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The Effect of Jandrt on Satellite Litigation

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by Janine P. Geske & William C. Gleisner III

SATELLITE LITIGATION

The effect of *Jandrt* on

According to Chief Justice Abrahamson in her dissent to the Supreme Court's Denial of the Motion to Reconsider its decision in *Jandrt v. Jerome Foods Inc.*,[1] "[t]he court's opinion will have a significant effect on the practice of law in this state for both plaintiffs' and defendants' counsel and on the people of the state of Wisconsin seeking redress of wrongs or defending themselves in court."[2]

In *Jandrt*, the Wisconsin Supreme Court substantially upheld the trial court's imposition of a $716,081 sanction against a Milwaukee law firm. In essence, the supreme court concluded that while a lawsuit commenced on May 10, 1995, was not frivolous, it became frivolous just 43 days later. The basis for why the suit became frivolous, and the supreme court's discussion of Wisconsin sanction law in connection with its finding of frivolousness, should be of serious concern to all Wisconsin litigators.

At a minimum, the *Jandrt* decision will almost certainly alter and increase the nature of "satellite"[3] litigation in Wisconsin under sections 802.05 and 814.025 of the Wisconsin Statutes. At its worst, this decision may very well change the overall practice methods of all civil litigators in Wisconsin, regardless of whether they represent plaintiffs or defendants, and may harm clients and the trial bar, and unacceptably increase the business of the courts.

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WILLIAM C. GLEISNER, MARQUETTE 1974, AN ATTORNEY PRACTICING IN MILWAUKEE, COAUTHORED AN AMICUS CURIAE BRIEF IN *JANDRT*, WHICH WAS SUBMITTED TO THE WISCONSIN SUPREME COURT ON BEHALF OF THE WISCONSIN ACADEMY OF TRIAL LAWYERS.

The *Jandrt* decision reflects, in part, some of the deficiencies of our existing sanction rules, as those rules are set forth in sections 802.05 and 814.025. As demonstrated in this article, the adoption of the current standards under Rule 11 of the Federal Rules of Civil Procedure (FRCP) could ameliorate many of the adverse consequences of *Jandrt* without diminishing the manifest necessity of regulating and discouraging frivolous litigation.

The Majority Decision

In *Jandrt*, upon certification from the Wisconsin Court of Appeals, a majority of the Wisconsin Supreme Court reversed the trial court's decision that the Milwaukee law firm of Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman (Previant) had commenced a frivolous action against Jerome Foods.[4] However, the supreme court's majority upheld the trial court's determination that Previant's continued prosecution of that action became frivolous.[5] While it remanded the action to the trial court for a recalculation of the sanction amount that should be imposed against Previant, the court's majority did not directly criticize the trial court's imposition of a $716,081 sanction against Previant.[6] The sanction represented a portion of the fees and costs incurred by Jerome Foods Inc. (JFI) in defending the Previant action.

Jandrt involved an alleged toxic tort. Previant commenced an action against JFI alleging that several children had been born with birth defects due to the leaking of certain chemicals into the atmosphere of the JFI plant.[7] The action was styled a class action and had two main claims: a claim for common law negligence and a claim for a violation of Wisconsin's Safe Place law under section 101.11 (2) of the Wisconsin Statutes.[8] Both the majority and dissent in *Jandrt* considered the chronology of events before and after the filing of the action to be significant.

Relevant Chronology. The relevant chronology according to the majority's decision follows.

1) In November 1994 Previant received a referral from a trusted referring attorney, who had made a preliminary investigation that had disclosed to him that between 12 and 15 women had indicated problem pregnancies while working at JFI. Referring counsel had done a medical literature search for evidence of a possible relationship between carbon dioxide or ammonia and birth defects. The referring attorney also had a statement from one of his clients stating that her doctor had told her that JFI was probably responsible for her child having a birth defect.[9]

2) In February 1995 the mothers of the children with birth defects first retained Previant.[10]

3) In February 1995 Previant had an associate and a law librarian conduct a medical literature search. Previant also consulted with a toxic tort consultant MD, who told Previant that "in order to obtain an expert opinion on causation it [will] be necessary to commence an action and obtain discovery."[11]

4) On March 1, 1995, Senate Bill 11 was passed by the Wisconsin Legislature, significantly altering the law on joint and several liability.[12]

5) In April 1995 Previant was advised by numerous sources, including its malpractice carrier, that suit should be filed in order to protect the rights of clients such as the plaintiffs in *Jandrt*.[13]

6) On or about May 10, 1995, Previant commenced suit sooner than it otherwise would have because of its concerns relative to Senate Bill 11.[14]

7) On May 17, 1995, Senate Bill 11 became law.[15]

8) In May and again on June 21, 1995, Previant formally requested documents from JFI, which request JFI resisted on the grounds that it would only produce documents under an order of confidentiality.[16]

The supreme court's decision to uphold a frivolous litigation sanction in *Jandrt v. Jerome Foods Inc.* will alter the nature of satellite litigation under sections 802.05 and 814.025 and may very well change the overall practice methods of all civil litigators in Wisconsin. The Advisory Committee Notes to Federal Rules of Civil Procedure 11 refer to litigation over the imposition of sanctions under Rule 11 as litigation that is "satellite" to the main litigation from which it was derived.

9) On July 8, 1995, JFI learned from its expert that there was no way in which the plaintiffs could prove a causal relationship between the chemicals at JFI and the birth defects.[17] JFI nevertheless retained one local and one national law firm, several experts on negligence and causation, a public relations firm, and a private investigation firm.[18]

10) On July 13, 1995, JFI answered the Previant complaint, without making any mention of its belief that causation could not be proved. In fact, JFI did not in any way affirmatively raise the possible frivolousness of the Previant claim in its answer.[19]

11) On Dec. 7, 1995, after extensive negotiations, an order of confidentiality was entered.[20]

12) On Jan. 31, 1996 and Feb. 1, 1996, Previant first had an opportunity to review more than 200,000 documents produced by JFI.[21]

13) Previant consulted with two experts; one of those experts consulted with an out-of-state expert, who advised Previant that cause could not be proved (none of the experts saw the documents produced by JFI).[22]

14) On Feb. 28, 1996, Previant voluntarily dismissed its action, and only then was put on notice by JFI of its intention to seek sanctions under sections 802.05 and 814.025.[23]

The majority's decision is divided roughly into two parts. The first part analyzes whether Previant frivolously commenced an action under section 802.05. The second part analyzes whether Previant frivolously continued the action under section 814.025.

Was the action frivolously commenced under section 802.05? The majority stated that it would turn to federal case law interpreting Rule 11 in order to determine whether the trial court had correctly concluded that the action had been frivolously commenced.[24] However, the majority relied upon federal authorities from prior to a fundamental and critical 1993 amendment to Rule 11. Citing a 1993 case, the majority stated that the circuit court is to

(continued on page 52)

Jandrt's probable effects on trial counsel

All trial counsel in Wisconsin, regardless of the nature of their practice, need to reflect on how *Jandrt* may affect their pleading and practice methods. It appears clear that under *Jandrt*:

- Pleading alternate causes of action in Wisconsin may pose serious and dangerous business.
- "Information and belief" pleading may become a thing of the past. Indeed, the entire concept of notice pleading may be placed in jeopardy by the tenor of the *Jandrt* decision. Boilerplate defenses, counterclaims, and cross-claims will be treated no differently than complaints under this decision.
- The entire concept of a reasonable investigation before suit, as well as the nature of discovery following the commencement of suit, must be rethought in light of *Jandrt*.
- A plaintiff's attorney may want to think long and hard before accepting a case at or near the running of a statute of limitation. Starting suit with the expectation that you will build a case through discovery now will be very dangerous under *Jandrt*.
- It may well be necessary to retain experts or consultants before commencing suit or asserting a counterclaim or cross-claim, and to be certain that you can sustain each element of a claim before you publish a pleading. According to Chief Justice Abrahamson in her dissent from the denial of Previant's Motion to Reconsider *Jandrt*, under *Jandrt* "lawyers cannot rely on discovery to obtain information to protect themselves against a claim of frivolousness."[1]
- It no longer will suffice to commence an action, counterclaim, or cross-claim and then focus on one form of discovery until that avenue is exhausted. If there are any doubts concerning the merits of a claim, immediate, aggressive, and comprehensive discovery will be the only prudent course of action.
- If there is any possibility that relevant information can be acquired, either before or after suit, by any means other than through formal discovery, one would be very well advised to aggressively pursue the acquisition of such information.
- The emphasis on sanctions as a form of compensation may lead to a proliferation of claims under sections 802.05 and 814.025 of the Wisconsin Statutes. After all, if one believes that there is a colorable basis for seeking sanctions, the failure to assert such a claim on behalf of a client may be malpractice.
- Overall, the *Jandrt* decision may significantly chill innovative plaintiff's litigation or creative cost and liability spreading through cross-claims. As noted again by Chief Justice Abrahamson in her dissent from the denial of the Motion to Reconsider *Jandrt*, the case at bar was "complex and is seeking to prove a causal link between chemicals and birth defects that previously has not been established. … Every toxic tort has a first case, and all of them are initially considered 'novel.'" But under *Jandrt*, pursuing such novel claims is now very dangerous.[2]

[1] *Jandrt v. Jerome Foods: Reconsideration Dissent*, __ Wis. 2d __, 601 N.W.2d 650, 653 (Oct. 28, 1999), ¶ 18.
[2] *Id.* at ¶ 15.

(from page 13)

apply an objective standard of conduct for litigants and attorneys.[25] Citing federal decisions from 1983, 1987, and 1989, the majority then stated that decisions under Rule 11 are not to be made using the wisdom of hindsight.[26]

The majority then states that the single allegation in the Previant complaint upon which JFI based its claim that the action against it had been frivolously commenced was Paragraph 28, which contained an allegation of cause "on information and belief."[27] The majority focused on Previant's failure to deal with the issue of causation under its common law negligence claim, while dismissing Previant's point made that the alternate claim for relief under Wisconsin's Safe Place law required no proof of causation.[28] It appears clear that negligence or safe place law constituted completely alternate causes of action in every sense and either theory could have allowed for a recovery against JFI for the alleged harm done to the plaintiffs.[29]

Then citing federal authorities from 1985, 1986, 1987, 1992, and 1993, the majority concluded that Previant had no right to rely upon what the referring attorney or the client said about the claim.[30]

While it would be "good practice" to consult an expert before trial, the majority concluded that Previant did not have an obligation to retain an expert before commencing suit because of the pending change in the law of joint and several liability.[31] Characterizing it a "close case," the majority finally did conclude that Previant had not frivolously commenced the lawsuit.[32]

Was the action frivolously continued under section 814.025? When the supreme court concluded that the lawsuit was not frivolously commenced, its analysis under section 802.05 was at an end,[33] and thus one might conclude that any further comparisons to Rule 11 of the FRCP were similarly at an end. However, while the court stated that section 802.05 was patterned after Federal Rule 11,[34] it nevertheless also observed that "in many respects, these are the same guidelines [under section 802.05] a circuit court uses in its determination of frivolousness under Wis. Stat. § 814.025."[35]

In the discussion of the court's analysis of whether the action was frivolously continued, one ought to bear in mind several important considerations. First, this action was pending only for a total of nine months.[36] The court concluded that the action became frivolous just 43 days after its commencement, without explaining the significance of that period.[37] The majority concluded, for several reasons, that the action was frivolously maintained. A review of those reasons seems to show a reliance on the trial court's findings on the issue of a frivolously commenced law suit. Although the court concluded that the action was *not* frivolously commenced, it concluded that Previant should have completed a series of tasks within the following 43 days. According to the majority, Previant did not:

1) Obtain an expert witness who supported the causation theory upon which rested the claims in the complaint.[38]

2) Consult with an identified scientific or medical professional with expertise in the areas of teratology, toxicology, epidemiology, genetics, pediatrics, or the causes of birth defects.[39]

3) Interview any treating physician of any of the mothers or the children in question.[40]

4) Pursue the purported "cover up" identified as one of the bases for the filing of the complaint.[41]

5) Conduct a comprehensive review of the medical records of the mothers and children in question.[42]

6) Attempt to identify the risk factors present in the mothers of the three children with birth defects.[43]

7) Conduct an evaluation through consultation with appropriate medical and scientific authorities of the multiple pregnancy problems among JFI employees.[44]

The majority concluded that the Previant firm "unreasonably followed" the toxic tort consultant's recommendation to commence a lawsuit in order to take discovery, since the Previant firm could have obtained all the information it required regarding chemical usage at JFI from OSHA records.[45] Despite *Kelly v. Clark*,[46] the majority found that Previant was not entitled to a "safe harbor" whereby Previant could safely file a pleading and make reasonable inquiry through formal discovery as to uncertain or unclear facts within a reasonable time after the pleading was filed.[47] In the words of the majority, a "'safe harbor' is not a loophole through which attorneys may escape the requirement of Wis. Stat. § 814.025 that an action have a reasonable basis in law or equity."[48] It is unclear why the majority found that the action was not frivolously commenced, since the OSHA records presumably would have been available both before and after the commencement of the action.

According to the majority, while a plaintiff need not "exhaust" outside sources of information before embarking on discovery, the Previant firm failed to avail itself of information that was available without discovery, such as the OSHA reports.[49] The majority said, "[t]he Previant firm may have believed that JFI had more detailed information on the levels of exposure than that which is required by OSHA. However, that belief does not excuse the Previant firm for failing to avail itself of information that was available without discovery." And yet, again, all of these conclusions are in sharp contrast with the majority's conclusion that Previant did not frivolously commence the lawsuit.

Stating that a party is not relieved of its responsibility to ensure that an action is well-grounded in fact and law once an action is commenced, the majority states "it is the facts the Previant firm knew and what it should have done in light of its recognition that the causal element was essential to its claim that lies at the heart of this appeal."[50] However, Previant did commence discovery immediately after the action was filed and was met by stiff resistance from JFI when it insisted on a protective order before it would turn over any documents for Previant's review.[51] Despite the request for production of documents in June of 1995, and the consequent failure of JFI to produce same, the majority concluded that "for nine months the Previant firm did nothing to try to establish ... causation."[52] This begs the question of just what should Previant have done.

Given the stringency of the majority's decision, it no longer will suffice to commence an action, counterclaim, or cross-claim and then focus on one form of discovery until that avenue is exhausted. If there are any doubts concerning the merits of a claim, immediate, aggressive, and comprehensive discovery will be the only prudent course of action. Further, if relevant information can be acquired, either before or after suit, by any means other than through formal discovery, one would be very well advised to aggressively pursue it.

Another disturbing aspect of the majority's decision is its conclusion that the purpose of sanctions under section 814.025 is not just punitive. "[W]e are less convinced that compensation is not an appropriate consideration [under 814.025]... [I]n a proper case, [814.025 may] provide full compensation for reasonable attorney fees necessary to defend against a frivolous action... We embrace this view today."[53] The emphasis on sanctions as a form of compensation may lead to a proliferation of claims under sections 802.05 and 814.025. After all, if one believes that there is a colorable basis for seeking sanctions, the failure to assert such a claim may be malpractice.

The Wisdom of Federal Rule 11, as Amended in 1993

The majority analyzes the decision of the Previant firm to commence litigation by reference to federal decisions interpreting Rule 11 of the Federal Rules of Civil Procedure. However, almost all of the decisions relied upon by the majority predate 1993. According to one commentator:

"Because many of the elements of Rule 11 were changed in 1993, be careful about relying on earlier cases. Such rulings were made when sanctions were mandatory and when fee-shifting was the most commonly imposed sanction. Neither is true under the amended Rule."[54]

When analyzing the majority's decision, it is important to contrast sections 802.05 and 814.025 and the majority's decision with the language of FRCP 11 and the Advisory Committee Notes that appertain to its 1993 amendment. First, current FRCP 11 is not mandatory. Moreover, arguably, the wording of FRCP 11 would today reach conduct covered by both section 802.05 and 814.025. FRCP 11 (b) now provides in pertinent part:

"By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

"(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

"(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

"(3) *the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery*; and

"(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief." [Emphasis supplied.]

FRCP 11 further provides that a motion under same "shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected."

According to the Advisory Committee Notes following FRCP 11, the 1993 Amendments were intended to:

1) Equalize the burden of the rule on plaintiffs and defendants.

2) Establish uniform standards for the imposition of sanctions, which could be monetary or nonmonetary. These standards:

"[E]numerate the factors a court should consider in deciding whether to impose a sanction or what sanctions would be appropriate in the circumstances. ... [that is] Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; ... what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants."

3) The court has significant discretion in determining what sanctions, if any, should be imposed for a violation, subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons.

4) Since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that if a

monetary sanction is imposed, it ordinarily should be paid into court as a penalty.

5) Any award of fees to another party under FRCP 11 should not exceed the expenses and attorney fees for the services directly and unavoidably caused by the violation of Rule 11.

6) If a wholly unsupportable count were included in a multi-count complaint or counterclaim any award of expenses should be limited to those directly caused by inclusion of the improper count, and not those resulting from the filing of the complaint or answer itself. The award should not provide compensation for services that could have been avoided by an earlier disclosure of evidence or an earlier challenge to the groundless claims or defenses.

It's Time to Conform Wisconsin's Sanction Rules to Federal Rule 11

Jandrt is not just a problem for the plaintiffs' bar. In fact, the Civil Trial Counsel sought to intervene in *Jandrt* when Previant's Motion to Reconsider was pending before the supreme court. Serious consideration should be given to reforming our frivolous sanctions law to better conform to the landscape of FRCP 11 practice in the following respects.[55]

Levy sanctions on those who bring groundless motions for sanctions. As Justice Bradley put it in her dissent, a party cannot spend unlimited resources to defend a frivolous action without those expenditures becoming frivolous as well.

Adopt the FRCP 11 provision that permits courts to *sua sponte* impose sanctions on offending parties. Why should sanctions be the exclusive province of a satellite adversarial proceeding? Perhaps it is clear that one party is frivolous, but the other party in seeking redress may cross into frivolous conduct as well. Why shouldn't the court have the power to step in and sanction both offenders?

A party who believes that a claim is frivolous should not be able to withhold that information from the court and opposing counsel until after the expenditure of considerable sums of money and judicial resources. Shouldn't a party with such knowledge at the minimum be required to plead affirmatively the existence of a frivolous claim (which wasn't done in *Jandrt*) or at least not be permitted to benefit from a considerable delay in asserting same?

More carefully calibrate sections 802.05 and 814.025 so as to take account of the factors mandated under FRCP 11, especially those factors that focus more precisely on the equity of a sanctions inquiry. That is: whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; what amount, given the responsible person's financial resources, is needed to deter that person from repetition in the same case; and what amount is needed to deter similar activity by other litigants.

Conclusion

To litigate is to sail in troubled waters. All members of the trial bar, however, have an interest in ensuring that reasonable safe harbors exist both for their own protection and to secure equal justice for all members of our society. It is time to at least reexamine our frivolous sanction rules in light of the 1993 amendments to FRCP 11.

Endnotes

[1] *Jandrt v. Jerome Foods Inc.*, 227 Wis. 2d 531, 597 N.W.2d 744 (July 7, 1999). [Authors' Note: All references in this article are to the opinion's page and, for pinpoint citations, to the paragraph number.]

[2] *Jandrt v. Jerome Foods: Reconsideration Dissent*, __ Wis. 2d __, 601 N.W.2d 650 (Oct. 28, 1999), ¶ 6.

[3] "Although Rule 11 must be read in light of concerns that it will spawn satellite litigation and chill vigorous advocacy, any interpretation of [the] rule must give effect to the rule's central goal of deterrence." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990).

[4] *Jandrt*, 597 N.W.2d 744, 559-60, ¶ 55. Although it found this to be a "close case." *Id.*

[5] *Id.* at 749, ¶ 6.

[6] *Id. at* ¶ 7.

[7] *Id.* at 749-50, ¶¶ 8-9.

[8] *Id.* at 751, ¶ 18.

[9] *Id.* at 749-50, ¶¶ 8-10.

[10] *Id.* at 750, ¶ 12.

[11] *Id.* at ¶¶ 13-14.

[12] *Id.* at 751, ¶ 16.

[13] *Id.*

[14] *Id.* at ¶ 17.

[15] *Id.*

[16] *Id.* at ¶ 20.

[17] *Id.* at 752, ¶ 23.

[18] *Id.* at 751-52, ¶ 21.

[19] *Id.* at 769, ¶ 94.

[20] *Id.* at 752, ¶ 24.

[21] *Id.*

[22] *Id.* at ¶ 25.

[23] *Id.* at ¶ 26.

[24] *Id.* at 754, ¶ 31.

[25] *Id.* at ¶ 32; *National Wrecking Co. v. International Bhd. of Teamsters Local 731*, 990 F.2d 957, 963 (7th Cir. 1993).

[26] *Jandrt* at 754-55, ¶ 33.

[27] *Id.* at 755, ¶ 34.

[28] *Id.* at ¶ 35 (Previant cited *Frederick v. Hotel Inv. Inc.*, 48 Wis. 2d 429, 434, 180 N.W.2d 562 (1970) for the proposition that no proof of causation is needed in a safe place action).

[29] *Id.* at ¶ 36.

[30] *Id.* at 757, ¶¶ 40-41.

[31] *Id.* at 758, ¶ 48.

[32] *Id.* at 559-60, ¶ 55.

[33] *Id.* at 753, ¶ 28.

[34] *Id.* at 754, ¶ 31.

[35] *Id.*

[36] *Id.* at 768, ¶ 88.

[37] *Id.* at 769, ¶ 97.

[38] *Id.* at 760-61, ¶ 60.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.* at 761, ¶ 61.

[43] *Id.*

[44] *Id.*

[45] *Id.* at 761, ¶ 62, *Id.* at 762, ¶ 68.

[46] *Kelly v. Clark*, 192 Wis. 2d 633, 651, 531 N.W.2d 455 (Ct. App. 1995).

[47] *Jandrt* at 762, ¶ 64, *Id.* at 763, ¶ 65.

[48] *Id.* at 762, ¶ 64.

[49] *Id.* at 763, ¶ 67, *Id.* at 762, ¶ 68.

[50] *Id.* at 760, ¶¶ 57-59.

[51] *Id.* at 751, ¶ 20.

[52] *Id.* at 765, ¶ 75.

[53] *Id.* at ¶¶ 79-80.

[54] Hittner, Schwarzer, et al., *Practice Guide: Federal Civil Procedure Before Trial – 5th Circuit Edition* (Rutter Group 1993-98).

[55] Chief Justice Abrahamson quotes the Civil Trial Counsel in her dissent from the denial of Previant's Motion to Reconsider. According to her dissent, the Civil Trial Counsel asked to be heard by the supreme court for the following reason:

"We believe that this is a case of significant importance to all attorneys practicing in the state, regardless of their affiliation with either the plaintiff's or defense bar. It is our position that this is a matter that needs to be addressed in an evenhanded way since it affects both sides dramatically."

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[8] *Id.* at 751, ¶ 18.

[9] *Id.* at 749-50, ¶¶ 8-10.

[10] *Id.* at 750, ¶ 12.

[11] *Id.* at ¶¶ 13-14.

[12] *Id.* at 751, ¶ 16.

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[26] *Jandrt* at 754-55, ¶ 33.

[27] *Id.* at 755, ¶ 34.

[28] *Id.* at ¶ 35 (Previant cited *Frederick v. Hotel Inv. Inc.*, 48 Wis. 2d 429, 434, 180 N.W.2d 562 (1970) for the proposition that no proof of causation is needed in a safe place action).

[29] *Id.* at ¶ 36.

[30] *Id.* at 757, ¶¶ 40-41.

[31] *Id.* at 758, ¶ 48.

[32] *Id.* at 559-60, ¶ 55.

[33] *Id.* at 753, ¶ 28.

[34] *Id.* at 754, ¶ 31.

[35] *Id.*

[36] *Id.* at 768, ¶ 88.

[37] *Id.* at 769, ¶ 97.

[38] *Id.* at 760-61, ¶ 60.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.* at 761, ¶ 61.

[43] *Id.*

[44] *Id.*

[45] *Id.* at 761, ¶ 62. *Id.* at 762, ¶ 68.

[46] *Kelly v. Clark*, 192 Wis. 2d 633, 651, 531 N.W.2d 455 (Ct. App. 1995).

[47] *Jandrt* at 762, ¶ 64, *Id.* at 763, ¶ 65.

[48] *Id.* at 762, ¶ 64.

[49] *Id.* at 763, ¶ 67. *Id.* at 762, ¶ 68.

[50] *Id.* at 760. ¶¶ 57-59.

[51] *Id.* at 751, ¶ 20.

[52] *Id.* at 765, ¶ 75.

[53] *Id.* at ¶¶ 79-80.

[54] Hittner, Schwarzer, et al., *Practice Guide: Federal Civil Procedure Before Trial – 5th Circuit Edition* (Rutter Group 1993-98).

[55] Chief Justice Abrahamson quotes the Civil Trial Counsel in her dissent from the denial of Previant's Motion to Reconsider. According to her dissent, the Civil Trial Counsel asked to be heard by the supreme court for the following reason:

"We believe that this is a case of significant importance to all attorneys practicing in the state, regardless of their affiliation with either the plaintiff's or defense bar. It is our position that this is a matter that needs to be addressed in an evenhanded way since it affects both sides dramatically."