PETERSON JOHNSON MURRAY

Recent Case Update

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Defamation – Immunity – Damages – Anderson v. Herbert (Court of Appeals, 2013 WI App 54, March 5, 2013)

Plaintiff was employed as the patrol superintendent for the Barron County highway department when an issue arose concerning improper billing of work to the state. Defendant was the county administrator at the time. Plaintiff sued defendant for defamation concerning numerous statements defendant made both directly to the media and to the county board of supervisors at open meetings. The gist of the statements was that plaintiff was not only aware of the improper billing procedures, but was also encouraging or directing the practice. The jury found that defendant made statements that damaged plaintiff's reputation, the statements were not true or substantially true, defendant made the statements with reckless disregard of their truth or falsity, and defendant made the statements within the scope of his employment. The jury awarded damages of $50,000 each on two verdicts, and $75,000 on another. However, the court applied the $50,000 damages cap set forth in Wis. Stat. § 893.80(3) to each verdict, resulting in a total adjusted award of $150,000. Defendant appealed asserting that his statements were protected by an absolute privilege and, alternatively, that his damages should be capped pursuant to Wis. Stat. § 893.80(3).

The court of appeals affirmed with respect to privileges and reversed in part with respect to damages. The court concluded on the issue of privilege that, as a lower strata executive, defendant was not entitled to an absolute privilege. Further, the court noted that while a county executive might be comparatively higher on the scale than a school board director, it is not the court's place to extend an absolute privilege to a position for which one has not been recognized by the state supreme court. As for a conditional privilege, the court noted that the board was conducting a regular meeting and not considering any existing or potential legislation at the time of defendant's statements and, therefore, defendant could not claim a legislative privilege before

a body that is not legislating. Lastly, on the issue of damages, plaintiff alleged that defendant made various defamatory statements on three separate occasions. Nonetheless, plaintiff brought his claims in a single action, thus, because Wis. Stat. § 893.80(3) provides for one damages cap, per person, per action, the court reduced the judgment accordingly to $50,000.

Torts – Service of Process – Diligence – Tilidetzke v. Cianciolo (Court of Appeals, 2012 AP 249, March 13, 2013)

Plaintiffs appeal from a judgment dismissing their claims against defendant for failing to exercise reasonable diligence in attempting to personally serve her with the summons prior to serving by publication as required by Wis. Stat. § 801.11(1). Plaintiffs hired a process server to serve the summons and complaint on defendant. The process server went to defendant's last known address and, as no one was there, left a card to contact him. About an hour later, the process server received a call from a person who stated he was the owner of the home and that defendant did not live there. The process server did not get the name of the person that called. The process server also investigated an additional address for defendant through the U.S. Postal Service and White Pages, but did not locate one. The White Pages did list a "John Cianciolo" at the address the process server attempted, so he attempted to call that number three times a day for five consecutive days and left several messages. Defendant moved for insufficient service of process and the motion was granted. Plaintiffs appeal contending that they exercised reasonable diligence in attempting to personally serve defendant prior to serving by publication.

The court of appeals affirmed, finding that the plaintiffs had failed exercise reasonable diligence by failing to pursue a viable lead which might reasonably have been expected to lead to personal service upon defendant.

Personal Injury – Medicare – Liens – Laska v. General Cas. Co. of Wisconsin (Court of Appeals, 2010 AP 2410, March 14, 2013)

Plaintiff was eligible for health care coverage through the Medicare program when he received treatment for injuries suffered in a motor vehicle accident. Defendant, the University of Wisconsin Hospital and Clinics, treated plaintiff and, instead of billing Medicare for the treatment, as it could have done, filed a statutory lien against any tort claims that plaintiff might have and against any settlement or judgment resulting from them. The circuit court allowed the defendant to enforce its lien. Plaintiff appealed arguing that the circuit court erred in interpreting Medicare law to allow the defendant to enforce the lien after expiration of the time period within which the defendant could have billed Medicare for plaintiff's treatment and that Dorr v. Sacred Heart Hospital, 228 Wis.2d 425, 597 N.W.2d 462 (Ct. App. 1999) bars enforcement of the lien.

The court of appeals affirmed concluding that plaintiff failed to provide sufficient reason to conclude that what he relied on constituted a reasonable interpretation of federal law and failed to point to any authority that would bar the defendant's lien after the Medicare billing period had expired. Furthermore, the court determined that the Gister v. American Family Mutual Insurance Co., 2012 WI 86, 342 Wis.2d 496, 818 N.W.2d 880 decision limited Dorr to its facts – the HMO

context – and was inapplicable to this case. The court concluded by noting that plaintiff failed to take into account the directive set forth in Gister – the courts should "ask whether the applicable statutory and regulatory framework permit the lien in light of the specific facts of the case."

Personal Injury – Default Judgment – Damages – Pecha v. Miers (Court of Appeals, 2010 AP 2227, March 19, 2013)

Plaintiffs sued defendant, his insurer and employer, for negligence with respect to a motor vehicle accident. Defendant's employer, Bank of America, failed to answer and plaintiffs obtained a default judgment in the amount of $450,000. Bank of America received notice of the default judgment on December 17, 2009, and acknowledges that it had "actual notice" by January 10, 2010. On August 9, 2010, Bank of America moved to vacate the default judgment and to enlarge the time to file an answer, or alternatively to allow it to challenge the amount of damages. The circuit court denied the motion holding that the motion was not filed within a reasonable time as required by Wis. Stat. § 806.07(2); however, the court did allow Bank of America to conduct discovery and challenge the amount of damages, which were determined to be $900,000, but the court limited plaintiffs to the $450,000 requested. Both parties appealed.

The court of appeals concluded that the court erred in treating the reasonable time requirement as a threshold analysis without considering any prejudice to the plaintiffs or addressing whether any other factors were relevant.

Personal Injury – Jury Instructions – DeFlorian v. Janisin (Court of Appeals, 2012 AP 540, March 19, 2013)

Plaintiff sustained injuries in a three-car accident. Plaintiff sued the negligent driver that started the three-car accident, her insurer, and plaintiff's own insurer for UIM benefits. A jury awarded plaintiff $58,400.59 for past and future health care expenses and past pain, suffering and disability and the court denied plaintiff's motion to set aside the verdict and grant a new trial based on her claim of jury instruction errors. Plaintiff appealed.

The court of appeals concluded that, even assuming the circuit court erred with respect to either the cause or aggravation instructions, plaintiff failed to show a reasonable possibility that the claimed errors, either separately or together, contributed to the outcome. The court concluded by noting that plaintiff's mere speculation that the jury's award would "likely" have been larger is not enough to undermine the court's confidence in the outcome.

Personal Injury – Negligence – Stolen Vehicle – Whiteaker v. Black (Court of Appeals, 2012 AP 90, March 19, 2013)

Plaintiff was injured in an accident with one of Trinity Trucking's dump trucks driven by defendant, an acquaintance of a Trinity employee. Defendant was a transient and a drunk that would infrequently stay at the residence where he ultimately stole the vehicle and was subsequently in an accident with plaintiff. The circuit court concluded that there were

insufficient facts to support a jury verdict for plaintiff as there were no special circumstances to support abrogating the general rule of immunity; specifically, the court determined that it was not reasonably foreseeable to the Trinity employee that someone might steal the truck. Thus, the circuit court concluded that the jury could not reasonably find that the negligent act of leaving the keys in the truck directly caused plaintiff's injury. Plaintiff appealed the directed verdict dismissing his negligence action against Trinity Trucking and its insurer.

The court of appeals affirmed, finding that plaintiff failed to show sufficient facts to support a jury verdict for plaintiff as there were no special circumstances to support abrogating the general rule of immunity. Specifically, the court emphasized that it was not foreseeable to the Trinity employee that the truck would be stolen.

Arbitration – UIM – Negligence – Discovery – Marlowe v. IDS Property Casualty Insurance Company (Wisconsin Supreme Court, 201 WI 29, April 5, 2013)

Plaintiff was involved in a car accident with an underinsured driver. At the time of the accident, plaintiff was insured by IDS and ultimately sought UIM benefits stemming from the accident. Plaintiff submitted a claim to IDS and after unsuccessful settlement negotiations, the parties agreed, in accordance with the policy, that an arbitration panel would determine whether an award was appropriate. In preparation for arbitration, IDS requested discovery materials including interrogatories, documents, medical, employment and income tax records, depositions, and an independent medical examination pursuant to Wis. Stat. ch. 840. Plaintiff asserted that these materials were not discoverable for the arbitration pursuant to Wis. Stat. § 788.07. The arbitration panel concluded that discovery should be broad as set by ch. 804. The plaintiff successfully filed for declaratory judgment in circuit court, obtaining an order reversing the arbitration panel's determination and directing that arbitration discovery would proceed within the narrow parameters of § 788.07. The court of appeals reversed concluding that the plaintiffs were not permitted to pursue relief from the circuit court before the arbitration panel rendered a final decision on the award and that full ch. 804 discovery was available to defendant.

The Wisconsin Supreme Court affirmed and modified in part, concluding that plaintiff's action in circuit court for a interlocutory appeal was premature and not justified by unusual circumstances and that the legislature has specifically set forth § 788.07 as a narrow scope of discovery for arbitration proceedings in the absence of an explicit, specific and clearly drafted arbitration clause to the contrary.

Wrongful Death – Waranka v. Wadena Ins. Co. (Court of Appeals, 12 AP 320, April 10, 2013)

Plaintiff brought a wrongful death action on behalf of her deceased husband who died in Michigan as a result of a snowmobile accident. The parties disputed whether Wisconsin or Michigan law applied to the claim. The circuit court concluded that the wrongful death cause of action under Michigan law applied, but ruled that Wisconsin law applied to all other issues in the case, which included Wisconsin law on beneficiaries and recoverable damages in wrongful death cases.

The court of appeals concluded that Wisconsin's wrongful death law does not apply in a case involving an out-of-state death. The court continued noting that because Wisconsin's wrongful death law, including its attendant terms and limitations, does not apply to deaths caused out-of-state, plaintiff does not have a viable wrongful death claim under Wisconsin law; instead, Michigan's wrongful death statute applies.

Torts – Damages – Inherently Dangerous Activity – Brandenburg v. Luethi (Court of Appeals, 12 AP 2085, April 23, 2013)

Plaintiffs sued defendant, their neighbor, and his insurer for hiring Briarwood Forestry Servicies which negligently applied herbicides to defendant's property and damaged trees and plants on plaintiffs' land. The circuit court concluded that defendant could not be held liable for Briarwood's negligence because it was an independent contractor and the application of the herbicides was not an inherently dangerous activity.

The court of appeals reversed in part, concluding that the circuit court erred in applying the improper test in analyzing whether the conduct was an inherently dangerous activity. The court first recognized that it is the law in Wisconsin that one who contracts for the services of an independent is not liable to others for the acts of the independent contract except for specific exceptions, including where the services contracted for involve inherent danger. The court noted that in Wisconsin two elements are necessary for an activity to be considered inherently dangerous: (1) the activity must pose a naturally expected risk of harm and (2) it must be possible to reduce the risk to a reasonable level by taking precautions. The court concluded that Briarwood's application of the herbicides posed a naturally expected risk of harm and that certain precautions could be taken to reduce the risk to a reasonable level.

Personal Injury – Exculpatory Clauses – Brooten v. Hickok Rehabilitation Services, LLC (Court of Appeals, 12 AP 1940, April 30, 2013)

Plaintiff was injured at Chetek Fitness when a weight bench he was using failed. Chetek Fitness requires every customer to sign a waiver form before they are permitted to use the facility. Plaintiff asserted causes of action against Chetek including common law negligence, safe place, and strict liability. Chetek asserts that plaintiff's claims are barred by an enforceable waiver that plaintiff signed. The circuit court granted summary judgment in favor of Chetek determining that the waiver was enforceable and barred plaintiff's claims. Plaintiff appealed.

The court of appeals reversed, concluding that Chetek's waiver was void and unenforceable. Specifically, the court noted that the waiver was impermissibly broad and all-inclusive and contrary to public policy.

Insurance – Contracts – Statute of Limitations – Rotering v. McMillan-Warner Mutual Insurance Company (Court of Appeals, 12 AP 2675, May 21, 2013)

Plaintiffs' barn collapsed in December 2010. They held a "farm owners" insurance policy issued by defendant. Defendant agreed to cover the contents of the barn, but refused to pay for any

damage to the structure itself asserting the roof had collapsed due to snow, which was contended as an uncovered risk. Plaintiffs retained an attorney in April 2011, and, while counsel had several exchanges with defendant, plaintiffs failed to file the action until March 2012. Defendant moved to dismiss arguing that the one-year limitations period set forth in Wis. Stat. § 631.83(1)(a) had expired before plaintiffs filed suit. The circuit court agreed and dismissed the action. Plaintiffs appealed.

The court of appeals reversed concluding that it was evident from the face of the policy – which had amended the limitations period to file a claim to two years – that the plaintiffs had two years to file their claim for property coverage claims. The court noted that Wis. Stat. § 631.83(1)(a) would have controlled, but for the amendment in the policy which explicitly extended the limitations period to two years.

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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 e-mail (enter first letter of first name, followed by last name, @pjmlaw.com). Questions can be directed to Recent Case Update editor Kevin Fetherston by phone or at kfetherston@pjmlaw.com.

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