



Law Watch

Fall 2006

WISCONSIN SUPREME COURT ACCEPTS NEW CASES

Aslakson v. Gallagher Bassett Services, Inc.

2004AP2588

Issue: Does Wis. Stat. § 102.81(1)(a) preempt bad faith claims by an uninsured employee against the contract administrator for the State Uninsured Employer's Fund (UEF), or may an uninsured employee bring a tort claim against the administrator for bad faith denial of a worker's compensation claim?

McNeil v. Hansen, et al.

2005AP423

Issue: Do the facts constitute "operation of a motor vehicle" as that term is used in Wis. Stat. § 102.03(2), so that the injured co-employee is not limited to the exclusive remedy of the workers compensation laws?

Estate of F. Rille, et al. v. Physicans Ins. Co.

2005AP1407

Issue: What is the extent of a tort litigant's responsibility to appear and object to a motion for summary judgment filed against another party to the tort action, but not against the litigant, when the litigant seeks to preserve a potential claim for contribution against the party to a motion?

Lornson, et al. v. Siddiqui, et al.

2005AP2315

Issue: Whether a surviving spouse's wrongful death claim in a medical malpractice case survives his or her own death such that his or her personal representatives have standing to pursue the claim?

Brew City Redevelopment LLC v. The Ferchill Group

2004AP3238

Issue: Is there a malevolent action exception to the economic-loss doctrine?

Shannon E.T. v. Alicia M. V.M

2005AP77

Issue: Whether an unmarried man who alleges that he is the father of a stillborn baby may bring a paternity action under Wis. Stat. § 767.45 to establish paternity for purposes of prosecuting a claim for the child's wrongful death

City of Milwaukee v. R. Washington

2005AP3141

Issue: Whether the circuit court abused its discretion when it confined a woman to the county jail for treatment of tuberculosis rather than allowing guarded hospital treatment because of the higher cost of hospitalization. The Supreme Court will also determine whether the circuit court had the authority to use "remedial contempt" as a sanction in order to incarcerate the woman for treatment until she was certified to be cured.

RECENT SEMINARS

Julie Frymark Kirby and Erin Fay presented "Intellectual Property Issues for Local Governments-What You Should Be Protecting" at the Municipal Attorney's Institute on June 15, 2006 in Sheboygan.

Josh Levy presented "Resolving Problems and Disputes on Construction Projects" on September 14-15, 2006.

Crivello, Carlson & Mentkowski will hold its annual Wisconsin Legal Update Seminar at the Hilton Hotel in Minneapolis, Minnesota on October 19, 2006.

Don Carlson is presenting at the February 7, 2007 DRI Seminar regarding "Water Heaters and the Ignition of Flammable Vapors."

Remzy Bitar presented "Employee Defection and Recruitment," a CLE for the Milwaukee Bar's Labor and Employment Section.



UPDATE

ECONOMIC LOSS DOCTRINE

CONSTRUCTION CONTRACT

1325 North Van Buren, LLC v. T-3 Group, Ltd.
2004AP352

The economic loss doctrine applied to bar a condominium renovation project owner's negligence claim against the general contractor because the general contractor had entered into a contract to complete a product – a condominium complex at a guaranteed maximum price. The court applied the predominant purpose test and held that the contract was a mixed contract with a predominant purpose to furnish a product, rather than provide a service. Thus, the economic loss doctrine applied to preclude the negligence claim. The court also found that the professional liability insurer provided coverage for the breach of contract claim.

AUTOMOBILE INSURANCE – UNDERINSURED MOTORIST COVERAGE

Teschendorf v. State Farm Insurance
2003AP3521

A payment of workers' compensation death benefit to the Work Injury Supplemental Benefit Fund did not entitle the insurer to reduce uninsured motorist coverage because the death benefit was not paid to or on behalf of the insured, the insured's heirs, or the insured's estate.

Welin v. American Family Mutual Insurance
2004AP1513

When a tortfeasor injures more than one person in a single occurrence and the injured persons are not insured under the same uninsured motorist policy, a definition of an underinsured motor vehicle that compares the injured person's

uninsured motorist limits to the limits of the tortfeasor's liability policy without regard to the amount the injured person actually receives from the tortfeasor's insurer is invalid as a reducing clause under Wis. Stat. § 632.32(4m) and (5)(i).

Rebernick v. Wausau General Insurance Co.
2005AP15

Persuant to Wis. Stat. § 632.32(4m) an insurer is required to notify the insureds of the availability of uninsured motorist coverage under their umbrella policy.

CONDEMNATION – GOOD FAITH NEGOTIATION

The Warehouse II, LLC v. State of Wisconsin DOT
2003AP2865

Where the Department of Transportation did not negotiate in good faith prior to issuing a jurisdictional offer to purchase plaintiff's warehouse property, the DOT did not commence a statutorily sufficient condemnation and lacked the right under the statutes to condemn the property.

CONDEMNATION – REAL ESTATE CONTRACTS

Sunday v. Dave Kohel Agency
2004AP2322

The transfer of property by condemnation constitutes a "sale" under the terms of a real estate contract, rather than a "transaction," so the real estate broker was entitled to a six percent commission.

INSURANCE – 3RD PARTY CLAIMS

Kontowicz v. American Standard Ins. Co.
2003AP2177

A 3rd party claimant injured by a negligent tortfeasor is able to collect interest from an overdue payment of an insurance claim

from the negligent tortfeasor's insurance company. However, this only applies if all of the following three conditions are satisfied: (1) there can be no question of liability on the part of the insured; (2) the amount of damages must be a certain amount; and (3) the 3rd party claimant must provide written notice of both liability and the certain amount owed. If the insurer has "reasonable proof" it is not responsible, then Wis. Stat. § 628.46, which imposes a 12 percent simple interest rate, does not apply.

INSURANCE – CONFLICT OF LAWS

Drinkwater v. American Family Mutual Insurance
2004AP1793

The insured, a Wisconsin resident, was injured in a motor vehicle accident in Wisconsin, and the insurance plan paid medical expenses on his behalf through his employer's health insurance plan. The contract was issued to the insured's employer in Iowa. The issue was whether Iowa law or Wisconsin law applied to the subrogation claim against the insured. Applying choice-of-law principles, the court determined that Wisconsin law applied. The plan was not entitled to subrogation against the insured's recovery because he was not made whole under Wisconsin law.

INSURANCE – COMMERCIAL GENERAL LIABILITY

Glendenning's Limestone & Ready-Mix Co. v. Reimer
2005AP1092

Faulty workmanship alone does not constitute an "occurrence" that causes property damage within the meaning of a commercial general liability policy

INSURANCE – PROFESSIONAL LIABILITY

Avery v. Diedrich

2005AP1730

An agent's initial agreement to obtain coverage does not give rise to a later duty to procure the requested increase in coverage. The agent's duty to the insured ends when the insured procures the original policy. Incurring additional coverage is a new task and because the agent did not agree to perform the new task, there was no duty.

MUNICIPALITIES – SANITARY DISTRICT ASSESSMENTS

Steinbach v. Green Lake Sanitary District

2003AP2245

The assessment of an "availability charge" to each condominium owner lacked a reasonable basis because there was no nexus between the charge assessed and the district's recovery of the capital cost to provide sanitary sewer service; other lots that had multiple units were assessed only one availability charge and there was no showing that the condo owners received a greater benefit than what was provided to other lots that were affected by the same sewer extension.

MUNICIPALITIES – ZONING

Roberts v. Manitowoc County Bd. of

Adjustment

2005AP2111

The Manitowoc County Board of Adjustment decision to grant a conditional use permit to an energy company to build a forty-nine-turbine wind energy park was sustained because the board (1) offered proper public notice, (2) allowed adequate time for the public to be heard at a public hearing, and (3) applied a reasonable interpretation of the Wind Energy System Ordinance.

MUNICIPALITIES – OPEN MEETINGS LAW

Plourde v. Habegger

2005AP2106

Wisconsin's open meeting law (Wis. Stat. §§ 19.81-19.98) does not apply to committees of one member.

NEGLIGENCE – SAFE PLACE VIOLATION

Mair v. Trollhaugen

2004AP1252

Wis. Stat. § 893.89 bars safe place claims resulting from injuries caused by structural defects beginning ten years after a structure is substantially completed.

NEGLIGENCE – NUISANCE & PUBLIC POLICY

Butler v. Advanced Draining Systems

2004AP1991

Public policy precluded claims for negligence and nuisance where a city retained the defendant to alleviate high water problems along a lake where a flooding hazard had been known for decades. Permitting contractor liability would open the door to an influx of claims against city-retained contractors hired to reduce naturally-occurring hazards if they are unsuccessful.

PERSONAL INJURY – COLLATERAL SOURCE RULE

Leitinger v. Van Buren Mgmt.

2005AP2030

The collateral source rule prohibits defendants in a personal injury case from introducing evidence of the amount of medical expenses actually paid for the purpose of showing that the billed expenses were not reasonable.

CONTRACTS – BREACH

Wisconsin Mall Properties, LLC v. Younkers, Inc.

2005AP323

This case was remanded to the lower court to determine the terms of a lease and whether the lease was actually breached before the court can determine if the plaintiff is precluded in seeking a remedy against the defendants for breach of contract.

CONSTITUTIONAL LAW – ORIGINAL COMPACTS BETWEEN THE STATE AND TRIBES

Dairyland Greyhound Park, Inc. v. Doyle

2003AP421

The 1993 Amendment to Article IV of section 24 of the Wisconsin Constitution does not invalidate the original compacts. The right to expand upon negotiations between the State and Tribes for Class III Gaming is not limited by the Amendment, as this would be contrary to the Contracts Clauses of the Wisconsin and the U.S. Constitution.

INTELLECTUAL PROPERTY – VALUATION

Adam's Outdoor Advertising, Ltd. v. City of

Madison

2005AP508

A city may use third tier methods of assessment to assess the value of billboard advertising, but a third tier method cannot be the sole determining factor to determine value. Billboard permits are not tangible personal property, but rather are an interest in real property.

INTELLECTUAL PROPERTY – TRADE SECRETS

Burbank Grease Services v. Sokolowski

2004AP468

Wisconsin's Trade Secret Statute, § 134.90(6)(a) (2003-4), does not preclude all other civil remedies based on the misappropriation of confidential information, if the information is not a "trade secret."

FIRMNEWS

Crivello, Carlson & Mentkowski, S.C. is pleased to welcome **John Loring** to the Firm. John graduated from Santa Clara University in 2002. John decided he wanted to enjoy the Wisconsin winters and has moved back to Milwaukee from California. He will be practicing in general litigation with a focus on municipal, construction and products liability law.

The Firm is also pleased to announce the hiring of **Renee O'Day**. Renee graduated from the University of Wisconsin, Madison in 2006. Renee will be pursuing work on general litigation matters.

Josh Levy obtained summary judgment dismissing an \$850,000 claim resulting from water damage to the Westchester (N.Y.) County Medical Center, when the Court agreed that our

client's appliance was not defective as a matter of law.

Bill Ehrke successfully resolved a claim in which an employee alleged he had suffered from Parkinson's disease as a result of exposure to manganese in welding fumes. The case was dismissed based on medical and scientific evidence available which indicated it was unlikely the alleged exposure could have been causally related to the onset of Parkinson's disease.

Ray Pollen and Remzy Bitar authored "Municipal Regulation of Adult Oriented Businesses: Restrictive Zoning Regulations of Adult Oriented Businesses Must Allow for Adequate Alternative Sites" in The Municipality, August 2006 edition.

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