PETERSON JOHNSON MURRAY

Recent Case Update

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Insurance – Contract Interpretation – Settlement – Fun Services of Kansas City v. National Cas. Co., (Court of Appeals, 15 AP 2367, March 16, 2017) (unpublished)

This action involves a claim by plaintiff against National Casualty Company ("National") for payment of the unpaid amount of a Kansas judgment that incorporated a settlement reached between plaintiff and National's insured, Hertz Equipment Rental Corporation ("Hertz"), without National's participation.

The underlying action involved a class action complaint filed by plaintiff in Kansas against Hertz alleging that Hertz had faxed unsolicited advertisements to plaintiff's facsimile machine in violation of the Telephone Consumer Privacy Act.

Plaintiff and Hertz agreed to the principal terms of settlement of the Kansas action, including a stipulated judgment against Hertz in the total amount of $40,782,000. The terms of settlement provided that Hertz would pay up to $12 million in partial satisfaction of the judgment, and that the plaintiff class could seek to collect the remaining $28,782,000 of the judgment only from National.

In this action, the circuit court dismissed plaintiff's complaint after reviewing cross motions for summary judgment on the basis that the property damages exclusion in National's policies precluded coverage.

The court of appeals affirmed on different grounds, based on an interpretation of New Jersey law argued by National and unrefuted by plaintiff. According to that interpretation, one prerequisite for an insurer's liability for the payment of a settlement reached by its insured without the insurer's participation was the insurer's wrongful refusal to defend. National did not wrongfully refuse to defend in the Kansas action because there was no evidence that Hertz requested a defense in the Kansas action under the policies under which plaintiff sought payment in this

action. Accordingly, having failed to establish a necessary prerequisite to payment, plaintiff failed to establish that it was entitled to payment of the Kansas settlement.

Breach of Contract – Expert Testimony – Court Discretion – Rydland v. Marina Cliffs Association, (Court of Appeals, 15 AP 1315, 15 AP 1565, March 21, 2017) (unpublished)

These appeals stem from an action brought by the Rydlands, alleging that the Marina Cliffs Association ("Association") was negligent in its maintenance and repair of the condominium unit in which the Rydlands resided and that the Association's conduct was in breach of its contract with the Rydlands. A jury found in favor of the Association and further determined that the Rydlands were negligent with respect to the purchase of the condo unit and the maintenance and repair of the atrium area of the unit. The Rydlands appealed, arguing in pertinent part that the circuit court erred in limiting the testimony of the Rydlands' expert.

Three years after litigation commenced, but still prior to the start of trial, defendants filed motions *in limine* to limit the testimony of the Rydlands' expert, Cassidy Kuchenbecker, to that of his deposition testimony. Defendants sought to limit Kuchenbecker's testimony to the fact that he did not offer an opinion as to the source of water infiltration. The trial court granted the motions, noting that the Rydlands' attempts to offer new opinions as to the source of the water infiltration violated the court's scheduling order, were filed too close to the start of trial, and essentially sought to shift responsibility from the Rydlands, who were responsible for the atrium area, to the Association, who was responsible for the flat roof.

The court of appeals affirmed, noting that allowing Kuchenbecker to testify about the flat roof as the source of water leakage at that late date in the proceedings would have led the defendants to retain an expert and essentially reopen the discovery process, rendering the initial scheduling order meaningless. The court of appeals concluded that the trial court was within its discretion to limit Kuchenbecker's testimony for the primary purpose of avoiding further delay in a case that had been pending for several years.

Expert Testimony – Evidence – State v. King, (Court of Appeals, 16 AP 319-CR, April 4, 2017) (unpublished)

King appealed the circuit court's judgment convicting him of possession of cocaine with intent to deliver, arguing, in pertinent part, that the circuit court erred in permitting a detective to provide expert testimony about slang or coded language used in drug transactions.

A detective testified at trial as an expert about the slang or coded language King used in phone calls from the jail to refer to drugs. King contended that the detective should not have been qualified as an expert because he had minimal experience and "had been a detective for just a few months." After his conviction, King appealed arguing that the circuit court erred in permitting the detective to provide expert testimony at trial.

The court of appeals affirmed, noting that, after hearing the detective's testimony about his experience, the circuit court made extensive factual findings: the detective worked as a police officer for the Milwaukee Police Department for over six years, including over four years in the

anti-gang unit; he became a detective six months earlier, tasked with investigating shootings that were related to drug trafficking, drug dealing, drug delivery, and drug distribution in the community; he interviewed many people regarding their involvement in illegal drugs, both drug users and people delivering or distributing drugs; he observed drug dealing on numerous occasions and observed undercover operations and/or buys; he worked extensively with confidential informants in undercover operations related to illegal drugs; he spent six to eight months working with the Federal Bureau of Alcohol, Tobacco, and Firearms investigating marijuana, heroin, and cocaine dealing; he repeatedly listened to and heard the type of language and terms used in drug dealing, both in telephone calls that jail inmates made and in conversations between confidential informants and buyers; he learned common names for cocaine through his work, including: "money," "work," and "cheese"; he kept updated with current drug use and distribution or delivery practices by visiting websites and attending trainings; he continued to increase his knowledge about terms or slang for different drugs and drug-related use or delivery practices by using internet searches for unfamiliar terms and by talking to other law enforcement organizations, confidential informants, and suspects to discern the meaning of unfamiliar slang; and he had a bachelor's degree in criminology and a master's degree in criminal justice.

Based on these findings and the circuit court's application of them to Wis. Stat. §907.02(1), the court of appeals concluded that the circuit court properly found that the detective had specialized knowledge about slang or coded language related to drug use and/or delivery practices that would assist the trier of fact in understanding the evidence.

Government Contractor – Summary Judgment – Negligence – Melchert v. Pro Electric Contractors, (Wisconsin Supreme Court, 13 AP 2882, April 7, 2017)

Plaintiffs brought suit against Pro Electric after it severed a sewer lateral during an excavation. The broken lateral caused flooding damage to plaintiffs' property.

The Wisconsin Department of Transportation ("DOT") approved a plan for the improvement of a five-mile stretch of highway and that plan consisted of over 1,000 pages and contained specifications and detailed diagrams for the installation of new asphalt pavement, curbs, gutters, sidewalks, and traffic signals. Following the bidding process, DOT awarded the project to a general contractor, which entity entered into a subcontractor agreement with Pro Electric to perform work on certain parts of the project, including the installation of traffic signals. For some of those signals, the DOT plan directed Pro Electric to install new concrete bases to support the traffic signal poles.

To do so, employees of Pro Electric augered the holes for the concrete supports by utilizing a circular auger attached to a truck at the end of a boom. When utilizing such an auger, the operator has no ability to see into the hole being augered. However, DOT retained an engineering firm to ensure that Pro Electric fully complied with the project plan, and an engineer employed by that firm was on site to supervise all augering work. Under the plan, the engineer had the authority to adjust the locations of any of the work being performed -- Pro Electric had no such authority.

At some point after the project had been completed, sewage backed up into an adjoining commercial property. It was determined the back up occurred because an underground sewer lateral serving the commercial property ran directly through the location of the hole augered by Pro Electric and Pro Electric had severed the lateral while constructing one of the supports. No one at the time the support was being constructed had any knowledge that Pro Electric had severed anything during its work.

When Pro Electric was named as a defendant in the lawsuit by the property owner, Pro Electric moved for summary judgment, asserting immunity as a governmental contractor pursuant to Wis. Stat. §893.80(4). Pro Electric admitted to severing the sewer lateral, but argued that the damage occurred because of construction design decisions made by the DOT and that Pro Electric was merely implementing DOT's decisions.

The circuit court granted Pro Electric's motion for summary judgment. The court of appeals affirmed. Plaintiffs appealed to the Wisconsin Supreme Court.

The issue before the Court was the extent to which governmental immunity set forth in Wis. Stat. §893.80(4) protects a private contractor implementing a construction design chosen by a governmental entity from liability for property damage caused to an adjoining property.

On appeal to the Wisconsin Supreme Court, the discussion began with the general principle that a governmental entity is immune from liability for acts done in the exercise of its legislative, quasi-legislative, judicial or quasi-judicial functions, which principle was codified in Wis. Stat. §893.80(4). The Court also noted that it is well established that a governmental entity's immunity may extend to private contractors acting as agents of the governmental entity, citing Estate of Lyons v. CNA Ins., 207 Wis.2d 446, 558 N.W.2d 658 (Ct. App. 1996). A private contractor asserting such immunity must prove two elements: (1) that it was an "agent" of the governmental entity under the Lyons test (i.e., whether the governmental entity approved reasonably precise specifications that the governmental contractor adhered to when engaging in the conduct that caused the injury); and (2) that it can demonstrate that the conduct for which immunity is being sought was the implementing of a governmental entity's decision made during the exercise of that entity's legislative, quasi-legislative, judicial or quasi-judicial functions. This second element is necessary because the contractor's immunity is dependent upon the immunity of the governmental act or decision that the agent was implementing when it caused the injury. In other words, a contractor is not immune from liability if the governmental entity did not direct the injury-causing conduct with reasonable precision in the exercise of its legislative, quasi-legislative, judicial or quasi-judicial functions.

When analyzing and applying Wis. Stat. § 893.80(4), the Court noted that courts often use the term "discretionary" as shorthand to refer to decisions of a governmental entity that are legislative, quasi-legislative, judicial or quasi-judicial. See, e.g., Willow Creek Ranch, L.L.C. v. Town of Shelby, 2000 WI 56, ¶25, 235 Wis.2d 409, 611 N.W.2d 693; C.L. v. Olson, 143 Wis.2d 701, 710 n. 5, 422 N.W.2d 614 (1988); Lifer v. Raymond, 80 Wis.2d 503, 511-12, 259 N.W.2d 537 (1977); Lyons, 207 Wis.2d at 453-54. Legislative and quasi-legislative functions generally refer to those policy choices made in an official capacity, e.g., when a governmental entity chooses one project design over another. See Lyons, 207 Wis.2d at 453. Quasi-judicial

functions generally refer to those acts that involve the exercise of discretion in coming to a judgment, the availability of a public hearing on the judgment before a specialized board, or the imposition by a board of an appropriate final decision. See Coffey v. City of Milwaukee, 74 Wis.2d 526, 534-35, 247 N.W.2d 132 (1976). When a governmental contractor performs its contractual tasks under reasonably precise specifications pursuant to the governmental entity's quasi-legislative design decision, the contractor functions as a Wis. Stat. §893.80(4) agent of the governmental entity when carrying out the entity's design decision. See Lyons, 207 Wis.2d at 457-58, 461. For that reason, the governmental contractor will be entitled to the same level of immunity as would be accorded to the governmental entity had it been sued directly for its choice. Id. at 454.

Applying the above principles to the case, the Wisconsin Supreme Court found governmental immunity applicable because the DOT project plan provided reasonably precise specifications for Pro Electric's augering; Pro Electric severed the sewer lateral by adhering to those specifications; and DOT adopted the specifications in the exercise of its legislative, quasi-legislative, judicial or quasi-judicial functions. In fact, the DOT directed the exact location for the augering using measured coordinates and specified the dimensions of the augering; the DOT specified the method of excavation with precise instruction; and Pro Electric did not deviate from these coordinates or methods in performing its work. Stated otherwise, Pro Electric did what it was told to do by the DOT, and had no authority to deviate from the DOT's plans or specifications. DOT, not Pro Electric, made the decision to auger that particular hole in that particular place, and all of the evidence presented to the Court suggested that Pro Electric severed the sewer lateral not because of the manner in which Pro Electric chose to do the augering but because the DOT's plan directed Pro Electric as to exactly where and how to auger. Based on this analysis, the Court upheld the summary judgment finding in favor of Pro Electric on the issue of governmental immunity.

However, the Court also found that certain activities performed by Pro Electric were not immune from liability. That work related to Pro Electric's backfilling of excavation without inspecting the sewer lateral, as required by Wis. Stat. §182.0175(2)(am). The Court held, and Pro Electric could not dispute, that Pro Electric was solely responsible for the means and methods of inspecting its excavation; ascertaining if there was any damage; and refraining from backfilling until all necessary repairs were completed. In other words, the DOT plan specifically assigned responsibility to Pro Electric to coordinate its construction activities with a call to Digger's Hotline or to directly call the utilities that had facilities in the area of the construction and to use caution to ensure the integrity of underground facilities. Moreover, the plan did not provide reasonably precise specification for how to fulfill these responsibilities. Therefore, the Court held there would have been ample room for Pro Electric's discretion if, for instance, it had discovered a damaged sewer lateral during excavation. On this issue, the Court concluded that a contractor may not possess such control over an alleged injury-causing action and still be considered an agent for purposes of governmental contractor immunity under Wis. Stat. §893.80(4).

However, utilizing a negligence analysis, because no evidence could demonstrate that Pro Electric did not comply with its duties under Wis. Stat. §182.0175(2)(am), and that Pro Electric

did what it was required to do under that statute, the Court upheld the summary judgment finding in favor of Pro Electric on this issue as well.

Safe Place Statute – Trespassing – Negligence – Donaldson v. K&R Cross, Inc., (Court of Appeals, 16 AP 800, April 25, 2017) (unpublished)

This lawsuit involves claims by plaintiff of violations of the safe place statute and negligence against defendants, restaurant and related parties, when plaintiff fell down a stairway and landing on defendant's property and sustained serious personal injuries.

Defendant owns and operates a restaurant. The main entrance to the restaurant is located on the north-facing side of the building. To the right of the main entrance is a window; next to that window is an outdoor stairway with a landing that leads up to a door on the second level. The previous owner used the second level as a residence, but, at the time, it was being used only as storage space. With the exception of an attempted robbery, no one had used the upper level door for access since that time. The door on the second floor had remained locked throughout defendant's ownership, and they never saw anyone use the exterior staircase.

Witnesses testified that on the evening that plaintiff came to the restaurant, he appeared intoxicated. Plaintiff continued drinking while at the restaurant. Plaintiff left the restaurant and was seen vomiting in the parking lot. Plaintiff was discovered approximately an hour later lying face down near the entrance door.

Plaintiff subsequently filed this lawsuit, alleging that he fell from the landing atop the outdoor stairway when "the deteriorated railing" surrounding the landing failed. Plaintiff's theories of liability were common law negligence and a violation of the safe place statute. Plaintiff alleged, among other things, that defendant failed to: properly repair and maintain the stairway, landing, and railing; inspect the premises; and place "adequate and appropriate warnings" not to enter around the stairway and landing.

Defendant filed a motion for summary judgment, arguing that plaintiff was a trespasser on the stairway and landing, and that its only duty was to refrain from willful, wanton or reckless conduct towards him. The circuit court granted defendant's motion for summary judgment, concluding that plaintiff was a trespasser on the outdoor stairway and landing at the restaurant at the time his injuries occurred. Plaintiff appealed.

The court of appeals affirmed, holding that plaintiff was a trespasser, that there was no evidence that defendant acted willfully, wantonly or recklessly, there was no express or implied consent for plaintiff to be on the stairway where he ultimately sustained his injuries, and there was no evidence to suggest to the general public that they were entitled to use defendant's stairway and landing.

Corporations – Shareholder Oppression – Breach of Fiduciary Duty – Bessette v. Bessette, (Court of Appeals, 16 AP 1215, April 26, 2017) (unpublished)

This dispute involves claims of fraud, breach of fiduciary duty, and shareholder oppression asserted by a minority shareholder, Lowell Bessette, in the context of a family owned corporation.

Mekco Manufacturing, Inc. ("Mekco") was incorporated in the early 1980s, with Lowell, David (Lowell's son), and Rutten (Lowell's son-in law) as equal shareholders. All three worked for the business until Lowell retired in 1997. David and Rutten continued to operate Mekco, and at some point Debbie (Lowell's wife) also began working for Mekco. She became its secretary in 2005 after Rutten resigned from his officer positions.

Lowell, David, and Rutten also formed a real estate holding partnership, Bessette, Bessette & Rutten (the "partnership"), which owned two parcels of real estate Mekco leased for its operations. Mekco's rent payments to the partnership were utilized as a way of distributing Mekco profits to the shareholders. After Lowell's retirement in 1997, he received a portion of the Mekco profits through Mekco's rent payments to the partnership, which were equally distributed to Lowell, David, and Rutten. While the amount of the rent payments varied throughout the years, from 2008 through November 1, 2011, payments were $240,000 per year. In the following years, rent payments were reduced to $130,000 per year until they again were raised to $240,000 per year effective November 1, 2013.

On February 14, 2014, Lowell, through his attorney, requested financial information from David related to Mekco and the partnership. Three days later, Mekco held a shareholders' meeting, which Lowell participated in via teleconference. Lowell was informed during this meeting that Rutten was planning to leave Mekco, and another meeting was scheduled for March 3, 2014. Lowell attended this second meeting in person, during which Rutten's impending departure was discussed, as well as strategies for attempting to sell Mekco.

In addition to renting property from the partnership, Mekco also rented property from Country Visions Co-op ("County Visions"). Mekco's rent for the Country Visions property was negotiated down from $3,500 to $1,750 per month in 2011. In November 2013, David acquired the Country Visions property through a limited liability corporation he owned, Bessette, LLC. Beginning in March 2014, pursuant to an alleged agreement of the shareholders during the March 2014 meeting, Mekco paid increased rent in the amount of $240,000 per year, retroactive to November 15, 2013, for the Country Visions property.

Lowell disputes that he agreed to the increase in rent for the Country Visions property. The summary of the minutes of the March meeting indicate "the company also agreed to lease additional space from Bessette, LLC formerly ... Country Visions" with the parties "agree[ing] to pay the same amount of annual rent for this property as had been established between the company and the partnership ($240,000)," and pay that amount retroactive to November 2013. Lowell averred that he did not remember agreeing to the increase in rent payments and that he was provided with "a copy of the tape from which the minutes were purportedly prepared" and

"nowhere on the tape is any discussion of retroactively increasing rent for the Bessette, LLC property to $240,000."

Mekco assets and the real estate owned by the partnership were eventually sold, and Lowell received one-third of the proceeds.

Lowell filed this action, and defendants moved for summary judgment, arguing that Lowell did not suffer a "loss particular to himself" and, therefore, his claims failed as a direct action and could only be maintained as a derivative action on behalf of Mekco. Defendants also argued that Lowell's request for judicial dissolution due to shareholder oppression was unfounded as all of Mekco's assets had been sold, Mekco's name had been changed, and with the exception of some funds remaining to deal with dissolution, there was little to dissolve.

The circuit court concluded that Lowell failed to allege fraud with sufficient specificity; his breach of fiduciary duty claim failed because the injuries Lowell alleged were direct injuries to the corporation, not Lowell, and thus he needed to bring a derivative claim; and neither dissolution nor other equitable remedies were appropriate as to Lowell's oppression claim. Lowell appealed.

The court of appeals affirmed, holding that Lowell's fraud claim failed to get out of the gate because the allegations were vague, not particular, and provided no "details of where and when" the alleged misrepresentations were made; that his breach of fiduciary duty claim was a claim of harm primarily to the corporation and not to Lowell; and that Lowell failed to convince either court to order dissolution.

Worker's Compensation – Unemployment Benefits – Substantial Fault – Operton v. LIRC, (Wisconsin Supreme Court, 15 AP 1055, May 4, 2017)

The Wisconsin Supreme Court unanimously held that an employee's eight accidental or careless cash handling errors over the course of 80,000 cash handling transactions were inadvertent errors under Wis. Stat. §108.04(5g)(a)2 and thus not "substantial fault" depriving the employee of unemployment insurance benefits.

The employee worked for Walgreens for 21 months, mostly as a cashier. She handled 80,000 cash transactions and committed eight errors at the cost of $555.36. Walgreens warned her several times about the errors she committed, ultimately terminating her employment after the eighth mistake. Walgreens then disputed the employee's claim for unemployment insurance, alleging misconduct deprived her of unemployment insurance.

After a hearing before an administrative law judge, the unemployment insurance claim was denied, not for misconduct, but for substantial fault. The ALJ held that the employee did not intend to disregard the employer's interests and was not so careless as to manifest culpability or wrongful intent.

The Labor and Industry Review Commission affirmed the administrative law judge's decision without modification. The LIRC's decision was affirmed by the circuit court, but reversed by the appeals court.

The supreme court affirmed the appeals court. The supreme court reasoned that Wis. Stat. §108.04(5g)(a)2 is one of three exceptions to the substantial fault rule. The court defined "inadvertent" as accidental oversight, carelessness, passive negligence and unintentional conduct. The court held that the employee's mistakes were inadvertent because they occurred over a period of 21 months and 80,000 transactions. The employee would go several months without making a mistake. Finally, each of her mistakes was different in kind from the other. The court suggested that the employer's warnings may be relevant to whether an error is inadvertent, but not dispositive. The court also held that the statute was silent as to how many inadvertent errors qualify as intentional, suggesting that there might be a number of inadvertent errors that become intentional. Two justices concurred in the result, but argued that the statute did not refer to warnings and that therefore they were irrelevant to an inadvertent determination. The concurring justices also argued that the statute allows for "one or more" inadvertent errors, suggesting that the number of inadvertent errors is irrelevant and that instead the quality of each error must be assessed.

Attorney Representation – Statute of Limitations – Rescission – First National Bank v. Trewin, (Court of Appeals, 16 AP 1423, May 9, 2017) (unpublished)

This action stems from an attorney's representation of and continued course of transactions with his clients, the Hearleys. Attorney Trewin represented the Hearleys for nearly two decades and entered into a series of transactions -- several real estate conveyances, loans, etc. -- throughout that period of time. In pertinent part, Trewin purchased the Hearleys property, a farm, in May 2005. From that time until the Hearleys ultimately filed a grievance against Trewin with OLR in July 2010, Trewin entered into several transactions with the Hearleys, often refinancing their loan obligations to him and providing them additional loans.

The Wisconsin Supreme Court ultimately revoked Trewin's license to practice law as a result of the OLR proceedings, finding that he was essentially defrauding his clients.

In June 2012, First National Bank filed the instant lawsuit to foreclose a mortgage on the remaining portion of the Hearleys' property that Trewin still owned. The Hearleys were named as defendants in the foreclosure action based on the bank's belief that they had a potential interest in the property. In October 2012, the circuit court granted the bank a judgment of foreclosure and a sheriff's sale was scheduled for April 23, 2013. On April 16, 2013, the Hearleys moved for a temporary injunction blocking the sale and filed a cross-claim against Trewin, alleging that, over the course of his various transactions with them, Trewin took advantage of his position as their attorney, thereby breaching his fiduciary duties to them and his ethical obligations as an attorney. The Hearleys sought rescission of the May 2005 deed conveying their property to Trewin or, alternatively, the imposition of a constructive trust over the property.

In response, Trewin argued that the Hearleys' cross-claim was time barred pursuant to Wis. Stat. §893.57, which imposes a two-year statute of limitations for intentional torts (amended in February 2010 to three years). After a trial, the circuit court concluded that the Hearleys' cross-claim was timely pursuant to the 30-year limitations period in Wis. Stat. §893.33(2) for actions concerning real property and further concluded that rescission was warranted because Trewin

breached his fiduciary duties to the Hearleys. Trewin appealed and the court of appeals remanded to the circuit court with instructions to determine which limitations period of Wis. Stat. 893.57 applied and to consider whether the discovery rule, continuing violation theory or equitable estoppel applied to the Hearleys' cross-claim.

On remand, the circuit court held that, pursuant to the discovery rule, the Hearleys' cross-claim did not accrue until sometime after they filed their OLR grievance because, "[p]rior to signing that grievance, there is no evidence that the Hearleys discovered or should have discovered that they had a claim against Trewin." Alternatively, applying the continuing violation theory, the court held that the statute of limitations on the Hearleys' cross-claim did not begin to run until Trewin's violations ceased. In either case, the court concluded the Hearleys' cross-claim was timely filed, pursuant to the three-year statute of limitations set forth in the post-February 2010 version of Wis. Stat. §893.57. Trewin appealed.

The court of appeals affirmed, finding that the three year statute of limitations of Wis. Stat. §893.57 applied to the Hearleys' cross-claim because violations continued after the statute was amended and that the continuing violation theory applied to their breach of fiduciary duty claim against Trewin. Because those violations continued until September 2011, the court of appeals concluded that the cross-claim was timely.

Personal Injury – Release – Hart v. Artisan and Truckers Cas. Co., (Court of Appeals, 16 AP 1196, June 13, 2017)

This appeal involves the enforceability of a release signed by plaintiff on the day of an automobile accident that resulted in personal injuries.

Defendant Artisan's insured was driving on Fond du Lac Avenue at about 2:30 p.m. on August 1, 2014, and he rear-ended the car that was behind plaintiff's vehicle and pushed it into her vehicle. Plaintiff was injured in the accident.

At approximately 3:00 p.m., plaintiff called Artisan to report the claim. At about 4:30 p.m., an Artisan representative spoke with plaintiff by phone. This conversation was recorded, and a transcript of the call was made part of the record. The Artisan representative informed plaintiff that she could take her vehicle to Artisan's service center for repairs that same day, that Artisan could "set aside $1,000 for the next fifteen days" to pay medical bills, and that Artisan could give plaintiff $500 for her pain and inconvenience. The Artisan representative told plaintiff that she would need to "sign a release" and that a copy of the release would be ready for her at the service center when she came to drop off her car for repair.

On that day, the same day as the accident, plaintiff signed a release titled "Full Release of All Claims with Indemnity." It expressly stated that the nature and extent of injury was doubtful and disputed, that recovery from any injuries was uncertain and indefinite, that it was not entered into in reliance upon any doctor's diagnosis, and that plaintiff was relying wholly on her own judgment, belief and knowledge of the nature, extent, effect and duration of injuries.

Plaintiff subsequently filed this action and Artisan moved for summary judgment on the basis of the release. The circuit court granted summary judgment on the grounds that the release of

claims barred plaintiff's action. Plaintiff appealed, arguing that pursuant to Wis. Stat. §904.12(1), the release was not admissible evidence.

The court of appeals affirmed, finding that the Wisconsin Supreme Court's decision in Buckland v. Chicago, St. Paul, Minneapolis & Omaha Railway Co., 160 Wis.2d 484, 486, 152 N.W. 289 (1915) -- holding that the legislature did not intend the statutory prohibition on such writings to apply to a release of claims -- controlled and barred plaintiff's action. The court further noted that the Buckland decision expressly held that the legislature intended to encourage settlement and did not intend to exclude settlement releases or it would have said so.

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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