



Law Watch

Summer 2007

WISCONSIN SUPREME COURT ACCEPTS NEW CASES

State v. William F. Schweda, et al.

2005AP1507

Issue: Whether the constitutional right to a jury attaches in an action seeking forfeitures for violations of waste disposal regulations.

K&S Tool & Die Corp. v. Perfection Machinery Sales, Inc., et al.

2005AP2148

Issue: In a case involving an allegation of “false advertising,” should the trial court, at close of plaintiff’s evidence, have dismissed the case or should it have issued a directed verdict in favor of defendant at the end of trial because the plaintiff was not a member of the “public” for purposes of Wis. Stat. § 100.18(1) as a matter of law instead of allowing the jury to decide the question? Did the jury err in finding that the defendant’s quotation in an advertisement caused the plaintiff’s pecuniary loss?

Shannon Below v. Dion and Dana Norton

2005AP2855

Issue: Does the economic loss doctrine bar intentional misrepresentation causes of action arising from non-commercial transactions and/or residential real estate transactions?

State Farm Mutual Automobile Insurance Company v. Travis L. Bailey

2003AP2482

Issue: Whether Wis. Stat. § 632.32(5)(i)1 and the reducing clause in insurance policies permits a reduction of the UIM limit by the amount paid by or on behalf of a second, non-UIM tortfeasor?

R. Stuart, et al. v. Weisflog’s Showroom Gallery, Inc., et al.

2005AP886

Issue: Does Wis. Stat. § 100.20(5) allow for doubling of all damages if unfair competition/trade practices are not the cause of all damages?

In remodeling/construction project, are separate damages for both misrepresentation and poor workmanship permissible under ch. ATPC 110?

If a jury verdict found no personal involvement in a building contract, can an individual, in his or her personal capacity, be liable for damages resulting from that contract? Is an officer of business liable for all damages found caused by that business where there is no causal finding against the officer in his or her personal capacity?

Shannon Nichols v. Progressive Northern Ins. Co.

2006AP364

Issue: Is there common law liability for a social host who does not provide alcoholic beverages to a guest who caused injury after leaving the host’s premises?

Did the amended complaint allege as a basis for foreseeability that the hosts, aware that minors on their property were consuming alcohol, would foresee that an accident would result?

Assuming duty and causation, does public policy preclude liability for a social host who did not provide alcoholic beverages to a guest who caused injury after leaving the host’s premises?

SEMINARS

Ray Pollen will present “Law Enforcement Authority and Liability for Activity Outside their Jurisdiction” at the Municipal Attorneys Institute in Green Lake on June 22, 2007.



UPDATE

WORKER'S COMPENSATION

BAD FAITH BY CONTRACT ADMINISTRATOR

**C. Aslakson v. Gallagher Bassett
Services, Inc.**

2007 WI 39

The issue decided by the Wisconsin Supreme Court in this case was whether the Worker's Compensation Act (Act) preempts bad faith claims by an uninsured employee against the contract administrator of the Uninsured Employers Fund (UEF), or may an uninsured employee bring a tort claim against the administrator for its misconduct while processing the worker's compensation claim? The Court answered that the "exclusive remedy" provision of the Act does not preclude such a claim. The Court reasoned that the Act only addresses bad faith conduct by employers and their insurance carriers, but not the Department of Workforce Development (DWD) or its agents. Since, the Act does not expressly address remedies for bad faith tort claims against the DWD or its agents, and is therefore outside the Act, such claims for damages arising from the intentional tort of bad faith against the DWD or its agents are not precluded.

EMPLOYMENT DISCRIMINATION

**Barricks v. Eli Lilly and Co. U.S. 7th
Circuit Court of Appeals**

05-3771

In this case, the 7th Circuit Court of Appeals determined that an employee must present the following requirements in order to have a prima facie case for employment discrimination:

"(1) she is a member of a protected class; (2) her performance met her employer's legitimate expectations; (3) despite this performance, she was subjected to an adverse employment action; and (4) her employer treated similarly situated employees outside of the protected class more favorably." If an employee successfully meets these four requirements, the burden then shifts to the employer to prove a "nondiscriminatory reason for its decision." In the case at hand, the plaintiff, instead of showing that a younger employee who was "similarly situated" received more favorable treatment than her, merely pointed out that everyone in her department, but her, received a raise. The Court determined that her evidentiary showing was not enough to meet the fourth requirement. Furthermore, the Court found that as to her claim of gender discrimination, that even if she was able to meet the fourth requirement, she did not show that her employer's reason not to give her a raise was pretextual.

EMPLOYMENT PRACTICES LIABILITY INSURANCE

**Krueger International, Inc. v. Royal
Indemnity Co.**

U.S. 7th Circuit Court of Appeals

06-2611

This case governed by Wisconsin law involved the issue of whether the employment practices liability insurance policy covered an oral modification of a written shareholders contract by the company's CFO. The shareholders in question, also happened to be employees at the time the modification was made. The Court found that the agreement was a shareholder contract and not an employment contract and, therefore, was not covered under the policy just because

the shareholders happened to be employees at the time the oral modification was made. Additionally, the Court held that there was no misrepresentation covered by the policy because the CFO had implied authority from the board of directors to modify the shareholder agreement.

WORKER'S COMPENSATION

EXCLUSIVE REMEDY EXCEPTION—MEANING OF "OPERATION OF A MOTOR VEHICLE"

**McNeil v. Hansen and Maryland Casualty Co.
2007 WI 56**

The Wisconsin Supreme Court determined that when a vehicle is being repaired and cannot be driven on a public roadway, it is not within the Worker's Compensation Act's meaning of "operation of a motor vehicle" to reach through the window and turn the ignition switch. Therefore, such an action does not fall within the Worker's Compensation Act's exception to its exclusive remedy for a work-related injury caused by a co-employee.

EMPLOYMENT PRACTICES LIABILITY INSURANCE

**Farmers Automobile Insurance
Association v. St. Paul Mercury
Insurance Company**

U.S. 7th Circuit Court of Appeals

06-2810

Farmers insurance had a class action suit filed against it in Illinois State Court by its claims adjusters for overtime pay in accordance with the Illinois Minimum Wage Law. Farmers sought coverage for this suit from its employment practices liability policy that it had obtained from St. Paul

insurance. St. Paul denied coverage due to an exclusion in the policy for actual or alleged violation of the Fair Labor Standards Act or “other similar provisions.” Farmers argued that the term “similar” was ambiguous and therefore, the policy must be construed against the drafter, i.e., St. Paul. The Court of Appeals construed this issue under Illinois law. The Court determined that the term “similar” was not “hopelessly vague” considering that the intended reader of the policy was another insurance company. Furthermore, the term “similar” in the context of this case eliminated vagueness because the overtime requirement of the Fair Labor Standards Act is identical to the Illinois Minimum Wage Law. The Court also rejected Farmers’ argument that the term “similar” makes the policy illusory reasoning that the exclusion merely narrows coverage and does not make coverage illusory.

WORKER’S COMPENSATION

CLAIM FOR ADDITIONAL PREMIUMS

Acuity Mutual Insurance Company v. Miguel A. Olivas

2007 WI 12

In this case, the Wisconsin Supreme Court held that for a worker’s compensation insurer to receive additional premiums for additional workers from an insured, the insurer must prove both that the workers (1) are not independent contractors under the nine-part test enumerated in the Wisconsin Worker’s Compensation Act, and (2) the workers at issue must have an employer-employee relationship with the insured.

TORTS

ECONOMIC LOSS DOCTRINE— PERSONAL LIABILITY— INTRACORPORATE CONSPIRACY DOCTRINE

Brew City Redevelopment Group, LLC v. The Ferchill Group

2006 WI 128

The Wisconsin Supreme Court decided that the economic loss doctrine that prevents “a party to a contract from employing tort remedies to compensate the party for purely economic losses arising from the contract,” does not apply to a claim for malicious injury to reputation and business pursuant to Wis. Stat. § 134.01, and therefore, does not bar such a claim. The Court also determined that members or managers of an LLC may be personally liable for tortious interference with contract, if the persons were acting individually and not as a member or manager of the LLC. Finally, due to the lack of complete unity of interests between some of the defendants, the intracorporate conspiracy doctrine does not bar claims for conspiracy to intentionally interfere with contract and conspiracy to maliciously injure reputation and business.

REAL ESTATE

EASEMENTS—DOCTRINE OF CHANGED CONDITIONS— IMPOSSIBILITY OF PURPOSE

AKG Real Estate, LLC v. Kosterman

2006 WI 106

In this case, the opinion of the Wisconsin Supreme Court was that an express easement for the purpose of ingress and egress to the dominate estate continues regardless of whether the dominate estate needs the easement. The Court refused to adopt the Restatement (Third) of Property: Servitudes § 4.8(3), but rather stayed with, “the longstanding default rule in Wisconsin that a servient estate cannot unilaterally relocate or terminate an express easement.”

MEDICAL MALPRACTICE

STATUTE OF LIMITATIONS— CONTINUUM OF NEGLIGENCE

Forbes v. Stoeckl

2006AP1654

The Wisconsin Court of Appeals held that under the continuum of negligent treatment doctrine, the statute of limitations does not start running until the last date on which the malpractice occurred. The doctrine was applicable in this case because the plaintiff was able to show that the care by her dentist met the following four elements that are required: “(1) a continuum of care, (2) a continuum of negligent care, (3) that the care is related to a single condition, and (4) that the precipitating factor in the continuum is the original negligent act. The plaintiff was able to show that her dentist continued on an allegedly negligent course of treatment stemming from an allegedly negligent diagnosis of TMJ in 1989 until a final root canal performed in 2001.

RECENT SEMINARS

Pat Brennan presented on Ethics Issues Surrounding CGL Coverage in Wisconsin during a seminar on May 4, 2007 in Milwaukee.

Raymond Pollen and Remzy Bitar presented on the subject of zoning regulations of adult oriented business at the Wisconsin Town Lawyers Conference on April 27, 2007.

Pat Brennan presented “How to Best Investigate, Mitigate and Settle Automobile Accident Claims and General Liability Claims,” to a focus group in Menomonee Falls on May 3, 2007.

FIRMNEWS

Crivello, Carlson & Mentkowski proudly announces the following new shareholders in the firm: **Ryan Braithwaite** (UW-2000), **Agatha Raynor** (UW-2000) and **Travis Rhoades** (Marquette-1998).

Jeffrey Nichols and **Stacy Luell** secured summary judgment in a wrongful death action that arose from a motor vehicle accident. Plaintiffs were demanding over \$1 million in damages.

Robert Dean attended the ABA House of Delegates' Midyear Meeting in Miami as a Delegate for the State Bar of Wisconsin. During the meeting, the entire Model Code of Judicial Conduct was amended and approved by the entire House of Delegates.

Josh Levy and **Agatha Raynor** had an article published "How's Your Employee Handbook—Have You 'Checked the Batteries?'" in the May, 2007 edition of the Official Publication of Associated Builders and Contractors of Wisconsin, Inc., "Shop Talk."

Crivello, Carlson & Mentkowski is pleased to announce the hiring of **Julie Huinker** and **Danny Mullin**. Julie and Danny are both Marquette law students entering their final year of school and will be clerking for **Crivello, Carlson & Mentkowski** this summer.

www.milwlaw.com

710 N. Plankinton Ave.
Suite 500
Milwaukee, WI 53203

CCM Update is a review of recent

legal developments prepared by

Crivello, Carlson & Mentkowski, s.c.

The information reported should not

be construed as legal advice, nor

utilized to resolve legal problems.

Contact Us

If you would like:

- additional information
- copies of decisions
- to subscribe to CCM Update electronically

Please contact us by calling 414-271-7722, or e-mail ccm@milwlaw.com with your request and e-mail or mailing address.

Copyright© Crivello, Carlson & Mentkowski, s.c. Reproduction with attribution permitted.

PRESORT
STANDARD
U.S. POSTAGE
PAID
BROOKFIELD, WI
PERMIT #0188