



Recent Case Update

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Product Liability – Negligence – Tatera v. FMC Corporation (Court of Appeals, 2008 AP 170, May 12, 2009)

Tatera worked at a machine shop grinding asbestos-containing brake liners. The defendant brake manufacturing company had contracted with Tatera's employer to provide the employer with the brake liners for grinding, after which the ground brake liners would be returned to the defendant for incorporation into a finished brake system. The defendant did not manufacture the brake liners itself but rather purchased them from other companies that manufactured them. After Tatera died of mesothelioma, the plaintiff sued alleging strict product liability and negligence.

The defendant moved for summary judgment, arguing that it was not a "seller" of a product, that Tatera was not a "user or consumer," and that the brake liners were not finished "products" susceptible to strict product liability in Wisconsin under Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967). The defendant also asserted that it could not be negligent as a matter of law because Tatera was an employee of an independent contractor to whom it did not owe a duty of care. The plaintiff argued that as a supplier of a dangerous product the defendant was a "seller," that Tatera was a "user or consumer" because he "used" the brake liners in grinding them at the defendant's request, and that the brake liners were "products" because the brake liners arrived at Tatera's employer in the same condition as they left the defendant. The plaintiff also asserted that the defendant supplied an abnormally dangerous product to Tatera's employer and that it is therefore negligent under Restatement (Second) of Torts § 388. The circuit court agreed with the defendant and granted summary judgment. The plaintiff appealed.

The court of appeals affirmed the dismissal of the strict product liability cause of action, holding that a defendant who is not a manufacturer, who does not provide a product to the ultimate user or consumer, and who does not sell a completed product cannot be liable under a strict product liability theory under Dippel. The court of appeals reversed the dismissal of the negligence cause of action, holding that a company that supplies an abnormally dangerous product is liable to all those who can reasonably be expected to use the product. The court noted that in Wisconsin a non-manufacturer has not yet been held strictly liable in products liability, and that the defendant here did not sell the brake liners to Tatera's employer. Tatera was not the ultimate user because, although he performed work on the brake liners, he was not a user of the finished brake system manufactured by the defendant. With regard to the negligence claim, Restatement § 388 states that a supplier, and not only a manufacturer, is negligent if it supplies products that are dangerous for their intended use. Although such suppliers are ordinarily not negligent to employees of independent contractors under Wagner v. Continental Casualty Co., 143 Wis. 2d 379, 421 N.W.2d 835 (1988), the defendant can be negligent here because it committed an affirmative act of negligence and because the brake liners were abnormally dangerous products.

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Insurance – Coverage – Medicare Supplemental Insurance – Froedtert Memorial Lutheran Hospital, Inc. v. National States Insurance Company (Supreme Court, 2007 AP 934, May 13, 2009)

The defendant issued Medicare Supplemental Insurance to one of the plaintiff's patients, which covered "all further expense" incurred for hospital confinement that would have been covered under Medicare Part A after the maximum Medicare Part A benefits had been paid for in-patient hospital expense. However, the defendant wanted to reimburse the plaintiff at the Medicare reimbursement rate rather than the plaintiff's standard rate that it charged insurance companies. The plaintiff sued for the difference between the Medicare reimbursement rate and its standard rate, and the circuit court awarded the plaintiff \$130,725.63 plus \$63,223.58 in interest under Wis. Stat. § 628.46. The defendant appealed and the court of appeals affirmed. The defendant appealed to the Wisconsin supreme court. **The supreme court affirmed, holding that the ambiguous phrase "all further expense" must be construed against the insurance company to require reimbursement of the plaintiff at its standard rate rather than at the Medicare rate.**

Fiduciary Duty – Dividend Distribution – Business Judgment Rule – Yates v. Holt-Smith (Court of Appeals, 2008 AP 17, May 14, 2009)

The plaintiff and the defendant were co-directors and shareholders in a company. The plaintiff sued the defendant, alleging that the defendant withheld a year-end bonus in an attempt to pressure the plaintiff out of the company, which constituted a breach of fiduciary duty. The defendant contended that her actions were justified under the business judgment rule because the bonus had not yet been declared a company dividend, which was required prior to disbursement. After a trial to the court, the circuit court found in favor of the plaintiff, holding that the defendant breached her fiduciary duty by using her role as a corporate director to influence the board of directors to refuse to classify the bonus as a dividend. The defendant appealed. **The court of appeals affirmed, holding that a company director acts in bad faith when she uses her role as a corporate director in pursuit of her own self interest.**

Worker’s Compensation – Course and Scope of Employment – Traveling Employee – McRae v. Porta Painting, Inc. (Court of Appeals, 2008 AP 1946, May 20, 2009)

The plaintiff was a painter traveling in his personal vehicle from his home to a work site, away from his employer’s premises, before the start of the workday when he was injured in an auto accident. He claimed entitlement to worker’s compensation. His employer’s worker’s compensation insurer denied the claim on the ground that he was not in the course and scope of his employment at the time of the accident because employees going to work are not covered until they reach the employer’s premises under the “coming and going rule.” The plaintiff argued that, under Bitker Cloak & Suit Co. v. Miller, 241 Wis. 653, 6 N.W.2d 664 (1942), when an employee has a duty to perform work away from the premises of the employer and is not required to report to the premises of the employer first, he is in the course and scope of employment as soon as he leaves his home and travels to the worksite. An administrative law judge (ALJ) found in favor of the plaintiff. The defendant appealed to the Labor and Industry Review Commission (LIRC), which reversed the ALJ. The plaintiff then appealed to the court of appeals, which affirmed the LIRC. The plaintiff appealed.

The court of appeals affirmed, holding that employees going directly to a worksite from their homes without first stopping at the employer’s premises are not necessarily in the course and scope of their employment, and their injuries are thus not compensable under the “coming and going rule.” The court distinguished the Bitker case, noting that the employee in that case had been asked, prior to the start of the workday, to detour from his normal travel directly to the employer’s premises to make a service call on a customer. Where the employee’s job requires him to regularly travel to a worksite away from the employer’s premises, as the plaintiff’s job as a painter did here, he is not in the course and scope of his employment until he reaches the worksite. The court also held that the “traveling employee doctrine” under Wis. Stat. § 102.03(1)(f) only applies when the commute prior to the workday is part of the job. Commuting to the workplace is an activity that everyone with a job performs.

Insurance – Coverage – Commercial General Liability – Estate of Jones v. Smith (Court of Appeals, 2008 AP 1753, May 27, 2009)

Jones, a two-year old, was taken by a daycare van driver to a daycare center and inadvertently left in the van for the day, and died of heat stroke. The plaintiff filed suit against the daycare center. The daycare center’s commercial general liability (CGL) insurer then sought a declaratory judgment that its policy did not provide coverage for the incident, arguing that the policy excluded acts arising out of the use of an automobile. The plaintiff opposed the motion, asserting that the “independent concurrent cause rule” operated to provide coverage. The circuit court agreed with the defendant’s CGL insurer and the plaintiff appealed. **The court of appeals reversed, holding that where a loss is caused by the combination of an insured risk and an excluded risk, coverage under a CGL policy is present where the alleged negligence attributable to the insured risk would stand alone as its own cause of action.** Here, the plaintiff alleged that the daycare employees were negligent in not discovering Jones in the van after the van had arrived at the daycare center. That cause of action would stand alone, independent of any cause of action Jones may have against the van driver for his negligent operation of the van.

Negligence – Custodial Care – Snyder v. Injured Patients and Families Compensation Fund (Court of Appeals, 2008 AP 1611, May 27, 2009)

The plaintiff's wife committed suicide while an inpatient at a hospital psychiatric unit. The plaintiff then filed suit against the hospital and the defendant, seeking a declaratory judgment that his cause of action was governed by the wrongful death statute, Wis. Stat. § 895.04, and not the medical malpractice chapter, Wis. Stat. ch. 655. The plaintiff argued that the hospital staff had failed to exercise ordinary care in searching his wife upon her return to the hospital from an unsupervised vacation pass. The defendant argued that the hospital staff had failed to exercise professional judgment and that the medical malpractice notice provisions applied. The court of appeals granted the plaintiff's declaratory judgment and the defendants appealed. **The court of appeals affirmed, holding that hospital staff performing routine duties upon psychiatric patients – such as performing searches for contraband – are not performing medical acts or healthcare services that require the exercise of independent professional judgment.**

Civil Procedure – Relief From Judgment – Claim Preclusion – Johnson v. American Family Mutual Insurance Company (Court of Appeals, 2008 AP 1536, May 27, 2009)

The plaintiff was injured in a two-car auto accident and filed a lawsuit against the other driver. She also named her auto insurance company, Royal Indemnity Company, as an involuntary plaintiff with regard to its subrogation rights for the medical payments it made on her behalf. Royal was served with the complaint but did not appear and a default judgment was entered against it, and it was dismissed from the action. The plaintiff subsequently amended her complaint to state a direct claim against Royal for underinsured motorist (UIM) coverage. Royal was served with the amended complaint but did not appear and a default judgment was entered against it in the amount of \$409,000. Royal then appeared for the first time and moved to vacate the default judgment under Wis. Stat. § 806.07(1)(h) based upon insufficiency of the complaint and claim preclusion. The circuit court denied Royal's motion and Royal appealed.



The court of appeals affirmed, holding that the complaint was sufficient to notify Royal that the plaintiff was seeking UIM coverage, and that claim preclusion cannot apply to claims within the same lawsuit. Under Wis. Stat. § 806.07(1)(h), a party may seek relief from an order or judgment for “any other reasons justifying relief from the operation of the judgment.” The court noted that Wis. Stat. § 806.07(1)(h) relief from judgment should be granted only in “extraordinary circumstances.” Here, the plaintiff alleged that she had UIM coverage through Royal and sought compensatory damages against all defendants, which was sufficient to put Royal on notice that it faced a direct claim for UIM coverage. Additionally, applying claim preclusion in the same lawsuit would have the effect of eliminating amended pleadings if one party had already been named as a party defendant under a different theory of liability.

Peterson Johnson & Murray, S.C.

All of the summarized decisions are recommended for publication. The full text of these and other Wisconsin cases can be found on the State Bar's Web site at www.wisbar.org. Further information can be provided by any member of the firm by phone or email (enter first letter of first name, followed by last name, @pjmlaw.com). Questions about the Update can be directed to Luke Kingree by phone or at lkingree@pjmlaw.com.

Milwaukee Office

733 North Van Buren Street
Milwaukee, Wisconsin 53202
(414) 278-8800

Madison Office

Ninth Floor
3 South Pinckney
Madison, Wisconsin 53703
(608) 256-5220

Kenosha Office

Suite 201A
10505 Corporate Drive
Pleasant Prairie, Wisconsin 53158
(262) 997-6300

Chicago Office

Suite 2900
30 North LaSalle
Chicago, Illinois 60602
(312) 782-7150
Metro WI Area 414-431-5768

www.pjmlaw.com