PETERSON JOHNSON MURRAY

Recent Case Update

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Insurance – UIM – Slip and Fall – Government Immunity – State Farm Mutual Automobile Ins. Co. v. Hunt (Court of Appeals, 13 AP 2518, October 2, 2014)

Defendant was involved in a collision with a snow plow owned by Dane County and operated by a county employee. The damages recoverable from the county and its employee are capped at $250,000 pursuant to Wis. Stat. § 345.05(3). Defendant claimed damages greater than that amount and sought UIM coverage. The circuit court granted State Farm, defendant's insurer, summary judgment finding that defendant could not recover damages in excess of $250,000 because defendant was not "legally entitled to recover" damages pursuant to Wis. Stat. § 632.32(2)(d) beyond the $250,000 statutory liability cap applicable to a claim against a municipality for negligent operation of a vehicle and government owned vehicles are excluded from the definition of UIM motor vehicle under the terms of defendant's insurance policy.

The court of appeals reversed finding that defendant was legally entitled to recover damages within the meaning of Wis. Stat. § 632.32(2)(d) and that, if the definition of a UIM vehicle under defendant's insurance policy included an exclusion for government-owned vehicles, that exclusion is void under § 632.32. In sum, the court determined that the phrase "legally entitled to recover" did not thwart a claim for UIM coverage for an insured who had not been fully compensated his or her damages where the amount of damages an insured actually recovered from a tortfeasor was capped by statute.

Insurance – Property Damage – Daubert – Nationwide Agribusiness Insurance Company v. August Winter & Sons, Inc. (Court of Appeals, 14 AP 488, October 2, 2014) (unpublished)

This action stems from a boiler that exploded during installation and adjustment of the boiler at Premier Cooperative. Plaintiff sued defendant installer for breach of contract and negligence and, prior to trial, defendant asked the circuit court to exclude the only expert witness plaintiff planned to present on the topic of the cause of the explosion. Plaintiff's expert prepared a report and gave the opinion that defendant's employee failed to sufficiently tighten a "set screw" which resulted in the accumulation of excessive gas

and explosion. Defendant moved to exclude plaintiff's expert pursuant to Wis. Stat. § 907.02, Wisconsin's Daubert statute, on the grounds that the expert's opinions depended on "an assumed fact that has no basis," namely, that the "set screw" was too loose at a particular point in time. The expert assumed this because of scratch marks, but failed to explain why the scratch marks could not have occurred at another time. The circuit court agreed, granted the motion and dismissed the case because plaintiff could not prove causation. Plaintiff appealed stating that the circuit court did not perform a proper analysis under § 907.02.

The court of appeals affirmed stating that the expert's testimony was not based upon sufficient facts and data. Notably, the court explained that if a plaintiff's expert causation testimony is based on an unsupported factual assumption, which the court concluded it was in this case, then the testimony was properly excluded.

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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.

Milwaukee
Suite 500
788 N. Jefferson St.
Milwaukee, WI 53202
(414) 278-8800

Madison
Ninth Floor
3 South Pinckney
Madison, WI 53703
(608) 256-5220

Kenosha
Suite 102A
10411 Corporate Drive
Pleasant Prairie, WI 53158
(262) 997-6300

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

Chicago
Floor 84
233 South Wacker Drive
Chicago, IL 60606
(312) 782-7150