



Law Watch

Winter 2005 - 2006

WISCONSIN SUPREME COURT ACCEPTS NEW CASES

S. Drinkwater v. American Family Mutual Ins. Co., et al.

2004AP1793 Grant County

Issue: This case involves a man who works in Iowa, lives in Wisconsin, and was badly injured in an auto accident in Wisconsin. The Supreme Court is expected to decide if the choice-of-law and subrogation provisions in the health insurance policy should be given effect in a Wisconsin tort case without regard to Wisconsin's "made whole" doctrine.

Richards v. First Union Securities

2004AP1877 Waukesha County

Issue: What evidence must a defendant produce in order to vacate a default judgment for insufficient service of process on a corporation under Wis. Stat. § 801.11(5)(a), especially with respect to whether an individual is a "managing agent" of the corporation?

Additionally, the court may address who bears the burden of persuasion that service was inadequate and how that burden interacts with the rule that a circuit court judgment is void if service was not proper?

J. Mair v. Trollhaugen Ski Resort, et al.

2004AP1252 Polk County

Issue: Whether Wis. Stat. § 893.89, which sets the timeframe for bringing a claim based upon an improvement to real property, applies to "safe place" claims brought under Wis. Stat. § 101.11 for injuries allegedly arising out of structural defects in a premise.

The Court is also expected to decide if there is a difference between "structural defects" and "unsafe conditions associated with a structure" for purposes of the application of Wis. Stat. § 893.89 to Wis. Stat. § 101.11 that would require that Wis. Stat. § 893.89 bar a safe place claim that arises after the deadline if it is based on a "structural defect" but not if it is based on an "unsafe condition" associated with the structure.

L. Mueller v. McMillan Warner Ins. Co., et al. 2005AP121

Issue: What standard of care must be provided to an injured individual at or near the scene of an accident to qualify a caregiver for immunity from civil liability under Wis. Stat. § 895.48(1), the "Good Samaritan" statute?

Adams Outdoor Advertising, Ltd. v. City of Madison 2005AP508

Issue: This case focuses on how the value of a billboard is calculated. The case arises from a dispute between Adams Outdoor Advertising and the City of Madison that began when the City placed new limits on the number of billboards that could be displayed. The limits edged out several Adams signs, and Adams sought compensation.

RECENT SEMINARS

Don Carlson spoke on the subject of "Defending Flammable Vapor Litigation from the Viewpoint of a Manufacturer" at the DRI Fire and Casualty Seminar.

Jim Niquet spoke on "Electronic Discovery: A National Counsel Dilemma" before the Association of Home Appliance Manufacturers.

Ray Pollen presented issues on "Balancing Liability Concerns with Budget Cutting" to the Wisconsin Public Risk Management Association.

Larry Drabot gave a presentation regarding mold issues to the Racine Kenosha Builders Association.

Josh Levy presented on the issue of "Averting Chaos on the Job Site: Proactively Understanding Components of a Good Contract" at the National Business Institute seminar hosted on January 20, 2006. Please see www.nbisems.com for more information.



UPDATE

PRODUCT LIABILITY BABY SWING – ADOPTIVE ADMISSION OF DEFECT

Tober v. Graco Children’s Products, Inc.
U.S. Court of Appeals, 7th Circuit
No. 04-3837

The Tobers filed this action seeking recovery for the death of their eight-month-old son, Trevor, who became entangled in his Lil’ Napper baby swing and died of asphyxia while at daycare. On appeal, the Tobers argued that the district court erred in the exclusion of certain evidence at trial, in rulings made prior to trial and how the jury was instructed.

The Court affirmed the decision of the district court on all issues, finding that 1) the exclusion of a CPSC letter regarding the safety of the Lil’ Napper was not in error because Graco’s failure to respond to the letter did not constitute an adoptive admission of the CPSC findings and that the voluntary recall of the product by Graco also did not amount to an adoptive admission that the product was defective; 2) IPLA does not expressly prescribe or define any cause of action arising from a post-sale duty to warn therefore plaintiffs’ post-sale claim was properly dismissed on summary judgment; and 3) a manufacturer is only liable for its own defects in the products, not for defects caused by the alteration or misuse of its products.

MUNICIPAL WATER AND SEWER FEES - FAILURE TO STATE A CLAIM, DECLARATORY JUDGMENT AND STANDING

Zehner v. Village of Marshall
2004AP2789

This case involved a lawsuit by mobile home park renters against their landlord

and their municipality. The renters alleged that the Village charged American Mobile Home water/sewer fees that were unjust, unreasonable and non-uniform when compared with other Village residents.

The issue on appeal was whether the renters’ complaint stated a claim and whether the court erred in finding a lack of standing to challenge the Village fees. The Court found no common law, administrative code or landlord-tenant law applicable to state a claim in this instance. Likewise, the Court found that the injuries the renters alleged here were insufficiently direct to confer standing. The renters failed to show that they had suffered, or were threatened with an injury to a legally protectible interest.

INSURANCE UIM COVERAGE – REDUCING CLAUSE

Marotz v. Acuity
2005AP1579

Marotz was an injured passenger in an auto accident and appealed a judgment declaring that he was not entitled to recover under the underinsured motorist (UIM) coverage provision of his parents’ auto liability policy with Rural Mutual Insurance. It was undisputed that Rural was permitted to reduce its UIM coverage by the amount Marotz received from the driver of the car he was a passenger in. However, the issue on appeal was whether Rural may also reduce its UIM coverage by the amount paid to Marotz on behalf of a second, adequately insured tortfeasor.

The Court determined that Rural was permitted to reduce its \$100,000 UIM coverage by the \$90,000 paid by the second driver’s insurer pursuant to Wis. Stat. § 632.32(5)(i), which permits insurers to include reducing clauses in their policies.

The Court was not persuaded by plaintiff’s policy ambiguity arguments in light of the guidelines set forth by the Wisconsin Supreme Court in *Folkman v. Quamme*, 2003 WI 116, ¶ 29, 264 Wis.2d 617, 665 N.W.2d 857; *Dowhower v. West Bend Mut. Ins. Co.*, 2000 WI 73, 236 Wis.2d 113, 613 N.W.2d 557; *Badger Mutual Insurance Co., v. Schmitz*, 2002 WI 98, 255 Wis.2d 61, 647 N.W. 223; and *State Farm Mut. Auto Ins. Co. v. Langridge*, 2004 WI 113, 275 Wis.2d 35, 683 N.W.2d 75.

UCC HOME CONSTRUCTION - CONTRACTS AND DAMAGES

Lindstrom v. Patriot Homes, Inc.
2004AP3074

The Lindstroms agreed to purchase a manufactured home from Pinewood. Upon delivery of the home, multiple defects in construction and assembly were discovered and the Lindstroms refused to pay the remaining balance left on the contract.

At the jury trial, the jury answered that Pinewood breached its contract with the Lindstroms. The remaining amount owed to Pinewood under the contract was undisputed and the court answered \$20,000 itself before submitting the special verdict form to the jury. The jury awarded the Lindstroms \$16,785 in damages, which the court offset against the \$20,000 they owed Pinewood under contract.

Lindstroms appealed contending that the court erred when it failed to provide a jury instruction regarding the requirement that Pinewood must substantially perform to collect fully under contract. The Court held that the offset was appropriate under Uniform Commercial Code - Wis. Stat. §§ 402.105(1)(c) and 402.717. The Court recognized that a customer is not permitted a windfall due to the contractor’s breach.

CIVIL RIGHTS

EXCESSIVE FORCE – STANDARD OF PROOF AND CONSTITUTIONAL LAW

Shaw v. Leatherberry
2005WI163

The issue before the Court was what standard of proof applies to cases alleging excessive use of force by the police. The Court concluded that the Supremacy Clause of the United States Constitution requires Wisconsin courts to apply the lowest burden of proof – preponderance of the evidence – in civil rights actions under 42 U.S.C. § 1983, alleging excessive force by police personnel.

Although the Court concluded that a higher burden of proof in state court in this instance may not necessarily affect the outcome of every case, it does disrupt the federal interest in uniformity. Allowing different burdens of proof for the same action, based solely on where the action is brought, would be discriminatory against Wisconsin plaintiffs, and would in effect, violate the purpose and objectives of § 1983 which is compensation and deterrence.

CONTRACTS

SALE OF PROPERTY – FRAUD, MISREPRESENTATION, ESTOPPEL AND STATUTE OF LIMITATIONS

Balistreri v. Alioto
2004AP929

John and Joseph Balistreri appealed from a judgment dismissing their action to enforce an option to purchase a property owned by Jennie Alioto. Alioto's defense was that the contract was obtained by fraudulent mis-representation and was therefore unenforceable. The Balistreris argued that Alioto's fraud defense was time-barred by Wis. Stat. § 893.14 (2003-04).

The Court affirmed the circuit court's decision, finding that the Balistreris were estopped from asserting the statute of limitations against Alioto because Wis. Stat. § 893.14 does not apply to defenses and because all the elements of estoppel were satisfied. Further the Court determined that the Balistreris were joint venturers and had a fiduciary relationship with Alioto as a longstanding client, regardless of the status of their bar membership at the time. The Balistreris fiduciary duty to Alioto required more than abstention from active mis-representation of the facts, it included a duty to disclose to Alioto that she was entering into an agreement providing the brothers with an option to purchase her property.

EMPLOYMENT LAW

WRONGFUL DISCHARGE - PUBLIC POLICY AND JURISDICTION

Repetti v. Sysco Corp.
2005AP575

Repetti filed a complaint against Sysco, alleging wrongful discharge in response to his complaint to the company comptroller and president that Sysco officers were violating Security and Exchange Commission revenue reporting requirements. Repetti claims his discharge was contrary to well-defined public policy and against the law. Sysco moved to dismiss based on a lack of jurisdiction and failure to state a claim.

Because Sysco raised a new issue in its reply brief, and because the trial court relied on Sysco's new argument in its decision, Repetti was entitled to file a motion to vacate and reconsider the order dismissing his complaint. Repetti will be permitted to file a brief in response to Sysco's reply brief on remand instructions from the court.

INSURANCE

PERSONAL INJURY – PUNITIVE DAMAGES

Ike v. Auto-Owners Ins. Co.
2004AP917

Ike's foot was amputated by a water extractor at a Laundromat owned by Miller. Ike brought this action alleging that Miller negligently failed to maintain the water extractor in good working condition and violated the safe-place statute, Wis. Stat. § 101.11(1). Punitive damages were also requested by Ike. Auto-Owners appeals a judgment in favor of Ike and Ike cross-appealed on the issue of punitive damages.

The court was not persuaded by Miller's arguments that imposing liability upon him would contravene public policy under the factors set forth in *Stephenson v. Universal Metrics, Inc.* 2002 WI 30, ¶ 43, 252 Wis. 2d 171, 641 N.W.2d 158.

While this appeal was pending, the supreme court reversed the Court of Appeals decision in *Wischer v. Mitsubishi Heavy Indus. America, Inc.*, 2005 WI 26, 279 Wis.2d 4, 694 N.W.2d 320, reconsideration denied, 2005 WI 134, 282 Wis.2d 724, 700 N.W.2d 276 (No. 2001 AP 724). Based on the supreme court's decision in *Wischer*, this case was reversed and remanded on the issue of punitive damages.

SUPER LAWYERS

Milwaukee Magazine Super

Lawyers: **Ray Pollen** was recently recognized as a **Super Lawyer** in the field of **City and Municipal Law**; **Pat Brennan** and **Don Carlson** were recognized as **Super Lawyers** in the field of **Civil Litigation Defense**.

Don Carlson was also voted one of the **Top 50 Civil Litigation Defense Lawyers in the State**.

FIRMNEWS

The firm is excited to welcome new attorney, **Oliver J. Kaufman**. Oliver will be concentrating his practice in commercial and business litigation, municipal liability defense, civil rights, criminal litigation and appellate work.

Having recently passed the United States Patent & Trademark Examination, **Julie Frymark Kirby** will be expanding her practice in the area of patent law.

Jim Niquet prevailed on a summary judgment motion in South Carolina where a subrogated insurer alleged a defective water heater started a fire in a private residence.

Jeff Nichols was granted a directed verdict in an Adams County case where plaintiff asserted

Jeff's client provided insurance coverage to a tenant who was sued for injuries sustained to a minor child as a result of a near drowning in the tenant's swimming pool.

Ray Pollen and **Amy Doyle** were successful in having dismissed a Section 1983 action against law enforcement officers following the shooting death of an eighteen year-old after he ignored commands and charged at the officer with his knife. Two separate actions were filed alleging violations of the Fourth, Eighth and Fourteenth Amendments. Both actions were dismissed on summary judgment with the court finding the shooting justified and the actions constitutional.

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