANY,

Defendant-Third-Party Plaintiff-Appellant,

-and-

DAVID SCHRIMPF,

Defendant-Third-Party Plaintiff,

-vs-

TOMAKIA PRATCHET,

Third-Party Defendant.

Appeal from the Circuit Court for Milwaukee County
The Honorable Patricia D. McMahon, Presiding
Trial Court Case No. 04-CV-392

BRIEF OF DEFENDANT-THIRD-PARTY PLAINTIFF-APPELLANT BADGER MUTUAL INSURANCE COMPANY

Appeal No. 2005-AP-002796

SCHMIDT, DARLING & ERWIN
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May 11, 2007

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STATEMENT OF THE CASE

This appeal arises out of a wrongful death lawsuit brought by the plaintiff-respondent-petitioner Michelle Richards ("Richards"), whose husband was killed in an automobile accident that occurred on the morning of January 26, 2003. R.87, p.3, ¶1. The accident happened when Robert Zimmerlee ("Zimmerlee") ran a stop sign at a speed in excess of the posted limit and collided with the driver's side of Richards' husband's car. *Id.* Zimmerlee was intoxicated at the time. *Id.* The appeal addresses the issue of whether joint and several liability can attach to ***all*** defendants in a situation where they are alleged to have entered into a "plan" to commit a tortious act, even when that act alone did not cause harm to the plaintiff, significant intervening acts of individualized negligence on the part of one of those defendants ***did*** cause that harm, and the individual tortfeasor's resulting negligence is assessed at well over 51% of the total negligence.

Richards initially pursued a claim against Zimmerlee and his automobile liability insurer, which was quickly settled for $1.3125 million. R.87, pp.13-15. No legal action was filed in advance of that settlement and Zimmerlee received a *Pierringer* release from Richards. *Id.* However, after those

settlement dollars were paid, Richards commenced a lawsuit against the defendant-third-party plaintiff David Schrimpf ("Schrimpf") and his liability insurer, the defendant-third-party plaintiff-appellant Badger Mutual Insurance Company ("Badger Mutual"). R.1. Schrimpf was a passenger in the Zimmerlee vehicle at the time of the accident.[1] Nonetheless, he was sued on the basis of an allegation that he had "procured" alcohol for Zimmerlee, an underage person, and was therefore liable under secs. 125.035(4)(a) and 125.07(1)(a)1., Wis. Stats. R.1, p.4. Schrimpf was also underage at the time. R.87, p.4, ¶4.

Early in the evening on the day before the accident, Zimmerlee and Schrimpf decided to ask the third-party defendant Tomakia Pratchet ("Pratchet") to purchase beer for them, as she was of legal age. R.87, p.4, ¶¶6-9. Because he was previously acquainted with her, Schrimpf was the one who approached Pratchet to ask whether she would buy the beer. R.87, pp.4-5, ¶¶9-12. He did so at a local restaurant where the two of them worked. *Id.* He was already off duty. She was about to end her shift. The three of them left the restaurant in Zimmerlee's car and drove to a nearby grocery store, where Pratchet went inside and purchased the beer with

[1] Schrimpf maintained his own personal injury claim against Zimmerlee, which was also settled.

Zimmerlee's money. R.87, p.5, ¶15. She came out of the store, left the beer in the back of Zimmerlee's car, and proceeded to a nearby bus stop to take a bus home. *Id.* She had no further involvement in the events of that evening and the subsequent morning.[2]

Zimmerlee and Schrimpf did not immediately drink any beer and in fact parted company for several hours. R.87, p.5, ¶16. Zimmerlee retained possession of the beer. *Id.* Closer to midnight, they got back together and went to a party being hosted by Jennifer Spencer, another employee of the restaurant where Schrimpf worked. R.87, p.6, ¶17. They consumed much of the beer at the party. *Id.* They left the party soon after 7:30 the following morning. R.87, p.6, ¶18. The accident happened minutes later, just a few blocks from the site of the party. *Id.*

While Richards never brought a direct claim against Pratchet, her claim against Schrimpf included an allegation that Pratchet also "procured" beer for Zimmerlee. Under the circumstances, that allegation is obviously not in dispute. However, Richards also argues that the activities of the

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[2] On the basis of these facts, the defense ultimately stipulated that Schrimpf "procured" alcohol for Zimmerlee, since the applicable case law defines the term expansively to include any act that initiates or materially contributes to the process that allows the underage person – in this case, Zimmerlee - to obtain alcohol. *See generally,* Miller v. Thomack, 210 Wis.2d 650, 563 N.W.2d 891 (1997). The statutory definition applies even though Schrimpf himself was also underage at the time.

three people in question at the time the beer was purchased constitutes "concerted action" under sec. 895.045(2), Wis. Stats., and that Zimmerlee, Pratchet and Schrimpf can therefore be held jointly and severally liable to her. Under Richards' interpretation of the statute, even Schrimpf and Pratchet, who are otherwise less than fifty-one percent at fault, can be held jointly and severally liable for ***all*** of her damages. While the *Pierringer* release given to Zimmerlee precludes Richards from holding Schrimpf responsible for the Zimmerlee portion of the overall negligence, she ***does*** attempt to hold Schrimpf responsible for the Pratchet share of that negligence. Simply put, Richards' legal position is that Schrimpf can be made to pay for both his and Pratchet's contributory fault[3], whereas Schrimpf stands by his right to limit his legal exposure to his own percentage share of the total damages, since his negligence is less than 51% of the total negligence. *See* sec. 895.045(1), Wis. Stats. Richards' unique interpretation of sec. 895.045(2), which was accepted by the trial court and rejected by the Court of Appeals, is the sole subject of this appeal.

[3] No liability insurance is available to Pratchet.

Procedural History

Just as important to an understanding of this appeal is the somewhat unique procedural history of the case. While a jury trial was commenced, it was terminated after jury selection and prior to opening statements. The reason is simple - the parties settled all of the factual and legal issues in the case, with the exception of the single issue that is the subject of this appeal. With respect to that issue, the trial judge had already conducted pretrial proceedings and reached the conclusion that the circumstances of this case ***do*** support a "common scheme or plan" allegation, the very legal conclusion that Badger Mutual now challenges. R.97, pp.25-27. On this basis, the trial judge ruled that the jury would be instructed and given a verdict question on the issue of whether the defendants had acted pursuant to such a scheme or plan. *Id.*

Following jury selection, the parties settled all of the other issues in the case by stipulating to an extensive set of facts and conclusions, including an agreed upon amount for the plaintiff's total damages (R.87, p.7, ¶28), as well as stipulated negligence percentages for each of the alleged tortfeasors (R.87, p.7, ¶27). By so doing, the parties eliminated all fact issues, with the possible exception of

any findings that might still have been necessary on the common scheme or plan issue. In order to avoid an otherwise unnecessary trial, the parties also agreed that to the extent a jury determination addressing common scheme or plan was still necessary, they would waive the jury and authorize the trial judge to act as trier-of-fact on that issue, basing her finding on the body of facts otherwise stipulated to. R.87, p.9, ¶33

Having eliminated the need for trial, the parties put together the stipulation that is item number 87 in the Appeal Record. The parties stipulated that Michelle Richards' total damages equal $1,785,714,29. They also agreed that Zimmerlee's overall negligence was 72%, that Schrimpf's "procurement" negligence was 14%, and that Pratchet's "procurement" negligence was 14%. R.87, p.7 ¶27.

Applying these percentages to the total damage figure required Richards to satisfy $1,285,714.29 of her damages pursuant to the *Pierringer* release given to Zimmerlee. This amount represents the 72% of her total damages attributable to his conduct. As for the remaining $500,000, half of this amount is attributable to Schrimpf's conduct, as it has been stipulated that his negligence equals 14% of the total negligence in the case. Accordingly, Badger Mutual has

already paid the $250,000 for which he is responsible and his legal obligation to this extent is not in dispute.

What ***is*** in dispute is the issue that gives rise to this appeal - whether Schrimpf can be made to pay the $250,000 worth of damages attributable to Pratchet's conduct. As should be clear by now, the trial judge not only ruled as a matter of law that the circumstances of this case give rise to a "common scheme or plan" allegation, she also ruled in her role as trier-of-fact that the three parties in question had in fact engaged in such a scheme or plan. R.87, p.11, ¶1. Applying her legal conclusion to these facts, she held Schrimpf jointly and severally liable for the 28% share of Richards' total damages that was not extinguished by the *Pierringer* release. *Id.*

The net effect of this procedural history is that a judgment was entered against Badger Mutual for $500,000. The undisputed half of that judgment - $250,000 - has already been paid to Richards and is hers to keep regardless of the outcome of this appeal. The balance of the judgment will have to be vacated if the trial court's legal conclusion as to "common scheme or plan" is ultimately reversed on appeal. If the trial court is ultimately affirmed, the balance of the judgment will have to be paid. *See,* R.87, p.10, ¶34 and

R.87, p.12, ¶2. As such, the trial court's "common scheme or plan" ruling presents the sole issue on appeal and represents a justiciable controversy having a value of $250,000.[4]

The Court of Appeals reversed the trial court, holding that in order for concerted action liability to attach under sec. 895.045(2), Wis. Stats., the parties in question must have acted in accordance with a common scheme or plan to accomplish the ultimate result that injures the plaintiff, and that there must have been an agreement about that common scheme or plan. If there is an agreement of some sort, but it does not include an agreement with respect to the tortious conduct that ultimately causes the injury, the statutory provision upon which the instant petitioner relies will not apply. App. 17. This Court then granted Richards' Petition for Review.

ARGUMENT

Introduction

The common law has long recognized civil liability for so-called "concerted action," which rests upon the principle

[4] For settlement purposes, the parties' rough evaluations of total damages and percentages of negligence were not that far apart. Nonetheless, their disagreement on the joint and several issue made the case impossible to settle. The "two-tiered" agreement encompassed by their subsequent stipulation, which guaranteed payment of Schrimpf's share of the liability but made payment of Pratchet's share contingent upon the outcome of this appeal, allowed the parties to avoid a trial that was otherwise unnecessary in light of their agreement on damages and percentages of negligence.

that "those who, in pursuance of a ***common plan or design*** to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are ***equally liable*** with him." W. Prosser, *Handbook of The Law of Torts*, sec. 46 at 292 (4th ed. 1971)(emphasis added). This description of concerted action liability is recognized in the applicable Wisconsin case law. *See, e.g.*, *Bruttig v. Olsen*, 154 Wis.2d 270, 280, 453 N.W.2d 153, 157-8 (Ct. App. 1989).

While concerted action liability is rarely invoked, it ***is*** clearly recognized under the proper factual circumstances. For example, in *Ogle v. Avina*, 33 Wis.2d 125, 146 N.W.2d 422 (1966), it was utilized to impose joint and several liability on all defendants participating in a drag race, even though only one of those defendants actually made significant contact with the plaintiff's vehicle in the accident that directly resulted from that drag race. Under such circumstances, "the jury [is not] permitted to apportion damages." *Bruttig, supra*, citing W. Prosser, *Handbook of The Law of Torts*, sec. 46 at 291 (4th ed. 1971). Rather, instead of assigning one percentage of negligence to one of the tortfeasors in question and a different percentage of

negligence to another, all of the participants in the "common scheme or plan" are "equally liable" for the damages resulting from the plan in question. Moreover, their liability is "joint and several" in nature. *See,* *Collins v. Eli Lilly Co.*, 116 Wis.2d 166, 185, 342 N.W.2d 37, 46 (1984)(the concerted action theory applied in the "drag racing" case [*Ogle*] imposed joint and several liability on all of the defendants participating in that race, even though only one of them actually caused the plaintiff harm).

As the Court is aware, "joint and several" liability is an even more basic concept long recognized in both the common law and in Wisconsin's jurisprudence. As the Court is also aware, the applicability of joint and several liability was statutorily altered in 1995, at which time the legislature decreed that it only applies to tortfeasors who are "51% or more" causally negligent. Sec. 895.045(1), Wis. Stats.

In addition to tortfeasors who are 51% or more causally negligent, subsection (2) of sec. 895.045 (entitled "**Concerted action**") provides that two or more parties who "act in accordance with a ***common scheme or plan***" are jointly and severally liable for all damages resulting from that action (emphasis added). In other words, concerted actors, whom the law has recognized as "equally liable" since long

before the 1995 statutory change, remain jointly and severally liable even though, as "equally liable" actors, any one of them might otherwise try to argue that his or her liability is ***less than*** 51% (e.g., 50% each in the case of two concerted actors, 33-1/3% each in the case of three, etc.).

In the instant appeal, the petitioner pursues an argument that necessarily requires the Court to conclude that the "concerted action" liability addressed by sec. 895.045(2), Wis. Stats., which is premised upon the concept of "2 or more parties [who] act in accordance with a common scheme or plan," has absolutely nothing to do with the "concerted action" liability addressed by the applicable Wisconsin cases, which is premised upon the ***exact same concept*** (2 or more actors who pursue "a common plan or design to commit a tortious act"). Assuming that the similarity between the statute in question and the case law that came before it is ***not*** just a coincidence, and that the "concerted action" liability addressed by each is one and the same, then the petitioner's arguments on appeal necessarily fail, as concerted action liability ***requires*** the imposition of ***equal*** liability on the part of each and every actor involved in the "common scheme or plan."

As has already been stipulated in this case, Robert Zimmerlee's negligence is not "equal" to the other two negligent parties. In fact, he was more than five times as negligent as them, since he committed a number of significantly negligent acts that were ***not*** part of the alleged "scheme or plan" to buy beer. Absent Zimmerlee's sole independent negligence, which was not part of the alleged "common scheme or plan" and occurred approximately twelve hours after its conclusion, and for which neither Pratchet nor Schrimpf are vicariously or otherwise responsible, there would have been no car accident on the morning in question. Put another way, while the beer purchase was the first step in a causal chain (thereby entitling Richards to collect 14% of her total damages from Schrimpf), it did ***not*** "injure the plaintiff" in the way that concerted action law requires (e.g., in the direct and immediate way that a drag race or other tortious activity engaged in by multiple actors does). That is why "concerted action" liability results in equal liability: Because the act itself is the direct and immediate cause of the harm, and because there are no intervening individual acts of negligence between the commission of the "scheme or plan" and the ultimate harm, "equal liability" is imposed upon the

participants, whereas in the instant case the driver is more than five times as negligent as the other tortfeasors, which is wholly inconsistent with the concerted action concept. Absent equal liability, which is clearly missing from this case, there can be no concerted action liability and sec. 895.045(2) does not apply.

I. THE FACT THAT SEC. 895.045(2), WIS. STATS., IS UNAMBIGUOUS DOES NOT MEAN THAT IT SHOULD BE INTERPRETED IN A VACUUM, OR THAT ITS HISTORICAL CONTEXT OR TITLE SHOULD BE IGNORED.

The petitioner argues that because sec. 895.045(2) is not ambiguous, its "plain meaning" must therefore be applied in a way that requires her to prevail in this manner, rather than in a way that (1) is consistent with the concerted action concept as it has been applied over the years, and (2) does not ignore the fact that the provision in question is ***entitled*** "Concerted action." The statute ***is*** unambiguous and only becomes otherwise if one seeks to ignore both its title and the fact that its language is substantively identical to the language contained in the concerted action cases that have been around since long before its 1995 enactment.

The fact that a statute is unambiguous does not mean that it does not need to be interpreted or that a reasonable interpretation can ignore the obvious historical context within which it is enacted. For example, the term "joint and

several liability" is also used but not specifically defined in the statute. As such, and in order to reach a desired result, one could conceivably interpret in a way that ignores its well-known definition. However, to view it in that way is obviously not a reasonable way to interpret the overall statute, since we clearly do know what the term means when viewed in the context of its history.

The terms "concerted action" and "common scheme or plan" are no different. They ***do*** have historical meaning, which cannot be ignored when interpreting the statute. Among other things, concerted action only applies when the facts give rise to a situation in which an apportionment of unequal negligence percentages is prohibited and in which "equal liability" on the part of all of the participants in the concerted action is mandated. Having stipulated that this is nowhere close to a case of equal liability, and that the intoxicated driver's independent negligence results in his being more than five times as negligent as the other two tortfeasors in question, the petitioner is simply not in a position to argue that the concerted action statute is applicable to this case.

Once the unique nature of concerted action liability is acknowledged, namely, that it results in a finding of equal

liability on the part of all of the participants in the "scheme or plan," it is easy to understand why, when the legislature otherwise changed the joint and several rules in 1995, it created the limited exception contained in sec. 895.045(2). In a drag racing case, for example, a defendant found liable for "concerted action" might argue that he or she cannot possibly be more than fifty percent negligent, since there will never be less than two actors and equal liability is mandated. Under those circumstances, and without the exception, any one defendant's liability exposure to the plaintiff under the 1995 changes might be limited to no more than half of the total damages. The exception contained in subsection (2) eliminates such an argument. As such, in the rare case where concerted action liability does apply, the old joint and several rules also apply.

In seeking to ignore the fact that the statute is entitled "Concerted action," the petitioner points to sec. 990.001(6), Wis. Stats., which states that the titles to statutes are not "part of" the statute. While this is obviously true as far as it goes, there is absolutely no case law support for the notion that a litigant may pursue a statutory interpretation that not only ignores the title, but

is based upon a premise that runs entirely contrary to the well recognized legal concept represented by that title.

As stated above, it is Badger Mutual's position that the intent of the legislation is clear on the face of the statute, and that it only applies to "concerted action" cases as that term has been defined over the years. However, to the extent that the petitioner wants to argue that the intent of the legislation was significantly broader than that, and that the statute has little or nothing to do with the "concerted action" liability that came before its passage, the title clearly contradicts that argument. Moreover, "[a]lthough the title is not part of the statute, it may be persuasive of the interpretation to be given the statute." *Mireles v. LIRC*, 2000 WI 96, ¶60, n.13, 237 Wis.2d 69, 613 N.W.2d 875 (quoting *Pure Milk Prods. Co-op v. Nat'l Farmers Org.*, 64 Wis.2d 241, 253, 219 N.W.2d 564 (1974)). The petitioner's argument that concerted action liability is a concept that is entirely "extrinsic" or foreign to an interpretation of the statute in question is wholly without merit.

II. LIMITING THE APPLICABLITY OF SEC. 895.045(2), WIS. STATS., TO "CONCERTED ACTION" CASES IN NO WAY IMPACTS WISCONSIN'S TRADITIONAL "SUBSTANTIAL FACTOR" TEST.

The petitioner's argument that the court of appeals decision in this case will somehow negatively impact Wisconsin's substantial factor test is disingenuous. There is no question but that David Schrimpf is being held liable because his negligence was ***a*** substantial factor in causing the ultimate harm at issue in the case. As a result of that causal negligence, Badger Mutual has already paid $250,000 to the petitioner. All the court of appeals decision does is recognize that Mr. Schrimpf is not ***jointly and severally*** liable pursuant to sec. 895.045, Wis. Stats., because his negligence is less than 51% [subsection (1)] and because this is not otherwise a "concerted action" case [subsection (2)], since the liability of the three tortfeasors in question is nowhere near "equal."

The court of appeals quite simply and correctly concluded that the conduct of David Schrimpf, while certainly constituting ***a*** substantial factor in the ultimate harm, does not constitute "concerted action" as defined by the Restatement and the common law. This is because the alleged "common scheme or plan" at issue in this case (the purchasing of alcohol) did not in and of itself injure the plaintiff,

nor was the negligent activity that ultimately did injure the plaintiff (driving recklessly while intoxicated) included in the "scheme or plan" in question. This obviously does nothing to impact Wisconsin's traditional substantial factor test. Rather, it simply constitutes a correct application of concerted action law in the joint and several context.

While the initial purchase of the beer was obviously a step in the causal chain, the court of appeals recognized the obvious fact that the "plan" in question (a trip to the grocery store to purchase some beer, roughly twelve hours before the accident in question) did ***not*** include any of Zimmerlee's subsequent actions. The "actors" in question did not "scheme or plan" for him to drive while intoxicated and proceed through a stop sign at a high rate of speed. While it is not necessary that the plan include an intent to harm the ultimate victim, it ***is*** necessary that it include an intent to commit all of the negligence that causes that harm. That is why, when the elements of concerted action ***are*** present, equal liability results, rather than a liability apportionment in which the primary tortfeasor is more than five times as negligent as the others.

By making reference to the fact that the "agreement" in question "had nothing to do with Zimmerlee driving while

intoxicated some twelve hours later," Court of Appeals Decision at ¶27, the court below was obviously not suggesting that the alcohol procurement was not a part of the causal chain. If it truly had not been, Schrimpf would not have been held liable for $250,000 of the plaintiff's damages. What the court was pointing out, and correctly so, is that when all of the negligence that causes the damages in question includes individual negligence (Zimmerlee's) of a significantly greater "kind and character," then equal liability does not exist and concerted action liability does not apply. While Pratchet and Schrimpf may be liable as "providers," these facts do not create concerted action liability amongst the three people involved. Notwithstanding their "agreement" to acquire the beer on the evening in question, it certainly "cannot be said that the negligence of each [of the three of them] is of the same kind and character as a matter of law." *Bruttig v. Olsen*, 154 Wis.2d 270, 280, 453 N.W.2d 153, 157 (Ct. App. 1989).

Contrary to the strained logic upon which the petitioner's "causation" arguments are based, "procurement" liability is alive and well in Wisconsin, and is based upon the principles of comparative negligence, not equal, concerted action liability. The Wisconsin Statutes allow a

plaintiff to seek recovery from anyone who procures alcohol for an underage drinker, as long as the "procurer" has actual or constructive knowledge that the other person is underage and the alcohol in question is a substantial factor in causing injury to the claimant. Secs. 125.035(4)(a) and 125.07(1)(a)1., Wis. Stats. When liability is established, the defendant in question is liable to the plaintiff in the proportion that his or her negligence in providing the beverage is "a substantial factor in causing the accident or injuries as determined under the rules of ***comparative negligence***." *Sorensen by Kercher v. Jarvis*, 119 Wis.2d 627, 646, 350 N.W.2d 108, 118 (1984)(emphasis added).

The statutory liability scheme that currently exists is a direct descendant of the judicially created liability first enunciated in *Sorensen*. As a form of liability that is subject to "the rules of comparative negligence," it can hardly be clearer that statutory procurement liability is entirely inconsistent with a form of liability (common scheme or plan) in which "the [finder of fact is not] permitted to apportion damages." *Bruttig, supra,* at 280, 453 N.W.2d at 158, *quoting from* W. Prosser, *Handbook of The Law of Torts,* sec. 46 at 291 (4th ed. 1971).

To hold otherwise is to conclude that every time someone knowingly provides alcohol to a willing underage drinker (which can, in the everyday sense, easily be characterized as a "common scheme or plan" between the willing provider and the willing underage drinker), the provider in question is jointly and severally liable with the underage drinker, for *all* of that drinker's negligent conduct, no matter how remote from the original purchase. This would be so even though the provider in question is otherwise likely to be well under 51 percent negligent, since the "plan" in question does not include the drinker's independent acts of becoming intoxicated, getting behind the wheel in that condition and negligently operating his or her vehicle so as to injure a third party.

Moreover, the effect of such a holding would not be limited to the "procurement" universe. There are numerous other examples of underlying negligence that might, in the everyday sense, be characterized as a "plan" between two or more persons, but which has no legal significance until and unless it is followed by individual acts of negligence on the part of one tortfeasor acting alone. For example, in a "negligent entrustment" case, the combined initial negligence of the person who entrusts a vehicle to another and the

person to whom that vehicle is entrusted, who later causes an accident, can certainly be characterized as a "tortious plan" to allow the latter person to drive, since it presumably involves the mutual consent of two people who should know better. Nonetheless, that negligence, while causally related to the ultimate harm, is separate and distinct from any subsequent negligence on the part of the driver in question once he or she gets behind the wheel. Moreover, the former negligence is also "irrelevant unless the person to whom a thing is entrusted acts in a negligent manner....and in fact inflicts injury as the result of such conduct." *See* *Bankert v. Threshermen's Mutual Insurance Co.*, 110 Wis.2d 469, 476, 329 N.W.2d 150, 153 (1983). As such, there is certainly no suggestion in our jurisprudence that concerted action liability results from such a situation or that the "entruster" is to be held jointly and severally liable with the driver, even where the former's negligence is found to be well under 51%.

The petitioner's "causation" arguments are misplaced. David Schrimpf's negligence clearly was **a** cause of the ultimate harm, assessed at 14%. Based on that percentage, his proportionate share of the total damages has already been paid. David Schrimpf does not have "concerted action"

liability, however, and he is not jointly and severally liable with the other tortfeasors in this matter.

III. WHILE SEC. 895.045(1), WIS. STATS., CLEARLY DOES DEAL WITH HOW TO APPLY JOINT AND SEVERAL LIABILITY DEPENDING ON HOW NEGLIGENCE HAS BEEN APPORTIONED, SUBSECTION (2) OF THE SAME STATUTE ONLY DEALS WITH HOW TO DO SO IN THE RARE CASE WHERE NEGLIGENCE IS *NOT* APPORTIONED BECAUSE "EQUAL LIABILITY" APPLIES.

To state the obvious point that sec. 895.045, Wis. Stats., concerns the apportionment of liability begs the even more obvious question: Under what circumstances? Moreover, the statutory language answers that question: Subsection (2) only applies to concerted action cases.

Subsection (1) sets forth the operative general rule that has been in effect since 1995: Tortfeasors whose proportionate share of the negligence is 51% or more are jointly and severally liable, whereas the liability of those who are less than 51% negligent "is limited to the percentage of the total causal negligence attributed to that person." Subsection (2) then provides that, notwithstanding subsection (1), two or more parties that are subject to concerted action liability "are jointly and severally liable for all damages resulting from that action."

The *Danks* case (*Danks v. Stock Building Supply, Inc.*, 2007 WI App 8, 727 N.W.2d 846) clearly ***supports*** Badger

Mutual's position in the instant case, as it confirms the point that subsection (2) is only applicable to concerted action cases:

> Subsection (2) simply modifies subsection (1) of the statute to provide that all defendants who are legally responsible for causing a plaintiff's damages, and who ***acted in concert*** in so doing, are jointly and severally liable for the plaintiff's damages, irrespective of whether a given defendant's apportioned causal negligence is less than 51%.

supra at ¶39 (emphasis added). It is important to note that, notwithstanding the instant petitioner's arguments that the body of the statute does not use the term "concerted action," that the title to the statute is not "part of" the statute, and that subsection (2) therefore should not be limited to "concerted action" as historically defined, the *Danks* court had no difficulty recognizing that the provision applies to concerted actors (defendants who "acted in concert").

It is also important to note that, contrary to the inference contained in the petitioner's arguments, the Wisconsin cases have traditionally defined concerted action as discussed, including by reference to Prosser. The fact that there are not many such cases only underscores the degree to which concerted action liability is factually rare.

In *Bruttig v. Olsen*, 154 Wis.2d 270, 453 N.W.2d 153 (Ct. App. 1989), where the theory was ultimately rejected, the

plaintiff's contributory negligence was found to exceed that of any single defendant. Only after trial did the plaintiff seek to utilize the concerted action theory to establish "equal" or "indivisible" liability between himself and two of the defendants, thereby creating an avenue of recovery. The plaintiff had been injured while engaged in a game of "snowmobile tag" with the defendants in question. In rejecting the plaintiff's argument, the *Bruttig* court discussed "concerted action" liability by stating that the theory "rests upon the principle that 'those who, in pursuance of a ***common plan or design*** to commit a tortuous act, actively take part in it...[or]...lend aid or encouragement to the wrongdoer...are ***equally liable*** with him.'" (citations omitted).

The *Bruttig* court also emphasized Prosser's comment that the jury is not "permitted to apportion damages" in a concerted action case. W. Prosser, *Handbook of The Law of Torts,* sec. 46 at 292 (4th ed. 1971). This was and is important, because at trial the plaintiff in *Bruttig* had taken the position that the defendants' negligence was greater than his. As pointed out by the court, at trial the plaintiff had "accepted the proposed special verdict that asked the jury to assess each boy's negligence individually,"

which foreclosed a later "concerted action" argument that their negligence was "indivisible." *Bruttig, supra,* 154 Wis.2d at 281, 453 N.W.2d at 158.

The instant case is procedurally identical. Having stipulated that Zimmerlee's causal negligence is more than five times greater than the other defendants, Richards is foreclosed from now pursuing a theory of recovery that is premised upon equal "indivisible" negligence. Especially in light of the binding liability apportionment in this case, it clearly "cannot be said that the negligence of each [of the three defendants] is of the same kind and character as a matter of law." *Bruttig v. Olsen*, 154 Wis.2d 270, 280, 453 N.W.2d 153, 157 (Ct. App. 1989).

IV. THE SUBSTANCE OF THE WISCONSIN JURY INSTRUCTIONS PROVIDES ADDITIONAL SUPPORT FOR THE POSITION THAT SEC. 895.045(2), WIS. STATS., APPLIES TO "CONCERTED ACTION" CASES ONLY.

The petitioner's arguments with respect to the Wisconsin Jury Instructions overlook the significance of those instructions in the eyes of the court below. It is not so much how the Court of Appeals characterizes those instructions as it is the fact that the Jury Instruction Committee clearly and without equivocation recognized that sec. 895.045(2), Wis. Stats., deals with "concerted action" as traditionally defined. The comment's reference to the

Restatement (Second) of Torts, §876 (entitled "Persons Acting in Concert") underscores the point further. Simply put, subsection (2) only applies in a concerted action case, which by definition excludes a case in which negligence is individually apportioned.

There can be no credible argument that "equal liability," imposed as a matter of law, is appropriate in the instant case. As previously stated, none of the parties in question entered into a "common scheme or plan" that had anything to do with the operation of a motor vehicle, let alone with getting intoxicated or speeding through a stop sign. If the plaintiff's position were correct, then, as mentioned above, an "equal liability" finding would be required in every case where a provider knowingly gives alcohol to an underage drinker who subsequently drives while intoxicated. This was obviously not the intent of the statute and "providing" alcohol is obviously not the culpability equivalent of causing death through the intoxicated use of a motor vehicle.

In a concerted action case, two or more parties engage in equally culpable behavior and the activity itself (e.g., a drag race) is viewed as the relevant cause of the plaintiff's injuries, regardless of which of the defendants happens to be

involved in the collision. The causal link between the activity and the harm is ***direct*** and ***immediate***. The result is that litigants found to have engaged in such behavior are "equally liable" ***as a matter of law***. In other words, if two actors are involved, each will be fifty percent liable. If three are involved, each will be 33-and-1/3 percent liable. The plaintiff is entitled to obtain any or all of his or her damages from any one defendant. The defendants are entitled to seek contribution between themselves according to their ***equal*** percentages of negligence.

The development of the law in the area of "procurer" liability clearly establishes that the "procurer" in question is liable to the plaintiff in the proportion that his or her negligence in providing the beverage is "a substantial factor in causing the accident or injuries ***as determined under the rules of comparative negligence***." *Sorensen by Kercher v. Jarvis*, 119 Wis.2d 627, 646, 350 N.W.2d 108, 118 (1984)(emphasis added). Moreover, the statutory liability scheme that currently exists is a direct descendant of the judicially created liability first enunciated in *Sorensen*. Again, a form of liability that is subject to "the rules of comparative negligence" is entirely inconsistent with a form of liability (common scheme or plan) in which "the [finder of

fact is not] permitted to apportion damages." *Bruttig, supra,* at 280, 453 N.W.2d at 158, *quoting from* W. Prosser, *Handbook of The Law of Torts,* sec. 46 at 291 (4th ed.1971) .

CONCLUSION

It is clear that when the legislature enacted sec. 895.045(2), Wis. Stats., it did not intend to create a new species of liability in Wisconsin. Rather, it was only addressing the rare case already recognized to fall within the "concerted action" theory of liability. In those rare circumstances, joint and several liability will attach to "equally liable" defendants engaged in concerted action, even where their "equal" percentages of negligence are otherwise less than 51 percent. This is not such a case and "concerted action" has no place in this case. The Court of Appeals' reversal of the trial court's ruling that Schrimpf is jointly and severally liable for Pratchet's negligence under sec. 895.045(2) should be affirmed. This matter should be remanded to the trial court with instructions that the judgment against Badger Mutual be reduced to $250,000. That amount having already been paid and satisfied, this matter will then be concluded.

DATED: May 11, 2007.

Respectfully submitted,

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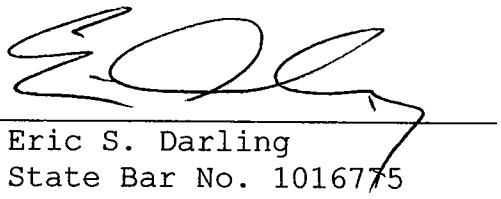
By: 

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CERTIFICATION

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Signed,

Attorney

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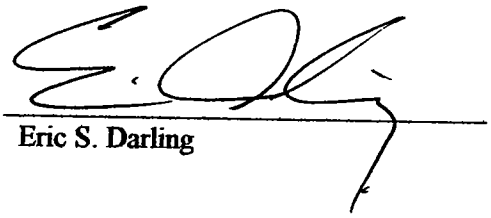

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SUPREME COURT
STATE OF WISCONSIN

Appeal No. 2005-AP-002796

MICHELLE RICHARDS,

Plaintiff-Respondent-Petitioner,

-vs-

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-vs-

TOMAKIA PRATCHET,

Third-Party Defendant.

Appeal from the Circuit Court for Milwaukee County,
The Honorable Patricia D. McMahon, Presiding
Circuit Court Case No. 04-CV-392

PLAINTIFF-RESPONDENT-PETITIONER'S REPLY BRIEF

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INTRODUCTION

This case is about the doctrine of joint and several liability. It has been said that the clearest example of a joint tort is the action of a tortfeasor in pursuance of a common plan or scheme.[1] "The wrongdoers are said to have acted in concert, and by universal authority they are jointly and severally liable."[2] Contrary to Badger Mutual's argument, the conduct of the defendants need not involve equal liability or direct participation in the particular harm that caused the plaintiff's injury.[3]

Indeed, under the clear language of Wis. Stat. § 895.045(2) (the "statute"), there is no requirement that the parties participate equally in the common scheme or plan, or that the harm be the direct result of their actions. Badger's argument does not comport with the plain meaning of the statute. Rather, it is based on the so called concerted action cases which predate the statute and therefore do not discuss

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[1] Harper, James & Gray, The Law of Torts 2nd Edition, Vol. 3 (1986), p 12.
[2] *Supra.*
[3] *Supra,* fn. 41, and the many cases cited therein.

the statute at all. When these cases talk about equal liability, it is only in the context of contribution between the wrongdoers. *See Ogle v. Avina,* 33 Wis. 2d 125, 146 N.W.2d 422 (1966). In this respect, it is important to note that Badger's contribution rights are not at issue in this case and that these cases discuss, but have never adopted, the concerted action doctrine. *See Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 342 N.W.2d 37 (1984), and *Bruttig v. Olson,* 154 Wis. 2d 270, 453 N.W.2d 153 (Ct. App. 1989).

ARGUMENT

I. The Statute Is Unambiguous And Requires The Application Of The Plain Meaning Of Its Words.

Badger agrees that Wis. Stat. § 895.045(2) is not ambiguous. (Page 13, response brief.) Therefore, Badger may not resort to the title of the statute in construing its plain meaning. A statute's title "may be resorted to in order to resolve a doubt as to statutory meaning, [but] we will not resort to them in order to create a doubt where none would otherwise exist." *Wisconsin Valley Improvement Co. v. Public*

Service Commission, 9 Wis. 2d 606, 618, 101 N.W.2d 798, 804 (1960). *Brennan v. Employment Relations Com'n of State,* 112 Wis. 2d 38, *41, 331 N.W.2d 667, **669 (Ct. App. 1983).

Badger relies on *Pure Milk Prods. Co-op v. Nat'l Farmers Org.*, 64 Wis. 2d 241, 219 N.W.2d 564 (1974) and *Mireles v. LIRC*, 2000 WI 96, 237 Wis. 2d 69, 613 N.W.2d 875. But, both of these cases deal with ambiguous statutes. In the instant case, the parties agree there is no ambiguity in the statute. Therefore, the text should be applied in a straightforward manner. *Pool v. City of Sheboygan,* 2007 WI 38, _____ Wis. 2d _____, 729 N.W.2d 415. ("If the words of the statute have a plain meaning, we ordinarily stop our inquiry and apply the words chosen by the legislature.")

But, even if the title of the statute is considered, the words "concerted action" are merely descriptive or shorthand for the phrase acting "in accordance with a common scheme or plan." There is nothing in the statute or its legislative history indicating that equal fault or liability on the part of

the wrongdoers is a prerequisite to their joint and several liability to the plaintiff.

Concerted action as set forth in § 895.045(2) is an exception to § 895.045(1), which only imposes joint and several liability on a defendant that is 51% or more causally negligent. If a party is less than 51% causally negligent, then the liability of that party is limited to the percentage of causal negligence attributed to that party.

Both §§ 895.045(1) and (2) expressly talk about joint and several liability, and neither section mentions equal fault or liability. It is pure conjecture on the part of Badger to assert that joint and several under subsection 2 requires any such parity on the part of the wrongdoers.

II. Tortfeasors Who Act In Accordance With A Common Scheme Or Plan Are Jointly And Severally Liable For "All Damages Resulting From That Action."

The statute as interpreted by the court of appeals in this case would change its meaning significantly. The statute does not require a common scheme or plan "to accomplish **the** result." The statute does not require that the common scheme

or plan be **the** direct cause of the plaintiff's harm. Rather, the statute plainly provides for joint and several recovery for "all damages resulting from that action."

In fact, Badger stipulates that the parties' illegal purchase of the beer was made in accordance with a common scheme or plan and that this was a substantial factor in causing Mr. Richards' death. At the same time, Badger argues that the "resulting damages" must be an integral part of the parties' common scheme or plan to trigger their joint and several liability. This is both contrary to the plain wording of the statute and Wisconsin's law of causation, which is well grounded on the "substantial factor" test. *See Morden v. Continental A G*, 2000 WI 51, ¶ 60, 235 Wis. 2d 325, 611 N.W.2d 659.

The ultimate goal of the parties in this case was not merely to buy beer. From the start, it was explicitly clear that Zimmerlee and Schrimpf wanted the beer to "party." And, they drove the vehicle that killed Mr. Richards to pick-up Pratchet; they drove the same vehicle to the store where she

bought the beer; they drove the same vehicle to the house where they partied with the beer; and, they drove the same vehicle to leave the party, when minutes later they collided with Mr. Richards' vehicle. Thus, the driving of the vehicle was an integral part of the common scheme or plan from the very beginning to the tragic end that caused Mr. Richards' death.

III. The Statute Does Not Impose A Unique Causation Standard For Concerted Action.

Badger asserts that § 895.045(2) is not governed by the substantial factor test of causation based on the ill conceived notion that concerted action requires equal liability on the part of the wrongdoers. As stated above, equal liability for purposes of contribution should not be confused with the defendants' joint and several liability to the plaintiff for all damages resulting from their action.

With respect to its causation argument, Badger's reliance on Restatement (Second) of Torts, § 876 is misplaced. In an analogous case applying the Restatement, *American*

Family Mut. Ins. Co. v. Grim, 201 Kan. 340, 440 P.2d 621 (1968), a boy entered a church at night with some companions to steal soft drinks from the kitchen. Two of the companions, but not the boy, entered the attic and lit some torches for illumination. Their failure to extinguish the torches resulted in the church burning down.

Even though the boy in *Grim* had nothing to do with entering the attic where the fire began, or with the use of the torches, he was held jointly liable for the harm. The court based its holding on the Restatement (Second) of Torts § 876, noting that the boy's initial conduct was a **substantial factor** in causing the fire.

As previously noted, Wisconsin has not adopted the Restatement. Even so, the Restatement makes it clear that the substantial factor test of causation applies to concerted action. In our case, Schrimpf actively planned with Pratchet and Zimmerlee to illegally obtain the beer, which launched the drinking and driving that resulted in Mr. Richards' wrongful death. Like the boy in *Grim,* he is jointly and

severally responsible for the foreseeable acts done by Zimmerlee in connection with the original scheme or plan.

IV. The Model Jury Instruction Does Not Conform To The Plain Words Of The Statute.

The court of appeals and Badger both assert that the adoption of Wis. JI – Civil 1740 demonstrates that § 895.045(2) only applies in rare cases, like the drag racing in *Ogle*. This, however, is not a reasonable deduction. There is no suggestion in the instruction that the statute is limited to similar facts.

The Committees' work is primarily intended to guide the trial courts, and the Committee merely cited *Ogle, inter alia,* because it had no case law actually interpreting the statue to guide it. The instruction has yet to be considered by and approved by this court. And, it is not a substitute for a clear, concise and correct analysis by the parties.

Accordingly, Richards submits that Wis. JI – Civil 1740 is not in accord with the plain wording of the statute. The instruction talks about a common scheme or plan "to

accomplish a result that injures the plaintiff." But the statute actually talks about joint and several liability "for all damages resulting from" the common scheme or plan. This is not merely a matter of semantics, but a significant distinction. The court of appeals relied very heavily on the instruction to incorrectly conclude that Wis. Stat. § 895.045(2) requires that the plaintiff's damages be the direct and particular result of the common scheme or plan, rather than merely a result of the common scheme or plan.

V. Badger Confuses Equal Liability of the Defendants for Purposes of Contribution with the Plaintiff's Right under the Statute to Make a Full Recovery against Any of the Defendants.

The common law rule concerning contribution was changed in *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105 (Wis. 1962). Previous to *Bielski*, causally negligent defendants shared equally in responsibility for the plaintiff's damages for purposes of contribution. After *Bielski*, contribution between defendants was based on the percentage of causal negligence attributable to each. However, as noted in the *Comment* to

Wis. JI—Civil 1740, *Bielski* did not affect the plaintiff's rights against any of the defendants. The plaintiff was entitled to a judgment for the full amount of his damages against each responsible defendant except as it may be reduced by his own contributory negligence. Badger ignores this historical development in our tort law.

VI. The Statute Does Not Codify *Ogle*, *Collins* or *Bruttig*.

Badger argues that the historical development of concerted action cases in Wisconsin reveals that the statute requires equal fault on the part of the wrongdoers for the imposition of joint and several liability. To the contrary, our case law has rarely discussed and never adopted the doctrine. *See, Ogle, supra, Collins, supra,* and *Bruttig, supra.* Therefore, it cannot be said that the legislature codified these cases in adopting Wis. Stat. § 895.045(2).

Ogle never discusses a concerted action doctrine and is about contribution rights between two drivers who were drag racing. It never discusses the defendants' joint and several

liability to the plaintiff. Rather, it merely affirms the trial court's equal allocation of negligence, even though only one of the drivers actually collided with the injured person. In fact, the injured person had previously settled his claim and recovered his damages in full.

Thus, the only dispute at trial in *Ogle* was over the respective contribution rights of the two drag racing drivers. Yet, Badger makes the strained argument that the legislature codified *Ogle* when it adopted § 895.045(2).

The concerted action doctrine was also discussed, but not adopted, in *Collins*. Neither did *Collins* adopt the Restatement rule of concerted action, nor alter the substantial factor test of causation. More to the point, *Collins* did not limit concerted action liability to a "drag racing" type of case, as Badger would have the court believe.

In *Bruttig*, the court, in dictum, noted that "Wisconsin has never explicitly adopted the concerted action theory except in a variant form to impose joint and several liability on all defendants participating in a drag race." *Id.* at 281, 453

N.W.2d 158. But, *Ogle* never discussed, much less adopted, the concerted action doctrine on which Badger relies. As stated above, in *Ogle*, the court merely imposed equal liability on drag racing defendants for purposes of contribution.

Ogle, Collins, and *Bruttig* do not support Badger's argument that the statute only applies in cases where the defendants have equal culpability for purposes of contribution. The statute uses the words "jointly and severally liable for all damages," rather than the words "equally liable for all damages." If the legislature intended "equal liability," it would have said so.

Moreover, the statute uses the use words "act in accordance with a common scheme or plan." This language is different and broader than the language of "concerted action" discussed in *Collins* and *Bruttig, i.e.*, "in pursuance of a common plan or design to commit a tortious act."

In short, *Ogle, Collins* and *Bruttig* are of no help in interpreting § 895.045(2). If anything, the cases demonstrate

that, contrary to Badger's assertion, a concerted action doctrine has never been adopted in Wisconsin.

CONCLUSION

The points of agreement in this case include that Schrimpf, together with Zimmerlee and Pratchet, engaged in a common scheme or plan to illegally buy alcohol. Badger also concedes that this action was a substantial factor in Zimmerlee's drunk driving that killed Richards' spouse. The statute plainly provides for joint and several liability, and Richards is entitled to recover all of her damages from Schrimpf.

Dated: May 29, 2007.

Respectfully submitted,

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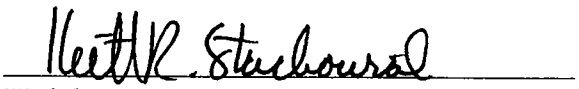
CERTIFICATION OF LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,351 words.



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CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY

I certify that on May 29, 2007, this brief was delivered to a third-party commercial carrier (Federal Express) for delivery to the Clerk of the Supreme Court within three calendar days. I further certify that the brief was correctly addressed.

Dated: May 29, 2007.

Keith R. Stachowiak

STATE OF WISCONSIN
SUPREME COURT

MICHELLE RICHARDS,

Plaintiff-Respondent-Petitioner,

-vs-

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-and-

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On Appeal from the Circuit Court for Milwaukee County
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The Honorable Patricia D. McMahon, Presiding

NON-PARTY BRIEF OF CIVIL TRIAL COUNSEL OF WISCONSIN

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June 22, 2007

TABLE OF AUTHORITIES

Cases

Statutes

Other

The court of appeals correctly interpreted both subsections of § 895.045, and its decision should be upheld. This brief addresses why subsection (2) of that statute does not apply in cases such as framed below.

Amicus Civil Trial Counsel of Wisconsin endorses the approach to Wis. Stat. § 895.045(2) taken by the Wisconsin Civil Jury Instruction Committee in Wis. JI-Civil 1740. This third-party analysis by a respected panel of informed judges and lawyers approximates well "an exercise in logic in which a court determines what a reasonable person in the position of a legislator enacting a statute would have said about the legal issue presented in a given case." *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 60 n.3, 271 Wis. 2d 633, 681 N.W.2d 110 (Abrahamson, C.J., *concurring*).

The Wisconsin Civil Jury Instruction Committee's analysis complies with the legislative text, promotes the legislative purpose and provides outcomes that are reasonable and just. Thus, its interpretation is plausible, efficacious and acceptable. *Id.*, ¶ 70.

The Jury Instruction Committee correctly turned to common law to interpret the legislative text, "act in accordance with common scheme or plan," because "[t]he interpretation of well-defined words and phrases in the common law carries over to statutes dealing with the same or similar subject matter." 2B Sutherland, *Statutory Construction*, 50:03 (6th ed. 2000). The common law's treatment of "persons acting in concert," as expressed in the *Restatement (Second) of Torts* § 876 (2006) and in the Wisconsin cases cited by the Jury Instruction Committee, illuminates "the

same or similar subject matter" addressed in Wis. Stat. § 895.045(2). That common law context led the Jury Instruction Committee to a correct result as set forth in JI-Civil 1740 and affirmed by the court of appeals. The common law of concerted action does not support Ms. Richards, and she concedes this point *sub silentio* by urging this Court not to consider or follow the *Restatement* § 876 (Pet. Br. at 17).

The Jury Instruction Committee's work likewise promotes the legislative purpose. All presumably acknowledge that Wis. Stat. § 895.045(2) became law as part of civil justice reform legislation in 1995. Daniel F. Ritsche, *Torts and Damages: The Civil Justice Reform Issues*; L.R.B. Brief 95-5 (1995) (CTCW App. 1). In response to concerns about the unfairness that a person "found to be as little as 1% at fault could wind up paying 100% of the judgment if the other guilty parties are indigent," *id.* at 4, Wisconsin lawmakers struck a compromise setting a 51% threshold before others' fault could be collected from a joint tortfeasor's assets. No reason is apparent, or suggested, why the legislative purpose would be served by significantly undercutting the 51% threshold. To the contrary, an open-ended exception that hitches the 1% rule to the substantial factor test would, given Wisconsin tort law, make illusory in numerous cases the fairness balance expressly struck by Wis. Stat. § 894.045(1). Ms. Richards implicitly acknowledges the unfair reach of her substantial factor approach by adding a foreseability requirement to her proposed rule. (Pet. Reply Br. at 7-8). A foreseeability test might work in jurisdictions that routinely utilize proximate cause, but Wisconsin's cause-in-fact approach would

wrongly negate the legislative purpose behind adding fifty percentage points to the 1% threshold.[1]

Finally, the Jury Instruction Committee's analysis provides outcomes that are reasonable and just. Looking beyond the instant case, as this Court must in shaping Wisconsin law, numerous instances come to mind where substituting cause-in-fact, in place of the balance of interests struck by concerted action common law and Wis. Stat. § 895.045, would be unreasonable and unfair. For example, suppose Messrs. Parker and Stork together rob a bank and then immediately part company after dividing the loot. The following day, Stork uses his share to buy a car and a case of beer, purchases he could not have made but for the stolen funds. Stork then drives while drunk and hits Mr. Johnson's parked car. Although the common scheme was limited to the bank robbery, can Johnson recover all his property damages from Parker's assets, since Parker was in a common scheme whose proceeds were "a cause" of the property damage? Alternatively, suppose that Messrs. Parker and Stork pool their funds to purchase illegal fireworks for use at Parker's lake cottage the following week. The next day Stork, by himself and without Parker's knowledge, uses the fireworks carelessly and burns Mr. Johnson's field. Again, can Johnson recover all his property damage from Parker even if Parker is found only 1% at fault? In both examples, Wisconsin's legislative

[1] Ms. Richards does not state whether the foreseeability element she proposes would likewise include a consideration of public policy factors, heretofore used in liability analyses. If she meant to include public policy factors as a mechanism for avoiding joint and several liability, then her rule would necessitate a new branch of Wisconsin tort law.

balancing of interests results in a rule that protects Parker from paying for another's misconduct unless (1) he is at least 51% responsible ***or*** (2) he acts in a scheme to accomplish not just any result, but rather "the result that injures the plaintiffs." As neither robbing the bank nor purchasing illegal fireworks injured Johnson, under the legislature's view of a just and fair result, Johnson must demonstrate 51% fault by Parker in order to use Parker's assets to pay for Stork's fault.

This Court of course is aware of many disturbing cases in which an innocent party receives nothing or only a miniscule share of her losses. The legislature likewise would have been aware of this when it struck the balance of interests at a 51% threshold, with a narrow exception not applicable here. Even in the instant case, the outcome appears neither unjust nor unreasonable. Ms. Richards elected to accept, without going to trial, payments totaling 86% of her stipulated damages. Richards elected to give a Pierringer Release to the drunk driver and in so doing agreed to allocate to him and take on a 72% share of responsibility. Richards also elected to assign 14% shares of fault to the passenger, Schrimpf, and to the beer purchaser, Prachet, when Schrimpf had additional insurance coverage and Prachet apparently is judgment-proof. Richards thus elected not to risk a trial where the jury could have assigned a greater share to the drunk driver (and thus to Richards), or to the apparently judgment-proof Prachet.

In actuality, Ms. Richards wants this Court to recalibrate the balance struck by the legislature, making it easier for plaintiffs to recover damages caused by one party out of the assets of another. The danger in such a

request, however, can be the creation of an inference that "there is no longer any problem on which the Court will defer to another organ of government if [a simple majority of the court] are confident (a) that their own solution is better and (b) that they can, as a practical matter, impose their solution on society." L. Lusky, *By What Right?* (The Michie Co., 1975) at 20. The decision of the appellate court should be affirmed.

Respectfully submitted this 22nd day of June, 2007.

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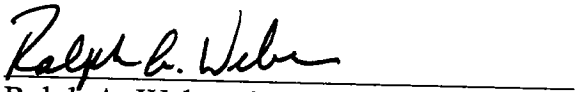

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Plaintiff,

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Third-Party Defendant.

FORM AND LENGTH CERTIFICATION

I hereby certify that this *Amicus* Brief of Civil Trial Counsel of Wisconsin conforms to the rules contained in Section 809.19(8)(b) and (c) of the Wisconsin Statutes for a brief and appendix produced with a proportional serif font. The length of this brief is 1,183 words.

Dated this 22nd day of June, 2007.

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SHORT APPENDIX TO NON-PARTY BRIEF OF CIVIL TRIAL COUNSEL OF WISCONSIN

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Brief 95-5

February 1995

TORTS AND DAMAGES: THE CIVIL JUSTICE REFORM ISSUE

I. INTRODUCTION

The continuing debate over revising the civil justice system, sometimes called "tort reform", is again the focus of legislative attention. Among the reasons for heightened interest in the issue, both in Wisconsin and the rest of the nation, is the persistent rise in the size of medical malpractice damage awards and the escalating effect they have on the cost of malpractice insurance premiums and on health care in general. Another reason is the widespread publicity given to large damage awards won in seemingly frivolous lawsuits. A third contributing factor is the recent electoral gains of the of the Republican Party, which has generally supported changes in the civil legal system.

While some groups, such as insurance companies, doctors, manufacturers and other businesses, see a need for significant reform in the civil justice ground rules, many others, such as trial lawyers, labor unions and advocates for consumers and the financially disadvantaged, disagree. They assert that the system is generally working well and believe that little, if any, change is warranted. This brief examines key elements of the tort reform issue and presents commonly expressed arguments for and against various proposed modifications in the civil justice system.

What is a Tort? A tort is a wrongful act or omission, constituting negligence, that results in identifiable harm to a person and for which relief may be obtained in a court of law, typically in the form of monetary damages. Negligence may be the failure to do what a reasonably prudent person would ordinarily have done to prevent foreseeable harm to another under the circumstances. It can also be the doing of a careless, reckless or intentionally malicious act that a prudent and reasonable person would not have done. Essentially, the negligence standard seeks to punish abnormal or inappropriate behavior that harms others. Torts can take the form of causing actual physical or psychological injuries; violating a business relationship by fraud, libel or slander; or any other negligent act or nonact which causes economic losses to another. A tort claim is a civil action in contrast to a criminal action for which the penalty can include imprisonment.

Prepared by Daniel F. Ritsche, Research Analyst

Purpose of a Tort Action. In general, a tort claim seeks redress by relying on the civil justice system to assign fault and, as much as practicable, to make an injured or wronged person "whole" again by forcing the guilty party ("tort-feasor") to pay for the harmed person's present and future medical expenses, income reduction or other tangible or intangible losses. While money alone is often inadequate to compensate a person for the severe pain and suffering resulting from physical or mental injuries or loss of reputation, it is the chief tool available to the civil court. The system is also designed to punish wrongdoing and provide warnings in hopes of preventing future similar unacceptable behavior.

Types of Damage Awards. Money can be awarded to successful plaintiffs in civil suits in the form of three basic types of damages — economic, noneconomic and punitive damages. **Economic damages** include compensation for the actual and estimated costs of present and future medical care, loss of income or earnings capacity, harm to reputation, and damage to or loss of property. **Noneconomic damages** can include awards for so-called "pain and suffering"; mental distress; worry or emotional anguish of the injured individual; embarrassment or humiliation; loss of enjoyment of the normal activities, benefits and pleasures of life; loss of well-being or bodily functions; and the loss of consortium, companionship, and affection suffered by the family of a person who is severely injured or dies as a result of a tortious act. **Punitive damages** may be awarded to the victim but are intended to serve as punishment to the party at fault and to deter similar future wrongdoing by the guilty party and others.

II. ISSUES AND ARGUMENTS

Medical Malpractice. Health care costs consume an increasingly larger share of national wealth each year, rising at a significantly faster pace than the general rate of inflation. It is argued that the escalation of health care costs is partly attributable to patients and their families trying to affix blame for unsatisfactory outcomes and to excessively large "pain and suffering" and punitive damage awards.

Tort reform advocates assert that doctors often resort to practicing so-called "defensive medicine" in order to avoid lawsuits. They may order unnecessary tests, medical interventions of dubious merit and prolonged hospital stays in order to prove later, if called into court, that everything possible was done to diagnose and treat a patient. Such procedures, in some cases performed against a physician's better judgment, may drive up the expense of health care for all.

Noneconomic and punitive damages make up increasingly large proportions of medical malpractice awards. The right of an injured individual to seek compensation for actual and quantifiable economic damages is generally not disputed. Similarly, most people agree that an injured person or surviving family members deserve fair compensation for the pain and

anguish caused by crippling injury or the death of a loved one. Tort reform advocates generally do not propose placing restrictions on awards for actual economic costs but believe some caps on difficult-to-calculate losses, such as "pain and suffering", are appropriate. They also assert that there should be reasonable limits on punitive damages. Critics of restrictions counter that malpractice caps will hamper the ability of juries to punish negligent doctors and adequately compensate victims for the diminished length and quality of life.

The cost of medical malpractice insurance premiums (currently estimated at between 1% and 3% of a physician's expenses) is a small but growing portion of the health care budget. However, those supporting caps argue that the accelerating cost of insurance, especially in certain high risk medical specialties, is prompting many doctors to retire and may discourage replacements. A prime example cited is obstetrics. Parents are apt to sue the doctor who delivered the baby if there are medical complications, particularly in cases of life-long handicaps. It is argued that statutory caps on the size of punitive damages will help control medical costs by stabilizing malpractice insurance premiums. Opponents claim, however, the prospect of damage awards provides a strong financial incentive for medical providers to practice within acceptable standards of care. Both sides admit the medical malpractice system is imperfect. Some deserving victims never get into court, while some parties file false claims. The process itself may be slow, costly and sometimes unjust.

Although several states have instituted caps on noneconomic awards, such as "pain and suffering" and punitive damages, there are currently no limits in Wisconsin on these types of damages. (1985 Wisconsin Act 340 placed a $1 million cap on noneconomic damages for claims filed after June 14, 1986, but that provision sunset on January 1, 1991.)

Some states limit the amount of time a patient has to bring suit, either as calculated from the date on which the alleged malpractice occurred or from the date the injury was discovered. In Wisconsin, for example, medical malpractice actions must be filed within three years of the date of the injury or one year from the date the injury was discovered or with reasonable diligence should have been discovered. However, no action may be commenced more than five years from the date of the negligent act or omission. This statute of limitations was upheld as a legitimate exercise of legislative discretion by the Wisconsin Third District Court of Appeals in *Miller v. Kretz* on February 7, 1995. Although many other tort actions have more lenient grace periods for filing claims, the court ruled that the limitation was not a denial of the constitutional guarantee of equal protection under the law because the legislature had a rational reason to enact it. The court noted: "Because of the distinct nature of medical malpractice claims, the costs involved and the insurance issues, distinguishing health care providers in medical malpractice claims is reasonable."

Excessive Damage Awards. As discussed previously, awards for noneconomic and punitive damages have increased greatly in size and frequently appear to be out of proportion to the actual economic losses. Critics point to the recent case in which a jury awarded almost $3 million to an elderly woman burned by a cup of McDonald's coffee. She sustained the burns when she attempted to pry the top off the cup while holding it between her legs as she was riding in a car. The judge later reduced the award to $640,000.

Some juries have arbitrarily set punitive awards so high as to call into question whether they may violate the prohibition of the U.S. Constitution against the imposition of excessive fines. In a land title dispute several years ago, a West Virginia jury imposed a $10 million punitive sanction against a gas and oil company — 526 times the $19,000 actually lost.

Some argue that punitive damages should not be paid in full to the harmed individual. Rather, since their purpose is to punish wrongdoers and promote public safety, such awards should accrue, in whole or part, to the public treasury.

Contributory and Comparative Negligence. The tort system is based on fault and the principle that whoever caused an injury should pay the costs resulting from the irresponsible behavior or negligence. This means that, in general, compensation is based on the percentage of the blame assigned to each individual involved. If one tort-feasor is responsible for the whole incident, then he or she pays all of the costs. Multiple tort-feasors share the costs based on their portion of the fault. Finally, the total costs to be paid to the injured victim are reduced by any percentage of fault attributed to the injured individual. For example, if A and B are involved in an automobile accident in which B is 85% at fault and the total damages awarded to A in a civil trial are $100,000, then the damages B will be required to pay will be reduced by $15,000, leaving A with a total award of $85,000. Under the doctrine of comparative negligence, recovery is barred unless the defendant's negligence was greater than the plaintiff's on the theory that if a person is more than 50% at fault for an accident, the other party involved should not be liable.

Joint and Several Liability. In cases in which more than one party is found to be at fault, theoretically all are supposed to pay a portion of the total cost of the damages based upon their allotted share of the blame. However, if one or more of the persons at fault are unable to pay all or part of their share, the burden to pay is shifted to the tort-feasors who do have sufficient financial resources, those with so-called "deep pockets". The result of joint and several liability is that a person who is found to be as little as 1% at fault could wind up paying 100% of the judgment if the other guilty parties are indigent. Some jurisdictions permit a person who is forced to pay more than his or her rightful share of the award to bring a civil action against the parties who were initially unable to pay, but the person with "deep pockets" may never be fully compensated by the less well-off defendants.

Proponents of the joint and several liability doctrine claim that justice requires that an injured or wronged person who suffers harm due to the negligence of others should receive compensation for pain and income losses, regardless of which defendant pays. They also argue that it spreads tort costs over the broad range of society in instances where awards are covered by liability insurance. Opponents assert joint and several liability should be altered so that a defendant found guilty should only have to pay his or her fair share of the damages based on the proportion of the fault assigned.

Contingency Fees. Because some of those injured are reluctant to file suit due to their inability to afford legal fees, attorneys often agree to take cases that have some merit in return for a percentage of any damage awards recovered. Such contingency fees are commonly set at one-third of the award but sometimes range up to one-half in particularly risky or complicated actions. Contingency fee arrangements may ensure that less affluent persons with legitimate complaints have access to the courts, but critics charge that the system encourages too many claims that are unlikely to prevail on their own merits. While some assert that lawyers will decline cases in which the chances of winning are small, others argue that attorneys may gamble on these weaker cases in hopes that defendants will settle out of court in order to avoid the high costs of litigation.

1985 Wisconsin Act 340 created Section 655.013, Wisconsin Statutes, which limits the amount of contingency fees that attorneys may collect in medical malpractice cases. In general, lawyers working on such a basis in claims against health care providers may collect one-third of the first $1 million recovered and 20% of any payment above that amount. Attorney fees are limited to 25% of the first $1 million if the case is settled within 180 days of filing the claim and at least 60 days before the first scheduled day of trial.

Product Liability. Manufacturers have a duty to produce products that are not defective or inherently unsafe. However, tort reform advocates claim that companies should not be held liable for products that meet government or accepted industry safety standards when they are made. They also say that manufacturers should not be liable if safety equipment is removed or if instructions are disregarded and the product is used incorrectly. They further argue that retail stores and dealers should not be responsible for selling defective equipment which they believed to be safe.

Reform proponents claim that product innovation is discouraged because of the propensity of people to sue for injuries that could have been prevented with a little common sense. Companies, such as pharmaceutical manufacturers, may even hesitate to undertake development and marketing if their liabilities may outrun product income. A case in point occurred at Abbott Laboratories in 1993 when it discontinued testing of an experimental vaccine to pre-

vent the transmission of the HIV virus from infected mothers to their children. The company voiced worries that the cost of potential liability lawsuits outweighed any anticipated profits.

There are notable cases where defective product design has made an item blatantly unsafe — a prominent example being the Ford Pinto automobile which exhibited a tendency for gas tank explosions in rear-end collisions. But there are also many examples of products, thought to be safe when initially marketed, that later were judged to have been manufactured or used negligently. In some cases where the products have been widely distributed, numerous plaintiffs may join in a class-action lawsuit, which can drive companies into bankruptcy. Well-known examples include the damages awarded against the manufacturers of asbestos products, silicone breast implants and Dalkon Shield intrauterine contraceptive devices. In many instances of alleged defective products, the maker will often settle out of court, without admitting guilt, to avoid the considerable legal costs and negative publicity resulting from a trial. In February 1995, for example, the Kellogg Company agreed to pay $2,400 in damages to a man who insisted the company's Pop-Tarts were to blame for a fire in his toaster which caused damage to his kitchen. Products are sometimes recalled for repair or replacement in order to forestall public relations disasters, but out-of-court settlements that bar plaintiffs from discussing their claims may mean the public at large is not warned about unsafe products.

Frivolous Suits. Some say that a prime contributor to the clogged state of the civil court system is the large number of suits of dubious merit filed for purposes of harassment, extortion or intimidation or because plaintiffs mistakenly believe that their frivolous claims are legitimate. One example was a girl in Maryland who sued her school for $1.5 million for injuries sustained playing on the football team on the grounds that no one told her of the risks involved. Some file relatively groundless suits in hopes that a sympathetic jury will side with them or that a wealthy defendant will settle out of court to avoid the costs and embarrassment of a public trial. Alleged personal injuries are an ample source of frivolous lawsuits because of the difficulty of proving or disproving pain in soft tissues, such as backaches, headaches or allergic reactions to alleged contaminants.

While there are remedies available to combat overburdening the justice system, judges are reluctant to sanction frivolous petitioners for fear of discouraging people from seeking just redress from the courts. Section 814.025, Wisconsin Statutes, permits judges to penalize those filing lawsuits found to be frivolous, either during the proceedings or upon judgment, by awarding the successful party court costs and reasonable attorney fees. To impose punishment for a groundless action, the judge must find that the suit was commenced in bad faith solely for the purposes of harassing or maliciously injuring another or that the plaintiff or the plaintiff's lawyer knew, or should have known, that the action was without any reasonable basis in law or equity and could not be supported by a good faith argument for modification

or reversal of existing law. The Wisconsin Court of Appeals ruled in *Minniecheske v. Griesbach*, 161 Wis. 2d 743 (1991), that restricting access to the courts as a sanction for frivolous actions was acceptable if narrowly tailored to balance the interests of public access to the courts against the citizens' right not to have frivolous litigation draining public resources.

III. PROPOSALS FOR REFORM

There continues to be considerable disagreement about whether radical tort reform is justified. Some claim that the so-called "litigation explosion" has been overblown and that altering the system will make it less responsive and accessible to the people who rely on it for redress of wrongs. They assert that the number of lawsuits and size of awards are not increasing as rapidly as in the recent past and that the system is working as intended to compensate harmed individuals, punish wrongdoers and promote safe products and practices. They also assert that the size and type of damage awards should be left up to the common sense and compassion of ordinary citizens serving on juries and that an arbitrary limit may not adequately compensate some severely harmed victims.

Federal Legislation. The U.S. Congress is currently considering the "Common Sense Legal Reform Act". Its stated purpose is to discourage frivolous lawsuits and limit excessive and "outrageous" punitive damage awards. The proposed act requires the losers of many federal lawsuits to pay the winner's legal fees, preempts state laws with federal standards, caps punitive damage awards for defective product claims, and requires that courts sanction attorneys for "improper actions and frivolous arguments".

Illinois Legislation. A bill passed by the Illinois House of Representatives in February 1995 would limit noneconomic damage awards, such as for "pain and suffering", to $500,000, an amount that would increase with inflation. It would cap punitive damage awards at three times the amount of actual economic damages and eliminate the concept of joint and several liability. The proposal would also give protection to manufacturers in product liability cases by creating a legal presumption that a product is considered safe if it met state or federal safety standards at the time it was made.

Wisconsin Legislation. The Wisconsin Legislature has enacted a number of limitations on liability over the years. Among them are exemptions for recreational land use (the "berry picker" law), aid and comfort to injured persons (the "Good Samaritan" law), donated food to charitable organizations, and ski patrol duties. In order to be exempt from liability claims, the actions must have been taken in good faith, and reckless negligence or failure to warn someone of a known hazard are not excused.

The 1995 Legislature is currently considering several bills relating to the subject of tort reform. 1995 Assembly Bill 36, which passed the assembly on February 2, 1995, would establish

a limit of $350,000 on the amount of noneconomic damages that a claimant may recover due to an injury caused by the negligence of a health care provider. Noneconomic damages are defined under this measure to include items such as pain and suffering, embarrassment, mental distress, and loss of society and companionship. The bill also limits medical malpractice damages related to loss of society and companionship as the result of a death to a maximum recovery of $150,000, the amount currently established for other civil actions involving death.

1995 Senate Bill 11 proposes significant changes in the areas of comparative negligence in general and in the principle of joint and several liability with respect to punitive damages. The proposal would change the rules of comparative and contributory negligence so that the negligence of the plaintiff, if any, would be measured separately against each of the joint tort-feasors. A tort-feasor's liability and share of the total damage award would be limited to the percentage of the total causal negligence attributed to that party. The doctrine of joint and several liability would be abolished in the area of punitive damages, meaning that a defendant would be responsible for only his or her allotted share of the punitive damages, even if the other parties at fault were unable to pay their assigned portion. In addition, evidence of a defendant's wealth, an indicator of ability to pay, would not be admissible until after the plaintiff had established a legally sufficient case for the allowance of punitive damages.

Continuing Debate Over Tort Reform. Even if all the currently proposed modifications at the state and federal level are enacted, questions of tort reform will persist. Like many other areas of the law, this ongoing debate will center around fair and equal justice and will involve a delicate balance between the rights of wronged or injured individuals and the costs to society as a whole.

STATE OF WISCONSIN
SUPREME COURT

MICHELLE RICHARDS,

Plaintiff-Respondent-
Petitioner,

-vs-

BADGER MUTUAL INSURANCE COMPANY,

Defendant-Third-Party
Plaintiff-Appellant,

-and-

Appeal No. 05-2796
Circuit Court Case No. 04-CV-392

DAVID SCHRIMPF,

Defendant-Third-Party
Plaintiff,

-vs-

TOMAKIA PRATCHET,

Third-Party Defendant.

CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2007, I filed with the Court by overnight courier and served copies of the Amicus Brief of Civil Trial Counsel of Wisconsin under Wis. Stat. (Rule) Section 809.19(7), upon counsel for the parties by first class mail:

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STATE OF WISCONSIN
IN SUPREME COURT
Appeal No. 2005-AP-002796

MICHELLE RICHARDS,

Plaintiff-Respondent-Petitioner,

vs.

BADGER MUTUAL INSURANCE COMPANY,

Defendant-Third-Party Plaintiff-Appellant,

vs.

DAVID SCHRIMPF,

Defendant-Third-Party Plaintiff,

vs.

TOMAKIA PRATCHET,

Third-Party Defendant.

APPEAL FROM THE CIRCUIT COURT FOR MILWAUKEE COUNTY,
THE HONORABLE PATRICIA D. MCMAHON, PRESIDING,
MILWAUKEE COUNTY CIRCUIT COURT CASE NO. 04-CV-392
AND FROM THE DECISION OF THE COURT OF APPEALS, DISTRICT ONE

AMICUS CURIAE BRIEF OF THE WISCONSIN ACADEMY OF TRIAL LAWYERS

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INTRODUCTION

WATL submits that from a public policy perspective what is most disturbing about the decision of the Court of Appeals below, 2006 WI App 255, __Wis. 2d __, 727 N.W.2d 69 (hereafter, "*Richards* Court of Appeals Decision"), is that it results in a partial civil exoneration of a tortfeasor who illegally supplied alcohol to an underage drunk driver, who in turn killed an innocent person. WATL submits that the Court of Appeals does this based on an incorrect and highly technical reading of a procedural statute.

ARGUMENT

I. THE COURT OF APPEALS DECISION WILL LESSEN CONFIDENCE IN THE INTEGRITY OF THE JUSTICE SYSTEM.

Except for the unusual interpretation of §895.045(2) by the Court of Appeals below,[1] there can be no question that Defendant Schrimpf in the case at bar would be found jointly and severally liable for furnishing alcohol to Defendant Zimmerlee and both Schrimpf and his insurer would be made to answer in damages for the death of Richards because of Zimmerlee's drunk driving.[2] As the Court of Appeals Majority itself admits:

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[1]The case at bar is very different from other cases where there may be some question about the application of either Wis. Stats. §§125.07(1)(a) or 125.035(4)(b). *Cf., e.g., Meier v. Champ's Sport Bar & Grill, Inc.*, 2001 WI 20, 241 Wis. 2d 605, 623 N.W.2d 94.

[2]Judge Fine put it very well in his Dissent to the decision of the Court of Appeals below when he observed:

> No one disputes that [Pratchet, Schrimpf, and Zimmerlee] acted in accordance with a common scheme or plan to buy alcohol for Zimmerlee, who could not lawfully buy it himself. Also, no one disputes, that as a result of Zimmerlee's drinking the alcohol bought for him by Pratchet, he killed Christopher Richards by ramming Richards's car. Richards would not have been killed by Zimmerlee if Zimmerlee had not been drunk as a result of

> Richards was killed in the accident. The parties have stipulated that there was no negligence on the part of Richards. It is also undisputed that Zimmerlee was intoxicated at the time of the accident, and that the beer was a substantial factor in causing the accident and Richards's death. .... The parties have further stipulated that both Schrimpf and Pratchet 'procured' alcohol for Zimmerlee, within the meaning of Wis. Stat. § 125.035(4)(a) [(4)(b)], and were thus negligent.... Sections 125.035(4)(a) [4(b)] and 125.07(1)(a)(1) specifically permit recovery from an individual who 'procures' alcohol for an underage drinker.

Richards Court of Appeals Decision, *id.* at ¶4.

And yet, in effect ignoring the words "jointly and severally liable" in §895.045(2), the Court of Appeals below concludes that "[a]lthough it is undisputed that Schrimpf and Pratchet are liable as providers of alcohol under Wis. Stat. §§ 125.07(1)(a)1. and 125.035(4)(a) [4(b)], this fact does not give Richards a cause of action for concerted action under § 895.045(2)." *Richards* Court of Appeals Decision, *id.* at ¶27.

WATL respectfully submits that the Court of Appeals decision below should be reversed in order to reassure the public that every effort is being made to safeguard the rights of those who are the victims of underage drunk drivers. It is further important to reassure the public that appropriate civil remedies will be made available to deter those who would dare to furnish alcohol to underage drinkers.

WATL respectfully asks that this Court recall its past pronouncements concerning the very important public policy objective of eradicating drunk driving from the roads of Wisconsin. As this Court said in *State v. Nordness,*

> drinking the alcohol bought for him by Pratchet. Under the unambiguous language of Wis. Stat. § 895.045(2), ... that ends our analysis.

Richards Court of Appeals Decision, *id.* at ¶¶34-35.

128 Wis. 2d 15, 381 N.W.2d 300 (1986), "... [d]runk driving is indiscriminate in the personal tragedy of death, injury, and suffering it levies on its victims.... It is ... a scourge on society.... It destroys and demoralizes personal lives and shocks society's conscience. It has no legitimate place in our society." *Id.* at 33-34. The elimination of drunk drivers from our roads is of paramount importance. *State v. Stenzel,* 2004 WI App. 181, 276 Wis. 2d 224, 688 N.W. 2d 20.

Citizens have a justifiable right to expect that those who drive drunk will be punished to the full extent of both the criminal and civil law. This Court has in fact recently demonstrated that it is prepared to mete out such punishment. *See Strenke v. Hogner,* 2005 WI 25, 279 Wis. 2d 52, 694 N.W.2d 296. In addition to the foregoing, WATL submits that citizens have a justifiable right to expect that punishment to the full extent of the law will be imposed where alcohol is knowingly furnished to minor drivers [*Cf.* Wis. Stats. §§125.07(1)(a) and 125.035(4)(b)[3]], who because of their inexperience are the least able to handle the effects of alcohol and thus constitute the greatest threat to the safety of our public roadways.

II. THE COURT OF APPEALS HAS IGNORED IMPORTANT HOLDINGS OF THIS COURT IN REACHING ITS DECISION.

The Court of Appeals has exceeded its authority as an error correcting court. In effect, the two Judge Majority of the Court of Appeals below imper-

[3] *Cf. Anderson v. American Family,* 2003 WI 148, 267 Wis. 2d 121, 671 N.W.2d 651.

missibly has sought to broadly interpret a statute of this State so as to eliminate a surviving vestige of our Common Law of joint and several liability.

A. The Court of Appeals has Completely Disregarded this Court's Decision in *Fuchsgruber.*

In *Fuchsgruber v. Custom Accessories, Inc.* 2001 WI 81, ¶ 25, 244 Wis. 2d 758, 628 N.W.2d 833, this Court addressed the reach and scope of Wis. Stats. §895.045(1). While *Fuchsgruber* involved a different subsection than the one at issue in the case at bar, there is absolutely nothing on the face §895.045 or in its legislative history which suggests that subsections (1) and (2) of that statute are different when it comes to the extent to which they are in derogation of the Common Law. The Supreme Court in *Fuchsgruber* noted that the legislative act which created §895.045, i.e., 1995 Wis. Act 17, was intended to modify the Common Law of joint and several liability in Wisconsin. *Id.* at ¶13. The 1995 Act created both subsections (1) and (2) of §895.045. Without making any distinction between subsections (1) and (2), the Supreme Court concluded in *Fuchsgruber* that §895.045 was in derogation of the Common Law and must be strictly construed, stating in part:

> Statutes in derogation of the common law are strictly construed. ... A statute does not change the common law unless the legislative purpose to do so is clearly expressed in the language of the statute. Id. To accomplish a change in the common law, the language of the statute must be clear, unambiguous, and peremptory.

Fuchsgruber, id. at ¶25.

Without explanation or justification, the Court of Appeals below did not strictly construe § 895.045(2). Instead, it has in effect expanded its reach,

thus further curtailing the Common Law. Without any support from legislative history and without any consideration of *Fuchsgruber,* the two Judge Majority of the Court of Appeals below asserts that "[w]e are satisfied that Wis. Stat. § 895.045(2) is a codification of the common-law rule on concerted action liability *discussed, but not explicitly adopted* [by the Supreme Court] [Emphasis supplied]." *Richards* Court of Appeals Decision, *id.* at ¶21.

In reliance on the thin reed of subsection (2)'s "concerted action" heading, the Court of Appeals below has in effect supplanted Wisconsin's surviving Common Law of joint and several liability in favor of a reading of §895.045(2) as supposedly codifying some sort of "concerted action" common law previously "discussed" by this Court, *but admittedly never adopted by this Court.* WATL submits that it is fair to observe that using the heading "concerted action" to define away the clear language of §895.045(2) regarding "joint and several liability" is a classic case of the tail wagging the dog. *Cf.* Wis. Stats. §990.001(6) ("The titles to subchapters, sections, subsections, paragraphs and subdivisions of the statutes and history notes are not part of the statutes").

WATL submits further that it should be of great concern to this Court that the interpretation of §895.045(2) espoused by the Majority of the Court of Appeals below in effect renders the language "joint and several liability" in §893.045(2) mere surplusage. As this Court stated long ago: "[It is] . . . a maxim of statutory construction that law should be so construed that no word

or clause shall be rendered surplusage. Thus every word appearing in a statute should contribute to the construction of the statute in accordance with its ordinary and customary meaning." *Johnson v. State,* 76 Wis. 2d 672, 676, 251 N.W.2d 834 (1977).

B. The Court of Appeals has Disregarded this Court's Teachings on how to Evaluate a Statute in relationship to the Common Law.

The Court of Appeals below has acted *ultra vires* the very guidelines this Court has established as a basis for evaluating a statute and its relationship to the Common Law. *See In re the Custody of DMM,* 137 Wis. 2d 375, 404 N.W.2d 530 (1987) where this Court set forth some of those guidelines:

> There is a presumption that a statute is consistent with the common law, and so *a statute creating a new remedy or method of enforcing a right which existed before is regarded as cumulative rather than exclusive of the previous remedies. ... '[A statute] should be construed in connection with the common law in force when the statute was enacted.* This is the rule whether the statute is simply declaratory of the common law, or whether it abrogates, modifies, or alters it in any way. And *there is a presumption that the lawmakers did not intend to abrogate or alter it in any manner... Even where this intention appears, there is a further presumption that the lawmakers did not intend to alter the common law beyond the scope clearly expressed, or fairly implied.'...* Further, ... '[w]here the language of the statute is subject to reasonable doubt, reference to common-law principles may provide a valuable clue as to whether a particular situation is controlled by the statute. ... *[A]ll legislation must be interpreted in the light of the common law and the scheme of jurisprudence existing at the time of its enactment.* The common law furnishes one of the most reliable backgrounds upon which analysis of the objects and purposes of a statute can be determined. [Emphasis supplied].'

Id. at 389-90.

The Court of Appeals below did not consider any of the foregoing *DMM* criteria. *Fuchsgruber* made it clear that in enacting §895.045 the Legislature was attempting to modify the Common Law of joint and several liability. Within the meaning of *DMM,* the Court of Appeals failed to consider that

subsections (1) and (2) of §895.045 should have been read as cumulative instead of exclusive of the previous Common Law of joint and several liability. Within the meaning of *DMM,* the Court of Appeals below ought to have construed §895.045 in light of the Common Law existing at the time of the amendment to that statute in 1995 by Wis. Act 17. Concerning this last point, while joint and several liability was clearly part of the Common Law existing when §895.045 was amended in 1995, "concerted action" was not. The mere fact that this Court may have discussed the concept of concerted action does not make it part of the Common Law.

III. THE COURT OF APPEALS DECISION IN THIS CASE IS IN CONFLICT WITH OTHER COURT OF APPEALS DECISIONS.

A decision of the Court of Appeals was handed down by District IV of the Court of Appeals on December 7, 2006, which appears to be in direct conflict with the decision of the District I Court of Appeals in the case at bar. *See Danks v. Stock Building Supply, Inc.,* 2007 WI App 8, __Wis.2d __, 727 N.W.2d 846. This Court declined to accept a Petition for Review of *Danks* (*See* 2007 WI 61), and so *Danks* remains the law in District IV.

Clearly, the District I Court of Appeals decision in the case at bar effectively creates a cause of action for "concerted action."[4] *Richards* Court of Appeals Decision, *id.* at ¶21. Undoubtedly, this is why the Court of Appeals dis-

[4] It is particularly difficult to understand the conclusion of the District I Court of Appeals when one considers that "concerted action" only appears in the heading to §895.045(2), whereas the actual text of that statute only provides that as a consequence of acting pursuant to a common scheme or plan "parties [will be] jointly and severally liable for all damages resulting from that action."

cusses the elements of such a cause of action by reference to Restatement (Second) of Torts §876. *Richards* Court of Appeals Decision, *id.* at ¶22. According to the District I Court of Appeals in the case at bar:

> [J]oint and several liability under Wis. Stat. § 895.045(1) is not to be confused with joint and several liability under § 895.045(2). Unlike § 895.045(1), where joint and several liability attaches after shares of causal negligence are individually attributed to the various tortfeasors and one tortfeasor is found to be 51 or more liable, when multiple tortfeasors are engaged in concerted action and are jointly and severally liable under § 895.045(2), shares of causal negligence are never attributed because all tortfeasors are equally liable.

Richards Court of Appeals Decision, at ¶28, n. 12.

The District IV Court of Appeals decision in *Danks* stands in sharp contrast to the decision of the District I Court of Appeals in the case at bar. This Court must reconcile the case at bar and *Danks,* and WATL submits that the reasoning of the *Danks* decision is far more compelling and consistent with the established law of Wisconsin than is the decision in the case at bar. WATL submits that this Court should adopt the *Danks* decision as the law of Wisconsin and reverse the decision of the Court of Appeals in the case at bar.

In *Danks,* the plaintiff attempted to establish liability against a defendant under §895.045(2), claiming that under the provisions of that statute a co-defendant was responsible for having harmed the plaintiff through a "common scheme or plan." *Danks, Id.* at ¶38.

According to the *Danks* Court, "[the plaintiff] appears to believe that the statute creates an independent cause of action ..." *Id.* at 38. The *Danks* Court concludes that the "statute does no such thing." *Id.* The *Danks* Court

goes on to observe that §895.045(2) plays no role in determining whether a particular defendant is liable to a plaintiff. *Danks, Id.* at ¶40. According to the *Danks* Court:

> [Wis. Stats.] § 895.045(1) sets forth Wisconsin's law of comparative negligence, specifying when a negligent plaintiff may recover from a negligent defendant. It also spells out Wisconsin law regarding joint and several liability among defendants, specifying when a given defendant may become liable for all damages assessed against multiple tortfeasors. Thus § 895.045(2) applies only *after* a judge or jury has determined, under applicable substantive law, that more than one tortfeasor is liable in some measure to the plaintiff. Subsection (2) simply modifies subsection (1) of the statute to provide that all defendants who are legally responsible for causing a plaintiff's damages, and who acted in concert in so doing, are jointly and severally liable for the plaintiff's damages, irrespective of whether a given defendant's apportioned causal negligence is less than 51%.

Danks, id., at ¶39.

CONCLUSION

Under §809.62(1)(d), it is up to this Court to resolve the clear division which has thus developed between the First District and the Fourth District Court of Appeals. WATL urges this Court to accomplish the resolution by adopting the reasoning of Fourth District's *Danks* decision and reversing the decision of the Court of Appeals decision in the case at bar.

Dated this 22nd day of June, 2007.

WISCONSIN ACADEMY OF TRIAL LAWYERS

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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 2654 words.

Dated this 22nd day of June, 2007.

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IN SUPREME COURT
STATE OF WISCONSIN

MICHELLE RICHARDS,

Plaintiff-Respondent-Petitioner,

v. Appeal No. 2005AP2796

BADGER MUTUAL INSURANCE COMPANY,

Defendant-Third-Party
Plaintiff-Appellant,

DAVID SCHRIMPF,

Defendant-Third-Party Plaintiff,

v.

TOMAKIA PRATCHET,

Third-Party Defendant.

Appeal from a Decision of the
Wisconsin Court of Appeals, District I, Affirming in Part and
Reversing in Part the Judgment of the Circuit Court for
Milwaukee County, the Hon. Patricia D. McMahon,
Case No. 04-CV-392

NON-PARTY BRIEF OF WISCONSIN INSURANCE ALLIANCE AND PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA WIS. STAT. § (Rule) 809.19(7)

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INTRODUCTION

The Wisconsin Insurance Alliance (the "WIA") and the Property Casualty Insurers Association of America (the "PCI"), by their attorneys, Godfrey & Kahn, S.C., submit this non-party brief, pursuant to Wis. Stat. § (Rule) 809.19(7) and the Court's May 29, 2007 order.

The WIA and the PCI have unique perspectives on this appeal because they represent the interests of a broad spectrum of the insurance industry in the State of Wisconsin and elsewhere, including numerous insurers who write liability insurance policies similar to the Badger Mutual Insurance Company ("Badger Mutual") policies at issue here.

The principle issue in this case is whether Badger Mutual, as David Schrimpf's liability insurer, may be held jointly and severally liable under Wis. Stat. § 895.045(2), based on "concerted action" for the negligence of third-party defendant Tomakia Pratchet, when Schrimpf and Pratchet both were found causally negligent, but their percentage of causal negligence was less than 51% each. Based on a plain reading of the statute as a whole, including the text, structure, and context, joint and several liability unambiguously does not apply in this case.

Even if the Court looks beyond the language of the statute, the title and legislative history provide further support for this result. A finding of joint and several liability would conflict with the legislature's intent and lead to absurd results. Therefore, the WIA and the PCI ask the Court to affirm the decision of the Court of Appeals and hold that Badger Mutual is not jointly and severally liable for Tomakia Pratchet's negligence.

ARGUMENT

All of the defendants in this case have been found causally negligent, and percentages have been assigned to their negligence. Schrimpf and, hence, his insurer, Badger Mutual, were assigned far less than 51% of the causal negligence (14% to be precise). Hence, Badger Mutual is not jointly and severally liable under Wis. Stat. § 895.045(1). The only issue remaining is whether the negligent acts of the defendants allow for the application of joint and several liability under Wis. Stat. § 895.045(2). Because the defendants did not act in concert – that is, they did not act in accordance with a common scheme or plan – to harm Christopher Richards and, accordingly, they were not found equally liable, subsection 2 does not apply. Schrimpf and Badger Mutual are not jointly and severally liable.

I. WIS. STAT. § 895.045(2) IS UNAMBIGUOUS, AND JOINT AND SEVERAL LIABILITY DOES NOT APPLY IN THIS CASE.

Subsections 1 and 2 of Wis. Stat. § 895.045 are mutually exclusive apportionment of damages provisions. Subsection 1 applies only where the percentage of causal negligence is at issue, while subsection 2 applies to an alternative basis for liability – concerted action – when the joint defendants are equally at fault. Both subsections apply only *after* liability has been determined. Hence, § 895.045 has no impact on Wisconsin's substantial factor test for causation.

A. The Text, Structure, and Context of the Statute Unambiguously Show That Subsection 2 Does Not Apply in Cases Where the Court Assigns Varying Percentages of Causal Negligence.

"Statutory language is given its common, ordinary, and accepted meaning." *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 663, 681 N.W.2d 110. The context of the statutory language and the structure of the whole statute are important to the meaning of a statute. *Id.* Section 895.045 reads as follows:

> **895.045 Contributory negligence. (1)** COMPARATIVE NEGLIGENCE. Contributory negligence does not bar recovery in an action by any person or the person's legal representative to recover damages for negligence resulting in death or in injury to person or property, if that negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributed to the person recovering. The negligence of the plaintiff shall be measured separately against the negligence of each person found to be causally negligent. The liability of each person found to be causally negligent whose percentage of causal negligence is less than 51% is limited to the percentage of the total causal negligence attributed to that person. A person found to be causally negligent whose percentage of causal negligence is 51% or more shall be jointly and severally liable for the damages allowed.
>
> **(2)** CONCERTED ACTION. Notwithstanding sub. (1), if 2 or more parties act in accordance with a common scheme or plan, those parties are jointly and severally liable for all damages resulting from that action, except as provided in s. 895.043(5).

A plain reading of all of § 895.045, including its structure and context, confirms that subsection 2 does not apply to this case. The statute differentiates between apportionment of damages based on a percentage of causal negligence or contributory negligence (subsection 1) and apportionment based on an alternative theory of liability – concerted action (subsection 2).

On its face, subsection 1 applies only when a court assigns different percentages of causal negligence to each defendant (and, in some cases, to the plaintiff). The last two sentences refer repeatedly to "percentage of causal negligence."

In contrast, subsection 2 makes no references to percentage of causal negligence. In concerted action cases, it is presumed to be equal. *See Bruttig v. Olsen*, 154 Wis. 2d 270, 280, 453 N.W.2d 153 (Ct. App. 1989). If the legislature had intended subsection 2 to apply in cases where courts assign different percentages of causal negligence to different parties, it most certainly could have done so. Subsection 2 could have been written to specifically include situations where percentage of causal negligence was at issue. The legislature chose not to do so. This distinction is especially informative because the legislature added subsection 2 at the same time as it added the last two sentences of subsection 1. Thus, at the same time the legislature added "percentage of causal negligence" language to subsection 1, it declined to include that same language in subsection 2. *Compare* Wis. Stat. § 895.045(1993-94) with (1995-96).

In short, subsection 1 and subsection 2 are mutually exclusive apportionment provisions. Subsection 1 discusses comparative negligence and how varying percentages of negligence affect a plaintiff's recovery. Subsection 2 does not even mention comparative negligence or percentages of

negligence. It assigns joint and several liability in the context of concerted action; that is, when two or more defendants act in accordance with a common scheme or plan to harm the plaintiff and, therefore, are equally liable.

Subsection 2 limits recovery to "damages resulting from *that action*." Wis. Stat. § 895.045(2) (emphasis added). The words "that action" in subsection 2 suggest a more limited application of joint and several liability – only in those cases where the damages result solely from the concerted action. In this case, the concerted action, or "that action," was buying beer, but the harm resulted from drunk driving – conduct different from "that action."

If the legislature had intended subsection 2 to apply in a case such as this one, where the court has assessed differing percentages of causal negligence to different defendants, there would have been no reason to use language different from subsection 1. Thus, when viewing the whole statute and comparing the language of both subsections, subsection 2, on its face, applies only where percentage of causal negligence is not at issue. In this case, the parties and the trial court assigned different percentages of causal negligence to each defendant.

B. Applying Subsection 2 to Cases With Varying Percentages of Causal Negligence Would Lead to Absurd Results and Endless Litigation of the Boundaries of a "Common Scheme or Plan."

Courts interpret statutes to avoid absurd results. *Kalal*, 271 Wis. 2d at 663. Applying subsection 2 of Wis. Stat. § 895.045 in a case where varying percentages of causal negligence have been assigned to the different defendants could lead to absurd results and produce an exception to the

joint and several liability statute that would swallow the general rule. A slight change in the facts of this case presents a good example. What if defendants Schrimpf and Pratchet were found to be only 1% at fault, for example, and Zimmerlee was 98% liable, but he was judgment proof? Then, contrary to the general rule in subsection 1, Schrimpf and Pratchet, with only 1% of fault each, would be liable for the full extent of the damages. This would be the case even though Zimmerlee's drunk driving was the direct cause of the accident. That is precisely the situation the legislature intended to avoid when it modified the joint and several liability rules.

While the purchase of alcohol for underage persons unquestionably is conduct that should be deterred, using subsection 2 to apply joint and several liability as a deterrent would have broader, unintended consequences. The effects of this interpretation could reach into all areas of negligence law and provide a perverse incentive for plaintiffs' attorneys to look for any basis upon which to plead a "common scheme or plan," regardless of the facts of their case. It would permit plaintiffs to avoid the legislature's strict limits on joint and several liability because the exception (subsection 2) would swallow the general rule (subsection 1).

If joint and several liability can be applied in situations such as this case, then what are the boundaries of "concerted action"? Would every underage person drinking at a party be liable for all of the future conduct of everyone else at the party? Presumably, they all would be part of a "common scheme or plan" to illegally consume alcohol. Would every company that has any connection to the manufacture, advertising, or sale of a defective product be jointly and severally liable for damages caused by that product? The manufacturer? The marketing company? The sales agency? The wholesale distributor? The retailer? Would each of

these entities be part of the "common scheme or plan" to sell a defective product? In short, applying joint and several liability in this case could greatly expand the scope of the limited statutory doctrine and lead to future litigation as to the bounds of what constitutes "concerted action" or a "common scheme or plan." In turn, it could significantly impact insurers' liability in each of these scenarios.

In order to avoid this absurd expansion of joint and several liability and the litigation that might follow, subsection 2 of Wis. Stat. § 895.045 must be limited to concerted action cases where the defendants are equally negligent. The text, structure, and context of the statute clearly support this interpretation. Where causal negligence has been determined not to be equal, only subsection 1 applies.

II. THIS INTERPRETATION IS SUPPORTED BY EXTRINSIC EVIDENCE; THUS, EVEN IF THE STATUTE WERE AMBIGUOUS, JOINT AND SEVERAL LIABILITY WOULD NOT APPLY.

The title and legislative history of the statute both confirm the interpretation of Wis. Stat. § 895.045(2) discussed above. Thus, even if the statute were ambiguous, the result would be the same – joint and several liability does not apply in this case.

A court is "not precluded from looking to legislative history 'to reinforce and demonstrate that a statute plain on its face, when viewed historically, is indeed unambiguous.'" *Fox v. Catholic Knights Ins. Soc'y*, 2003 WI 87, ¶19, 263 Wis. 2d 207, 219-20, 665 N.W.2d 181 (quoting *Resp. Use of Rural & Agric. Land v. Pub. Serv. Comm.*, 2000 WI 129, ¶41, 239 Wis. 2d 660, 619 N.W.2d 888). The court may consider other collateral sources as well, including "the scope, history,

context, subject matter and object of the statute." *Dubis v. Gen'l Motors Acceptance Corp.*, 2000 WI App 209, ¶7, 238 Wis. 2d 608, 612, 618 N.W.2d 266 (citing *Armor All Prods. v. Amoco Oil Co.*, 194 Wis. 2d 35, 50, 533 N.W.2d 720 (1995)).

The title of subsection 2 – "Concerted Action" – supports the more limited interpretation discussed above. Wisconsin courts have interpreted concerted action as applying to situations where the defendants are equally liable based on their joint conduct. *See Bruttig*, 154 Wis. 2d at 280. That was not the situation here. Zimmerlee's drunk driving directly caused Mr. Richards' death. Zimmerlee was assigned 72% of the fault. Schrimpf was causally negligent based on his role in procuring the beer, but only 14% at fault. Schrimpf and Zimmerlee did not act in concert to cause the accident, and they were not equally liable.

The legislative history of the statute provides support for this result. A drafting note included with an earlier version of § 895.045, which included the same language ultimately enacted by the legislature, stated that "[t]he bill specifies that the changes in the rule of joint and several liability do not apply to parties whose *concerted action* results in damages." *See* Drafting Records of 1995 Wis. Act 17 (Supp. App. 0005) (emphasis added). Moreover, the proposed changes were meant to "[a]bolish Joint and Several Liability except as follows: (a) people who act *in concert* on a common scheme or plan; ...." *See* Drafting Records of 1995 Wis. Act 17, Proposed Changes in Joint & Several Liability (Supp. App.0009) (emphasis added).

Viewing the statute against the history of joint and several liability in Wisconsin provides further support for this interpretation. Before the 1995 changes to the statute, Wisconsin applied joint and several liability to all joint

tortfeasors. *See Matthies v. Positive Safety Mfg. Co.*, 2001 WI 82, 244 Wis. 2d 720, 731-32, 628 N.W.2d 842. The 1995 changes to the statute dramatically altered this scheme by limiting the application of joint and several liability to only two situations: 1) where a joint tortfeasor is found to be at least 51% causally negligent; or 2) where tortfeasors "act in accordance with a common scheme or plan" to cause harm. *See* Wis. Stat. § 895.045; *see also Matthies*, 244 Wis. 2d at 733-34. This change in the law of joint and several liability is evidence of the legislature's purpose – to significantly narrow the application of joint and several liability. Applying subsection 2 to find joint and several liability in this case would do the opposite. It would permit the exception to swallow the rule. Thus, in order to advance the legislature's intent, subsection 2 must be read narrowly. *See Belleville State Bank v. Steele*, 117 Wis. 2d 563, 570, 345 N.W.2d 405 (1984).

The legislative history supports an interpretation of the statute whereby subsection 2 applies only in concerted action cases, in which the defendants' common conduct directly harms the plaintiff and, therefore, the defendants are held equally liable. The title of the statute, the legislature's discussion of its intent for this exception to apply only in concerted action cases, and the overall purpose of the revisions to limit the application of joint and several liability support this interpretation.

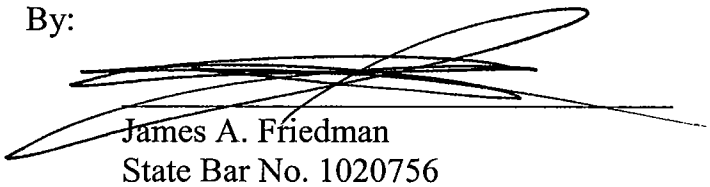
CONCLUSION

For the reasons stated above and based on the entire record in this action, the WIA and the PCI ask the Court to affirm the decision of the Wisconsin Court of Appeals and hold that Wis. Stat. § 895.045(2) applies only in concerted action cases where liability is equally apportioned based on the common conduct of the defendants.

Dated this 22nd day of June, 2007.

Respectfully submitted,

GODFREY & KAHN, S.C.

By: 

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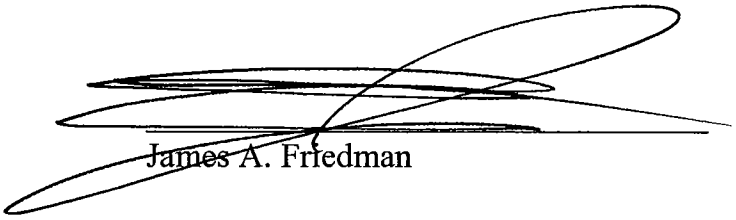
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c), Stats., for an amicus brief produced with a proportional font. The length of this brief is 2,500 words.

Dated: June 22nd, 2007.



James A. Friedman

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IN SUPREME COURT
STATE OF WISCONSIN

MICHELLE RICHARDS,

Plaintiff-Respondent-Petitioner,

v. Appeal No. 2005AP2796

BADGER MUTUAL INSURANCE COMPANY,

Defendant-Third-Party
Plaintiff-Appellant,

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Case No. 04-CV-392

SUPPLEMENTAL APPENDIX

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SUPPLEMENTAL APPENDIX

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1995 DRAFTING RECORDS

WISCONSIN LEGISLATIVE REFERENCE BUREAU

WISCONSIN ACT 17

Each drafting record for a proposal (bill, joint resolution, resolution, or an amendment or substitute amendment thereto) consists of: 1) a request sheet or form containing the requester's name and other identifying infromation relating to that proposal; 2) one or more versions of the drafted proposal; and 3) a copy of the introduced proposal.

These files are created by legislative drafting attorneys during the drafting process, and may contain any written instructions given to the attorney by the requester (including correspondence or model bills) and any notes or memos written by the drafting attorney.

The files will not contain voting records (which are found in the daily journal) or transcripts of floor debate or committee hearings (which are not recorded).

Contact LRB research analysts at (608) 266-0341 if you have questions concerning the drafting records. The mailing address is: P.O. Box 2037, Madison, WI 53701-2037.

State of Wisconsin

1995 Senate Bill 11

Date of enactment: May 16, 1995
Date of publication*: May 16, 1995

1995 WISCONSIN ACT 17

AN ACT *to renumber and amend* 895.045; and *to create* 895.045 (2) and 895.85 of the statutes; relating to: comparative negligence and punitive damages.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 895.045 of the statutes is renumbered 895.045 (1) and amended to read:

895.045 (1) (title) COMPARATIVE NEGLIGENCE. Contributory negligence shall does not bar recovery in an action by any person or the person's parent's legal representative to recover damages for negligence resulting in death or in injury to person or property, if such that negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable attributed to the person recovering. The negligence of the plaintiff shall be measured separately against the negligence of each person found to be causally negligent. The liability of each person found to be causally negligent whose percentage of causal negligence is less than 51% is limited to the percentage of the total causal negligence attributed to that person. A person found to be causally negligent whose percentage of causal negligence is 51% or more shall be jointly and severally liable for the damages allowed.

SECTION 2. 895.045 (2) of the statutes is created to read:

895.045 (2) CONCERTED ACTION. Notwithstanding sub. (1), if 2 or more parties act in accordance with a common scheme or plan, those parties are jointly and severally liable for all damages resulting from that action, except as provided in s. 895.85 (5).

SECTION 3. 895.85 of the statutes is created to read:

895.85 Punitive damages. (1) DEFINITIONS. In this section:

(a) "Defendant" means the party against whom punitive damages are sought.

(b) "Double damages" means those court awards made under a statute providing for twice, 2 times or double the amount of damages suffered by the injured party.

(c) "Plaintiff" means the party seeking to recover punitive damages.

(d) "Treble damages" means those court awards made under a statute providing for 3 times or treble the amount of damages suffered by the injured party.

(2) SCOPE. This section does not apply to awards of double damages or treble damages, or to the award of exemplary damages under ss. 46.90 (6) (c), 51.30 (9), 51.61 (7), 103.96 (2), 153.85, 252.14 (4), 252.15 (8) (a), 943.245 (2) and (3) and 943.51 (2) and (3).

(3) STANDARD OF CONDUCT. The plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.

(4) PROCEDURE. If the plaintiff establishes a prima facie case for the allowance of punitive damages:

* Section 991.11, WISCONSIN STATUTES 1993–94: Effective date of acts. "Every act and every portion of an act enacted by the legislature over the governor's partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication as designated" by the secretary of state [the date of publication may not be more than 10 working days after the date of enactment].

(a) The plaintiff may introduce evidence of the wealth of a defen[illegible]; and

(b) The judge shall submit to the jury a special verdict as to punitive damages or, if the case is tried to the court, the judge shall issue a special verdict as to punitive damages.

(5) APPLICATION OF JOINT AND SEVERAL LIABILITY. The rule of joint and several liability does not apply to punitive damages.

SECTION 4. Initial applicability.

(1) This act first applies to civil actions commenced on the effective date of this subsection.

State of Wisconsin
1995 – 1996 LEGISLATURE

LRB-1744/1
RPN:kmg:kmf

1995 SENATE BILL 11

January 17, 1995 – Introduced by Senators HUELSMAN, DRZEWIECKI, DARLING, PETAK, ZIEN, ANDREA, BUETTNER, SCHULTZ, A. LASEE, PANKE, COWLES, LEEAN, FARROW, RUDE, WEEDEN, ROSENZWEIG, FITZGERALD and ELLIS, cosponsored by Representatives GREEN, ALBERS, HUEBLER, KREIBO, JENSEN, FRENCH, GARD, LEHMAN, GOETSCH, LADWIG, DUFF, MUSSER, BRANDEMUEHL, SILBAUGH, WILDER, URBAN, SCHNEIDERS, OWENS, WALKER, KREIBICH, ARENDT, VRAKAS, WARD, F. LASEE, OLSEN, POWERS, LAEICH, HANDRICK, HAHN, BRANCEL, GROTHMAN, GRONEMUS, KAUFERT, KLUSMAN, NASS, RYBA, SERATTI and DOBYNS. Referred to Committee on Judiciary.

AN ACT *to renumber and amend* 895.045; *and to create* 895.045 (2) and (3) and 895.85 of the statutes; relating to: comparative negligence and punitive damages.

Analysis by the Legislative Reference Bureau

This bill revises the standards and procedures for awarding punitive damages in certain civil cases. Under present law, the plaintiff sues for damages, including punitive damages, and submits evidence as to the defendant's behavior and ability to pay. If the defendant acted maliciously or in a wilful or wanton manner in reckless disregard of the rights or interests of the plaintiff, punitive damages may be awarded. The plaintiff uses the rule of joint and several liability to collect punitive damages against any defendant found liable for the plaintiff's loss.

The following changes are made in civil actions covered by the bill:

1. The rule of joint and several liability is abolished as to punitive damages.

2. The reference to wanton or reckless action by the defendant is omitted from the standard of conduct necessary to prove punitive damages, allowing the plaintiff to receive punitive damages if the defendant acts maliciously or in a wilful disregard of the plaintiff's rights.

3. Evidence of the defendant's wealth, an indicator of ability to pay, is admissible only after the plaintiff has established a legally sufficient case for the allowance of punitive damages.

4. The judge is required to issue a special verdict for punitive damages if legally sufficient evidence is introduced to allow those damages.

Wisconsin has a modified system of comparative negligence. Contributory negligence does not bar recovery for an action unless the negligence of the person seeking recovery (plaintiff) is greater than the negligence of the person against whom recovery is sought (defendant). In the situation where more than one party contributes to an injury (joint tort–feasors), Wisconsin generally follows a rule of joint and sever-

al liability. That is, a plaintiff may collect the total damages against any of the joint tort–feasors whose negligence combines to cause the injury, as reduced by the plaintiff's percentage of the negligence. A joint tort–feasor who pays more than his or her proportionate share has a cause of action for contribution against the other joint tort–feasors.

This bill modifies the comparative negligence system in several ways. The bill requires that the negligence of the plaintiff be measured separately against each of the joint tort–feasors. Under this bill, a joint tort–feasor's liability is limited to the percentage of the total causal negligence attributed to that party.

The bill specifies that the changes in the rule of joint and several liability do not apply to parties whose concerted action results in damages or to causes of action resulting from environmental pollution, hazardous waste or substances or waste disposal sites.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 895.045 of the statutes is renumbered 895.045 (1) and amended to read:

895.045 (1) (title) COMPARATIVE NEGLIGENCE. Contributory negligence shall does not bar recovery in an action by any person or the person's person's legal representative to recover damages for negligence resulting in death or in injury to person or property, if such that negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributed attributed to the person recovering. The negligence of the plaintiff shall be measured separately against the negligence of each party found to be causally negligent. The liability of each party found to be causally negligent is limited to the percentage of the total causal negligence attributed to that party.

SECTION 2. 895.045 (2) and (3) of the statutes are created to read:

895.045 (2) CONCERTED ACTION. Notwithstanding sub. (1), if 2 or more parties act in accordance with a common scheme or plan, those parties are jointly and severally liable for all damages resulting from that action, except as provided in s. 895.57 (5).

(3) JOINT AND SEVERAL LIABILITY. Except as provided in s. 895.57 (5), nothing in this section prohibits the imposition of joint and several liability in a cause of action for damages resulting from environmental pollution, hazardous waste or substances or waste disposal sites.

SECTION 2. 895.85 of the statutes is created to read:

895.85 Punitive damages. (1) DEFINITIONS. In this section:

(a) "Defendant" means the party against whom punitive damages are sought.

(b) "Double damages" means those court awards made under a statute providing for twice, 2 times or double the amount of damages suffered by the injured party.

(c) "Plaintiff" means the party seeking to recover punitive damages.

(d) "Treble damages" means those court awards made under a statute providing for 3 times or treble the amount of damages suffered by the injured party.

(2) SCOPE. This section does not apply to awards of double damages or treble damages, or to the award of exemplary damages under ss. 46.90 (6) (c), 51.30 (8), 51.61 (7), 103.96 (2), 153.85, 252.14 (4), 252.15 (5) (a), 943.245 (2) and (3) and 943.51 (2) and (3).

(3) STANDARD OF CONDUCT. The plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in a wilful disregard of the rights of the plaintiff.

(4) PROCEDURE. If the plaintiff establishes a prima facie case for the allowance of punitive damages:

(a) The plaintiff may introduce evidence of the wealth of a defendant; and

(b) The judge shall submit to the jury a special verdict as to punitive damages or, if the case is tried to the court, the judge shall issue a special verdict as to punitive damages.

(5) APPLICATION OF JOINT AND SEVERAL LIABILITY. The rule of joint and several liability does not apply to punitive damages.

SECTION 4. Initial applicability.

(1) This act first applies to civil actions commenced on the effective date of this subsection.

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Page 1

1995 DRAFTING REQUEST

Assembly Substitute Amendment (ASA-SB11)

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STATE BAR
OF WISCONSIN
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PROPOSED CHANGES IN JOINT & SEVERAL LIABILITY

I. Abolish Joint and Several for punitive damages. in SSA 1 to SB 11

II. Abolish Joint and Several except as follows:

(a) people who act in concert on a common scheme or plan; in SB 11

(b) cases involving environmental pollution, hazardous waste or substance, or waste disposal sites; in SB 11

(c) in cases where the defendant is less than 15% at fault, except:

if "D" use K.P. or otherwise twice

(1) allow Joint and Several if such defendant's negligence is at least twice the negligence of the victim;

(2) but only up to the limits of that defendant's insurance or self insurance. personal property

(3) any defendant sued under a claim of Joint and Several who is found not liable under the rules of (c) may recover double statutory attorney's fees and costs (Wis. Stats. 814.04).

Q. 1. Punitive damages - on p. (5) on p. 3.
2. 15% is
3. self-ins. - - personal assets
4. Int. app. - actions com. or occurrences on or after