Nos. A12-1575

STATE OF MINNESOTA

IN SUPREME COURT

Alice Ann Staab,

Respondent,

v.

Diocese of St. Cloud,

Appellant.

BRIEF OF AMICUS CURIAE MINNESOTA DEFENSE LAWYERS ASSOCIATION

BURKE & THOMAS, PLLP

Richard J. Thomas (#137327)
Bryon G. Ascheman (#237024)
Corinne Ivanca (#0386744)
3900 Northwoods Drive, Suite 200
St. Paul, MN 55112
Telephone: (651) 490-1808

Attorneys for Amicus Curiae Minnesota Defense Lawyers Association

McCOLLUM, CROWLEY, MOSCHET, MILLER & LAAK, LTD.

Robert L. McCollum (#0119039)
Cheryl Hood Langel (#0220012)
7900 Xerxes Avenue South, Suite 700
Minneapolis, MN 55431
Telephone: (952) 831-4980

Attorneys for Amicus Curiae Minnesota Defense Lawyers Association

(other counsel listed on next page)

QUINLIVAN & HUGHES, P.A.

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

Attorneys for Appellant Diocese of St. Cloud

FLUEGEL LAW OFFICE

Wilbur W. Fluegel (#30429)
150 S. 5th Street, Suite 3475
Minneapolis, MN 55402-4245
Telephone: (612) 238-3540

Attorney for Minnesota Association for Justice

PEMBERTON, SORLIE, RUFER & KERSHNER, P.A.

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

AND

KEVIN S. CARPENTER, P.A.

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

Attorneys for Respondent Alice Ann Staab

TABLE OF CONTENTS

Page

Statement of the Case 1

Argument 2

Conclusion 11

TABLE OF AUTHORITIES

Page

CASES

N. States Power Co. v. Comm'r of Revenue,
571 N.W.2d 573 (Minn. 1997)....................10

O'Brien v. Dombeck,
823 N.W.2d 895 (Minn. App. 2012)....................6

Staab v. Diocese of St. Cloud (Staab II),
813 N.W.2d 68 (Minn. 2012)....................1, 5-6

Staab v. Diocese of St. Cloud (Staab III),
830 N.W.2d 40 (Minn. App. 2013)....................1, 6

RULES

Minn. R. Civ. App. P. 129.03....................1

STATUTES

Minn. Stat. § 604.02, subd. 1....................*passim*

Minn. Stat. § 604.02, subd. 2....................*passim*

Minn. Stat. § 645.17....................1

OTHER AUTHORITIES

Minn. Session Law, 1986, Regular Session, Ch. 455 (S.F. No. 2078)....................5

Minn. Session Law, 1988, Regular Session, Ch. 503 (H.F. No. 1493)....................5

Steenson, Michael, "Joint and Several Liability in Minnesota: The 2003 Model,
30 Wm. Mitchell L. Rev. 845 (2004)....................3

STATEMENT OF THE CASE

This appeal results from the trial court's ruling applying Minn. Stat. § 604.02, subd. 2 to reallocate a non-party's fault to a party which is severally, but not jointly, liable, resulting in the severally liable party being responsible for 100% of the damages awarded by the jury.[1]

The MDLA has been involved in shaping Minnesota's law relative to joint and several liability throughout the organization's history. The MDLA has advocated for the various modifications to joint and several liability, and MDLA members were involved in drafting the various amendments to Minn. Stat. § 604.02. The MDLA's position is that the lower courts[2] have improperly applied Minn. Stat. § 604.02, subd. 2 first by allowing reallocation to an entity which is severally, but not jointly liable, and second by allowing reallocation of a non-party's fault, against whom no judgment exists. The MDLA is in agreement with the specific arguments in this regard put forth by the Appellant Diocese, and will not repeat those arguments here. Rather, the MDLA would like to draw the Court's attention to the historical context of Minn. Stat. § 604.02, subd. 2 and the broader repercussions of the Court's ruling on litigants in Minnesota courts.

---

[1] Pursuant to Minn. R. Civ. App. P. 129.03 no counsel for the parties in this matter took part in authoring this brief. No persons or entities other than counsel for the MDLA, who have authored this brief *pro bono*, have made a monetary contribution to the preparation or submission of this brief.

[2] We will refer to the Court's 2012 decision in this case regarding § 604.02 sudivision 1 (Staab v. Diocese of St. Cloud, 813 N.W.2d 68 (Minn. 2012)) as Staab II and to the court of appeals' recent decision regarding subdivision 2 (Staab v. Diocese of St. Cloud, 830 N.W.2d 40 (Minn. App. 2013)) as Staab III.

ARGUMENT

I. The lower courts' rulings violate the rules of presumption in ascertaining legislative intent and lead to uncertainty by making a defendant's liability dependent not on fault, but on a plaintiff's pleading choices.

The rules of presumption in ascertaining legislative intent provide that the legislature never intends an absurd result, and that the legislature intends the entire statute to be effective and certain. See Minn. Stat. § 645.17. The lower courts' interpretation violates both of these rules by interpreting subdivision 2 in a way that makes subdivision 1 ineffective, which leads to an absurd result.

When the legislature amended Minn. Stat. § 604.02 in 2003, it specifically intended to provide relief to those defendants who are 50% or less at fault and who do not satisfy the other exceptions to subdivision 1, by limiting such defendants' liability to several liability, rather than joint. The lower courts' interpretation of subdivision 2, however, is that subdivision 1 does not limit joint liability when a motion for reallocation is made. Inevitably, a motion for reallocation will always be made if any fault has been attributed on the verdict to a non-party, or a judgment against a party is even partly uncollectible. Under the trial court's ruling, defendants deemed to be severally, rather than jointly and severally, liable under subdivision 1 become jointly and severally liable through operation of subdivision 2. It was clearly never the legislature's intent on the one

hand to limit joint liability in subdivision 1 and then on the other to take that limitation away upon a plaintiff's request for reallocation under subdivision 2.[3]

The lower courts' interpretation leads to the absurd result that whether a party is jointly liable is dependent not on actual fault but on another defendant's collectability, or, more troubling, the plaintiff attorney's strategic decision to only pursue the "deep pocket" thereby creating the very problem the legislature was attempting to prevent-the unfair shift of financial burden to a party based not upon that party's fault fault but that party's financial depth. Minnesota should not embrace a tort system whereby a party's liability is not dependent upon fault but upon the pleading strategy of plaintiff's counsel. Indeed, the trial court's ruling makes Minnesota law worse for the minimally at-fault defendant than at any time in recent history.

II. The lower courts' rulings are contrary to the history of amendments to joint and several liability law in Minnesota which have progressively limited joint liability.

---

[3] This is consistent with the cases cited by appellant which interpret the reallocation provision to not apply where joint liability does not exist, as well as Professor Michael Steenson's interpretation of how the reallocation provision applied after the 2003 amendments to subdivision 1:

> Section 604.02, subdivision 2 of the Comparative Fault Act was not directly changed by the 2003 amendment, although its role was substantially diminished through the adoption of several liability as the general rule in cases involving indivisible injuries caused by joint, concurrent, or successive acts of two or more at-fault defendants. The simple reason is that the elimination of joint and several liability in favor of a general rule of several liability will remove the need for reallocation.

Steenson, Michael, "Joint and Several Liability in Minnesota: The 2003 Model," 30 Wm. Mitchell L. Rev. 845 (2004).

Subdivisions 1 and 2 of § 604.02 were initially enacted in 1978. That version of the statute provided:

> APPORTIONMENT OF DAMAGES. Subdivision 1. When two or more persons are jointly liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that each is jointly and severally liable for the whole award.
> Subd. 2. Upon motion made not later than one year after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. A party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.
>
> Minn. Stat. § 604.02 (1979).

As originally enacted, the statute affirmed the common law rule of joint liability, but provided a mechanism to reduce the burden on jointly liable defendants that were forced to pay judgments in excess of their fault. As the statute was originally enacted, Subdivision 2 operated *to benefit defendants*. An example illustrates this point. In the original version of the statute, if a plaintiff's damages were found to be $100,000, and two defendants (D1 and D2) were jointly liable for the judgment, and D1 had been apportioned 80% fault and D2 had been apportioned 10% fault, and the plaintiff had been apportioned 10% fault, and D1 was found to be insolvent, then D1's fault could have been reallocated under subdivision 2 between the plaintiff and D2. Thus, rather than D2 paying $90,000 by operation of common law of joint liability, D2 would only pay $50,000 ($10,000 for its own 10% fault and $40,000 for its 1/2 share of D1's fault upon reallocation-the other $40,000 being reallocated to the "at fault" plaintiff). Under the statute, the "at fault" plaintiff and the "at fault" defendant share equally in the inability of

the failure of the remaining "at fault" defendant to pay because their fault is equal. The statute as originally drafted was not designed to "increase" recovery as argued by the Minnesota Association for Justice ("MAJ") in its brief since its operation as originally drafted has the opposite effect.

In 1986, § 604.02 was amended to limit the joint and several liability of the state and municipalities to twice the amount of attributed fault in cases where the fault attributed was less than 35%. Minn. Session Law, 1986, Regular Session, Ch. 455 (S.F. No. 2078). In 1988, § 604.02 was amended to limit the joint and several liability of defendants (with the exception of defendants whose liability arose under certain specific statutes) who were 15% or less at fault to four times their percentage of fault, including any amount reallocated to that person under subdivision 2. Minn. Session Law, 1988, Regular Session, Ch. 503 (H.F. No. 1493). To continue the example above, under the 1988 version of the statute, although D2 would still have been subject to joint liability, D2's payment would have been limited to $40,000 (four times 10% of $100,000).

In 2003 the current version of the statute was enacted, wherein:

> [T]he Legislature explicitly limited the common law principle of joint and several liability to the four enumerated circumstances, thus enabling an injured person to recover more than a tortfeasor's comparative-responsibility share in only those four circumstances.[4]

Staab II, 813 N.W.2d 68, 78 (Minn. 2012).

[4] It is undisputed that the Diocese is severally, and not jointly, liable because the Diocese does not satisfy any of the four circumstances of joint liability enumerated by the statute.

As recognized by the Court in Staab II, the history of revisions to § 604.02, subd. 1 demonstrates that the legislature has progressively limited, and never sought to expand, joint and several liability. Id. at 77. Mrs. Staab and the MAJ nevertheless argue that the legislature, pursuant to the 2003 amendment, at once imposed the strictest limitations to joint liability in Minnesota to date by making several, rather than joint liability the default rule, and at the same time intended for that limitation to be overridden by the application of subdivision 2. The lower courts' interpretation of subdivision 2 essentially repeals the protection enacted in subdivision 1. Rather than limiting defendants to their several liability only, by operation of the lower court's interpretation, subdivision 2 imposes the greater obligation of full joint and several liability-a result not available under Minnesota law since the original version of the statute was in effect prior to the 1988 amendments.

Minn. Stat. § 604.02, subd. 2 had never been used to increase the amount of damages a plaintiff was able to collect on a judgment until the court of appeals' erroneous rulings in O'Brien v. Dombeck, 823 N.W.2d 895 (Minn. App. 2012) and in Staab III. Under the lower courts' rulings, D2 in the example above would now be required to pay $50,000, which is more than D2 would have been responsible for under the 1988 version of the statute. In fact, under the lower courts' interpretation, a Defendant with 1% fault could be forced to pay 100% of an award, so long as the plaintiff chooses not to sue the 99% at fault party within the statute of limitations. Minimally at fault defendants have not been subject to such responsibility since prior to the 1988 amendments.

Given this historical context, it is simply nonsensical that subdivision 2 of the statute, originally written to reduce the burdens of joint and several liability, can now be used for the opposite result to reestablish full joint and several liability when the last pronouncement by the legislature was to create, for the first time, several liability for parties having 50% fault or less.

III. The lower courts' rulings produce unfair and arbitrary results which will encourage the targeting of "deep pocket" minimally at-fault defendants.

The lower courts' holdings, if affirmed, will produce inconsistent and arbitrary results when applied in practice. The MDLA would like to draw the Court's attention to two specific problems that will result from affirming the trial court's ruling. The MDLA's first concern is with fairness – this rule will result in minimally at-fault defendants being held jointly liable for 100% of jury awards despite the legislature's 2003 attempt to avoid this very problem. Second, this rule will produce arbitrary results for defendants, because whether a defendant is held jointly liable for an entire award will depend not upon a defendant's actual percentage of fault, but on the fortuity of whether additional defendants happen to be present at the time of entry of judgment, or whether other defendants are deemed uncollectible.

As an example, assume potential defendant 1 (D1) is 5% at fault, and potential defendant 2 (D2) is 95% at fault. Under the district court's analysis, if plaintiff sues D1 only, D1 would be held liable for the entire verdict, even though it is only 5% at fault, because D2's "obligation" would be deemed uncollectible under Minn. Stat. § 604.02, subd. 2. If plaintiff were to timely sue both D1 and D2, D2 would be jointly liable for the

whole amount of the award and D1 would only be severally liable for 5%. Thus, under the district court's rule, D1's liability for the judgment is dependent upon the pleading choices of the plaintiff's attorney.

Perhaps ironically, the lower courts' interpretation of Minn. Stat. § 604.02 encourages plaintiffs to forgo suit against those whose conduct is most responsible for the injury and, instead, focus only on defendants who have the financial wherewithal to pay a verdict. Pursuant to the lower courts' rulings, excluding all but one at-fault defendant, regardless of that defendant's percentage of fault, creates full joint and several liability for that solitary defendant, so long as plaintiff moves for reallocation of the damages attributable to the fault of the non-party tortfeasors. The defendants most at-fault would escape liability. Under the lower courts' interpretation of subdivision 2, plaintiffs will be encouraged to sue a single party with insurance rather than those principally at fault who may or may not be collectible, because even a finding of 1% fault will obligate that defendant to pay the plaintiff as if it were jointly and severally liable by operation of subdivision 2, thus forcing the 1% at-fault defendant to undertake the exclusive burden of payment, and the risk of uncollectability, against co-tortfeasors.

The "problem" is not cured, as argued by the MAJ, by third-party practice. The same result will follow: a singular defendant least at fault will no longer be subject to only his/her percentage of fault as intended by the legislature; instead through the "reallocation" process, the limitation of several liability is destroyed and the burden is again placed upon the financially capable whose fault does not justify the burden. One has to ask why a plaintiff would ever sue all potentially at-fault parties when there is one

party with substantial assets or insurance who can be made liable for the whole award irrespective of the extent of his/her fault. That is contrary to the intent of the legislature, which intended that parties should be liable based upon their fault and not upon the strategic decisions of plaintiffs as to who they will sue. Professor Steenson was right when he stated that when several liability removes the obligation to pay in excess of that liability, there is nothing to which one can reallocate because the several liability defines and limits the obligation. Any conclusion that differs from this is nothing less than a rewrite of the legislature's last word on this subject: several liability for those defendants who are 50% at fault or less.

Affirmance of the lower courts' rulings will adversely impact businesses and individuals in ways not intended by our state representatives. For instance, affirmance may well put some of our struggling residential and commercial contractors out of business. In order to keep their premiums at reasonable levels, many have taken on a substantial amount of risk with high deductibles and self insured retentions (SIR) in order to secure appropriate coverage for their risk exposure. In the hypothetical where potential defendant 1 (D1) is 5% at fault, and potential defendant 2 (D2) is 95% at fault, assume that D2, a general contractor, has exhausted its policy limits by payment of other claims, while its subcontractor, D1, obtains insurance with $1,000,000 limits, but has an SIR of $250,000. Learning of the general contractor's inability to pay, the plaintiff sues only the subcontractor (D1). After a construction-defect trial, a jury allocates 95% fault to the general contractor (D2) and only 5% to the subcontractor (D1), and awards total damages of $1,000,000. Under the lower courts' interpretation of subdivision 2, the fault allocated

to the general contractor is reallocated to the subcontractor. In the end, the subcontractor will be liable for the whole award even though it was only minimally at fault and will pay $250,000 out of pocket. The subcontractor may not be able to avoid that result because it is unable to afford traditional first dollar liability insurance. Again, it is precisely this type of shifting of the obligation to pay damages that the legislature sought to correct by the 2003 amendments.

Public policy cannot support an interpretation that places the burden of a judgment on the party who most responsibly obtains protection against liability, irrespective of fault. Nor did the legislators envision such a result when they modified the comparative fault statute to *reduce* the instances of joint-and-several liability rather than continue the status quo. Indeed, according to this Court, when the legislature amends a statute, some change in the law is presumed.[5] We need not simply "presume" change here. Creating a new category of "at fault" defendants whereby defendants who are 50% at fault or less are severally liable only is a dramatic change in the law. The legislature debated this, all sides fought for or against, depending on their interests, the public policy of this state was declared. This court should interpret that legislative change accordingly and give full intent to the voice of this legislative body and its elected officials.

---

[5] N. States Power Co. v. Comm'r of Revenue, 571 N.W.2d 573, 575-76 (Minn. 1997) (stating: "When the legislature changes a statute, the courts are to presume that the legislature intends a change in the law unless it appears that the legislature only intended to clarify the earlier statute").

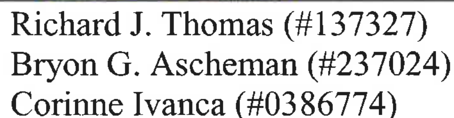
CONCLUSION

In conclusion, the MDLA urges this Court to apply a rule that embraces the intent of the legislature and that will result in fairness and consistency for civil litigants in Minnesota. The MDLA respectfully requests that this Court reverse the lower courts and hold that Minn. Stat. § 604.02, subd. 2 may only be invoked where the defendant receiving the reallocation of fault is jointly liable and where a judgment is uncollectible.

Respectfully submitted,

Dated: Aug. 2, 2013

BURKE & THOMAS, PLLP

By 

Richard J. Thomas (#137327)
Bryon G. Ascheman (#237024)
Corinne Ivanca (#0386774)
3900 Northwoods Drive, Suite 200
Arden Hills, MN 55112
Telephone: (651) 490-1808
Facsimile: (651) 490-1872

And

McCOLLUM, CROWLEY, MOSCHET, MILLER & LAAK, LTD.
Robert L. McCollum (#0119039)
Cheryl Hood Langel (#0220012)
7900 Xerxes Avenue South, Suite 700
Minneapolis, MN 55431
Telephone: (952) 831-4980

ATTORNEYS FOR AMICUS CURIAE MINNESOTA DEFENSE LAWYERS ASSOCIATION

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 3,005 words. This brief was prepared using Microsoft® Office Word 2010.

Dated: Aug 2, 2013.

BURKE & THOMAS, PLLP

By

Richard J. Thomas (#137327)
Bryon G. Ascheman (#237024)
Corinne Ivanca (#0386774)
3900 Northwoods Drive, Suite 200
Arden Hills, MN 55112
Telephone: (651) 490-1808
Facsimile: (651) 490-1872
ATTORNEYS FOR AMICUS CURIAE MINNESOTA DEFENSE LAWYERS ASSOCIATION