



Law Watch

Winter 2007

WISCONSIN SUPREME COURT ACCEPTS NEW CASES

**Joseph Leitinger, et al. v. Van Buren
Management, et al.**

2005AP2030

Issue: Is evidence of the amounts paid for claimed medical expenses relevant and admissible for the purpose of determining the reasonable value of services rendered?

**State of Wisconsin ex rel. Brian L. Buswell v. Tomah
Area School District**

2005AP2998

Issue: Does Wis. Stat. § 19.84(2) require a specific notice when the subject matter of a governmental entity's meeting is of wide public interest? Is there a violation of the open records law where there is an allegation of subterfuge to avoid the requirements of Wis. Stat. § 19.84(2)?

Wendy S. DeHart, et al. v. Wisc. Mut. Ins. Co., et al.

2005AP2962-FT

Issue: Is an unidentified motor vehicle that allegedly struck a third vehicle shortly before allegedly being involved in a non-contact "hit-and-miss" accident with an insured vehicle an "unidentified motor vehicle involved in a hit-and-run accident" pursuant to Wis. Stat. § 632.32 (4) (a) (2) (b)?

R. Pool v. City of Sheboygan

2005AP2028

Issue: Does service of a notice of disallowance by certified mail addressed to the claimant and received by the claimant's adult daughter and received by the claimant constitute service "on the claimant by registered or certified mail" in compliance with Wis. Stat. § 893.80 (1) (g)?

Thomas Avery, et al. v. Drew Diedrich, et al.
2005AP1730

Issue: Is an insurance agent exposed to liability for damages where a client had requested an increase in coverage and the agent did not agree to procure it?

FAS, LLC v. Town of Bass Lake, et al.

2005AP1689

Issue: Whether the board lawfully determined that a navigable waterway bisected a parcel of land into two lots? Whether the resulting two lots conform to the county zoning ordinance or the State Shoreland Regulations?

Jeffrey E. Marotz v. Arthur E. Hallman, Jr., et al.
2005AP1579

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?

SEMINARS

Josh Levy and Eric Carlson will present 'Contractual Issues In Conjunction With The Sale of Heavy Equipment' on January 4, 2007.

CCM will participate in the Associated Builders and Contractors, Wisconsin Chapter, Winter Convention March 1, 2, 2007 at the Kalahari Resort. **Josh Levy** will be presenting Leadership Development for Emerging Construction Executives; and

Pat Brennan will be presenting Green Building Certification for developers, builders and design professionals.



UPDATE

FRIVOLOUS CLAIM COURT COSTS AND FEES

Trinity Petroleum, Inc. v. Scott Oil Co, Inc.
2005AP2837

The new § 802.05, Wis. Stats., recreated, effective July 1, 2005, contains a “safe harbor” provision which requires a frivolous claim motion first be served on the offending party to afford an opportunity to correct or withdraw its action; it may only be filed with the court if the offending party does not oblige within 21 days. Motions may no longer be served post judgment. Sanctions of costs and attorney fees are no longer mandatory; the court “may impose an appropriate sanction,” which must be “limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated.” The statute is procedural and retroactive.

INTERNATIONAL LAW SERVICE OF PROCESS – HAGUE CONVENTION

Griffen v. Mark Travel Corp.
2005AP2298

American plaintiffs injured in hotel van accident while vacationing in Mexico properly served the Mexican corporation under the Hague Convention, when a Mexican lawyer on behalf of plaintiffs gave authenticated copies of the summons and complaint along with ancillary Spanish-language documents to an office coordinator for the Mexican corporation.

JUDGMENT OFFERS OF JUDGMENT

Bockin v. Farmers Insurance Exchange.
2005AP3020

The claim for a minor’s medical bill belongs to the parent, therefore an offer of judgment by an insurer was not valid or enforceable

under § 807.01(1), Wis. Stats., where the offer contemplated that the minor was responsible for paying medical expenses either by indemnifying the insurer or by “satisfying any and all related claims” including the parents’ claim for the minor’s medical expenses.

NEGLIGENCE MOTOR VEHICLE

Hamdan v. Dawicki
2005AP1821

Even where defendant in a negligence case admitted on cross examination that she did not know if the plaintiff had done anything wrong, the jury could still find the plaintiff causally negligent where the record contained “plethora” of evidence that plaintiff was negligent with respect to lookout.

CIVIL RIGHTS ACCESS TO COURTS

Pratt v. Tarr
05-4470 (7th Circuit U.S. Court of Appeals)

Pro se prisoner’s access to the courts complaint was improperly dismissed at pleadings stage where the complaint alleged he lost court cases because the defendants withheld law books, briefs and other materials from him. However, to prevail on his claim, plaintiff will be required to prove that he lost one or more of those cases due to the withholding of legal materials.

ANITITRUST ALCOHOL – MUNICIPALITIES

**Eichenseer v. Madison-Dane County
Tavern League, Inc.**
2005AP1063

A class action suit alleged that twenty-four University of Wisconsin campus-area

taverns and the Madison-Dane County Tavern League, Inc., engaged in an illegal conspiracy in restraint of trade by voluntarily agreeing to limit “drink specials” on Friday and Saturday nights after 8:00 p.m. in response to City of Madison regulatory initiatives. The City’s initiatives followed concerns that alcohol over-consumption resulted in more frequent life-threatening conveyances of University students to detoxification facilities and expensive police response services. The agreement between the taverns, the Tavern League and the City did not violate Antitrust laws, because the agreement was in direct response to City’s legitimate exercise of regulatory authority over tavern operations. A municipality may engage in anticompetitive conduct otherwise prohibited under Ch.133, Wis. Stats., as the legislature impliedly authorized an exception from the antitrust laws for sale of alcohol beverages.

TORTS STRAY VOLTAGE – STATUTE OF LIMITATIONS – FILED RATE DOCTRINE

Schmidt v. Northern States Power Co.
2005AP862

Plaintiffs’ stray voltage claim was not precluded by the “discovery rule” where more than one reasonable inference could be drawn regarding whether plaintiffs exercised reasonable diligence in attempting to discover nature and source of their injury. The Filed Rate Doctrine did not immunize the utility from liability, even though it had filed a stray voltage tariff describing its customer complaint policies and procedures, and even though there was no evidence that electrical currents on the customer’s farm exceeded Public Service Commission’s designated “levels of concern.”

BANKRUPTCY

ENVIRONMENTAL CLEANUP CLAIMS

Glidden Co. v. FV Steel and Wire Co.

05C1355 (E.D. Wis.)

When a PRP (potentially responsible party) filed bankruptcy and withdrew from an Agreement to manage cleanup in compliance with Environmental Protection Agency's (EPA) remedial plan and Order: (1) claims for future cleanup against withdrawing PRP were properly valued at zero as participation in the Agreement was voluntary; (2) claimants may not seek contribution from the withdrawing PRP under CERCLA Sec. 113(f)(3)(B); claimants have contingent claims under Sec. 113(f)(1) which bankruptcy court should value as EPA may bring future action, and also under Sec. 107(a) which permits contribution actions for future cleanup efforts undertaken without judicial decree.

INSURANCE

UIM COVERAGE –REDUCING CLAUSE

Gresens v. State Farm Mut. Ins. Co.

2005AP2574

An insured may recover the difference between her policy limits and those of an underinsured motorist where two tortfeasors are responsible for insured's injuries – one of whom is underinsured, notwithstanding reducing clause in insured's policy. The reducing clause was "contextually ambiguous" and unenforceable where it was found only in one sentence of the limits of liability section, and nothing in the policy definition of UIM coverage, the index, or declarations page referenced the existence of a reducing clause in the policy.

TORTS

MEDICAL MALPRACTICE – COLLATERAL SOURCE RULE

Hegarty v. Beauchaine

2004AP3252

In a medical malpractice action, where one physician is a licensed health care provider under Ch. 655, Wis. Stats., and subject to

§ 893.55(7), Wis. Stats., but other physician is an unlicensed resident who may or may not be subject to that statute, the collateral source rule did not apply and trial court properly reduced the reasonable value of medical services to the amounts actually paid, as opposed to amounts billed.

ENVIRONMENTAL LAW

NAVIGABLE WATERS– ENFORCEMENT ACTION

Baer v. Wisconsin Department of Natural Resources

2005AP668

The Department of Natural Resources may initiate enforcement proceedings for alleged pier permitting violations in the absence of a complaint by a third party, even though a third party complaint is required under the administrative rule. An administrative rule cannot deprive the DNR of statutory authority under § 30.03(4), Wis. Stats to protect navigable waters.

TORTS

GOVERNMENTAL IMMUNITY – KNOWN AND PRESENT DANGER EXCEPTION

Voss v. Elkhorn Area School District

2005AP3037

The "known and present danger exception" precluded governmental immunity from suit, where a health class teacher knew of dangers, but took no precautions to minimize the risk of injury

during a required classroom exercise. This exception permitted suit against the District, where a student sustained injuries after falling while wearing "fatal vision goggles," designed to replicate the degree of impairment to vision, depth perception and balance equal to a .10 blood alcohol concentration while driving a vehicle. The teacher had used the goggles since 1998, was aware of the inherent risk of falling when wearing the goggles, and knew that other students had fallen.

CIVIL RIGHTS

PRISONERS – RLUIPA – EXCESSIVE FORCE

O'Malley v. Litscher

05-3415 (7th Circuit U.S. Court of Appeals)

The Wisconsin District Court (E.D.) properly dismissed a Wisconsin prison inmate's federal court claims for violation of civil rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA), and for Excessive Force under the Eighth Amendment, pursuant to the Rooker-Feldman doctrine. That doctrine barred the inmate from pursuing a federal action, where he alleged his injuries resulted from actions taken by prison officials under a state court order to force-feed him for the purpose of ending the inmate's self-proclaimed "religious fast."

TORTS

JOINT AND SEVERAL LIABILITY

Richards v. Badger Mutual Ins. Co.

2005AP2796

Procuring alcohol for an underage drinker who causes injury when driving while intoxicated does not make the person who procured the alcohol jointly and severally liable for the injury; there is no "concerted action" giving rise to joint and several liability under § 895.045(2), Wis. Stats. where the person procuring the alcohol did not agree to act in a "common scheme or plan" to drive while intoxicated.

FIRMNEWS

Don Carlson and **Pat Brennan** were recognized as "Super Lawyers" in the 2006 Super Lawyers list published by Milwaukee Magazine; **Aggie Raynor** was recognized as a 2006 "Rising Star" in the same publication.

Bill Ehrke received a favorable verdict from a Waukesha County jury after a two week trial in which the insureds alleged that our client breached their contract of insurance and did so in bad faith. The jury's verdict confirmed that the insurer had not breached their contractual obligations to the insured plaintiffs in the adjusting and handling of their claimed structural and personal property loss as a result of a fire at their home.

Travis Rhodes won a contested arbitration in Memphis, TN, involving a total loss residential fire claim allegedly caused by a gas-fired appliance.

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 Current Municipal Problems, a quarterly publication by West Group and Thomson Publishing.

Mary Nelson, Amy Doyle and **Larry Drabot** presented CCM's annual Wisconsin Legal Update Seminar at the Hilton Hotel in Minneapolis, Minnesota on October 19, 2006.

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