PETERSON JOHNSON MURRAY

Recent Case Update

VOL. XXIII, NO. 4
Winter 2015

Personal Injury – Dog Bite – Insurance – Augsburger v. Homestead Mut. Ins. Co., (Wisconsin Supreme Court, 12 AP 641, December 26, 2014)

Kontos purchased a property for his daughter and her family to live in. Kontos did not reside at the property with his daughter and general repairs and maintenance were done to the property by his daughter's husband. There was no formal lease between Kontos and his daughter, he did not expect rent payments, and his daughter did not think of Kontos as a landlord. Kontos' daughter acknowledged that Kontos had the authority to prohibit dogs on the property, but Kontos did not exercise that authority. Whenever Kontos was on the property, he would rarely go near the dogs, never fed them, watered or bathed them, nor pay for taking care of them. When plaintiff visited the property, she was attacked by the dogs. Plaintiff filed an action against Kontos, his daughter, and Kontos' insurer. Plaintiff alleged that Kontos was negligent in keeping and controlling the dogs and was liable for her injuries pursuant to Wis. Stat. §174.02(1), which imposes strict liability on dog owners. Kontos filed a motion for summary judgment.

The circuit court determined that the term "harbor" means "to give shelter or refuge to" and concluded that that is what Kontos did, denying his motion for summary judgment. Kontos and his insurer filed an interlocutory appeal asserting that he was not a statutory owner because he did not exercise control or custody over or care for the dogs.

The court of appeals affirmed the circuit court's determination that Kontos could be held liable to the plaintiff for injuries caused by his daughter's dog because he was the owner of the property and knowingly afforded lodging and shelter for the dogs.

On appeal, Kontos contended that he cannot be strictly liable for injuries caused by the dogs because he is not an "owner" of the dogs under the statutory definition. Specifically, Kontos contended that he was not a "harborer" of his daughter's dogs when he permitted her family to

live in a house he owned while he resided elsewhere. Because he lived elsewhere, Kontos contended, he did not have the requisite control to be a "harborer" under the statute.

The Wisconsin Supreme Court concluded that mere ownership of the property on which a dog resides is not sufficient to establish an individual as an owner of a dog under Wis. Stat. §174.02. Rather, the totality of the circumstances determines whether a legal owner of the property has exercised the requisite control over the property to be considered a "harborer" and thus an owner under the statute. Because Kontos neither lived in the same household as the dogs nor exercised control over the property on which the dogs were kept, he was not an "owner" or "harborer" of the dogs, reversing the court of appeals.

Insurance – Personal Injury – UIM – Stacking – Szmanda v. American Family Mut. Ins. Co., (Court of Appeals, 13 AP 1867, January 14, 2015) (unpublished)

Plaintiff was involved in an automobile accident and sought UIM coverage after the offending vehicle paid its policy limits. Two policies were at play through the same insurer -- one policy insured the plaintiff's Mercedes, which was in the collision, and the other policy insured plaintiff's wife's vehicle, a Jetta. Both policies included UIM.

When the Mercedes policy was issued on September 16, 2009, insureds could not stack coverages under multiple insurance policies. When the Jetta policy was issued on January 16, 2010, the law had changed and insureds could stack coverages under multiple policies. The parties do not dispute that the insurer did not have any obligation to make a UIM payment under the Mercedes policy because that policy's reducing clause took effect upon payment of the policy limits on the offending vehicle. Plaintiff contended that the stacking rules allowed them to recover UIM benefits under the Jetta policy.

The circuit court granted the insurer's motion for summary judgment on the question of coverage for injuries and property damage arising from the collision.

The court of appeals affirmed stating that, in order to stack coverages, there must be another policy that applies to the claim. That was not the case with plaintiff's policies because the Mercedes policy was subject to anti-stacking and reducing clause rules and, therefore, did not apply to the claim. Accordingly, the court concluded that the Jetta policy could not be stacked on the Mercedes policy.

Jurisdiction – Fraud – Misrepresentation – Carlson v. Fidelity Motor Group, LLC, (Court of Appeals, 14 AP 695, January 14, 2015)

Plaintiff commenced an action in Ozaukee County against Fidelity, an automobile dealership in Illinois, alleging fraud by wire and negligent representation by Fidelity related to plaintiff's purchase of a 2006 BMW. Fidelity brought a motion to dismiss based on lack of personal jurisdiction.

The circuit court granted Fidelity's motion to dismiss on the basis that it did not have personal jurisdiction. Plaintiff appealed asserting that the court did have personal jurisdiction over Fidelity because of its advertisements on third party web sites and a phone conversation with plaintiff.

The court of appeals affirmed, finding that Fidelity's limited contact with plaintiff and Wisconsin did not meet the minimum contacts requirement and, therefore, there were not sufficient contacts to establish jurisdiction. The ultimate question was whether defendant's contacts with Wisconsin were of such a quality and nature that it could reasonably expect to be haled into Wisconsin courts. Furthermore, Fidelity's advertisements on its own website or third party websites represented merely potential contacts with the State of Wisconsin, and there was no showing that Fidelity was targeting Wisconsin and its residents.

Insurance – Made Whole Doctrine – Subrogation – Employers Mut. Cas. Co. v. Kujawa, (Court of Appeals, 14 AP 732, February 10, 2015)

Defendant was injured in September 2010, when a tortfeasor rear-ended the car he was driving. Defendant was insured by plaintiff. Plaintiff paid defendant $767 under the medical payment provision. The tortfeasor's insurer had a $2 million policy limit. Defendant's injuries resulted in $3,917 of medical expenses and $2,132.72 in lost wages. Defendant's attorney negotiated a settlement with the tortfeasor for $10,000 and no lawsuit was ever filed. During settlement discussions, plaintiff was requested to waive its $767 subrogation interest or reduce it to $500, but plaintiff refused and insisted upon full payment. Defendant's attorney told plaintiff that its subrogation interest depended on defendant being made whole. Plaintiff filed a declaratory judgment action asking the circuit court to order defendant to pay it $767.

The circuit court held a Rimes hearing, found defendant's testimony credible, determined that defendant was not made whole, and concluded that plaintiff did not have a right of subrogation to collect its $767. The court also determined that the Muller decision regarding the "made whole" doctrine applied to property damage, but not personal injury cases. Plaintiff appealed.

The court of appeals affirmed, citing the Rimes holding -- in a personal injury case, a subrogated insurer will not be reimbursed unless the injured insured has been "made whole." The court also cited plaintiff's insurance policy as specifically barring it from recouping the $767 because defendant had not been "fully compensated."

Insurance – Personal Injury – Duty to Defend – Indemnification – Melby v. Metropolitan Property and Casualty Ins. Co., (Court of Appeals, 13 AP 12, February 12, 2015)

Melby sustained injuries while he was installing a shelf in the garage of Buckmaster's home. Buckmaster operated an auto parts business out of his garage where he stored zinc dichromate, an acid used in his business, in a five-gallon bucket. While Melby was installing the shelf, he stepped through the lid of the bucket holding the acid, causing chemical burns to his leg and foot. Melby sued for personal injuries stemming from Buckmaster's negligence. Defendant insurance companies, which insured Buckmaster's home, moved for summary judgment on the issues of

coverage, indemnification and duty to defend. The circuit court granted summary judgment to the insurance companies on the ground that the business exclusions in the policies applied and there was no coverage. Buckmaster appealed asserting that the exclusions were ambiguous.

The court of appeals affirmed the circuit court, finding that the injury required a "causal relationship" to the "business activity." Because the court concluded that Melby's injuries arose out of or was in connection to Buckmaster's business activities, there was no coverage.

Legal Malpractice – Insurance Coverage – Claims Made and Reported Policies – Anderson v. Aul, (Wisconsin Supreme Court, 13 AP 500, February 25, 2015)

Andersons sued former attorney, Aul, for legal malpractice. Before suit commenced, Aul received a letter from the Andersons' attorney while he was insured under the claims-made-and-reported professional liability policy issued by WILMIC. It is undisputed that the letter from the Andersons' attorney constituted a "claim first made against the insured" during the policy period (April 1, 2009, to April 1, 2010) and that the policy required Aul to report that claim to WILMIC during the same period. Aul did not report the claim to WILMIC until March 2011, nearly a year after the policy period expired.

WILMIC intervened and sought summary judgment declaring that the insurance policy it issued Aul did not cover the Andersons' claim. WILMIC's insurance policy provided coverage for "those claims that are first made against the insured and reported to the [insurance company] during the policy period." This type of policy is commonly known as a claims-made-and-reported-policy. Wisconsin's notice-prejudice statutes, Wis. Stat. §§631.81(1) and 632.26(2) provide that an insured's failure to furnish timely notice of a claim as required by the terms of a liability policy will not bar coverage unless timely notice was "reasonably possible" and the insurance company was "prejudiced" by the delay.

The parties agree that the Andersons' claim against Aul was first made during the policy period, that Aul did not report the claim during the policy period, and that reporting the claim during the policy period was reasonably possible. They dispute whether the WILMIC policy's requirement that claims be reported during the policy period is governed by the notice-prejudice statutes and also whether WILMIC was prejudiced by Aul's failure to report the claim during the policy period.

The circuit court granted WILMIC's coverage motion stating that the court was satisfied that Aul did not notify WILMIC in a timely fashion and that there was nothing in the record that indicated specifically that WILMIC had been prejudiced by the untimely reporting, but that that was not the standard. WILMIC appealed.

The court of appeals reversed stating that the applicable statutes and case law make it clear that the circuit court must determine whether untimely notice prejudiced an insurer, but that the finding of untimeliness alone is not solely dispositive of the issue.

The Wisconsin Supreme Court reversed the court of appeals and concluded that Wisconsin's notice-prejudice statutes do not supersede the reporting requirement specific to claims-made-and-reported policies and that, based on that initial determination, the notice-prejudice statutes do not supersede the WILMIC policy's requirement that claims be reported within the policy period. The Court also concluded that requiring an insurance company to provide coverage for a claim reported after the end of a claims-made-and-reported policy period is *per se* prejudicial to the insurance company.

Workers' Compensation – Death Benefits – American Family Mut. Ins. Co. v. LIRC, (Court of Appeals, 14 AP 999, February 26, 2015) (unpublished)

The dispute involved the application of Wis. Stat. §102.11(1)(g), which creates a rebuttable presumption that an employee who sustained a work injury at age 26 or under is entitled to the maximum average weekly wage for death benefits. In this case, the deceased employee, Juan Camacho, was 17 years old when he died in a farm accident while employed by Kirk Haslow, insured by American Family. Because Camacho died without dependents, the Work Injury Supplemental Benefit Fund was entitled to death benefits pursuant to Wis. Stat. §102.49(5)(b). The Fund contended that the death benefit should be the maximum for the injury date, while American Family's vocational expert opined that Camacho was not likely to earn the maximum wage by age 27. American Family's expert contended that the wage should be no greater than $443.00 per week, which is what he assumed a farm worker in Wisconsin would be expected to earn at age 27.

The court of appeals held that American Family had to rebut the presumption with a preponderance of the evidence. It held that American Family did not meet that evidentiary test because its vocational expert had no information about Camacho's pre-injury education, talents, abilities and goals in life. The court rejected American Family's position as based on no evidence.

Personal Injury – Insurance – Reducing Clause – Wolf v. American Family Mut. Ins. Co., (Court of Appeals, 14 AP 1522, March 4, 2015)

Plaintiff sustained injuries in an automobile accident while she rode as a passenger on December 8, 2009. Defendant insurer provided both automobile liability coverage for the driver's vehicle and separate UIM coverage for plaintiff. Both policies had coverage amounts of $250,000. Pursuant to the driver's policy, insurer paid plaintiff $250,000 of automobile liability coverage. Plaintiff then sought UIM benefits from her policy. Insurer sought declaratory judgment claiming that it did not owe plaintiff anything under her UIM coverage.

Plaintiff's underinsured motorist coverage was part of a six-month automobile policy that had renewed on June 19, 2009, and continued through December 19, 2009. The policy had a reducing clause, which curtailed the coverage owed to Wolf by the amount she received from other sources (e.g., another driver's liability coverage). The policy defined an "underinsured motor vehicle" as a vehicle insured with "bodily injury liability limits less than the limits of liability of this Underinsured Motorist coverage." The policy also contained an elasticity clause,

which stated, "Terms of this policy which are in conflict with the statutes of the state in which this policy is issued are changed to conform to those statutes."

During summary judgment, insurer argued that the Truth in Auto Law had no effect on plaintiff's UIM coverage and, therefore, the terms of the policy as written prohibited plaintiff from collecting any additional damages. Plaintiff, on the other hand, argued that the elasticity clause caused her insurance policy to automatically conform to the changes the Truth in Auto Law instituted on November 1, 2009, meaning the reducing clause and the definition of an "underinsured motorist" in her policy were no longer valid.

The circuit court sided with the insurer, finding the Truth in Auto Law only applied to policies issued or renewed after November 1, 2009, not plaintiff's existing policy, and dismissed plaintiff's claim. Plaintiff appealed.

The court of appeals affirmed. The court noted that the Truth in Auto Law was in effect from November 1, 2009, until the legislature replaced it, effective November 1, 2011, and that, during its brief lifespan, the law prohibited reducing clauses and created broader protections for UIM coverage. The law explicitly stated that it applied prospectively -- only affecting insurance policies issued or renewed on or after the November 1, 2009, effective date. Many policies, like the one held by plaintiff, contained "elasticity clauses," which mandated that the insurance policy must conform to the law of the state where it is issued. Plaintiff renewed her insurance policy before the Act's effective date, but she suffered injuries in a car accident after the law took effect. Plaintiff argued on appeal that, because her insurance policy contained an elasticity clause, the changes instituted by the Truth in Auto Law should apply to her coverage. The court of appeals rejected plaintiff's position, noting that, in accordance with the legislature's explicitly mandated effective date, the changes in the law simply did not exist for policies that were renewed or issued before November 1, 2009. As a result, plaintiff's policy could not "conflict" with a law that only applied to renewed or issued policies after November 1, 2009, which hers was not.

Michael J. Wirth of Peterson, Johnson & Murray, S.C. successfully represented the insurer.

Legal Malpractice – Probate – Summary Judgment – Damages – MacLeish v. Boardman & Clark LLP, (Court of Appeals, 14 AP 575, March 5, 2015) (unpublished)

Plaintiffs, siblings of Estate, claimed that defendant attorney was negligent in probating the estate of their father following his death in 1984, most notably by failing to advise his widow and personal representative, Thelma MacLeish, that their father's estate should claim a particular type of partial marital property deduction on their father's federal estate taxes. The siblings alleged that this negligence resulted in monetary losses to the siblings, as beneficiaries of Thelma's estate, upon her death in 2008. Defendant moved for summary judgment asserting, even if negligence could be proven, the siblings could not prove damages resulting from defendant attorney's conduct.

The circuit court granted summary judgment for defendant attorney on the grounds that the there was no evidence of damages to the siblings sufficient to raise a genuine issue of material fact and that the damages element was based on speculation

The court of appeals reversed, finding that certain materials that were submitted to the circuit court on summary judgment amounted to a factual dispute. Relying on large part on the siblings' expert's affidavit, the court concluded that the summary judgment materials submitted to the circuit court, considered in the light most favorable to the non-moving party, reflected a genuine issue of fact regarding the potential to prove damages based on the legal theories now advanced by the parties and therefore summary judgment on that ground was error.

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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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