

Insurance – Coverage – Sponsor of a Minor’s Driver’s License – Progressive Northern Ins. Co. v. Jacobson (Court of Appeals, 2011 WI App 140, September 27, 2011)

A minor, David Jacobson, allegedly caused an auto accident in which his two passengers, Hiatt and Loescher, were killed. He owned his vehicle and had insurance coverage. His mother, Laura Link, had sponsored his driver’s license pursuant to Wis. Stat. § 343.15(1)(a), and Progressive Northern Ins. Co. insured her. Wis. Stat. § 343.15(1)(a) requires all minors to have an adult sponsor of their driver’s license, and Wis. Stat. § 343.15(2)(b) specifies that a sponsor is jointly and severally liable for the minor’s negligence when operating a motor vehicle. Progressive Northern filed this action for declaratory judgment, seeking a determination that its policy did not provide coverage for her son’s allegedly negligent use of his own vehicle because the policy excluded coverage for “bodily injury arising out of the ownership, maintenance, or use of any vehicle owned by a relative or furnished or available for the regular use of a relative, other than a covered auto for which this insurance has been purchased.” The estates of Hiatt and Loescher opposed declaratory judgment, asserting that the “relative” exclusion contains an exception that provides coverage for Link’s “maintenance or use of such vehicle,” and that Link “used” Jacobson’s vehicle by being a sponsor of Jacobson’s driver’s license. The circuit court granted declaratory judgment and the estates of Hiatt and Loescher appealed. **The court of appeals affirmed, holding that a sponsor of a minor’s driver’s license does not “use” the minor’s vehicle for purposes of the exception to the “relative” exclusion in an auto policy.** The court noted that this is a case of first impression in Wisconsin. A petition for review with the Wisconsin supreme court is currently pending.

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Damages – Costs – Costs Awarded to Plaintiff Upon Recovery – Estate of Radley v. Ives (Court of Appeals, 2011 WI App 144, October 20, 2011)

The plaintiff sued the defendant alleging medical malpractice. Prior to trial, the parties submitted to the court two stipulations. One stipulation was that the defendant was negligent and that the negligence was a substantial factor in causing Radley’s death, but reserved the nature and extent of pre-death damages for trial. The second stipulation was that the defendant acknowledged responsibility for \$10,052.07 in funeral expenses and that the court could enter judgment in that amount on the funeral expenses. A trial then proceeded on the plaintiff’s claim for pre-death damages, where the jury returned an answer of \$0. The plaintiff then sought costs on its judgment under Wis. Stat. § 814.01(1), which states that “costs shall be allowed of course to the plaintiff upon a recovery.” The circuit court awarded costs, reasoning that the plaintiff had obtained a recovery as a result of the pre-trial stipulation on funeral expenses, and the defendant appealed. On appeal, the defendant argued that the plaintiff was not a “prevailing party” in a “litigated trial court proceeding” because it had not made a recovery on the only issue presented for trial. **The court of appeals affirmed, holding that where parties stipulate as to the amount of one type of damages and allow a circuit court to enter judgment in that amount, and then proceed to trial on another type of damages where a jury returns a verdict in the amount of \$0, the plaintiff may still recover costs for the entire action because he or she obtained a “recovery” as a result of the stipulation.** The court held that whether costs are recoverable by a plaintiff depends upon whether a judgment for damages was entered in his or her favor, and not whether a verdict for damages was returned in his or her favor.



Insurance – Coverage – Underinsured Motorist – Bethke v. Auto-Owners Ins. Co. (Court of Appeals, 2010 AP 3153, November 2, 2011) (unpublished)

The plaintiffs were in an auto accident with the driver of a rental car, and claimed that the rental car driver was negligent. The rental company was self-insured under Wis. Stat. § 344.01(2)(am)(1), with liability limits of \$50,000 per occurrence which it tendered to the plaintiffs. The plaintiffs had underinsured motorist (UIM) coverage through the defendant insurance company, but the defendant refused to tender any UIM benefits because the definition of “underinsured automobile” in its policy excluded “any vehicle owned or operated by a self-insurer under any automobile law.” The plaintiffs then sued the defendant seeking UIM benefits. The circuit court granted the defendant summary judgment, holding that the rental vehicle was excluded from the definition of “underinsured automobile” in the defendant’s policy. The plaintiffs appealed, arguing, among other things, that the defendant’s exclusion of self-insured vehicles from UIM coverage constituted an impermissible reducing clause contrary to Wis. Stat. § 632.32. **The court of appeals affirmed, holding that an auto insurer’s exclusion of self-insured automobiles from UIM coverage does not constitute an impermissible reducing clause contrary to Wis. Stat. § 632.32.** Note that 2011 Wisconsin Act 14 amends Wis. Stat. § 632.32 to allow reducing clauses in auto insurance policies issued after November 1, 2011, so arguments that reducing clauses are impermissible may only be made for policies issued prior to November 1, 2011.

Civil Procedure – Claim Preclusion – Barricade Flasher Service, Inc. v. Wind Lake Auto Parts, Inc. (Court of Appeals, 2011 WI App 162, November 16, 2011)

The plaintiff sued the defendant in Racine County Circuit Court after attempting to add it to a suit already pending in Milwaukee County Circuit Court. In the Milwaukee County action, the plaintiff’s motion to amend its complaint to add the defendant was denied as being untimely. The Racine County action alleged the same background facts against the defendant as the Milwaukee County action had alleged against other parties. Accordingly, the Racine County Circuit Court dismissed the complaint pursuant to Wis. Stat. § 802.06(2), which allows a circuit court to dismiss an action when there is “another action pending between the same parties for the same cause.” The plaintiff appealed to the court of appeals. **The court of appeals affirmed, holding that when Party A fails to add Party B to Lawsuit 1, then files Lawsuit 2 in a different county against Party B based on the same facts as Lawsuit 1, the circuit court can dismiss Lawsuit 2 under Wis. Stat. § 802.06(2).** While this concept was already settled law under Aon Risk Services, Inc. v. Liebenstein, 2006 WI App 4, Aon Risk Services was overruled on other grounds by the Wisconsin supreme court. Because the supreme court held in Blum v. 1st Auto & Casualty Ins. Co., 2010 WI 78, that any court of appeals decision that is overruled retains no precedential value, the court of appeals re-instituted this concept as binding precedent with this decision.

Negligence – Negligent Infliction of Emotional Distress – Negligent Mutilation of a Body – Kidd v. Allaway (Court of Appeals, 2011 WI App 161, November 16, 2011)

The plaintiffs sued the defendant for negligent emotional distress, specifically for negligent mutilation of a body. The plaintiffs’ daughter had been in a head-on auto collision and was killed on impact. The impact ejected her from the vehicle and the driver of another vehicle, the defendant, struck the daughter’s body in the roadway. The defendant was allegedly intoxicated and traveling too fast for conditions at the time. The defendant moved for summary judgment, arguing that the plaintiffs’ claim should be excluded on public policy grounds under the various factors set forth in Bowen v. Lumbermens Mutual Casualty Co., 183 Wis. 2d 627, 517 N.W.2d 432 (1994). The circuit court agreed and granted summary judgment, and the plaintiffs appealed. **The court of appeals affirmed, holding that the defendant’s liability for the plaintiffs’ emotional distress was too remote, the emotional distress was too disproportionate to the defendant’s negligence, and the burden on the defendant to defend against the claim was too unreasonable.** The court noted that the plaintiffs’ emotional distress arising from the death of their daughter and the emotional distress arising from the mutilation of her body would be too difficult to separate, given the fact that the two events - death and bodily mutilation - occurred within minutes of each other.

Insurance – Offset – Payment By Other Insurer – Peterson v. American Family Mutual Ins. Co. (Court of Appeals, 2010 AP 2435, November 22, 2011) (unpublished)

The plaintiff was injured in an auto accident in Minnesota with the defendant's Wisconsin-resident insured. The plaintiff was paid \$40,000 in no-fault benefits under her Minnesota auto policy with Badger Mutual. In this Wisconsin action, the defendant insurer sought an offset in the amount paid to the plaintiff by Badger Mutual because Badger Mutual's subrogation rights in Wisconsin had expired due to the statute of limitations. The circuit court granted the offset request, in part, and upon conclusion of a jury trial the plaintiff appealed the offset to the court of appeals. **The court of appeals reversed, holding that where an insurer other than a defendant insurer pays benefits to the plaintiff and the subrogation rights of that insurer have expired due to the statute of limitations, the defendant insurer is not entitled to an offset if the other insurer retains the ability to obtain reimbursement due to a reimbursement clause in the other insurer's auto policy.** The court noted that, because Badger Mutual's policy contained a reimbursement clause, it could pursue contractual reimbursement instead of subrogation. Accordingly, if contractual reimbursement is not foreclosed by some sort of agreement (here it was not), the defendant insurer is not entitled to an offset.

Civil Procedure – Amended Complaint – Relation Back – Wiley v. M.M.N. Laufer Family Limited Partnership (Court of Appeals, 2011 WI App 158, November 22, 2011)

The plaintiff slipped and fell in the parking lot of a business called Skateland, Inc. She sued Kevin Laufer d/b/a Skateland, Inc., alleging that Laufer was "in the business of owning and/or operating and/or managing Skateland, Inc." She later filed an amended complaint against the owner of the building in which Skateland, Inc. was located, but this amended complaint was filed four years after the accident. The defendant moved for summary judgment, arguing that the amended complaint did not relate back to the original complaint because the original complaint had not provided notice to the building owner that a claim would be made against it. The plaintiff asserted that she had filed the amended complaint after discovering the identity of the building owner through discovery, and that because she had asked for the identity of the building owner in discovery prior to the time the statute of limitations had run, the building owner had adequate notice. The circuit court agreed with the defendant and granted summary judgment, and the plaintiff appealed.



The court of appeals affirmed, holding that where an original complaint does not state any claim against a building owner for injuries occurred on the premises, but rather makes only a claim against the business using or operating the premises, an amended complaint against the building owner does not relate back. Under Wis. Stat. § 802.09(3), an amended complaint relates back if 1) the claim being added arises out of the transaction, occurrence, or event set forth, or attempted to be set forth, in the original complaint; 2) within the period of time provided by law for commencing a claim, any added party must have received notice of the institution of the action such that he or she will not be prejudiced in defending on the merits; and 3) within the period provided by law for commencing a claim, any added party must have known, or should have known, that but for a mistake concerning the proper identity of the added party, the added party would have been initially part of the lawsuit. Here, the court held that although the complaint alleged a claim against Kevin Laufer as being "in the business of owning and/or operating and/or managing Skateland, Inc.," the inclusion of "Inc." indicated that the original claim was being made against the business that occupied or operated the site of the accident, not against the building owner.

Insurance – Bad Faith – Consideration of Third Party Advice – Winter v. Seneca Sigel Mutual Ins. Co. (Court of Appeals, 2011 AP 42, November 29, 2011) (unpublished)

The plaintiffs sued the defendant - their home insurer - for breach of contract and bad faith for refusing to tender the policy limits for replacement of personal property damaged in a fire. The defendant had voluntarily paid \$91,468.81 for personal property loss, and the limits for personal property loss were \$106,500, so the dispute was over payment of the additional \$15,031.19. In determining whether to pay the additional money, the defendant sought the advice of an independent appraiser and an attorney. The appraiser and attorney raised questions of whether the lost property was properly categorized and inventoried, and the attorney raised questions of whether fraud was being committed. In the plaintiffs' bad faith claim, the circuit court took into consideration the fact that the defendant had sought the advice of an appraiser and an attorney. The plaintiff appealed to the court of appeals, arguing, among other things, that the circuit court should not have considered whether the defendant utilized the services of third parties for assistance in paying or withholding the additional money. **The court of appeals affirmed, holding that in a bad faith claim the circuit court may consider the fact that an insurance company sought the advice of third parties, and the substance of the third parties' advice, in determining whether the insurance company committed bad faith.** The court noted that, although an insurance company may not delegate its duty of good faith, the advice it receives from third parties is relevant in determining whether it fulfilled its duty.

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