PETERSON JOHNSON MURRAY

Recent Case Update

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Summary Judgment – Expert Testimony – Negligence – Walker v. Sacred Heart Hospital, (Court of Appeals, 15 AP 805, January 4, 2017) (unpublished)

This lawsuit involves personal injury claims stemming from plaintiff's sexual assault while a patient in defendant's psychiatric ward. Plaintiff claims that defendant was negligent in failing to adequately supervise both her and the patient that assaulted her to prevent the assault. Plaintiff did not name or disclose an expert witness addressing defendant's standard of care. Defendants moved for summary judgment, arguing that expert testimony was required to support plaintiff's negligence claim and that, without one, she could not prevail on her claim. The circuit court granted summary judgment, finding that plaintiff's claims involved issues regarding defendant's professional judgment and medical care that required expert testimony.

Plaintiff appealed, contending that the circuit court erred in dismissing her negligence claim due to her failure to disclose an expert liability witness to testify about the standard of care for the security of patients in the psychiatric ward and that the doctrine of *res ipsa loquitur* applied, negating the need for expert testimony.

The court of appeals affirmed, concluding that plaintiff was required to have an expert witness testify concerning defendant's standard of care and that the doctrine of *res ipsa loquitur* did not apply. The court noted that expert testimony was necessary to address how, where and to what degree defendant could control the assaulting patient in light of statutory restrictions. Consequently, the court determined that defendant's standard of care involved "complex facts and circumstances outside the common knowledge and ordinary experience of an average juror."

The court further noted that plaintiff was incapable of demonstrating the elements necessary for the application of *res ipsa loquitur*, namely, exclusive control over the assaulting patient.

Medical Malpractice – Daubert – Seifert v. Balink, (Supreme Court, 14 AP 195, January 6, 2017)

This lawsuit involves claims of medical malpractice. The decision represents the Wisconsin Supreme Court's first opportunity to interpret and apply amended Wis. Stat. §907.02, which adopted the Daubert standard for the admissibility of expert testimony. The action alleged that the defendant doctor was negligent in the prenatal care of the plaintiff's mother and the plaintiff's delivery.

To support their claim, plaintiffs relied on their obstetrical expert witness, Dr. Wener, who testified as to the standard of care for family practitioners practicing obstetrics with regard to prenatal care, labor, and delivery, and concluded that the defendant doctor fell below that standard. Defendants challenged Dr. Wener's testimony in the circuit court, on appeal and to the Wisconsin Supreme Court. The circuit court and the court of appeals concluded that Dr. Wener's testimony was admissible pursuant to Wis. Stat. §907.02. Specifically, defendants argued that Dr. Wener's testimony was inadmissible pursuant to Daubert because he did not apply a sound methodology and instead rested on his qualifications and "personal references," he did not rely on the medical literature or other recognized sources of reliability, and the application of his opinions to the facts of the case was flawed because his testimony was internally inconsistent.

The Wisconsin Supreme Court affirmed, concluding that the lower courts properly concluded that Dr. Wener's testimony was admissible pursuant to the Daubert standard. With respect to the first challenge, the court noted that, because Dr. Wener applied an accepted medical method relied upon by physicians and had extensive personal experience and knowledge pertaining to the standard of reasonable care, the circuit court did not erroneously exercise its discretion in admitting his testimony. On the second challenge, the court noted that reliance on the literature, especially with an experience-specific methodology, was not a *sine qua non* to admissibility and it did not necessarily correlate to reliability. On the third challenge, the court held that Dr. Wener's opinions on the facts went to the weight of Dr. Wener's testimony, not its admissibility. In concluding that the circuit court did not erroneously exercise its discretion in admitting Dr. Wener's testimony as reliable based on personal experiences and that Dr. Wener reliably applied his methodology to the facts, the court noted that "[t]rial judges are gatekeepers, not armed guards."

Breach of Contract – Duty to Defend & Indemnify – MillerCoors, LLC v. Millis Transfer Inc., (Court of Appeals, 15 AP 1894, February 1, 2017) (unpublished)

This dispute involves the duty to defend and indemnify. Millis provided transportation and related services to its customers. It entered into a master transportation services agreement ("MSTA") whereby it agreed to transport MillerCoors' products to various locations. While transporting MillerCoors' products, one of Millis's employees was injured in a single-vehicle

accident. The employee filed suit against Millis and MillerCoors alleging that negligence by each caused the injuries. Pursuant to an indemnification provision in the MSTA, MillerCoors tendered its defense to Millis multiple times, but Millis refused to defend MillerCoors. Eventually, MillerCoors reached a settlement in the amount of $200,000 with the injured employee. Millis contributed $50,000 towards that settlement amount. MillerCoors then filed this lawsuit asserting that Millis breached the indemnification provision of the MSTA by failing to defend and indemnify MillerCoors with regard to the employee's lawsuit.

The parties stipulated that (1) MillerCoors was not negligent with respect to the employee's accident; (2) the Millis employee's injuries were not caused by MillerCoors' conduct; and (3) reasonable defense and settlement costs incurred by MillerCoors were $825,000. Based on the parties previous arguments on summary judgment (which the circuit court previously denied) and the new stipulations, the circuit court granted summary judgment against Millis and its insurer in favor of MillerCoors.

Millis and its insurer appealed, arguing that the circuit court erred in determining that Millis breached its contractual duty to MillerCoors by failing to defend and indemnify it in a negligence suit brought by one of Millis's employers. MillerCoors cross-appealed, seeking additional damages.

The court of appeals affirmed, finding that the employee's lawsuit triggered Millis's duty to defend MillerCoors. The court continued, noting that although Millis did not have a duty to indemnify MillerCoors for its own negligent acts in claims or actions filed by Millis employees, Millis did have a duty to defend MillerCoors in such actions when Millis or its employees were claimed to be negligent.

Summary Judgment – Safe Place – Flores v. Cincinnati Insurance, (Court of Appeals, 15 AP 2407, February 2, 2017) (unpublished)

Plaintiff was injured while working as part of an inmate project crew assigned to work on Dodge County Antique Power Club (the "Club") grounds pursuant to a contract between the Club and the Department of Corrections ("DOC"). At the time of her injury, plaintiff was an inmate at the DOC's John C. Burke Correctional Center. Another inmate assigned to the project crew accidentally struck plaintiff in the head with a plastic barrel while moving the barrels from a trailer to a shed. Plaintiff filed a complaint against the Club and its insurer, alleging that the Club was vicariously liable for the other inmate's negligence, that the Club failed to properly supervise and manage its agents in the moving of the barrels, and that the Club failed to maintain a safe workplace, in violation of Wis. Stat. §101.11. The Club and its insurer filed a motion for summary judgment on grounds that it could not be held vicariously liable for the other inmate's actions because the record failed to demonstrate that any master/servant relationship existed, and the circuit court granted the motion after a hearing. Plaintiff appealed.

The court of appeals affirmed, finding that on the undisputed facts, no reasonable jury could return a verdict that the Club was vicariously liable for plaintiff's injuries. The court also

affirmed dismissal of plaintiff's breach of contract claim, finding that that contract was between the Club and the DOC, and plaintiff was not a party.

Arbitration – Claim Preclusion – Olson v. Ivanovic, (Court of Appeals, 15 AP 1803, February 22, 2017) (unpublished)

Plaintiffs contracted with defendants to sell software. As part of that agreement, the parties agreed to submit any disputes "arising out of or relating to" the agreement to arbitration. Following disputes, arbitration proceedings were in fact commenced and concluded with an award. Subsequently, however, plaintiffs filed suit in the circuit court raising various tort claims they believed were not subject to arbitration. The defendants filed a motion to dismiss on claim preclusion grounds. The circuit court granted the motion. Plaintiffs appealed.

The court of appeals affirmed on claim preclusion grounds, noting that obtaining a judgment would be meaningless if the losing party could simply turn around and relitigate the same claims addressed in that judgment. The court further noted that, subject to exceptions not applicable in this case, a valid and final award by arbitration has the same effect under the rules of claim preclusion as a judgment of a court.

Wrongful Death – Keeper / Owner – Drexler v. McMillan Warner Mutual Insurance Company, (Court of Appeals, 15 AP 2047, February 22, 2017) (unpublished)

This wrongful death action stems from a motorcycle accident with a horse. As plaintiff's husband was operating his motorcycle, he crashed into one of four horses that were running loose and ultimately died. The horses were allegedly kept at a nearby property owned by defendant. The complaint alleged that defendant was a "keeper" of the horses and had negligently failed to maintain the fences on his property so as to prevent the horses from escaping. In answer to the complaint, defendant asserted the horse involved in the accident was owned by the individual leasing defendant's property and he was responsible for maintaining the fence around it. Defendant did not provide feed for the horses, did not check on the horses, and did not go out to the pasture.

Defendant filed a motion for summary judgment asserting that because he was not the owner or keeper of the horse, he could not be liable for the death of plaintiff's husband. Plaintiff opposed summary judgment, arguing defendant had a duty to maintain and repair his fence, defendant was a "harborer" of horses, and any public policy determination barring liability was best reserved for after a trial. The circuit court granted summary judgment, holding that, as a matter of public policy, landlords cannot be held liable for harm caused by an animal unless they are the animal's owner or keeper. Plaintiff appealed.

The court of appeals affirmed, concluding that the Smaxwell v. Bayard, 2004 WI 101, 274 Wis.2d 278, 682 N.W.2d 923 decision barred plaintiff's negligence claim because it was undisputed that defendant was not the owner or keeper of the horse that caused the death of plaintiff's husband.

Recreational Immunity – Supervision – Wilmet v. Liberty Mutual Insurance Company, (Court of Appeals, 15 AP 2259, February 28, 2017)

Plaintiff filed a lawsuit alleging violation of the safe place statute, negligence and negligence per se when she tripped on a cement doorstop and was injured at a local pool, while she was there dropping off and supervising her grandchildren. The defendants moved for dismissal pursuant to the recreational immunity statute, Wis. Stat. §895.52. Plaintiff opposed summary judgment arguing that, in supervising her grandson, she "was not partaking in a recreational activity just prior to or when the incident occurred." Defendants responded that plaintiff's admitted activity of supervising her grandson, who was himself indisputably engaged in a recreational activity, was sufficient to bring plaintiff's claims within the ambit of the recreational immunity statute.

The circuit court granted summary judgment, concluding that plaintiff's claims were barred by Wis. Stat. §895.52, the recreational immunity statute, finding that supervision of a child engaged in a recreational activity fell within the statute's ambit. Plaintiff appealed.

The court of appeals affirmed, noting that supervision, by definition, involved overseeing and directing another's performance of an activity, and it was similar in meaning to "practice" and "instruction" -- two activities that are expressly within the recreational immunity statute's scope. The court concluded that a recreational activity includes "supervising" another person engaged in a recreational activity pursuant to the recreational immunity statute.

Insurance – UIM – Timely Notice – Shugarts v. Mohr, (Court of Appeals, 16 AP 983, March 14, 2017)

Plaintiff was injured in an automobile accident. More than four years after the accident and over one year after commencing a lawsuit against the other driver and that driver's insurer, plaintiff wrote to his personal underinsured motorist ("UIM") carrier, notifying it of a UIM claim arising from the accident. The UIM carrier moved for summary judgment arguing that plaintiff failed to provide timely notice of the UIM claim and that it was prejudiced as a result.

The circuit court granted the UIM carrier's motion for summary judgment, concluding as a matter of law that plaintiff failed to provide the UIM carrier with timely notice of his UIM claim, and that plaintiff had failed to rebut the presumption that the UIM carrier was prejudiced by the untimely notice.

The court of appeals affirmed, finding that plaintiff failed to provide timely proof of the UIM claim as required by the insurance policy and that plaintiff had failed to rebut the UIM carrier's presumption of prejudice.

Legal Malpractice – Statute of Limitations – Bleecker v. Cahill, (Court of Appeals, 16 AP 1231, March 15, 2017)

This lawsuit involves a legal malpractice claim. In 2003, plaintiff sought legal assistance from defendant attorney in reviewing a lease between plaintiff and a medical group to build a clinic on

plaintiff's land. Under the terms of the lease, plaintiff was to finance the construction costs and the medical group would reimburse plaintiff for those costs pursuant to an amortization schedule. The medical group agreed to an initial term of ten years with three, five-year options to extend the term of the lease. Plaintiff claims he told defendant attorney it was very important that he recover all of his construction costs and defendant attorney assured him the lease would accomplish that. In contrast, defendant attorney claims he informed plaintiff the amortization payments would end if the medical group terminated the lease at the end of the initial term of ten years.

In 2013, the medical group informed plaintiff it was terminating the lease. Plaintiff claims it was then that he first learned the lease permitted the medical group to terminate it at the end of the first term of ten years without being obligated to make the remaining amortization payments. Plaintiff filed this action against defendant attorney. Defendant attorney moved for summary judgment on statute of limitation grounds. The circuit court granted the motion, holding that plaintiff's claim accrued when the lease was signed in 2003, "before the ink was even dry," and thus the statute of limitations had run.

Plaintiff appealed, arguing that the circuit court erred in concluding his legal malpractice claim was barred on the basis the statute of limitations began to run in 2003 when he signed a lease agreement on which defendant attorney advised him, as opposed to in 2013 when he incurred actual damages in relation to the agreement.

The court of appeals reversed, holding that plaintiff's legal malpractice claim did not accrue until plaintiff actually suffered harm. The court continued, noting that the possibility that the medical group would not extend the lease and that plaintiff would suffer harm was just a "mere possibility" in 2003 and remained so until the medical group notified plaintiff that it would not extend the term of the lease.

WORKER'S COMPENSATION UPDATE

The appellate court action in the past year is on the unemployment insurance compensation front. But that is now relevant to worker's compensation cases because of an amendment to the Worker's Compensation Act that governs injuries sustained on or after March 2, 2016. The new provision, Wis. Stat. §102.43(9)(e), allows employers to avoid paying temporary disability compensation during periods when an injured employee is medically eligible for light work. To defend the claim, an employer must have a light work job suited to the employee's physical or mental limitations arising from the work injury. If the employer does not provide the light work because it fired or suspended the employee for misconduct or due to "substantial fault," the employer can invoke the defense. To put the recent appellate cases in perspective, it is necessary to understand how Wis. Stat. §102.43(9)(e) works.

First, before any of the defenses summarized below may be considered, the employee has to have been declared eligible for light work by a medical practitioner. The employer must also prove that it had work suited to the medical restrictions. The wage for that job is also relevant. If it is less than the average weekly wage at the time of injury, then even if the defense is held

valid, some compensation payment to make up for the partial loss in wages will have to be made. See Wis. Stat. §102.43(2). But if the employer can clear those hurdles, it may refuse to provide the light work *and* legally avoid paying temporary total disability compensation where it suspended or fired the employee for certain work infractions that are specifically defined in the statute.

Wis. Stat. §102.43(9)(e): Allows employers to defend claims for temporary disability compensation resulting from refusals to provide light work to a disabled employee because of the employee's misconduct. The definition of misconduct is imported from the Unemployment Insurance Act, specifically, Wis. Stat. §108.04(5), which provides:

> ". . . For purposes of this subsection, 'misconduct' means one or more actions or conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which an employer has a right to expect of his or her employees, or in carelessness or negligence of such degree or recurrence as to manifest culpability, wrongful intent, or evil design of equal severity to such disregard, or to show an intentional and substantial disregard of an employer's interests, or of an employee's duties and obligations to his or her employer. In addition, 'misconduct' includes:
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> (a) A violation by an employee of an employer's reasonable written policy concerning the use of alcohol beverages, or use of a controlled substance or a controlled substance analog, if the employee:
>
> 1. Had knowledge of the alcohol beverage or controlled substance policy; and
>
> 2. Admitted to the use of alcohol beverages or a controlled substance or controlled substance analog or refused to take a test or tested positive for the use of alcohol beverages or a controlled substance or controlled substance analog in a test used by the employer in accordance with a testing methodology approved by the department.
>
> (b) Theft of an employer's property or services with intent to deprive the employer of the property or services permanently, theft of currency of any value, felonious conduct connected with an employee's employment with his or her employer, or intentional or negligent conduct by an employee that causes substantial damage to his or her employer's property.
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> (c) Conviction of an employee of a crime or other offense subject to civil forfeiture, while on or off duty, if the conviction makes it impossible for the employee to perform the duties that the employee performs for his or her employer.

> (d) One or more threats or acts of harassment, assault, or other physical violence instigated by an employee at the workplace of his or her employer.
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> (e) Absenteeism by an employee on more than 2 occasions within the 120-day period before the date of the employee's termination, unless otherwise specified by his or her employer in an employment manual of which the employee has acknowledged receipt with his or her signature, or excessive tardiness by an employee in violation of a policy of the employer that has been communicated to the employee, if the employee does not provide to his or her employer both notice and one or more valid reasons for the absenteeism or tardiness.
>
> (f) Unless directed by an employee's employer, falsifying business records of the employer.
>
> (g) Unless directed by the employer, a willful and deliberate violation of a written and uniformly applied standard or regulation of the federal government or a state or tribal government by an employee of an employer that is licensed or certified by a governmental agency, which standard or regulation has been communicated by the employer to the employee and which violation would cause the employer to be sanctioned or to have its license or certification suspended by the agency.

Wis. Stat. §102.43(9)(e) also refers to Wis. Stat. §108.04(5g)(a) as an appropriate reason to terminate employment and deny payment of temporary disability compensation. The latter section uses the term "substantial fault" as a legitimate basis for an employer to terminate an employee's employment and deny the payment of unemployment insurance. Here is the definition from that statute:

> ". . . For purposes of this paragraph, 'substantial fault' includes those acts or omissions of an employee over which the employee exercised reasonable control and which violate reasonable requirements of the employee's employer but does not include any of the following:
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> > 1. One or more minor infractions of rules unless an infraction is repeated after the employer warns the employee about the infraction.
> >
> > 2. One or more inadvertent errors made by the employee.
> >
> > 3. Any failure of the employee to perform work because of insufficient skill, ability, or equipment."

Several of this year's appellate court cases dealt with the meaning of "misconduct" and "substantial fault" in the context of the UI statute.

Worker's Compensation – Entitlement – Misconduct – UI – Cockrell v. LIRC, (Court of Appeals, 16 AP 448, December 29, 2016)

This case arises out of a dispute over entitlement to unemployment insurance that is relevant to worker's compensation claims pursuant to Wis. Stat. §102.43(9)(e).

Zamon Cockrell injured his shoulder while employed by SSM Healthcare. His physician imposed light-duty restrictions that the employer said it could accommodate. On January 14, 2015, Cockrell's supervisor instructed Cockrell not to return to work on January 15 because the only available work would be outside his lifting restrictions. The supervisor said that Cockrell seemed to understand the instructions and that he would not come into work on January 15. However, he reported to work on January 15 because he said he did not want to lose the income. When his supervisor saw him at work, she terminated Cockrell's employment for **insubordination**. The employer subsequently resisted Cockrell's unemployment insurance claim, contending that his insubordination amounted to "**misconduct**" under Wis. Stat. §108.04(5).

The appeals court sustained the LIRC's misconduct finding. The court held that Cockrell's knowing refusal to follow his supervisor's order not to report for work on January 15, 2015, because Cockrell did not want to lose wages for the day was "conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which an employer has a right to expect of his or her employees." Cockrell's claim for unemployment insurance was denied. The case does not indicate what, if any, impact such a denial had on Cockrell's entitlement to worker's compensation. However, if Cockrell would have been provided with light work within his doctor's restrictions but was denied the work because of his misconduct, the employer would have been in good faith to deny payment for temporary disability compensation during the period when the light work restrictions were in effect.

Worker's Compensation – Entitlement – Misconduct – UI – Easterling v. LIRC, (Court of Appeals, 16 AP 190, February 2, 2017)

This case arises out of a dispute over entitlement to unemployment insurance that is relevant to worker's compensation claims pursuant to Wis. Stat. §102.43(9)(e). The employer, Badger Bus Lines, terminated the employment of Paulina Easterling after she violated its "wheelchair tip policy." Specifically, the policy mandated that bus drivers must properly secure wheelchair-bound passengers such that the wheelchair would not tip over during transport. In this case, the employee neglected to properly secure the wheelchair and, during transport, it tipped. The following day, her employment was terminated and the employer resisted her claim for unemployment insurance, alleging that her termination was the result of "**substantial fault**" under Wis. Stat. §108.04(5g).

In its decision, the LIRC specifically held that Easterling did not intend to leave the wheelchair unsecured, but it also rejected the notion that Easterling's neglect was an "**inadvertent error**" within the meaning of Wis. Stat. §108.04(5g)(a)2.

The appeals court reversed the LIRC and found that the failure to secure the wheelchair was the result of inadvertent error. It held that there was no substantial evidence supporting the notion that the failure to secure the wheelchair was the result of substantial fault. The employee Easterling testified at the unemployment insurance hearing that she failed to secure the wheelchair because she was overwhelmed by the number of elderly passengers getting onto her bus along with the wheelchair-bound passenger. Moreover, she lacked the usual assistance at the time, so she had to handle the passengers herself. She admitted putting the wheelchair into its proper position in the bus, but she also admitted that she failed to secure it.

The appeals court held that Easterling's failure to secure the wheelchair was the result of mistake and poor memory. It found no substantial evidence that she intended to violate the company policy. It defined inadvertent error as failing to act carefully or considerately, being inattentive and resulting from unintentional and heedless action. Thus, based on the testimony from Easterling, it found that her actions were inadvertent and that the substantial fault statute did not apply.

If this had been a worker's compensation claim and Easterling had been denied the right to perform light work during her healing period because she failed to secure the wheelchair, under this holding she would have been awarded temporary total disability compensation because the employer could not justify its refusal to offer light work under Wis. Stat. §102.43(9)(e).

Worker's Compensation – Unreasonable Refusal – Barry v. LIRC, (Court of Appeals, 15 AP 1853, February 14, 2017)

The Wisconsin Court of Appeals also recently decided a case involving rehire after recovery from a work injury.

This case involved a dispute between an injured employee and her employer about whether it unreasonably refused to rehire her after she was released from medical care without limitation. The employee's pre-injury job required her to drive from Milwaukee to Appleton to deliver and retrieve material for her employer. She then proceeded to three or four other northeastern Wisconsin cities to deliver additional material for her employer. While recuperating from the work injury, the employer's chief executive told the employee that due to business restructuring it would no longer require her to drive from Milwaukee to Appleton with deliveries, but she could keep her other northeastern delivery route when she was able to work.

The dispute in the case was whether the employee actually refused the alternate job offer, not whether the employer's business decision to terminate the Milwaukee-to-Appleton route was reasonable cause to refuse rehire.

The court affirmed a denial of worker's compensation under Wis. Stat. §102.35(3) because it found that the employer had offered rehire and that the employee refused the work offered to her. The key evidence was a letter the employer sent to the employee indicating that it assumed that she refused the restructured job and gave her a month to contact it and indicate that she wanted the position. It held the position open during that period, even though it was a busy season for the employer.

Worker's Compensation – Misconduct – UI – DWD v. LIRC, (Court of Appeals, 16 AP 1365, March 8, 2017)

The dispute turned on the meaning of a 2014 amendment to the unemployment insurance statute that defines when an employee's violation of an employer's written attendance policy constitutes "**misconduct**" under Wis. Stat. §108.04(5)(e). The issue is relevant to worker's compensation litigation because Wis. Stat. §102.43(9)(e) allows employers to avoid liability for temporary disability compensation when they refuse to offer light work because an employee's employment is suspended or terminated due to "misconduct" as set forth in the UI statute. Wis. Stat. §108.04(5)(e) defines "misconduct" as "**[a]bsenteeism** by an employee on more than 2 occasions within the 120-day period before the date of the employee's termination, unless otherwise specified by his or her employer in an employment manual of which the employee has acknowledged receipt with his or her signature . . . if the employee does not provide to his or her employer both notice and one or more valid reasons for the absenteeism."

In this case, an employer terminated an employee's employment because she missed one day of work without phoning to notify her employer at least two hours in advance of her shift. At hire, she signed a form acknowledging that her employer's attendance policy mandated employment termination for such a violation. The employer denied the employee's unemployment insurance claim, asserting a misconduct defense for violating the attendance policy.

A Department of Workforce Development unemployment insurance administrative law judge upheld the UI denial, but the LIRC reversed, ruling that the statute required employers to allow at least two work absences in 120 days before terminating employment.

In a 2-1 divided decision, the appeals court affirmed the LIRC's interpretation of the statute. It held that the LIRC's interpretation was the most reasonable alternative because a one-absence rule was too draconian. The court cited several prior appellate court decisions where the purpose of unemployment insurance was emphasized. It is an economic entitlement that is designed to help an employee transition between jobs. As a remedial law, ambiguous statutory provisions should be interpreted to allow compensation, not deny it. Thus, the court held that Wis. Stat. §102.08(5)(e) does not allow attendance policies with only one missed day of work to qualify as "misconduct" under that specific statutory provision. The court noted that the LIRC preserved its right to find that a single absence might qualify as "misconduct" under the more general provision of the UI law, Wis. Stat. §102.08(5). In this case, because the employee was absent due to illness she was not found to have engaged in general misconduct. The court suggested that if she had spent the day in a tavern, a general misconduct finding would have been warranted. The dissenting judge argued that the statute's language is plain that any employer-

promulgated attendance policy supplants the statute. The dissenting judge argued that Wis. Stat. §102.08(5)(e) is a "default" provision that sets the limit at no more than two absences in a 120-day period, only where the employer has no contrary 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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