1979


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manifest injustice.\textsuperscript{48} So long as the criminal defendant is afforded due process and steps are taken to avoid the conviction of an innocent person, the court appears to be satisfied. Convictions based on guilty pleas will be upheld in Minnesota, provided the standards for accepting the pleas are applied properly, within the limits established by the United States Supreme Court in\textit{Alford}.

\textbf{Evidence—Remedies—Property Rights—Torts—\textit{Busch v. Busch Construction, Inc.}, 262 N.W.2d 377 (Minn. 1977).}

\textit{In this 1977 decision, the Minnesota Supreme Court addressed the doctrine of curative admissibility, discussed remittiturs and the reasonableness of jury verdicts, expanded the right of women to bring actions for future medical expenses, and adopted a comparative fault analysis in strict products liability suits.}

In\textit{Busch v. Busch Construction, Inc.},\textsuperscript{1} the Minnesota Supreme Court addressed a number of significant issues that affect the law of evidence,\textsuperscript{2} damages,\textsuperscript{3} married women's property rights,\textsuperscript{4} and products liability.\textsuperscript{5} \textit{Busch} involved six consolidated personal injury actions arising out of a single vehicle accident. The accident victims contended that a plastic particle broke loose from the turn signal switch prior to the accident, causing the steering wheel to lock and the vehicle to go out of control.\textsuperscript{6} General Motors, manufacturer of the automobile, disputed the plaintiffs' theory of causation, maintaining that the accident resulted from the driver falling asleep at the wheel or his inattention.\textsuperscript{7} After a twelve week trial, the jury found Lando Busch, the vehicle's driver, fifteen percent at fault, and General Motors, on a strict liability theory, eighty-five percent at fault.\textsuperscript{8}

\begin{itemize}
  \item[48.] See, e.g.,\textit{Coolen v. State}, 288 Minn. 44, 48, 179 N.W.2d 81, 84 (1970) ("[A]n application to withdraw a plea of guilty \ldots should be granted whenever necessary to correct a manifest injustice.");\textit{Chapman v. State}, 282 Minn. 13, 20-21, 162 N.W.2d 698, 703 (1968) ("We have refused to order vacation of a guilty plea when manifest injustice has not been demonstrated.");\textit{ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilt} § 2.1(b), Commentary § 2.1(b) (Approved Draft 1968).
  \item[1.] 262 N.W.2d 377 (Minn. 1977).
  \item[2.] See notes 9-32 infra and accompanying text.
  \item[3.] See notes 33-44 infra and accompanying text.
  \item[4.] See notes 45-65 infra and accompanying text.
  \item[5.] See notes 66-100 infra and accompanying text.
  \item[6.] 262 N.W.2d at 383-84.
  \item[7.] Id.
  \item[8.] Id. at 383.
\end{itemize}
In affirming the verdict, the supreme court initially examined the doctrine of curative admissibility. Essentially, this doctrine permits otherwise inadmissible evidence to be introduced when a party’s opponent previously introduced similar inadmissible evidence. An examination of this doctrine was necessitated when General Motors claimed that on seven occasions the claimants introduced improper evidence, mandating the acceptance of its own otherwise inadmissible evidence.

Because of the variety of circumstances in which the doctrine of curative admissibility has arisen, courts are in disagreement as to its proper application. The major area of disagreement is whether making an

9. See id. at 386. Previous Minnesota cases have recognized the doctrine but the term “curative admissibility” has never been used in any prior decisions. See id. at 387. For prior Minnesota cases applying the curative admissibility doctrine without referring to it by name, see McNab v. Jeppesen, 258 Minn. 15, 102 N.W.2d 709 (1960) (automobile collision; on cross-examination of patrolman, defendant, without objection, elicited that impact occurred on west portion of pavement; testimony of engineer, thereafter called by plaintiff, to lane of collision held admissible); Albertson v. Chicago, M., St. P. & P.R.R., 242 Minn. 50, 64 N.W.2d 175 (1954) (personal injury suit; plaintiff’s witness testified, over objection, to certain requests made by employees upon defendant; later testimony of defendant’s witness denying such request held admissible).


11. General Motors claimed that it was reversible error to disallow its expert witness to testify in rebuttal to testimony offered by Kathleen Vohnoutka that Lando Busch was “trying to turn the steering wheel” prior to the accident. 262 N.W.2d at 387-88. The court held that application of the doctrine of curative admissibility was not proper because plaintiff’s testimony was admissible. See id. at 388. Six additional reversible errors were claimed by General Motors. First, General Motors claimed that it was impermissible for Lando Busch to testify that he did not fall asleep at the wheel because “he never fell asleep.” See id. In this instance, the doctrine of curative admissibility was not proper because General Motors’ proper rebuttal should have been direct or circumstantial evidence that Busch fell asleep at the wheel. See id. Second, it was claimed that the testimony offered by plaintiff’s expert witness as to causation was improper. See id. The Busch court determined that this argument was unmeritorious because the testimony on causation was admissible. See id. at 389. Third, General Motors claimed that improper testimony was offered by plaintiff’s expert witness as to reaction time of a person under distress. See id. In this instance, the doctrine of curative admissibility was inapplicable because General Motors prejudiced itself by misconstruing the trial court’s order, which would have allowed rebuttal testimony. See id. Fourth, General Motors argued that testimony offered as to the restful night Lando Busch spent prior to the accident was improper. See id. Because this testimony was admissible, the doctrine of curative admissibility did not apply. See id. Fifth, testimony of the investigating officers concerning alcohol consumption was claimed to be inadmissible. See id. Because this testimony was also admissible, the doctrine of curative admissibility did not apply. See id. Finally, testimony concerning Busch’s driving and sleeping habits was challenged. See id. As with the two preceding allegations of error, because the testimony was admissible, the doctrine of curative admissibility did not apply. See id.

12. See C. McCormick, supra note 10, § 58, at 132 ("Because of the many variable factors affecting the solution in particular cases the decisions do not lend themselves easily to generalizations.").
objection to the original inadmissible evidence is a prerequisite to the admission of otherwise inadmissible evidence under the doctrine. The Busch court had to determine whether objection to the original inadmissible evidence was necessary because General Motors twice failed to object to the introduction of evidence it subsequently claimed as the basis for introducing its own otherwise inadmissible evidence.

Three rules have been formulated to determine whether an objection to the original inadmissible evidence is necessary before the curative admissibility doctrine applies. The majority rule views the failure to object as immaterial. The rationales supporting this rule vary. Some courts have reasoned that a party introducing inadmissible evidence waives future objections to inadmissible evidence of a similar nature. Other courts accept the inadmissible evidence based on the "opening the door" doctrine. Under this doctrine, if one party, without objection, introduces inadmissible evidence, courts view the door as being opened to similar inadmissible evidence offered by an opponent. A third basis for the rule is that a party introducing incompetent evidence is estopped

14. See 262 N.W.2d at 390. First, General Motors contended that the admission of opinion testimony by the investigating officers concerning alcohol consumption and braking marks entitled it to introduce rebuttal testimony. See id. Second, General Motors claimed that admission of testimony concerning Busch's driving and sleeping habits entitled it to introduce expert testimony in rebuffal. See id. Because on both occasions the testimony offered by plaintiff's witness was admissible, the court held the doctrine of curative admissibility did not apply. See id.
15. See United States v. Regents of New Mexico School of Mines, 185 F.2d 389 (10th Cir. 1950) (condemnation; majority rule applied to specific offer of purchase); State v. Mercer, 13 Ariz. App. 1, 473 P.2d 803 (1970) (defendant, having opened door to inadmissible evidence, may not object when prosecution asks questions of witness on same matter); Hopwood v. Thomas Hoist Co., 71 Ill. App. 2d 434, 219 N.E.2d 76 (1966) (when plaintiff's witness testified on direct examination that physician had examined plaintiff for workers' compensation claim, it was proper for defendant to cross-examine physician on such testimony); State v. Owens, 301 So. 2d 591, 593 (La. 1974) (defense cannot complain about inquiries on cross-examination pertaining to subject matter of direct examination); Lucas v. State, 479 S.W.2d 314 (Tex. 1972) (testimony regarding polygraph test admitted for rebuttal purposes); Larson v. Pischell, 13 Wash. App. 576, 535 P.2d 833 (1975).
16. See, e.g., Larson v. Pischell, 13 Wash. App. 576, 580, 535 P.2d 833, 836 (1975) ("The subject having been raised by the plaintiffs in their case in chief, they cannot now be heard to claim it was error."); J. Wigmore, supra note 10, § 15, at 309.
17. See, e.g., State v. Mercer, 13 Ariz. App. 1, 3, 473 P.2d 803, 805 (1970) (defendant, having "opened the door" to inadmissible evidence, may not subsequently complain); Scott v. Wilson, 157 Iowa 31, 33, 137 N.W. 1043, 1044-45 (1912) (when plaintiff introduced oral evidence bearing on a contract he was not entitled to object to introduction of responsive oral evidence); State v. Barnett, 156 Kan. 746, 747, 137 P.2d 133, 137 (1943) (defendant, by testifying as to his own character, opened door for state to show prior bad behavior); Busch v. Busch Constr., Inc., 262 N.W.2d 377, 386 (Minn. 1977) (doctrine of curative admissibility permits introduction of inadmissible evidence when "door is opened" by introduction of similar evidence on same point).
18. See cases cited in note 17 supra.
from objecting to the other party’s inadmissible evidence. Finally, at least one court has reasoned that courts should give both parties the benefit of the same rules of evidence.

The minority rule views the failure to object as barring an opponent from introducing similar inadmissible evidence. Courts following the minority rule have suggested three rationales. First, parties should not have the right to introduce immaterial evidence by their failure to object to inadmissible evidence. Second, as a matter of public policy, court time should not be wasted by hearing inadmissible evidence. Finally, some courts have reasoned that two wrongs never make a right.

The third view, known as the Massachusetts rule, is an intermediate one. Courts following this approach permit the trial court discretion as to the admissibility of curative evidence.

Although a 1975 Minnesota case appeared to place Minnesota in the minority, the rule is not uniform. See, e.g., Peterson v. McManus, 187 Iowa 522, 526, 172 N.W. 460, 465 (1919) (plaintiff, having introduced inadmissible evidence, is estopped to deny counterproof); State v. Owens, 301 So. 2d 591, 593 (La. 1974) (“the defense cannot be heard to complain about inquiries on cross-examination pertaining to the subject matter of the direct examination”).


See, e.g., Henson v. State, 239 Ark. 727, 732, 393 S.W.2d 856, 859 (1965); Stapleton v. Monroe, 111 Ga. 848, 36 S.E. 428 (1900) (per curiam).


See, e.g., Herget Nat'l Bank v. Johnson, 21 Ill. App. 3d 1024, 1027, 316 N.E.2d 191, 193 (1974) (“If one party's evidence opens up an issue and the other party will be prejudiced unless he can introduce contradictory or explanatory evidence he should be permitted to do so . . . .”); Vine St. Corp. v. City of Council Bluffs, 220 N.W.2d 860, 864 (Iowa 1974) (“The rule in Iowa is that when one party introduces inadmissible evidence, with or without objection, the trial court has discretion to allow . . . otherwise inadmissible evidence on the same subject when it is fairly responsive.”); Roy v. Commonwealth, 191 Va. 722, 729, 62 S.E.2d 902, 905 (1951) (“Evidence, though immaterial and admitted without objection, may be rebutted if necessary to prevent an unfair influence or prejudice which might otherwise exist.”).
category of jurisdictions following the minority rule, the *Busch* court, without stating any reasons, held that General Motors’ failure to object to the allegedly inadmissible evidence was immaterial. In so holding, the court clarified and limited the doctrine’s application to those situations in which the original evidence was inadmissible and prejudicial and the inadmissible rebuttal evidence is limited to the same evidentiary facts as the original inadmissible evidence.

So formulated, the curative admissibility doctrine in Minnesota is simply a corollary of the rule that trials should be fair to all litigants. Accordingly, after a party introduces inadmissible evidence, the opposing party should receive a similar favorable ruling on evidence of the same character relating to the same issue. Although the *Busch* court viewed the doctrine of curative admissibility with favor, its interpretation of the doctrine failed to benefit General Motors because the court found that the evidence General Motors intended to rebut was either admissible, nonprejudicial, or of a different character than that sought to be brought before the jury. Consequently, General Motors was unable to persuade the court that a new trial should be granted because of evidentiary errors made by the trial court.

Second, the *Busch* court addressed the propriety of both Angeline Busch’s damage awards and the propriety of the trial court’s order substantially reducing three of the claimants’ damage awards. General Motors claimed that Angeline Busch’s damage awards were excessive because, when invested at eight percent, they yielded an amount greater than her projected annual medical expenses and lost earning capacity, thereby violating the *Hallada v. Great Northern Railway* test of rea-

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28. 262 N.W.2d at 387.
29. See id.
31. See 262 N.W.2d at 387.
32. See id. at 390.
33. See id. at 396-400.
34. See id. at 400-01.
35. See id. at 397.
36. 244 Minn. 81, 69 N.W.2d 673 (1955), overruled in part, Busch v. Busch Constr., Inc., 262 N.W.2d 377, 397 (Minn. 1977). In *Hallada*, the court stated:
   The reasonableness of an award for damages can be appraised only in the light of the elementary principle that plaintiff should be given neither more nor less than a sum which leaves him financially whole to the same extent as he would have been had no injury occurred. Whether an injured person has been made financially whole must be tested by determining what the total amount of damages awarded by the jury will accomplish for him if conserved and used with ordinary prudence. Here we have a verdict of $170,154.81. If this sum is invested at three percent plaintiff will receive in interest alone an annual income of $5,104.64 or slightly less than his regular preinjury income of $5,400. If the
sonableness. In *Hallada*, the Minnesota Supreme Court held that damage awards are unreasonable when the award plus the respective interest on the total damage award exceeds a plaintiff's projected annual medical expenses and lost earning capacity. The *Busch* court specifically overruled *Hallada* because its effect was to require injured plaintiffs to invest their pain and suffering awards and to use the resulting interest for future medical expenses and wage loss. Overruling *Hallada* was further justifiable because pain and suffering awards are intended to compensate past as well as future pain and suffering.

Three of the claimants also appealed the trial court's order, which substantially reduced their damage awards. Traditionally, the reduction of a jury's verdict has been left to the discretion of the trial court and has been a decision with which the supreme court would not interfere on appeal, absent a clear showing that the trial court had abused its discretion. Moreover, before the Minnesota Supreme Court would reverse a trial court's order reducing a verdict, the preponderance of the evidence had to be "manifestly and palpably in favor of the verdict."

The Minnesota court appeared to remove much of the trial court's discretion in a 1976 decision in which the court suggested that a remittitur was proper only when the evidence clearly indicated jury mistake, money is invested at the reasonable rate of only three and one-fourth percent he will have an annual interest income of $5,530.03 or slightly more than his former income. When his life expectancy expires he will still possess the entire principal sum of $170,154.81.

*Id.* at 97, 69 N.W.2d at 686 (emphasis in original) (footnote omitted).

37. See 244 Minn. at 97-99, 69 N.W.2d at 686-87. This reasoning had been accepted consistently by the Minnesota court. See, e.g., Sorenson v. Cargill, Inc., 281 Minn. 480, 491, 163 N.W.2d 59, 67 (1968); Cox v. Chicago, R.I. & P.R.R., 250 Minn. 187, 195, 84 N.W.2d 263, 268-69 (1957); Clay v. Chicago, M. & St. P. Ry., 104 Minn. 1, 14, 115 N.W. 949, 955 (1908).

38. See 262 N.W.2d at 397.


40. 262 N.W.2d at 400-01. The remittiturs in question were as follows:

<table>
<thead>
<tr>
<th>Plaintiff</th>
<th>Jury Award</th>
<th>Remittitur Order</th>
</tr>
</thead>
<tbody>
<tr>
<td>Angeline Busch</td>
<td>$1,000,000</td>
<td>$725,000</td>
</tr>
<tr>
<td>Future Expenses</td>
<td>$800,000</td>
<td>no remittitur</td>
</tr>
<tr>
<td>Pain and Suffering</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lando Busch</td>
<td>$608,500</td>
<td>$135,400</td>
</tr>
<tr>
<td>(found 15% at fault)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Francis Vohnoutka</td>
<td>$250,000</td>
<td>$19,192</td>
</tr>
</tbody>
</table>


42. See, e.g., Koenig v. Ludowese, 308 Minn. 380, 243 N.W.2d 29 (1976); Rheiner v. Stillwater St. Ry. & Transfer Co., 29 Minn. 147, 150, 12 N.W. 449, 451 (1882).
bias, or improper motive. The *Busch* court, however, appears to have returned to the prior "abuse of judicial discretion" standard because, in affirming the trial court's remittitur order, neither the supreme court nor the trial court indicated that the jury had suffered from passion or prejudice or had misapplied a mathematical formula in computing any of the plaintiff's damages, other than those arising from Mrs. Busch's claim. Consequently, *Busch* renders uncertain the circumstances in which a trial court may grant a remittitur.

A third significant issue considered by the *Busch* court involved the right of a married woman to bring a cause of action in her own name for future medical expenses. The court recognized Angeline Busch's right to bring such an action and affirmed the damages awarded to her by the trial court. Prior to *Busch*, a husband was deemed to have the exclusive right to recover his wife's medical expenses. The only exceptions to this rule occurred when a wife either paid or had impliedly assumed liability for her future medical expenses. Such a result devel-

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43. See Koenig v. Ludowese, 308 Minn. 380, 383-84, 243 N.W.2d 29, 31 (1976).
44. See 262 N.W.2d at 400-01.
45. See id. at 401-02.
46. Historically, the Minnesota rule has been that an actionable wrong, resulting in personal injury to the wife, gives rise to two causes of action against the wrongdoer; one in favor of the wife for her own personal damages and another in favor of the husband for loss of the services and society of his wife and for expenses incurred by him for medical treatment of her injuries. See, e.g., Plain v. Plain, 307 Minn. 399, 403-04, 240 N.W.2d 330, 332-33 (1976), *overruled in part*, Busch v. Busch Constr., Inc., 262 N.W.2d at 402; Janke v. Janke, 292 Minn. 296, 299-300, 195 N.W.2d 185, 185-86 (1972), *overruled*, Busch v. Busch Constr., Inc., 262 N.W.2d at 402; Boland v. Morrill, 275 Minn. 496, 498-99, 148 N.W.2d 143, 145 (1967), *overruled in part*, Busch v. Busch Constr., Inc., 262 N.W.2d at 402. Thus, because a husband was primarily liable for the payment of his wife's medical expenses, the wife usually was precluded from recovering such expenses herself.
47. Minnesota courts have granted married women the right to recover their own medical expenses only under unusual or special circumstances. See, e.g., Holmes v. Hollingsworth, 234 Ark. 347, 349, 352 S.W.2d 96, 97-98 (1961) (wife permitted to recover amounts on her own initiative or as a result of acts of a wrongdoer); Hyland v. Southwell, 320 A.2d 767, 768-69 (Del. Super. Ct. 1974) (same); Hickey v. Shoemaker, 132 Ind. App. 136, 143-44, 167 N.E.2d 487, 490 (1960) (same); Staskiewicz v. Galvic, 13 Mich. App. 215, 219-21, 163 N.W.2d 815, 817-18 (1968) (wife contracted for medical services and paid almost all bills); Rearick v. Manzella, 355 S.W.2d 134, 137 (Mo. Ct. App. 1962) (wife contracted or incurred liability for her medical treatment); De Fossez v. Lake George Marine Indus., Inc., 281 A.D. 1002, 1002, 120 N.Y.S.2d 449, 450 (1953) (wife incurred bills on her own credit and paid bills with her own funds); Verchereau v. Jameson, 122 Vt. 189, 195, 167 A.2d 521, 525-26 (1961) (wife permitted to recover medical expenses for which she has assumed primary liability); Baum v. Bahn Frei Mut. Bldg. & Loan Ass'n, 237 Wis. 117, 125, 295 N.W. 14, 17 (1940) (wife permitted to recover for expenses she has previously paid).
oped out of the "protective" interpretation given women under the Minnesota married women's property statute. Because the trial court granted Angeline Busch's request that she be deemed responsible for her future medical expenses, the *Busch* court had to review its prior interpretation of that statute.

The rule that a husband is deemed to have the exclusive right to recover the reasonable cost of care, treatment, and cure of his wife's personal injuries was justified through the judicial fiction that a husband and wife constituted one legal entity with the husband having the only right to bring suit either in the name of one or both marriage partners. As a result of this legal fiction, a wife lost all capacity to sue or be sued without joining her husband as a plaintiff or defendant in the suit.

48. MINN. STAT. § 519.05 (1978) provides:

No married woman shall be liable for any debts of her husband, nor shall any married man be liable for any torts, debts, or contracts of his wife, committed or entered into either before or during coverture, except for necessaries furnished to the wife after marriage, where he would be liable at common law. Where husband and wife are living together, they shall be jointly and severally liable for all necessary household articles and supplies furnished to and used by the family.

49. Originally Lando Busch included a claim for past and future medical expenses and attendant care for Angeline Busch in his complaint. At the commencement of the trial, counsel for Mrs. Busch moved to amend his client's complaint to allow her to collect future medical expenses and attendant care, leaving the past medical expenses and attendant care to her husband's complaint. The motion was predicated on the argument that she had assumed the obligation of her future medical expenses and future attendant care and that the rule in Minnesota denying her the right to recover such expenses, as affirmed in Janke v. Janke, 292 Minn. 296, 195 N.W.2d 185 (1972), *overruled*, Busch v. Busch Constr., Inc., 262 N.W.2d at 402, was outdated in light of the current status of women in society.

Appellants-Respondents Lando Busch and Busch Construction, Inc. argued that the amendment was merely a tactical move on the part of Mrs. Busch to avoid forfeiture of recovery in the event that Mr. Busch was found negligent and therefore unable to recover. See Brief for Appellant at 61.

Prior interpretations of section 519.05 of the Minnesota Statutes had held that the test of whether a wife could recover her own medical expenses was one of an unequivocal agreement by the wife directly with the parties supplying the services to the exclusion of the husband and not one of an alleged agreement between the husband and wife. See Janke v. Janke, 292 Minn. 296, 299-300, 195 N.W.2d 185, 186-87 (1972), *overruled*, Busch v. Busch Constr., Inc., 262 N.W.2d at 402; Boland v. Morrill, 275 Minn. 496, 501, 148 N.W.2d 143, 147 (1967), *overruled in part*, Busch v. Busch Constr., Inc., 262 N.W.2d at 402.

50. See 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 441-45 (3d ed. Cooley 1884). In fact, the very legal existence of the wife's personal and property rights was regarded as suspended for the duration of the marriage, or at least, as incorporated and consolidated into those of the husband. See id. at 441.

Fortunately, toward the middle of the nineteenth century, statutes known as married women’s property statutes, or emancipation statutes, began to appear in the United States. These statutes purported to give married women many of the legal rights that previously had been held only by men. In Busch, an attempt was made to carry the prior interpretations of Minnesota’s married women’s property statute one step further by allowing Angeline Busch to recover her own future medical expenses. Similar attempts had already proved successful within the limits of married women’s property statutes in other jurisdictions. Accepting the argument that a married woman has a right to contract, the Minnesota Supreme Court replaced its prior construction of the statute with a more contemporary interpretation that recognizes the right of a married woman to bring an action for her own future medical expenses in her name. In permitting Angeline Busch to recover such expenses, the Busch court overruled several prior Minnesota cases, indicating that its prior decisions did not accurately reflect the trend with which women were being treated by the law. The Busch court further rationalized its interpretation of the statute on the premise that any other


53. See W. PROSSER, supra note 51, § 122, at 861.

54. Previously, the statute had been interpreted to permit a married woman to recover her own medical expenses only if she had specifically contracted with the parties rendering the medical services. See, e.g., Janke v. Janke, 292 Minn. 296, 299-300, 195 N.W.2d 185, 186-87 (1972), overruled, Busch v. Busch Constr., Inc., 262 N.W.2d at 402; Boland v. Morrill, 275 Minn. 496, 501, 148 N.W.2d 143, 147 (1967), overruled in part, Busch v. Busch Constr., Inc., 262 N.W.2d at 402. In Busch, the Minnesota Supreme Court was confronted with the question whether a wife should be allowed to recover her future medical expenses solely on the basis of an agreement between a husband and a wife in which the wife assumed primary liability for such expenses. See 262 N.W.2d at 401-02.

55. See Graham v. Central of Ga. Ry., 217 Ala. 658, 660, 117 So. 286, 288 (1928) (wife must sue for personal injuries to self, but husband retains action for compensatory damages resulting therefrom); Chase v. Fitzgerald, 132 Conn. 461, 470, 45 A.2d 789, 793 (1946) (damages due to incapacity of wife by reason of personal injury recoverable by her and not her husband); Cassidy v. Constantine, 269 Mass. 56, 168 N.E. 169 (1929) (wife has right to recover future probable medical expenses); Laskowski v. People's Ice Co., 203 Mich. 186, 188-89, 168 N.W. 940, 942 (1918) (husband not necessary or proper party to wife's suit); Rubalcava v. Giseman, 14 Utah 2d 344, 384 P.2d 389 (1963) (wife given privilege of suing to protect whatever rights she has, but not to create new causes of action); Gilman v. Gilman, 115 Vt. 49, 50-51, 51 A.2d 46, 47 (1947) (wife has statutory right to sue for damages resulting from personal injury).

56. See 262 N.W.2d at 402.

57. See id. (overruling Plain v. Plain, 307 Minn. 399, 240 N.W.2d 330 (1976); Janke v. Janke, 292 Minn. 296, 195 N.W.2d 185 (1972); Boland v. Morrill, 275 Minn. 496, 148 N.W.2d 143 (1967)).

58. See id.
construction would be inconsistent with a wife's right to enter into contracts and to incur liabilities. 59

While the Busch court permitted a married woman to bring suit to recover her future medical expenses, the court did not interpret the married women's statute as relieving the husband of all liability to pay for his wife's medical or other necessary expenses. Rather, the court held that a husband's liability for necessary expenses is secondary while the wife's liability for such expenses is primary. 60

The Busch court's holding, therefore, should not alter substantially a husband's duty to support his wife. The court, however, appeared reluctant to deprive a husband of all access to a damage award claimed by his wife. The Busch court's hesitation probably stemmed from the fear that a wife might collect an award and then fail to pay her expenses covered by the award. 61 Consequently, the Busch court suggested that any future medical funds be placed in a trust fund. 62 In suggesting the establishment of such a trust, the court also indicated that the recovery of future medical expenses by an injured wife is an issue in need of legislative review. 63 If the married women's property statute was repealed rather than modified, however, major problems could occur. Without this statute, it is doubtful whether alimony or other support obligations of the husband could ever be successfully enforced. 64 Any legislative modifications of the statute, therefore, should be carefully tailored to balance a husband's liability for his wife's expenditures against a woman's need to receive alimony. Perhaps the Legislature should consider the current impact of the statute in light of Minnesota's

59. See id. The right of a woman to contract independently is contained in Minn. Stat. § 519.03 (1978), which provides in part: "Every married woman . . . may make any contract which she could make if unmarried, and shall be bound thereby . . . ."

60. 262 N.W.2d at 402. The term "necessary" is not capable of exact definition, but it generally has been asserted that whatever reasonably and naturally aids in the relief of distress, or materially promotes comfort, of either body or mind, may be deemed a necessary expense. See, e.g., Conant v. Burnham, 133 Mass. 503, 505 (1882). Medical expenses, including surgical, hospital, dental, and nursing expenses and services, and medical supplies are generally considered to be within the scope of necessaries. See, e.g., Plain v. Plain, 307 Minn. 399, 403, 240 N.W.2d 330, 332-33 (1976), overruled in part, Busch v. Busch Constr., Inc., 262 N.W.2d at 402; Janke v. Janke, 292 Minn. 296, 300, 195 N.W.2d 185, 187 (1972), overruled, Busch v. Busch Constr., Inc., 262 N.W.2d at 402; Boland v. Morrill, 275 Minn. 496, 501-02, 148 N.W.2d 143, 146-47 (1967), overruled in part, Busch v. Busch Constr., Inc., 262 N.W.2d at 402.

61. See 262 N.W.2d at 402.

62. See id.

63. See id.

64. According to Minn. Stat. § 609.375 (1978), a husband may be guilty of a misdemeanor if he knowingly refuses to perform his legal obligation to support his wife. The repeal of section 519.05 could serve to eliminate any such criminal liability on the part of the husband. See 62 Minn. L. Rev. 1316, 1321-22 & 1321 n.34 (1978).
ratification of the proposed Equal Rights Amendment. Such consideration should lead to modification of the statute so as to make each spouse secondarily liable for each other's necessary expenditures.

Perhaps the most significant issue addressed by the *Busch* court concerned the interplay between the doctrines of products liability and comparative negligence. Jurisdictions adopting both doctrines must eventually face the troublesome problem of determining the extent to


66. The strict products liability theory is set forth in *Restatement (Second) of Torts* § 402A (1965), which states:

§ 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer

1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

a) the seller is engaged in the business of selling such a product, and

b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

2) The rule stated in Subsection (1) applies although

a) the seller has exercised all possible care in the preparation and sale of his product, and

b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.


The adoption of the strict products liability doctrine has undergone a similar explosion. See Reitz & Seabolt, *Warranties and Products Liability: Who Can Sue and When?*, 46 *Temp. L.Q.* 527 (1973) (indicating that 34 states permit recovery based on strict products liability concepts); 1 *Prod. Liab. Rep.* (CCH) ¶¶ 4050-70 (indicating that 48 states have accepted strict products liability concepts).
which a plaintiff's conduct should affect any potential recovery. In
addressing this difficult issue, the *Busch* court approved the trial court's
use of a special verdict that required the jury to compare the motor
vehicle driver's negligence with General Motors' strict liability. The
*Busch* court held that such a comparison was proper because with Min-
nesota's adoption of Wisconsin's comparative negligence statute in
1969, the Legislature also acquiesced in the Wisconsin Supreme
Court's pre-1970 interpretation of the borrowed statute. Consequently,
the 1967 Wisconsin Supreme Court decision in *Dippel v. Sciano*, which

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68. For a discussion of this problem, see Epstein, *Products Liability: Defenses Based on
  Sw. L.J. 61 (1965); Noel, *Defective Products: Abnormal Use, Contributory Negligence, and
  Assumption of Risk*, 25 Vand. L. Rev. 93 (1972); Wright, *Hoelter-Skelter: Product
  Defect and Plaintiff Negligence—A Connecticut Commentary on Confusion*, 10 Conn. L.
  Rev. 90 (1977); Note, supra note 66.

69. See 262 N.W.2d at 393-94. Other courts have applied comparative fault principles
  in products liability cases. See, e.g., West v. Caterpillar Tractor Co., 547 F.2d 885 (6th
  Cir. 1977) (court apparently also applied a comparative fault approach applicable only
  when the plaintiff's fault is failing to discover or guard against the possibility of the
  existence of a defect); Edwards v. Sears, Roebuck & Co., 512 F.2d 276, 290 (5th Cir. 1975);
  prior to adoption of comparative-negligence statute, court indicated that comparative
  negligence and strict liability may be compared); General Motors v. Hopkins, 548 S.W.2d
  344 (Tex. 1977) (comparative causation applied to misuse situation); Dippel v. Sciano,
  37 Wis. 2d 443, 155 N.W.2d 55 (1967). *But see Melia v. Ford Motor Co.*, 534 F.2d 796 (8th
  Cir. 1976) (holding that applying Nebraska slight-gross comparison statute would be
  confusing in a strict liability case); Hoelter v. Mohawk, 170 Conn. 495, 365 A.2d 1064
  (1976) (dissent chastising majority for not applying comparative fault concepts).

Whether the *Busch* court actually adopted a comparative fault approach is uncertain,
however, because of its description of the comparative negligence statute as a comparative
cause statute. See 262 N.W.2d at 394. Consequently, future litigation is necessary to
determine whether a jury in determining liability is to compare causation or causal fault.
Apparently, the only commentator who has considered this issue is Jensvold. See Jens-
vold, *A Modern Approach to Loss Allocation Among Tortfeasors in Products Liability
law, see Calebresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven,
Jr.*, 43 U. Chi. L. Rev. 69 (1975); Green, *Duties, Risks, Causation Doctrines*, 41 Tex. L.
543 (1962); Malone, *Ruminations on Cause-In-Fact*, 9 Stan. L. Rev. 60 (1956); Twerski,
*From Defect to Cause to Comparative Fault—Rethinking Some Product Liability

70. The Wisconsin comparative negligence statute was enacted in 1931. See Act of June
15, 1931, ch. 242, § 1, 1931 Wis. Laws 375, as amended by Act of July 26, 1949, ch. 548, §
95, as amended by Act of June 22, 1971, ch. 47, 1971 Wis. Laws 50 (current version at

71. See 262 N.W.2d at 393.

72. 37 Wis. 2d 443, 155 N.W.2d 55 (1967).
applied the Wisconsin comparative negligence statute in a strict products liability case,73 required the judicial adoption of a comparative fault approach to products liability claims in Minnesota.74 In Dippel, the Wisconsin court held that all types of plaintiff negligence could be compared with a defendant’s strict liability because strict liability is equivalent to negligence per se.75

The Busch court, however, departed from the Dippel holding in two respects. First, the court did not indicate that strict liability is equivalent to negligence per se.76 Instead, in a rather cursory fashion, the court merely held that a plaintiff’s negligence may be compared with a defendant’s strict liability. Second, the Busch court held that there are exceptions to the rule that a plaintiff’s negligence is to be compared with a defendant’s strict liability.77 To insure the protection of consumer reliance on a product’s safety, the court adopted the position that all negligence except a consumer’s negligent failure to inspect or guard against product defects should be compared with a defendant’s strict liability.78

In an attempt to clarify its holding that negligent failure to inspect or guard against defects is not to be compared with a defendant’s strict liability the court held that all other types of consumer negligence, misuse, or assumption of risk must be compared with a defendant’s strict liability.79 Unfortunately, the court’s failure to distinguish between failure to inspect or to guard against product defects and misuse will present difficulties as practitioners and trial courts attempt to distill the various types of plaintiff misconduct. Consequently, an analysis of the judicial treatment of plaintiff misconduct is necessary to understand the proper application to be given the defenses available in a strict liability action.80

73. See id. at 461-62, 155 N.W.2d at 64.
74. See 262 N.W.2d at 393-94. The Minnesota court gave as an additional justification for applying the comparative negligence statute to strict products liability cases that “shifting some of the risk of loss away from negligent plaintiffs is consistent with the same policy found in § 402A.” Id. at 394.
75. See 37 Wis. 2d at 461-62, 155 N.W.2d at 64.
76. See 262 N.W.2d at 394.
77. See id.
78. See id. The Busch court adopted the position advocated in a recent law review Note. See Note, supra note 66, at 251. The Busch court’s decision to exempt a consumer’s negligent failure to inspect a product or to guard against a product defect from liability apportionment should be lauded because the National Commission on Product Safety estimated in 1970 that 20 million Americans are injured in their homes each year in product accidents, and as many as seven million workers are injured annually in product accidents on the job. See Weinstein, Twerski, Piehler & Donaher, Product Liability: An Interaction of Law and Technology, 12 Duq. L. Rev. 425, 425 (1974) (citing President’s Report on Occupational Safety & Health (May 1972)). No doubt, many of these injuries occurred because of the accident victim’s failure to inspect or to guard against a defect.
79. 262 N.W.2d at 394.
80. See notes 81-88 infra and accompanying text.
The defense of misuse has received various interpretations by the courts. Some courts take the position that plaintiff misuse of a product constitutes an affirmative defense. Courts using the misuse defense in this fashion require defendants to prove product misuse. Most courts, however, take the position that misuse relates only to the question of whether a product is defective and whether the product's defectiveness was the proximate cause of the plaintiff's injury. Under this approach a plaintiff must prove that the product was used in a foreseeable manner. Assuming that the plaintiff's use of the product was foreseeable, the defendant is liable for all injuries that an ordinary prudent person reasonably could foresee.

The disagreement over the application of the misuse doctrine was not clarified by the Busch court. Indeed, the Busch court neither defined misuse nor explained how the misuse doctrine should be applied. Refer-

81. See Noel, Defective Products: Abnormal Use, Contributory Negligence and Assumption of Risk, 25 Vand. L. Rev. 93 (1972); Weinstein, Twerski, Piehler & Donaher, supra note 78, at 427-34.

Apparently, the first time any court addressed the misuse defense in a strict tort case was in Justice Traynor's famous concurring opinion in Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 463, 150 P.2d 436, 441 (1944) (Traynor, J., concurring), in which reference is made to "normal and proper use." Id. at 466, 150 P.2d at 444.

The comments to the Restatement (Second) of Torts § 402A (1965) reflect a quasi-misuse terminology. For example, comment g refers to the use of a product in a "normal" manner; comment h states that a product is not defective "when it is safe for normal handling and consumption. If the injury results from abnormal handling . . . or from abnormal preparation for use, . . . the seller is not liable." Comment k makes reference to the product's "intended and ordinary use."

82. Compare Preston v. Up-Right, Inc., 243 Cal. App. 2d 636, 639, 52 Cal. Rptr. 679, 682 (1966) (requiring plaintiff to prove that he was injured while using the product in a way intended) with Adams v. Ford Motor Co., 103 Ill. App. 2d 356, 357-58, 243 N.E.2d 843, 845-46 (1968) ("[I]n an action pleaded and tried on a theory of strict liability in tort, contributory negligence is an affirmative defense to be pleaded and proved by the defendant.").


86. See 2 L. Frumer & M. Friedman, supra note 85, at § 16A[4][d].
ence to prior Minnesota cases also fails to clarify these issues. Arguably, the only conclusion that can be drawn from prior Minnesota misuse cases is that application of the misuse doctrine represents an effort to utilize the then-prohibited defense of contributory negligence without using contributory negligence terminology.

Clothing contributory negligence in misuse terminology, however, creates troublesome problems in light of the conflicting results that may occur when an injured party's conduct encompasses both failure to inspect or guard against product defects, and misuse. For example, consider a situation in which a consumer purchases a chair that appears to have a broken rung. While standing on the chair it collapses causing serious injuries. Separating the consumer's failure to inspect or guard against a defect from the arguable misuse of the chair presents obvious difficulties. As this example indicates, future situations will occur in which the same plaintiff conduct falls within the parameters of failure to inspect or guard against product defects or misuse. Consequently, until the *Busch* holding is clarified, the area of plaintiff misconduct will be one fraught with semantical problems.

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87. See Olson v. Village of Babbit, 291 Minn. 105, 189 N.W.2d 701 (1971); Magnuson v. Rupp Mfg., Inc., 285 Minn. 32, 171 N.W.2d 201 (1969); Kerr v. Corning Glass Works, 284 Minn. 115, 169 N.W.2d 587 (1969). *Kerr* was the first Minnesota case dealing with a misuse defense. In that case, the plaintiff was injured when a baking dish manufactured by the defendant exploded. See *id.* at 116, 169 N.W.2d at 587. The court held that the plaintiff could not recover as a matter of law because she was unable to prove that the bruise in the dish existed when it left the manufacturer's control. See *id.* at 117-19, 169 N.W.2d at 588-89. Apparently the *Kerr* court's misuse test places the burden on the plaintiff to negate any intervening misuse of the product; otherwise recovery is barred. See *id.* at 117-19, 169 N.W.2d at 588-89.

Less than three months after *Kerr*, the Minnesota court reconsidered its misuse test in the *Magnuson* case. In *Magnuson*, the plaintiff suffered injury when he was thrown from his snowmobile and struck his knee on a protruding sparkplug. See 285 Minn. at 36, 171 N.W.2d at 204. The evidence showed that the protruding sparkplug was obvious and that the plaintiff was aware of its existence. The court indicated that because the defect was obvious, the plaintiff misused the product. See *id.* at 41, 171 N.W.2d at 207. Consequently, the plaintiff was barred from recovering damages. However, because it is not clear from the *Magnuson* court's opinion whether contributory negligence, misuse, or assumption of risk barred recovery it is difficult to draw any conclusions as to the proper application of the misuse doctrine.

Subsequently, in the *Olson* case, the court used the misuse doctrine to determine whether a product was defective. In that case, a child was injured while igniting an unexploded rocket found after a fireworks show. See 291 Minn. at 106-07, 189 N.W.2d at 703. Because the use that the injured child made of the fireworks was unforeseeable the court held that the product was not defective. See *id.* at 110, 189 N.W.2d at 705.

88. See Wade, Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act, 29 MERCER L. REV. 373, 384 (1978) (misuse grew up "as a response to the rule that ordinary contributory negligence is not a defense to an action for strict liability").

89. See Wright, supra note 68, at 109.

90. See Vargo, The Defenses to Strict Liability in Tort: A New Vocabulary With An
Two possible solutions exist to solve the problem that is presented when a plaintiff's negligence falls within the ambit of the failure to inspect or guard against product defects, or the misuse categories. One solution is for the court to define misuse as behavior that consists of something other than a failure to discover or to guard against product defects. To implement this concept, a jury should be instructed that failure to inspect or to guard against product defects does not constitute misuse. So instructed, a jury would be permitted to find misuse only if the misuse did not consist of or was in addition to a failure to inspect or to guard against defects. Such a jury instruction would preserve the holding in Busch because it permits a jury to find product misuse while complying with the court's order that failure to inspect or to guard against product defects does not constitute a defense to a strict liability claim.

A second solution to the problem that arises when a plaintiff's conduct contributes to an injury would be to recast misuse as part of contributory negligence. Under this approach the jury would receive an instruction free of any confusing misuse language; the jury should be instructed that the plaintiff can be found negligent only if such negligence did not consist of failing to inspect or to guard against product defects. The rationale supporting the merger of misuse and contributory negligence is threefold. First, recognizing that misuse is a part of contributory negligence is consistent with the Minnesota court's reasoning in Springrose v. Willmore, which merged implied assumption of the risk with contributory negligence. Second, retention of the misuse ter-

Old Meaning, 29 Mercer L. Rev. 447, 455-60 (1978) (indicating that "a new vocabulary" has been created by courts when comparing and contrasting various strict liability defenses).

91. Misuse could be defined to exclude failure to discover or guard against a defect as follows:

Product users have a duty not to misuse products. Misuse is the use of a product in an improper manner. Because the user fails to discover a defective condition in the product, or fails to guard against defects, does not mean the product was misused.

92. See 262 N.W.2d at 394.

93. This can be accomplished by a simple modification of 4 Minnesota Practice JIG II, 101 G-S (2d ed. 1974) which states:

Negligence is the failure to use reasonable care. . . . [R]easonable care is that care which a reasonable person would use under like circumstances. Negligence is the doing of something which a reasonable person would not do, or the failure to do something which a reasonable person would do, under like circumstances.

Id. When plaintiff misconduct is at issue the following instruction could be given:

Negligence, by the product user, is the failure to use reasonable care. Reasonable care is that care which a reasonable person would use under like circumstances, but does not include failure to discover or guard against product defects.

94. 292 Minn. 23, 192 N.W.2d 826 (1971).

95. Id. at 25-26, 192 N.W.2d at 827. The court stated that "[s]uch assumption of risk
minology is inconsistent with prior Minnesota case law, which treated misuse as an aspect of contributory negligence. Finally, an examination of the historical roots of the misuse defense in products liability cases clearly shows that the rationale for the separate defense of misuse is no longer valid in Minnesota.

Although the merger of misuse and contributory negligence may be inconsistent with the Busch court’s enumeration of the various types of plaintiff misconduct, such a merger is fully consistent with the reasoning expressed in prior Minnesota cases. More important, such a

is but a phase of contributory negligence.’’ In so holding, the court stated that the Minnesota jury instruction that allowed implied assumption of risk to be a separate defense should be abandoned. Id. at 26, 192 N.W.2d at 828.


In Erickson the plaintiff was injured when he placed his hand on a cable after releasing a hydraulic hoist to which it was attached. As a result, his hand was drawn into a pulley and his fingers were partially severed. Arguably the plaintiff misused the hydraulic hoist; nevertheless, the court held that the injury was attributable solely to plaintiff’s conduct, that he was contributorily negligent, and had assumed the risk as a matter of law. See 270 Minn. at 52, 132 N.W.2d at 821.

The plaintiff in Miller fell from a scaffold while it was being moved across a dirt floor. The fall resulted from the scaffold’s wheels falling into a trench in the floor. The court referred to testimony given at the trial, which indicated that the scaffold was not to be moved when a person was on it. See 262 Minn. at 424, 115 N.W.2d at 670. Implicit in the court’s statement is the realization that the plaintiff misused the scaffold. The court analyzed plaintiff’s actions in terms of contributory negligence and held that it was proper to submit that issue to the jury. See 262 Minn. at 431, 115 N.W.2d at 674.

In Johnson the plaintiff’s decedent was killed when the elevator he was changing stop-hooks in collapsed. The elevator collapsed because the stop-hooks were improperly used to support the machine while its cables were being changed. Although the decedent apparently misused the stop-hooks, the court evaluated his conduct in terms of negligence rather than treating misuse as a separate and independent defense. See 255 Minn. at 24-25, 95 N.W.2d at 501.

Implicit in the court’s failure to analyze the plaintiff’s negligence in misuse terminology in Erickson, Miller, and Johnson is the recognition that treating misuse as a separate and independent defense only confuses the basic inquiry, which is to determine whether the plaintiff’s own conduct was negligent.

97. See Wade, supra note 88, at 384 (indicating that the misuse defense developed as a result of contributory negligence not being a defense to a strict liability claim).

98. See 262 N.W.2d at 394.

99. See note 96 supra. Adding to the uncertainty generated by the Busch apportionment exceptions is the recent passage of a comparative fault statute in Minnesota. See Minn. Stat. § 604.01 (1978). The statute’s broad definition of fault may require that all types of plaintiff conduct be compared with a defendant’s strict liability. Such a result, however, would frustrate several of the policies behind the imposition of strict liability, which include protecting consumer reliance that results from mass production and complex marketing conditions, see Hawkeye Security Ins. Co. v. Ford Motor Co., 199 N.W.2d 373, 382 (Iowa 1972); McCormack v. Hankscraft Co., 278 Minn. 322, 338, 154 N.W.2d 488, 500 (1967), avoiding interpretive difficulties inherent in warranty law, see Greenman v. Yuba
merger will serve to overcome the problems resulting in situations in which a plaintiff's misconduct encompasses both failure to inspect or to guard against product defects and misuse.100

The Busch decision clearly portends significant changes in Minnesota law. Although the court merely clarified existing Minnesota law with regard to the evidence issue, new law was enunciated in the areas of damages, married women's property rights and products liability. Regarding damages, injured plaintiffs are no longer required to invest their pain and suffering awards and to use the interest attainable for future medical expenses and wage loss. The Busch court failed, however, to clarify the circumstances in which a trial court may grant a remittitur thereby rendering uncertain the standard of review that will be used to consider remittitur orders. Although the Busch court recognized that a married woman has a right to bring suit in her own name to recover future medical expenses, in effect, a husband's duty to support his wife was not substantially altered because a husband may still be found liable for his wife's necessary expenditures. In reaching its decision the court indicated the entire married women's statute should be reviewed by the Legislature in light of the changing status of women in society. The Busch court also indicated that a plaintiff's negligence could be compared with a defendant's strict liability. To protect consumers of defective products, the Busch court defined negligence to exclude a plaintiff's failure to inspect or to guard against product defects. Future litigation will be needed, however, to distill the various types of plaintiff misconduct.


A more sound approach, and one less likely to undermine the Busch court's reasoning, is to judicially define "fault" or "negligence" to exclude a consumer's negligent failure to inspect or to guard against product defects. 100. See Vargo, supra note 90, in which the author states:

Furthermore, relabeling contributory negligence as "misuse," then applying this new label as part of the requisite elements of defect, causation, or foreseeability, would not only reinject into the case elements that were specifically rejected as defenses to strict liability, but would also shift the burden of proof from the defendant to the plaintiff. All this could be accomplished through the use of the "new vocabulary" which is in reality a mere renaming of the old factual elements of contributory negligence.

... Thus, there is no need to consider misuse an independent bar to recovery. ... [T]he term "misuse" has little to add to the defect or causation requirements, and serves only to add confusion to the already difficult issues.

Id. at 458 (footnote omitted).