PETERSON JOHNSON MURRAY

Recent Case Update

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Insurance – Bad Faith – Summary Judgment – Muller v. General Casualty Insurance Company, (Court of Appeals, 14 AP 1296, March 24, 2015) (unpublished)

On April 13, 2013, plaintiffs' son was involved in an auto accident that resulted in a property damage claim. Defendant insurer denied the claim, stating the policy had been effectively cancelled on April 11 due to failure to pay the premium before the cancellation date.

Plaintiffs commenced this action contending that the policy was in effect on the date of the accident. Defendant insurer moved for summary judgment on the grounds that plaintiffs were sent a billing statement on March 1 requiring a premium payment by March 22 and that, when payment was not received, a notice of intent to cancel was mailed to plaintiffs on March 27 advising that their policy would be cancelled unless the premium was received by defendant insurer prior to April 11, the effective date of cancellation. The notice further advised plaintiffs that any payments received after the cancellation date would be applied to any balance owed. A separate notice was mailed to plaintiffs on April 11 advising them their policy had been cancelled and any payment received after that date would be considered late and would not reinstate coverage. Plaintiffs allege that they made a telephonic payment on April 12. In addition, a claims representative investigated the accident and determined a fair valuation for plaintiffs' vehicle and issued a check on April 18. However, the claims representative was advised by underwriting that the policy had been cancelled prior to the accident, and the check was cancelled on April 22.

The trial court granted defendant insurer's motion for summary judgment, concluding that no genuine issue of material fact existed concerning whether the insurance contract was in effect on April 14, 2013, or whether defendant insurer lacked any reasonable basis to deny payment given the effective cancellation of the policy on April 11. Plaintiffs appealed.

The court of appeals affirmed, finding that defendant insurer did not waive its cancellation defense and that the insurance contract's effective cancellation prior to the date of the accident precluded a claim by plaintiffs for bad faith.

Personal Injury – Jury Verdicts – Dante v. 1st Auto & Casualty Ins. Co., (Court of Appeals, 14 AP 1490, March 25, 2015) (unpublished)

During a snowstorm, the defendant, while traveling on the highway, attempted to change lines to avoid a state patrol car positioned on the side of the road. In the process of changing lanes, defendant hit a patch of ice and lost control of his vehicle, causing his vehicle to veer back into the direction of the state patrol vehicle. Defendant's vehicle ultimately contacted the patrol car, causing plaintiff injuries.

At trial, the jury returned a verdict finding that defendant was zero percent negligent and not a cause of plaintiff's injuries. On motions after verdict, plaintiff asked the trial court to change the jury's answers. Finding that no credible evidence supported the jury's answers, the trial court changed them to finding that defendant was 100% negligent and that his negligence caused plaintiff's injuries. Defendant appealed.

The court of appeals reversed, finding that the trial court erroneously changed the jury's answers because there was credible evidence supporting them. The court noted that, when there is conflicting credible evidence, the question is to be resolved by the jury.

Insurance – Recreational Immunity – Roberts v. T.H.E. Insurance Company, (Court of Appeals, 14 AP 1508, March 26, 2015) (unpublished)

Plaintiff attended a charity event. Defendant agreed to donate free tethered hot air balloon rides during the charity event. Plaintiff was standing in a line of people waiting to take a tethered hot air balloon ride when a gust of wind caused one of the balloon's tether lines to snap and the balloon and its basket slid along the ground and struck plaintiff, knocking her down and causing her injuries. Defendant moved for, and the trial court granted, summary judgment pursuant to Wis. Stat. §895.52, the recreational immunity statute, finding that defendant was immune from liability. Plaintiff appealed.

The question on appeal was whether the operator of a tethered hot air balloon ride at a charity event was immune from liability for injuries to a person waiting in line for a ride

when a gust of wind snapped a tether, sending the balloon and its basket sliding across the land, where it crashed into the person and knocked her down. On appeal, defendant argued that it was immune and entitled to summary judgment because plaintiff was engaging in the recreational activity of ballooning on property occupied by defendant. Plaintiff argued that §895.52 did not apply because negligent acts or decisions not directed at the condition of the land were not entitled to immunity and there was nothing about the land that caused plaintiff's injuries.

The court of appeals affirmed, finding that defendant was immune from plaintiff's claims for injury under the plain meaning of Wis. Stat. §895.52. Specifically, the court of appeals rejected plaintiff's argument that Wisconsin precedent interpreted the recreational immunity statute to require proof that the negligence of the party asserting immunity was not sufficiently "directed at the condition of the land" to trigger immunity.

Insurance – Exclusions – Underinsurance – Smith v. Acuity, A Mutual Ins. Co., (Court of Appeals, 14 AP 1587, April 8, 2015) (unpublished)

Plaintiff was injured when he was struck by a vehicle as he was proceeding through an intersection on his motorcycle. The operator of the other car and her insurer paid the policy limits and plaintiff was also compensated under the policy covering his motorcycle. Plaintiff also sought UIM benefits from the policy that named his two automobiles, but not his motorcycle. Plaintiff's request for UIM benefits was denied by defendant insurer because his motorcycle was not listed on the declarations page and the policy specifically excepted coverage of motor vehicles owned but not listed in the written agreement. The trial court granted defendant insurer's motion for summary judgment holding that the insurer had no duty to pay UIM benefits to plaintiff because of the "drive other car" exclusion contained in the subject policy. Plaintiff appealed.

The court of appeals affirmed, finding that the subject policy contained a clear, unambiguous "drive other car" exclusion. Specifically, the court noted that the terms of plaintiff's contract clearly barred plaintiff from recovering UIM benefits in this instance --while operating a vehicle he owned but did not pay a premium to insure with defendant insurer.

Lemon Law – Verdicts – Comparable Replacement Vehicle – Porter v. Ford Motor Company, (Court of Appeals, 14 AP 975, April 21, 2015)

In 2010, plaintiffs purchased a 2010 Ford Escape. The vehicle had a red metallic exterior and stone-colored premium cloth seats. Plaintiffs had a problem with the vehicle's transmission. Between June 2010 and July 2012, plaintiffs brought in the vehicle for repairs approximately 9 times and plaintiffs allege that the vehicle was out of service for more than 30 days in the first year after they purchased it. When numerous repairs failed

to correct the problem, plaintiffs sent Ford a Lemon Law notice seeking a comparable new vehicle. Ford made a comparable new vehicle available for plaintiffs. Plaintiffs opined that the vehicle Ford made available was not comparable, even though the comparable vehicle was a 2012 Ford Escape that had all of the same equipment and accessories as the 2010 vehicle, but the interior was dark and the exterior was blue. Plaintiffs rejected the comparable replacement vehicle because the colors were wrong. Ford insisted that the proposed replacement vehicle was comparable and that Ford satisfied its obligations under the Lemon Law.

Plaintiffs sued under several theories, including Wisconsin's Lemon Law. At trial, Ford denied both that the 2010 Escape was a lemon and that Ford failed to provide plaintiffs with a comparable new vehicle.

At trial, the jury retuned a verdict finding that the 2010 Escape was a "lemon" but that Ford did not violate Wisconsin's Lemon Law because it provided plaintiffs with a comparable vehicle.

Plaintiffs filed motions after verdict arguing that they should be granted judgment notwithstanding the verdict on their Lemon Law claim because Ford should not have been allowed to argue defenses that plaintiffs claimed were "inconsistent," namely, that the 2010 Escape was not a lemon, and, even if it was a lemon, Ford provided a "comparable" replacement. The trial court denied plaintiffs' motions after verdict, but the court acknowledged that plaintiffs did not want either the vehicle they originally purchased or the replacement vehicle that Ford provided, and ordered Ford to issue plaintiffs a refund for the purchase price of the 2010 Escape and ordered plaintiffs to return the car. Plaintiffs appealed.

On appeal, plaintiffs argued that they should have been granted judgment notwithstanding the verdict on their Lemon Law claim because Ford should not have been allowed to present inconsistent defenses that the 2010 Ford Escape that the plaintiffs purchased was not a lemon and, even if it was a lemon, Ford provided a comparable replacement.

The court of appeals affirmed, agreeing with the trial court's holding that Ford's defenses directly corresponded to the two elements that the plaintiffs were required to prove in order to recover under Wisconsin's Lemon Law -- that (1) their car was a lemon and (2) Ford failed to provide a comparable replacement. Thus, the court held, it was not inconsistent for Ford to defend both elements of plaintiff's Lemon Law claim. The court also noted that plaintiffs' argument that Ford should have been required to "choose" between defending the various elements of a Lemon Law claim would only make sense if the law allowed them to recover if they could prove *either* that their car was a lemon *or* that Ford failed to provide a comparable replacement. Lastly, the court noted that

proving that a manufacturer failed to comply with the refund or replacement requirement is a necessary requirement of a successful Lemon Law claim.

Michael J. Wirth of Peterson, Johnson & Murray, S.C. successfully represented Ford throughout the underlying trial.

Employment – Non-Competes – Runzheimer International, Ltd. v. Friedlen, (Wisconsin Supreme Court, 13 AP 1392, April 30, 2015)

On April 30, 2015, the Wisconsin Supreme Court issued an important decision in favor of employers which settled a long-standing dispute concerning the consideration necessary to enforce a restrictive covenant signed by a current employee. In Runzheimer, the Court ruled that continued at-will employment constitutes lawful consideration to support an otherwise reasonably drafted restrictive covenant agreement signed by a current employee. What this means for employers in Wisconsin is that if the employer tells a current employee that he/she will be terminated unless he/she signs a non-compete agreement, valid consideration will be found to have existed for that restrictive covenant if the employee executes the agreement and retains his position, with no additional monetary payments or other consideration necessary for enforcement.

In Runzheimer, after the employee, Friedlen, had worked for the employer, Runzheimer International, as an at-will employee for over twenty (20) years, Runzheimer required Friedlen to sign an agreement containing various restrictive covenants. No consideration was provided to Friedlen for signing the new agreements other than the right to remain employed by Runzheimer. In other words, Friedlen did not receive any additional salary or other benefit for signing the agreement -- he was simply able to retain his current position if he signed the agreement. Friedlen testified he felt forced to sign the agreement and understood that he would be fired if he did not sign it.

Two years after he signed the agreement, Friedlen was fired by Runzheimer and subsequently accepted a position with a competitor of Runzheimer. Runzheimer sued Friedlen and his new employer for breach of the restrictive covenants. Friedlen and his new employer argued that the agreement was unenforceable because it was not supported by adequate consideration. The trial court agreed and ruled that an employer's offer of continued-at-will employment to support a restrictive covenant with an existing employee was "illusory" and therefore unenforceable. Runzheimer appealed and the appellate court certified the issue directly to the Supreme Court, as the appellate court acknowledged the law on the issue was unsettled in Wisconsin.

The Supreme Court began its analysis by recognizing existing precedent that the promise of new employment at the beginning of the employment relationship is lawful consideration even though the employer is free to terminate the employee at any time

thereafter. The Court then discussed the differences between a new employment relationship and the relationship at issue in the case before it -- an existing employment relationship. The Court then reviewed existing case law on the issue of lawful consideration to support a restrictive covenant entered into with an existing employee. Rejecting Friedlen's argument that the 2009 decision of Star Direct v. Dal Pra, 2009 WI 76, stood for the principle that continued employment was not sufficient consideration, the Court noted that Star Direct merely acknowledged that additional consideration was required when a current employee was required to sign a restrictive covenant, but did not address whether continued at-will employment could be considered adequate additional consideration.

In its decision, the Court noted that other jurisdictions were split on the issue of continued at-will employment constituting lawful consideration and noted a "distinct minority" that do not find continued employment as sufficient consideration. In ruling with the majority, the Court held that an employer's promise to continue to employ an at-will employee constitutes lawful consideration in Wisconsin. Specifically, the Court held "an employer's forbearance in exercising its right to terminate an at-will employee constitutes lawful consideration for signing a restrictive covenant."

It should be noted that the Runzheimer Court specifically addressed the issue of whether continued at-will employment was "lawful" consideration. What the Court did not address is the related issue of whether continued employment was "sufficient" consideration. The Court left that particular issue for the parties to address in their contracts.

The Runzheimer Court also addressed two other issues for Wisconsin employers and employees. First, the Court recognized that although a Wisconsin employee can bring a "wrongful discharge" claim if a discharge is contrary to a fundamental and well-defined public policy as evidenced by existing law, an employee who is terminated for failing to sign a restrictive covenant does not have a valid wrongful discharge claim. Second, although the Court addressed the issue of whether continued employment was lawful consideration to support a restrictive covenant, the employer remains bound by long-standing principles of contract formation including fraudulent inducement and the covenant of good faith and fair dealing, which prohibit employers from misrepresenting their intention to continue to employ an employee.

One issue the Court did not address was the enforceability of the underlying restrictions contained within the covenants not to compete, including the reasonable standards with respect to the scope and duration of such covenants. However, this issue may be addressed by the Wisconsin legislature, which is currently considering legislation to repeal and recreate Wisconsin's Restrictive Covenant Statute, Wis. Stat. §103.465. If

passed, this legislation would implement broad-sweeping changes to the current state of the law concerning restrictive covenants in Wisconsin.

Finally, although the Runzheimer Court settled the issue of continued employment as lawful consideration for a restrictive covenant signed by a current employee, the business implications for each employer considering any such agreements must be taken into account. Stated otherwise, before an employer passes out restrictive covenants to be signed by all employees, the employer must consider the consequences of losing key employees upon their refusal to sign such agreements.

For further information about the impact of the Runzheimer decision, whether current restrictive covenants comply with existing law, or any other employment issue, contact Maria Sanders at Peterson, Johnson & Murray, S.C.

Frivolous Claims – Summary Judgment – Brandt v. Joe's Crushing, LLC, (Court of Appeals, 13 AP 2257, May 13, 2015) (unpublished)

Plaintiffs' claims arose out of a complex set of business and financial relationships between and among various related business entities and the bankruptcy of one of those entities, CAM Recycling and Materials, Inc. In 2005, plaintiffs founded CAM, which recycled and disposed of concrete. In 2007, defendant agreed to invest in CAM. In 2009, CAM commenced bankruptcy. For the benefit of CAM's creditors, the bankruptcy trustee sought court approval to liquidate assets listed in the trustee's May 2010 summary of CAM's property. Included within the trustee's asset summary was a Bobcat T300, which the trustee noted was in the possession of either plaintiffs or their minor son. The bankruptcy court determined that plaintiffs did not prove that they owned items for which they made a personal claim in CAM's bankruptcy case. The bankruptcy court authorized the sale of CAM's assets, which defendants purchased. The bankruptcy court noted that if there was a dispute regarding ownership of a particular asset, defendants would have to address that dispute in the future.

In 2011, plaintiffs sued defendants for conversion arising from defendants' refusal to return property included in the CAM asset sale which plaintiffs claimed they owned personally, for breach of fiduciary duty relating to CAM, and other claims. Defendants moved for summary judgment.

The trial court granted defendants' motion for summary judgment -- noting that the only opposition entailed sham affidavits submitted by plaintiffs -- and the court concluded that plaintiffs' claims were frivolous. Specifically, the court held that plaintiffs' claims were frivolous because there was absolutely no basis in fact or law for the claims, the absence of facts should have been clear at the time plaintiffs were deposed, plaintiffs submitted sham affidavits to avoid summary judgment, and plaintiffs increased the cost of the defense by

failing to comply with court orders. As a sanction, the court awarded $150,000 in attorney's fees. Plaintiffs appealed, arguing that material factual disputes should have precluded summary judgment and their claims were not frivolous.

The court of appeals affirmed, noting the trial court's emphasis on plaintiffs' conduct throughout the litigation, i.e., plaintiffs' claim that their nine-year-old son purchased equipment in the sum of $10,000 that should not have been included in bankruptcy. The court also affirmed the award of attorney's fees noting that plaintiffs ignored the circuit court's findings that plaintiffs did not offer sufficient facts to support their claims at the summary judgment stage, filed sham affidavits on summary judgment, and increased litigation costs by failing to comply with circuit court orders.

Insurance – Interest on Claim – Dilger v. Metropolitan Property and Casualty Insurance Company, (Court of Appeals, 14 AP 1851, June 3, 2015)

Plaintiff was a police officer for the city of Brookfield. Shortly after midnight on December 11, 2009, plaintiff was on duty and walking along West North Avenue in response to a call when he was struck from behind by a vehicle that did not stop. Ms. Druecke, who had consumed several alcoholic drinks earlier in the night, had struck plaintiff on her drive home from a bar, although she did not know it at the time. Ms. Druecke turned herself in to the police three days later to be interviewed and maintained she thought she hit a deer.

At the time of the accident, Ms. Druecke had an automobile policy that provided liability coverage of $500,000 and an umbrella policy with a $1,000,000 limit through defendant insurer. On May 11, 2011, plaintiff filed a written claim for $500,000 with defendant insurer pursuant to Wis. Stat. §628.46 as a "partial demand" upon Ms. Druecke's policies. On June 13, 2011, defendant insurer rejected plaintiff's demand on the grounds there were significant questions concerning liability, including whether Ms. Druecke's vehicle struck plaintiff.

On June 17, 2011, plaintiff filed suit seeking compensatory damages, punitive damages, and Wis. Stat. §628.46 interest. On September 22, 2011, Ms. Druecke pled guilty to hit-and-run causing injury to plaintiff in a related criminal case and, on January 5, 2012, Ms. Druecke was sentenced to jail. On February 14, 2012, plaintiff demanded payment of the full $1.5 million of Ms. Druecke's insurance policies plus Wis. Stat. §628.46 interest, referencing plaintiff's medical treatment records, past earning losses, and future earning losses totaling between $1.6 million and nearly $1.85 million. The case settled in late January 2013, with defendant insurer paying $1.5 million and Ms. Druecke contributing an additional $40,000. The court thereafter dismissed all claims, with the exception of plaintiff's claim for §628.46 interest.

The trial court held that plaintiff was owed §628.46 interest, finding that Ms. Druecke's guilty plea resolved any questions about her liability in causing plaintiff's injuries and that, by the time she was convicted and sentenced, defendant insurer had notice of damages that "were far, far in excess of what was the insurance available under the circumstances." The trial court tied the interest award to Ms. Druecke's sentencing date of January 5, 2012, instead of her guilty plea on September 22, 2011, reasoning that in the intervening period Ms. Druecke could have attempted to withdraw her guilty plea and the court would have had to treat that request liberally. Altogether, the trial court ordered defendant insurer to pay $178,191.78 in interest to plaintiff. Defendant insurer appealed the trial court's decision to award interest and plaintiff appealed the amount awarded.

On appeal, defendant insurer challenged the trial court's decision to award §628.46 interest, arguing that liability issues persisted even after Ms. Druecke's criminal conviction. Plaintiff challenged the court's calculation of the amount of interest awarded, contending that interest should have begun accruing when defendant insurer denied its pre-suit claim or, alternatively, when Ms. Druecke pled guilty to the criminal charge rather than at the sentencing date.

The court of appeals affirmed, finding that neither party demonstrated that the great weight and clear preponderance of the evidence dictated a finding contrary to that of the circuit court. Noting that both parties' arguments were viable, the court of appeals held that the circuit court's decision was not contrary to the great weight and clear preponderance of the evidence and it was consistent with the caveats set forth in Kontowicz v. American Standard Insurance Co., 2006 WI 48, 290 Wis.2d 302, 714 N.W.2d 105.

Product Liability – Spoliation – Angrist v. 4520 Corp., Inc., (Court of Appeals, 14 AP 1855, June 11, 2015) (unpublished)

This product liability and negligence case arises out of a riding lawn mower accident in which plaintiff was injured. Plaintiff purchased the riding lawn mower from defendant, Small Engine Repair. The mower had been manufactured by a company that transferred pertinent liabilities to defendant, 4520 Corporation, Inc.

As manufactured, the mower was designed to include a safety feature called an "operator presence system" which was designed to kill the engine and stop power to the rotating mower blades whenever the weight of the operator was not on the operator's seat. The function only worked, however, if a "connector" that was located underneath the driver's seat was plugged in. Thus, unplugging the connector under the seat kept the electrical circuit open and allowed the engine to continue to run and the blades to rotate, even when no one was sitting on the seat.

On the day of the accident, plaintiff was operating the mower when it began to slide down a hill. He alleged that he tried to leap clear of the mower, but one of his feet went under the mower and connected with the rotating blade, injuring him. A neighbor testified that, upon arriving on the scene, the riderless mower's engine was still running and he heard the mower blades rotating.

Approximately one year after the accident, an attorney retained by plaintiff hired an investigator to examine the mower. However, defendants were not notified of the examination. As part of his examination, plaintiff's investigator unplugged and plugged in (or, perhaps, plugged in and unplugged) the connector multiple times. Plaintiff was present during the inspector's examination, but plaintiff testified that he did not recall whether the connector was plugged in or unplugged when the investigator began his examination. The investigator passed away after examining the mower.

Plaintiff subsequently filed suit, alleging that defendants were negligent in "designing, constructing, manufacturing, installing, maintaining, servicing and inspecting" the mower. Plaintiff's theory was that, had the connector been plugged in and, thus, the safety system functioning, then the blades would have stopped rotating between the time plaintiff leapt from the seat and the time the blades hit his foot, reducing the severity of or eliminating the chance of injury.

Defendants filed motions for spoliation sanctions based on the investigator's manipulations of the connector without prior notice to the defendants, seeking sanctions that included exclusion of evidence relating to the condition of the mower at the time of the accident. Defendants also filed motions for summary judgment arguing that if the court excluded evidence regarding the condition of the mower at the time of the accident as a sanction for spoliation, no triable issues would remain.

The circuit court held that plaintiff's investigator altered the condition of the lawnmower, thereby eliminating evidence bearing on the question of whether the connector was plugged in at the time of his inspection by the investigator and, by implication, whether the connector was plugged in at the time of the accident and at the time plaintiff purchased the mower. The circuit court ordered as a sanction for spoliation that no evidence be introduced at trial on the topic of whether the mower blades were rotating at the time of the accident including the neighbor's testimony that the blades continued to rotate immediately following the accident. After ordering this sanction, the court addressed motions for summary judgment and determined that, given the exclusion of evidence as a sanction for spoliation, plaintiff could not meet his burden at trial. Plaintiff appealed.

The court of appeals affirmed, finding that the trial court properly exercised its discretion in excluding evidence from trial as a sanction for spoliation and granting summary

judgment on the basis that there was no evidence upon which plaintiff could prove his claims.

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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