

LEGISLATIVE HEARING CALENDAR

Positions to be taken by the City of Milwaukee on the following bills will be discussed by the

COMMITTEE ON JUDICIARY-LEGISLATION

MONDAY, MAY 18, 2009 AT 1:30 PM

Room 301-B City Hall

Update on State Budget

State Budget Discussion/Action Items:

- Joint and several liability in tort law.

Olinger, Mary

From: Wood, Brenda
Sent: Wednesday, May 13, 2009 10:38 AM
To: Olinger, Mary
Cc: Vornholt, Paul
Subject: FW: AB 75, amendment to statute governing joint and several liability in tort law
Attachments: AB 75 liability issue.doc

For Jud Leg: e-mail below and attached file.....

From: Konrad, Rudolph
Sent: Monday, May 11, 2009 2:36 PM
To: Gonda, Jennifer
Cc: Moschella, Vincent; Houren, Maurita
Subject: AB 75, amendment to statute governing joint and several liability in tort law

Assistant City Attorney Maurita Houren wrote the following commentary on AB 75. Vince and I reviewed it and agree with it. In the crossing guard case she refers to, which was decided under the pre-1995 statute, the jury held the City to be 1% negligent, but the City had to pay the entire \$100,000 verdict, because the plaintiff was a child under 7 years of age, who could not be found to be negligent as a matter of law, and the driver of the car, who was 99% negligent, had no insurance and no money. The 1995 statute was amended to its current version to avoid that kind of result.

Maurita Houren's comment:

AB 75 changes the current contributory negligence statute in two major ways. First, it compares the negligence of the plaintiff against the combined negligence of all the defendants for the purpose of allowing recovery. Currently, the plaintiff's negligence is compared with each individual defendant for the purpose of recovery. This change impacts situations where there is more than one defendant. The second change is that a defendant is jointly and severally liable if the defendant's negligence is equal to or greater than the negligence of the plaintiff. This second amendment changes the law to what it was prior to the 1995 changes that eliminated joint and several liability if the defendant's negligence was less than 51% (the defendant was only liable for his percentage of negligence). With the 1995 changes, only if the defendant was 51% or more would the defendant be jointly and severally liable.

The way I assume the first change works is that with multiple defendants if the individual defendant's negligence is less than the plaintiff's negligence, but the combined negligence of the multiple defendants is more than the individual plaintiff's negligence, then the individual defendants are not jointly and severally liable. The individual defendant is only responsible for his or her percentage of negligence. (Plaintiff's recovery is still reduced by his or her own contributory negligence.). In cases where the city has a co-defendant, its exposure is increased with this amendment because plaintiff will be able to recover against the city in situations where previously recovery was barred, i.e. Plaintiff is 40%, city is 30% and co-defendant is 30%. Currently, plaintiff cannot recover. Under the amendment, the City is responsible for 30% of damages subject to monetary caps.

The second amendment puts contributory negligence back to where it was before 1995. My understanding was that several City cases in which the City was found 1% negligent and the co-defendant 99% were cited in support of the 1995 amendments to the contributory negligence statute. In one of these cases, the plaintiff was under 7 years of age and therefore not negligent as a matter of law (crossing guard case where driver hit child pedestrian). The other case involved an innocent victim killed by a fleeing felon in a police "chase." The chase, if you can call it that, involved the police activating their red lights and siren when they spotted a stolen vehicle. Upon activation, the stolen car driven by the fleeing felon took off down an alley. When the stolen vehicle got to the end of the alley it smashed into a car driven by the plaintiff, killing him. In both these case, the City paid the whole judgment. Obviously, this amendment increases the City's exposure.

5/13/2009

Two other changes are noted. One allows the court to explain the effect of percentages of contributory negligence to the jury. When I did negligence, I know that this was something that defense attorneys wanted. If the changes to the contributory negligence statute are going to be enacted, I think telling the jury of the impact might help – certainly in the 1% cases.

The other change is to eliminate subsection 2, entitled "Concerted Action." This subsection must have been enacted with the 1995 amendments because it was unnecessary prior to 1995. Subsection 2 is an exception to the rule that there is no joint and several liability for a defendant who is less than 51% causally negligent in situations where there is a common scheme or plan. It does not appear to have impacted the City and with the proposed amendments is unnecessary.

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Rudolph M. Konrad
Deputy City Attorney
City of Milwaukee
200 East Wells Street
Milwaukee, WI 53202
Phone: 414-286-2601
Fax: 414-286-8550
rkonra@milwaukee.gov

Under current law, a court is required to instruct the jury on the law involved in the case before the jury. In addition, the court provides the jury with a complete set of written instructions that provides the burden of proof and the substantial law to be applied in the case. This bill adds a requirement, in civil actions involving contributory negligence, that the court 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.

Under current law, in a civil action involving negligence, the injured party may recover damages resulting from the negligence of another person if the injured party's negligence is not greater than the negligence of the person against whom recovery is sought. Currently, the negligence of the person seeking recovery is measured separately against the negligence of each person whose negligence caused the damages. If the causal negligence of the person against whom recovery is sought is less than 51 percent of the total negligence, that person's liability is limited to the percentage of negligence attributable to that person. Currently, if the person's causal negligence is 51 percent or more of the total negligence, that person is jointly and severally liable for the damages, which means that the person may be liable for all of the damages, reduced by the percentage of negligence attributable to the person seeking recovery. Current law also provides that if two or more parties act in concert,

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ASSEMBLY BILL 75

those parties are jointly and severally liable for all of the damages resulting from that action, except punitive damages.

This bill eliminates the provision regarding persons acting in concert, the provision that the negligence of the person seeking recovery is compared to each person who was negligent separately, the provision that the liability of a person who is less than 51 percent negligent is limited to that person's percentage of the total negligence, and the provision that the liability of a person whose causal negligence is 51 percent or more is jointly and severally liable. Instead, the bill allows an injured person to recover damages if that person's negligence is not greater than the combined negligence of all of the persons against whom recovery is sought. The bill also provides that any person whose causal negligence is equal to or greater than the causal negligence of the person seeking recovery is jointly and severally liable for the damages awarded to the person seeking recovery.