PETERSON JOHNSON MURRAY

Recent Case Update

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Legal Malpractice – Attorney-Client Relationship – Summary Judgment – Williamson v. Schweiger (Court of Appeals, 13 AP 1777, July 1, 2014) (unpublished)

Plaintiff sued defendant attorney for failing to represent plaintiff's interests in pursuing a potential medical malpractice claim and ultimately failing to advise about the statute of limitations. After infrequent contact with defendant, plaintiff went to another attorney in 2012, at which time it was discovered that the statute of limitations had expired for plaintiff's potential claim. Defendant had never spoke with plaintiff -- plaintiff would communicate with the receptionist and send materials regarding the case to defendant's office -- and stated he had no intention to take the case. Plaintiff asserts that defendant was representing plaintiff throughout a 5-year period of time and defendant asserts that there was never an agreement or an understanding between attorney and client regarding representation.

Defendant filed a motion for summary judgment asserting that plaintiff's legal malpractice claim should be dismissed because there was no attorney-client relationship and that defendant had never agreed to represent plaintiff over a 5-year period of time with infrequent contact and without a retainer agreement. The circuit court denied defendant's motion for summary judgment relying primarily on the OLR v. Kostich, 2010 WI 136, 330 Wis. 2d 378, 793 N.W.2d 494 decision, which states that the "attorney[-]client relationship is established based upon the reasonable expectations of the person seeking the lawyer's advice." Defendant appealed.

The Court of Appeals reversed and granted summary judgment on the basis that plaintiff failed to prove that there was an attorney-client relationship and that an attorney-client relationship can only be formed by the mutual consent of the lawyer and client.

Insurance – Personal Injury – Slip and Fall – Government Immunity – Larsen v. Wisconsin County Mutual Ins. Co. (Court of Appeals, 13 AP 2395, July 3, 2014) (unpublished)

Plaintiff asserted claims for negligence and violating the safe place statute against Portage County seeking to recover damages for injuries sustained when plaintiff slipped and fell inside the building housing the Portage County Circuit Court. At the time, county employees had noticed that the area had been slippery. The circuit court granted Portage County's motion for summary judgment finding that it was immune from liability pursuant to Wis. Stat. §893.80(4), the governmental immunity statute. The plaintiff appealed asserting that Portage County's immunity was defeated by the ministerial duty exception (for failing to adhere to the safe place statute) and the clear and compelling danger exception (because employees had notice of the slippery condition). The Court of Appeals affirmed, holding that governmental bodies are immune from liability for any acts involving the exercise of discretion or judgment which included determining how to handle a slippery surface.

Personal Injury – Insurance Coverage – Duty to Defend and Indemnify – Blasing v. Zurich American Ins. Co. (Wisconsin Supreme Court, 12 AP 858, July 17, 2014)

Plaintiff was injured when lumber that was being loaded into her pickup truck by an employee of Menard fell on her foot. Plaintiff asserted a tort action against Menard and its insurer, Zurich American, but plaintiff did not sue the employee. At the time, plaintiff also was the named insured under a policy of automobile liability insurance issued by American Family. Menard asserted that its employee was an additional insured under plaintiff's American Family policy as a permissive user of plaintiff's pickup truck. American Family moved for summary judgment on the basis that there was no duty to defend and indemnify the Menard employee.

The issue was whether American Family had a duty to defend and indemnify Menard when the injury was to the named insured under the American Family policy and the alleged tortfeasor (a Menard employee) was a permissive user of the vehicle insured under the American Family policy. The three sub-issues that required addressing included: (1) did the alleged tortfeasor's actions constitute a "use" of the pickup truck under the American Family liability policy; (2) did American Family's policy require it to defend and indemnify a permissive user tortfeasor when the injured victim was the named insured under the policy; and (3) did the concept of a permissive user under Wis. Stat. § 632.32(3)(a) (the Omnibus Statute) require an injured person's own liability insurer to defend and indemnify the tortfeasor who injured the insured, when the tortfeasor had its own liability insurance.

The circuit court granted American Family's motion for summary judgment, finding that the parties to the policy did not contemplate that there would be coverage for a

permissive user tortfeasor injuring the named insured. The Court of Appeals reversed the circuit court, holding against American Family by answering sub-issues (1) and (2) in the affirmative and stating that with respect to sub-issue (3), that permissive user coverage was required in this case by the Omnibus Statute.

The Supreme Court of Wisconsin granted review. American Family asked the Court to reverse and hold that American Family's policy does not cover the liability of a permissive user tortfeasor who injured a named insured because such a conclusion would be absurd. The Supreme Court affirmed the Court of Appeals, finding that coverage under the circumstances of this case was set forth in American Family's policy. Specifically, the Supreme Court concluded that the plain and ordinary meaning of American Family's policy covered bodily injuries sustained by any person and that it was not unusual or contrary to the common law for an insured to seek a recovery from an additional insured under the policy.

Personal Injury – Insurance Coverage – UIM – Hahn v. Harleysville Insurance Company (Court of Appeals, 13 AP 2429, August 26, 2014) (unpublished)

Plaintiff sought UIM coverage from her insurer, defendant, after her husband was killed in an automobile accident. At the time of the accident, plaintiff's husband was driving a Kawasaki Mule (an ATV). The tortfeasor's insured paid its policy limits of $150,000. Plaintiff then sought UIM, but defendant denied the claim on the basis that the vehicle plaintiff's husband was driving at the time of the accident was not covered under its policy. Plaintiff sought a declaratory judgment on coverage. The circuit court granted declaratory judgment in defendant's favor, finding that coverage did not apply under the "drive other cars" exclusion because plaintiff's husband was not driving a covered vehicle at the time of the accident. Plaintiff appealed.

The Court of Appeals affirmed, stating that the policy plainly and clearly only afforded UIM benefits to an insured if the insured was involved in an accident while driving a vehicle for which a premium was paid. Because the ATV was not a covered vehicle, plaintiff could not recover UIM benefits.

Insurance Coverage – Construction – Duty to Defend – Dahl v. Peninsula Builders, LLC (Court of Appeals, 14 AP 270, September 9, 2014) (unpublished)

Plaintiffs sued defendant after it completed remodeling work on plaintiffs' home. Insurer, which had issued defendant a commercial general liability ("CGL") policy, intervened in the action and sought declaratory judgment that it had no duty to defend or indemnify defendant. The circuit court granted insurer's motion for declaratory judgment, finding that coverage was triggered by an "occurrence," but exclusions barred coverage. Defendant appealed.

The Court of Appeals affirmed, finding that coverage was not triggered by an "occurrence" under the policy issued by insurer to defendant for plaintiff's breach of contract and damage to property claims because the complaint entailed only allegations of faulty workmanship and other negligence which did not constitute an "occurrence."

Insurance Coverage – Personal Injury – Settlement – Interest – Singler v. Zurich American Insurance Company (Court of Appeals, 14 AP 391, September 16, 2014)

Plaintiff sustained personal injuries in a motor vehicle accident. Plaintiff ultimately agreed to settle all personal injury claims against defendant's insured with defendant for $1.9 million. When defendant failed to pay the settlement proceeds to plaintiff within thirty days, plaintiff moved the circuit court and was granted interest pursuant to Wis. Stat. §628.46 at 12% on the settlement amount beginning 30 days after the settlement agreement was reached and until the amount was paid. Defendant appealed the circuit court's decision.

The Court of Appeals affirmed in part, finding that defendant had failed to make payment of the settlement within a reasonable amount of time, but concluded that the appropriate measure of interest due for the failure to pay was not 12% pursuant to Wis. Stat. §628.46 -- because it applies to undisputed claims whereas here it was a settlement amount of a dispute claim -- and the Court instead directed the circuit court to apply §138.04, which sets forth interest at the rate of 5%.

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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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