

Workers Compensation – Constitutional Law – Statute of Limitations –

Society Insurance v. L.I.R.C. (Supreme Court, 2010 WI 68)

A worker suffered a traumatic work injury in 1982, which resulted in his need for a prosthetic leg. The last compensation payments were made in 1990, and the twelve year statute of limitations that applied to his claim ran in 2002. According to Wis. Stat. §§ 102.66 and 102.17(4), the State of Wisconsin Work Injury Supplemental Benefit Fund (WISBF) was responsible for the cost of his medical treatment from 2002 forward. On April 1, 2006, the legislature changed Wis. Stat. § 102.17(4) to do away with the statute of limitations for treatment expense relating to traumatic injuries that resulted in the loss of a limb (among other listed injuries) and becoming due after the twelve years has run. The legislation was intended to apply retroactively.

As a result of the legislation, the WISBF demanded that the plaintiff begin making payments for medical expense for this 1982 injury under the new statute. The plaintiff then brought this action to determine whether it had the responsibility to make such payments. The issue before the court was whether the amended Wis. Stat. § 102.17(4) applied retroactively to claims such as this one, where the statute of limitations ran before the amendment to the statute was made.

The circuit court held that the retroactive application of the statute was unconstitutional as being violative of due process and the contract clause. LIRC appealed and the case was certified to the Wisconsin supreme court. **The supreme court affirmed, holding that the retroactive application of the statute was unconstitutional, as it violated both the due process and contractual rights of the plaintiff.** In cases involving work injuries that fall under Wis. Stat. § 102.17(4), where the statute of limitations ran prior to April 1, 2006, the WISBF is liable for the ongoing treatment expenses. Attorney James Goonan of Peterson, Johnson & Murray represented Society Insurance in this successful appeal.

Society Insurance v. LIRC	1
Mehra v. Chang	1
Diocese of Superior v. Swan	2
Westport Ins v. Appleton Paper	2
Sturtevant v. STS Consultants	3
Western Leather v. Busalacchi	3
Watertown Tire v. Nortman	4
Rivera v. Perez	4
Roehl Transport v. Liberty	4
Johnson Controls v. London	5



Medical Malpractice – Statute of Limitations – Mehra v. Chang (Court of Appeals, 2009 AP 13, June 2, 2010)

(unpublished opinion)

The plaintiff sued the defendants for medical malpractice following treatment for a head injury sustained on April 1, 2003. The plaintiff had two CT scans of her brain: one on April 1, 2003, and another on May 12, 2003. The plaintiff alleged that she suffered a blood clot from her injury that was indicated on the May 12, 2003, CT scan and that the doctors intentionally concealed this fact from her. The plaintiff further alleged that the doctors' negligence resulted in a heart attack that she suffered on December 10, 2006. The plaintiff waited until January 22, 2008, to file suit and the circuit court dismissed her action because she failed to establish by competent expert evidence that the doctors breached the standard of care and because she failed to develop her respondeat superior theory. The plaintiff appealed. **The court of appeals affirmed the circuit court's dismissal on different grounds, holding that plaintiff's claims were barred by the three year statute of limitations.** The court discounted the plaintiff's argument that the statute of limitations was five years per Wis. Stat. § 893.55(1m)(b), stating that the plaintiff's allegations failed to implicate the discovery deadline. The five-year deadline applies only to actions commenced pursuant to the one-year discovery deadline of Wis. Stat. § 893.55(1m)(b). Instead, the court held that Wis. Stat. § 893.55(1m) governed the claim, which provides that the statute of limitations is the later of three years from the date of injury, or one year from when the injury was or should have been discovered.

Insurance – Coverage – Choice-of-Law Provision – Diocese of Superior v. Swan & Associates (Court of Appeals, 2009 AP 531, June 2, 2010) (unpublished opinion)

The plaintiff sued the defendant and its insurer alleging breach of contract, negligence, and negligent misrepresentation for contaminating the plaintiff's premises while testing for asbestos. The insurer denied coverage and filed a motion for declaratory judgment, asserting that the policy did not provide coverage and that its choice-of-law provision required interpretation according to Georgia law. The defendant opposed the motion, arguing that Wisconsin law required coverage. The circuit court first determined that Wisconsin law did not apply and held that Georgia law governed the dispute, and then ruled that the defendant's failure to brief the issue pursuant to Georgia law was a concession. The circuit court therefore granted the insurer's motion for summary judgment, and the defendant appealed. **The court of appeals affirmed with regard to the choice-of-law determination, but reversed the circuit court's finding that the defendant's failure to brief the coverage issue under Georgia law was a concession.** As such, the court of appeals remanded to the circuit court for a determination of coverage under Georgia law.

Insurance – Coverage – Environmental Damage – Westport Insurance Corp. v. Appleton Papers Inc. (Court of Appeals, 2009 AP 286, June 8, 2010)

Westport, who was Appleton Papers' excess insurance carrier, and other excess insurance carriers filed a declaratory judgment action against Appleton Papers after it had tendered defense of an environmental restoration and remediation claim. The insurers argued that their policies did not provide coverage because there was no "occurrence" which had caused property damage, and because Appleton Papers' tender of defense was late. Appleton Papers then counterclaimed, seeking a judgment affirming coverage for its losses under Johnson Controls, Inc. v. Employers Insurance of Wausau, 2003 WI 103 (environmental damage claims are "damages" under CGL policies).

The case proceeded to trial on the coverage issue, and the circuit court directed a verdict that there was an "occurrence" under the policies, i.e. the pollution was an unexpected event. The jury returned a verdict that the "occurrence" caused property damage and that the Appleton Papers' tender of defense was not late. In motions after verdict, the insurers filed renewed motions for summary judgment on the coverage issue, this time asserting that there was no coverage because they had previously made voluntary payments and because the damages were after-acquired liabilities. The circuit court sua sponte granted summary judgment to Appleton Papers on the coverage issues of voluntary payments and after-acquired liabilities, and the insurers appealed. **The court of appeals affirmed, holding that the environmental damages caused by Appleton Papers were an "occurrence" which had caused property damage, that the tender of defense to the insurance companies was not late, and that the voluntary payment and after-acquired liability defenses asserted by the insurance companies were not valid.**



Negligence – Duty – Design Services – Village of Sturtevant v. STS Consultants, Ltd. (Court of Appeals, 2009 AP 1305, June 9, 2010) (unpublished opinion)

The plaintiff contracted with the defendant to provide design services for the construction of a passenger rail station. The defendant, in turn, subcontracted with Schindler Elevator Corp. to construct the elevators. When the elevators malfunctioned, the plaintiff sued the defendant for breach of contract and negligence, and the defendant then brought a third party claim against Schindler alleging that Schindler failed to alert their design team of potential problems with the elevators in exposed weather conditions when they had a duty to do so. Schindler denied liability and moved for summary judgment on the basis that it did not have the duty to confirm the defendant's elevator design. The circuit court granted summary judgment to Schindler and the defendant appealed.



The court of appeals affirmed, holding that Schindler had no duty to advise the defendant on the defendant's specifications and design for the elevator because of Schindler's limited role as a supplier and installer. The duty of ordinary care is restrained by "what would be reasonable given the facts and circumstances of that particular claim at hand." Schindler was therefore not liable because it played no role in the preparation of the defendant's specifications and design for the elevators.

Economic Loss Doctrine – Vertical Privity – Products as Fixtures in Building – Western Leather Lofts Condominium Association v. Busalacchi (Court of Appeals, 2009 AP 1451, June 15, 2010) (unpublished opinion)

The plaintiff sued the defendant, alleging that he was liable for installing boilers in its building which did not meet City of Milwaukee ordinances. The plaintiff also sued the boiler distributor, alleging negligence. The boiler distributor moved for summary judgment, arguing, among other things, that the economic loss doctrine barred the plaintiff's direct claim against it. The plaintiff and the defendant opposed the motion, asserting that the economic loss doctrine did not apply because the boiler distributor had sold the boilers to the defendant, who then installed the boilers in the plaintiff's building, thus there was no contract for the sale of a product between the plaintiff and the boiler distributor, and because any agreement between the boiler distributor and the plaintiff involved the provision of services, i.e. a promise to bring the boilers up to code. The circuit court granted summary judgment, and the defendant appealed. **The circuit court reversed, holding that the economic loss doctrine did not apply because there was no contract for the sale of a product between the plaintiff and the boiler distributor, and because any agreement between the plaintiff and the boiler distributor may have involved the provision of services.** The court further expressed skepticism that the economic loss doctrine applies between a distributor of a product that is installed as a fixture in a building and a later owner of the building, as there is no sale of a product between the parties and the product has become a fixture. Attorneys Terry Johnson and Luke Kingree of Peterson, Johnson & Murray represented the defendant in this successful appeal.

Negligence – Professional Liability – Insurance Coverage – Watertown Tire Recyclers v. Nortman (Court of Appeals, 2009 AP 2465, June 17, 2010) (unpublished opinion)

The plaintiff sued the defendant, who was its former insurance agent, alleging that he negligently procured a policy with a broad pollution exclusion which resulted in the denial of coverage after an accidental tire fire. The defendant moved for summary judgment arguing that the policy would have precluded coverage of the clean-up expenses regardless of any negligence because other exclusions, namely the owned property exclusion, precluded coverage. The circuit court agreed and granted summary judgment.



The court of appeals affirmed, holding that the policy would not have provided coverage regardless of the pollution exclusion. The court stated that since the plaintiff did not broaden its argument after the defense showed that there was no coverage under the owned property exclusion, the court was limited to the arguments the plaintiff made. Had the plaintiff alleged negligence in failing to cover the particular risk of tire fires, then it may have had a compensable action against the defendant. However, since the plaintiff sued the defendant for negligently procuring a policy with an “absolute pollution exclusion,” and since the plaintiff failed to recognize that the owned property exclusion would have excluded its claim, the plaintiff’s action was properly denied.

Civil Procedure – Discovery – Requests for Admission – Rivera v. Perez (Court of Appeals, 2009 AP 838, June 17, 2010)

The plaintiff sued the defendant for personal injuries sustained in an automobile accident. During the course of litigation, the defendant received several requests for admission regarding liability from the plaintiff and other parties involved, but she did not answer them within the time required by Wis. Stat. § 804.11(1). The plaintiff and other parties moved for summary judgment on the basis of failure to answer the requests for admission. The defendant opposed the motions for summary judgment, moved the court to allow her to withdraw her admissions, and answered the admissions denying liability. The circuit court granted summary judgment, finding that the requirements for withdrawing admissions under Wis. Stat. § 804.11(2) had not been met. The defendant appealed. **The court of appeals reversed, holding that when a party moving to withdraw admissions under Wis. Stat. § 804.11(2) meets both statutory requirements, the circuit court must grant the motion to withdraw absent some egregious conduct from the moving party.** The court concluded that the requirements were satisfied here because the parties regarded the admissions as central to the case. The court further concluded that withdrawal would subserve the presentation of the merits of the action, and that the party objecting to the motion would not be prejudiced.

Insurance – Bad Faith – Roehl Transport v. Liberty Mutual (Supreme Court, 2010 WI 49, June 22, 2010)

The plaintiff sued the defendant, its insurer, for bad faith after the defendant failed to settle an auto accident claim brought against it and allowed the matter to go to trial where the injured party was awarded \$830,400. The defendant had issued the plaintiff a Truckers/Auto Insurance Policy with up to \$2 million in liability coverage and a \$500,000 deductible, whereby the insurer retained control over the claims process and had the right and duty to defend the insured against a suit asking for damages covered under the policy. The defendant moved for summary judgment arguing that the plaintiff’s bad faith claim was not recognized in Wisconsin law because the judgment entered in the third-party action was not in excess of the \$2 million policy limit. The circuit court denied the motion and the matter went to a jury trial. The jury found that the defendant’s conduct was in bad faith and awarded the plaintiff \$127,000, but declined to award punitive damages and attorney fees. The plaintiff appealed for punitive damages and attorney fees, and the defendant appealed arguing that the particular bad faith claim raised in this situation is not recognized by Wisconsin law. The court of appeals certified the matter to the Wisconsin supreme court. **The supreme court affirmed, holding that an insured has a cognizable bad faith claim against its insurer when the company has control over settlement of a third-party claim and engages in bad-faith conduct toward the insured, even though the judgment does not exceed the policy limits.** For the very same reasons that an insurer becomes liable for the tort of bad faith when it fails to act in good faith and exposes its insured to liability over policy limits, an insurer may also be liable for the tort of bad faith when the insurer fails to act in good faith and exposes the insured to liability for sums within the deductible amount.

Insurance – Duty to Defend – Contracts – Johnson Controls, Inc. v. London Market (Supreme Court, 2010 WI 52, June 24, 2010)

The plaintiff sued the defendant and other insurers seeking a declaratory judgment that the insurers were obligated to provide defense and indemnification under the terms of their CGL insurance policies for environmental restoration and remediation costs. Before the circuit court made a determination on the insurers' obligations, the Wisconsin supreme court decided City of Edgerton v. General Casualty Co. of Wisconsin, 184 Wis. 2d 750, 517 N.W.2d 463 (1994), holding that environmental damage claims constitute "equitable relief" rather than legal damages and that a CGL policy provides no duty to indemnify the insured for these expenses. This case nevertheless continued. Ultimately, on one of the plaintiff's appeals, the Wisconsin supreme court overruled City of Edgerton in Johnson Controls, Inc. v. Employers Insurance of Wausau, 2003 WI 103, holding that environmental damage claims are "damages" under CGL policies. The supreme court then remanded this action to the circuit court to determine whether other exclusions in the policies might apply, and to determine the liability of the various insurers.

London Market is the plaintiff's excess insurer. It moved for summary judgment, arguing that its policy was an indemnity-only excess umbrella policy which does not promise a defense of any claim; that the duty to defend in the underlying policy is not incorporated into the excess policy; that if there was a duty to defend it was never triggered because the duty to defend is conditioned upon exhaustion of the underlying insurer's policy limits; and that Wisconsin law does not require an excess insurer to drop down and defend the insured when the underlying insurer refused to defend. The circuit court concluded that London Market's "follow form" policy provision incorporated the duty to defend found in the underlying policies, and that nothing in the policy suggested that London Market's duty to defend is conditioned on exhaustion of the underlying policy. London Market appealed, and the court of appeals certified the issue to the Wisconsin supreme court. **The supreme court affirmed, holding that excess insurers' "follow form" clause provides a duty to defend the insured against a claim when the primary insurer denies liability under its policy.**



COURTESY: JOHNSON CONTROLS, INC.

Peterson Johnson & Murray, S.C.

All unpublished decisions are marked as unpublished in this Update. 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 can be directed to Recent Case Update editor Luke Kingree by phone or at kingree@pjmlaw.com, or one of the associate editors: Grace Kulkoski gkulkoski@pjmlaw.com, Tiffany Jones tjones@pjmlaw.com, and Jessica Butler jbutler@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

Manitowoc Office

Suite 206
4400 Calumet Avenue
Manitowoc, Wisconsin 54221
(920) 684-4720

Chicago Office

120 North LaSalle Street
Suite 2850
Chicago, Illinois 60602
(312) 782-7150