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The Staab Saga: The Nonparty, Joint and Several Liability, and Loss Reallocation in the Minnesota Comparative Fault Act

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THE STAAB SAGA: THE NONPARTY, JOINT AND SEVERAL LIABILITY, AND LOSS REALLOCATION IN THE MINNESOTA COMPARATIVE FAULT ACT

Mike Stenson[†]

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I. INTRODUCTION

Comparative fault ameliorates the harsh effects of the all-or-nothing defense of contributory negligence and provides a mechanism for the apportionment of fault among those whose fault caused loss or damage to an injured plaintiff or plaintiffs.¹ One of the perplexing problems in construing comparative fault statutes is in determining whose fault should be considered in the apportionment of fault in tort litigation, and more specifically, whether the fault of nonparties should be considered in the allocation of fault, and if so, which nonparties.

The nonparty issue inheres in any comparative negligence or fault statute. While the issue is sometimes directly addressed in a statute, often it is not. Minnesota's comparative negligence and fault statutes did not directly address that question, leaving it to the courts to resolve the issue.

Minnesota's Comparative Fault Act is a modified comparative fault statute. A plaintiff will be barred from recovery if the plaintiff's fault is greater than the fault of the person from whom recovery is sought.² In general, Minnesota requires individual comparisons of fault.³ A plaintiff will be barred from recovery if the plaintiff's fault is greater than the fault of each individual defendant.⁴

Minnesota's default rule is several liability. That means that defendants will be held liable for only their percentage of fault unless one of the four joint and several liability exceptions⁵ applies,

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1. 1 COMPARATIVE NEGLIGENCE MANUAL § 1:1 (3d ed. 2015).

2. MINN. STAT. § 604.01, subdiv. 1 (2014).

3. *Cambern v. Sioux Tools, Inc.*, 323 N.W.2d 795, 798 (Minn. 1982); *Marier v. Mem'l Rescue Serv., Inc.*, 296 Minn. 242, 246, 207 N.W.2d 706, 709 (1973). *Cambern* points out that aggregate comparisons of fault will be permitted only in limited cases, one of which is where the defendants are involved in a joint venture. 323 N.W.2d at 798 (citing *Krengel v. Midwest Automatic Photo, Inc.*, 295 Minn. 200, 209–10, 203 N.W.2d 841, 847 (1973)). For a more detailed discussion, see Michael K. Steenson, *The Fault with Comparative Fault: The Problem of Individual Comparisons in a Modified Comparative Fault Jurisdiction*, 12 WM. MITCHELL L. REV. 1 (1986).

4. MINN. STAT. § 604.01, subdiv. 1.

5. *Id.* § 604.02, subdiv. 1.

one of which imposes joint and several liability on a defendant who is more than 50% at fault.

The greater the distribution of fault, the greater the likelihood that any individual defendant will be held severally liable rather than jointly and severally liable. This means that the issue of whose fault is included in the allocation of fault will be critical, not only in determining whether a plaintiff is entitled to recover against any individual defendant, but also whether any given defendant will be only severally liable or jointly and severally liable to the plaintiff.

The rule of several liability became the default rule in Minnesota in a 2003 amendment to the Comparative Fault Act. Section 604.02, subdivision 1 of the Act reads in part as follows: “When two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each,” subject to four enumerated exceptions where joint and several liability continues to apply.⁶

A loss reallocation statute, enacted in 1978, further provides that if a party’s equitable share of the obligation is uncollectible after the entry of judgment, it must be reallocated among the remaining parties to the litigation according to their respective percentages of fault.⁷

The problem of determining whose fault should be considered in the apportionment of fault has persisted from the time of the adoption of the comparative negligence statute in 1969, through the adoption of the 1978 and 2003 amendments. If anything, inconsistencies in the language in the amendments amplified the problem. The Minnesota Supreme Court had previously determined that the fault of certain nonparties should be considered in the allocation of fault, but not in cases arising after the 2003 amendment. The issues of whether the fault of nonparties should be considered in the apportionment of fault under post-amendment section 604.02, subdivision 1 and its impact on those who were parties to the litigation remained unresolved until the supreme court’s decisions in *Staab v. Diocese of St. Cloud* in 2012⁸ and 2014.⁹

6. *Id.*

7. *Id.* § 604.02, subdiv. 2.

8. *Staab v. Diocese of St. Cloud (Staab I)*, 813 N.W.2d 68 (Minn. 2012).

9. *Staab v. Diocese of St. Cloud (Staab II)*, 853 N.W.2d 713, 719 (Minn. 2014).

The plaintiff in the case was injured at a parish school, owned and operated by the diocese, when her husband pushed her wheelchair over a five-inch drop, causing her to pitch forward and out of the chair.¹⁰ The plaintiff brought suit against the Diocese of St. Cloud.¹¹ At trial, the fault of the diocese and the plaintiff's husband was submitted to the jury, which found both to be at fault.¹² The jury allocated 50% of the fault to the diocese and 50% to the husband, even though he was not a party to the litigation.¹³

Staab I required the supreme court to consider for the first time the impact of the legislature's 2003 amendment of Minnesota Statutes section 604.02, subdivision 1 of the Comparative Fault Act. That amendment was the culmination of years of legislative erosion of the rule of joint and several liability, a process that began in 1978 and concluded in the 2003 legislative amendments, making several liability the default rule, subject to limited exceptions.¹⁴

The court construed the amendment to mean that "persons . . . severally liable" includes nonparties,¹⁵ and held that Mr. Staab's fault was appropriately considered in the apportionment of fault in the case,¹⁶ and that the consequence was that the other severally liable party, the diocese, would be held liable for only its percentage of fault.¹⁷

In *Staab II*, decided two years later, the supreme court held that the loss reallocation statute in section 604.02, subdivision 2, which requires reallocation of the uncollectible share of a party (defined to include a non-party), could not be applied to increase the liability of a severally liable party.¹⁸

The upshot of the *Staab* decisions is that where the fault of a nonparty is considered, it will have consequences, one of which is that the parties to a lawsuit will be held liable only for their percentages of fault, unless one of the joint and several liability

10. *Staab I*, 813 N.W.2d at 71.

11. *Id.*

12. *Id.*

13. *Id.*

14. For a more detailed analysis of the changes, see Michael K. Steenson, *Joint and Several Liability in Minnesota: The 2003 Model*, 30 WM. MITCHELL L. REV. 845 (2004).

15. *Staab I*, 813 N.W.2d at 76.

16. *Id.* at 80.

17. *Id.*

18. *Staab II*, 853 N.W.2d at 719.

exceptions applies, and that the loss reallocation statute cannot be used to increase the obligation of a severally liable party.

Staab I and *II* resolved two of the issues concerning the allocation of fault. Others remain, however, including the circumstances under which the fault of nonparties will be considered; the rule of loss reallocation and its relationship to joint and several liability; the impact of the *Staab* decisions on products liability loss reallocation, which is subject to a special reallocation rule; and, finally, the impact of the decisions on cases involving third-party contribution claims against employers.

The purpose of this article is to address these issues in depth. Part II is a short history of comparative negligence and fault. It looks at the law in distinct periods, including before and after the 1978 amendments to the Comparative Fault Act. And, because Minnesota's comparative negligence statute was based on Wisconsin's, it also surveys early Wisconsin decisions dealing with the problem of the nonparty. Part III takes a detailed look at the *Staab* decisions. Part IV considers a variety of situations where the issue of the fault of a nonparty may arise. Part V examines the impact of the *Staab* decisions on joint and several liability and loss reallocation. Part VI considers the impact of the decisions on section 604.02, subdivision 3, which is the special loss reallocation provision that applies to products liability cases where the parties are in the chain of manufacture and distribution. Part VII considers the impact of the *Staab* decisions on contribution claims by third parties against employers. Part VIII is the conclusion.

II. A SHORT HISTORY

Before parsing the *Staab* decisions, a brief explanation of the source of the problems the court faced in those cases will aid in understanding the court's analysis. Joint and several liability was the traditional rule in Minnesota.¹⁹ It survived the adoption of the comparative negligence statute and the amendments that turned that statute into a broader Comparative Fault Act.²⁰ Those amendments are the source of the problem because of the inconsistencies that they introduced into the Act.

The original comparative negligence statute read in part as follows:

19. See Stenson, *supra* note 14, at 850–51.

20. MINN. STAT. § 604.01 (2014 & Supp. 2015); MINN. STAT. § 604.01 (1969).

Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering. The court may, and when requested by either party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of negligence attributable to each party; and the court shall then reduce the amount of such damages in proportion to the amount of negligence attributable to the person recovering. When there are two or more persons who are jointly liable, contributions to awards shall be in proportion to the percentage of negligence attributable to each, provided, however, that each shall remain jointly and severally liable for the whole award.²¹

Minnesota's statute was modeled after Wisconsin's.²² The Bar Committee comment to section 604.01 makes it clear that Wisconsin law was thoroughly researched and that the Minnesota statute was modeled largely upon Wisconsin's comparative negligence statute.²³ The Minnesota Supreme Court has taken the position that adoption of the Wisconsin statute also included interpretations of that statute by Wisconsin's highest court, up to the time of adoption by Minnesota.²⁴

The comparative negligence statute used the term "person" in two places in subdivision 1.²⁵ In the first sentence, the statute states that contributory negligence does not bar the recovery of a "person" as long as that person's fault is not equal to or greater

21. Act of May 23, 1969, ch. 624, 1969 Minn. Laws 1069. In *Maday v. Yellow Taxi Co.*, 311 N.W.2d 849, 850 (Minn. 1981), the court made it clear that joint and several liability was incorporated in the comparative negligence act.

22. Compare Wis. STAT. ANN. § 895.045 (West, Westlaw through 2015), with MINN. STAT. § 604.01 (2014 & Supp. 2015).

23. MINN. STAT. ANN. § 604.01 note (1969 Committee Comment) ("Supplied by the Minnesota State Bar Association as a portion of the interpretive memorandum of its Legislative Committee. . . . The Minnesota Comparative Negligence Statute . . . is based on Wisconsin Law.").

24. *Busch v. Busch Constr., Inc.*, 262 N.W.2d 377, 393 (Minn. 1977); *Marier v. Mem'l Rescue Serv., Inc.*, 296 Minn. 242, 244–45, 207 N.W.2d 706, 708 (1973).

25. MINN. STAT. § 604.01, subdiv. 1 (1969).

than the negligence of the “person” from whom recovery is sought.²⁶ In that context, it seems clear that “person” or “legal representative” has to refer to someone who is a party to the lawsuit. Only a “person” who is a *party* would be entitled to recover.

The last sentence, the joint and several liability provision, stated that “[w]hen there are two or more persons who are jointly liable, contributions to awards shall be in proportion to the percentage of negligence attributable to each, provided, however, that each shall remain jointly and severally liable for the whole award.”²⁷

Again, the use of the word “person” in that context appears to mean that a “person” is a *party* to the lawsuit. For consistency, the term should be interpreted similarly when it appears in the same subdivision. There is perhaps an ambiguity, however, because the second sentence uses the term *party*:

The court may, and when requested by either party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of negligence attributable to each *party*; and the court shall then reduce the amount of such damages in proportion to the amount of negligence attributable to the person recovering.²⁸

In context, however, “party” and “person” appear to be interchangeable. That argument can be made based upon the text alone. Read that way, however, the statute has gaps that have to be filled. Wisconsin’s experience with its comparative negligence statute illustrates the problem, especially because Minnesota borrowed Wisconsin’s comparative negligence statute in 1969. It also foreshadows the problems the Minnesota Supreme Court would have to face in interpreting its own statutes.

A. *Short Detour to Wisconsin*

Wisconsin’s comparative negligence statute initially was quite abbreviated:

Contributory negligence does not bar recovery in an action by any person or the person’s legal representative to recover damages for negligence resulting in death or in

26. *Id.*

27. *Id.*

28. *Id.* (emphasis added).

injury to person or property, if that negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributed to the person recovering.²⁹

Prior to the adoption of Minnesota's comparative negligence statute in 1969, the Wisconsin Supreme Court had held that the fault of certain entities had to be considered in allocating fault. Because of the brevity of the Wisconsin comparative negligence statute, the Wisconsin Supreme Court, out of necessity, had to plug the gaps in the comparative negligence statute. In 1972, in *Payne v. Bilco Co.*,³⁰ the court read its 1962 decision in *Bielski v. Schulze*³¹ as adopting "the rule that the negligence of all joint tortfeasors must be apportioned according to their degree of negligence."³²

The Wisconsin comparative negligence statute did not provide for contribution based on the percentage of negligence assigned to co-tortfeasors. Historically, co-tortfeasors were liable on a pro rata basis for purposes of contribution.³³ The key issue in *Bielski* was whether contribution would continue to be determined on a pro rata basis or whether co-tortfeasors would be liable for their specific percentages of negligence.³⁴ The court opted for a revision of the common law pro rata rule in favor of determining contribution liability based on the percentages of negligence assigned to the parties.³⁵ In doing so, the court applied equitable principles, but used the framework of the statute and Wisconsin's special verdict practice to expand the existing rule of equitable contribution to contribution based on percentages of fault.³⁶ The court explained:

If the doctrine is to do equity, there is no reason in logic or in natural justice why the shares of common liability of joint tortfeasors should not be translated into the

29. Act of June 15, 1931, ch. 242, 1931 Wis. Sess. Laws 375, 375–76 (codified as amended at Wis. STAT. § 331.045 (1931)).

30. 195 N.W.2d 641, 645–46 (Wis. 1972).

31. 114 N.W.2d 105 (Wis. 1962), *overruled by* Wangen v. Ford Motor Co., 294 N.W.2d 437, 447 (Wis. 1980) ("We conclude that permitting the award of punitive damages in product liability cases is not inconsistent with *Bielski* and does not undermine the law of comparative negligence.").

32. *Payne*, 195 N.W.2d at 645–46.

33. *See Bielski*, 114 N.W.2d at 107–08.

34. *See id.* at 107.

35. *Id.* at 107–08.

36. *Id.* at 108–09.

percentage of the causal negligence which contributed to the injury. This is merely a refinement of the equitable principle. It is difficult to justify, either on a layman's sense of justice or on natural justice, why a joint tortfeasor who is 5% causally negligent should only recover 50% of the amount he paid to the plaintiff from a co-tortfeasor who is 95% causally negligent, and conversely why the defendant who is found 5% causally negligent should be required to pay 50% of the loss by way of reimbursement to the co-tortfeasor who is 95% negligent.³⁷

In *Pierringer v. Hoger*,³⁸ the Wisconsin Supreme Court sanctioned piecemeal settlement of a tort claim. The court noted that the percentage of negligence assigned to the non-settling defendant "can only be determined by a proper allocation of all the causal negligence, if any, of all the joint tortfeasors and of the plaintiff if contributory negligence is involved."³⁹ The *Pierringer* release severs joint and several liability, and makes the non-settling defendants liable only for the percentage of negligence allocated to them.⁴⁰

Wisconsin law, at the time of the adoption of Minnesota's comparative negligence statute, required consideration of the fault of settling defendants and, even though the comparative negligence statute did not provide for it, contribution according to the percentages of negligence assigned to co-tortfeasors. Because of the limited reach of the Wisconsin cases, it would be difficult to conclude that Wisconsin intended for the fault of nonparties, other than settling defendants, to be compared in the allocation of fault, at least at the time of the adoption of Minnesota's comparative negligence statute.

B. *Return to Minnesota*

The 1978 amendment to the comparative negligence statute moved the joint and several liability sentence virtually verbatim to a new section 604.02, subdivision 1.⁴¹ The only change was the

37. *Id.* at 109.

38. 124 N.W.2d 106 (Wis. 1963).

39. *Id.* at 111-12.

40. Peter B. Knapp, *Keeping the Pierringer Promise: Fair Settlements and Fair Trials*, 20 WM. MITCHELL L. REV. 1, 26 (1994).

41. MINN. STAT. § 604.02, subdiv. 1 (1978).

substitution of the word “fault” for “negligence.”⁴² The 1978 amendment also added a new loss reallocation provision in new section 604.02, subdivision 2, which provides that:

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.⁴³

The loss reallocation provision, which was the first dent in the law of joint and several liability in Minnesota, provides for reallocation of a *party’s* equitable share of the obligation.⁴⁴ The language was taken verbatim from section 2(d) of the Uniform Comparative Fault Act,⁴⁵ which provided for the allocation of fault only to *parties* to the litigation, not *nonparties*.⁴⁶

At the time the Uniform Comparative Fault Act’s loss reallocation provision was adopted in Minnesota, there was nothing to indicate how the Minnesota courts would handle the issue of whether the fault of nonparties should be considered in the allocation of fault in tort litigation. Later, in 1978, however, the Minnesota Supreme Court decided *Frey v. Snelgrove*⁴⁷ and *Lines v.*

42. *Id.*

43. *Id.* § 604.02, subdiv. 2.

44. *Id.*

45. UNIF. COMPARATIVE FAULT ACT § 2, 12 U.L.A. 135 (2008).

46. *Id.* § 2 cmt. The comment explains:

The limitation to parties to the action means ignoring other persons who may have been at fault with regard to the particular injury but who have not been joined as parties. This is a deliberate decision. It cannot be told with certainty whether that person was actually at fault or what amount of fault should be attributed to him, or whether he will ever be sued, or whether the statute of limitations will run on him, etc. An attempt to settle these matters in a suit to which he is not a party would not be binding on him. Both plaintiff and defendants will have significant incentive for joining available defendants who may be liable. The more parties joined whose fault contributed to the injury, the smaller the percentage of fault allocated to each of the other parties, whether plaintiff or defendant.

Id.

47. 269 N.W.2d 918 (Minn. 1978).

Ryan.⁴⁸ Both cases were decided after April 15, 1978, the effective date of the amendment.⁴⁹ In *Frey*, the supreme court sanctioned the use of the *Pierringer* release⁵⁰ in Minnesota and outlined the procedures for its use, stating as part of the procedure that the fault of the parties, including settling defendants, should be submitted to the jury:

In almost every case the trial court should submit to the jury the fault of all parties, including the settling defendants, even though they have been dismissed from the lawsuit. If there is “evidence of conduct which, if believed by the jury, would constitute negligence (or fault) on the part of the person . . . inquired about,” the fault or negligence of that party should be submitted to the jury.⁵¹

The court quoted *Connar v. West Shore Equipment of Milwaukee*,⁵² a 1975 Wisconsin Supreme Court decision, in support of that proposition.⁵³ The issue in *Connar* was whether the negligence of an employer should be considered in the allocation of negligence, even though the employer was immune from liability.⁵⁴

Lines v. Ryan,⁵⁵ decided a little more than three months after *Frey*, arose out of a three-car accident in which a car driven by Jones was hit by a car driven by Lines.⁵⁶ Lines’ car was then hit by a car driven by Ryan.⁵⁷ Whether Lines hit Jones’ car before being hit by

48. 272 N.W.2d 896 (Minn. 1978).

49. *Id.* at 896 (decided on November 24, 1978); *Frey*, 269 N.W.2d at 918 (decided on August 18, 1978).

50. For a deeper look at *Pierringer* releases, see Knapp, *supra* note 40 and John E. Simonett, *Release of Joint Tortfeasors: Use of the Pierringer Release in Minnesota*, 3 WM. MITCHELL L. REV. 1 (1977); see also *supra* notes 38–40 and accompanying text. *Pierringer* releases sever joint and several liability as between the settling defendant and nonsettling defendant(s). See *Frey*, 269 N.W.2d at 922–23 (citing *Pierringer v. Hoyer*, 124 N.W.2d 106 (1963)). The fault of the settling party has to be submitted to the trier of fact in part to establish the liability of the nonsettling defendants. *Id.*

51. *Frey*, 269 N.W.2d at 923 (quoting *Connar v. W. Shore Equip. of Milwaukee*, 227 N.W.2d 660, 662 (Wis. 1975)).

52. *Connar*, 227 N.W.2d at 662.

53. *Frey*, 269 N.W.2d at 923.

54. *Connar*, 227 N.W.2d at 661.

55. *Lines v. Ryan*, 272 N.W.2d 896, 896 (Minn. 1978).

56. *Id.* at 899.

57. *Id.*

Ryan's car was in dispute.⁵⁸ Because Lines was uninsured and not gainfully employed, Jones made a claim for uninsured motorist insurance benefits from her insurer, State Farm.⁵⁹ Jones executed a release and subrogation trust agreement with State Farm upon receiving her insurance payment.⁶⁰

Lines brought suit against Ryan.⁶¹ State Farm subsequently brought suit in Jones' name against Lines pursuant to the release and subrogation trust agreement.⁶² Ryan moved for consolidation of the claims.⁶³ During the trial, "Jones moved to amend her complaint to add Ryan as a defendant in the *Jones v. Lines* action."⁶⁴ That motion was granted.⁶⁵ Ryan then "cross-claimed against Lines for contribution and indemnity."⁶⁶

The jury found Jones free from negligence and assigned 60% of the fault to Lines and 40% to Ryan.⁶⁷ Lines argued that the fault of Jones should not have been submitted to the jury in the *Lines v. Ryan* action.⁶⁸ The supreme court followed *Frey* and relied again on *Connar* for the proposition that the fault of all persons contributing to the accident should be considered by the trier of fact in allocating fault.⁶⁹ *Connar* articulated the "principle" the Minnesota Supreme Court found persuasive in *Lines*:

It is established without doubt that, when apportioning negligence, a jury must have the opportunity to consider the negligence of all parties to the transaction, whether or not they be parties to the lawsuit and whether or not they can be liable to the plaintiff or to the other tort-feasors either by operation of law or because of a prior release.⁷⁰

Connar could be read to stand for the broader proposition that in all cases the fault of nonparties has to be taken into

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 900.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 902.

69. *Id.*

70. *Id.* at 902-03 (quoting *Connar v. W. Shore Equip. of Milwaukee*, 227 N.W.2d 660, 662 (Wis. 1975)).

consideration, but at the time the case was decided the “principle” was confined to released parties,⁷¹ the same as in Wisconsin. *Connar* expanded the “principle” to justify consideration of the fault to the immune employer.

As of *Lines*, then, one view is that the broadest proposition the Minnesota Supreme Court’s cases had established is that the fault of nonparties should be considered where a party is released pursuant to a *Pierringer* release and where a person not joined contributed to a single indivisible injury. Minnesota had already taken the same position as *Connar* in *Lambertson v. Cincinnati Welding Corp.*,⁷² although, in Minnesota, unlike in Wisconsin, the employer can be made a party to a lawsuit on a third-party contribution claim and be held liable to the extent of its workers’ compensation liability or fair share of the judgment, whichever is less.

The court broadened its approach to nonparties in *Hosley v. Armstrong Cork Co.*⁷³ *Hosley* involved the application of the reallocation provision in section 604.02, subdivision 2 of the Act.⁷⁴ The issue was whether the reallocation statute applied in a case in which the fault of nonparties was submitted to the trier of fact.⁷⁵

71. *Lines*, while relying on *Connar*, just as easily could have relied on its prior decision in *Ferguson v. Northern States Power Co.*, 307 Minn. 26, 239 N.W.2d 190 (1976). See generally *Lines*, 272 N.W.2d at 896. The minor plaintiff in that case suffered a serious electrical shock and burns while trimming a tree in his backyard under his father’s direction. *Ferguson*, 307 Minn. at 28–29, 239 N.W.2d at 191–92. The trial court separated the case into distinct comparative negligence questions, which asked the jury to first apportion fault between the minor plaintiff and Northern States Power and then to Northern States Power and the plaintiff-father. *Id.* at 31, 239 N.W.2d at 193. The jury found the minor plaintiff to be 75% at fault and Northern States Power 25% at fault and, in the second set of apportionment questions, found the plaintiff-father to be 70% at fault and Northern States Power 30% at fault. *Id.* The supreme court held that it was error to submit two separate sets of questions apportioning fault because the fault should have been apportioned among all three at fault parties in a single apportionment question. *Id.* at 36, 239 N.W.2d at 196. The same rationale would presumably apply in *Lines*. See generally *Lines*, 272 N.W.2d at 896.

72. 312 Minn. 114, 119–21, 257 N.W.2d 679, 684 (1977) (describing the inequity arising from allowing contribution or indemnity to an employer already under a workers compensation system). See *infra* Part VII for a more detailed discussion.

73. 383 N.W.2d 289 (Minn. 1986).

74. *Id.* at 293–94.

75. *Id.* at 292.

The court held that it did not, because the equitable share of the nonparties' obligation was not proved to be uncollectible.⁷⁶

Hosley sued several asbestos manufacturers.⁷⁷ After commencement of the suit, two of the defendants filed chapter 11 petitions for reorganization.⁷⁸ The proceedings against those defendants were automatically stayed.⁷⁹ On Hosley's motion, the claims and cross-claims against those defendants were severed.⁸⁰ Hosley went to trial against the remaining defendants.⁸¹ The trial court submitted the fault of nine parties to the jury, including Hosley and Johns-Manville, two of the defendants who had filed under chapter 11.⁸²

The court held that the loss reallocation provision applied to Johns-Manville, the chapter 11 defendant that was severed from the litigation.⁸³ The court rejected the Uniform Comparative Fault Act's restrictive definition of "party" to mean a party to a lawsuit.⁸⁴ Rather, the court concluded that the definition "can be more broadly defined as 'a person whose fault has been submitted to the jury,' or, in other words, 'parties to the transaction.'"⁸⁵

The court noted the comments to the Uniform Comparative Fault Act, which explain that the reason for excluding nonparties to the lawsuit is because of the lack of certainty involved in assigning fault to them, because any findings of fault would not be binding on them, and because the plaintiff and defendant already have sufficient incentives to join them as parties.⁸⁶ But, the court rejected these arguments, concluding simply that *Lines* resolved the problem, even though *Lines* did not consider the Uniform Comparative Fault Act in its opinion:

Under *Lines*, courts submit to the jury the fault of all "parties to the transaction." Because a percentage of fault is assigned to such a party (Johns-Mansville in this case),

76. *Id.* at 294.

77. *Id.* at 290.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 293.

84. *Id.*

85. *Id.*

86. *Id.* (quoting UNIF. COMPARATIVE FAULT ACT § 2, cmt., 12 U.L.A. 39, 43 (Supp. 1985)).

and because the percentage assigned represents the maximum amount chargeable against such a party (the figure can be used defensively by the party in a future suit), Minnesota courts can calculate the reallocation of this assigned fault pursuant to the statute. Thus, the concerns expressed in the comment to the Uniform Act have no applicability here.⁸⁷

Lines and *Hosley* establish the proposition that “person” for purposes of subdivision 1 of section 604.01, and “party” for purposes of the reallocation provision in subdivision 2 of section 604.02, mean “parties to the transaction,” rather than parties to the lawsuit.⁸⁸ Taken together, however, *Lines*, *Frey*, and *Hosley* could be read as having a limited reach. The cases do not declare an open season on submission of the fault of “parties to the transaction” if they are not joined in the lawsuit.⁸⁹ In each of the cases, the “person” whose fault was submitted for apportionment was either joined in the lawsuit and subsequently released or severed from the lawsuit via settlement.⁹⁰

Those cases did not consider the joint and several liability provision of subdivision 1 of section 604.02, however, and what impact the allocation of fault to a nonparty would have on the joint and several liability of a *party* to a lawsuit. There are two Minnesota Supreme Court cases indicating that the Comparative Fault Act is simply inapplicable in cases involving in a single defendant, even if fault could be allocated to nonparties.⁹¹

In *Schneider v. Buckman*,⁹² the supreme court held that the loss reallocation statute in section 604.02, subdivision 2 did not apply in a case in which there was only one defendant against whom

87. *Id.*

88. *Id.* at 293; *Lines v. Ryan*, 272 N.W.2d 896, 903 (Minn. 1978).

89. The Minnesota Court of Appeals noted the limitations in *Ripka v. Mehus*, 390 N.W.2d 878 (Minn. Ct. App. 1986), in which the defendant sought to include a “phantom” person on the special verdict form. The court held that “a mere allegation by the defendant that a phantom tortfeasor contributed to the accident is insufficient evidence to justify submitting the alleged negligence of the phantom tortfeasor to the jury for apportionment.” *Id.* at 881.

90. See *Hosley v. Armstrong Cork Co.*, 383 N.W.2d 289 (Minn. 1986); *Frey v. Snelgrove*, 269 N.W.2d 918 (Minn. 1978); *Lines*, 272 N.W.2d at 896.

91. See *Imlay v. City of Lake Crystal*, 453 N.W.2d 326, 335 (Minn. 1990); *Schneider v. Buckman*, 433 N.W.2d 98, 103 (Minn. 1988).

92. 433 N.W.2d at 103.

judgment could be entered.⁹³ The jury in the case had apportioned 35% of the fault to Buckman, the owner of an ambulance service, for negligence in the transfer of Schneider to another hospital, 25% of the fault to Buckman's daughter, and 20% each to the transferring hospital and a physician at the hospital.⁹⁴ Buckman's daughter was not a party to the suit because of defective service of process, and the hospital and physician were not subject to liability because Schneider's suit against them was time-barred.⁹⁵

The parties assumed that section 604.02, subdivision 2 reallocation would apply, the plaintiff argued that the uncollectible shares of the hospital and physician should be reallocated to Buckman, and Buckman argued that there could be no reallocation because Schneider did not follow the proper procedures to establish reallocation.⁹⁶ The supreme court held "that the reallocation procedures . . . as interpreted in *Hosley I*, are not implicated where, as here, there is but one defendant against whom judgment can be or has been entered."⁹⁷ The court held that the defendant was responsible for 100% of the plaintiff's damages.⁹⁸

In *Imlay v. City of Lake Crystal*,⁹⁹ a case involving a claim by the plaintiffs against a city-owned liquor store that served alcoholic beverages to an intoxicated motorcyclist who subsequently injured the plaintiffs when their motorcycles collided, the jury apportioned 20% of the fault to the city and 80% to the motorcyclist.¹⁰⁰ In a footnote, the supreme court questioned whether joint and several liability applied because the plaintiffs did not sue the motorcyclist whose estate was brought in as a third-party defendant by the city.¹⁰¹ The court did not question the application of section 604.02, subdivision 1, however, because the parties proceeded on the assumption that subdivision 1 did apply.¹⁰²

93. *Id.*

94. *Id.* at 99.

95. *Id.* at 100.

96. *Id.* at 102.

97. *Id.* at 103.

98. *Id.*

99. 453 N.W.2d 326 (Minn. 1990).

100. *Id.*

101. *Id.* at 330 n.3.

102. *Id.*

In summary, the key supreme court cases construing the Comparative Fault Act established that the fault of certain persons who are not parties to a suit may be considered in the allocation of fault, but also hinted at the conclusion that the joint and several liability provisions of the Act are inoperable in cases where there is a single defendant who is subject to liability to the plaintiff. It was against this backdrop that the Minnesota Supreme Court decided *Staab I* and *Staab II*.

III. THE STAAB DECISIONS

In *Staab I*, the Minnesota Supreme Court resolved the issue of whether the fault of a nonparty could be used to effectively limit the liability of the sole party to a lawsuit. The court framed the issue as “whether the sole defendant, the Diocese of St. Cloud, although found by the jury to be only 50% at fault, must pay 100% of the \$224,200.70 jury award because Staab elected not to join her husband as a defendant.”¹⁰³ An addendum, not the court’s, might be, “. . . and where the Diocese chose not to join her husband.”¹⁰⁴

The court held that the Diocese was responsible for only its percentage of fault.¹⁰⁵ The open issue, however, was whether the fault assigned to Mr. Staab could be reallocated to the Diocese, a result suggested by Justice Meyer’s dissent in the case¹⁰⁶ and the position taken in two court of appeals decisions, including *O’Brien v. Dombeck*¹⁰⁷ and *Staab I* itself, in the second court of appeals decision in the case.¹⁰⁸ The supreme court resolved the lingering question, left after its first decision, in the case of *Staab II* by reversing the court of appeals and holding that the loss reallocation

103. *Staab I*, 813 N.W.2d 68, 72 (Minn. 2012).

104. The issue of whether a party to a suit could join a nonparty is an important consideration in the Restatement (Third) of Torts: Apportionment of Liability. According to the Restatement, consideration of the fault of certain identified parties turns on the type of comparative fault adopted in a particular jurisdiction. *See id.* intro., §§ A9–E19. In cases where there may be joint and several liability, the fault of nonparties will generally not be considered, if a defendant has the ability to join the nonparty. The burden is not placed on the plaintiff to do so. *See id.* § A19 cmt. d (1998).

105. *Staab I*, 813 N.W.2d at 80.

106. *Id.* at 85.

107. 823 N.W.2d 895, 899 (Minn. Ct. App. 2012).

108. *Staab v. Diocese of St. Cloud*, 830 N.W.2d 40, 43 (Minn. Ct. App. 2013), *rev’d*, *Staab II*, 853 N.W.2d 713 (Minn. 2014).

provision could not be applied to increase the responsibility of a severally liable party.¹⁰⁹

A. Staab I

In *Staab I*, the court set out the basic rules for statutory construction as a first step, noting the noncontroversial proposition that the goal of all statutory interpretation is to ascertain and “effectuate the intention of the legislature.”¹¹⁰ The court’s analysis is somewhat complicated, but the key points in the decision are that “‘several liability’ means ‘liability that is separate and distinct’”¹¹¹ from that of another, that several liability arises at the time the tort is committed rather than at the time of judgment, and that the legislature was presumed to know these special meanings at the time of the 2003 amendment to the Comparative Fault Act.¹¹²

The court’s first step was to determine whether the statutory language was ambiguous.¹¹³ Absent ambiguity, a court simply applies the plain statutory language.¹¹⁴ If the language is ambiguous, the court looks beyond the language to determine legislative intent, applying the relevant canons of statutory construction.¹¹⁵

Preliminarily, the court noted that the joint and several liability statute is in derogation of the common law and, therefore, has to be strictly construed.¹¹⁶ That means that the court will not presume a legislative intent to modify the common law absent a clear indication by the legislature. The court swept that canon aside because it concluded that the clear legislative intent was to modify the rule of joint and several liability.¹¹⁷ The court’s next step was to “carefully examine the express wording of the statute to determine

109. *Staab II*, 853 N.W.2d at 719.

110. *Staab I*, 813 N.W.2d at 72 (quoting MINN. STAT. § 645.16 (2010)).

111. *Id.* at 73.

112. *Id.* at 73–77.

113. *Id.* at 72.

114. *Id.* at 73.

115. *Id.*

116. *Id.*

117. *Id.* Of course, finding an intent to modify the common law would not necessarily mean that the statute should not be narrowly construed in determining how far the rule of joint and several liability is modified. Following this conclusion, however, the strict construction canon was not an impediment to the court in its subsequent analysis.

the nature and extent to which the statute modifies the common law.”¹¹⁸

In part two of its opinion, the court saw two “fundamental challenges” that had to be resolved in order to ascertain the meaning of subdivision 1 of section 604.02.¹¹⁹ The first was to determine “the point in time [when] the statute . . . appli[es] to determine whether ‘persons are severally liable.’”¹²⁰ The second concerned the meaning of the terms “severally liable” and “jointly and severally liable.”¹²¹

1. *When Does Several Liability Arise?*

As to the first challenge, the court saw the timing of the several liability determination as crucial to the issue of whether a sole defendant is required to pay more than its equitable share of a judgment as measured by a jury’s apportionment of fault. This is the pivotal point in the court’s opinion:

The answer to the question of when liability is determined for purposes of the statute directly impacts whether a sole defendant in a lawsuit must pay more than its equitable share of a judgment as measured by the percentage of fault apportioned to it by the jury. Thus, in order to interpret the statutory phrases “persons are severally liable” and “persons are jointly and severally liable,” we must examine when “persons are . . . liable” at common law and determine whether the statute modifies the common law rule.¹²²

The supreme court concluded that liability is created at the instant [a] tort is committed.¹²³

Under Minnesota common law, “persons are . . . liable” at the instant those persons’ acts cause injury to a victim. Applying the common law, a tortfeasor’s liability *exists* prior to and independent of any claim or civil action that arises from that liability; hence, a judgment on a plaintiff’s

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 74–79.

122. *Id.*

123. *Id.* at 73 (quoting *White v. Johnson*, 272 Minn. 363, 371, 137 N.W.2d 674, 679 (1965), *overruled on other grounds* by *Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362 (Minn. 1977)).

cause of action in tort in a civil action *enforces* that liability only against the defendant or defendants who are parties to the civil action. Moreover, the language of section 604.02 provides no clear indication that it modifies the common law rule regarding the time of creation of tort liability. Subdivision 1 therefore cannot be read to indicate that “persons are . . . liable” as a result of the jury’s apportionment of fault because those “persons” are *already* liable at the time the tort was committed.¹²⁴

White and the cases citing it do make that statement, but all involved distinctly different questions than the one involved in *Staab*. *White* arose out of a three-vehicle collision.¹²⁵ A truck driven by Johnson collided with a car driven by White, in which White’s wife was a passenger.¹²⁶ The White car collided with a car driven by Urman.¹²⁷ Three separate actions were commenced against Johnson, who served third-party complaints against the City of St. Paul alleging negligence because of the way it maintained, controlled, and operated the highway where the collision occurred.¹²⁸ Johnson provided written notice of the claim to the City.¹²⁹ He did not claim damages for injuries sustained by anyone other than himself.¹³⁰ The plaintiffs in the three cases did not file notice of their claims with the City.¹³¹

The cases were consolidated for trial.¹³² The City then moved for summary judgment on the basis that none of the plaintiffs had filed a notice of claim against the City, and that because the City could not be held liable to the plaintiffs directly, it could not be held liable in contribution or indemnity to Johnson.¹³³ Putting aside the indemnity claim, based on its conclusion that there were sufficient facts to preclude summary judgment on that claim, the court considered whether the general rule that lack of common liability precludes a contribution claim applied to the case.¹³⁴

124. *Staab I*, 813 N.W.2d at 73–74.

125. *White*, 272 Minn. at 365, 137 N.W.2d at 675.

126. *Id.* at 365, 137 N.W.2d at 676.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 366–67, 137 N.W.2d at 676–77.

The court distinguished the notice provision as a potential impediment to common liability based on the nature of that provision. While the statute requires a claimant to give notice to a municipality of a claim, it “also destroys the municipality’s common-law immunity from liability for negligence [claims]” arising out of “the maintenance of . . . [the municipality’s] streets and public grounds.”¹³⁵ “Thus the statute concurrently creates a duty upon the municipality to use due care and a right against the municipality on the part of any person damaged because of a breach of that duty. We have here, then, a right and a duty pre-existing the injury.”¹³⁶

The court went on to say that the notice requirement “is a condition precedent to bringing suit for the practical purpose of quickly informing a municipality of injuries for which it might be liable,”¹³⁷ and that, while “[c]onceptually, the giving of notice is an essential element of the cause of action, . . . realistically, because of the preexisting right and duty, liability is created at the instant the tort is committed.”¹³⁸ What that means is that the city is “subject to a liability.”¹³⁹ There are other cases where subsequent limitations on the plaintiff’s right to sue the defendant from whom contribution is sought did not bar contribution claims, including cases where the plaintiff and defendant have entered into a covenant not to sue or where the plaintiff’s claim is barred by a statute of limitations.¹⁴⁰ The supreme court has consistently held that those subsequent disabilities do not extinguish the common liability required for the contribution claim, and the court has noted that other jurisdictions take the same position.¹⁴¹ The reason, the court in *White* said, “is that joint liability arises the moment the tort is committed and these defenses come into being after the conduct which creates that liability.”¹⁴²

135. *Id.* at 370, 137 N.W.2d at 679.

136. *Id.*

137. *Id.*

138. *Id.* at 370–71, 137 N.W.2d at 679.

139. *Id.* at 371, 137 N.W.2d at 679.

140. *See Gustafson v. Johnson*, 235 Minn. 358, 364, 51 N.W.2d 108, 112 (1952) (statute of limitations); *Emp’rs Mut. Cas. Co. v. Chi., St. Paul, Minneapolis & Omaha Ry. Co.*, 235 Minn. 304, 309, 50 N.W.2d 689, 693 (1951) (covenant not to sue).

141. *White*, 272 Minn. at 371, 137 N.W.2d at 679.

142. *Id.*

The court's authority for that proposition was a 1953 note in the *Minnesota Law Review* covering contribution and indemnity among joint tortfeasors.¹⁴³ In the course of discussing whether a contribution claim can be asserted when the statute of limitations has run in favor of one tortfeasor against the injured person, the note made the following statement: "Common legal liability is present since liability comes into existence at the instant the tort is committed; thereafter, the right to recover contribution remains inchoate until one of the tortfeasors discharges a disproportionate share of the financial liability."¹⁴⁴ The supporting authority was a 1948 Wisconsin Supreme Court case, *Ainsworth v. Berg*.¹⁴⁵

In discussing when the right of contribution arises, the court in *Ainsworth* stated:

With respect to the equitable right to contribution arising in automobile cases, it clearly has its origin in the joint misconduct of the negligent parties at the time of the accident. It remains an inchoate right until such time as one of the joint tort-feasors pays more than his fair share of the total damages resulting from such joint negligence, at which time it ripens into a right to legal action to recover therefor.¹⁴⁶

The *Ainsworth* court preceded the automobile case discussion with an analysis of when liability of joint tortfeasors is established, drawn from a 1933 Wisconsin case.¹⁴⁷ *Western Casualty & Surety Co. v. Milwaukee General Construction Co.* stated:

Some confusion seems to exist as to when joint tortfeasors are subject to a common liability. Logically, it would appear that the right comes into being when the combination of negligent acts gives force and direction to events necessarily resulting in an occasion for paying damages. This does not depend upon an action being begun. A lawsuit may be necessary to settle the differences arising between the parties, but it is not within the province of a court as an original matter to give this right

143. *Id.* at 371 n.14, 137 N.W.2d at 679 n.14 (citing Note, *Contribution and Indemnity Among Tortfeasors in Minnesota*, 37 MINN. L. REV. 470 (1953)).

144. Note, *Contribution and Indemnity Among Tortfeasors in Minnesota*, 37 MINN. L. REV. 470, 480–81 (1953) (citing *Ainsworth v. Berg*, 34 N.W.2d 790 (Wis. 1948)).

145. *Ainsworth*, 34 N.W.2d 790.

146. *Id.* at 793.

147. *Id.* at 792 (citing *W. Cas. & Sur. Co. v. Milwaukee Gen. Constr. Co.*, 251 N.W. 491 (Wis. 1933)).

or to take it away. It has its inception at the time the negligence of the alleged joint tort-feasors concurs to bring the injuries to the third person. It springs up at the time, and then and forever afterwards, until the claim is outlawed, they or either of them are under a liability to pay for injuries their negligent acts have caused. This inchoate right ripens into a cause of action when one of the joint tort-feasors pays more than his proportionate share of the claim for which all are liable.¹⁴⁸

The important point in all of this is that the right of contribution is inchoate.¹⁴⁹ The contribution claim ripens upon payment by a party of more than his or her fair share of a judgment.¹⁵⁰ The Minnesota Supreme Court's decision in *Spitzack v. Schumacher*,¹⁵¹ which was cited by the court in *Staab I*,¹⁵² explains that "common liability" exists from the moment a tort is committed and that subsequent events, including the execution of a covenant not to sue, the running of a statute of limitations, and the failure to provide notice as required by a municipal tort claims act, do not destroy the common liability necessary to sustain the contribution claim:

Even though a joint tortfeasor may subsequently acquire a particular defense against an injured party, that tortfeasor may still be held liable to a cotortfeasor for contribution. Thus, an injured party's execution of a covenant not to sue does not destroy the common liability necessary to a cause of action for contribution. Similarly, neither an injured party's failure to bring an action against a tortfeasor within the statute of limitations nor an injured party's failure to provide statutory notice of a claim against a municipality relieves a tortfeasor of his liability to a joint tortfeasor for contribution.

However, in all of these cases the defenses were procedural in nature and did not go to the merits of the case. The defenses of release, statute of limitations, and lack of statutory notice do not deny liability, but rather avoid liability. Thus, the underlying common liability was

148. *Milwaukee Gen. Constr. Co.*, 251 N.W. at 492.

149. *Id.*

150. *Id.*

151. *Spitzack v. Schumacher*, 308 Minn. 143, 241 N.W.2d 641 (1976).

152. *Staab I*, 813 N.W.2d 68, 75 (Minn. 2012). The court cited *Spitzack* for the proposition that "joint liability is created at the instant the tort is committed." *Id.*

never extinguished and a joint tortfeasor's right to contribution was allowed.

The issue in the instant case is different. Respondents' personal defense is not based on procedural defects which allowed them to escape liability. Instead, a jury found on the merits of the case that respondents were not as negligent as decedent and therefore were not liable for damages resulting from his death. Thus, at no time could plaintiffs have recovered against respondents, and thus no common liability could ever have existed.¹⁵³

Spitzack highlights the reason for taking the position that common liability arises when the tort is committed. It provides a rationale for refusing to allow "procedural" defenses to thwart a contribution claim that in fairness should not be barred by those defenses.¹⁵⁴ That line of cases is simply inapposite to *Staab I*'s assertion that several liability arises from the time the tort is committed.¹⁵⁵ The argument that several liability does not exist unless there are two or more parties to a suit is not a "procedural" defense.¹⁵⁶

While the *Staab I* court concluded that "persons are . . . liable"¹⁵⁷ at the instant that their acts cause injury to a victim, the common law rule in *White* was interpreted by the court in *Staab I* to mean that

a tortfeasor's liability exists prior to and independent of any claim or civil action that arises from that liability; hence, a judgment on a plaintiff's cause of action in tort in a civil action enforces that liability only against the defendant or defendants who are parties to the civil action.¹⁵⁸

That seems obvious. A person cannot be bound by a judgment in a lawsuit if the person is not a party to the litigation, but, nonetheless, liability exists at the moment the tort is committed.¹⁵⁹

153. *Spitzack*, 308 Minn. at 145–46, 241 N.W.2d at 643 (internal quotation marks omitted).

154. *See id.*

155. *Staab I*, 813 N.W.2d at 73.

156. *Spitzack*, 308 Minn. at 145–46, 241 N.W.2d at 643.

157. *Staab I*, 813 N.W.2d at 74.

158. *Id.* at 73–74.

159. *See id.* at 75 (citing *Emp'rs Mut. Cas. Co. v. Chi., St. Paul, Minneapolis & Omaha Ry. Co.*, 235 Minn. 304, 309–10, 50 N.W.2d 689, 693 (1951)).

The paradox is that a party is “liable” for purposes of the allocation of fault, but not really liable absent a judgment against it.¹⁶⁰

There is then a major step in the court’s reasoning that ties the *White* concept to section 604.02, subdivision 1:

Moreover, the language of section 604.02 provides no clear indication that it modifies the common law rule regarding the time of creation of tort liability. Subdivision 1 therefore cannot be read to indicate that “persons are . . . liable” as a result of the jury’s apportionment of fault because those “persons” are already liable at the time the tort was committed.¹⁶¹

The reasoning of the *Staab I* court is wrapped tightly around *White*, which is essential to the several holdings of the court in the case.

The dissenting opinion in *Staab I* distinguished the cases cited by the majority for the reasons noted in this analysis.¹⁶² The majority responded in a footnote:

The dissent correctly observes that cases stating and applying the rule regarding the time of creation of common (i.e., joint and several) liability involved disputes over contribution between jointly and severally liable tortfeasors. This observation has no bearing, however, on the validity of the rule that such liability arises at the time of commission of the tort, or on our conclusion that section 604.02, subdivision 1, incorporates and relies upon that rule to determine “[w]hen two or more persons are severally liable.”¹⁶³

2. *The Meaning of Several Liability and Joint and Several Liability*

The second fundamental challenge noted by the court was to determine the meaning of “several liability” and “joint and several liability.”¹⁶⁴ The court found Minnesota law in *Black’s Law Dictionary*:

Pursuant to Minnesota common law, “several liability” means “[l]iability that is separate and distinct from another’s liability, so that the plaintiff may bring a separate action against one defendant without joining the

160. *Id.* at 82.

161. *Id.* at 74.

162. *Id.* at 80–85.

163. *Id.* at 75 n.4.

164. *Id.*

other liable parties.” Moreover, whether a person is “[an]other liable part[y]” for the purposes of several liability is a separate question from whether that person is joined as a defendant in a plaintiff’s lawsuit. In contrast, “joint liability” is “[I]iability shared by two or more parties.”¹⁶⁵

The court noted that the difference between joint and several liability is that defendants who are jointly and severally liable are responsible for the entire award, but defendants who are severally liable are only responsible for their equitable shares of the award.¹⁶⁶

Several liability has different meanings than the one noted in *Black’s Law Dictionary*, however. The sense in which the supreme court used the term “several liability” is consistent with section 11 of the Restatement (Third) of Torts: Apportionment of Liability, establishing the effect of several liability: “When, under applicable law, a person is severally liable to an injured person for an indivisible injury, the injured person may recover only the severally liable person’s comparative-responsibility share of the injured person’s damages.”¹⁶⁷

The meaning of “several liability” has shifted, however, as the Reporters’ Note on comment (a) explains:

Use of the term “several liability,” to describe the liability of defendants who are only required to pay the plaintiff their proportional share of the plaintiff’s damages is imprecise and potentially confusing. Before the advent of comparative responsibility, “several liability” was employed to describe a defendant who was responsible for all of the plaintiff’s damages but who could not be joined in a suit with any other defendant who may also have been responsible . . . “Several liability” was also employed when damages could be apportioned among concurrent tortfeasors based on their causal contribution to the plaintiff’s injury, thereby rendering each defendant “severally liable” for the portion of the plaintiff’s injury caused by that defendant.¹⁶⁸

The pre-comparative fault concept of several liability differs from the supreme court’s. Holding a severally liable party

165. *Id.* at 74 (quoting BLACK’S LAW DICTIONARY 997–98 (9th ed. 2009)).

166. *Id.*

167. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 11 (AM. LAW INST. 2000).

168. *Id.* cmt. a Reporters’ note (citations omitted).

responsible for the entire damages award to the plaintiff was the usual understanding. Prosser, in the first edition of his treatise on torts, said:

Quite apart from any question of vicarious liability or joinder of defendants, the common law developed a separate principle that a tortfeasor might be liable for the entire loss sustained by the plaintiff, even though his act concurred or combined with that of another wrongdoer to produce the result—or, as the courts have put it, that the defendant is liable for all consequences proximately caused by his wrongful act.¹⁶⁹

The English understanding of the concept was the same:

Where more than one person is concerned in the commission of a wrong, the person wronged has his remedy against all or any one or more of them at his choice. Every wrong-doer is liable for the whole damage, and it does matter . . . whether the acted, as between themselves, as equals, or one of them as agent or servant of another(s).¹⁷⁰

Minnesota Supreme Court decisions are consistent with this understanding of the meaning of several liability. In *Gronquist v. Olson*, for example, the supreme court noted: “Liability in tort is several as well as joint, and this is so, whether the tort-feasors act separately or in conjunction. Each is responsible for the whole, although the injured person may not have more than full satisfaction except as punitive damages.”¹⁷¹

By relying on *Black’s Law Dictionary* and the Restatement (Third) of Torts, the supreme court adopted a meaning of several liability that deviated from its own precedent. In light of the court’s previous analysis, use of the term in the cases would suggest that the legislature would be presumptively aware of that meaning in

169. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 1102 (1941).

170. P.A. LANDON, POLLOCK’S LAW OF TORTS 109 (14th ed. 1939).

171. 242 Minn. 119, 126, 64 N.W.2d 159, 164 (1954) (citation omitted); *see also* *Bartley v. Fritz*, 205 Minn. 192, 196, 285 N.W.2d 484, 486 (1939) (“It is well recognized that when an injury is caused by the concurrent negligence of several, the negligence of each is deemed to be a proximate cause of the injury and each is liable for the resultant damage”); *Flaherty v. N. Pac. Ry. Co.*, 39 Minn. 328, 329, 40 N.W. 160, 160 (1888) (“If the collision was caused directly by the concurrent negligence of both companies, both are responsible.”); *Heartz v. Klinkhammer*, 39 Minn. 488, 490, 40 N.W. 826, 827 (1888) (noting that joint trespassers are severally liable).

adopting the statute. That would be awkward, however, because prior case law was not decided in the context of a statute that used the familiar term, “several liability,” in a different setting. If the legislature was charged with understanding a general common law rule, that “liability” arises at the time a tort is committed, it could also have been charged with knowledge that the common law rule of several liability meant that a party would be liable for the entire judgment to the plaintiff. The court sidestepped the issue by rerouting Minnesota law through *Black’s Law Dictionary*.¹⁷²

In context, however, it seems clear that the legislative intent was to adopt the Restatement meaning of the term, even if that was not the settled meaning in the Minnesota cases. For the 2003 amendment to have its desired effect, the liability of persons had to be limited to the persons’ percentage of fault, subject to the joint and several liability exceptions.

3. *Cleanup*

In the next part of its opinion the court interpreted three additional words and phrases in section 604.02, subdivision 1.¹⁷³ The first was “person.”¹⁷⁴ The statute states that where “two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each.”¹⁷⁵ The issue was whether “person” means a party to the lawsuit.¹⁷⁶ The court discerned no legislative intent to so limit the term, concluding that “a broad interpretation is consistent with the common law principle that several liability is examined at the time the tort is committed.”¹⁷⁷ The court held that the word “persons” includes both parties to the lawsuit and parties to the transaction.¹⁷⁸ While the connection between the issue of when liability arises (at the time the tort is committed) and the definition of the term

172. See *Staab I*, 813 N.W.2d 68, 74 (Minn. 2012).

173. *Id.* at 75–77.

174. *Id.* at 75.

175. MINN. STAT. § 604.02, subdiv. 1 (2014).

176. *Staab I*, 813 N.W.2d at 73–74.

177. *Id.* at 75 (citing BLACK’S LAW DICTIONARY 1257 (9th ed. 2009) (defining “person” as “[a] human being” or “[a]n entity . . . that is recognized by law as having most of the rights and duties of a human being”); AMERICAN HERITAGE DICTIONARY 1310 (4th ed. 2006) (recognizing the legal definition of “person” as “[a] human or organization with legal rights and duties”)).

178. *Id.*

“person” is not readily apparent, the court’s opinion in *Hosley*,¹⁷⁹ which construed the term to include “parties to the transaction,”¹⁸⁰ justifies the result.

Hosley interpreted the loss reallocation provision in section 604.02, subdivision 2,¹⁸¹ to support its position. That section provides for the reallocation of a “party’s” uncollectible share of an obligation.¹⁸² The court in *Hosley* concluded that the term “party” includes “‘a person whose fault has been submitted to the jury,’ or, in other words, ‘parties to the transaction.’”¹⁸³ Following *Hosley*, the court in *Staab I* concluded that the construction of the word “‘party’ in subdivision 2 means all persons who are parties to the tort, regardless of whether they are named in the lawsuit, it logically follows that ‘persons’ in subdivision 1 must also mean all parties to the tort.”¹⁸⁴

The second phrase in section 604.02 that the court construed was that “contributions to awards shall be in proportion to the percentage of fault attributable to each.”¹⁸⁵ Citing section 11 of the Restatement (Third) of Torts: Apportionment of Liability, which limits the right to recover against a severally liable person to only the amount assigned to that person, the court construed the clause to make a severally liable person liable only for the percentage of fault assigned to that person.¹⁸⁶ The court did not read the clause to mean that contribution could be required from a person not a party to the lawsuit because “[n]otably, the statute does not say, ‘When two or more persons are severally liable, *each shall contribute* to the award in proportion to the percentage of fault attributable to

179. *Hosley v. Armstrong Cork Co.*, 383 N.W.2d 289, 293 (Minn. 1986).

180. *Id.* at 293.

181. MINN. STAT. § 604.02, subdiv. 2.

182. *Id.*

183. 383 N.W.2d at 293. *Hosley* was a suit against thirteen asbestos manufacturers of asbestos products to which Hosley was exposed during his work as an insulator. *Id.* at 290. After the suit was filed, two of the defendants in the case, Johns-Manville and Unarco Industries, filed petitions for reorganization under the Bankruptcy Reform Act. *Id.* That Act provides for an automatic stay. *Id.* Accordingly, the Hennepin County District Court stayed the proceedings against those two defendants. *Id.* Upon Hosley’s motion, the district court severed all the claims that had been asserted against Johns-Manville and Unarco. *Id.*

184. *Staab I*, 813 N.W.2d 68, 76 (Minn. 2012).

185. MINN. STAT. § 604.02, subdiv. 1.

186. *Staab I*, 813 N.W.2d at 75–76.

each.”¹⁸⁷ Again, the distinction is not immediately apparent. Even had the legislature specifically stated that each severally liable person shall contribute to the award in proportion to his or her percentage of fault, it still would not obligate a nonparty to contribute to the award, nor could it.

The dissent’s point was that, in order for the language to make sense, two parties who are liable would have to make contributions to awards. If there is only one party, the statute does not apply. It takes at least two parties to have an apportionment of liability, and at least two for the “contributions to awards” language to make sense.

The court also rejected the argument made by the dissent that the clause would be ineffective if a severally liable person not a party to the lawsuit made no contribution. Instead, the court concluded that “[t]he clause would be ineffective . . . if a severally liable person were compelled to contribute out of proportion to his or her percentage of fault.”¹⁸⁸ Of course, not being a party to a lawsuit, the nonparty would not be bound by the judgment.

The third word the court construed was “liability.”¹⁸⁹ The statute provides that “[w]hen two or more persons are severally liable,” the “contributions to awards shall be in proportion to the percentage of fault attributable to each.”¹⁹⁰ The word “liable” is problematic because it suggests that fault may be apportioned only to persons against whom a judgment has been rendered. The court rejected that argument, however, again falling back on its previous *White* analysis in which it concluded that liability exists at the time a tort occurs, rather than at the time of judgment.¹⁹¹

Sometimes statutory construction seems to require pounding square pegs into round holes. That describes the process in *Staab I*. The basic issue was whether the fault of a nonparty, who could have been joined by either the plaintiff or the single defendant in the suit, should be considered in the allocation of fault and, if so, whether it would count in establishing the liability of the sole defendant to the suit.¹⁹² As a general proposition, it seems clear that after years of whittling away at joint and several liability, the

187. *Id.*

188. *Id.* at 76.

189. *Id.*

190. MINN. STAT. § 604.02, subdiv. 1 (emphasis added).

191. *Staab I*, 813 N.W.2d at 76.

192. *Id.* at 72.

legislature adopted several liability as the default rule, and that the meaning of several liability was that each party should be held responsible for its fair share of a judgment.

The problem is that the statutory language seems to frustrate that conclusion. The statute seems to contemplate that, in order to make the several liability determination, the fault in a case has to be assigned to “two or more persons” who “are severally liable.”¹⁹³ The statute states that “contributions to awards shall be in proportion to the percentage of fault attributable to each [person],” absent application of one of the four exceptions where joint and several liability continues to apply, as in cases where a person is more than 50% at fault.¹⁹⁴

The court avoided the problem by concluding that liability exists independently of a tortfeasor’s participation in a lawsuit, and it exists independently of any obligation to contribute to a judgment.¹⁹⁵ That takes care of the problem. Persons (including nonparties) can be severally liable absent their joinder and absent any judgment against them. It resolves the problem, but not without bending precedent to support the conclusion.

Having dug deeply into Minnesota case law to find the answer of when liability arises, the court then relied on *Black’s Law Dictionary* to find the meaning of several liability, which means proportionate liability, rather than digging deeply into Minnesota case law to find the answer, which would have prompted a distinctly different and inconvenient conclusion on the issue.

The main points of *Staab I* are:

1. Liability does not arise at the time of judgment. Rather, it arises at the moment the tort is committed. That takes care of the issue of whether a person has to be “liable” for the statute to apply.¹⁹⁶
2. “Person” includes all parties to the transaction, so fault can be assigned to anyone whose fault contributed to the injury,¹⁹⁷ even if that person is not a party to the litigation.

193. *Id.* at 73.

194. *Id.* (citing MINN. STAT. § 604.02, subdiv. 1).

195. *Id.* at 77.

196. *Id.*

197. *Id.* at 76–77.

3. “Liability” exists independently of a party’s participation in a lawsuit.¹⁹⁸

So, there can be several liability (or joint and several liability) even where the swing factor is the fault of a nonparty (who is really a party to the transaction that led to the lawsuit) who is liable (even though not a party to the suit, and even though there is no judgment against that nonparty).

4. *An Alternative Construction?*

After that detailed analysis, the court concluded that there is an alternative interpretation of the statute, which is that the issue of when two or more persons are severally liable is determined at the time of the judgment.¹⁹⁹ That was the dissent’s basic position.²⁰⁰ The court painted the window shut on that interpretation, however, in stating that “[t]he predicate to this proposed interpretation is that the Legislature modified the common law rule that several liability is created at the moment the tort is committed.”²⁰¹ Of course, starting with that proposition immediately dooms the alternative construction.

The court noted the legislative intent to limit joint and several liability through a string of amendments, continuously limiting its reach.

In order to give effect to this intent, the statute must be interpreted to apply in all circumstances in which a person would otherwise be jointly and severally liable at common law, and a person is liable at common law at the moment the tort is committed, not as a result of a judgment. This interpretation is consistent with the common law and limits the application of joint and several liability to those circumstances that are explicitly specified in the statute.²⁰²

Even if that concept is rejected, however, there is support for the proposition that the fault of nonparties should be considered.

Viewed through the prism of the long history of legislative amendments and judicial interpretations of the comparative

198. *Id.* at 77.

199. *Id.*

200. *Id.* at 85.

201. *Id.* at 77.

202. *Id.* at 78.

negligence and fault statutes,²⁰³ the issue of whether the fault of nonparties should be considered in the apportionment of fault

203. The long history of comparative fault in Minnesota has been one of creative judicial solutions to a series of problems that were either not directly addressed by the legislation or, if they were, in a way that left gaps between the apparent legislative intent and the path the legislature took to effectuate that intent.

In two of the cases, the supreme court construed the comparative negligence statute to apply to claims that were not based on negligence. In *Busch v. Busch Construction, Inc.*, 262 N.W.2d 377, 395 (Minn. 1977), the supreme court applied the comparative negligence statute to claims for strict products liability, even though the comparative negligence statute at the time was limited to the comparison of negligence. *Id.* The court followed the Wisconsin Supreme Court's decision in *Dippel v. Sciano*, 155 N.W.2d 55, 64 (Wis. 1967), in which that court applied its comparative negligence statute to strict liability claims. *Busch*, 262 N.W.2d at 393. The case was made easier because the court followed *Marier v. Memorial Rescue Service, Inc.*, 296 Minn. 242, 244–45, 207 N.W.2d 706, 708 (1973) (requiring individual rather than aggregate comparisons of negligence), in which the court held that an adoption of the comparative negligence statute presumed adoption of the Wisconsin Supreme Court's interpretations of its comparative negligence statute up to that point. *Id.*

Following *Busch*, the court in *Jones v. Fisher*, 309 N.W.2d 726, 733 (Minn. 1981), applied comparative fault principles to alcohol-related claims, one based on a violation of the Civil Damage Act and one based on the then-permissible claim for negligence arising out of the sale of 3.2 beer. *Jones*, 309 N.W.2d at 733. Jones, who had been drinking at an American Legion and VFW bars, and also at a 3.2 tavern, was struck and killed by a car driven by Kortuem and owned by Gallagher. *Id.* at 727. He was survived by his wife and two children. *Id.* His wife, as trustee, brought a wrongful death action against the owner and driver of the car. *Id.* That case settled. *Id.* Mrs. Jones and her two children then brought a dram shop suit against the two bars and a common law action against Fisher, the 3.2 beer vendor, an action that was at the time permitted under the supreme court's decision in *Trail v. Christian*, 298 Minn. 101, 213 N.W.2d 618 (1973). *Id.* One of the issues on appeal was whether Kortuem and Gallagher could assert a third-party claim for contribution against either the dram shop defendants or the 3.2 beer seller. *Id.* at 728. The supreme court held that the contribution claim could be asserted against both defendants. *Id.* at 733. To arrive at that result, the court had to permit the assertion by Mrs. Jones and her two children for loss of means of support under the 3.2 common law action, and then justify the right of contribution against two defendants who were on theories other than negligence. *Id.* at 728. The dram shop and 3.2 defendants argued that there was no common liability between them and the wrongful death defendants, whose liability ran to Mr. Jones and not his spouse. *Id.* at 729. The court rejected the argument, concluding that “[s]ince all defendants are liable to decedent’s spouse either in her capacity as trustee or individually, the common liability requirement is satisfied.” *Id.* The court permitted allocation of fault based on comparative fault principles, even though the Civil Damage Act at the time did not provide for the application of

comparative fault principles to those claims. *Id.* at 731. The court recognized that the case arose prior to the amendment of the Civil Damage Act requiring allocation pursuant to the comparative negligence statute, but concluded “that it is appropriate to apply comparative fault concepts in the same manner as we did in [*Busch*].” *Id.* at 731.

In *Rambaum v. Swisher*, 435 N.W.2d 19 (Minn. 1989), the supreme court was faced with a conflict between subdivision 5 of section 604.01 of the Comparative Fault Act and the mandate of a *Pierringer* release. *Id.* at 20. The nonsettling defendant in the case wanted a pro tanto reduction of his damages by the amount of the settlement between the plaintiff and the defendant, which subdivision 5 seemed to mandate, but the *Pierringer* release provided that the nonsettling defendant would be held liable for the percentage of fault assigned to him by the jury. *Id.* at 22–23. The court recognized that the acceptance of the *Pierringer* release in *Frey v. Snelgrove*, 269 N.W.2d 918 (Minn. 1978), occurred after the adoption of the comparative negligence statute, but nonetheless read the statute to exclude *Pierringer* releases:

We hold, therefore, that the term “payments” as used in [Minnesota Statutes section 604.01, subdivision 5], with respect to *Pierringer* settlements, refers only to payment for that portion of plaintiff’s damages representing the settling defendant’s share of the liability.

The settlement payment does not extend to any further portion of plaintiff’s award. In this case, only O’Neill’s 10 percent share of the award is to be deducted from plaintiff’s award.

Id. at 23.

In the *Lambertson v. Cincinnati Welding Corp.*, 312 Minn. 114, 124, 257 N.W.2d 679, 686 (1977) line of decisions, the supreme court used the comparative negligence statute’s framework to solve one of the problems involved when it held that employers could be subject to liability on contribution claims by third parties. *Id.* While concluding that the comparative negligence and fault statutes did not apply directly, the court used the statutory framework for purposes of apportioning fault to the parties involved in the suit in order to establish the extent of the employer’s contribution liability. *Id.* In *Hudson v. Snyder Body, Inc.*, 326 N.W.2d 149, 158 (Minn. 1982), the supreme court held that “a third-party tortfeasor may recover contribution from a negligent employer under the principles of *Lambertson* and *Johnson* whether or not the employee, in a direct suit, would have been barred from recovery under the comparative-fault statute.” *Id.* In *Florenzano v. Olson*, 387 N.W.2d 168, 176 (Minn. 1986), the supreme court applied comparative fault principles in a case involving a claim for economic loss arising out of negligent misrepresentation, even though the statute at the time covered only claims for personal injury, death, or property damage. *Id.* The Comparative Fault Act was later amended to catch up to *Florenzano* and include claims for economic loss. See MINN. STAT. § 604.01, subdiv. 1 (Supp. 2015).

These decisions dealt with problems that were not directly addressed in the comparative negligence and fault statutes. The problem of determining what theories of recovery are subject to comparison, what damages claims, and how employer liability should be treated illustrate adaptation of the statute to reach fair results in the face of statutory deficiencies. Of course, another reading might

becomes easy. The overriding goal of statutory interpretation is “to ascertain and effectuate the intention of the legislature.”²⁰⁴ The specified factors in the basic canon suggest a holistic approach to statutory construction, in attempting to determine the legislative intent.²⁰⁵

Given the fluidity of the statutory construction endeavor, there are different roads to follow in cases where the legislature appears to have a clear purpose in enacting a statute, but uses language that actually frustrates realization of that purpose. The court’s solution to the problem presented in *Staab I* seems to fit, but not without some tap-dancing around definitional problems in the statute, including the show-stopping use of the concept that liability arises when a tort is committed, rather than when one is actually found liable.

The consideration of the fault of nonparties in *Hosley*,²⁰⁶ *Lines*,²⁰⁷ and *Frey*²⁰⁸ could be used as a platform for concluding that

simply be that the court ignored the statutory language to achieve an equitable result in those cases, and that the deficiencies should have been a matter for the legislature to correct.

At base, comparative fault raises numerous issues, not all of which a legislature could have been expected to grasp in drafting a statute with such broad implications in tort litigation. If the statute is viewed as a framework to be judicially completed, the results may be justifiable.

204. MINN. STAT. § 645.16 (2014).

205. *See id.* Section 645.16 reads as follows:

The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. Every law shall be construed, if possible, to give effect to all its provisions.

When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.

When the words of a law are not explicit, the intention of the legislature may be ascertained by considering, among other matters:

- (1) the occasion and necessity for the law;
- (2) the circumstances under which it was enacted;
- (3) the mischief to be remedied;
- (4) the object to be attained;
- (5) the former law, if any, including other laws upon the same or similar subjects;
- (6) the consequences of a particular interpretation;
- (7) the contemporaneous legislative history; and
- (8) legislative and administrative interpretations of the statute.

Id.

206. *Hosley v. Armstrong Cork Co.*, 383 N.W.2d 289 (Minn. 1986).

the fault of certain identified parties should be considered in the allocation of fault. Imputed legislative awareness of those decisions could readily lead to the conclusion that it knew that the fault of nonparties would continue to be relevant in fault allocation, and that to have an accurate headcount for purposes of fault allocation the fault of nonparties would have to be considered, even if they are not actually parties to the litigation.

Most importantly, in cases where there is ambiguity, construing the statute in a way that harmonizes subdivisions 1 and 2 of section 604.02 is perhaps the strongest argument for considering the fault of nonparties. The second *Staab* decision establishes the supporting rationale.

B. *Staab II*

In *Staab v. Diocese of St. Cloud (Staab II)*,²⁰⁹ the Minnesota Supreme Court resolved the lingering question left after its first decision in the case when it held that the fault allocated to the nonparty could not be reallocated to the only at-fault party in the lawsuit.

Section 604.02, subdivision 2 of the Comparative Fault Act provides for reallocation in certain cases where a share of an obligation is uncollectible:

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.²¹⁰

Any party may move for reallocation where "all or part of a party's equitable share of the obligation is uncollectible"²¹¹ The uncollectible share must be reallocated to the remaining parties "according to their respective percentages of fault."²¹²

207. *Lines v. Ryan*, 272 N.W.2d 896 (Minn. 1978).

208. *Frey v. Snelgrove*, 269 N.W.2d 918 (Minn. 1978).

209. 853 N.W.2d 713, 722 (Minn. 2014).

210. MINN. STAT. § 604.02, subdiv. 2.

211. *Id.*

212. *Id.*

To illustrate the typical operation of the statute, assume that a plaintiff brings suit against two defendants (D1 and D2), that both defendants are found to be liable to the plaintiff, and that the plaintiff is found to be contributorily negligent. Assume that the jury apportions 20% of the fault to the plaintiff, 20% to D1, 60% to D2, and sets the damages at \$100,000. Also assume that D1 is unable to pay its fair share of the judgment. D2, whose fault is greater than 50%, is jointly and severally liable to the plaintiff and would be required to pay the plaintiff 80% of the plaintiff's damages (\$100,000, less plaintiff's 20%). D2 would seek to reallocate D1's uncollectible share of the damages (\$20,000), in part to the plaintiff. Because D2's equitable share of the obligation has to be reallocated to the plaintiff and D2 according to their respective percentages of fault, the plaintiff would absorb one-fourth (20/80) of the uncollectible amount (\$5,000) and D2 three-fourths (60/80) of the uncollectible amount (\$15,000). Both parties would have continuing contribution claims against D2.

Staab II involved a different situation for two reasons. There was only one defendant who was a party to the suit.²¹³ The plaintiff's husband was not a party, but *Staab I* requires allocation of fault to parties to the transaction, so even though the husband's chair was empty, fault had to be allocated to him when the jury found him to be causally negligent in causing his wife's injuries.²¹⁴ The second difference from the hypothetical is that the only defendant in the suit, the Diocese of St. Cloud, was found to be 50% at fault and was, therefore, not jointly and severally liable.²¹⁵

That means that the reallocation statute has to be read against section 604.02, subdivision 1, which makes several liability the default rule, subject to limited exceptions where a defendant or defendants will be jointly and severally liable. In *Staab I*, the Diocese could not be jointly and severally liable because its fault was not greater than 50% and none of the other exceptions applied.²¹⁶

As the court noted in *Staab II*, there are two potential constructions of the loss reallocation provision. One interpretation, reconciling the loss reallocation rule with the default rule of several liability, would not allow the loss reallocation rule to override the

213. *Staab II*, 853 N.W.2d at 715.

214. *Staab I*, 813 N.W.2d at 80.

215. *Id.*

216. *Id.*

default rule of several liability in subdivision 1 of section 604.02.²¹⁷ The other would, based on the text of the reallocation provision.²¹⁸ That was the subject of the disagreement between the majority and dissenting opinions in *Staab II*. The essential problem in construing the statute is in finding breathing room for the loss reallocation provision when the rule of joint and several liability is no longer the default rule, as it was when the loss reallocation provision was added to the Comparative Fault Act in 1978.²¹⁹ When all defendants found to be at fault were jointly and severally liable, the new loss reallocation rule, which included any at-fault plaintiff in the reallocation equation if a defendant (or defendants) was unable to pay its fair share of the judgment, was a middle position between full retention of the rule of joint and several liability and a rule of pure several liability.

The erosion of the rule of joint and several liability continued when the legislature adopted percentage cutoffs that made certain defendants liable for only a certain multiple of their fair shares,²²⁰ but the statute at issue in *Staab II* was the 2003 amendment, which clearly made several liability the default rule.²²¹

Again, the court began its analysis of the statute with the basic proposition that “[t]he goal of statutory interpretation is to effectuate the intent of the Legislature.”²²² “If the Legislature’s intent is clear from the unambiguous language of the statute,” the court applies “the statute according to its plain meaning.”²²³ Judicial

217. *Staab II*, 853 N.W.2d at 722.

218. *Id.* at 725–26 (Lillehaug, J., dissenting).

219. *Id.* at 719.

220. Michael K. Steenson & Peter B. Knapp, *Two or More Defendants (Joint and Several Liability, Several Liability, or Independent Liability)*, in 4 MINN. PRAC. SERIES, CIVJIG no. 15.15 (6th ed. 2015) (“The common law rule of joint and several liability was modified several times by the legislature through the adoption of a loss reallocation rule and cutoffs limiting the liability of defendants whose fault fell below a certain percentage of fault.”).

221. *Staab II*, 853 N.W.2d at 718–19 (“The current text of subdivision 1 was enacted in 2003. . . . By adopting this amendment, the Legislature ‘inten[ded] to limit joint and several liability to the four circumstances enumerated in the exception clause, and to apply the rule of several liability in all other circumstances.’” (citing *Staab I*, 813 N.W.2d 68, 78 (Minn. 2012))).

222. *Id.* at 716. Supporting its proposition, the court first cited *Brayton v. Pawlenty*, 781 N.W.2d 357, 363 (Minn. 2010), and then referenced Minnesota Statutes section 645.16. *Id.*

223. *Id.* at 716–17 (citing *State v. Rick*, 835 N.W.2d 478, 482 (Minn. 2013)).

constructions of a statute become an integral part of the statute,²²⁴ “[b]ut if [the] statute is susceptible to more than one reasonable interpretation, the statute is ambiguous,” and the court will look to “other factors to ascertain the Legislature’s intent.”²²⁵

The court determined that permitting reallocation to a severally liable party under section 604.02, subdivision 1 would violate two canons of statutory construction.²²⁶ First, it “would violate the principle that a statute must be construed in a manner that gives effect to each of its provisions.”²²⁷ Increasing the liability of a severally liable party via reallocation would render ineffective the language in section 604.01, subdivision 1, stating that contributions to awards should be made in proportion to the percentage of fault assigned to that defendant (absent a finding of joint and several liability under one of the statutory exceptions in subdivision 1).²²⁸ Second, it “would be inconsistent with [another] canon of statutory construction ‘*expressio unius est exclusio alterius*’—the expression of one thing is the exclusion of another.”²²⁹ Permitting reallocation would result in an interpretation of subdivision 2 that would in effect create a fifth exception to the rule of several liability.²³⁰

The court also concluded that the legislative history of the 2003 amendment supported its conclusion.²³¹ The original purpose of the loss reallocation provision was to allow a jointly and severally liable party to shift part of the loss, due to the uncollectibility of a party who was unable to pay his or her fair share of a judgment, to

224. *Id.* at 717 (“Judicial construction of a statute becomes part of the statute as though it were written therein.” (citing *Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 836 (Minn. 2012))).

225. *Id.* (citing *Lietz v. N. States Power Co.*, 718 N.W.2d 865, 870 (Minn. 2006)).

226. *Id.* at 718.

227. *Id.*

228. MINN. STAT. § 604.02, subdiv. 1 (“When two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that the following persons are jointly and severally liable for the whole award . . .”).

229. *Staab II*, 853 N.W.2d at 718 (emphasis added).

230. *Id.* at 719 (“The fact that one liable party is insolvent or cannot be collected from for other reasons is not one of the four exceptions in subdivision 1 to which joint and several liability still applies. Yet that would be the practical effect of permitting reallocation to severally liable parties under subdivision 2.”).

231. *Id.* at 718–21.

other parties, including the plaintiff.²³² The legislature has been consistent in moving toward greater restrictions of the rule of joint and several liability since 1978, while the loss reallocation rule has remained unchanged.²³³ The adoption of the rule of several liability as the default rule effectively limited the role of the loss reallocation provision.²³⁴

Putting together the canons of statutory construction, the legislative history, and the purpose of section 604.02, subdivision 2, the court held “that under [section 604.02, subdivision 2], an uncollectible portion of a party’s equitable share of damages cannot be reallocated to a party that is only severally liable under [subdivision 1].”²³⁵

The result is reminiscent of John Simonett’s observation that “everyone knows a statute does not mean what it says until a court says it means what it says.”²³⁶ We now know that several liability means several liability and that the fault of non-parties may be considered in the allocation of fault. The issue is whose fault should be included in the allocation question.

IV. WHOSE FAULT IS APPORTIONED?

The Minnesota cases establish that the fault of certain nonparties may be considered in the allocation of fault. The Minnesota cases are devoid of any policy analysis on the issue of why the fault of nonparties should be considered and under what circumstances. Only by implication, considering the court’s reference to *Connar*²³⁷ in *Frey*²³⁸ and *Lines*,²³⁹ is there a suggestion that the fault of all persons who contributed to the accident must

232. *Id.* (“[W]hen subdivision 2 was enacted, it was a mechanism to limit the amount of damages that a jointly liable defendant could be required to pay. . . . [A] jointly liable defendant could petition the district court to reallocate an uncollectible portion of damages among all potentially liable parties, including the plaintiff.” (citing Michael K. Steenson, *Joint and Several Liability Minnesota Style*, 15 WM. MITCHELL L. REV. 969, 976 (1989))).

233. *Id.* at 720.

234. *See infra* Part V.

235. *Staab II*, 853 N.W.2d at 721.

236. John E. Simonett, *The Footnote as Excursion and Diversion*, 55 A.B.A.J. 1141, 1141 (1969).

237. *Connar v. W. Shore Equip. of Milwaukee, Inc.*, 227 N.W.2d 660, 662 (Wis. 1975).

238. *Frey v. Snelgrove*, 269 N.W.2d 918, 923 (Minn. 1978).

239. *Lines v. Ryan*, 272 N.W.2d 896, 902–03 (Minn. 1978).

be submitted to the trier of fact in order to achieve a fair apportionment of fault.

A. *The Policy of Including Nonparties in the Allocation of Fault*

Whether or not to include nonparties in the allocation of fault is a question of fairness, but fairness is a relative and nuanced concept. From the plaintiff's perspective, fairness might dictate apportioning fault only to parties to the suit. With Minnesota's comparative fault allocation rules, the plaintiff is already at a disadvantage because of individual comparisons of fault, and if a defendant is concerned that there are other potentially responsible persons, the defendant can join those persons in the litigation. On the other hand, there may be cases where a nonparty is not subject to suit. That will occur in a variety of cases, including, for example, cases where a person or entity is immune from liability, or where a statute of limitations has run.²⁴⁰

240. The issue of whether and under what circumstances the fault of a nonparty should be considered has been the subject of numerous articles. See generally David C. Anderson & Monika L. Sullivan, *Ten Tips for Navigating Michigan's Notice of Nonparty at Fault Requirements*, 90 MICH. B.J. 22 (2011); William D. Cleaveland, *The Empty Chair Game: Is the Price More Than We Should Pay?*, ARIZ. ATT'Y, Jan. 1997, at 16; Brian P. Dunigan & Jerry J. Phillips, *Comparative Fault in Tennessee: Where Are We Going, and Why Are We in This Handbasket?*, 67 TENN. L. REV. 765 (2000); Neal F. Eggeson, *The Return of the Anonymous Nonparty: Why Hasn't Anyone Noticed?*, RES GESTAE, June 2006, at 11; Mark M. Hager, *What's (Not!) in a Restatement? ALI Issue-Dodging on Liability Apportionment*, 33 CONN. L. REV. 77 (2000); Nancy C. Marcusal, *Phantom Parties and Other Practical Problems with the Attempted Abolition of Joint and Several Liability*, 60 ARK. L. REV. 437 (2007); Joshua D. Shaw, *Limited Joint and Several Liability Under Section 15-38-15: Application of the Rule and the Special Problem Posed by Nonparty Fault*, 58 S.C. L. REV. 627 (2007); Mark Siegel & H. Michael Wright, *The Nonparty at Fault Defense, the Squirrel, the Phantom and Everybody Else But Me*, ARIZ. ATT'Y, Jan. 1992, at 23; David C. Sobelsohn, *Comparing Fault*, 60 IND. L.J. 413, 445-57 (1985); Stephen B. White & David J. Abney, *Phantom Nonparties at Fault, Problems in Apportioning Degrees of Fault*, ARIZ. ATT'Y, June 1992, at 15; Joseph Bean, Comment, *Torts—Carroll v. Whitney: The Tennessee Supreme Court Permits Juries to Allocate Fault to Immune Nonparties in Negligence Actions*, 32 U. MEM. L. REV. 179 (2001); Jonathan Cardi, Note, *Apportioning Responsibility to Immune Nonparties: An Argument Based on Comparative Responsibility and the Proposed Restatement (Third) of Torts*, 82 IOWA L. REV. 1293 (1997); Nancy A. Costello, Note, *Allocating Fault to the Empty Chair: Tort Reform or Deform?*, 76 U. DET. MERCY L. REV. 571 (1999); Daniel Levi, Note, *A Comparison of Comparative Negligence Statutes: Jury Allocation of Fault—Do Defendants Risk Paying for the Fault of Nonparty Tortfeasors?*, 76 WASH. U. L.Q. 407 (1998).

The uniform acts covering comparative fault and the Restatement (Third) of Torts: Apportionment of Liability take different positions on the issue, based on varying views of the underlying policies.

The Uniform Comparative Fault Act,²⁴¹ and the Uniform Apportionment of Tort Responsibility Act²⁴² which replaced it, limited the allocation of fault to parties to the lawsuit with the exception of settling parties. The Uniform Comparative Fault Act is a pure comparative fault act.²⁴³ The Uniform Apportionment of Tort Responsibility Act is a modified comparative fault act with aggregate comparisons of fault.²⁴⁴ A plaintiff would be barred from recovery only if the plaintiff's fault is equal to or greater than the aggregate fault of the defendants.²⁴⁵ The Act imposes several liability with limited exceptions for joint and several liability.²⁴⁶ It also provides for reallocation of amounts uncollectible from a severally liable party to all other parties, including the plaintiff and any settling parties.²⁴⁷

A preliminary draft of the Uniform Apportionment of Tort Responsibility Act provided for the consideration of a "nonparty at fault," but that position was rejected because of the inherent problems involved in determining whose fault would be considered:

First, who is it that should qualify as a "nonparty at fault"? Anyone over whom the court lacks jurisdiction? Or, does it matter that jurisdiction is lacking because the person is, for example, a foreign diplomat or an immune governmental or other entity, as compared to someone upon whom service cannot be perfected because the person is out of the country or whose location is unknown? Second, to qualify as a "nonparty at fault", does the person have to be identifiable and, if so, in what manner or particulars? Third, it was also thought that the absence, and nonparticipation, of such a person tended to skew the trial process unfairly. Finally, it was noted that

241. UNIF. COMPARATIVE FAULT ACT § 4(b), 12 U.L.A. 142 (2008).

242. UNIF. APPORTIONMENT OF TORT RESPONSIBILITY ACT § 3, 12 U.L.A. 14 (2008).

243. UNIF. COMPARATIVE FAULT ACT § 2, 12 U.L.A. 135–36.

244. UNIF. APPORTIONMENT OF TORT RESPONSIBILITY ACT § 3(b), 12 U.L.A. 14.

245. *Id.*

246. *Id.* § 6(a).

247. *Id.* § 5.

a defendant always has the right to seek contribution from any legally responsible person whose fault also contributed to the claimant's injury or harm and that this right, in most cases, will permit a defendant to join someone who was not already a defendant. If joinder is not possible, a defendant who is held responsible may subsequently pursue an absent tortfeasor in a separate action.²⁴⁸

Those problems led to a limitation of the fault to only the parties to the litigation. A party is someone who has been sued and is a party to the lawsuit, not "someone who merely was involved in the accident that led to the lawsuit."²⁴⁹

The Restatement (Third) of Torts: Apportionment of Liability takes a different position on whose fault is subject to allocation, depending on the type of comparative fault involved.²⁵⁰ Given the variations in state comparative negligence and fault statutes, stating a single rule for the allocation of fault applicable to all of those variations would be difficult. Instead, the Restatement breaks down the standards for the allocation of fault according to comparative fault type.²⁵¹ The Restatement includes a range of "tracks," from pure joint and several liability, to joint and several liability with loss reallocation, to hybrid liability based on a threshold percentage of comparative fault, to hybrid liability based on the type of damages.²⁵² No matter what type of comparative fault track is considered, however, there is an exception for persons engaged in concerted action.²⁵³

To understand how the Restatement works, it is helpful to delineate the persons whose fault is potentially subject to consideration before pointing out how each is treated under the

248. *Id.* note (2003).

249. *Id.*

250. *See generally* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. (AM LAW INST. 2000).

251. *Id.* §§ 12–15.

252. *Id.* §§ D18 cmt. D, A18, C21, D19.

253. Restatement (Third) of Torts: Apportionment of Liability section 15 states "[w]hen persons are liable because they acted in concert, all persons are jointly and severally liable for the share of comparative responsibility assigned to each person engaged in concerted activity." *Id.* § 15. Comment a notes that "joint and several liability for persons engaged in concerted action applies regardless of the rule regarding joint and several or several liability for independent negligent tortfeasors in the jurisdiction." *Id.* § 15, cmt. a.

varied tracks. The key terms are “party,” “identified person,” “immune person,” and “settling tortfeasor.”

“Party” means “those who have been joined as a party in the lawsuit,” including “plaintiffs, defendants, third-party defendants, intervenors, and other named parties.”²⁵⁴ An “identified person” is “a person who has been sufficiently identified to permit service of process or discovery from that person.”²⁵⁵ A “settling tortfeasor” is defined as “a potentially liable tortfeasor who is released from liability to the plaintiff by the settlement.”²⁵⁶

“Immune persons” is a broad grouping that includes persons who are not liable because a statute of limitations has run, persons whose liability is limited because of a damages cap, and governmental entities who are immune from liability.²⁵⁷ In the latter case the Restatement excludes from consideration the fault of governmental entities where the immunity is a proxy for a no-duty conclusion.²⁵⁸

Where the rule of joint and several liability applies, only the fault of “parties” and “settling tortfeasors” is submitted to the trier of fact.²⁵⁹ The rationale is that the burden of identifying and suing other liable parties should be on those who are jointly and severally liable.²⁶⁰ The fault of other nonparties is not submitted to the factfinder.²⁶¹ Defendants usually can join nonparties, and the plaintiff may sue all potentially liable persons, but the plaintiff is not required to do so.²⁶²

In pure several liability jurisdictions, on the other hand, the Restatement rule provides for consideration of a broader grouping of persons in the allocation of fault, including parties, settling tortfeasors, and identified persons.²⁶³ The rationale is that because a severally liable defendant’s liability is limited to its percentage of fault, the burden of joining additional parties shifts to the plaintiff.²⁶⁴

254. *Id.* § A19 cmt. b.

255. *Id.* § B19 cmt. b.

256. *Id.* § 24 cmt. c.

257. *Id.* § B19 cmt. e.

258. *Id.*

259. *Id.* § A19 cmt. d.

260. *Id.* § A19 cmt. d.

261. *Id.*

262. *Id.*

263. *Id.* § B19.

264. *Id.* § B19 cmt. d.

A third track covers cases where joint and several liability is coupled with loss reallocation. In cases where a judgment of contribution cannot be fully collected from another defendant, the uncollectible portion of the damages is reallocated to all other parties, including the plaintiff, in proportion to the percentages of fault assigned to the other parties.²⁶⁵ The rule requires allocation of fault to parties, which covers only “those who have been joined as a party in the lawsuit.”²⁶⁶ It includes “plaintiffs, defendants, third-party defendants, intervenors, and other named parties.”²⁶⁷ It also includes settling tortfeasors and employers where the employer is subject to liability on a contribution claim or where the employer’s comparative responsibility reduces the plaintiff’s damages.²⁶⁸ The rule does not permit the assignment of fault to immune persons.²⁶⁹ The rationale is that

[o]mitting immune persons does not place the financial burden of the immune person’s legal responsibility necessarily on either plaintiffs or defendants. Comparative responsibility that would have been assigned to an immune person will necessarily (since the factfinder must still distribute 100 percent of responsibility) be apportioned among the remaining parties in the case. The immune nonparty’s share of comparative responsibility may not be assigned to (and borne by) the parties in the same proportion as would have occurred if the factfinder assigned comparative responsibility to the immune person and that share were then reallocated²⁷⁰

The omission of immune persons from consideration could result in an increase of the plaintiff’s percentage of fault and, in a modified comparative fault jurisdiction, bar the plaintiff from recovery; however, the Restatement notes that omission of immune persons from consideration will not avoid that impact.²⁷¹

Yet another track applies to cases where there may be both joint and severally liable defendants and severally liable defendants. In cases where it is clear that the parties to a suit may be only jointly

265. *Id.* § C21.

266. *Id.* § C19 cmt. c.

267. *Id.*

268. *Id.* § C20.

269. *Id.* § C19 cmt. e.

270. *Id.*

271. *Id.*

and severally liable, the same rules apply as under the pure joint and several liability rule.²⁷² Because it will not be generally known whether a party, or parties, will be severally liable only, the same rules for the treatment of immune persons apply as in the pure several liability cases where one or more defendants are severally liable.²⁷³

Minnesota's Comparative Fault Act²⁷⁴ is an amalgam of three of the Restatement tracks. It has a system with a default rule of several liability, but with limited joint and several liability exceptions, one of which imposes joint and several liability on a party whose fault is greater than 50%.²⁷⁵ It also has a loss reallocation provision, which is still viable, in addition to a special loss reallocation provision that applies in certain products liability cases.²⁷⁶

The relevant Restatement tracks could justify differing results as applied to Minnesota. The default rule of several liability suggests consideration of nonparties, including identified persons, which would include certain immune persons. Even with the joint and several liability exception and a loss reallocation rule, the possibility that any party to a suit may be held only severally liable points as a matter of policy toward a broader inclusion of identified persons, beyond parties to the suit. While there is a possibility that parties could be jointly and severally liable, that will ordinarily not be determinable in advance of litigation. And, while a defendant may have the ability to join a nonparty, that will not be the case if the nonparty is immune from liability, which leads back to the basic position on several liability. That policy is to include identified persons, including certain immune persons, in the allocation of fault.

That policy is disputable, of course. Several liability is intended to achieve fair treatment of tortfeasors,²⁷⁷ but it does so at the expense of injured persons whose chances for a full recovery are diminished by the consideration of the fault of multiple persons.²⁷⁸

272. *See id.* § D19(b).

273. *Id.* § D19(b) cmt. h.

274. MINN. STAT. § 604.01.

275. *Id.* § 604.02, subdiv. 1(1).

276. *Id.* § 604.02, subdivs. 2–3.

277. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. §§ B19 cmt. d, D19 cmt. j.

278. Hager, *supra* note 240, at 104. Professor Hager notes Professor Wright's characterization of the result as a "tortfest" in which "[t]he more defendants there

There is also the concern, expressed in the Uniform Comparative Fault Act, that ensuring full litigation of tortfeasors' fault justifies limiting the allocation of fault to those who are parties to the suit.²⁷⁹

Minnesota's rule as of 1978 was joint and several liability with loss reallocation. The Restatement track on joint and several liability permits consideration of the fault of only parties to the litigation, along with the fault of settling defendants and employers who are subject to liability on contribution claims.²⁸⁰ It would not permit consideration of the fault of identified persons, including persons immune from liability. Minnesota cases certainly suggested a more expansive rule than the Restatement's, however, even before the 2003 amendment. In *Staab I*, the Minnesota Supreme Court carried the rule forward in considering the fault of a nonparty in its interpretation of the 2003 amendment. Minnesota's position is consistent with the Restatement track on pure several liability, but at this point the Restatement position is broader simply because the Minnesota courts have not had occasion to consider some of the nonparties who are included in the Restatement's apportionment of fault.

B. *Fault Allocation in Minnesota*

The Restatement tracks permitting the consideration of the fault of nonparties in several liability cases includes "identified persons,"²⁸¹ which includes a variety of persons who are not parties to the litigation. This section breaks down in more detail the persons whose fault might potentially be subject to comparison under Minnesota law.

Under current Minnesota law, the fault of a nonparty may be submitted in cases involving a party who is dismissed from litigation pursuant to a *Pierringer* release, where a party is identified and not joined (including the *Staab* facts), and where a party is dismissed because of bankruptcy proceedings (*Hosley*). There are other cases

were, or the worse they behaved, the less individual responsibility each defendant would bear for the injury, even though her tortious behavior remained constant and was an actual and proximate cause of the entire injury." *Id.* at 103; Richard W. Wright, *The Logic and Fairness of Joint and Several Liability*, 23 MEM. ST. U. L. REV. 45, 59 (1992).

279. UNIF. COMPARATIVE FAULT ACT § 1 cmt., 12 U.L.A. 125 (2008).

280. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § B19 cmt. c.

281. *Id.* § B19 cmt. b.

yet to be resolved, including where a statute of limitations has run on a claim against a person, where a person is not subject to jurisdiction in Minnesota, or where a person or entity is immune from liability.

1. *Parties Released Pursuant to Settlement*

In *Frey v. Snelgrove*,²⁸² the supreme court followed Wisconsin law in holding that the fault of defendants who have entered into a *Pierringer* release should, in almost every case, be submitted to the jury.²⁸³ The court said that “[i]f there is ‘evidence of conduct which, if believed by the jury, would constitute negligence (or fault) on the part of the person . . . inquired about,’ the fault or negligence of that party should be submitted to the jury.”²⁸⁴

If a *Pierringer* release is executed, any possibility of joint and several liability between the settling and nonsettling defendants is severed.²⁸⁵ The remaining parties are held liable only for their percentages of fault.²⁸⁶ Of course, the nonsettling defendants could be held jointly and severally liable for their combined percentages of fault, assuming that one of the statutory exceptions is applicable.

2. *Identified Persons*

The term “identified person” in the Restatement includes a variety of persons whose fault will be included in the apportionment of fault.²⁸⁷ The term is used more narrowly here to include persons whose identity is known, but who are not joined in the litigation for reasons other than that they are not subject to jurisdiction or are otherwise immune from liability.

In *Lines v. Ryan*,²⁸⁸ a three-car chain collision gave rise to two lawsuits.²⁸⁹ Jones, who was driving the first car, was hit by Lines, who was driving the second car.²⁹⁰ Lines was in turn hit by a third car

282. 269 N.W.2d 918 (Minn. 1978).

283. *Id.* at 923. The court followed the Wisconsin Supreme Court’s decision in *Connar v. West Shore Equipment of Milwaukee, Inc.*, 227 N.W.2d 660, 662 (Wis. 1975).

284. *Frey*, 269 N.W.2d at 923 (quoting *Connar*, 227 N.W.2d at 662).

285. *Id.* at 922.

286. *Id.*

287. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § B19 cmt. b.

288. *Lines v. Ryan*, 272 N.W.2d 896 (Minn. 1978).

289. *Id.* at 899.

290. *Id.*

driven by Ryan, causing Lines to hit Jones a second time or, if Lines were believed, for the first time after Ryan hit him.²⁹¹ Lines brought suit against Ryan.²⁹² Because Lines was uninsured, Jones made a claim against State Farm, her uninsured motorist insurer, and settled the claim pursuant to a subrogation and trust agreement.²⁹³ State Farm then brought suit against Lines in Jones' name.²⁹⁴ The trial court consolidated the cases and submitted the fault of all three drivers to the jury, which found Lines to be 60% negligent and Ryan 40% negligent.²⁹⁵ Lines argued that Jones' negligence should not have been submitted to the jury in Lines' claim against Ryan.²⁹⁶ Again, following the Wisconsin Supreme Court's decision in *Connar v. West Shore Equipment of Milwaukee*,²⁹⁷ the Minnesota Supreme Court held that the trial court correctly submitted the fault of Jones to the jury, even though Jones was not a party to the Lines-Ryan litigation.²⁹⁸

In *Ripka v. Mehus*, the Minnesota Court of Appeals considered a case involving an automobile accident in which the defendant claimed that the accident was due at least in part to the fault of a construction worker who waved her through a construction area.²⁹⁹ The defendant requested that the trial court submit the fault of the unidentified construction worker to the jury.³⁰⁰ The trial court denied the request.³⁰¹ The jury found the plaintiff 17% negligent and the defendant 83% negligent.³⁰² The court of appeals held that the trial court did not abuse its discretion in refusing to submit the fault of what it called a "phantom tortfeasor" to the jury.³⁰³

The court distinguished *Lines*, *Frey*, and *Connar* on the facts because the persons whose fault was submitted in those cases were identified.³⁰⁴ The court of appeals concluded that "a mere

291. *Id.*
 292. *Id.*
 293. *Id.*
 294. *Id.* at 900.
 295. *Id.*
 296. *Id.* at 902.
 297. 227 N.W.2d 660, 662 (Wis. 1975).
 298. *Lines*, 272 N.W.2d at 902-03.
 299. 390 N.W.2d 878, 879 (Minn. Ct. App. 1986).
 300. *Id.*
 301. *Id.*
 302. *Id.*
 303. *Id.* at 881.
 304. *Id.*

allegation by the defendant that a phantom tortfeasor contributed to the accident is insufficient evidence to justify submitting the alleged negligence of the phantom tortfeasor to the jury for apportionment.³⁰⁵

The court's approach is consistent with the position taken in the Restatement (Third) of Torts: Apportionment of Liability in cases where the fault of identified parties may be submitted to the factfinder:

A nonparty who is not sufficiently identified to be either subject to service of process or discovery ordinarily should not be submitted to the factfinder for assignment of responsibility. Before assigning responsibility to nonparties, they should be sufficiently identified that they could be joined in the suit (regardless of whether personal jurisdiction or subject-matter jurisdiction would exist) or that discovery could be obtained from them.³⁰⁶

The Restatement takes the position that fairness may require an exception to the rule in some cases:

Thus, for example, if the plaintiff attempts to mitigate her comparative responsibility by claiming that an unidentified person created an emergency that required the plaintiff to respond suddenly, a defendant who could not reasonably identify the person nevertheless should be permitted to have the nonparty submitted for an assignment of comparative responsibility.³⁰⁷

3. *Persons Against Whom a Statute of Limitations or Repose Has Run*

A person may not be subject to liability because a statute of limitations³⁰⁸ or repose³⁰⁹ has run on the plaintiff's claim against that person. Although the Minnesota Supreme Court has not directly decided whether the fault of a person not liable to the plaintiff because of a statute of limitations defense should be

305. *Id.* Note that other jurisdictions have specific standards for making this determination.

306. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § B19 cmt. f (AM. LAW INST. 2000).

307. *Id.*

308. *See, e.g.*, MINN. STAT. § 541.05, subdiv. 1(5) (six-year statute for negligence claims); *id.* § 541.07(1) (two-year statute for certain intentional torts).

309. *See id.* § 541.051, subdiv. 1(a) (ten-year statute of repose for improvements to real property).

submitted to the factfinder, the court's precedent with respect to contribution claims indicates that it would.

The court regards the statute of limitations as a "technical" defense that does not go to the merits of the case.³¹⁰ "[I]t is a factor extrinsic to the tort itself . . . by which liability is avoided."³¹¹ If the statute of limitations is not a bar to the contribution claim,³¹² and the person against whom the contribution claim has been asserted is a party to the litigation, that person's fault obviously has to be submitted to the factfinder to determine whether there is joint and several liability in the first place and, if so, what the fair share is of the person against whom contribution is sought.

Even if the person against whom the statute has run is not a party to the litigation, that person's fault would arguably have to be submitted. The statute of limitations is still only a "technical" defense,³¹³ and to achieve a fair apportionment of fault under the Minnesota rationale for including the fault of "parties to the transaction," the person's fault would have to be submitted to the factfinder.

4. *Persons Not Subject to Personal Jurisdiction*

The Restatement position in the several liability track permits the inclusion of persons who are not subject to personal jurisdiction in the allocation of fault.³¹⁴ Comment (f) to section B19 states that "[b]efore assigning responsibility to nonparties, they should be sufficiently identified that they could be joined in the suit (regardless of whether personal jurisdiction or subject-matter jurisdiction would exist) or that discovery could be obtained from them."³¹⁵ Minnesota has not yet faced this issue. If it follows the Restatement, Minnesota will treat persons not subject to

310. See *Jones v. Fisher*, 309 N.W.2d 726, 729–30 (Minn. 1981).

311. *Horton v. Orbeth*, 342 N.W.2d 112, 114 (Minn. 1984) (emphasis omitted).

312. See *City of Willmar v. Short-Elliott-Hendrickson, Inc.*, 512 N.W.2d 872, 875 (Minn. 1994) (explaining the equitable reasons for allowing contribution claims against a party to whom the plaintiff's claim is barred by a statute of limitations).

313. See *Horton*, 342 N.W.2d at 114.

314. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § B19 cmt. f (AM. LAW INST. 2000).

315. *Id.*

jurisdiction the same as persons against whom a statute of limitations has run.

5. *Persons Who Are Immune from Liability*

The Minnesota courts have not yet taken a position on the issue of whether the fault of persons who are immune from liability by operation of statute or common law should be considered in the apportionment of fault. The exception is *Hosley*, in which the supreme court permitted the allocation of fault to a defendant who was severed from the lawsuit because of the filing of a chapter 11 petition for reorganization.³¹⁶ Whether the fault of immune persons or entities should be considered should turn on the nature of the immunity.

There are various cases in which immunities may prevent the imposition of liability on an individual or entity. The term “immunity” is used here to describe cases in which persons, including governmental entities, are immune from liability, either by statute or common law.³¹⁷ The supreme court has abolished certain common law immunities, including interspousal tort immunity,³¹⁸ parent-child tort immunity,³¹⁹ and charitable immunity.³²⁰ That leaves various other immunities, both statutory and common law, that preclude imposition of liability in cases where either the legislature or the supreme court has determined that certain conduct is deserving of protection from civil liability.

a. *Governmental Immunities*

Governmental entities and officials are insulated from liability in three basic ways. The nature of the immunity will determine whether the fault of a governmental entity or official is subject to allocation under the Comparative Fault Act.

316. *Hosley v. Armstrong Cork Co.*, 383 N.W.2d 289, 292–93 (Minn. 1986). Filing of the petition results in an automatic stay of judicial proceedings. 11 U.S.C. § 362(a)(1) (1982).

317. The term has a broader meaning in the Restatement. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § B19 cmt. e.

318. See *Beaudette v. Frana*, 285 Minn. 366, 373, 173 N.W.2d 416, 420 (1969).

319. See *Anderson v. Stream*, 295 N.W.2d 595, 601 (Minn. 1980).

320. See *Mulliner v. Evangelischer Diakonniessenverein*, 144 Minn. 392, 398, 175 N.W. 699, 701 (1920).

Government is insulated from liability by statute for damages or injuries caused by a variety of governmental actions,³²¹ including discretionary decisions occurring at the policy level (statutory immunity).³²² Government is also insulated from liability in cases where the duty owed to an injured person is a public rather than a private duty. Finally, government officials and their employers may be shielded from liability because of official and vicarious official immunity.

Statutory immunity provides protection for “policy-making activities that are legislative or executive in nature.”³²³ It applies to planning-level decisions involving social, political, or economic considerations.³²⁴ It is inapplicable in cases involving operational-level decisions involving “day-to-day operations of the government,” the exercise of professional judgment, or “the application of scientific and technical skills.”³²⁵ The purpose of statutory immunity is to avoid “judicial second-guessing” of the policy decisions of other branches of government.³²⁶

Governmental entities are also shielded from liability by the judicially created public-private duty distinction.³²⁷ A governmental entity that assumes a special duty to certain members of the public may be held liable to a person injured as a result of the breach of duty, but not in cases where the government violates an obligation owed only to the general public.³²⁸ The fault of the governmental entity would not be submitted to the factfinder in cases involving a violation of a public duty by the entity.³²⁹

321. See MINN. STAT. §§ 3.736, subdiv. 3, 466.03, subdivs. 3–6b.

322. See *id.* at §§ 3.736, subdiv. 3(b), 466.03, subdiv. 6.

323. *Nusbaum v. Blue Earth Cty.*, 422 N.W.2d 713, 718 (Minn. 1988).

324. *Holmquist v. State*, 425 N.W.2d 230, 231–32 (Minn. 1988). The governmental entity bears the burden of establishing that its decisions are covered by statutory immunity. *Conlin v. City of St. Paul*, 605 N.W.2d 396, 402 (Minn. 2000).

325. *Holmquist*, 425 N.W.2d at 232–33 (internal citations omitted).

326. *Schroeder v. St. Louis Cty.*, 708 N.W.2d 497, 503 (Minn. 2006) (citing *Nusbaum*, 422 N.W.2d at 718).

327. *Hage v. Stade*, 304 N.W.2d 283, 286 (Minn. 1981); *Cracraft v. City of St. Louis Park*, 279 N.W.2d 801, 806 (Minn. 1979).

328. *Andrade v. Ellefson*, 391 N.W.2d 836, 841 (Minn. 1986) (citing *Hage*, 304 N.W.2d at 286; *Cracraft*, 279 N.W.2d at 806).

329. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § B19 cmt. e (AM. LAW INST. 2000).

Finally, government employees and entities employing them may assert official immunity for claims involving the exercise of judgment or discretion at the operational level.³³⁰ Official immunity is a common law creation.³³¹ It insulates “public official[s] charged by law with duties which call for the exercise of . . . judgment . . . from being held personally liable to an individual for damages.”³³² Generally, when official immunity applies, the governmental entity employing the person who committed the tort will be insulated from liability by vicarious official immunity.³³³ Official immunity is inapplicable where “a ministerial duty is either not performed or is performed negligently” or “when a willful or malicious wrong is committed.”³³⁴

There are various cases in which the issue will arise as to whether the fault of a governmental entity or official should be considered in the allocation of fault. Two examples illustrate how it could work. First, a plaintiff might sustain injury in a motor vehicle accident that is the result of negligence on the part of a driver and a highway hazard that is the consequence of disrepair. Or, as another example, the plaintiff might be injured because of the negligence of a driver and a police officer who is pursuing the driver in a high speed chase.

In the first example the issue is whether the fault of the governmental entity should be considered in the allocation of fault. If the road repair decision is a policy decision involving political, economic, and social factors, the claim against the governmental entity would be barred by statutory immunity, even if the decision not to repair could be deemed to be negligent.

The dismissal because of statutory immunity is the result of a legislative policy decision not to subject planning-level policy decisions made by governmental entities to scrutiny through lawsuits. Where statutory liability applies there is simply no duty

330. See MINN. STAT. § 466.03, subdiv. 6.

331. See *Pletan v. Gaines*, 494 N.W.2d 38, 40 (Minn. 1992) (quoting *Susla v. State*, 311 Minn. 166, 175, 247 N.W.2d 907, 912 (1976)) (citing *Elwood v. Rice Cty.*, 423 N.W.2d 671, 677 (Minn. 1988)).

332. *Schroeder v. St. Louis Cty.*, 708 N.W.2d 497, 505 (Minn. 2006) (quoting *Elwood*, 423 N.W.2d at 677) (citing *Anderson v. Anoka Hennepin Indep. Sch. Dist.* 11, 678 N.W.2d 651, 655 (Minn. 2004)).

333. *Anderson*, 678 N.W.2d at 663–64 (citations omitted).

334. *Schroeder*, 708 N.W.2d at 505 (citing *Anderson*, 678 N.W.2d at 662).

owed by the governmental entity to the injured person. Statutory immunity puts the fault issue out of reach.³³⁵

In the second example assume that the police officer was negligent; the claim is barred by official immunity not because the police officer was not negligent, but because the police officer's decision to engage in the high speed chase was discretionary.³³⁶ Neither the police officer nor the governmental entity employing the officer would be liable unless the plaintiff could overcome the immunity. Official and vicarious official immunity differ from statutory immunity, however. Where statutory immunity applies the governmental entity owes no duty to the injured person. Official immunity applies to shield an at-fault official (and the employer) from liability for the official's fault.

Procedurally, if the plaintiff brings suit against the entity or official and the statutory immunity defense is established on motion for summary judgment, the governmental entity would be dismissed from the suit. No duty would be owing and there would be no basis for submitting the fault of the governmental entity to the trier of fact. If statutory immunity is inapplicable the entity would be subject to liability for the fault of the government official who caused the injury to the plaintiff.

In a case involving a suit against an official and the governmental entity employing the official where the official immunity defense is asserted, the outcome would differ. If official (and vicarious official) immunity is asserted but overcome by the

335. Restatement (Third) of Torts: Apportionment of Liability section D19, comment h, explains the difference in immunities:

[I]mmunities sometimes may be an alternative way of stating that the person has no legal duty or has not breached any duty that exists. Thus, for example, a municipality may be "immune" from suit for failing to provide police protection to an individual who was assaulted. This "immunity" may obscure that a municipality has no duty of care in tort law to the general public to prevent assaults and/or that there was no reasonable means of precaution by which to prevent any such assault, such that any duty that might have existed was not breached as a matter of law. Identifying those immune persons who are truly immune despite tortious conduct that would be actionable and those whose immunity is an alternative way of stating that there is no duty or no breach of duty may be uncertain and difficult. Courts must, nevertheless, carefully analyze these issues in determining whether an immune party may be assigned a percentage of comparative responsibility.

336. *E.g.*, Pletan v. Gaines, 494 N.W.2d 38 (Minn. 1992).

plaintiff (or a defendant on a third-party claim) by establishing that the official engaged in willful or malicious conduct,³³⁷ the fault of the official would be subject to allocation by the trier of fact. A potential problem will arise, however, if the plaintiff is unable to overcome the immunity. Neither the official nor the employing entity could be liable, but the official could nonetheless be found negligent. Under those circumstances there is an argument that the fault of the official should be submitted to the trier of fact for allocation. The conduct is tortious, even if the immunity cannot be overcome.

b. Other Immunities

There are other cases where the legislature has enacted statutes that make certain conduct immune from liability. The function of the immunities is to insulate from liability conduct that is socially useful. There are various examples, but two will suffice.

The Good Samaritan statute provides immunity from liability, even if a person engaging in a rescue effort is negligent.³³⁸ Willful and wanton or reckless conduct is necessary to trigger liability.³³⁹

Another example is the immunity provided to volunteer athletic coaches and officials, as well as physicians and trainers.³⁴⁰ As with the Good Samaritan statute, the immunity is inapplicable in cases where the person asserting the immunity has acted in a willful and wanton or reckless manner.³⁴¹

337. See *Schroeder*, 708 N.W.2d at 505 (citing *Anderson*, 678 N.W.2d at 662).

338. MINN. STAT. § 604A.01, subdiv. 2. The Good Samaritan statute reads in pertinent part as follows:

A person who, without compensation or the expectation of compensation, renders emergency care, advice, or assistance at the scene of an emergency or during transit to a location where professional medical care can be rendered, is not liable for any civil damages as a result of acts or omissions by that person in rendering the emergency care, advice, or assistance, unless the person acts in a willful and wanton or reckless manner in providing the care, advice, or assistance. This subdivision does not apply to a person rendering emergency care, advice, or assistance during the course of regular employment, and receiving compensation or expecting to receive compensation for rendering the care, advice, or assistance.

Id. § 604A.01, subdiv. 2(a).

339. *Id.*

340. *Id.* § 604A.11, subdiv. 1.

341. *Id.* § 604A.11, subdiv. 2. The list of exceptions is as follows:

In each case, the person who seeks the immunity would be subject to liability according to an ordinary negligence standard, absent the immunity. If the immunity applies, the plaintiff seeking to recover against the person asserting the immunity would have to prove willful and wanton or reckless misconduct in order to recover.³⁴² One argument is that the fault of those persons should not be considered unless the plaintiff is able to establish willful and wanton or reckless conduct on the part of the person asserting the immunity. The other argument is that the immunity should be treated the same as official immunity in cases involving claims against governmental officials. Where that immunity applies, an official may be negligent but nonetheless immune from liability unless the plaintiff is able to overcome the immunity by proving willful or malicious conduct.³⁴³ Even assuming the official has not acted willfully or maliciously, however, the official may still have been negligent, and if so, that negligence should arguably be considered in any allocation of fault.

There would be no reason to treat these statutory immunities any differently than the official immunity. Persons asserting the immunity may be negligent and their fault subject to apportionment even if they are not liable. It is consistent with the

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- (1) to the extent that the acts or omissions are covered under an insurance policy issued to the entity for whom the coach, manager, official, physician, or certified athletic trainer serves;
 - (2) if the individual acts in a willful and wanton or reckless manner in providing the services or assistance;
 - (3) if the acts or omissions arise out of the operation, maintenance, or use of a motor vehicle;
 - (4) to an athletic coach, manager, or official who provides services or assistance as part of a public or private educational institution's athletic program;
 - (5) to a public or private educational institution for which a physician or certified athletic trainer provides services; or
 - (6) if the individual acts in violation of federal, state, or local law.

Id.

342. See MINN. STAT. § 604A.01, subdiv. 2; see also *Tiedeman v. Morgan*, 435 N.W.2d 86, 86–89 (Minn. Ct. App. 1989) (reasoning that willful and wanton or reckless acts would have triggered an exception to the Good Samaritan statute, but ultimately finding the statute inapplicable for other reasons), *review denied* (Minn. Mar. 29, 1989).

343. See *supra* Section IV.B.5.a.

rationale of the Restatement (Third) of Torts and prior Minnesota case law, including *Staab I*.³⁴⁴

6. Summary

Even before the *Staab* decisions, the Minnesota Supreme Court had started down the road of permitting the fault of nonparties to be considered in the allocation of fault. *Staab I* extended the rule by permitting allocation of fault to a clearly identified nonparty who could have been joined in the litigation by either the plaintiff or defendant.³⁴⁵ Having headed down that road in *Frey*, *Lines*, and *Hosley*, there seem to be few stop signs along the way.³⁴⁶ The fault of a variety of parties may be considered in the allocation of fault, including the fault of settling parties, certain identified persons, persons against whom a statute of limitations or repose has run, and certain parties who are immune from liability because of common law or statutory immunities. There may be distinctions between these categories of cases, but once the supreme court made the decision to allocate fault to nonparties, supported by the policy that it is necessary to do so to achieve a fair allocation of fault, the distinctions seem to be without a sustainable difference.

C. Procedural Issues

Minnesota currently has no specific procedural requirements that have to be satisfied before the fault of a nonparty may be considered in the fault allocation question and no specific mechanism for challenging the inclusion of the nonparty. Other jurisdictions have established procedures to be followed before a nonparty's fault may be considered. Michigan, for example,

344. If the person asserting the immunity is a party to the suit, the plaintiff's claim could turn on the plaintiff's ability to satisfy the higher standard of proof required by official immunity or the immunity provided by other statutes. If the plaintiff is unable to meet the higher standard of willful, wanton, or reckless conduct, there would still be an issue as to whether the immune party was negligent. Then, if the courts take the position that the fault of immune persons should be considered in the allocation of fault, there would have to be a second special verdict question asking whether the person was negligent. A finding of causal negligence would be a basis for considering the fault of the immune person.

345. See *Staab I*, 813 N.W.2d 68 (Minn. 2012).

346. See *supra* Section II.B.

requires notice before the fault of a nonparty may be considered.³⁴⁷ Arizona requires consideration of “the fault of all persons who contributed to the alleged injury, death or damage to property, regardless of whether the person was, or could have been, named as a party to the suit.”³⁴⁸ The accompanying rule requires a party who seeks to include a nonparty to “provide the identity, location, and the facts supporting the claimed liability of such non-party”³⁴⁹

The Restatement suggests a basic procedure for challenging the sufficiency of the evidence to justify including a nonparty in the allocation of fault:

Any nonparty that a party proposes for assignment of responsibility could be the subject of a ruling by the court on the sufficiency of the evidence to permit assignment of a percentage of comparative responsibility. The inquiry would be similar to a motion for a directed verdict or for judgment as a matter of law, except that the motion would

347. MICH. CT. R. 2.112, subdiv. K(2) (West, Westlaw through 2016). The notice requirement reads in part as follows:

(a) A party against whom a claim is asserted may give notice of a claim that a nonparty is wholly or partially at fault. A notice filed by one party identifying a particular nonparty serves as notice by all parties as to that nonparty.

(b) The notice shall designate the nonparty and set forth the nonparty’s name and last known address, or the best identification of the nonparty that is possible, together with a brief statement of the basis for believing the nonparty is at fault.

Id. 2.112, subdiv. K(3) (a)–(b).

348. ARIZ. REV. STAT. ANN. § 12-2506 (West, Westlaw through 2015 1st Reg. Sess. and 1st Spec. Sess.).

349. ARIZ. R. CIV. P. 26(b)(5) (West, Westlaw through 2015). The rule reads in full as follows:

Any party who alleges, pursuant to A.R.S. § 12-2506(B), that a person or entity not currently or formerly named as a party was wholly or partially at fault in causing any personal injury, property damage or wrongful death for which damages are sought in the action shall provide the identity, location, and the facts supporting the claimed liability of such non-party within one hundred fifty (150) days after the filing of that party’s answer. The trier of fact shall not be permitted to allocate or apportion any percentage of fault to any non-party whose identity is not disclosed in accordance with the requirements of this subsection except upon written agreement of the parties or upon motion establishing good cause, reasonable diligence, and lack of unfair prejudice to other parties.

Id.

not be made by a party seeking dismissal, but by another party seeking a determination that the evidence of a nonparty's conduct is insufficient to permit the factfinder to assign responsibility to that nonparty.³⁵⁰

The general principle that can be drawn from these sources is that the party who seeks to have the fault of a nonparty submitted on the allocation question should provide timely notice of the name and last known address of the nonparty, along with something like "a short and plain statement of the claim,"³⁵¹ that indicates the basis for a finding of fault on the nonparty. The requirements could be made part of the scheduling order.³⁵²

The plaintiff should be able to test by pretrial motion the issue of whether the fault of a nonparty may be considered, either because the nonparty belongs to a class of persons whose fault should not be considered as a matter of law or, if there is no argument on that issue, whether there is sufficient evidence of fault to consider the fault of the nonparty in the allocation of fault.

V. STAAB, JOINT AND SEVERAL LIABILITY, AND LOSS REALLOCATION

Minnesota Statutes section 604.02, subdivision 2 provides that if "a party's equitable share of the obligation is uncollectible from that party," any uncollectible amount shall be reallocated among the other parties, including the plaintiff, "according to their respective percentages of fault."³⁵³ After *Staab II*, there is an issue as to whether the loss reallocation provision has any life. It does, but before the loss reallocation statute can apply, a party to the litigation will have to be in a position where it is asked to pay more than its fair share of an obligation. This can happen only where the party seeking to reallocate an uncollectible amount is jointly and severally liable. A party who is only severally liable will never seek to reallocate because, by definition, that party will be responsible for only his or her equitable share of the obligation and no more.

There are four situations where the rule of joint and several liability will apply, according to section 604.02, subdivision 1.³⁵⁴ The

350. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § B19 cmt. c (AM. LAW INST. 2000) (citation omitted).

351. MINN. R. CIV. P. 8.01.

352. *See id.* 16.02. The scheduling order may include "any other matters appropriate in the circumstances of the case." *Id.* 16.02(g).

353. MINN. STAT. § 604.02, subdiv. 2 (2014).

354. *See id.* § 604.02, subdiv. 1. There are other cases, such as vicarious liability

relationship between joint and several liability and loss reallocation will differ depending on the basis for a finding of joint and several liability.

The first exception makes a party who is more than 50% at fault jointly and severally liable.³⁵⁵ The rule of joint and several liability will make that party liable for 100% of the plaintiff's damages (assuming no fault is assigned to the plaintiff). The jointly and severally liable defendant who pays more than its fair share would have a contribution claim against any other defendant, to the extent of that defendant's fault, or against a nonparty in a subsequent action for contribution, but the burden of establishing uncollectibility falls on the jointly and severally liable defendant.

To illustrate, assume the following:

Party	Percentage of Fault
P	0%
D1	60%
D2	20%
NP3	20%

D1 and D2 are parties to the suit. NP3 is a nonparty who was assigned a percentage of fault. Assume damages of \$100,000.

Under the rule of joint and several liability, D1 is liable for 100% of the plaintiff's damages. If D2 is able to satisfy its share of the judgment, D1 will still be jointly and severally liable for 80% of the plaintiff's damages. If D1 is obligated to pay the plaintiff those damages, D1 would have a contribution claim against D2 for D2's share of the damages. D1 bears the burden of proving the uncollectibility of those damages on the contribution claim. NP3 is not liable on a contribution claim because NP3 is not a party to the suit and would not be bound either by a jury's finding of fault or the percentage of fault assigned to NP3. D1 would have to establish the right to contribution in a separate action. Assuming, for the moment, that NP3 is insolvent, no part of NP3's share of the obligation would be subject to reallocation. No part of NP3's fault could be reallocated to D2, even if it satisfied its contribution obligation, because D2 is only severally liable.

cases, that also would have to fit within the concept. See Steenson, *supra* note 14, at 875–77.

355. MINN. STAT. § 604.02, subdiv. 1(1).

If, however, the plaintiff is at fault, reallocation is a possibility. To illustrate, assume the following:

Party	Percentage of Fault
P	20%
D1	60%
D2	20%

If D2 is unable to satisfy its share of the judgment, D1 would be jointly and severally liable to P for 80% of the damages. If D1 is unable to shift 20% of that loss to D2 on a contribution claim because of D2's insolvency, D1 would seek to reallocate that uncollectible amount in part to P, pursuant to section 604.02, subdivision 2.³⁵⁶ If damages are \$100,000, D2's share, \$20,000, would be reallocated to D1 and P according to their respective percentages of fault. That means that D1 would bear three-fourths of the uncollectible amount (\$15,000) and P would bear one-fourth of that amount (\$5,000).

If a defendant is held jointly and severally liable because of participation in a common scheme or plan resulting in injury to the plaintiff, the interaction between joint and several liability and loss reallocation is different.³⁵⁷

To illustrate the application, assume the following:

Party	Percentage of Fault
P	0%
D1	60%
D2	20%
D3	20%

Assume damages of \$100,000. Also assume that D1, D2, and D3 are part of a common scheme or plan that resulted in injury to the plaintiff. If D3 is unable to satisfy its share of the obligation, the uncollectible amount would be reallocated to the remaining jointly and severally liable defendants. The *Staab* decisions would not apply to limit the liability of D2, because even though D2 is 50% or less at fault, D2 is jointly and severally liable to the plaintiff for the full amount of the judgment because of participation in the

356. *Id.* § 604.02, subdiv. 2.

357. *Id.* § 604.02, subdiv. 1(2).

common scheme or plan. D3's share (\$20,000) would be reallocated between D1 and D2 according to their respective percentages of fault. That means that D1 would bear three-fourths of the uncollectible amount (\$15,000) and D2 would bear one-fourth of that amount (\$5,000). D1's total liability would be \$75,000 and D2's \$25,000. The result would not change if D3 were not a party to the common scheme or plan. D2's uncollectible share would still have to be reallocated between D1 and D2.³⁵⁸

The result should be the same if the defendants were all held liable pursuant to the environmental liability statutes noted in section 604.02, subdivision 1.³⁵⁹

There would not be a possibility of reallocation in a case involving a defendant who is jointly and severally liable because of an intentional tort. As an example, assume a case where there are two defendants, one liable for committing an intentional tort and one for negligence in failing to prevent that tort. Section 604.02, subdivision 1 states that "a person who commits an intentional tort" is jointly and severally liable for the whole award.³⁶⁰

There are at least two problems with reallocation in this case. One is that there appears to be no basis for comparing the fault of a negligent defendant with a defendant who has committed an intentional tort.³⁶¹ In order for loss reallocation to apply, a defendant would have to pay more than its fair share of the judgment, be unable to obtain contribution from a co-defendant, and seek to shift a proportionate share of the uncollectible amount to an at-fault plaintiff. None of those prerequisites can be met because of the lack of a statutory mechanism for the comparison of intentional wrongdoing with negligence. In fact, the negligent defendant could be held liable for the actions of the intentional tortfeasor.³⁶²

358. The court indicated that this would be the result in *Staab I*. See *Staab I*, 813 N.W.2d 68, 79 n.9 (Minn. 2012).

359. See MINN. STAT. § 604.02, subdiv. 1(4).

360. *Id.* § 604.02, subdiv. 1(3).

361. See *id.* § 604.01, subdiv. 1a. The Comparative Fault Act's definition of "fault" does not include liability based on an intentional tort. *Id.*

362. See, e.g., *ADT Sec. Servs., Inc. v. Swenson*, 687 F. Supp. 2d 884, 894–96 (D. Minn. 2009) (acknowledging statutory ambiguity on this issue, but relying on the Restatement's position that a negligent defendant may be "jointly and severally liable for the share of comparative responsibility assigned to the intentional tortfeasor").

VI. STAAB AND PRODUCTS LIABILITY

Products liability cases are subject to a special reallocation rule in Minnesota Statutes section 604.02, subdivision 3:

In the case of a claim arising from the manufacture, sale, use or consumption of a product, an amount uncollectible from any person in the chain of manufacture and distribution shall be reallocated among all other persons in the chain of manufacture and distribution but not among the claimant or others at fault who are not in the chain of manufacture or distribution of the product. Provided, however, that a person whose fault is less than that of a claimant is liable to the claimant only for that portion of the judgment which represents the percentage of fault attributable to the person whose fault is less.³⁶³

Subdivision 3 reallocation applies only to product sellers and manufacturers in the chain of manufacture and distribution.³⁶⁴ The impact of this section is to treat all parties in the chain of manufacture and distribution as a unit. If fault is apportioned among two or more parties in the chain, and one is unable to pay its fair share, that share will be reallocated to the remaining parties who are in the chain. There will be no reallocation to other parties, including the plaintiff, presumably as long as there is at least one party in the chain who bears responsibility for the injury-causing defective product. Subdivision 3 effectively creates a rule of joint and several liability applicable to parties in the chain of manufacture and distribution.³⁶⁵

Subdivision 3 uses the term “person” rather than “party.”³⁶⁶ The *Staab* decisions construe “person” to include parties to the

363. MINN. STAT. § 604.02, subdiv. 3.

364. Unrelated product sellers are not covered. *See* *Tester v. Am. Standard, Inc.*, 590 N.W.2d 679, 680–81 (Minn. Ct. App. 1999) (holding subdivision 3 inapplicable to independent asbestos manufacturers).

365. MINN. STAT. § 604.02, subdiv. 3. The last sentence of subdivision 3 does impose a limitation on the liability of a party in the chain of manufacture and distribution. *Id.* The liability of a person who is less at fault than the plaintiffs is limited to that person’s percentage of fault. *Id.* If parties in the unit are effectively treated as a unit, however, it makes little sense for a party in the chain to avoid joint and several liability simply because fault can be split among parties in the chain. Given the fact that intermediaries are likely to be dismissed under Minnesota Statutes section 544.41, the last sentence should have limited impact.

366. *Id.* § 604.02, subdiv. 3.

transaction.³⁶⁷ If the manufacturer is a party to a products liability lawsuit, the manufacturer could seek to join other intermediaries in the chain of manufacture and distribution, even if the plaintiff does not join them, or the manufacturer could simply seek to have the intermediaries included in the fault allocation question. The *Staab* decisions might point that way, but there are reasons why the fault of the intermediaries should not be included because of the application of Minnesota Statutes section 544.41, which entitles intermediaries in the chain to dismissal of strict liability claims against them if the manufacturer is solvent and subject to jurisdiction in Minnesota.³⁶⁸ There are two key points to be made.

367. *Staab II*, 853 N.W.2d 713, 718 (Minn. 2014); *Staab I*, 813 N.W.2d 68, 75 n.5 (Minn. 2012).

368. MINN. STAT. § 544.41. The statute reads in full as follows:

Subdivision 1. Product liability; requirements. In any product liability action based in whole or in part on strict liability in tort commenced or maintained against a defendant other than the manufacturer, that party shall upon answering or otherwise pleading file an affidavit certifying the correct identity of the manufacturer of the product allegedly causing injury, death or damage. The commencement of a product liability action based in whole or part on strict liability in tort against a certifying defendant shall toll the applicable statute of limitation relative to the defendant for purposes of asserting a strict liability in tort cause of action.

[Subdivision 2]. Certifying defendant; dismissal of strict liability. Once the plaintiff has filed a complaint against a manufacturer and the manufacturer has or is required to have answered or otherwise pleaded, the court shall order the dismissal of a strict liability in tort claim against the certifying defendant, provided the certifying defendant is not within the categories set forth in subdivision 3. Due diligence shall be exercised by the certifying defendant in providing the plaintiff with the correct identity of the manufacturer and due diligence shall be exercised by the plaintiff in filing a law suit and obtaining jurisdiction over the manufacturer.

The plaintiff may at any time subsequent to dismissal move to vacate the order of dismissal and reinstate the certifying defendant, provided plaintiff can show one of the following:

- (1) that the applicable statute of limitation bars the assertion of a strict liability in tort cause of action against the manufacturer of the product allegedly causing the injury, death or damage;
- (2) that the identity of the manufacturer given to the plaintiff by the certifying defendant was incorrect. Once the correct identity of the manufacturer has been given by the certifying defendant the court shall again dismiss the certifying defendant;
- (3) that the manufacturer no longer exists, cannot be subject to the

First, if the only claim against the intermediary is a strict liability claim, the intermediary is dismissed from the litigation. There would be no basis for any allocation of fault to that intermediary. It follows that the result should be the same if the manufacturer seeks to include the intermediary on the special verdict form for the allocation of fault if the only theory on which the intermediary could be liable is a strict liability theory. The section 544.41 dismissal³⁶⁹ effectively precludes liability on the basis of strict liability. If there is no liability, there is no fault to be apportioned to the intermediary and there should not be a line on the special verdict form asking the trier of fact to apportion fault to the intermediary.

Second, even if intermediaries in the chain of manufacture and distribution are joined, it is questionable whether fault would have to be split among those parties. If a product is defective, the intermediary is liable for selling the product,³⁷⁰ but the

jurisdiction of the courts of this state, or, despite due diligence, the manufacturer is not amenable to service of process;

(4) that the manufacturer is unable to satisfy any judgment as determined by the court; or

(5) that the court determines that the manufacturer would be unable to satisfy a reasonable settlement or other agreement with plaintiff.

[Subdivision 3]. Dismissal order prohibited. A court shall not enter a dismissal order relative to any certifying defendant even though full compliance with subdivision 1 has been made where the plaintiff can show one of the following:

(1) that the defendant has exercised some significant control over the design or manufacture of the product, or has provided instructions or warnings to the manufacturer relative to the alleged defect in the product which caused the injury, death or damage;

(2) that the defendant had actual knowledge of the defect in the product which caused the injury, death or damage; or

(3) that the defendant created the defect in the product which caused the injury, death or damage.

[Subdivision 4]. Limiting constructing laws. Nothing contained in subdivisions 1 to 3 shall be construed to create a cause of action in strict liability in tort or based on other legal theory, or to affect the right of any person to seek and obtain indemnity or contribution.

Id.

369. *Id.*

370. *See* Marcon v. Kmart Corp., 573 N.W.2d 728, 732 (Minn. Ct. App. 1998) (holding sled retailer liable for sale of sled even though jury assigned 100% of the fault to the bankrupt manufacturer). The court of appeals noted that “[t]he practical effect of strict-liability principles is to hold a faultless seller jointly and

intermediary is a passive party, liable only for passing along a defective product in the chain of distribution. There is no basis for splitting fault in those cases. The intermediary is liable for selling a defective product, even if the intermediary had no knowledge of the defect and played no role in causing the defect.

If dismissal under section 544.41 is inappropriate because the intermediary influenced the design of the product, had actual knowledge of the defect, or created the defect, there may be a basis for a finding of fault, in addition to the strict liability that flows, just from the intermediary's sale of the product. In the first two situations, there would be a basis for allocating fault to the intermediary. In the last, where the intermediary is responsible for creating the defect, the intermediary could be found solely responsible for the defect, of course.

Because the reallocation rule requires reallocation to other parties in the chain, there is no reason to think that the *Staab* decisions would apply to limit the liability of a party who is found to be 50% or less at fault. All persons in the chain are treated as a unit. If one party's share is uncollectible, it should be reallocated to the remaining parties in the chain, and only if the parties in the chain were unable to satisfy their obligations would there be reallocation to other parties, including the plaintiff.

In summary, the *Staab* decisions should not have an impact on products liability cases where apportionment of fault among parties in the chain of manufacture and distribution is concerned. The *Staab* decisions permit consideration of the fault of nonparties, but careful consideration has to be given to the circumstances where that will occur. The general rationale that fault of all responsible persons should be considered in the allocation of fault does not fit in subdivision 3 cases.

severally liable for the causal fault of the manufacturer." *In re Shigellosis Litig.*, 647 N.W.2d 1, 6 (Minn. Ct. App. 2002). For that proposition, the court relied on Justice Simonett's concurring and dissenting opinion in *Hudson v. Snyder Body, Inc.*, in which he noted that an intermediary in the case "is liable to plaintiffs but only in a vicarious or derivative sense as the inert seller in the marketing chain." 326 N.W.2d 149, 158 (Minn. 1982). He noted that "[t]his is not the kind of conduct that needs to be included in a comparative fault question, and the jury properly ignored it." *Id.*

VII. STAAB AND EMPLOYER LIABILITY

There is also a question as to whether the *Staab* decisions apply in cases where a third party has a contribution against an employer. It is clear from *Lambertson v. Cincinnati Corp.*³⁷¹ and subsequent cases³⁷² that situations involving third-party claims against an employer for contribution will be resolved under the comparative fault structure, even if the common liability requirement, which is a prerequisite for contribution claims, is technically missing.³⁷³ Because prior cases³⁷⁴ have indicated that the comparative negligence statute and Comparative Fault Act are not applicable to those contribution claims, even though comparative fault principles are used to apportion fault among parties to that litigation, there is an issue as to whether the *Staab* decisions will apply to cap the fault of an employer found to be 50% or less at fault.

The question was considered in *Gaudreault v. Elite Line Services, LLC*.³⁷⁵ The plaintiff, a former equipment service manager for Delta Airlines, was injured when a ground power cord unit that was hanging from a jetway fell on him as he was working under the jetway.³⁷⁶ The plaintiff received workers' compensation benefits from Delta and later commenced suit against Elite Line Services (ELS), "a company that provides operation and maintenance services to airports and airlines."³⁷⁷ ELS had a contract with Delta for the inspection and maintenance of the ground equipment at

371. 312 Minn. 114, 119–20, 257 N.W.2d 679, 684 (1977).

372. See, e.g., *Horton v. Orbeth, Inc.*, 342 N.W.2d 112, 114–15 (Minn. 1984).

373. Common liability is a prerequisite for contribution. See *Ascherman v. Vill. of Hancock*, 254 N.W.2d 382, 384 (Minn. 1977) (holding that the husband who sustained injury leading to Civil Damage Act claim against the Village was not liable on a contribution claim because of lack of common liability due to the fact that husband had no direct liability to his wife and daughter for loss of their means of support); *Spitzack v. Schumacher*, 308 Minn. 143, 147, 241 N.W.2d 641, 643 (1976) (holding that no common liability existed where a person from whom contribution is sought was found not liable in a previous proceeding) (internal quotation omitted).

374. *Id.*

375. 22 F. Supp. 3d 966 (D. Minn. 2014).

376. *Id.* at 969. A ground power cord unit can weigh over 150 pounds. *Id.* The cord can be attached to the side of the jetway with a hanger assembly that permits the cord to be hoisted up and down from that position by the ground crew. *Id.*

377. *Id.*

Minneapolis Saint Paul Airport, where the plaintiff was working.³⁷⁸ The plaintiff asserted a negligence claim against ELS.³⁷⁹ ELS filed a third-party complaint against Delta, “asserting a right of contribution.”³⁸⁰

In one of its pre-trial motions, ELS asked for an order granting partial summary judgment finding that ELS could not be held jointly and severally liable unless found to be more than 50% at fault.³⁸¹ The court viewed it as “in essence, a request for clarification about the intersection of Minnesota law on joint and several liability with the no-fault workers’ compensation scheme.”³⁸²

The issue in the case concerned the impact of the 2003 amendment of the Comparative Fault Act on the apportionment of fault in a case involving a contribution claim by a third party against an employer.³⁸³ *Staab I* would require the apportionment of fault to the employer, even if it were not a party to the case, and a finding that ELS is 50% or less at fault would mean that ELS could be held only severally liable.³⁸⁴ If more than 50% at fault, however, ELS would be jointly and severally liable.³⁸⁵ On the other hand, following the line of cases dealing with an employer’s contribution liability, it appears that the apportionment of fault among an employer and third party is not controlled by the Comparative Fault Act and is therefore not subject to the default rule of several liability in the Act.³⁸⁶

In *Lambertson v. Cincinnati Welding Corp.*,³⁸⁷ the Minnesota Supreme Court arrived at a compromise that avoided the potential constitutional problems created by disallowing a claim for contribution by a third-party tortfeasor while allowing an at-fault

378. *Id.*

379. *Id.* at 969–70.

380. *Id.* at 970.

381. *Id.* at 978.

382. *Id.* Procedurally, the court noted that there is “no basis” in the Federal Rules of Civil Procedure “for granting partial summary judgment on a hypothetical question of this sort,” which required denying the motion, but because the parties briefed and argued the issue, the court saw “no reason to defer addressing an issue that the parties have indicated will be relevant to the resolution of the case.” *Id.*

383. *Id.* at 978–79.

384. *See Staab I*, 813 N.W.2d 68, 80 (Minn. 2012).

385. *See id.*

386. *See id.* at 81 (Meyer, J., dissenting).

387. 312 Minn. 114, 257 N.W.2d 679 (1977).

employer to receive reimbursement for workers' compensation benefits paid to an injured employee.³⁸⁸ The court held that a third-party tortfeasor had a right to contribution against an employer whose fault caused injury to an employee, but preserved the balance struck in the Workers' Compensation Act by limiting the right of contribution to the employer's percentage of fault or workers' compensation, whichever is less.³⁸⁹ The solution was a practical one:

While there is no common liability to the employee in tort, both the employer and the third party are nonetheless liable to the employee for his injuries; the employer through the fixed no-fault workers' compensation system and the third party through the variable recovery available in a common law tort action. Contribution is a flexible, equitable remedy designed to accomplish a fair allocation of loss among parties. Such a remedy should be utilized to achieve fairness on particular facts, unfettered by outworn technical concepts like common liability.³⁹⁰

Because contribution is an equitable remedy "unfettered by outworn technical concepts like common liability,"³⁹¹ the Comparative Fault Act does not control the employer's liability on a contribution claim, notwithstanding the absence of common law, common liability between an employer and third party tortfeasor.³⁹² Subsequent Minnesota Supreme Court decisions continued to take that position.³⁹³

In *Hudson v. Snyder Body, Inc.*,³⁹⁴ the court held that the Comparative Fault Act does not affect the apportionment procedure set out in *Johnson*, and "that a third-party tortfeasor may recover contribution from a negligent employer under the principles of *Lambertson* and *Johnson* whether or not the employee, in a direct suit, would have been barred from recovery under the comparative-fault statute."³⁹⁵ *Hudson* permitted contribution against the employer even though the employer's fault was equal to the

388. *Id.* at 130, 257 N.W.2d at 689.

389. *Id.*

390. *Id.* at 128, 257 N.W.2d at 688.

391. *Id.*

392. MINN. STAT. § 604.02, subdiv. 1 (2014).

393. *See Hudson v. Snyder Body, Inc.*, 326 N.W.2d 149 (Minn. 1982).

394. *Id.*

395. *Id.* at 158.

plaintiff's (under the comparative negligence statute in existence at the time a plaintiff was barred from recovery if the plaintiff's fault was equal to or greater than the fault of the person from whom recovery was sought).³⁹⁶ The court permitted a result that would have been precluded had the employer been a defendant subject to traditional tort liability.³⁹⁷

In *Kempha v. E.W. Coons Co.*,³⁹⁸ decided three years later, the Minnesota Supreme Court held that "section 604.02[] does not govern an employer's contribution or an offset to an employer's subrogation claim," and that an employer's obligation is limited to its obligation to pay workers' compensation benefits, "even though the employer's fault-based share of the damages would have been greater."³⁹⁹ Following *Hudson*, the court concluded "that the statutory apportionment of damages" in the Comparative Fault Act "does not govern an employer's contribution or an offset to an employer's subrogation claim."⁴⁰⁰ The court explained:

We agree with U.S. Steel that the statutory apportionment of damages, section 604.02, does not govern an employer's contribution or an offset to an employer's subrogation claim. Clark and U.S. Steel are neither jointly liable nor jointly and severally liable to U.S. Steel's employee. An employer's obligation with respect to the employee's damages is limited by his obligation for workers' compensation benefits even though the employer's fault-based share of the damages would have been greater. On the other hand, an employer's subrogation against a more culpable third-party is denied to the extent of the employer's proportionate share of the fault even though the employer was less at fault than the injured employee.⁴⁰¹

This strain of authority clearly acknowledges that while the structure of the Comparative Fault Act is used for purposes of apportioning fault, the Act does not limit the third party tortfeasor's right of contribution against the employer.⁴⁰² It also

396. *Id.* at 157–58.

397. *Id.* at 158.

398. 370 N.W.2d 414 (Minn. 1985).

399. *Id.* at 420–21.

400. *Id.* at 420.

401. *Id.* at 420–21 (citations omitted).

402. *Id.* at 421.

clearly states that the third party and the employer are neither jointly nor severally liable to the injured employee.⁴⁰³

When *Lambertson* was decided, the rule of joint and several liability had not yet been modified by the legislature, and the Workers' Compensation Act was silent on the issue of contribution from the employer. In *Johnson v. Raske Building Systems, Inc.*,⁴⁰⁴ the court adopted a procedure for application of the *Lambertson* principle:

The third-party tortfeasors . . . should pay the entire verdict . . . to the plaintiff. The employer should then contribute to the third-party tortfeasor an amount proportionate to its percentage of negligence, but not to exceed the amount of workers' compensation benefits payable to the employee. . . . The employee . . . should then reimburse the employer pursuant to [section 176.061, subdivision 6(c)].⁴⁰⁵

The *Johnson* procedure requires the third party tortfeasor to pay the plaintiff the entire verdict.⁴⁰⁶ The employer then pays the third party on the contribution claim an amount equal to its workers' compensation or fair share of the verdict.⁴⁰⁷ The employer is then reimbursed for its workers' compensation payments from the plaintiff-employee's tort recovery.⁴⁰⁸ The rough net effect is that the third party obtains contribution, capped by the employer's workers' compensation liability.⁴⁰⁹ The employer's liability is limited to no more than its workers' compensation liability.⁴¹⁰ The plaintiff-employee's recovery is reduced by the workers' compensation liability in order to avoid any double recovery.⁴¹¹

403. *Id.* at 420.

404. 276 N.W.2d 79, 81 (Minn. 1979).

405. *Id.*

406. *Id.*

407. *Id.*

408. *Id.*

409. *Id.* at 80.

410. *Id.*

411. *See Naig v. Bloomington Sanitation*, 258 N.W.2d 891, 894 (Minn. 1977). In *Naig v. Bloomington Sanitation*, the court held:

So long as the employer is notified of negotiations leading to such a settlement so that it can appear or intervene to protect its interest and so long as the employee demonstrates that the settlement concerns only damages not recoverable under worker's compensation, or allocates the settlement into recoverable and nonrecoverable claims, the employer cannot credit the nonrecoverable portion of the

In 2000, the legislature added subdivision 11 to section 176.061 of the Workers' Compensation Act that addresses the right of contribution:

To the extent the employer has fault, separate from the fault of the injured employee to whom workers' compensation benefits are payable, any nonemployer third party who is liable has a right of contribution against the employer in an amount proportional to the employer's percentage of fault but not to exceed the net amount the employer recovered pursuant to subdivision 6, paragraphs (b) and (c). The employer may avoid contribution exposure by affirmatively waiving, before selection of the jury, the right to recover workers' compensation benefits paid and payable, thus removing compensation benefits from the damages payable by any third party.

Procedurally, if the employer waives or settles the right to recover workers' compensation benefits paid and payable, the employee or the employee's dependents have the option to present all common law or wrongful death damages whether they are recoverable under the Workers' Compensation Act or not. Following the verdict, the trial court will deduct any awarded damages that are duplicative of workers' compensation benefits paid or payable.⁴¹²

Paragraph one incorporates *Lambertson*, but also provides that the employer may avoid contribution by the third party if, prior to jury selection, it waives the right to recover workers' compensation benefits from the damages payable by a third party.⁴¹³ Double recovery is still avoided because workers' compensation benefits will be deducted from any awarded damages that are duplicative of the workers' compensation benefits paid or payable to the plaintiff-employee in the suit against the third party.⁴¹⁴

Notwithstanding the Minnesota Supreme Court's statements that the Comparative Fault Act does not apply in determining whether an employer will be liable to a third party on a

settlement against compensation payments.

Id. at 894.

412. MINN. STAT. § 176.061, subdiv. 11 (2014).

413. *Id.*

414. *Id.*

contribution claim,⁴¹⁵ the Comparative Fault Act does apply when the issue concerns the impact of allocation of fault to the employer on the right of the plaintiff-employee to recover against a third party. The court made that clear in *Cambren v. Sioux Tools, Inc.*⁴¹⁶ The plaintiff, employed by Bayliner Boats, was injured when a high-speed drill with a circular saw blade slipped in her hands when the blade stuck in a hole she was drilling.⁴¹⁷ The drill twisted violently, causing serious injuries to her wrist and arm.⁴¹⁸ She sued Sioux Tools, the drill manufacturer. Sioux Tools impleaded Bayliner Boats, seeking contribution.⁴¹⁹ The jury apportioned 35% of the fault to the plaintiff, 20% to Sioux Tools, and 45% to Bayliner Boats.⁴²⁰ Because the Comparative Fault Act requires individual comparisons of fault, and because the plaintiff's percentage of fault was greater than Sioux Tools' fault, the plaintiff was barred from recovery.⁴²¹

The plaintiff argued that the fault of her employer and Sioux Tools should be aggregated and that refusing to do so would extend the employer's immunity from suit to the third party manufacturer, in effect allowing the third party to "borrow" some of the employer's immunity.⁴²² The court rejected that argument, noting that the plaintiff was not barred from recovery because of her employer's immunity, but rather because a jury found her to be more negligent than the third-party manufacturer.⁴²³ The court found Bayliner's status to be irrelevant to the issue of whether the plaintiff is entitled to recover when the plaintiff's fault is greater than the fault of the person from whom recovery is sought.⁴²⁴ The court rejected as "pure speculation" the argument that the fault apportionment would have been different had the employer's fault not been considered.⁴²⁵

The court also pointed out that Bayliner's fault would still have been submitted to the jury even had a contribution claim not been

415. See *Kempa v. E.W. Coons Co.*, 370 N.W.2d 414, 421 (Minn. 1985).

416. *Cambren v. Sioux Tools, Inc.*, 323 N.W.2d 795, 798 (Minn. 1982).

417. *Id.* at 796.

418. *Id.*

419. *Id.*

420. *Id.*

421. *Id.* at 799.

422. *Id.* at 798.

423. *Id.*

424. *Id.*

425. *Id.*

asserted.⁴²⁶ The court's conclusion was based on *Lines v. Ryan*, a 1978 decision in which the court held that the fault of a nonparty could be considered in apportioning fault.⁴²⁷ While *Lines*⁴²⁸ did not involve the liability of an employer, the court in that case relied on *Connar v. West Shore Equipment of Milwaukee*,⁴²⁹ in which the Wisconsin Supreme Court concluded that the fault of the plaintiff-employee's employer had to be considered in the fault allocation. *Cambern* specifically appears to apply the Comparative Fault Act in taking the position that the fault of the employer has to be considered in the apportionment of fault and that it will have consequences.⁴³⁰

Cambern also has to be read in conjunction with the court's opinion in *Hudson v. Snyder Body, Inc.*⁴³¹ However, *Hudson* was decided on the same day as *Cambern*, but without citing that case.⁴³² Hudson sustained serious injuries when the box of a dump truck descended on his shoulder.⁴³³ He brought suit against the manufacturer of the truck hoist, the dealer that supplied the truck chassis on which the dump truck box was mounted, and Snyder, the assembler of the truck.⁴³⁴ The truck hoist manufacturer impleaded Hudson's employer, seeking contribution and indemnity.⁴³⁵ The jury found the plaintiff 20% at fault, the truck hoist manufacturer 25% at fault, the assembler 35% at fault, and the plaintiff's employer 20% at fault.⁴³⁶

The court held that an employer whose fault was equal to the fault of the plaintiff⁴³⁷ would still be subject to liability on a contribution claim by a third party, even though the employer would not have been liable to the employee had a direct action

426. *Id.*

427. *Lines v. Ryan*, 276 N.W.2d 896, 902 (1978).

428. *Id.*

429. *Connar v. W. Shore Equip. of Milwaukee*, 227 N.W.2d 660, 662–63 (Wis. 1975).

430. *Cambern*, 323 N.W.2d at 798.

431. *Hudson v. Snyder Body, Inc.*, 326 N.W.2d 149 (Minn. 1982).

432. *Id.*

433. *Id.* at 151.

434. *Id.*

435. *Id.*

436. *Id.* at 154.

437. The case arose in 1974, four years before the amendments to the comparative negligence statute turned it into a Comparative Fault Act. *See id.* at 151.

been permitted against the employer.⁴³⁸ The court concluded that “[t]he comparative-fault statute does not affect the apportionment procedure set out in *Johnson*,”⁴³⁹ and that “a third-party tortfeasor may recover contribution from a negligent employer under the principles of *Lambertson* and *Johnson* whether or not the employee, in a direct suit, would have been barred from recovery under the comparative-fault statute.”⁴⁴⁰

Justice Simonett, who wrote for the court in *Cambern*, dissented from that part of the majority’s opinion in *Hudson* because of the court’s creation of a special rule of pure comparative fault applied only in cases involving employers.⁴⁴¹ He noted that the problem of the adjustment of liabilities and apportionment of loss where “the principles of a common-law, comparative fault action conflict with the counter policies of the workers’ compensation law [are] perplexing,” and that in *Lambertson* the court “relaxed the technical requirements for contribution” in order “to achieve a more equitable result,” but he disagreed that the court should “now rely on technicalities to relax comparative fault principles.”⁴⁴²

After the 1978 amendment, an employer would be liable on a contribution claim even if the fault of the plaintiff-employee was greater than the fault of the employer.⁴⁴³ The employer’s fault is capped by its percentage of fault or its workers’ compensation liability, whichever is less.⁴⁴⁴ The key issue is whether the fault of the third party will be limited after the *Staab* decisions in light of *Cambern* and *Hudson*. The decision could go one of two ways. Either the court could hold that the Comparative Fault Act does not apply in the *Lambertson* setting, or it could hold that the Comparative Fault Act does apply to limit the liability of the third party. The cases from *Lambertson* through *Hudson* suggest the first. *Cambern* suggests the second.

438. *Id.* at 157.

439. *Id.*

440. *Id.* at 158.

441. *Id.* at 159 (Simonett, J., concurring in part and dissenting in part).

442. *Id.*

443. *Staab II*, 853 N.W.2d 713, 719 (Minn. 2014).

444. MINN. STAT. § 604.02, subdiv. 2 (2014); *see also Staab II*, 853 N.W.2d at 720.

The federal district court in *Gaudreault*⁴⁴⁵ took the second position, finding that *Staab I* is decisive on the issue, but without mentioning either *Hudson* or *Cambern* in its opinion:

After *Staab*, it is beyond dispute that “a tortfeasor’s liability—whether joint, several, or both—arises and exists independently of the tortfeasor’s participation in a lawsuit and, therefore, is independent of the tortfeasor’s obligation to contribute to any judgment entered in such a lawsuit.” That Delta has no exposure in tort to Gaudreault by operation of the Workers’ Compensation Act is thus no barrier to the application of [section 604.02, subdivision 1] to a special verdict in this case.⁴⁴⁶

Applying the Minnesota Supreme Court’s analysis in *Staab I*, however, could well lead to the opposite conclusion. Nothing in the 2000 amendment that added subdivision 11 to section 176.061 of the Workers’ Compensation Act changed the procedure the supreme court adopted in *Johnson v. Raske Building Systems, Inc.*⁴⁴⁷ Using the *Staab I* approach to legislative history, when the legislature adopted several liability as the default rule in 2003,⁴⁴⁸ replacing the “15% x 4” rule,⁴⁴⁹ which the court had held inapplicable in the employer/third party claim setting, it did so with knowledge of the supreme court’s position on the issue. Had the legislature intended to change that result, it could easily have done so.

If there is no common law several liability because of the employer’s immunity from suit, the *Staab I* rationale does not apply. The court in *Staab I* relied on a conclusion that several liability and joint and several liability are determined at the time the tort is committed as a means of circumventing the problem created by the requirement in section 604.02, subdivision 1 that the statute applies “[w]hen two or more persons are severally liable.”⁴⁵⁰ The Minnesota Supreme Court held in *Kempa*, however, that there can be no joint and several liability between an employer and third party tortfeasor.⁴⁵¹

445. *Gaudreault v. Elite Line Servs., LLC*, 22 F. Supp. 3d 966 (D. Minn. 2014).

446. *Id.* at 981 (emphasis omitted) (citation omitted).

447. 276 N.W.2d 79 (Minn. 1979).

448. MINN. STAT. § 604.02, subdiv. 1 (2002 & Supp. 2003).

449. MINN. STAT. § 604.02, subdiv. 1 (1988).

450. *Staab I*, 813 N.W.2d 68, 73 (Minn. 2012).

451. *Kempa v. E.W. Coons Co.*, 370 N.W.2d 414, 420 (Minn. 1985).

In *Decker v. Brunkow*, the plaintiff, an employee of Oak Ridge Homes, was injured when she slipped and fell on property owned by Brunkow.⁴⁵² She brought suit against Brunkow, who then brought a third party action against Oak Ridge, claiming contribution or indemnity.⁴⁵³ A jury found Oak Ridge to be 95% at fault and Brunkow 5%.⁴⁵⁴ Decker moved to allocate the entire verdict of \$125,020.93 to Brunkow.⁴⁵⁵ Brunkow argued that the then-existing limitation on damages of a person 15% or less at fault to no more than four times that percentage of fault applied.⁴⁵⁶

The court of appeals rejected the argument.⁴⁵⁷ Following *Lamberton* and *Kempa*, the court noted that the lack of common liability precluded a finding of joint liability, which was a prerequisite for the application of the reallocation statute.⁴⁵⁸ Neither party in the case argued that the legislature contemplated the conflict between workers' compensation law and the contribution claim contemplated by *Lambertson*.⁴⁵⁹ The court of appeals concluded, as did the supreme court in *Lambertson*, that any change would have to be made by the legislature.⁴⁶⁰

The 2000 amendment to the Workers' Compensation Act does not appear to address the problem through its waiver and walk provision.⁴⁶¹ The issue was not presented in *Staab I*. While the *Staab I* analysis of the 2003 amendment to the Comparative Fault Act can be applied in other cases where the fault of a nonparty is submitted to the trier of fact, it is by one line of supreme court decisions inapplicable in a case involving an employer.

On the other hand, the supreme court took the position early on that the fault of the employer must be considered in any allocation of fault arising out of a workplace accident. It does have consequences, as *Cambern* illustrates, barring recovery where the fault of the plaintiff is greater than the fault of the third party. If it is considered for those purposes, it should arguably be considered

452. 557 N.W.2d 360, 361 (Minn. Ct. App. 1996).

453. *Id.*

454. *Id.*

455. *Id.*

456. *Id.* at 362.

457. *Id.*

458. *Id.*

459. *Id.*

460. *Id.*

461. MINN. STAT. § 176.061, subdiv. 11 (2002).

in cases where the fault of the third party is 50% or less, but not via the route the supreme court took in *Staab I*. Rather, the analysis is the result of the application of section 604.01, subdivision 1 of the Comparative Fault Act as interpreted in *Cambern*.

In summary, there are two choices in considering *Staab's* impact on the third party claim. One, which follows the *Kempa* line of cases, recognizes that the Comparative Fault Act is inapplicable as a limitation on the fault of the employer, while at the same time using the Act's structure for the apportionment of fault. The other is to assume that *Staab* overrides that line of decisions and applies the rule of several liability to employers if they are found to be 50% or less at fault. *Cambern* provides support for that proposition. If the court applied the Comparative Fault Act to preclude a finding of liability on the part of a third party manufacturer when its fault was less than the fault of the plaintiff-employer, it is a short step to apply the statute to limit the liability of the third party to its percentage of fault if it is 50% or less.

VIII. CONCLUSION

In *Staab I*⁴⁶² the Minnesota Supreme Court answered the important issue of the impact of the assignment of fault to a nonparty. Through a creative use of the tools of statutory construction the court reaffirmed the principle that the fault of a nonparty could be considered and that it would have consequences. The court held that the only defendant in the litigation, the Diocese of St. Cloud, would be liable for only the percentage of fault assigned to it. Because the diocese was found to be 50% at fault, it was liable for only 50% of the plaintiff's damages, even though the other person (a party to the transaction leading to the injury) was not joined in the litigation. In the second *Staab* decision⁴⁶³ the court held that the Comparative Fault Act's loss reallocation provision could not be utilized to increase the diocese's liability beyond its 50% share of fault. Several liability means what it says.

Together, then, the *Staab* decisions establish that the fault of a nonparty may be submitted to the trier of fact in allocating fault among the persons responsible for causing a plaintiff's injuries, that a party found to be 50% or less at fault is only severally liable

462. *Staab I*, 813 N.W.2d 68 (Minn. 2012).

463. *Staab II*, 853 N.W.2d 713, 719 (Minn. 2012).

(absent a joint and several liability exception) even if it is the only defendant in the suit, and that the loss reallocation statute cannot be used to allocate any uncollectible share of the obligation assigned to the nonparty to the severally liable party (absent a joint and several liability exception).

The result in *Staab I* was certainly justifiable in terms of the court's prior precedent, even absent the fiction that "liability" exists at the time of an accident, rather than judgment. Those cases lacked a clear policy rationale, however, one that was not supplied in *Staab I*. *Staab II* becomes easy in light of *Staab I*. Taking the statute as a whole, several liability means several liability, and the reallocation statute cannot be used to double down on the obligation of the severally liable party. That is the important point in *Staab II*.

The issue of whose fault will be considered in the allocation of fault has been the subject of prior Minnesota cases, but even after *Staab I* there are open questions concerning whose fault will be considered. There are various cases where the issue has already arisen and others that will likely arise in subsequent cases. This short list includes cases where a party:

1. Has been released from litigation pursuant to a Pierringer release;
2. Is identified and is a party to related litigation;
3. Is sufficiently identified to permit joinder;
4. Is sufficiently identified but cannot be joined because it is not subject to service of process in Minnesota;
5. Is not liable because a statute of limitations has run;
6. Is a government employee protected from liability for negligence by reason of official immunity; or
7. Is a person protected from liability for ordinary negligence by reason of a statutory protection.

There are other issues remaining after the *Staab* decisions. One concerns the impact of the loss reallocation statute after *Staab II*. While the court barred its application to increase the liability of a severally liable party, the court by no means read the loss reallocation provision out of existence. There are various cases where reallocation will apply, but a condition precedent will be a finding that the party seeking to reallocate has paid more than his or her fair share of the judgment and seeks to reallocate an uncollectible share in part to other jointly and severally liable

parties or to the plaintiff, because of an inability to shift the loss through a contribution claim.

There is also a question concerning the impact of the *Staab* decisions on the products liability reallocation provision in the Comparative Fault Act. The key issue is whether the fault of parties in the chain of manufacture and distribution will be limited to their percentages of fault if 50% or less at fault. Given the nature of the relationship of parties in the chain of manufacture and distribution, coupled with the impact of section 544.41, the *Staab* decisions should not in any way limit the liability of defendants in the chain of manufacture and distribution.

The final issue concerns the impact of *Staab I* on third party claims against employers for contribution. The issue is whether the third party will be only severally liable if found to be 50% or less at fault. That turns on whether the Comparative Fault Act applies to those claims. The single decision on the issue, a federal district court opinion, applied *Staab I* and held that it did.⁴⁶⁴ The result in that case is sustainable, although its analytical path is questionable.

As a final point, the gaps in the comparative negligence statute and the Comparative Fault Act over the years have been filled through a series of decisions necessitated by those gaps. The legislative march toward the adoption of several liability as the default rule has been a road that the legislature left rough because it used unclear and ambiguous language to express the key goal of achieving several liability.⁴⁶⁵ If several liability is the goal, the construction of the Comparative Fault Act in the *Staab* decisions achieved that goal. It is important to be discerning in assessing the impact of the decisions, however.

464. *Gaudreault v. Elite Line Servs., LLC*, 22 F. Supp. 3d 966 (D. Minn. 2014).

465. In *King v. Burwell*, 135 S. Ct. 2480, 2492–93 (2015) (construing the Affordable Care Act), the Supreme Court noted the basic principle that in cases where the text of a statute is ambiguous, the “provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.” *Id.* (citation omitted).