



Law Watch

Spring 2006

WISCONSIN SUPREME COURT ACCEPTS NEW CASES

Acuity Mutual Ins. Co. v. M. Olivas

2005AP685

Issue: Whether, when determining if a worker is an employee or an independent contractor for the purpose of setting a premium under a worker's compensation insurance policy, the specific statutory definition of "independent contractor" set forth in Wis. Stat. § 102.07(8)(b) controls, or whether the common law test controls.

J. Hansen v. American Family Mutual Ins. Co., et al.

2004 AP 2065

Issue: Whether a defendant's liability for well-performed but allegedly unnecessary medical surgery is subject to the same standard used when necessary surgery is negligently performed, thus aggravating the injury.

First American Title Ins. Co. v. D. Dahlmann

2004 AP 2318

Issue: Whether a land owner's unintentional encroachment onto an adjacent property results in a defect in or affects the marketability of the landowner's title, and whether the title insurance company's deletion of exceptions from its title insurance policy allows for coverage of damages to the land owner's title.

Wisconsin Mall Properties LLC v. Yonkers, Inc.

2005 AP 323

Issue: Whether, in a case where the City of Green Bay moved to acquire the downtown Yonkers building as part of a redevelopment effort, a condemnation action against real property extinguishes a party's contractual rights where there is an express agreement in which

contractual rights survive condemnation and whether, if the rights do survive condemnation, the injured party's recourse against the government entity condemning the property is limited.

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

2005 AP 508

Issue: In a case arising from the banning of certain billboards in the City of Madison, the Supreme Court is expected to decide questions related to the valuation of outdoor advertising, including what methods are used to calculate that valuation and what evidence will be considered in those calculations.

Daimler Chrysler c/o ESIS v. LIRC, et al.

2005 AP 544

Issue: In a case involving an injured employee, the Supreme Court will decide whether the Wisconsin Labor and Industry Review Commission may interpret the administrative code section DWD 80.32 (4) to stack minimum permanent partial disability assessments for successive ligament repair procedures where the resulting award is higher than the highest medical estimate of permanent partial disability in evidence.

NOTE:

The above cases have been recently accepted by the Wisconsin Supreme Court. Watch for possible changes to Wisconsin law in future editions of Law Watch as these cases are determined.



UPDATE

ECONOMIC LOSS DOCTRINE

CONSTRUCTION CONTRACT – NEGLIGENCE

Trinity Lutheran Church v. Dorschner Excavating, Inc.

2004 AP 785

Trinity sued Dorschner alleging breach of contract and negligence on grounds that Dorschner caused a large crack in a water lateral while excavating the footings for an addition to the church. The issues presented to the Court of Appeals were: (1) whether Dorschner's third-party claim against the project's general contractor, OCI, was barred by the Economic Loss Doctrine, and (2) whether expert testimony was required to establish that OCI's conduct was negligent and contributed to Trinity's loss. The Court held that because Dorschner contracted with Trinity and not OCI, no contractual relationship existed between Dorschner and OCI and Dorschner's third party negligence claim for contribution against OCI was not barred by the Economic Loss Doctrine. The Court held that expert testimony was not required to establish that OCI's failure to mark the location of the water pipe before Dorschner was permitted to excavate the area and failure to direct second pressure test on the pipe was negligent and contributed to Trinity's loss.

AUTOMOBILE INSURANCE

UNDERINSURED MOTORIST COVERAGE

Dempich v. Pekin Ins. Co.

2004 AP 1861

This is a two vehicle accident case in which the plaintiff, injured while driving in the course of his employment, had \$100,000 per person UIM coverage from his employers' worker's compensation coverage through Pekin Insurance. Pekin's UIM policy contained a reducing clause and an "other insurance" provision. Other insurance policies implicated were the other driver's \$50,000 per person liability coverage with Heritage Insurance Company and the plaintiff's \$100,000 per person UIM policy issued by State Farm. The State Farm policy also contained a reducing clause and an "other insurance" provision. After plaintiff received \$109,476 in benefits from Pekin and Heritage Insurance, he filed claims with Pekin and State Farm for the \$100,000 UIM limit provided by each policy. The trial court granted Pekin's motion for summary judgment determining that its reducing clause was not ambiguous and granted plaintiff's summary judgment motion against State Farm holding that its policy was ambiguous. The Court of Appeals affirmed summary judgment for Pekin, reversed summary judgment for the plaintiffs against state Farm and remanded with

instruction that the trial court grant State Farm's motion for summary judgment. The Court held that the failure to define the word "endorsement" does not render a policy ambiguous. Further, the failure to clearly state the possibility of zero dollars in secondary coverage on a UIM policy does not render that policy ambiguous.

CONDEMNATION

COMPARABLE REPLACEMENT PROPERTY

City of Janesville v. CC Midwest, Inc.
2004 AP 267

This is a case involving the City of Janesville's acquisition of a business property as part of a transportation project, and whether the City was obligated to provide a "comparable replacement business" pursuant to Wis. Stat. §32.19(2) or simply a "comparable replacement property" in Wis. Stat. §32.05(8). The Court denied the City's argument that it need only identify property that could be made comparable and offer the required payments in Wis. Stat. § 32.19(2). The Court held that the City could not require CC Midwest to vacate the property the City had acquired without identifying a comparable replacement business, which includes a comparable replacement property as set forth in Wis. Stat. §32.19(2)(c).



AUTOMOBILE INSURANCE POLICY LIMITS

LaCount v. General Casualty Co. of WI.

2003 AP 3258

The issue presented in this case is the interplay between Wis. Stat. § 343.15(2)(b), which imputes liability for a minor child's negligent operation of a permissively used vehicle, and Wis. Stat.

§632.32(3), the omnibus coverage statute. The Supreme Court analyzed whether that interplay compels an insurance company to provide separate policy limits for both the named insured and for the minor whose negligence caused the injury, for whom the named insured was the sponsor for the minor driver's negligent operation of a motor vehicle as imposed by Wis. Stat. §343.15(2)(b). The Court held that the Wis. Stat. §632.32(3) does not require an insurance company to provide separate limits of liability to permissive users and named insureds who are liable by statute for the imputed negligence of permissive users pursuant to §343.15(2)(b).

AUTOMOBILE INSURANCE UNINSURED MOTORIST COVERAGE – OTHER INSURANCE PROVISIONS

Progressive Northern Ins. Co. v. Hall

2004 AP 688

This case involves the interpretation of an underinsured motorist provision and "other insurance" provision in an automobile policy which provides "any insurance we provide shall be excess over any other uninsured or underinsured motorist coverage, except for bodily injury to you or a relative when occupying the covered vehicle." The Supreme Court affirmed the Court of Appeals

decision that the "other insurance clause" was unenforceable under §632.32 because it provided primary coverage for a named insured and driver while providing only excess coverage for a passenger in the same vehicle.

MUNICIPALITIES PUBLIC CONTRACTS

D.M.K., Inc. v. Town of Pittsfield

2005 AP 221

This is a contract and lost profits case in which a contractor sued a municipality when it was not awarded a road building project despite the fact that it was the lowest bidder. The statute under which the Town let the disputed contract is Wis. Stat. §60.47, which requires that the Town must award the contract to "the lowest responsible bidder." The Court of Appeals held that the determination of the lowest responsible bidder implies the exercise of discretion, and that the Town is entitled to immunity for its discretionary evaluation of bidders for the road building job pursuant to Wis. Stat. §893.80(4).

PRODUCT LIABILITY DUTY TO WARN

Kessel v. Stansfield Vending, Inc.

2005 AP 1037

This is a hot liquids case in which the Court of Appeals considered whether a manufacturer of a dispenser of hot water for tea and hot chocolate was required to warn users of the machine of the dangers of hot water. A second issue was whether the hospital that owned the machine was required to provide lids for the cups designed to hold the hot liquids dispensed by the machine. The Court of Appeals held that the nature of hot water and its

propensity to burn skin at high temperatures is common knowledge, and a manufacturer is not required to anticipate and warn of the many and varied degrees of injury that could be caused by hot water. The Court dismissed the claims against the hospital regarding the failure to provide lids on public policy grounds, deciding that the injury was too remote from the negligence, and that recovery on these types of facts would have no sensible stopping point.

RECENT SEMINARS

Josh Levy presented on the issue of the law of engineering malpractice in a seminar for professional engineers.

Laura Schuett taught at the "Lawyering Skills Program" at the UW Law School in April, 2006.

Pat Brennan made a presentation on construction issues to the American Woodwork Institute

Josh Levy presented on "Using a Mechanics Lien to Get Your Money" at the National Business Institute Seminar in Milwaukee on May 22, 2006, and Madison on May 23, 2006.

Ray Pollen presented "Liability Concerns and Budget Cuts: When is the Cut Too Deep?" to the Wisconsin Town Lawyers Conference on April 28, 2006 in Madison.

FIRMNEWS

Don Carlson and **Matt Fricker** prevailed in the appeal of a Milwaukee County jury verdict that rejected plaintiff's claim for over \$5 million in damages caused by allegedly defective refrigerator valves.

Raymond Pollen and **Remzy Bitar** argued successfully to uphold a municipal ordinance which controls and regulates sexually oriented businesses.

Pat Brennan and **Zac Davis** prevailed in appellate cases involving additional insured status in a chemical burn bodily injury case and on statute of limitations grounds in a case involving a defective roof.

James Niquet and **Travis Rhoades** secured summary judgment in an Iowa product liability case involving a gas explosion.

James Niquet and **Timothy Pagel** secured summary judgment in two toxic tort wrongful death cases.

Michele Ford won a recent decision involving fair employment issues before the 7th Circuit Court of Appeals.

Marianne Morris Belke and **Ray Pollen** secured summary judgment in cases involving building code enforcement, and in a breach of contract case involving a former police officer.

Joshua Levy and **Todd Jex** secured summary judgment in a lawsuit arising from the Bielinski Home Builders scandal.

Eric Carlson secured summary judgment in a product liability injury case involving a lawn mower in federal court in Mississippi.

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