STATE OF WISCONSIN
SUPREME COURT

Appeal No.: 2005AP001638

HJALMER C. HEIKKINEN, AMELIA HEIKKINEN, STATE OF WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES AND TOMMY G. THOMPSON, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiffs-Respondents,

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION AND MARGARET E. MORSE,

Defendants-Third-Party Plaintiffs-Respondents,

v.

THE CATHOLIC MUTUAL RELIEF SOCIETY OF AMERICA AND ARCHDIOCESE OF MILWAUKEE,

Defendants-Third-Party Defendants-Petitioners.

Appeal from the Circuit Court for Milwaukee County,
The Honorable Michael D. Guolee, Presiding
Circuit Court Case No. 2003CV001267

BRIEF OF AMICUS CURIAE DEFENSE RESEARCH INSTITUTE IN SUPPORT OF PETITION FOR REVIEW

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Defense Research Institute ("DRI"), pursuant to sec. 809.19(7), STAT., hereby submits this brief in support of the petition for review filed by the Catholic Mutual Relief Society of America and the Archdiocese of Milwaukee.

INTEREST OF AMICUS CURIAE

DRI is the "Voice of the Defense Bar." It is a 22,500 member national association of defense lawyers who represent insureds, insurance carriers, and corporations in the defense of civil litigation. It serves as a counterpoint to the plaintiffs' bar and seeks balance in the justice system.

ARGUMENT

THE DECISION OF THE COURT OF APPEALS THREATENS NOT ONLY TO EXPAND INSURANCE COVERAGE BEYOND ITS INTENDED LIMITS BUT TO EXTEND VICARIOUS LIABILITY TO INNOCENT PERSONS HAVING NO CONTROL OVER A TORTFEASOR'S BEHAVIOR.

This lawsuit arises out of an automobile collision caused by Margaret Morse. Petitioners were held liable for Morse's negligence on the strength of a finding that, at the time of the collision, she was acting "*on behalf of* Christ King parish and/or the Milwaukee

Archdiocese." Yet, not only is such a phrase foreign to the field of respondeat superior, but the insurance certificate in question covered only persons "acting within the scope of their duty or in their official capacity as such." The Court of Appeals upheld the judgment nonetheless, claiming to discern no difference between the standards.

The decision of the Court of Appeals sets the law of Wisconsin on a new and hazardous course. Not only does it vastly expand the scope of insurance coverage, but its reasoning sets the stage for a dangerous erosion of the well-established limits on respondeat superior. In essence, the Court of Appeals' decision now authorizes the imposition of liability on an innocent party merely because a tortfeasor turns out to have been acting for its benefit at the time of the occurrence. This is not and must not be the law. The petition for review should be granted and the law of vicarious liability clarified.

Contrary to the Court of Appeals' belief, the phrase "on behalf of" carries a significantly different meaning from the phrase "while acting in the scope of their duties or in their official capacity as such." The phrase "on behalf of" can mean *either* "as the representative of"

or "for the benefit of." *See, e.g.,* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 198 (1993); RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 188 (2d ed. 1998). The first definition implies both knowledge and authority of the party on whose behalf the action is taken; it is at least consistent (although not synonymous) with the coverage provisions of the policy. The second meaning, however, is broad enough to encompass wholly unsolicited support; it clearly extends beyond the coverage provisions of the policy. Despite these disparate definitions, the jury was given no guidance other than to "give the words 'on behalf of' their common and ordinary meaning." In light of the inherent ambiguity of the phrase, this is no guidance at all.

By validating the substitution of an ambiguous and wholly elastic phrase for one with established meaning and limitations, the Court of Appeals has expanded coverage from the universe of persons whose activities might be expected to result in the imposition of vicarious liability on the primary insured—the usual intent of most "covered persons" clauses—to those whose activities would normally

present no risk to the primary insured at all. The potential ramifications of so extending the reach of the "covered persons" clause are considerable. Carriers may be required to reassess risk, itself a difficult task (you can count an insured's employees, but how do you estimate how many persons might act "on its behalf"?). Having reassessed it, insurers may be compelled either to expand or to limit the coverage of future policies. If the former, the cost of insurance to the consumer will increase; if the latter, the acts covered for policyholders will shrink, perhaps dramatically. Neither result serves the people of Wisconsin.

But the implications of the Court of Appeals' decision extend far beyond the field of insurance. Courts tend to give the same meaning to analogous provisions in insurance policies and agency law. *See, e.g., Newyear v. Church Ins. Co.*, 155 F.3d 1041 (8th Cir. 1998) (phrase "acting within the scope of his duties" interpreted consistently with agency law); *Integrated Health Prof'ls, Inc. v. Pharmacists Mut. Ins. Co.*, 422 F. Supp. 2d 1223 (E.D. Wash. 2006) (court looks to law of vicarious liability to determine meaning of

phrase "scope of employment" in policy). Although found here in an insurance policy, the phrase construed by the Court of Appeals ("within the scope of their duty") is the language of vicarious liability. *See, e.g.,* WIS. JI CIVIL 4035 (Servant: Scope of Employment); RESTATEMENT (SECOND) OF AGENCY § 219 (1957). Moreover, the standards governing vicarious liability for a volunteer are no different than for a paid employee of a commercial venture. *See, e.g.,* RESTATEMENT (SECOND) OF AGENCY § 225 (1957); *Giese v. Montgomery Ward, Inc.*, 111 Wis. 2d 392, 416-17, 331 N.W.2d 585 (1983). We can, therefore, reasonably expect to see the Court of Appeals' interpretation of the "covered persons" provision extended to the realm of vicarious liability, for volunteers and otherwise.

Such an extension would dramatically alter the law of agency. Vicarious tort liability—that is, "the imposition of liability on an innocent party for the tortious conduct of another"—is "an exception to our fault-based liability system . . . ." *Kerl v. Dennis Rasmussen Inc.*, 2004 WI 86, ¶ 4, 273 Wis. 2d 106, 682 N.W.2d 328. For this reason, it "is imposed only where the principal has control or the right

to control the physical conduct of the agent such that a master/servant relationship can be said to exist." *Ibid.* By contrast, a principal is not liable for the torts of an agent whose physical conduct is not within the principal's control, *i.e.*, an independent contractor. *Id.*, ¶ 24. Nor does just any control suffice. It must, rather, be control over the specific conduct or instrumentality that is alleged to have caused the harm. *Id.*, ¶¶ 7, 39, 50. Thus, in *Kerl*, this Court held that a franchisor was not liable for an assault committed by its franchisee's employee, despite its imposition of quality and performance standards, where it did not exercise "routine, daily supervision and management of the franchisee's business . . . ." *Id.* ¶ 34.

By equating the phrase "on behalf of" with the established standard for vicarious tort liability, therefore, the decision of the Court of Appeals, if not modified, will effectively change the law of agency, creating a new and novel standard. Liability may now be imposed on an innocent party simply because the tortfeasor was acting for its benefit, and notwithstanding the innocent party's inability to control the tortfeasor's actions. Even if such a change were desirable, it is not

the prerogative of the Court of Appeals to adopt it. *See, e.g., In re Marriage of Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

In truth, such a change would be highly undesirable. It seems clear that the expansion of vicarious liability made possible by the Court of Appeals' decision will broadly affect commercial enterprises in Wisconsin. Whether they will be able to procure additional insurance for such exposure is an open question; at the very least, it will entail additional expense. And even if they can, it will not deter any tortious activity; by definition, you cannot deter what you cannot control.

Hardest hit, however, will be civic groups, charitable causes, political organizations or other non-commercial endeavors, many of which have ill-defined structures, fluid membership, and peripheral allegiances. These organizations often work in tandem with other persons or organizations for a common cause that benefits both, yet exercise none of the control that would justify imposing liability under existing law. Consider, for example, political parties. Typically,

there is a national organization, a state organization, and even a county organization. There may also be special interest groups not directly affiliated with the party. On occasion, however, all work for the election of a particular candidate (and, hence, "on behalf of" that candidate and each other), yet none controls any other. If a volunteer for a local special interest group is involved in an automobile accident while distributing leaflets (perhaps those "blessed" by the candidate), who is liable? If acting "on behalf of" someone else is a sufficient predicate to liability, the answer could be "all of the above, including the candidate."

Indeed, what volunteer could not be said to be acting "on behalf of" the object of his or her generosity in literally countless situations involving no opportunity to supervise or control his or her activities? Consider the following examples:

- A homemaker delivering "Meals on Wheels"
- A Little League coach attending an unaffiliated coaching clinic

- A college alumnus conducting courtesy interviews of potential applicants for admission
- A Trout Unlimited member checking out the condition of a local stream
- A member of the Lions Club doing yard work for an elderly person whose name was on a "helping hand" list maintained by the club
- A blood donor driving to the local Blood Center to donate
- An office worker drumming up support for the United Way campaign
- A Big Brother/Big Sister traveling to an appointment with his or her "little" sibling
- An American Legion member driving downtown to sell poppies on Memorial Day
- A volunteer firefighter driving to the firehouse
- An elementary school room-mother checking out sites for possible field trips

- A booster club raising money for the school's marching band

Each of these individuals acts "on behalf of" the designated organization every bit as much as, if not more than, Margaret Morse was acting "on behalf of" Christ King parish or the Archdiocese when she delivered statues to persons requesting them. Each of these individuals is every bit as much removed from any practical day-to-day control or supervision of the respective organization as was Margaret Morse, if not more. *Cf. Kerl*, ¶¶ 32-35 (franchisor has no practical ability to control franchisee's individual harmful act). And, under the Court of Appeals' reasoning, each of these individuals will necessarily expose the organization on whose "behalf" he or she is acting to vicarious liability if he or she is involved in an automobile accident while traveling to or from the situs of the activity.

The cost to society would be staggering. Even if cost-spreading were a sufficient justification for an inherently unjust result, these organizations are simply not capable of spreading the costs. Most of them cannot obtain insurance, at least not commensurate with the vast

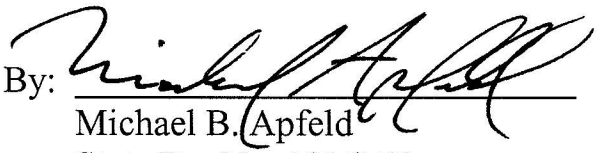
liability they now face. Even if they could, they don't have any customers to whom they can pass the cost. These organizations operate on a shoestring, yet contribute immensely to the common weal through the generosity of many. If they cannot accept the contributions of volunteers—haphazard and unpredictable as they always will be—without risk of crushing liability, they will wither and die. Perhaps a strict utilitarian analysis might suggest allowing these organizations to be driven out of existence for their inherent inefficiencies, but that will be cold comfort to their ultimate beneficiaries—children, the poor, the hungry, the elderly, the dispossessed. A decision with such consequences must be reversed.

CONCLUSION

For the foregoing reasons, the petition for review should be granted.

Dated this 20th day of October, 2006.

GODFREY & KAHN, S.C.

By: 
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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this Brief conforms to the rule contained in s. 809.19(8)(b) for a brief produced with a proportional serif font. The length of this brief (exclusive of cover, tables of contents and authorities, signature block and certification) is 1,897 words.

By: _____
Michael B. Apfeld

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