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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Treatises

Other Authorities

INTEREST OF AMICUS CURIAE

Defense Research Institute ("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.

Although DRI supports the position advanced by the Catholic Mutual Relief Society of America and the Archdiocese of Milwaukee, it submits this brief to emphasize certain issues and implications that go beyond the parties to the lawsuit.

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 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. The briefs of the Respondents do nothing to dispel this danger. Indeed, both the interpretation of the policy they advance and the facts they marshal in support of that interpretation highlight the necessity for confining the nearly boundless scope of the elastic phrase on which the Court of Appeals allowed liability to stand.

For example, there can be no doubt that, by equating the phrase "on behalf of" (which comes from an exception to the policy's automobile exclusion) with the "scope of duty/official capacity" language of the coverage clause itself, the Court of Appeals

significantly expanded the scope of the latter. Although Morse argues that the "on behalf of" language submitted to the jury "convey[s] essentially the same meaning as acting within the scope of her duties or in an official capacity . . . ," *see* Morse Brief at 18, and Heikkinen argues that the "on behalf of" language of the exclusion "merely clarifies" the supposedly "legalistic" terms of the primary coverage provisions, *see* Heikkinen Brief at 27-29, both assertions are simply untenable. 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 both the coverage provisions of the policy and the traditional basis for vicarious liability.

Nor can there be any serious question about the potential impact of the Court of Appeals' decision beyond this case. Respondents would have this Court believe that this is "merely" a dispute about a supposedly "unique" insurance policy. In fact, the "scope of duty/official capacity" language of the coverage clause of this policy is similar if not identical to that found in standard commercial insurance policies. *See* Petitioners' Opening Brief at 34-35 (collecting authorities). Moreover, although found here in an insurance policy, the language of the coverage clause 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). It is an acknowledged fact that 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). Thus, if the Court of Appeals' interpretation of the "covered persons" provision is affirmed, we can reasonably expect to see it extended not only to other insurance policies, but to the realm of vicarious liability, for volunteers and otherwise.

Such an extension would radically alter the existing framework of the law. The intent of most "covered persons" clauses is to include persons under the named insured's control, whose activities might be expected to result in the imposition of vicarious liability on the named insured. Interpreting coverage clauses to include any person acting "on behalf of" the named insured will expand coverage to persons beyond its practical control, whose activities have not heretofore been thought to present any risk to the named insured at all. And if the "scope of duty/official capacity" concepts of vicarious liability continue to track the analogous language in insurance policies, the necessary effect will be to expand such liability as well, whether or not an insurance policy was in place.

Perhaps the most eloquent proof of the potential reach of this interpretation can be seen in Respondents' own choice of facts supposedly justifying the imposition of liability in this case. What characteristic of Morse's actions do they say is sufficient to subject the Archdiocese and its insurer to liability? Principally, that she indirectly helped the parish priest to discharge his *own* duty by "spreading the faith" and promoting Catholic devotion. Morse Brief at 7-8, 11-12; Heikkinen Brief at 11.[1] Voluntarily helping the parish priest discharge his *spiritual* duty, however, does not establish that Morse either assumed or was discharging a *temporal* duty to him, the parish or the Archdiocese, much less that either had any practical ability to control her actions. Indeed, if she was discharging a "duty" at all, it was to a higher authority—the same divine authority served by both the parish and the Archdiocese. But serving a common master, divine or otherwise, does not render one servant liable for the

[1] Further support is claimed to be found in the fact that the Legion's formation had been announced in a church bulletin, *see* Morse Brief at 8, Heikkinen Brief at 9, and that the statue Morse was delivering at the time of the accident had been blessed by a priest. *See* Morse Brief at 10. The former can also be said of every plumber, accountant, lawn service, and other parish member who advertises in the parish bulletin, which is nothing more than a newsletter; the latter can be said of every participant at every Mass. Are all of these "covered persons" as well?

acts of another. RESTATEMENT (SECOND) OF AGENCY § 358(1) (1958); *id.*, rptr's notes ("The cases are unanimous in holding that a servant or other agent is not liable for the dereliction of fellow workers or agents of the same principal").

The effect of this ruling cannot be disguised by labeling the Legion of Mary "unique." *See* Morse Brief at 22, 38. Nothing about the relationship between the Legion of Mary and the organizations on whose "behalf" Morse was acting is materially distinguishable from the relationship between countless other volunteer organizations, religious or secular, and their volunteers, supporters, and allies.[2] Many of these organizations have ill-defined structures, fluid membership, and peripheral allegiances. They often work in tandem

[2] Morse declares that the Legion of Mary is the "only religious organization which has as its primary purpose assisting the clergy in spreading the faith and in spiritual service to others." *See* Morse Brief at 22, 38. The assertion is untenable. In any Catholic parish in the country one will find literally dozens of loose-knit associations of parish members of differing sizes, degrees of formality, and fluidity of structure, organized to address any of countless spiritual goals and purposes. Every one of these associations seeks in some way to advance a religious purpose and, to that extent, could be said to be "on behalf of" the parish. But many if not most of these associations have no more material support of the parish than the blessing given by the parish priest to the statue Morse was delivering, and no more control by the parish than a general review of their compatibility with Church doctrine. We assume the same can be said of other denominations.

with other persons or organizations for a common cause that benefits both, yet exercise none of the control that would justify imposing liability or extending insurance coverage 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"—a result wholly unforeseeable to the organizations or their insurers.

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? 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 member of a school booster club raising money for the school's marching band

Each of these individuals is acting "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. 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 practical consequences of the Court of Appeals' decision will be considerable, for commercial and non-profit organizations alike. Even if there were no effect on the law of vicarious liability, extending the reach of the "covered persons" clause would alter the insurance landscape of the state. It would require carriers 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 accept the expansion or to limit the coverage of future policies. If the former, the cost of insurance will increase, necessarily causing some insureds to drop or limit their own insurance. (Charitable organizations will be hardest hit, since they don't have any customers to whom they can pass the cost.) If the latter, the range of coverage for policyholders will shrink, perhaps dramatically, resulting in more, not fewer, unrecoverable judgments. Neither result serves the people of Wisconsin.

Moreover, for reasons noted above, the effect of the Court of Appeals' decision cannot easily be confined to mere questions of

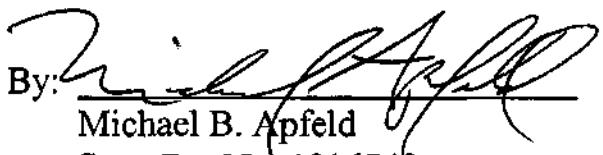
insurance coverage. The Court of Appeals' decision invites the expansion of vicarious liability well beyond its traditional and carefully crafted limits in ways that are almost impossible to predict. It will do so without moral legitimacy, since there is no justification for imposing liability on an innocent party for the actions of someone over whom the innocent party had no control. And it will do so without any deterrent effect, since one cannot deter what one does not control. A decision with such consequences must not stand.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed.

Dated this 17th day of April, 2007.

GODFREY & KAHN, S.C.

By: 

Michael B. Apfeld
State Bar No. 1016749

Attorneys for Non-Party Defense Research Institute

ADDRESS:
780 North Water Street
Milwaukee, WI 53202-3590
Phone: (414) 273-3500
Fax: (414) 273-5198

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 1,918 words.

By: _____
Michael B. Apfeld

mw1303581_1

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

MOTION OF DEFENSE RESEARCH INSTITUTE, PURSUANT TO SECTION 809.19(7), STATS., FOR LEAVE TO FILE A NON-PARTY BRIEF

Defense Research Institute ("DRI"), by its undersigned counsel, hereby petitions the Court, pursuant to sec. 809.19(7), STATS., for permission to file a non-party brief in the above-captioned case. In support of this request, DRI states as follows:

1. 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.

2. Of the several issues addressed by the parties, DRI would like the opportunity to address one: the Court of Appeals' conclusion that acting "on behalf of" another is the functional equivalent of acting "within the scope of duty" owed to another.

3. DRI's proposed brief (copies of which are being filed with this motion) will address the significant consequences of this aspect of the Court of Appeals' decision—intended and unintended—including the expansion of vicarious liability within and without Wisconsin, the effect on the scope of availability of insurance

coverage for commercial and non-commercial ventures, and the inhibiting effect on a variety of non-profit organizations that depend on volunteers to accomplish their goals.

4. With its broad-based, nationwide membership and experience, DRI can provide a national perspective of the potential impact of the Court of Appeals' decision, in Wisconsin and elsewhere. Given the significance of this case, such a perspective can only benefit the Court and the people of Wisconsin.

FOR THE FOREGOING REASONS, DRI respectfully requests that the Court grant it permission, pursuant to sec. 801.19(7), STATS., to file a non-party brief in the above-captioned case.

Dated this 17th day of April, 2007.

GODFREY & KAHN, S.C.

By: _____
Michael B. Apfeld
State Bar No. 1016749

Attorneys for Non-Party
Defense Research Institute

ADDRESS:
780 North Water Street
Milwaukee, WI 53202-3590
Phone: (414) 273-3500
Fax: (414) 273-5198
mw1304337_1