

Negligence – Negligent Supervision – Foreseeable Harm – Maypark v. Securitas Security Services USA, Inc. (Court of Appeals, 2008 AP 1528, September 1, 2009)

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The defendant provided security services for Polaris Industries’ manufacturing plant, and its security guards had access to Polaris employees’ identification photos and to a computer in a guard shack. The plaintiffs were employees of Polaris. They sued the defendant for negligent supervision, alleging emotional distress after one of the defendant’s security guards posted defaced pictures of them online. The circuit court found in favor of the plaintiffs after a bench trial and awarded them \$1.4 million in damages. The defendant appealed, arguing that it could not be negligent as a matter of law because it was not reasonably foreseeable that harm might result from giving its security guards access to the internet and access to pictures of other people, and because liability would have no just stopping point as a matter of public policy. The plaintiffs asserted that the defendant could be liable because it did not discover the security guard’s actions sooner.

The court of appeals reversed, holding that providing an employee with access to the internet cannot give rise to liability under a negligent supervision theory of recovery when the employee posts defamatory images of people online. Here, the defendant had provided its security guards with training on sexual harassment and theft, and Polaris actually had control over the guard shack computer. Notably, there was no evidence that the security guard even used the work computer to send the images. The plaintiffs’ damages were too remote from the defendant’s conduct, and to allow liability here would have no just or sensible stopping point concerning negligent supervision liability for employees’ activities on the internet.

Agency – Respondeat Superior – Intentional Acts – James Cape & Sons Co. v. Streu Construction Co. (James Cape I) (Court of Appeals, 2008 AP 1517, September 9, 2009)

The plaintiff was a construction contractor. It sued one of its former employees, defendant Beaudoin, after it discovered that he had been rigging its construction bids in collusion with people from two other construction companies. Defendant Beaudoin testified in his deposition that part of his motivation was to help the plaintiff by preventing it from becoming “overextended” by making sure it would not win some of the contracts. All defendants then moved for summary judgment, arguing that defendant Beaudoin’s actions were at least partly on behalf of the plaintiff as its agent, making the plaintiff itself equally at fault with the defendants in the bid rigging, and precluding recovery. The plaintiff asserted that the doctrine of respondeat superior does not apply as between a company and its employee for damages occasioned by that employee’s misconduct, or as between the company and other companies that conspired with the employee in committing the misconduct. The circuit court agreed with the defendants and dismissed the suit, and the defendant appealed.



The court of appeals reversed, holding that the doctrine of respondeat superior only applies between an employer and third parties as a result of the actions of its employee, and not as to suits between an employer and its employee for the employee’s misconduct in the course of his employment, or between an employer and third parties that conspired with its employee. To hold otherwise, the court said, would be to allow an employee to essentially do whatever he wants in pursuit of what he sees as the employer’s best interest or business strategy, without recourse. The court also noted that the issue was actually decided by the Wisconsin supreme court in the year 1866, in Zulkee v. Wing, 20 Wis. 429 (1866), which the parties had apparently entirely missed in their briefing.

Insurance – Coverage – Negligent Supervision – James Cape & Sons Co. v. Streu Construction Co. (James Cape II)
(Court of Appeals, 2008 AP 2872, September 9, 2009)

The plaintiff was a construction contractor that sued the defendants – one former employee and two other construction companies – regarding a construction bid rigging conspiracy. The two construction company defendants were each owned and operated by two individuals, who had all been charged with committing a felony violation of the Sherman Anti Trust Act and entered into a plea agreement relating to the same. However, in this suit, four of the plaintiff's causes of action alleged negligent supervision and negligent retention on the part of the construction company defendants. The construction company defendants then tendered their defenses to their liability insurers, who declined coverage and declined to provide a defense. The construction company defendants then sought and obtained a declaratory judgment from the circuit court that the insurers had breached their duties to defend, and obtained a separate judgment for damages as a result of that breach. The insurers appealed.

The court of appeals reversed, holding that a complaint that alleges intentional criminal conspiracy and negligence relating to the same acts does not trigger the duty to defend, where the criminal conspiracy has already been admitted by closely-held company defendants. The court found it to be significant that the companies and their four principals/owners had admitted to intentional criminal wrongdoing prior to the beginning of this civil suit. In such a case, only intentional acts have been committed as a matter of law, regardless of whether the complaint also alleges negligence.

Civil Procedure – Scheduling Order – Sanctions – Lee v. GEICO Indemnity Co. (Court of Appeals, 2008 AP 3125, September 29, 2009)

The plaintiff sued the defendant and its insured regarding an auto accident. The circuit court scheduling order specified a date by which mediation must be completed, and specified that each corporate entity must appear by a person who has authority to settle the case other than the attorney, unless the parties agree to the contrary. The parties met for the mediation and the case did not settle at mediation. The defendant's claim representative appeared by phone at the mediation, and neither the mediator nor the plaintiff objected to the claim representative's telephonic appearance. However, the plaintiff moved for sanctions for violation of the scheduling order. The defendant asserted that the plaintiff was actually making the motion because the defendant would not give her what she wanted at settlement, and argued that sanctions for failing to have a claims representative personally present at mediation would be unduly burdensome on insurance company defendants. The circuit court agreed with the plaintiff and imposed sanctions. After trial, the defendant submitted a motion after verdict to vacate the previous sanctions, making many of the same arguments as it made before the sanctions were granted. The circuit court denied that motion, determined that the motion was frivolous, and sanctioned the defendant again. The defendant appealed both sets of sanctions. **The court of appeals reversed in part and affirmed in part, holding that parties may be sanctioned for violating a scheduling order – even the provision requiring insurance claims representatives to be personally present at mediation – but that sanctions for a motion for reconsideration brought as a motion after verdict relating to the scheduling order sanctions are not appropriate, unless there is a finding that the party bringing the motion acted in bad faith.**



Negligence – Governmental Immunity – Ministerial Duty – Heuser v. Community Insurance Corp. (Court of Appeals, 2008 AP 2760, September 30, 2009)

The plaintiff, an 8th grade student, sued the defendant and its insured, a school district, after he cut himself in science class with a scalpel. The teacher had asked her students to use the scalpels to dissect a flower. On two occasions earlier the same day, two other students had cut themselves with scalpels. The science teacher had instructed each class to “be careful” with the scalpels, and filled out accident report forms after the first two accidents noting that use of scissors for dissection in the future could prevent accidents, but otherwise did nothing else as a guard against future accidents, such as instructing the children how to use scalpels. The defendants argued that the school district was immune from discretionary acts as a governmental unit under Wis. Stat. § 893.80(4). The plaintiff asserted that immunity did not apply because there was a known compelling danger giving rise to a ministerial duty, and the teacher did not perform the required ministerial duties, i.e. taking appropriate safeguards against injury. After a bench trial, the circuit court awarded damages to the plaintiff and held that the compelling danger exception to governmental immunity applied, and the defendants appealed.

The court of appeals affirmed, holding that when a government employee literally does almost nothing in response to a known compelling danger, governmental immunity does not apply. A ministerial duty is not a generalized duty to look out for any foreseeable harm, but rather specific actions that must be taken in response to a known harm. Here, the teacher could have immediately removed the scalpels from class and used scissors for the flower dissection, or instructed the students on how to use scalpels.

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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.

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