



MEMORANDUM

To: Wisconsin Joint Finance Committee Co-Chairs, Sen. Mark Miller and Rep. Mark Pocan, and Members of the Joint Finance Committee

From: Wisconsin Defense Counsel Officers and Board of Directors¹

Re: Opposition to Proposed Changes to the Contributory Negligence Law (Including Joint and Several Liability) Contained in the Proposed Budget Bill (AB 75)

Date: April 22, 2009

Wisconsin Defense Counsel (formerly Civil Trial Counsel of Wisconsin) submits this memorandum registering its strong opposition to the provisions in the Budget Bill (AB 75) that would dramatically alter Wisconsin's contributory negligence law.

Wisconsin Defense Counsel (WDC) is a statewide organization of attorneys dedicated to the defense of Wisconsin citizens and businesses, the maintenance of an equitable civil justice system, and the education of its members. WDC's over 500 members firmly believe in the rights of the injured to be fairly compensated; equally they believe that the defendant's rights are crucial to the integrity of the court system. The defendants WDC represent, as well as their insurance carriers, must also receive fair and equal treatment under the law.

WDC respectfully requests that three non-budget policy provisions, inserted on pages 1,588 and 1,605, be removed from the budget. Those provisions include: 1) amending the existing joint and several liability law; 2) amending the current contributory negligence law by allowing recovery if the "combined" fault of all persons sued is greater than the plaintiff; and 3) requiring circuit courts to advise jurors of the effect of their verdicts.

Combined, these three provisions would drastically change Wisconsin's litigation landscape, tilting the scales of justice away from fairness and toward more litigation, higher awards, and a less competitive Wisconsin. At a minimum, these provisions should be removed from the budget and be introduced as separate legislation, with public hearings and the full deliberation of elected officials.

¹ Robert J. Lauer, President, Milwaukee; Catherine Rottier, President-Elect, Madison; Bryce Tolefree, Secretary/Treasurer, Madison; James Mathie, Immediate Past President, Waukesha. Board of Directors: Arthur Simpson, Milwaukee; Laure Rakvic-Farr, Madison; Matthew Yde, Wausau; Steven Schlitz, Eau Claire; Rollin Krafft, West Bend; Kara Burgos, La Crosse; Scott Pernitz, Madison; Emile Banks, Milwaukee; Jackie Lorenz Seholf, Manitowoc; Tim Hawley, DePere; Mike Gill, La Crosse.

Joint and Several Liability

The provision amending Wisconsin's joint and several liability law undoes the positive reforms made in 1995. Prior to 1995, Wisconsin had "pure" joint and several liability, meaning that a co-defendant as little as one percent at fault could be liable for 100 percent of the plaintiff's damages. The Legislature amended that law in 1995 (SB 11/Act 17) in a bipartisan manner (69-27 in the Assembly; 24-8 in the Senate) so that a co-defendant can be responsible for 100 percent of damages only if he or she is 51 percent or more at fault.

This was a sensible compromise that placed Wisconsin's joint and several liability law in the mainstream when compared with other state laws. Unfortunately, the budget proposal would place Wisconsin in the dubious position of having the most expansive joint and several liability law in the Midwest, and one of the worst in the nation.

The purpose of the "one percent rule" is to place disproportionate responsibility on a particular business or individual. This is done simply to shift the risk because a third party cannot be sued due to a statutory defense (worker's compensation) or because some third-party has inadequate assets or insurance.

In the first instance, employers and employees have agreed that in return for employer immunity, the employer waives defenses of negligence when a negligent employee is injured. These parties have agreed the "remedy" will be worker's compensation benefits. If the one percent rule is adopted, the responsibility for employer negligence is shifted to **third parties**.

Assume an employer is 95 percent negligent and a third party 5 percent negligent with the employee not negligent. Under this scenario currently, the third party contractor is obligated for 5 percent of the employee's damages. Under the one percent rule, the five percent responsible third party contractor is responsible for 100 percent of the employee's damages. In a further irony, under Wisconsin Statute § 102.29 the employer recovers worker's compensation payments even though the employer is 95 percent negligent.

There is no justification for shifting 100 percent tort responsibility to third party contractors in situations where the real fault lies with the employer. The third party contractor is helpless to patrol the negligence of the employer. The one percent rule creates a disproportionate recovery to an employee who has agreed by act of the legislature not to pursue a negligence claim against the employer in return for guaranteed benefits.

There are examples where employees are free of negligence and injured. In those cases, the employee has elected to trade their right to sue the employer for guaranteed benefits. This works to the employee's benefit in other cases where the employee's negligence is clearly the cause of the injury. The employee is guaranteed benefits under the worker's compensation law. There is no justification for shifting the trade off of the right to sue for guaranteed benefits of worker's compensation law to a disproportionate burden for third party contractors.

The second scenario where the one percent rule is important is where there are insufficient assets or insurance for the principal tortfeasor. Driver A may be 99 percent negligent and driver B one percent negligent. A passenger is injured.

Assuming everyone has adequate assets/insurance, driver A pays 99 percent and driver B pays one percent. Simply because driver A has no assets does not justify shifting the burden of compensation completely to a party bearing only a very small percentage of responsibility. The insurance industry currently has a product that protects the injured passenger from lack of compensation in most situations. This is uninsured and/or underinsured motorist coverage.

It is simply unsound public policy to shift the responsibility for negotiated statutory rules or for lack of assets to create a disproportionate payout requirement for someone with a minor involvement in an accident situation.

Suing Those Less at Fault

A second provision—inserted on page 1,605 of the budget—allows a plaintiff to sue a defendant who is less at fault than the plaintiff. Requiring someone to pay damages to another who is more at fault is unfair and will lead to substantially more litigation. This was never allowed under the law prior to the 1995 changes. Wisconsin has always compared a defendant's fault individually to the plaintiff.

The most significant danger this provision poses is how it allows plaintiff lawyers to go on a fishing expedition, suing anybody that has a remote nexus to the incident. So long as the plaintiff is arguably less than 50 percent at fault, businesses and individuals can be sued even if their fault is substantially less than the plaintiff's. Therefore, a plaintiff will sue as many people as possible so that the combined negligence of the co-defendants equals or surpasses the plaintiff's negligence. This will lead to a litigation nightmare.

For example, under this change, five defendants who are 10 percent or less at fault each could be sued and made to pay a plaintiff who is 49 percent at fault. While joint and several liability would not apply in this instance, each defendant would have to pay the plaintiff the percentage of his or her damages, even though the plaintiff was more at fault than any of the defendants.

The net effect of this provision is that more businesses and individuals are going to get dragged into a lawsuit, even if they have very little to do with the case. The more defendants there are, the easier it is for the plaintiff's lawyer to argue that the plaintiff's negligence is less than the combined negligence of the co-defendants. Thus, the plaintiff's attorney will have a built-in excuse to sue anyone and everyone that has any nexus to the lawsuit.

Explaining to Jury Effect of Their Verdicts

Section 3223 on page 1,588 of the budget bill forces circuit courts to explain to the jury the effect on awards and liabilities of the percentage of negligence found by the jury to be attributable to each party. The practical result is to create situations in which jurors might be tempted to make or alter findings in such a way as to bring about a desired outcome without any regard to the true facts or the law. Given that jury deliberations are conducted in secret, it would be difficult, if not impossible, to determine if any such abuse occurred in a particular case.

Conclusion

Wisconsin's legal system can only be preserved when the fragile balance of impartial justice is maintained. As an organization of trial attorneys dedicated to the defense of Wisconsin citizens and businesses, we believe that the three provisions placed in the budget bill dramatically alter Wisconsin's civil justice system and fail to preserve the balance of impartial justice.

Because these policy issues are so important to Wisconsin's civil justice system, at the very least they should be introduced as separate legislation so they can be fully vetted by the Legislature. Therefore, WDC urges the Legislature to remove the contributory negligence provisions from the state budget.

cc: Governor Jim Doyle
Members, Wisconsin Assembly and Senate