PETERSON JOHNSON MURRAY

Recent Case Update

VOL. XXIII, NO. 1
Spring 2014

Construction Contracts – Negligence – Economic Loss Doctrine – Mazemke v. Pusch (Court of Appeals, 13 AP 1472, April 9, 2014) (unpublished)

Defendants were subcontractors hired by the general contractor and owner of a residence to install siding on a newly constructed home that plaintiffs purchased. Plaintiffs never entered into a construction contract with defendants or the owner/general contractor of the residence because the residence had been completed by the time plaintiffs purchased it. After living in the residence for some time, plaintiffs discovered problems with the siding and commenced a lawsuit against defendants for negligent siding installation. Defendants moved for and the circuit court granted summary judgment on the basis that the economic loss doctrine barred plaintiffs' claim. Plaintiffs appealed.

The court of appeals affirmed finding that plaintiffs had contractual remedies against the general contractor, with which they contracted, who in turn has its own remedies against subcontractors. Furthermore, allowing plaintiffs to have a tort claim against the subcontractors for services rendered to the general contractor undermines the distinction between contract and tort that the economic loss doctrine seeks to preserve.

Personal Injury – Negligence – Insurance Coverage – Sterry v. Acker (Court of Appeals, 13 AP 2099, May 13, 2014) (unpublished)

Riley Sterry and his father, William Sterry, sued Riley's mother, Kerry Sterry, among others, for negligence after Kerry failed to look after Riley when leaving a tractor pull event. As Kerry was leaving with Riley, Kerry shouted for Riley to cross the road to get to their vehicle, at which time Riley was struck by a vehicle. Riley and William sued Kerry asserting that she was negligent in failing to park her vehicle in a safe location as to avoid feasible dangers in crossing a road and failing to properly supervise Riley immediately prior to the accident. The policy issued to Kerry by Progressive provided that it would pay all sums which Kristy may be legally obligated to pay as a result of a covered incident. The circuit court granted Progressive's motion for summary judgment

finding that Riley's accident did not arise out of the use of Kristy's vehicle and that, even though not pled, Riley's claim for underinsured motorist benefits ("UIM") could not stand because he was not "occupying" Kristy's vehicle at the time of the accident.

The court of appeals affirmed, finding that Riley's injuries did not stem from the use of Kristy's vehicle -- Kristy's supervision of Riley did not constitute a use of the vehicle and, while parking is a use of Kristy's vehicle, the accident did not arise out of that use -- and that, in each instance, the alleged "use" of the vehicle was too remote and removed from the accident at issue.

Personal Injury – Wrongful Death – Insurance Coverage – Waranka v. Wadena Insurance Company (Supreme Court of Wisconsin, 14 WI 28, June 3, 2014)

Plaintiff, Sharon Waranka, brought a wrongful death action in Wisconsin after her husband was killed in a snowmobiling accident in Michigan. Plaintiff moved for a declaratory order that Michigan's wrongful death statute on damages applied to her action. One of the insurers, State Farm, argued that Wisconsin's wrongful death statute damages limitations should apply because the case was brought in Wisconsin.

The circuit court determined that the Wisconsin wrongful death limitations applied to an action brought by plaintiff seeking recovery for the out-of-state death of her husband. The court of appeals disagreed, concluding that because the damage limitations in Wis. Stat. § 895.04 must be read together with the wrongful death statute, Wis. Stat. § 895.03, and because the latter expressly provides that it does not apply to deaths caused out-of-state, the Wisconsin wrongful death damages limitations do not apply.

The Supreme Court of Wisconsin affirmed, concluding that the damage limitations set forth in § 895.04 necessarily refer to wrongful death actions created by § 895.03 and, thus, the statutes could not be applied separately. Thus, because § 895.03 does not apply to deaths caused outside the state of Wisconsin, there was no conflict between Wisconsin and Michigan wrongful death law and, therefore, only Michigan's wrongful death statute applied.

Insurance – Stacking – UIM – Bodish v. West Bend Mutual (Court of Appeals, 13 AP 1659, June 10, 2014)

Plaintiff was employed as a Milwaukee County Deputy Sherriff and was injured in an automobile accident while driving a vehicle owned by Milwaukee County. The other driver in the accident was insured by Progressive and plaintiff was insured by West Bend Mutual for $500,000 for each of two vehicles he owned. Milwaukee County was insured by County Mutual with $100,000 UIM limits. Plaintiff sued Progressive, West Bend and County Mutual. Progressive paid its liability limits, West Bend settled with plaintiff and

took an assignment of rights against County Mutual, and County Mutual paid plaintiff its $100,000 UIM limits.

West Bend then sought to recover the cost of its settlement with plaintiff by claiming that Wis. Stat. § 632.32(6)(d) required County Mutual to stack the UIM coverage in the policy by multiplying the UIM limit by the number of vehicles in Milwaukee County's fleet, putting County Mutual on the hook for up to $42 million in coverage. The circuit court held that County Mutual was not subject to stacking and that the total liability was $100,000 per person UIM limit.

The court of appeals affirmed concluding that because the insurance policy did not include a separate premium attributable to each vehicle in Milwaukee County's fleet and that a reasonable insured would not read the policy in such a way, the UIM coverage in the policy was not subject to stacking.

Insurance – Duty to Defend – Pumpkin, Inc. v. Ryan, Jr. (Court of Appeals, 13 AP 1320, June 17, 2014) (unpublished)

Plaintiff contracted with defendant to provide equipment and personnel during the period from November 2010 through December 2011. Plaintiff asserted the following causes of action against defendant: (1) breach of contract; (2) conversion; (3) theft; (4) battery; (5) conspiracy to cause injury; and (6) malicious and outrageous conduct warranting punitive damages. During the relevant time period, defendant was insured by American Family, which bifurcated the proceedings until the circuit court determined coverage issues. The circuit court concluded that American Family had no duty to defend the Ryans against the claims alleged in the Complaint because those claims were for intentional acts.

The court of appeals affirmed, relying on the Sustache decision for the proposition that American Family had no duty to defend because the Complaint alleged that defendant intentionally assaulted plaintiff -- allegations that on their face were not covered under the subject policy.

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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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