Recent Case Update

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Personal Injury – Notice of Claim – Statute of Limitations – Kwick v. Cities and Villages Mutual Insurance Company (Court of Appeals, 13 AP 160, November 5, 2013) (unpublished)

Plaintiff filed her personal injury lawsuit against the City of Antigo and its insurer before the expiration of the 120-day disallowance period set by the notice-of-claim statute, Wis. Stat. § 893.80(1g). Plaintiff was allegedly injured in an accident with a City of Antigo vehicle on October 24, 2008. She filed a notice of claim on September 28, 2011. The City acknowledged receipt on September 29, 2011, and informed plaintiff that her claim would be investigated and either paid, disallowed, or compromised. The letter further stated that claims for a "specific dollar amount will be submitted to the City of Antigo Insurance Review Committee for review," with notice of a meeting to follow. However, the letter did not indicate what dollar amount triggered committee review, or whether plaintiff's claim satisfied that criterion. In fact, plaintiff's claim could not be acted on by the committee, which cannot consider claims in excess of $10,000. No notice of disallowance was served. Plaintiff filed a summons and complaint on January 6, 2012, before the 120-day disallowance period had expired. The statute of limitations on her claim expired on February 21, 2012. On February 22, the City filed an answer and motion to dismiss, asserting plaintiff's summons and complaint were premature and her suit was barred by the statute of limitations. Because the action was filed too soon, and the limitations period had lapsed, the circuit court dismissed the action with prejudice. Plaintiff appealed arguing that the City should be estopped from raising the notice-of-claim statute or the statute of limitations as a defense.

The court of appeals affirmed noting that a summons and complaint filed prematurely, before a claim is disallowed or the 120-day disallowance period has expired, is defective and does not validly commence an action.

Personal Injury – Summary Judgment – Causation – Safe Place Statute – Campbell v. Regency Janitorial Service, Inc. (Court of Appeals, 13 AP 45, November 5, 2013) (unpublished)

Plaintiff was injured while working the 11:00 p.m. to 7:00 a.m. shift at his employer's building when he slipped and fell in the bathroom after noticing that the carpet was wet. Plaintiff sued defendant for his injuries alleging negligence and violation of the safe place statute, Wis. Stat. § 101.11. The circuit court granted defendant's motion for summary judgment noting that plaintiff could not prove causation, knew that the carpet was wet, and that warning signs would not have prevented the incident. Plaintiff appealed.

The court of appeals affirmed finding that plaintiff could not prove causation because plaintiff was aware of the wet conditions.

Insurance – Personal Injury – Immunity – WEA Property & Casualty Insurance Company v. Krisik (Court of Appeals, 11 AP 1335, November 7, 2013)

Defendant received severe injuries while cutting branches from a tree located on property adjacent to property owned by his brother-in-law. Plaintiff insurer was the brother-in-law's homeowner's insurance carrier at the time of the accident. Plaintiff insurer brought an action against defendant seeking a declaration that the brother-in-law and plaintiff insurer were immune from liability for the injuries suffered by defendant under Wisconsin's recreational immunity statute, Wis. Stat. § 895.52. The circuit court granted summary judgment to plaintiff insurer concluding that it was immune from liability based on the undisputed facts of record.

The court of appeals affirmed concluding that plaintiff insurer was immune from liability because defendant was injured while engaging in a "recreational activity" as defined by § 895.52(1)(g), and because the brother-in-law "occupied" the property where the injury occurred and therefore was an "owner" of the property as those terms are used in § 895.52(1)(d)1.

Michael Crooks, John Rather and Grace Kulkoski of Peterson, Johnson & Murray, S.C., successfully litigated the case and achieved a declaratory action declaring that plaintiff insurer was immune from liability for defendant's injuries pursuant to Wisconsin's recreational immunity statute.

Insurance – Coverage – Criminal Acts – Estate of Shawn E. Dobry v. Wilson Mutual Insurance Company (Court of Appeals, 13 AP 580, December 10, 2013) (unpublished)

On June 18, 2010, Jordan hosted an underage drinking party at his parents' home in Oconto County. Party attendees included Jordan's sixteen-year-old brother, Lucas, and Jordan's friend Shawn Dobry. Jordan's parents were out of town, and his paternal grandmother, Henrietta, was staying at the house to house sit, take care of the dogs, prepare meals, do laundry, and care for Jordan and Lucas. During the course of the night, Jordan became intoxicated. At some point, Jordan asked Lucas's girlfriend to go inside and retrieve a Glock 21 .45 caliber handgun from Jordan's bedroom, which she did. Jordan removed the ammunition from the gun and began "dry firing" at people. In other words, he would point the gun at someone, cock the hammer back,

and pull the trigger without a round chambered, causing the gun to make a clicking sound. Jordan loaded and unloaded the gun multiple times throughout the night. In the early morning hours of June 19, Dobry came up behind Jordan. Jordan raised the gun over his shoulder, it discharged, and the bullet hit Dobry. Dobry died as a result of the gunshot wound. Jordan was charged with second-degree reckless homicide and two counts of resisting or obstructing an officer.

The Dobrys subsequently sued Jordan and Lucas and parents Robert and Sande, alleging their negligence caused Dobry's death. The complaint also named Robert and Sande's homeowner's insurer as a defendant. The Dobrys later amended the complaint to assert claims against Henrietta. Defendant moved for summary judgment, arguing its policy did not cover the Dobrys' claims and, specifically, that the policy's insuring agreement did not make an initial grant of coverage for the Dobrys' claims because Dobry's death was not caused by an occurrence; alternatively, defendant argued coverage was barred by the policy's criminal acts and intentional acts exclusions. The circuit court concluded both the criminal acts and intentional acts exclusions applied and granted defendant's motion for summary judgment on the coverage issue and dismissed it from the case. The Dobrys appealed.

The court of appeals affirmed concluding that the criminal acts exclusion in defendant's policy unambiguously barred coverage for the Dobrys' claims.

Insurance – Coverage – Wrongful Death – Intra-Insured – Barrows v. Renfrow (Court of Appeals, 13 AP 720, December 10, 2013) (unpublished)

A.B. was the eleven-year-old son of Barrows and LaValla. He resided with LaValla and Renfrow at Renfrow's home in Osceola, Wisconsin. On October 18, 2011, A.B. found a loaded .45-caliber handgun in Renfrow's nightstand. The gun was not secured with any kind of safety lock. A.B. shot himself in the head, and he died later that day. The Polk County Sheriff's Department classified A.B.'s death as a suicide. Barrows subsequently filed a wrongful death suit against Renfrow, LaValla, and their homeowner's insurer, American Family. The complaint alleged Renfrow negligently stored the handgun which directly contributed to A.B.'s death. The complaint further alleged Barrows had suffered damages as a result of Renfrow's negligence and would continue to suffer future damages.

American Family moved for summary judgment, arguing that both the intra-insured and intentional injury exclusions in its policy barred coverage for Barrows' claim. The circuit court agreed that both exclusions applied, and it therefore granted American Family summary judgment. Barrows appealed.

The court of appeals affirmed noting that even if American Family's policy provides an initial grant of coverage for Barrows' claim, coverage is barred by the policy's intra-insured exclusion. The court further noted that coverage was barred because it was undisputed that A.B. qualified as an "insured" under the policy and that the injury to A.B. meets the policy's definition of "bodily injury." The disputed issue was whether Barrows' claim for damages caused by A.B.'s death constituted a claim for "bodily injury" to an "insured," so that the intra-insured exclusion applies. The court concluded that it would follow the majority rule that an intra-insured exclusion like the

one in American Family's policy bars coverage for a wrongful death claim arising out of an insured's death, even if the claimant is a non-insured.

Wrongful Death – Failure To State A Claim – Timeliness – McIntyre v. Forbes (Court of Appeals, 13 AP 611, December 19, 2013) (unpublished)

Plaintiff's wife died in 1980. On March 30, 2009, the State of Wisconsin filed a criminal complaint charging defendant with first-degree intentional homicide in her death. Shortly after it was filed, the criminal complaint was available to plaintiff. On November 15, 2010, defendant was convicted of the charged crime. On July 12, 2011, plaintiff filed the civil complaint at issue alleging that defendant was liable for wrongful death and intentional infliction of emotional distress because he killed plaintiff's wife. Defendant moved for summary judgment based on the statute of limitations pursuant to Wis. Stat. § 893.57. The circuit court determined that plaintiff's cause of action against defendant accrued on March 30, 2009, the day the State of Wisconsin filed a criminal complaint against defendant charging him with first-degree intentional homicide in the death of plaintiff's wife, and, thus, plaintiff's civil lawsuit, which was filed on July 12, 2011, was not timely filed under § 893.57.

Plaintiff appealed arguing that the statute of limitations does not bar his claims because, under the discovery rule, a criminal complaint cannot provide a sufficient basis for a potential plaintiff acting with due diligence to know, to a reasonable probability, that the person charged was responsible for conduct alleged in the criminal complaint. Instead, plaintiff argued, given the presumption of innocence and heavy burden of proof placed on the State in the criminal justice system, the civil action could not have accrued until defendant was convicted of first-degree intentional homicide in November 2010.

The court of appeals affirmed, focusing the issue on when plaintiff knew or should have known to a reasonable probability, acting with reasonable diligence, that defendant was responsible for his wife's death and that, under the discovery rule, a civil cause of action can accrue based on information contained in a criminal complaint, thus making plaintiff's claim untimely.

Medical Malpractice – Standard of Care - Daubert – Rupert v. Tandias (Court of Appeals, 13 AP 1705, January 22, 2014) (unpublished)

Plaintiff had a bunionectomy performed on her right foot by defendant. After the surgery, plaintiff ultimately had another surgery performed, but reported continued pain and never returned to work as a certified nursing assistant. Plaintiff sued defendant for medical malpractice stemming from the initial procedure. Defendant moved for a directed verdict that plaintiff's medical expert failed to articulate the standard of care at trial which the circuit court granted stating "plaintiff's expert failed to testify at trial of this matter that [defendant] violated a standard of care that plaintiff's expert could define." Plaintiff appealed asserting that the circuit court erroneously applied the Daubert standard when determining whether her medical expert established the standard of care.

The court of appeals affirmed stating that the Daubert standard applies to medical standard-of-care testimony.

<u>Recreational Immunity – Summary Judgment</u> – <u>Scheuren v. Green Bay Skydivers, Inc.</u> (Court of Appeals, 12 AP 2288, January 30, 2014) (unpublished)

Plaintiff sued several parties following injuries sustained at Moosefest, an annual charity event, when a skydiver collided with him while he was standing in the spectator area. Plaintiff sued, among others, the owner of the venue for Moosefest and her insurer. The owner moved for summary judgment asserting that she was immune from liability pursuant to Wis. Stat. § 895.52 (the "recreational immunity" statute), which the circuit court granted. Plaintiff appealed asserting that owner's negligent conduct was not directly related to the land or related to the condition or maintenance of the land.

The court of appeals affirmed because plaintiff had conceded that he was engaged in a recreational activity and on the finding that the owner's alleged conduct – setting up the charitable event and positioning the skydiving event outside – was related to the condition and maintenance of the land, such that the recreational immunity statute applied to bar liability.

<u>Personal Injury – Safe Place Statute – Improvements to Real Property</u> – <u>Wilde v. Pharmacists Mutual Insurance Company</u> (Court of Appeals, 13 AP 1402, February 19, 2014) (unpublished)

Plaintiff sustained injuries while she was shopping at defendant pharmacy when she slipped and fell on the floor. The defendant's building had been renovated in 1995 to combine two buildings. Plaintiff alleged that she slipped and fell because of a dip in the floor resulting from the renovation. The circuit court concluded that plaintiff's claim was barred pursuant to Wis. Stat. § 893.89, the statute of repose for claims alleging injuries resulting from improvements to real property. Plaintiff appealed arguing that exceptions applied including misrepresentation concerning a defect in the improvement and negligence in the inspection or maintenance of improvement to real property.

The court of appeals affirmed finding that plaintiff's claim was barred by the 10-year statute of repose and that plaintiff failed to persuasively prove any of the exceptions to the bar to liability.

<u>Personal Injury – Insurance – UIM – Reducing Clause</u> – <u>Meyers v. American Family Mutual Company</u> (Court of Appeals, 13 AP 2045, February 25, 2014)

Plaintiff sustained injuries in a motor vehicle accident on December 11, 2009. The tortfeasor's insured paid plaintiff its liability limits and plaintiff pursued a UIM claim against its insurer, defendant. At the time of the accident, plaintiff was insured under an insurance policy that was issued September 10, 2009. The policy defined "underinsured motor vehicle" as "a motor vehicle which is insured by a liability bond or policy at the time of the accident which provides bodily injury liability limits less than the limits of liability of this Underinsured Motorists coverage." The limits of plaintiff's UIM coverage were the same as the tortfeasor's liability limits that were paid. The policy also included a reducing clause, which stated the UIM liability limits would be reduced by "[a] payment made … under any collectible auto liability insurance, for loss caused by an accident with an underinsured motor vehicle."

Plaintiff argued the policy's reducing clause and definition of "underinsured motor vehicle" were void, in light of 2009 Wis. Act 28, which amended Wis. Stat. § 632.32 to prohibit reducing clauses and defined the term "underinsured motor vehicle" as a vehicle insured by a policy whose bodily injury liability limits are "less than the amount needed to fully compensate the insured for his or her damages." The circuit court held that plaintiff was not entitled to UIM coverage under defendant's policy by virtue of the policy's reducing clause and definition of "underinsured motor vehicle."

Plaintiff appealed asserting that the circuit court erred because the underlying accident took place after the effective date of 2009 Wis. Act 28 and that, pursuant to the applicable policy's elasticity clause, plaintiff should be able to recover UIM benefits.

The court of appeals affirmed finding that the elasticity clause in the subject insurance policy stated that any policy term that conflicts with a state statute is changed to conform to the statute, but that the relevant changes to § 632.32 did not apply to plaintiff's policy on the date of the accident, finding that the term "issued or renewed" was controlling with respect to the application of the policy and the amendments to the statute.

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 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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