SUPREME COURT OF WISCONSIN

JESSICA L. SIEBERT, by her
Guardian ad Litem, D. J. WEIS
and LYNETTE A. SIEBERT,

Plaintiffs-Appellants

District 3
Appeal No. 2009AP001422
Case No. 2007CV000080
Judge Patrick F. O'Melia

STEVE ALBRECHT, JR., by his
Guardian ad Litem, THOMAS W. KYLE,
STEVEN ALBRECHT, SR.,
KARI SOSNOWSKI, by her
Guardian ad Litem, THOMAS W. KYLE
and CYNDI ANDERSON,

Intervening-Plaintiffs,

ONEIDA COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Involuntary-Plaintiff,

v.

WISCONSIN AMERICAN MUTUAL
INSURANCE COMPANY,

Defendant-Respondent-Petitioner,

INTERSTATE BRANDS CORPORATION,
ACE AMERICAN INSURANCE COMPANY
and RYAN FRIBERG,

Defendants.

# BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT-PETITIONER, WISCONSIN AMERICAN MUTUAL INSURANCE COMPANY

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## STATEMENT OF ISSUES

1. Does negligent entrustment constitute an independent concurrent cause of plaintiffs' injuries sufficient to trigger coverage under Wisconsin American's automobile liability policy where the jury's finding established there is no coverage for the driver's negligent operation of the vehicle?

Answered by the trial court: No.

Answered by the court of appeals: Yes.

2. Does claim preclusion bar plaintiffs from asserting a new cause of action against Wisconsin American for negligent entrustment after a jury verdict entitled Wisconsin American to an Order for Judgment dismissing the plaintiffs' complaint against it, with prejudice?

Answered by the trial court: Not addressed.

Answered by the court of appeals: No.

## STATEMENT OF THE CASE

### A. Statement of Facts and Procedural History

On June 17, 2006, Jessica Koehler ("Koehler") lent her father's car to Jesse Raddatz ("Raddatz") to go to a food pantry in Eagle River, where they lived. (R.108:6). Raddatz was supposed to return home with the car immediately afterwards. (*Id.*).

Instead of using the car to go to the food pantry, Raddatz picked up two boys and three girls, including the plaintiff Jessica Siebert ("Siebert"), to go to Rhinelander. (R.108: 8-9). On the way, Raddatz got into an accident that ended his life, along with the life of one other passenger. Other passengers in the car were injured, including Siebert. (R.1:3).

Wisconsin American Mutual Insurance Company ("Wisconsin American") issued a policy of automobile liability insurance to Koehler's father that covered the vehicle involved in the accident. (R.4:1).

On February 14, 2007, Siebert and her mother filed a complaint against Wisconsin American based on Raddatz's negligent operation of the vehicle, pursuant to the direct action

statute, Wis. Stat. §623.24.[1] (R.1). Other passengers in the vehicle, intervening plaintiffs Steve Albrecht, Jr. and Kari Sosnowski, filed an intervening complaint against Wisconsin American.[2] (R.7). Wisconsin American's answers raised an affirmative defense that Raddatz lacked permission to use the vehicle at the time the accident occurred. (R.2, R.10).

Wisconsin American filed a motion to bifurcate the issue of insurance coverage from liability and damages, which was granted by the trial court and incorporated into the scheduling order. (R.17:1-2, R.23:1-2). The court did not, however, institute a stay of discovery on the issues of liability and damages. (*Id.*).

Following the scheduling conference, both plaintiffs and intervening plaintiffs amended their complaints to add a cause of action against Ryan Friberg, Interstate Brands Corp., and Alias Insurance Company No.1, alleging that the negligent operation of a Hostess truck was also a cause of the accident. (R.24, R. 31).

A jury trial was held in June 2008 to determine whether the plaintiffs could recover under the policy of insurance issued by

[1] Siebert's mother has asserted claims against Wisconsin American relating to her loss of society and companionship and her daughter's medical expenses. (R.1:3).

Wisconsin American based on Raddatz's negligent operation of the vehicle. (R.59, PET-APP 129). Specifically, the jury was asked whether Raddatz exceeded the scope of the permission that he was provided by Jessica Koehler at and immediately before the time of the accident. (*Id.*). On June 24, 2008, the jury found Raddatz had exceeded the scope of his permission to use the vehicle such that Wisconsin American was not liable under the policy it issued to Koehler's father. (*Id.*). Plaintiffs did not file any motions after verdict to challenge the jury's finding.

On July 7, 2008, plaintiffs and intervening plaintiffs filed a motion to amend their complaint against Wisconsin American to assert a cause of action based on negligent entrustment of the automobile from Koehler to Raddatz. (R.63:1-2, R.64:1-2). Wisconsin American opposed the motion to amend on grounds that the doctrine of claim preclusion[3] prevented plaintiffs from bringing another cause of action under the direct action statute relating to the same policy and the same accident. (R.66, R.73, R.87). Further,

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[2] Intervening plaintiffs' claims were likewise based on Raddatz's negligent operation of the vehicle, pursuant to the direct action statute, Wis. Stat. §623.24.

[3] The term "claim preclusion" has replaced the term "res judicata." *Sopha v. Owens-Corning Fiberglas Corp.*, 230 Wis. 2d 212, 232, n.25, 601 N.W.2d 627 (1999).

Wisconsin American argued that issue preclusion[4] prevented plaintiff from proving negligent entrustment as a matter of law based on Raddatz's lack of permission to use the vehicle. (R.66).

On September 10, 2008, the court held a hearing on plaintiffs' motion to amend the complaint. (R.82). At the hearing, the parties stipulated as follows: (1) the court would enter the Order for Judgment in favor of Wisconsin American; (2) the Order for Judgment would not be perfected until after the motion to amend was decided; and (3) the court's ruling on the motion to amend would be adjourned to permit additional briefing on the issue of whether the jury's finding was a "final judgment" for purposes of claim preclusion. (R.82:33-36).

On September 10, 2008, Judge O'Melia signed an Order for Judgment, which dismissed the plaintiffs' complaints and all cross-claims against Wisconsin American, on the merits, and with prejudice. (R.86, PET-APP 134-135).

On November 4, 2008, the trial court ruled that plaintiffs could amend their complaint to assert a claim against Wisconsin American

[4] The term "issue preclusion" has replaced the term "collateral estoppel." *Sopha*, 230 Wis. 2d at 232, n.25.

based on negligent entrustment of the vehicle from Koehler to Raddatz. (R.90:1-2). Plaintiffs and intervening plaintiffs then filed a second amended complaint against Wisconsin American under the direct action statute.[5] (R.91, R.98).

Wisconsin American then moved for summary judgment on the newly asserted negligent entrustment claim based on the application of the independent concurrent cause rule and principles of claim preclusion and issue preclusion. (R.106, R.107).

**B. Disposition in the Trial Court.**

The trial court granted Wisconsin American's motion for summary judgment on the plaintiff's negligent entrustment claim based upon the independent concurrent cause rule. [6] (R.126:1-18, PET-APP 111-127; R.118:1-3, PET-APP 108-110). The trial court explained that Raddatz's negligent operation of the vehicle was an "excluded risk" under Wisconsin American's policy based on the jury's finding that Raddatz exceeded the scope of his permission to use the vehicle. (R.126:11, PET-APP 121). The trial court held that

[5] Plaintiffs did not join Koehler to the lawsuit, and the statute of limitations on that claim has expired. Thus, plaintiffs have no cause of action against Koehler or Raddatz individually with regard to the subject accident.

[6] The trial court did not address Wisconsin American's other arguments in support of its motion for summary judgment.

Koehler's alleged negligent entrustment of the vehicle to Raddatz was not an independent concurrent cause sufficient to trigger coverage under Wisconsin American's policy because negligent entrustment requires the occurrence of an "excluded risk"— Raddatz's negligent operation of the vehicle— to be actionable. (*Id.*).

The trial court rejected plaintiffs' argument that the independent concurrent cause rule does not apply to automobile liability policies. (R.126:12, PET-APP 122). The court reasoned that the relevant cases do not analyze whether the doctrine applies depending on the type of policy at issue; rather, the analysis focuses on principles of causation, which do not change depending on the type of policy at issue. (*Id.*).

The Siebert plaintiffs subsequently appealed the circuit court's decision granting summary judgment in favor of Wisconsin American.[7]

### D. Disposition in the Court of Appeals.

The court of appeals reversed the trial court's summary judgment ruling in a published decision. (*Siebert v. Wisconsin Am.*

[7] The intervening plaintiffs did not appeal from the trial court's summary judgment in favor of Wisconsin American.

*Mut. Ins. Co.*, 2010 WI App 94, ¶11, 325 Wis. 2d 740, 787 N.W.2d 54, PET-APP 107). The court of appeals held that the independent concurrent cause rule did not apply in this case because the negligent entrustment claim does not implicate an excluded risk. (*Id.* at ¶7, PET-APP 106). The court or appeals explained that Raddatz's negligent operation of the vehicle not covered under the policy, but it was not an "excluded risk." (*Id.*) "The rule is concerned not with who is covered for their actions, but with whether the risk is one the policy insures." (*Id.* at ¶10, PET-APP 107). The court was thus able to conclude that "Raddatz's own negligence may be excluded from coverage, but the risk associated with Koehler lending her car to him is not." (*Id.* at ¶11, PET-APP 103).

The court of appeals briefly addressed Wisconsin American's argument that plaintiffs' negligent entrustment claim is barred based on principles of issue preclusion and claim preclusion. (*See id.* at ¶¶12-13, PET-APP 103). Under a heading entitled "Claim preclusion," the court of appeals stated that the jury's finding that Raddatz did not have permission to use the car at the time of the accident did not preclude plaintiffs from proving the "permission"

element of negligent entrustment. (*Id.*). The court of appeals did not address any of the claim preclusion cases cited by Wisconsin American, which provide that a final judgment on the merits bars any subsequent suits for all matters which were litigated or which might have been litigated in the former proceeding. (*See id).*

Wisconsin American subsequently filed a Petition for Review on the application of the independent concurrent cause rule and the claim preclusion issue. This Court granted the Petition.

## ARGUMENT

### I. NEGLIGENT ENTRUSTMENT IS NOT AN INDEPENDENT CONCURRENT CAUSE SUFFICIENT TO TRIGGER COVERAGE UNDER WISCONSIN AMERICAN'S POLICY WHERE NO COVERAGE EXISTS FOR NEGLIGENT OPERATION OF THE VEHICLE.

Contract interpretation presents a question of law that is reviewed by this Court independently. *Hull v. State Farm Mut. Auto. Ins. Co.,* 222 Wis. 2d 627, 636, 586 N.W.2d 863 (1998).

The independent concurrent cause rule provides that "[w]here a policy expressly insures against loss caused by one risk but excludes loss caused by another risk, coverage is extended to a loss caused by the insured risk even though the excluded risk is a contributory cause." *Kraemer Bros., Inc. v. United States Fire Ins. Co.,*

89 Wis. 2d 555, 570, 278 N.W.2d 857, 863-64 (1979). However, the independent concurrent cause "must provide the basis for a cause of action in and of itself and *must not require the occurrence of the excluded risk to make it actionable*." *Estate of Jones v. Smith,* 2009 WI App 88, ¶ 5, 320 Wis. 2d 470, 475, 768 N.W.2d 245 (emphasis added). In other words, if the cause of the liability requires the occurrence of an excluded risk to be actionable, it is not sufficiently independent of the excluded risk to trigger coverage under the policy.

Wisconsin courts have consistently held that negligent entrustment is not sufficiently "independent" to trigger coverage where the driver's negligent operation of the vehicle is excluded from coverage. *See Malone v. Gaengel,* 221 Wis. 2d 92, 96-100, 583 N.W.2d 882 (Ct. App. 1998) (discussing the evolution of the independent concurrent cause rule). This is because negligent entrustment requires the occurrence of an "excluded risk" - negligent operation of the vehicle – to be actionable. *Id.* at 98; *see also Bankert v. Threshermen's Mut. Ins. Co.*, 110 Wis. 2d 469, 476, 329 N.W.2d 150 (1983) ("negligent entrustment is irrelevant unless the person to whom the thing is entrusted acts in a negligent manner").

In *Bankert* and *Malone*, the independent concurrent cause rule was applied with respect to a negligent entrustment claim under insurance policies that provided coverage for vehicle-related liability, except if the accident occurred away from the covered premises. *Bankert,* 110 Wis. 2d at 479; *Malone*, 221 Wis. 2d at 95. In both *Bankert* and *Malone*, the subject accident occurred away from the covered premises such that the driver's negligent operation of the vehicle was considered to be an "excluded risk." *Bankert*, 110 Wis. 2d at 479; *Malone*, 221 Wis. 2d at 99. Both cases held that negligent entrustment was not an independent concurrent cause sufficient to trigger coverage because this claim necessarily required the excluded risk—negligent operation of the vehicle off the premises—to be actionable. *Bankert*, 110 Wis. 2d at 484; *Malone*, 221 Wis. 2d at 100.

In *Bankert*, coverage for the driver's negligent operation was precluded by an exclusion in the policy. *Bankert*, 110 Wis. 2d at 479. In *Malone*, coverage for the driver's negligent operation was precluded by the initial granting language of the policy. *See Malone*, 221 Wis. 2d at 93, 95. In *Malone*, the court of appeals expressly stated

in a footnote that "[i]n this context, *it makes no difference whether a risk is 'excluded' or 'not covered*.'" *Id.* at 99, n 4 (emphasis added).

Applying this concept to the case at hand, plaintiffs' negligent entrustment claim is not an independent concurrent cause of the plaintiff's damages to trigger coverage under Wisconsin American's automobile liability policy. The policy provides coverage to a driver of a covered automobile, except if the driver lacks permission to use the vehicle when the accident occurs. *Siebert*, 2010 WI App 94 at ¶2, PET-APP 105. The jury concluded that Raddatz exceeded the scope of his permission to use the vehicle at the time of the accident. (R.59, PET-APP 129). As a consequence, Raddatz's negligent operation without permission was not a risk for which coverage is afforded under Wisconsin American's policy. The trial court correctly held, pursuant to *Bankert* and *Malone*, that there can be no coverage for Koehler's negligent entrustment because it requires the occurrence of a "non-covered risk"—Raddatz's negligent operation of the vehicle without permission —to be actionable. (PET-APP 121).

The court of appeals' decision acknowledged that Raddatz's negligent operation of the vehicle was excluded, yet held coverage could exist for negligent entrustment. *See Siebert*, 2010 WI App 94 at

¶11, PET-APP 107 ("Raddatz's own negligence may be excluded, but the risk associated with Koehler lending her car to him is not."). The court of appeals' decision is at odds with *Bankert* and its progeny in this respect. To resolve the conflict, the court of appeals created a distinction between an "excluded risk" and a "non-covered risk," and held that the independent concurrent cause rule applies only to the former. *Id.* at ¶¶8-9, PET-APP 106-107. Ostensibly, a non-covered risk relates to limitations in a policy's initial grant of coverage, whereas an "excluded risk" is established by the application of an exclusion in the policy.

The court of appeals did not cite any authority to support its distinction between a non-covered risk and an excluded risk, but states, "[a]n excluded risk is a risk for which the insurance company did not receive a premium." *Id.* at ¶8, PET-APP 106 (citing *Lawver v. Boling*, 71 Wis. 2d 408, 422, 238 N.W.2d 514 (1976). As a practical matter, however, an insurer does not receive a premium to assume any risk that is not covered, whether by operation of the initial granting language or an exclusion. Therefore, the purpose of the independent concurrent cause rule—to prevent insurers from paying claims for which they did not receive a premium—is equally

served in either case. Presumably, for this reason, *Malone* indicated that it makes no difference whether a risk is excluded or not covered under the policy with regards to the application of the independent concurrent cause rule. *Malone*, 221 Wis. 2d at 99, n 4.

The court of appeals erred by creating a semantic distinction between a non-covered risk and excluded risk and holding that the independent concurrent cause rule applies only to the latter. The application of the independent concurrent cause rule should be consistent regardless of whether the driver's negligence is not covered because he lacked permission to use the vehicle or whether the driver's negligence occurred away from the covered premises, as in *Bankert* and *Malone*.

In sum, this Court should affirm the circuit court's summary judgment dismissal of the plaintiffs' negligent entrustment claim based on the application of the independent concurrent cause rule. Negligent entrustment does not constitute an independent concurrent cause of the plaintiffs' injuries in light of the jury's finding there is no coverage for Raddatz's negligent operation of the vehicle. The court of appeals decision, based on the newly minted

distinction between an "excluded risk" and a "non-covered risk," is not supported in the law and should be reversed.

## II. CLAIM PRECLUSION BARS PLAINTIFFS FROM MAINTAINING A CAUSE OF ACTION FOR NEGLIGENT ENTRUSTMENT THAT COULD HAVE BEEN LITIGATED AS PART OF THE PREVIOUS JURY TRIAL.

The application of the doctrine of claim preclusion to undisputed facts presents a question of law. *Lindas v. Cady*, 183 Wis. 2d 547, 552, 515 N.W.2d 458 (1983).

Under the doctrine of claim preclusion, a valid and final judgment in an action extinguishes all rights to remedies against a defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. *Kruckenberg v. Harvey*, 2005 WI 43, ¶ 25, 279 Wis. 2d 520, 694 N.W.2d 879 (2005). A final judgment on the merits will ordinarily bar all matters "which were litigated or which *might have been litigated* in the former proceedings." *Id.* (emphasis added).

In order for the previous jury trial on insurance coverage to act as a claim-preclusive bar to the plaintiffs' newly asserted cause of action for negligent entrustment, the following elements must be present: (1) an identity between the parties or their privies in the prior and present suits; (2) a final judgment on the merits in a court

of competent jurisdiction; and (3) an identity between the causes of action in the two suits. *Sopha*, 230 Wis. 2d at 233-34. In this case, all of the factors are present to support the application of claim preclusion to this case.

**A. The Parties Are Identical**.

Plaintiffs filed suit against Wisconsin American based under the direct action statute, Wis. Stat. §632.24. (R.1). Raddatz was not made a party. *Estate of Otto v. Physicians Ins. Co. of Wisconsin, Inc.*, 311 Wis. 2d 84, 751 N.W.2d 805 (2008) (the insured is not a necessary party to an action brought against its insurer under the "direct action" statute). Plaintiffs had their "day in court" against Wisconsin American on the issue of whether Wisconsin American provided coverage for Raddatz's negligent operation of the vehicle. The new cause of action for negligent entrustment was again pursued directly against Wisconsin American, and Koehler was not made a party.[8] Because plaintiffs and Wisconsin American were parties to the previous jury trial, and will be the parties involved in

[8] This Court need not decide whether Raddatz or Koehler would be bound by a jury's determination there is no coverage under Wisconsin American's policy, since the statute of limitations has run on Siebert's claim against them.

litigating the plaintiff's newly asserted cause of action, the first element of claim preclusion is satisfied.

### B. The Jury's Finding Constitutes a Final Judgment on the Merits Because It Disposed of the Entire Matter in Litigation as to Wisconsin American.

The hallmark of a final judgment on the merits is that it disposes of the entire matter in litigation as to one or more of the parties. *See* Wis. Stat. §808.03(1). A dismissal "with prejudice" denotes a final judgment on the merits. *See Tietsworth v. Harley Davidson, Inc.*, 2007 WI 97 at ¶59, 303 Wis. 2d 94, 126, 735 N.W.2d 418. On the other hand, a judgment entered "without prejudice" is not a "final judgment on the merits." *Russell v. Johnson*, 14 Wis. 2d 406, 411-12, 111 N.W.2d 193 (1961) (holding that a dismissal without prejudice does not constitute a judgment because it is not the final determination of the rights of the parties in the action).

In *New Amsterdam Casualty Co. v. Simpson*, this Court analyzed the defenses available to an insurer that was sued under a predecessor of the direct action statute:

> When sued by the injured party [an insurer] has not only the defense that the insured was not negligent but the defense that the policy did not cover the driver of the car. It is to be emphasized that the latter is not merely a defense any claims of the insured but a separate and distinct plea in bar

> to a separate and distinct cause of action asserted by the injured party.
>
> 238 Wis. 550, 300 N.W. 367, 369 (1941).

Thus, under the direct action statute, an insurer can only be held liable if its policy provides coverage for the insured and the insured person was negligent. *See id.*

"Although the direct action statute provides that an insurer may be directly liable to those entitled to recover, an injured party may recover directly against an insurer *only if* the contract of insurance provides coverage." *Estate of Logan by Fink v. Northwestern Nat. Cas. Co.*, 144 Wis. 2d 318, 349, 424 N.W.2d 179 (1988) (citing *Loy v. Bunderson*, 107 Wis. 2d 400, 422-32, 320 N.W.2d 175 (1982)) (emphasis added).

In the case at hand, plaintiffs filed suit against Wisconsin American under the direct action statute. (R.1). Plaintiffs chose to establish the existence of insurance coverage only with respect to Raddatz's negligent operation of the vehicle. (*Id.*). Wisconsin American's answers raised the affirmative defense that no coverage was available to Raddatz because he did not have permission to use the accident vehicle (or exceeded the scope of his permission), and demanded a dismissal on the merits. (R.4, R.10, R.25, R.36).

A jury trial was held in June 2008 to determine whether Wisconsin American was liable to plaintiffs under the insurance policy issued to Koehler's father. (R.59, PET-APP 129). Plaintiffs had their "day in court" on the merits of the direct action against Wisconsin American. The jury decided that Raddatz exceeded the permission he was granted by Koehler. (*Id.*). This determination disposed of the existing litigation between the parties in favor of Wisconsin American, and entitled Wisconsin American to a judgment dismissing the plaintiff's complaint on the merits. *See New Amsterdam Cas. Co.*, 300 N.W. at 369. The trial court did, in fact, sign an Order for Judgment dismissing the plaintiffs' complaint with prejudice. (R.86, PET-APP 134-135). Plaintiffs never filed any motions after verdict to challenge the jury's finding.

The jury's finding and subsequent Order for Judgment constitute a final judgment on the merits, which satisfies the second element of claim preclusion.

Before the Order for Judgment was entered by the Court, plaintiffs filed a motion to amend their complaint. The timing of this motion, however, does not alter whether claim preclusion applies to this case. If Wisconsin American had filed their judgment

on the merits before the plaintiff's filed the motion to amend the complaint, plaintiff would have to re-file the action.[9] If Wisconsin American re-filed the action, claim preclusion would clearly bar plaintiffs claim against Wisconsin American based on the same policy of insurance and the same accident. The plaintiffs' amendment of the complaint was, in all practical respects, the filing of a new action, and should be treated as such. A contrary holding would place form over substance.

**C. There is an Identity Between the Causes of Action.**

In *DePratt v. West Bend Mut. Ins. Co.*, 113 Wis. 2d 306, 334 N.W.2d 883 (1983), the Wisconsin Supreme Court expressly adopted the "transactional view" of a claim or cause of action as set forth in the Restatement (Second) of Judgments. *Id.* at 311-12. The court explained:

> We also adopt the transactional view of claim or cause of action. Wisconsin's modern procedural system provides the parties with an adequate method of fully developing the entire transaction in the one action going to the merits to which the plaintiff is ordinarily confined. It permits the presentation in the action of all material relevant to the transaction without artificial confinement to any single substantive theory or kind of relief without regard to historical forms or actions.

[9] Plaintiffs could also move to vacate the judgment pursuant to Wis. Stat. §806.07.

> Section 25 of the Restatement states that a plaintiff's second claim is barred even though he or she is prepared in the second action: (1) to present evidence or grounds or theories of the case not presented in the first action; or (2) to seek remedies or forms of relief not demanded in the first action.
>
> *Id*.

The court of appeals held that the plaintiff's negligence claim was barred by the former judgment because it was based on the same set of facts or transaction; to wit, the subject crane accident. *Id.* at 312-313.

A case dealing with bifurcated causes of action was recently decided by the court of appeals in *Viscusi v. Progressive Universal Insurance Co.*, 2010 WI App 33, 323 Wis. 2d 823, 781 N.W.2d 551. Plaintiff's counsel sought to amend the complaint to add a bad faith claim after the circuit court had entered its final order setting damages for the breach of contract claim. *Id.* at ¶4. The trial court denied the motion to amend. *Id.* Plaintiff's counsel filed a new action presenting a bad faith claim, and the trial court dismissed the action based on claim preclusion. *Id.* The court of appeals affirmed because "the breach of contract and bad faith claims flow from the same nexus of facts." *Id.* at ¶8. The court explained that it is irrelevant that one claim would permit contract damages while the

other might allow tort and punitive damages, and that additional facts would be required to support his bad faith claim. *Id.* at ¶8. The court also noted that the plaintiff's counsel offered no explanation why he could not have proceeded in such fashion, since the facts were already in existence at the time he initiated the first action. *Id.* at ¶9.

The plaintiff argued that the bad faith claim could not be addressed in the same trial such that claim preclusion should not apply. *Id.* The court stated that "even if [plaintiff] were correct that the bad faith claim could not be addressed in the same trial, his position ignores the practice of holding bifurcated coverage and bad faith trials within the same action." *Id.* The court noted that plaintiff offered no explanation why he could not have proceeded in such fashion, as the facts pertaining to the insurer's investigation and non-payment of plaintiff's claim were already in existence at the time he initiated the first action. *Id.*

In this case, there is an identity between plaintiffs' action based on Raddatz's negligent operation and their action based on Koehler's negligent entrustment. Both actions relate to the same transaction under *Depratt*— the subject automobile accident. Under

these circumstances, plaintiffs are barred from asserting any other causes of action that might have been litigated as part of the prior litigation, even if plaintiffs are prepared to present evidence or grounds or theories of the case not presented in the first action.

Because both of the plaintiffs' causes of action against Wisconsin American arise from the same "nexus of facts," the third element of claim preclusion is satisfied.

### D. The Purpose Underlying Claim Preclusion Favors Finality of Judgments.

Claim preclusion is meant to provide "an effective and useful means to establish and fix the rights of individuals, to relieve parties of the cost and vexation of multiple lawsuits, to conserve judicial resources, to prevent inconsistent decisions, and to encourage reliance on adjudication." *Kruckenberg*, 2005 WI 43 at ¶ 20 (citation omitted). This Court has stated:

> The doctrine of claim preclusion recognizes that endless litigation leads to chaos; that certainty in legal relations must be maintained; that after a party has had his day in court, justice, expediency, and the preservation of public tranquility requires that the matter be at an end.
>
> *Id.* (citation omitted).

Further, this Court has expressly stated that fairness is not a factor when considering the application of claim preclusion. *Id.* at ¶62.

> [A]n ad hoc exception to the doctrine of claim preclusion cannot be justified simply by concluding that it is too harsh to deny an apparently valid claim by balancing the values of claim preclusion against the desire for a correct outcome in a particular case. Case-by-case exceptions to the application of the doctrine of claim preclusion based on fairness "weaken the repose and reliance values of claim preclusion in all cases.
>
> *Id.* at ¶55.

"The theory is that the doctrine of claim preclusion rests on justice (fairness) being served by attributing finality to judgments rather than by allowing courts to make second efforts at improved results." *Id.* at ¶53.

In this case, plaintiffs took a calculated risk they could establish Wisconsin American's liability under the insurance policy based on the Raddatz's negligent operation of the vehicle. The potential for a negligent entrustment claim against Koehler was known by the plaintiffs well before the time of the jury trial, based on discovery. If plaintiffs wanted to amend their complaint to add or substitute claims against Wisconsin American, plaintiffs had

ample opportunity to do so. For whatever reason, plaintiffs chose a different strategy.

Plaintiffs have had their "day in court" against Wisconsin American to establish insurance coverage for the accident. The plaintiffs took their proverbial "kick at the cat," which resulted in a jury verdict that entitled Wisconsin American to dismissal of the plaintiffs' complaint on the merits. Plaintiffs' negligent entrustment cause of action—raised after losing at trial on the merits—is exactly the type of re-litigation that claim preclusion was meant to put to an end. Justice dictates that plaintiffs should not get another "kick at the cat" to establish liability against Wisconsin American under the same policy of insurance for the same accident.

## CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the court of appeals, and affirm the trial court's ruling on Wisconsin American's motion for summary judgment as to plaintiffs' cause of action based on negligent entrustment.

Dated this 23rd day of November, 2010.

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## CERTIFICATION

I certify that brief meets the form requirements of Wis. Stat. (Rule) 809.19(8)(b) and (c), in that it is:

> Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 4,800 words.

Dated this 23rd day of November, 2010.

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## CERTIFICATION

I hereby certify I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 23rd day of November, 2010.

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# APPENDIX

STATE OF WISCONSIN CIRCUIT COURT ONEIDA COUNTY

Jessica L. Siebert, by her Guardian
ad Litem, D.J. Weis; and
Lynette A. Siebert,
Plaintiffs,

PAGINATION OF RECORDS

Case No. 07CV80

Steve Albrecht, Jr. by his Guardian
ad Litem, Thomas W. Kyle and
Steven Albrecht, Sr. and

Appeal No. 2009AP001422

Kari Sosnowski, by her Guardian
ad Litem, Thomas W. Kyle and
Cyndi Anderson,
Intervening Plaintiffs
And

Oneida County Department of Social Services,

Involuntary Plaintiffs
Vs.

Wisconsin American Mutual Insurance Company;
Interstate Brands Corporation;
Ace American Insurance Company;
Ryan Friberg,
Defendants
And

Oneida County Department of Social Services,

Nominal Defendants

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Westlaw.
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**(Cite as: 325 Wis.2d 740, 787 N.W.2d 54)**



Court of Appeals of Wisconsin.
Jessica L. SIEBERT, by her Guardian ad Litem, D.J. Weis and Lynette A. Siebert, Plaintiffs-Appellants,
Steve Albrecht, Jr., by his Guardian ad Litem, Thomas W. Kyle, Steven Albrecht, Sr., Kari Sosnowski, by her Guardian ad Litem, Thomas W. Kyle and Cyndi Anderson, Intervening-Plaintiffs, Oneida County Department of Social Services, Involuntary-Plaintiff,
v.
WISCONSIN AMERICAN MUTUAL INSURANCE COMPANY, Defendant-Respondent,[FN†]

FN† Petition For Review Granted Oct. 27, 2010.

Interstate Brands Corporation, ACE American Insurance Company and Ryan Friberg, Defendants.
**No. 2009AP1422.**

Submitted on Briefs Feb. 2, 2010.
Opinion Filed May 4, 2010.

**55 On behalf of the plaintiffs-appellants, the cause was submitted on the briefs of D.J. Weis and Rhonda L. Lanford of Habush Habush & Rottier S.C., Rhinelander.

On behalf of the defendant-respondent, the cause was submitted on the brief of John M. Swietlik, Jr. and Michael D. Aiken of Kasdorf, Lewis & Swietlik, S.C., Milwaukee.

Before HOOVER, P.J., PETERSON and BRUNNER, JJ.

PETERSON, J.

*743 ¶ 1 Jessica Siebert appeals a summary judgment in favor of Wisconsin American Mutual Insurance Company declaring there is no coverage for her negligent entrustment claim against Jessica Koehler. The circuit court concluded that, because there was no coverage for the driver's negligent operation of a vehicle, there was also no coverage for Koehler's negligent entrustment of the vehicle to the driver. We disagree. We therefore reverse and remand.

## BACKGROUND

¶ 2 Koehler lent her father's car to Jesse Raddatz to run an errand. Raddatz instead used the car to pick up Siebert and go to a party. On the way to the party, Raddatz got into an accident, injuring Siebert. Siebert sued Koehler's father's insurer, Wisconsin American, alleging its automobile liability policy covered Raddatz's negligence. Under the policy, Raddatz's negligence would be covered if he was an insured person. In this situation, that meant he must have had permission to *744 operate the vehicle and did not exceed the scope of that permission. A jury concluded Raddatz exceeded the scope of permission.

¶ 3 The court then permitted Siebert to amend her complaint to assert a claim that Koehler negligently entrusted the car to Raddatz. Wisconsin American moved for summary judgment, arguing the independent concurrent cause rule barred coverage for this claim. It contended that Siebert's negligent entrustment claim against Koehler depended on Raddatz's negligent driving. Based on the jury verdict, there was no coverage for Raddatz's driving. Therefore, Wisconsin American argued it follows that there is also no coverage for Koehler's negligent entrustment. Wisconsin American also contended issue preclusion prevented Siebert from proving negligent entrustment: because the jury found Raddatz exceeded the scope of Koehler's permission, Siebert could not prove Koehler permitted Raddatz to use the car the way he did.

**56 ¶ 4 The circuit court did not address the latter

argument. But it agreed with Wisconsin American that Siebert's negligent entrustment claim was barred by the independent concurrent cause rule:

> The alleged negligence of Raddatz is not covered under the policy pursuant to the jury's finding ... [he] exceeded the scope of permission. And so Raddatz's negligent operation of the vehicle is an excluded risk. And because the negligent entrustment claim against Koehler requires the occurrence of Raddatz's negligence and because a claim for Raddatz's negligence is excluded under the policy, the alleged negligent entrustment by Koehler is not an independent concurrent cause.

The court therefore granted summary judgment in favor of Wisconsin American.

***745 DISCUSSION**

¶ 5 Whether a circuit court properly granted summary judgment is a question of law we review independently. *Torgerson v. Journal/Sentinel, Inc.*, 210 Wis.2d 524, 536, 563 N.W.2d 472 (1997). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).[FN1]

> FN1. References to the Wisconsin Statutes are to the 2007-08 version.

**1. Independent concurrent cause rule**

[1] ¶ 6 "The independent concurrent cause rule operates to extend coverage to a loss caused by the insured risk even though the excluded risk is a contributory cause, where a policy expressly insures against loss by one risk but excludes loss caused by another risk." *Estate of Jones v. Smith*, 2009 WI App 88, ¶ 5, 320 Wis.2d 470, 768 N.W.2d 245 (citation and internal punctuation omitted). "The independent concurrent cause must provide the basis for a cause of action in and of itself and must not require the occurrence of the excluded risk to make it actionable." *Id.* (citation omitted).

¶ 7 Siebert argues the independent concurrent cause rule does not apply here because her negligent entrustment claim does not implicate an excluded risk. We agree.

[2] ¶ 8 The circuit court concluded that because there was no coverage for Raddatz's negligence under the Wisconsin American policy, it was an "excluded risk." However, this conclusion conflates lack of coverage***746** with excluded risk. An excluded risk is a risk for which the insurance company did not receive a premium. *See Lawver v. Boling*, 71 Wis.2d 408, 422, 238 N.W.2d 514 (1976). For example, homeowner's policies do not insure against the risk of automobile accidents off the insured premises. Thus, an automobile accident off the premises is not an insured risk under a homeowner's policy. *See Bankert v. Threshermen's Mut. Ins. Co.*, 110 Wis.2d 469, 329 N.W.2d 150 (1983) (where farmowners had a farm policy that excluded automobile accidents off the farm premises, their son's motorcycle accident off the premises was an excluded risk).

[3] ¶ 9 Here, Raddatz was not an insured person under the Wisconsin American policy because he exceeded the scope of Koehler's permission. But that does not mean Koehler's policy excluded the risk that an individual entrusted with the insured car might cause bodily injury while using the car. The policy promises to "pay damages an insured person is legally liable for because of bodily injury and property damage due to the use of a car...." Individuals other than the driver can be insured persons: "[L]iability can arise when any person [negligently entrusts****57** another with a vehicle]." *Bankert*, 110 Wis.2d at 475-76, 329 N.W.2d 150. There is no dispute Koehler was an insured person under the policy. The risk that Koehler could incur liability for lending her father's car to someone who then operated it negligently, then, was a risk the policy insured. Indeed, Wisconsin American's argument that Koehler's coverage depends on Raddatz's coverage implicitly concedes this. If Koehler's cov-

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erage depends on Raddatz's coverage, it would follow that Koehler would be covered for the risk of entrusting Raddatz with her father's car had he operated it within the scope of her permission.

*747 ¶ 10 Yet, Wisconsin American contends that under the independent concurrent cause rule, Koehler's coverage for this very same risk disappears simply because Raddatz flouted Koehler's permission. That is not how the rule operates. The rule is concerned not with who is covered for their actions, but with whether the *risk* is one the policy insures. For example, in *Estate of Jones,* a two-year-old girl died after a day care driver forgot he left the girl buckled into the backseat of the van. Although the girl was expected at the day care that day, none of the staff inquired about her whereabouts or looked for her. As relevant here, the girl's estate sought recovery under the day care's commercial general liability policy. Although the policy explicitly excluded liability arising out of the use of automobiles, the girl's estate contended the policy provided coverage for the incident because the staff's on-site negligence in failing to look for the girl was an independent concurrent cause of her death. Thus, the independent concurrent cause rule permitted the estate to argue coverage should be extended to an excluded risk-automobile liability-because the death was also caused by an insured risk-the staff's on-site negligence. *See Estate of Jones,* 320 Wis.2d 470, ¶ 12, 768 N.W.2d 245.

¶ 11 As discussed above, however, Siebert's negligent entrustment claim-unlike the claim in *Estate of Jones*-does not implicate an excluded risk. Raddatz's own negligence may be excluded from coverage, but the risk associated with Koehler lending her car to him is not. The rule therefore does not apply here.[FN2]

> FN2. Beyond the fact that the independent concurrent cause rule does not apply here, Wisconsin American's argument that it bars coverage is problematic. As described in the text of this opinion, the independent concurrent cause rule *extends* coverage to an excluded risk when a loss is also caused by an insured risk. Wisconsin American cites no authority for the idea the rule functions as an affirmative bar to coverage.

***748 2. Claim preclusion**

[4] ¶ 12 Wisconsin American also argues that the jury's conclusion Raddatz exceeded the scope of permission precludes Siebert's negligent entrustment claim because it prevents Siebert from arguing Raddatz had permission to use the car the way he did. Siebert counters that it is immaterial Koehler did not permit Raddatz to do what he eventually did. What is important, she contends, is simply that Koehler permitted Raddatz to use the car.

[5] ¶ 13 We agree with Siebert. To prove negligent entrustment, Siebert must show Koehler (1) was initially in control of the vehicle, (2) permitted Raddatz to use it, and (3) knew or should have known Raddatz intended or was likely to use the vehicle in a way that would create an unreasonable risk of harm to others. *See Bankert,* 110 Wis.2d at 469, 475-76, 329 N.W.2d 150; *see also* WIS JI-CIVIL 104 (2003). The issue, then, is not whether Koehler actually permitted Raddatz to use **58 the car as he did, but whether she entrusted it to him and knew or should have known he would use it in a way that would create an unreasonable risk. *See id.* Therefore, the jury's conclusion Raddatz acted outside the scope of Koehler's permission does not preclude Siebert from showing Koehler negligently entrusted Raddatz with the car.

Judgment reversed and cause remanded.

Wis.App.,2010.
Siebert v. Wisconsin American Mut. Ins. Co.
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END OF DOCUMENT

STATE OF WISCONSIN : CIRCUIT COURT : ONEIDA COUNTY

JESSICA L. SIEBERT, by her
Guardian ad Litem, D.J. Weis; and
LYNETTE A. SIEBERT,

Plaintiffs,

STEVE ALBRECHT, JR. by his Guardian
Ad Litem, Thomas W. Kyle and
STEVEN ALBRECHT, SR.,
KARI SOSNOWSKI by her Guardian
Ad Litem, Thomas W. Kyle and
CYNDI ANDERSON,

Intervening Plaintiffs,

and

ONEIDA COUNTY DEPARTMENT
OF SOCIAL SERVICES,

Involuntary Plaintiffs,

vs.

WISCONSIN AMERICAN MUTUAL
INSURANCE COMPANY, INTERSTATE
BRANDS CORPORATION, ACE AMERICAN
INSURANCE CORPORATION, ALIAS
INSURANCE COMPANY NO 1, RYAN
FRIBERG,

Defendants,

and

BLUE CROSS BLUE SHIELD OF
WISCONSIN (n/k/a Anthem Blue Cross and
Blue Shield),

Nominal Defendant.

Case No. 07-CV-80
Case Code: 30101



**ORDER FOR JUDGMENT**

The motion of the defendant, Wisconsin American Mutual Insurance Company, having come before the court, the Honorable Patrick F. O'Melia presiding, the Siebert plaintiffs having appeared by D.J. Weis, their attorney, and the Albrecht and Sosnowski plaintiffs having appeared by Dixon Gahnz, their attorney, Wisconsin American Mutual Insurance Company having appeared by John M. Swietlik, Jr., its attorney, and the defendants Interstate Brands Corporation, Ryan Friberg and ESIS, Inc. having appeared by Bruce D. Huibregtse, their attorney, and the defendant Ryan Friberg also having appeared by Dan Peters, his attorney, and the involuntary plaintiff, Oneida County, having appeared by Brian J. Desmond, its attorney, and the court having considered all affidavits and briefs filed in support of and in opposition to the motion, and having entertained oral argument, and otherwise being fully advised;

NOW, THEREFORE, IT IS HEREBY ORDERED that the motion of Wisconsin American Mutual Insurance Company for summary judgment is hereby granted such that all claims, counterclaims, crossclaims and causes of action against it are hereby dismissed, on the merits, together with taxable costs and disbursements to be awarded in favor of Wisconsin American Mutual Insurance Company and against each party that opposed the Wisconsin American motion. In so ruling the court determined that there is no insurance coverage available under the Wisconsin American Mutual Insurance Company policy issued to Lee Koehler for the allegations contained in the Second Amended Complaints filed by the Siebert plaintiffs and the Albrecht and Sosnowski plaintiffs and in the Amended Counterclaim filed by the defendants Interstate Brands Corporation, Ryan Friberg and ESIS, Inc. relative to the allegations of negligent entrustment of the accident vehicle by Jessica Koehler to Jesse Raddatz such that Wisconsin American Mutual Insurance Company would have no obligation to defend or indemnify Jessica Koehler for the allegations of negligent entrustment if she were ever made a party to this action. This is a final judgment.

Dated: 4/17/09

BY THE COURT:

Patrick F. O'Melia

STATE OF WISCONSIN : CIRCUIT COURT : ONEIDA COUNTY

**********

JESSICA L. SIEBERT, by her Guardian
ad Litem, D.J. Weis; and
LYNETTE A. SIEBERT,

Plaintiffs,



STEVE ALBRECHT, JR. by his Guardian
ad Litem, Thomas W. Kyle and
STEVEN ALBRECHT, SR.; and

KARI SOSNOWSKI by her Guardian
ad Litem, Thomas W. Kyle and
CYNDI ANDERSON,

Intervening Plaintiffs,

and

ONEIDA COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Involuntary Plaintiff,

vs. Case No. 07-CV-80

WISCONSIN AMERICAN MUTUAL
INSURANCE COMPANY; INTERSTATE
BRANDS CORPORATION; ACE AMERICAN
INSURANCE COMPANY; RYAN FRIBERG,

Defendants,

and

ONEIDA COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Nominal Defendant.

**********

SUMMARY JUDGMENT MOTION HEARING

BEFORE: PATRICK F. O'MELIA
Circuit Judge, Branch I

RHINELANDER, WISCONSIN
APRIL 2, 2009

A P P E A R A N C E S

HABUSH, HABUSH & ROTTIER, S.C., by D. JAMES WEIS, 126 East Davenport Street, Rhinelander, WI, 54501, appeared telephonically on behalf of the Plaintiffs Jessica L. Siebert and Lynette A. Siebert.

PITMAN, KYLE & SICULA, S.C., by DIXON R. GAHNZ, 721 North Fourth Street, Watertown, WI, 53094, appeared telephonically on behalf of the Plaintiffs Steve Albrecht, Jr., Steven Albrecht, Sr., Kari Sosnowski, and Cyndi Anderson.

KASDORF, LEWIS & SWIETLIK, S.C., by JOHN M. SWIETLIK, Jr., One Park Plaza, 5th Floor, 11270 West Park Place, Milwaukee, WI, 53224, appeared on behalf of the Defendant Wisconsin American Mutual Insurance Company.

STAFFORD ROSENBAUM, LLP, by BRUCE D. HUIBREGTSE, 222 West Washington Avenue, Suite 900, P.O. Box 1784, Madison, WI, 53701-1784, appeared telephonically on behalf of the Defendants Interstate Brands and Ryan Friberg.

PIETZ, VANDERWAAL, STACKER & ROTTIER, S.C., by DANIEL R. PETERS, 530 Jackson Street, Wausau, WI, 54403-5589, appeared telephonically on behalf of the Defendant Ryan Friberg.

A P P E A R A N C E S

{Continued}

BRIAN J. DESMOND, Corporation Counsel, Oneida County Courthouse, P.O. Box 400, Rhinelander, WI, 54501, appeared on behalf of the Involuntary Plaintiff and Nominal Defendant Oneida County Department of Social Services.

E X H I B I T S

NONE.

P R O C E E D I N G S

THE COURT: This is an action in Oneida County Circuit Court, 07-CV-80, Siebert versus Wisconsin American, et al.

And appearances are Mr. Swietlik in the courtroom in Rhinelander. And appearing by telephone if you could, please, one by one, and spell your last name for the court reporter.

MR. WEIS: Jim Weis, W-E-I-S.

MR. GAHNZ: Dixon Gahnz, G-A-H-N-Z.

MR. HUIBREGTSE: Bruce Huibregtse, H-U-I-B-R-E-G-T-S-E, on behalf of Interstate Brands Corporation and Ryan Friberg.

THE COURT: All right.

MR. PETERS: And Dan Peters, P-E-T-E-R-S, also for Ryan Friberg.

THE COURT: And appearing now in the courtroom is Corporation Counsel Brian Desmond.

This was the date and time set for summary judgment motion and decision. We've received briefs from everybody that wanted to submit them and replies and responses.

Mr. Swietlik, do you want to be heard any further?

MR. SWIETLIK: Just briefly, Your

Honor. I'm not gonna go over everything that's already been argued, but I think that one thing that I don't really understand --

THE COURT: John, pull that up. Thank you.

MR. SWIETLIK: One thing that I'm not sure I understand about the opposition is that there's an argument made that this independent concurrent cause rule doesn't apply in auto cases, yet I haven't seen any authority that suggests that to be the law. I think that if you look at the independent concurrent cause rule, basically what that says is that there is coverage for an independent concurrent cause but it cannot require the occurrence of a noncovered act.

And here we have an noncovered act, that is the driving of the vehicle by Raddatz at the time the accident occurred. If that negligence hadn't occurred, there would be no basis for an action for negligent entrustment. It's the same principal that's in Bankert and Smith and the -- the third case that we cited. I realize that all of those three cases involve homeowner's policies rather than auto policies, but I have not seen any cases that say that this rule that requires that --

if -- if -- if you want coverage for an independent concurrent cause, it cannot be based on the occurrence of an uncovered risk. I think that if there really was that distinction, there would be some case law out there that said that. So I really think that Bankert and its progeny do apply and that there is no coverage for the alleged negligent entrustment by Jessica Koehler of the accident vehicle to Jesse Raddatz.

The second argument has to do with the merits rather than insurance coverage. I think it's clear based on the fact that the jury found that Raddatz didn't have permission to drive the vehicle at the time the accident occurred that the second element that requires Koehler to entrust the vehicle to Raddatz can't be met.

And I don't think that it matters that he had permission to go to the food pantry. He didn't have permission to go joyriding with a bunch of teenagers to Rhinelander and that's what he was doing at the time the accident occurred.

So for those reasons, Your Honor, I would request that the motion for summary judgment be granted.

THE COURT: All right. We'll start

with Mr. Weis. Would you like to be heard any further?

MR. WEIS: Just -- just very briefly, Your Honor. With all due respect to Mr. Swietlik, the reason that there's no case law with respect to our position is that no one has had the unmitigated moxie to take the position short of Mr. Swietlik.

Essentially the reason for all of these cases is that in every one of the cases they tried to take a policy which does not cover motor vehicle accidents, has specific exclusions that keep you from being able to get motor vehicle accidents, and then attempted to essentially do an end run around those policies by claiming negligent entrustment. And in every one of the cases the court said, well, you got to have an independent concurrent cause in order to rope in a nonauto policy in this kind of circumstance.

There's absolutely no dispute in this case that the auto policy that covered Jessica Koehler is the policy that we seek coverage under and there's no question that there is coverage for Jessica Koehler for the auto accident under the auto policy. There's simply no need for an independent concurrent cause rule since we're not

trying to apply a nonauto policy.

And there isn't a single case that Mr. Swietlik has cited -- and he certainly has the burden of proof with respect to the motion for summary judgment and it's a very high one -- that would place this situation within the independent concurrent cause rule. It simply doesn't have anything to do with the situation.

With respect to the finding of the jury, our contention is that the number two requirement under the negligent entrustment doctrine is simply that there was permission given to the individual to drive the car. If that permission was exceeded, there can still obviously be negligent entrustment with respect to giving him the keys in the first place.

Whether this accident happened to happen on the way to the food pantry or whether it happened on the way to go to Rhinelander is of no import and I don't believe will be of import to the jury. She should have never given him the keys to begin with. So I don't believe that the finding of the jury is in any way inconsistent with our position and, in fact, is supportive of it. She should have never simply given him the keys.

So, again, I don't believe that that reaches the level of summary judgment here and certainly it's Mr. Swietlik's burden to prove summary judgment to the requisite standard.

THE COURT: All right. Mr. Gahnz, anything?

MR. GAHNZ: I have nothing to add, Your Honor.

THE COURT: I beg your pardon?

MR. GAHNZ: I have no further argument.

THE COURT: All right.

Mr. Huibregtse, anything?

MR. HUIBREGTSE: I agree with Mr. Weis a hundred percent.

THE COURT: And Mr. Peters.

MR. PETERS: I have nothing to add that hasn't been spoken in opposition.

THE COURT: Hold on a moment, please.

Well, the -- the issue is -- and we'll take up the independent concurrent cause issue first. You know, does that rule preclude coverage. And I think typically -- and I cite Varda versus Acuity -- "[w]hen an insurance policy expressly insures against loss caused by one risk, but

excludes loss caused by another risk, coverage is extended to a loss caused by the insured risk even though the excluded risk is a contributory cause." And, again, that's the Varda case cited by counsel.

For this rule to apply here, the covered risk must be an independent concurrent cause. That is it "must provide the basis for a claim in and of itself, and must not require the occurrence of the excluded risk to make it actionable."

The cases that applied the independent concurrent cause rule analyze whether the injury would have occurred without the occurrence of the excluded risk. And that's the Smith case. And, for example, in the Smith case it involved a snowmobile accident that occurred off the premises insured under a homeowner's policy and was therefore excluded from coverage. Now the plaintiff argued that the defendant's intoxication and failure to put a helmet on the decedent were separate acts under the independent cause rule. That's in the Smith case. And the court held that the injury would not have occurred without the operation of the snowmobile and therefore the defendant's intoxication and failure to provide a

helmet are not independent concurrent causes.

Now in Bankert, which is somewhat similar here in terms of the causes of action, maybe not the types of policies, but in Bankert the court concluded that "negligent entrustment is irrelevant unless the person to whom a thing is entrusted acts in a negligent manner."

So analyzing these facts under Bankert, Siebert's claim for negligent entrustment is dependent upon Raddatz's negligent operation of the vehicle. The alleged negligence of Raddatz is not covered under the policy pursuant to the jury's finding last summer when they found that Raddatz exceeded the scope of permission. And so Raddatz's negligent operation of the vehicle is an excluded risk. And because the negligent entrustment claim against Koehler requires the occurrence of Raddatz's negligence and because a claim for Raddatz's negligence is excluded under the policy, the alleged negligent entrustment by Koehler is not an independent concurrent cause.

Now the plaintiff argues that the independent concurrent cause rule does not apply in this case because, as it was pointed out, it is almost always brought into play in cases involving

coverage for an auto accident under a nonauto policy such as a homeowner's policy. But I would think the courts in Bankert and Smith, etcetera, you read those cases, they draw no distinctions between the types of policies or when they're brought up. They talk about causation and causation doesn't change in my opinion just from -- because of what kind of policy it is.

And there's no authority for this proposition and the relevant cases that have been cited give no indication that the rule is limited to simply a certain type of policy. Now if it's new law, I guess it will be new law, but I have a feeling that it's not new law. I think it's just an application of the old law to some different facts.

And for the reasons stated I'm going to grant the motion for summary judgment sought by Wisconsin. And for the reasons stated I'm not going to get into the merits, that is whether or not there is negligent entrustment, because of these findings. So I'll sign an order consistent with that.

Anything further, Mr. Swietlik?

MR. SWIETLIK: Well, Your Honor,

the -- the issue of costs from the trial last summer is still before the court, but I think maybe the best thing to do would be to enter whatever order and judgment would be appropriate from this ruling and then maybe take it all up at one time rather than do it piecemeal. That would be my suggestion at least.

THE COURT: I totally agree with that.

Any -- anybody differ with that suggestion?

Hearing no objection, we have a trial date in September. Is there anything between now and then that would cause us to get together on the cost issue or do you want to wait to just after the order's signed and --

MR. SWIETLIK: Well, I'd like to talk to the lawyers, too, and see.

MR. WEIS: Yeah, see what their intentions are.

I think practically speaking -- I'm thinking out loud now, Your Honor, but practically speaking I think we'll probably seek interlocutory relief. And the only reason I say that is that if we -- if we go forward and we try the case in September, and whether or not Jessica Koehler would

be on the verdict for negligent entrustment, we wouldn't have a valid verdict against Wisconsin Mutual for that theory in September.

MR. SWIETLIK: But it wouldn't be interlocutory.

MR. WEIS: They won't be a party to the action at that point in time.

MR. SWIETLIK: I don't mean to interrupt, Jim, but it's a final -- it would be a final judgment so you -- if you want to appeal, you would have a right.

MR. WEIS: No, I understand that, John, but --

MR. SWIETLIK: Oh. Okay.

MR. WEIS: But what I'm saying is is that -- well, what we don't want to do is we don't want to try the case and have a comparison of negligence in September that wouldn't include Jessica Koehler because then the only alternative if the case is decided in our favor on this coverage issue would be to come back and have to try the whole thing over again.

MR. SWIETLIK: Well, I doubt anyone would object to a stay if you appeal. I mean, Jim --

MR. WEIS: Oh, I understand. I -- and -- but I think that probably our only remedy to keep that from happening would be to seek an interlocutory appeal. Now they do not grant them very often, but we do have time obviously between now and September so that we'd know before the -- before the September trial date.

So let me give that some thought, John, and I'll communicate with you and the others on it, but it seems to me that that's probably what makes sense.

MR. SWIETLIK: Well --

MR. WEIS: And you --

MR. HUIBREGTSE: Go ahead.

MR. SWIETLIK: -- the only thing that confuses me is it couldn't be interlocutory because it's --

MR. WEIS: No, you're right, John. What we would have to do -- I guess the only -- the only remedy would be -- you're right. The remedy would be to --

MR. SWIETLIK: To appeal and stay.

MR. WEIS: -- to appeal and stay. Right.

MR. SWIETLIK: Right.

MR. WEIS: Or to appeal and adjourn essentially during the pendency of the appeal.

MR. SWIETLIK: Right.

MR. WEIS: I'll give that some further thought and communicate with the parties but that -- it seems to me that that's what makes the most sense. Because the last thing that we want to do -- and this is not a cheap case to try for everybody -- is to try this and then find out that -- that she could be responsible for negligent entrustment and then come back and try it again. We could end up with potentially inconsistent verdicts.

MR. SWIETLIK: I -- I understand.

THE COURT: All right. We'll let you go. And --

MR. WEIS: Judge --

THE COURT: -- we're adjourned.

MR. HUIBREGTSE: -- this is Bruce Huibregtse. If -- if Mr. Weis is seriously considering that, and I hope he does, would the court have any objection to staying this matter until the appeal is resolved?

THE COURT: Well, I'll take that up when it comes up, but frankly no. Off the cuff I

would say no. But I reserve the right to change my mind. There's no objection now, but there might be down the road so . . .

MR. HUIBREGTSE: Can the parties stay on after the court hangs up?

UNIDENTIFIED SPEAKER: Sure.

THE COURT: All right. Well, actually --

MR. SWIETLIK: I can't because I'm --

MR. HUIBREGTSE: Well, Swietlik's out, so we don't need him.

MR. SWIETLIK: Okay. Talk to you guys later.

THE COURT: All right.

MR. SWIETLIK: Thank you, Your Honor.

(At 2:20 p.m. the proceedings adjourned.)

* * *

STATE OF WISCONSIN)

)

ONEIDA COUNTY )

I, JEAN M. WOOD, R.M.R., C.R.R., do hereby certify that I have carefully compared the foregoing transcript with the stenograph notes taken by me at the time of the above-entitled action and find the same to be a full, true, and correct transcript of said notes containing all the testimony given and proceedings had in the above-entitled matter on the 2nd day of April, 2009.

Jean M. Wood

R.M.R., C.R.R.

Dated this 10th day of June, 2009

Rhinelander, Wisconsin.

STATE OF WISCONSIN CIRCUIT COURT ONEIDA COUNTY

Jessica L. Siebert, et al,

Petitioner,

vs. CASE NO. 07-CV-80

American Mutual Insurance Company, et al,

Respondent.

SPECIAL VERDICT

At and immediately before the time of the accident, did Jesse Raddatz exceed the scope of permission that he was provided by Jessica Koehler to use the 1996 Chevrolet Lumina?

ANSWER: Yes
(yes or no)

Dated this 4th day of June, 2008.

Thomas Welch
Foreperson

Kenneth Lowe

(Dissenting Jurors, if any)

Was the question ever posed to Steve where they were going when the accident occured. NO one in the Jury can recall that in testimony.

Thomas Welch

STATE OF WISCONSIN : CIRCUIT COURT : ONEIDA COUNTY

JESSICA L. SIEBERT, by her
Guardian ad Litem, D.J. Weis; and
LYNETTE A. SIEBERT,

Plaintiffs,

STEVE ALBRECHT, JR. by his Guardian
Ad Litem, Thomas W. Kyle and
STEVEN ALBRECHT, SR.,
KARI SOSNOWSKI by her Guardian
Ad Litem, Thomas W. Kyle and
CYNDI ANDERSON,

Intervening Plaintiffs,

and

ONEIDA COUNTY DEPARTMENT
OF SOCIAL SERVICES,

Involuntary Plaintiffs,

vs.

WISCONSIN AMERICAN MUTUAL
INSURANCE COMPANY, INTERSTATE
BRANDS CORPORATION, ACE AMERICAN
INSURANCE CORPORATION, ALIAS
INSURANCE COMPANY NO 1, RYAN
FRIBERG,

Defendants,

and

BLUE CROSS BLUE SHIELD OF
WISCONSIN (n/k/a Anthem Blue Cross and
Blue Shield),

Nominal Defendant.

Case No. 07-CV-80
Case Code: 30101



**JUDGMENT**

The above-entitled action having come on for trial before a 12-person jury, the Honorable Patrick F. O'Melia presiding, on June 23 and 24, 2008, and the jury having returned its verdict on June 24, 2008 in favor of the defendant, Wisconsin American Mutual Insurance Company, and the court having entered an Order for Judgment directing that judgment be entered in favor of the defendant, Wisconsin American Mutual Insurance Company, and against all plaintiffs and all defendants who had crossclaimed against Wisconsin American Mutual Insurance Company, together with taxable costs and disbursements to be awarded in favor of the defendant, Wisconsin American Mutual Insurance Company, now, on motion of Kasdorf, Lewis & Swietlik, S.C., attorneys for the defendant, Wisconsin American Mutual Insurance Company:

IT IS HEREBY ADJUDGED AND DECREED that the Complaints of the plaintiffs Jessica L. Siebert, by her guardian ad litem, D.J. Weis and Lynette A. Siebert, against Wisconsin American Mutual Insurance Company be dismissed, on the merits and with prejudice, and that judgment be and it is herewith entered in favor of the defendant, Wisconsin American Mutual Insurance Company, and against the plaintiffs, Jessica L. Siebert, by her guardian ad litem, D.J. Weis and Lynette A. Siebert, for the taxable costs and disbursements of Wisconsin American Mutual Insurance Company in the sum of $ To be determined.

IT IS FURTHER ADJUDGED AND DECREEED that the Complaints of the plaintiffs, Steve Albrecht, Jr., by his guardian ad litem, Thomas W. Kyle, Steven Albrecht, Sr., Kari Sosnowski by her guardian ad litem, Thomas W. Kyle and Cyndi Anderson against the defendant, Wisconsin American Mutual Insurance Company, be dismissed on the merits and that judgment be and it is herewith entered in favor of the defendant, Wisconsin American Mutual Insurance Company, and against the plaintiffs, Steve Albrecht, Jr., by his guardian ad litem, Thomas W. Kyle, Steven Albrecht, Sr., Kari Sosnowski by her guardian ad litem, Thomas W.

Kyle and Cyndi Anderson for defendant Wisconsin American Mutual Insurance Company's taxable costs and disbursements in the sum of $ to be determined

IT IS FURTHER ADJUDGED AND DECREED that the Crossclaims of the defendants, Interstate Brands Corporation, ACE American Insurance Company, and Ryan Friberg against the defendant, Wisconsin American Mutual Insurance Company, be dismissed, on the merits and with prejudice and that judgment be and it is herewith entered in favor of the defendant, Wisconsin American Mutual Insurance Company, and against the defendants, Interstate Brands Corporation, ACE American Insurance Company, and Ryan Friberg for defendant Wisconsin American Mutual Insurance Company's taxable costs and disbursements in the sum of $ to be determined

Dated this 10 day of September, 2008 at 9:00 o'clock in the a.m.

CLERK OF COURTS

By: Kellie M Meyer
DEPUTY CLERK

STATE OF WISCONSIN : CIRCUIT COURT : ONEIDA COUNTY

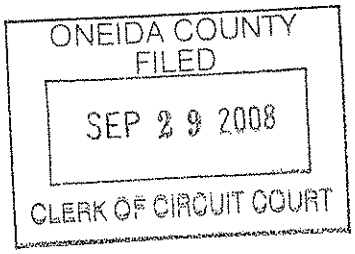
JESSICA L. SIEBERT, by her
Guardian ad Litem, D.J. Weis; and
LYNETTE A. SIEBERT,

Plaintiffs,

STEVE ALBRECHT, JR. by his Guardian
Ad Litem, Thomas W. Kyle and
STEVEN ALBRECHT, SR.,
KARI SOSNOWSKI by her Guardian
Ad Litem, Thomas W. Kyle and
CYNDI ANDERSON,

Case No. 07-CV-80
Case Code: 30101

Intervening Plaintiffs,




and

ONEIDA COUNTY DEPARTMENT
OF SOCIAL SERVICES,

Involuntary Plaintiffs,

vs.

WISCONSIN AMERICAN MUTUAL
INSURANCE COMPANY, INTERSTATE
BRANDS CORPORATION, ACE AMERICAN
INSURANCE CORPORATION, ALIAS
INSURANCE COMPANY NO 1, RYAN
FRIBERG,

Defendants,

and

BLUE CROSS BLUE SHIELD OF
WISCONSIN (n/k/a Anthem Blue Cross and
Blue Shield),

Nominal Defendant.

**ORDER FOR JUDGMENT**

This case having been tried before a jury of twelve (12) on June 23 and 24, 2008, the Honorable Patrick F. O'Melia presiding, and the jury having returned its verdict on June 24, 2008, finding that because Jesse Raddatz exceeded the scope of the permission that he was provided by Jessica Koehler to use the 1996 Lumina at and immediately before the time the accident occurred there is no insurance coverage available under the Wisconsin American Mutual Insurance Company policy, and the court having granted the motion of Wisconsin American Mutual Insurance Company for judgment on the verdict;

NOW, THEREFORE, IT IS HEREBY ORDERED:

That the clerk enter judgment in this action dismissing the Complaint of the plaintiffs and the Crossclaims of the defendants against the defendant, Wisconsin American Mutual Insurance Company, on the merits and with prejudice, together with taxable costs and disbursements to be awarded in favor of Wisconsin American Mutual Insurance Company and against Jessica L. Siebert, by her guardian ad litem, D.J. Weis, Lynette A. Siebert, Steve Albrecht, Jr., by his guardian ad litem, Thomas W. Kyle, Steven Albrecht, Sr., Kari Sosnowski by her guardian ad litem, Thomas W. Kyle, Cyndi Anderson, Interstate Brands Corporation, ACE American Insurance Company, and Ryan Friberg.

Dated this 10 day of September, 2008.

BY THE COURT:

Patrick F. O'Melia
Circuit Judge, Branch 1

## CERTIFICATION

I hereby certify that filed with this petition, either as a separate document or as a part of this petition, 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 this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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.

Dated this 23rd day of November, 2010.

KASDORF, LEWIS & SWIETLIK, S.C.
Attorneys for Defendant-Respondent-Petitioner, Wisconsin American Mutual Insurance Company

By: _____

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## CERTIFICATION

I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of s. 809.19(13). I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 23rd day of November, 2010.

KASDORF, LEWIS & SWIETLIK, S.C.
Attorneys for Defendant-Respondent-Petitioner, Wisconsin American Mutual Insurance Company

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SUPREME COURT OF WISCONSIN

JESSICA L. SIEBERT, by her Guardian ad Litem, D.J. WEIS, and LYNETTE A. SIEBERT,

Plaintiffs-Appellants,

STEVE ALBRECHT, JR., by his Guardian ad Litem, THOMAS W. KYLE; STEVEN ALBRECHT, SR.; KARI SOSNOWSKI, by her Guardian ad Litem, THOMAS W. KYLE, and CYNDI ANDERSON,
Intervening-Plaintiffs,

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,
Involuntary-Plaintiff,

v.

WISCONSIN AMERICAN MUTUAL INSURANCE COMPANY,
Defendant-Respondent-Petitioner,

INTERSTATE BRANDS CORPORATION; ACE AMERICAN INSURANCE COMPANY, and RYAN FRIBERG,
Defendants.

District 3
Appeal No. 2009AP1422
Case No. 2007CV80
Judge Patrick F. O'Melia

# RESPONSE BRIEF OF PLAINTIFFS-APPELLANTS JESSICA L. SIEBERT, BY HER GUARDIAN AD LITEM, D.J. WEIS, AND LYNETTE A. SIEBERT

HABUSH HABUSH & ROTTIER S.C.

By: D. J. Weis, SB #: 01006471
Rhonda L. Lanford, SB #: 1027017
Attorneys for Plaintiffs-Appellants
126 East Davenport Street
Rhinelander, WI 54501
Phone: 715-365-1900

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## STATEMENT OF ISSUES PRESENTED

Plaintiffs-Appellants Jessica Siebert and Lynette Siebert ("Siebert") disagree with the issues presented by Defendant-Respondent-Petitioner Wisconsin American Mutual Insurance Company ("Wisconsin American"). They respectfully submit that the following accurately represent the issues before this Court:

Does the independent concurrent cause rule act as an affirmative bar to Siebert's negligent entrustment claim against Wisconsin American for the conduct of its insured, Jessica Koehler, when she gave permission to Jesse Raddatz to use her vehicle when she knew or should have known that he was likely to use the vehicle in a way that would create an unreasonable risk of harm to others?

Answered by the trial court: Yes.

Answered by the Court of Appeals: No.

Does the jury's verdict in a bifurcated trial during the insurance coverage phase that Jesse Raddatz exceeded the scope of his permission at or immediately before the accident act as a bar to Siebert's negligent entrustment merits claim when initial permission is one of the elements of the claim?

Answered by the trial court: Not answered by the trial court.

Answered by the Court of Appeals: No.

## ARGUMENT

Wisconsin American's statement of issues and its entire argument rest on the premise that the jury's verdict that Raddatz exceeded the scope of his permission in the insurance coverage phase of a bifurcated trial established that no coverage existed under any circumstance for the "driver's negligent operation of the vehicle." Pet. Br. at v. This is an incorrect statement of the jury's verdict, and therefore a faulty premise from which to begin. Because Wisconsin American challenged coverage on the scope of permission issue under its policy, the case was bifurcated. At the coverage trial, the jury was asked one question, and one question only: was Jesse Raddatz exceeding the scope of his permission to use the vehicle at the time of the accident. R:59; Pet. App. 129. Whether Raddatz was negligently driving was not determined by the jury. See id. Instead, because of the finding that Raddatz exceeded the scope of permission, the trial court judicially determined there was no coverage under the policy. R:60. Had the jury found that Raddatz had permission to use the vehicle at or immediately prior to the accident, the merits trial would have followed. It is the trial on the merits that would have determined issues of negligence, comparative fault, and damages.

The court of appeals recognized the appropriate issues in this case, and found that the independent concurrent cause rule did not apply to these facts because Siebert's negligent entrustment claim did not implicate an excluded risk. Siebert v. Wisconsin American Mutual Ins. Co., 2010 WI App 94, ¶ 7, 325 Wis. 2d 740, 787 N.W.2d 54. Furthermore, the court of appeals found that the verdict

on scope of permission in a coverage trial did not act as a bar to Siebert's negligent entrustment claim on the element of permission in a merits trial. Id. ¶ 13. This Court should affirm the court of appeals' decision on all issues, and remand this case to the trial court for a trial on the merits of Siebert's negligent entrustment claim.

## I. SIEBERT'S NEGLIGENT ENTRUSTMENT CLAIM IS A STAND-ALONE CLAIM, NOT DEPENDENT ON AN EXCLUDED RISK, AND THE INDEPENDENT CONCURRENT CAUSE RULE DOES NOT APPLY.

Wisconsin American agrees with Siebert that the independent concurrent cause rule extends coverage "to a loss caused by the insured even though the excluded risk is a contributory cause, [w]here a policy expressly insures against loss caused by one risk but excludes loss caused by another risk." Smith v. State Farm Fire & Cas. Co., 192 Wis. 2d 322, 331, 531 N.W.2d 376 (Ct. App. 1995).; Pet Br. at 8. However, Wisconsin American provides no authority for its argument that the rule can also act as a bar to coverage. The court of appeals recognized and questioned Wisconsin American's attempt, without any authority, to use the independent concurrent cause rule to bar coverage:

> Beyond the fact that the independent concurrent cause rule does not apply here, Wisconsin American's argument that it bars coverage is problematic. As described in the text of this opinion, the independent concurrent cause rule *extends* coverage to an excluded risk when a loss is also caused by an insured risk. Wisconsin American cites no authority for the idea the rule functions as an affirmative bar to coverage.

Siebert, 2010 WI App. 94, ¶ 11 n.2 (emphasis in original). Wisconsin American does not address the court of appeals' concern in its Argument here, and it cites no authority for the proposition that the independent concurrent cause rule can act as a bar to coverage. For this reason, and all of the other reasons discussed infra, application of this rule to the facts of this case is error.

Wisconsin American asserts that the "excluded risk" in this case is the "negligent operation of the vehicle." Pet Br. at 9. This is incorrect – the excluded risk is Raddatz's operation of the vehicle while exceeding the scope of his permission to use the vehicle. A finding that he exceeded his scope of permission to use the vehicle in the coverage phase of a bifurcated trial does not preclude a finding that Koehler negligently entrusted Raddatz with the vehicle in the first place.

Wisconsin American cites Bankert v. Threshermen's Mutual Ins. Co., 110 Wis. 2d 469, 329 N.W.2d 150 (1983) and Malone v. Gaengel, 221 Wis. 2d 92, 583 N.W.2d 882 (Ct. App. 1998) in support of its position. However, in both of these cases, an injured party was seeking coverage under different policies which had exclusions or different policies insuring against different risks. This is not the case here. Under the facts of this case, the negligent entrustment claim is not dependent on whether Raddatz was operating the vehicle outside the scope of his permission for his own negligence. See infra Part II. There was no question on the verdict regarding Jessica's Koehler's separate negligence, which is a covered event under the same policy.

A closer examination of the cases relied upon by Wisconsin American shows that they are non analogous to this case. In Malone, a ten-year-old died when a three-wheel, all-terrain vehicle driven by his cousin and on which he was riding rolled over and crushed him. Id. at 93. The plaintiff brought suit against the driver's parents under their "Family Home and Highway" policy. Id. This policy combined homeowner's and auto insurance, but each had separate premiums, and insured for different risks. Id.

Plaintiff's claim against the defendants alleged that defendants negligently permitted their son to drive, and did not make the ten-year-old, Jason, wear a helmet. Id. at 94. No allegation of negligence against the driver was made.

The policy under which plaintiff made her claim was a five-part "personal liability insurance" policy which separated categories under which the coverage applied and the limitations within the categories. Id. The policy applied to motor vehicles owned and listed by the defendants, or non-owned and non-listed vehicles used on the defendants' property. Id. The vehicle driven by defendants' son was not listed on the declarations page, and did not take place on the defendants' property. Id. Coverage was clearly excluded under this provision for this accident.

In order to avoid a "no coverage" claim, plaintiff sought coverage instead under a "Home and Personal Activities Legal Liability" provision of the policy. That policy section provided:

> We insure the liability of you and your family because of bodily injury or property damage to others in an accident or incident that happens in your home or on your property, as listed in the Declarations Page.
>
> We will also cover such liability involving your personal, nonbusiness activities anywhere in the world.

Id. Plaintiffs claimed that since the act of negligent permission and not making Jason wear a helmet occurred on the defendants' property, the Home and Personal Activities Legal Liability provision applied.

In finding no coverage, the court of appeals invoked the independent concurrent cause rule. The court held that plaintiff's attempt to avoid the exclusion in the motor vehicle policy failed, because the plaintiff did not allege that the insurance covered the driver's negligence, and absent this coverage for this negligence, the act of negligent supervision or failing to make Jason wear a helmet were not stand-alone claims. Id. at 99. In invoking the rule, the court stated:

> A reasonable insured would not expect automobile-liability coverage under his or her homeowner's policy. Indeed, although the West Bend policy provided both homeowner's coverage and motor-vehicle coverage, separate premiums were assessed for each. Additionally, the policy specifically noted that it "separated the categories under which [liability] coverage will apply and what the limitations are." Thus, there was no bleed-over between the various coverages, and, as already noted, Malone does not claim that the Gaengels had coverage under their homeowner's policy for Damian's driving. Moreover, to use the homeowner's part of the West Bend policy to expand motor-vehicle-accident coverage beyond that provided under the motor-vehicle insurance part of the policy would give the Gaengels coverage for which they did not pay. See Bankert, 110 Wis. 2d at 479-480, 329 N.W.2d at 154 (granting coverage based on theories of liability rather than the risk for which insurance was purchased

> "would convert the farmowners liability policy into an automobile policy").

Id. at 99-100.

Similarly, in Bankert v. Threshermen's Mutual Ins. Co., 110 Wis. 2d 469, 329 N.W.2d 150 (1983), plaintiff sought coverage under a farmowner's policy for a motorcycle accident that occurred off the farm premises. Plaintiff was a passenger on a motorcycle without functioning lights and being driven by an unlicensed fifteen-year-old. The driver crashed the motorcycle into a parked car in Watertown, off the premises of the farm. Id. at 472.

Because of an automobile exclusion in the farmowner's policy, Plaintiff brought a claim against the driver's parents, alleging negligent entrustment and negligent supervision. Id. Defendant insurance company, Threshermen's Mutual, claimed no coverage under the farm policy, because it did not insure for operation of the motorcycle while away from the premises or the roads immediately adjoining the premises. See id. at 479.

The Supreme Court held that the negligent entrustment is a separate act of negligence, but the act of the driver was the cause of the injury. Id. at 478. The policy clearly excluded the motorcycle accident which occurred away from the premises. The supreme court clearly articulated the reasoning as to when it is appropriate to apply the independent concurrent cause rule:

> According to the plaintiffs, it is not the place of the accident that controls, but rather the place of the negligent act. It is immediately apparent that this contention, if approved, would result in a strange and strained construction of the policy in

> numerous circumstances, *e.g.*, in the case of negligently maintained tires which cause an accident or where brakes have been neglected. These acts of negligence could hardly have occurred at the situs of the accident. In part, the negligence would have occurred where the vehicle was garaged -- the farm premises. Under this argument, irrespective of where the accident occurred, all negligence which was attributable to conduct at the farm home would be covered. Acceptance of this theory would convert the farmowners liability policy into an automobile policy.

Id. at 479-80. The court held that the farmowner's policy excluded "all conceivable coverage" when there is an automobile accident. Id. at 484. Unlike the defendant in Bankert, Raddatz's negligent driving was not a completely excluded risk – it was only excluded if he exceeded the scope of his permission while driving negligently. This has no bearing on the negligent entrustment claim against Jessica Koehler.

In its decision in this case, the court of appeals relied on Estate of Jones v. Smith, 2009 WI App. 88, 320 Wis. 2d 470, 768 N.W.2d 245 to illustrate the operation of the independent concurrent cause rule when used properly. In Jones, a child was left in a van after it arrived at a day care center, and she died from hyperthermia. Id. ¶ 2. Although the commercial policy for the day care excluded acts involving automobiles, Jones argued that the independent concurrent cause rule applied, requiring the day care to cover the loss. Id. The court of appeals analyzed Siebert's claim using the Jones case:

> Yet, Wisconsin American contends that under the independent concurrent cause rule, Koehler's coverage for this very same risk disappears simply because Raddatz flouted Koehler's permission. That is not how the rule operates. The rule is concerned not with who is covered for their actions, but with whether the risk is one

> the policy insures. For example, in Estate of Jones, a two-year-old girl died after a day care driver forgot he left the girl buckled into the backseat of the van. Although the girl was expected at the day care that day, none of the staff inquired about her whereabouts or looked for her. As relevant here, the girl's estate sought recovery under the day care's commercial general liability policy. Although the policy explicitly excluded liability arising out of the use of automobiles, the girl's estate contended the policy provided coverage for the incident because the staff's on-site negligence in failing to look for the girl was an independent concurrent cause of her death. Thus, the independent concurrent cause rule permitted the estate to argue coverage should be extended to an excluded risk-automobile liability-because the death was also caused by an insured risk-the staff's on-site negligence. See Estate of Jones, 2009 WI App 88, 320 Wis. 2d 470, P12, 768 N.W.2d 245.
>
> As discussed above, however, Siebert's negligent entrustment claim-unlike the claim in Estate of Jones-does not implicate an excluded risk. Raddatz's own negligence may be excluded from coverage, but the risk associated with Koehler lending her car to him is not. The rule therefore does not apply here.

Siebert v. Wisconsin American Mut. Ins. Co., 2010 WI App. 94 ¶¶ 10, 11 (emphasis supplied). [1] Wisconsin American does not even address the Jones case substantively, or attempt to distinguish it from this case.

Siebert is not trying to obtain coverage for which no premium was paid. In Bankert, the Supreme Court essentially said that the independent concurrent cause rule's purpose is to prevent parties from converting policies into policies that cover acts for which no premium was paid. In Siebert's case, Raddatz's negligent driving is a covered risk under the policy, provided that a jury finds that Jessica Koehler negligently entrusted the vehicle to him. By definition, as discussed infra Part II, negligent entrustment claims almost always involve entrustees who exceed

[1] Although the court of appeals stated in its decision that Raddatz's negligent operation of the vehicle was excluded, see Siebert, 2010 WI App. 94 ¶ 11, it was implicit in the decision that the reason it was excluded was a finding of no permission by the jury at or immediately prior to the accident.

their scope of permission to use a vehicle. In this case, a jury could easily find that because Jessica Koehler gave Raddatz initial permission to use the vehicle, and because she knew or in the exercise of reasonable care should have known he was likely to use it in a way that would create an unreasonable risk of harm to others, she is liable for negligent entrustment. Whether Raddatz exceeded the scope of permission is irrelevant in a negligent entrustment case, and all that the jury in the coverage trial decided was scope of permission at or immediately before the accident.

In Siebert's case, she is not asking for the court to convert a homeowner's policy into an automobile policy. She is not asking for Wisconsin American to pay for a risk it did not contemplate. Clearly, negligent driving is a risk for which Wisconsin American received a premium. Clearly, negligent entrustment, if proven by the facts of the case, is a risk Wisconsin American contemplated and for which it was paid a premium. The fact that another jury found that Raddatz exceeded his scope of permission in an insurance coverage trial has no bearing on whether he was negligently driving the vehicle. The uncovered risk was not negligent driving of the vehicle – the uncovered risk was that Raddatz was exceeding the scope of his permission to drive the vehicle at or immediately before the accident. This is not an element of negligent entrustment, and the independent concurrent cause rule should not be applied to this case.

The court of appeals correctly applied the law regarding the independent concurrent cause rule, and reversed the trial court. This Court should affirm the court of appeals, and remand this case for further proceedings on the merits.

## II. THE JURY'S VERDICT ON SCOPE OF PERMISSION IN THE COVERAGE PHASE OF A BIFURCATED TRIAL DOES NOT PRECLUDE SIEBERT FROM BRINGING A NEGLIGENT ENTRUSTMENT CLAIM FOR JESSICA KOEHLER'S ACTIONS.

For the first time, Wisconsin American argues that because Siebert chose to bring her claims under Wisconsin's direct action statute, sec. 632.24, Stats. and not name Raddatz and Koehler in the lawsuit, this somehow establishes the "identity of parties" prong for claim preclusion. See Pet. Br. at 16. While this argument is clearly erroneous, this Court's order granting the Petition for Review specifically stated that Wisconsin American cannot raise or argue issues not set forth in its Petition for Review. The direct action statute was never mentioned in any appellate briefs or the Petition for Review, and reference to it and arguments about it should be disregarded by this Court. Without waiving Siebert's objection to this new argument, she respectfully submits that there is no authority for Wisconsin American's contention that the direct action statute is implicated in identity of parties for claim preclusion purposes.

More importantly, on the issues that are properly before this Court, Wisconsin American's entire argument on claim preclusion fails for one simple reason: there was never a trial on the merits in this case. Wisconsin American refers to the scope of permission trial as a "trial on the merits," Pet. Br. at 24, but it

was unquestionably the coverage phase of a bifurcated trial, not a merits trial. Because this was a coverage question only, none of the cases and none of the arguments set forth by Wisconsin American apply to the facts of this case. Each case cited by Wisconsin American to support its argument relates to a situation where a trial on the merits was held, and then a party tried to renew a cause of action under the same set of facts, between the same parties. The court of appeals correctly recognized that the issue of permission to use the vehicle (a coverage issue) does not preclude Siebert from bringing a claim for negligent entrustment (a liability issue) after the coverage trial was held. See Siebert v. Wisconsin American Mut. Ins. Co., 2010 WI 94, ¶ 13, Pet-App. 107.

None of the cases cited by Wisconsin American involve actions arising out of a bifurcated trial on coverage and liability. All of the cases involve actual claims for which a judgment on the merits was rendered, and then a party sought to revisit those facts and judgment in another claim. In DePratt v. West Bend Mutual Ins. Co., 113 Wis. 2d 306, 334 N.W.2d 883 (1983), one of the cases cited by Wisconsin American, the initial claim brought by plaintiffs was for a liability claim under safe place and respondeat superior. Id. at 309. After the trial court granted summary judgment on those liability issues, plaintiff filed an action alleging defendant was independently negligent. Id. This Court held that the second liability claim was barred because it arose from the same causes of action and the same parties, and a "valid and final judgment on the merits" barred the

action by the plaintiff. Id. at 310. Similarly, in Kruckenberg v. Harvey, 2005 WI 43, 279 Wis. 2d 520, 694 N.W.2d 879, the issue involved the merits of a claim involving the boundary line between two properties, where one action was for failing to provide a lateral support when defendant dug a ditch, and the second involved a claim for trespass and conversion.. Id. ¶¶ 1, 2. In Sopha v. Owens Corning Fiberglass Corporation, 230 Wis. 2d 212, 601 N.W.2d 627 (1999), the two claims involved a liability action for a non-malignant asbestos-related condition and a later diagnosis of a distinct malignant asbestos related condition. Id. at 217.

Unlike the plaintiff in DePratt, Siebert has not yet received a judgment on the merits in this case. There has been no merits trial in this case on any issue. Wisconsin American moved to bifurcate the trial on the coverage issue, and it is axiomatic that a coverage trial does not involve the same analysis or issues as a merits trial, because a coverage trial involves the question of whether the insurance contract covers the acts alleged in the complaint, and a merits trial decides whether the acts alleged in the complaint can be proven by a preponderance of the evidence. See Liebovich v. Minn. Ins. Co., 2008 WI 75, ¶ 55, 310 Wis. 2d 751, 751 N.W.2d 764 (it is well established that an insurer may request a bifurcated trial on the issue of coverage while moving to stay proceedings on the merits of the liability action until the issue of coverage is resolved).

Furthermore, in looking at the purpose behind claim preclusion, none of the public policy reasons apply in this case. In Sopha, the supreme court held:

> Claim preclusion rests on the policy that justice is better served by ensuring finality of judgments and furthering repose, rather than by allowing a claimant the opportunity to obtain improved justice in a second action. This court summarized the purposes of claim preclusion as follows: "the doctrine of claim preclusion provides an effective and useful means to 'relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.'"

Id. at 235 (citations omitted). In this case, there is no question that Koehler's negligent entrustment is covered under the terms of the insurance policy because it is a liability issue, not a coverage issue, and it is a matter of whether Siebert can prove the elements of the tort in a merits trial. Had Siebert brought her claim for negligent entrustment from day one, the case procedurally would be in exactly the same position – the coverage trial on scope of permission would have been held, and then a merits trial on the liability issues, including negligent entrustment against Koehler, would have proceeded. No multiple lawsuits are involved here; no extra judicial resources are implicated, and no inconsistent decisions will result, because scope of permission is not an element of negligent entrustment. In order for Siebert to maintain her claim for negligent entrustment, Siebert must show that:

1. Jessica Koehler was initially in control of the car;
2. Jessica Koehler permitted Raddatz to use the car;
3. Jessica Koehler either knew or in the exercise of ordinary care should have known that Raddatz intended or was likely to use the car in a way that would create an unreasonable risk of harm to others.

See WI JI—Civ. 1014. Wisconsin case law has acknowledged that negligent entrustment is a separate cause of action, and does not arise out of vicarious liability or imputed negligence, but instead arises out of the entrustor's own negligence in making such an entrustment. Iaquinta v. Allstate Ins. Co., 180 Wis. 2d 661, 669, 510 N.W.2d 715 (Ct. App. 1993).

In the coverage trial, the only question was whether Raddatz exceeded the scope of his permission to use the car. This was the only question that jury had to decide, and it in no way addressed the separate, active negligence of Koehler in negligently entrusting Raddatz with the car in the first place. Wisconsin American essentially argues that a finding regarding Raddatz's conduct for acting outside the scope of permission is imputed to Koehler, and this clearly is not the law regarding negligent entrustment. According to Bankert, for liability to exist under negligent entrustment (1) the entrustor must be negligent and (2) the person to whom the thing has been entrusted must be negligent. Bankert, 110 Wis. 2d at 476, 329 N.W.2d at 153. Here, Koehler gave Raddatz permission to use the vehicle, he acted negligently, and whether or not he was acting within or outside the scope of permission granted to him by Jessica Koehler is irrelevant in a negligent entrustment analysis.

Negligent entrustment cases by their nature often involve activities that are beyond the scope of permission. What is required is that the negligent entruster knew or should have known that the entrustee intended or was likely to use the instrument in a way that would create an unreasonable risk of harm to others. No

one gives permission to act negligently, but negligent entrustment holds individuals liable when they knew or should have known that entrusting a vehicle would likely result in harm to others.

Put simply, if exceeding the scope of permission were a defense, the tort of negligent entrustment would not exist. Any time an accident occurred and a claim were based on negligent entrustment, all that the entruster would have to do is claim that an entrustee went outside the scope of permission. An entruster could claim that he or she did not give an entrustee permission to drive drunk, even if he or she knew the entrustee always drove drunk. Scope of permission has no bearing on the law – the entruster must have given initial permission, which Jessica Koehler did, and she must have known or in the exercise of ordinary care should have known that Raddatz was likely to create an unreasonable risk to others. This is a jury question, and the mere fact that Jessica Koehler specifically tried to limit Raddatz's use of the car makes it even more likely that she was aware of the unreasonable risk to others his driving posed.

The law of negligent entrustment is based on the Restatement (Second) Torts, sec. 308 (1965). In the comments to the Restatement:

> The rule stated in this Section has its most frequent application where the third person is a member of a class which is notoriously likely to misuse the thing which the actor permits him to use. Thus, it is negligent to place loaded firearms or poisons within reach of young children or feeble-minded adults. The rules also applies, however, where the actor entrusts a thing to a third person who is not of such a class, if the actor knows that the third person intends to misuse it, or if the third person's known character or the peculiar circumstances of the case are such as to give the actor good reason to believe that the third person may misuse it.

The Restatement goes on to give the following example of negligent entrustment:

> A lends his automobile to B, whose license has to A's knowledge been revoked for reckless driving. B drives the automobile negligently, running down C. A is negligent toward C.

Id.

As the court of appeals correctly held, Koehler can still be found negligent on the separate theory of liability of negligent entrustment for allowing Raddatz to have any permission to use the vehicle at all:

> We agree with Siebert. To prove negligent entrustment, Siebert must show Koehler (1) was initially in control of the vehicle, (2) permitted Raddatz to use it, and (3) knew or should have known Raddatz intended or was likely to use the vehicle in a way that would create an unreasonable risk of harm to others. See Bankert, 110 Wis. 2d at 469, 475-76; see also WIS JI-CIVIL 104 (2003). The issue, then, is not whether Koehler actually permitted Raddatz to use the car as he did, but whether she entrusted it to him and knew or should have known he would use it in a way that would create an unreasonable risk. See id. Therefore, the jury's conclusion Raddatz acted outside the scope of Koehler's permission does not preclude Siebert from showing Koehler negligently entrusted Raddatz with the car.

Siebert v. Wisconsin American Mut. Ins. Co., 2010 WI App. 94, ¶ 13, Pet-App. 103. The issue on scope of permission decided in the coverage trial does not preclude a liability claim against Koehler for negligently entrusting the vehicle to Raddatz. The court of appeals correctly analyzed and applied the law, and this Court should affirm the court of appeals, and remand this case for a trial on the merits of Siebert's negligent entrustment claim.

## CONCLUSION

Siebert respectfully requests that this Court affirm the court of appeals on all issues and remand the case to the circuit court for a trial on the merits.

Dated this 13th day of December, 2010.

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## CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of Response Brief of Plaintiffs-Appellants Jessica L. Siebert, by her Guardian ad Litem, D.J. Weis, and Lynette A. Siebert, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,833 words.

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SUPREME COURT OF WISCONSIN

JESSICA L. SIEBERT, by her Guardian ad Litem, D. J. WEIS and LYNETTE A. SIEBERT,

Plaintiffs-Appellants

District 3
Appeal No. 2009AP001422
Case No. 2007CV000080
Judge Patrick F. O'Melia

STEVE ALBRECHT, JR., by his Guardian ad Litem, THOMAS W. KYLE, STEVEN ALBRECHT, SR., KARI SOSNOWSKI, by her Guardian ad Litem, THOMAS W. KYLE and CYNDI ANDERSON,

Intervening-Plaintiffs,

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,

Involuntary-Plaintiff,

v.

WISCONSIN AMERICAN MUTUAL INSURANCE COMPANY,

Defendant-Respondent-Petitioner,

INTERSTATE BRANDS CORPORATION, ACE AMERICAN INSURANCE COMPANY and RYAN FRIBERG,

Defendants.

# REPLY BRIEF OF DEFENDANT-RESPONDENT-PETITIONER, WISCONSIN AMERICAN MUTUAL INSURANCE COMPANY

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### I. THE INDEPENDENT CONCURRENT CAUSE RULE SHOULD BE APPLIED TO THIS CASE.

The jury's verdict established that Raddatz exceeded the scope of his permission such that there was no coverage for his negligent operation of the vehicle under the Wisconsin American policy. (R.59, PET-APP 129). Siebert is correct that the jury did not specifically find that Raddatz was negligent; however, that is the only way the plaintiff would ever have a valid claim against Wisconsin American based on the allegations in the complaint. Both parties agree there can be no coverage for Raddatz's operation of the vehicle whether he was negligent or not. (*See* Pl.'s Br. at 4) ("the excluded risk is the operation of the vehicle while exceeding the scope of his permission"). Thus, the jury was not required to make a specific finding of negligence or purposes of an independent concurrent cause analysis.

The independent concurrent cause analysis resolves whether the exclusion of one type of injury-causing conduct should also exclude another type of injury-causing conduct. *See Zarnstorff v. Neenah Creek Custom Trucking*, 2010 WL 4008535, ¶23 (Ct.App.) (Slip Copy). The independent concurrent cause analysis applies where

some injury-causing conduct is a covered risk, while other injury-causing conduct is an excluded risk. *Id.* If injury-causing conduct that is a covered risk is sufficiently independent of the injury-causing conduct that is excluded, coverage will be found. *See id.* It is necessary and proper to undertake an independent concurrent cause analysis in this case because Raddatz's injury-causing conduct is excluded as a result of the jury's verdict, and Koehler's injury causing conduct is alleged to be covered.

The cases interpreting the independent concurrent cause hold that the injury-causing conduct of Koehler (negligent entrustment) is not sufficiently independent from the injury-causing conduct of Raddatz (negligent operation of the vehicle) to trigger coverage. *See e.g. Bankert v. Threshermen's Mut. Ins. Co.*, 110 Wis. 2d 469, 476, 329 N.W.2d 150 (1983).

Siebert and the court of appeals have compared the facts of this case to *Estate of Jones v. Smith*. *See Siebert v. Wisconsin Am. Mut. Ins. Co.*, 2010 WI App 94, ¶10, 325 Wis. 2d 740, 787 N.W.2d 54. That case involved a van driver for a day care center who failed to remove a child from the van after arriving at the day care center. 2009 WI App 88, ¶2, 9, 320 Wis. 2d 470, 768 N.W.2d 245. The policy

at issue in *Estate of Jones* contained an exclusion for liability arising out of the ownership, maintenance use or entrustment to others of any motor vehicle. *Id.* at ¶4.

The court explained the independent concurrent cause analysis as follows:

> The case before us presents two separate assertions of negligence: (1) Turkvan's negligence for failing to remove Asia from the van (the excluded risk), and (2) the negligence of the staff at the Day Care Center for not looking for Asia or inquiring as to why she was not present on a day she was expected (the covered risk). Turkvan's negligence, although it preceded the negligence of the staff, did not contribute to the staff's alleged negligence…. Thus, the staff's alleged negligence does not require the use of an automobile to be actionable.
>
> *Id.* at ¶9.

Because each act of negligence could "stand alone," the court held t hat the staff's alleged negligence was an independent concurrent cause sufficient to trigger coverage until it was determined that it did not cause the plaintiff's death. *See id.* at ¶12.

The court in *Estate of Jones* then distinguished its facts from the facts of *Bankert* and *Smith* as follows:

> In *Smith*, we held that the independent concurrent cause rule did not apply because the driver of a snowmobile's acts of intoxication and failure to put a helmet on his passenger could not form an independent cause of action from the crashing of the snowmobile itself. In other words, the insured in *Smith* could not be sued for his intoxication or

> failure to put a helmet on his passenger because those acts cannot form an independent claim without the crashing of the vehicle.
>
> Likewise, in *Bankert*, our supreme court held that the independent concurrent cause rule did not apply for the act of parents' negligent entrustment or supervision of their minor child who took a motorcycle off the property and crashed into a parked car. It ruled that the parents' acts were not independent from the operation of the motorcycle. In other words, the parents could not be sued for negligent entrustment or supervision as a stand alone claim. For the *Bankert* claim to exist, there has to also be the negligent operation of the motorcycle.
>
> *Id.* at ¶¶14-15.

The facts of the instant case are clearly analogous to *Bankert* and *Smith*, but do not follow the facts of *Estate of Jones*. Unlike *Estate of Jones*, Koehler's act of negligent entrustment cannot "stand alone." As stated in *Bankert*, "the parent's acts [of negligent entrustment] could not render them liable without their son's operation of the vehicle." 110 Wis. 2d 469, 329 N.W.2d 150 (1983). Like *Bankert*, Koehler's act of negligent entrustment could not render her liable for the accident without Raddatz's negligent operation of the vehicle.

Although *Bankert* involved a farmowner's policy, as the trial court stated, the independent concurrent cause rule is based upon principles of causation that do not depend upon the type of policy at

issue. (R.126:12, PET-APP 122). Therefore, the independent concurrent cause rule should be applied in this case.

Siebert claims that, unlike the defendant in *Bankert*, Raddatz's negligent driving was not a "completely excluded risk" because "it was only excluded if he exceeded the scope of his permission." (Pl.'s Br. at 8). In *Bankert*, however, negligent driving was not a completely excluded risk either. *See Bankert*, 110 Wis. 2d at 479. The risk was excluded only if the accident occurred off the insured premises. *Id.* Similarly, in this case, the risk of Raddatz's negligent operation of the vehicle was completely excluded only if the accident occurred while he lacked permission to use the vehicle. Like the operator in *Bankert*, Raddatz's negligence is a completely excluded risk based on the facts of this case. It is irrelevant whether Raddatz's negligent operation would be covered if he had permission, just as it was irrelevant that the negligent operation in *Bankert* would have been covered if it occurred on the insured premises.

In sum, *Bankert* and its progeny have held that there can be no coverage for negligent entrustment where there is no coverage for negligent operation of the vehicle. *Id.* at 478. "Negligent

entrustment is part of the tort of negligent use and operation of the entrusted automobile." *Id.* at 476-77. Here, the jury's finding has already established Raddatz's operation is not a covered risk. While Siebert's negligent entrustment claim may not depend on whether Raddatz had exceeded the scope of his permission to exist, it clearly depends on Raddatz's negligent operation of the vehicle. The application of the independent concurrent cause rule will not extend coverage for negligent entrustment where the operation of the vehicle is excluded from coverage.

## II. CLAIM PRECLUSION PREVENTS PLAINTIFF FROM ASSERTING A NEW THEORY OF INSURANCE COVERAGE AFTER A BIFURCATED INSURANCE COVERAGE TRIAL.

The bedrock of Siebert's argument that claim preclusion should not apply in this case is that a bifurcated coverage trial can never be an adjudication "on the merits." (Pl.'s Br. at 11). Black's Law Dictionary defines "merits" as follows: "the elements or grounds of a claim or defense; the substantive considerations to be taken into account in deciding a case, as opposed to extraneous or technical points, esp. of procedure <trial on the merits>." BLACK'S LAW DICTIONARY (8th ed. 2004).

In this case, Siebert sued Wisconsin American under the direct action statutes, Wis. Stat. §§632.24 and 803.04. (R.1:1-8). Wisconsin American is not liable for a direct action claim unless there is insurance coverage *and* Siebert is able to prove the elements of negligence. *See New Amsterdam Cas. Co. v. Simpson*, 238 Wis. 550, 300 N.W. 367, 369 (1941). Thus, the existence of insurance coverage is an "element or ground of a claim or defense" as well as a "substantive consideration to be taken account when deciding" whether Siebert can recover the proceeds of insurance coverage in a direct action claim. Thus, the insurance coverage trial constitutes a trial "on the merits" for purposes of claim preclusion.

At the insurance coverage trial, the jury found that Raddatz exceeded the scope of permission he was granted by Koehler such there was no coverage under the Wisconsin American policy. (R.59, PET-APP 129). This verdict disposed of the existing litigation between the parties in favor of Wisconsin American, and entitled Wisconsin American to a judgment dismissing the plaintiff's complaint with prejudice. *See New Amsterdam Cas. Co.*, 300 N.W. at 369. The trial court did, in fact, sign an Order for Judgment dismissing Siebert's complaint with prejudice. (R.86, PET-APP 134-

135). Siebert never filed any motions after verdict to challenge the jury's verdict.

The jury's verdict has a claim preclusive effect on all issues that could have been raised as a part of the insurance coverage trial. *See Kruckenburg v. Harvey*, 2005 WI 43, ¶19, 279 Wis. 2d 520, 694 N.W.2d 879. Siebert deliberately chose not to assert a claim against Wisconsin American based on Koehler's negligent entrustment of the vehicle at the insurance coverage trial. Indeed, Siebert does not argue to the contrary. Claim preclusion makes Siebert responsible for her choice in strategy, and precludes a new theory of insurance coverage after a bifurcated insurance coverage trial.

Siebert glosses over the fact that she would still have to meet the burden of proving insurance coverage to prevail against Wisconsin American. Yet, the insurance coverage portion of the trial is over. Justice does not require that Siebert twice be afforded her day in court to prove the existence of insurance coverage under the direct action statute.

The fact the insurance coverage issue was bifurcated does not alter the claim preclusive effect of the jury's finding. (R.17:1-2, R.23:1-2). Although a coverage trial does not involve the same

issues as the trial on negligence, either trial could dispose of the entire matter in litigation under the direct action statute. *See New Amsterdam Cas. Co.*, 300 N.W. at 369. Importantly, the jury's verdict in the bifurcated insurance coverage trial was not merely a declaratory judgment, which is only binding as to matters which were actually decided therein and not matters which might have been litigated. *Barbian v. Lindner Bros. Trucking Co.*, 106 Wis. 2d 291, 297, 316 N.W.2d 371 (1982).

In the context of a direct action claim, claim preclusion applies the same regardless of whether: (1) Siebert submits a new theory of insurance coverage after loosing at a bifurcated coverage trial; (2) Siebert submits a new theory of liability after loosing at a bifurcated negligence trial; or (3) Siebert submits a new theory as to either coverage or liability after loosing at a non-bifurcated trial. Under each scenario, the previous trial on the merits precludes a newly asserted theory of recovery.

Claim preclusion is meant to provide an effective and useful means to establish and fix the rights of individuals. *Kruckenberg*, 2005 WI 43 at ¶ 20. Siebert's new claim—based on the same automobile accident and made under the same policy of insurance—

is exactly the type of piecemeal litigation that claim preclusion was meant to end. A contrary rule would permit Siebert and other litigants to keep a theory of insurance coverage "up their sleeve" at the insurance coverage trial, and after loosing, prove up the new theory of insurance coverage as part of the trial on negligence and damages. This would place an undue burden on both insurers and courts alike. Clearly, the preferred procedure would be to have a plaintiff set forth all their theories of coverage at a single coverage trial.

Siebert argues that a separate trial on the issue of insurance coverage would have been necessary even if the negligent entrustment claim was asserted from day one. (*See* Pl.'s Br. at 14). Again, this argument wrongly assumes that the issue of insurance coverage trial was not dispositive of Siebert's direct action claim. Moreover, if Siebert is correct that the insurance coverage trial is not dispositive as to the entire litigation between the parties, then there would be no reason to bifurcate an insurance coverage dispute in the first place.

Ostensibly, the reason to bifurcate the insurance coverage portion of a direct action claim is judicial economy. By expediting

the coverage issue, which is often less involved than a full trial on negligence and damages, bifurcation potentially avoids a protracted trial on negligence and damages. To serve judicial economy, however, the insurance coverage trial must be dispositive if no coverage is established. Otherwise, a negligence trial would necessarily follow regardless of the outcome of the coverage trial, and the benefit of bifurcation would be lost. The application of claim preclusion under the circumstances of this case would conserve judicial resources by preventing a wholly unnecessary jury trial on the issue of insurance coverage when plaintiff is sitting on another potentially viable theory.

Siebert had a bifurcated trial "on the merits" against Wisconsin American at the insurance coverage trial. Claim preclusion bars any claim that could have been brought as part of the insurance coverage trial, such as Siebert's theory of insurance coverage based on Koehler's negligent entrustment.

## CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the court of appeals, and affirm the trial court's ruling on Wisconsin American's motion for summary judgment.

Dated this 28th day of December, 2010.

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## CERTIFICATION

I certify that this Brief meets the form requirements of Wis. Stats. § 809.19(8)(d) and § 809.50(1), in that it is:

> Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this Brief is 2,192 words.

Dated this 28th day of December, 2010.

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## CERTIFICATION

I hereby certify I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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