



Recent Case Update

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Summary Judgment – Expert Witness – Negligence
– Sears, Roebuck and Co. v. Bayshore Town Center, LLC, (Court of Appeals, 15 AP 1381, June 27, 2017) (unpublished)

After a substantial storm in July 2010, Sears’ store located in the Bayshore Town Center in Glendale, Wisconsin flooded. Sears sued several defendants alleging breach of contract and negligence based on the redevelopment of parking garages at Bayshore. The defendants included the current and prior landlords, the leasing agent, the redevelopment project’s developer and the project’s construction managers.

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All defendants moved for summary judgment, arguing that Sears did not have expert testimony supporting its claim and that its claims against certain defendants were barred pursuant to an earlier release and settlement agreement, among other arguments. Certain defendants also moved to recover attorney’s fees and costs as sanctions and pursuant to the earlier releases.

The circuit court granted summary judgment finding that Sears was barred from maintaining claims against certain defendants based on an earlier release and settlement agreement and Sears could not maintain claims against any of the defendants because it did not have the necessary expert testimony to support its claims of negligence. The circuit court denied all defendants’ requests for attorney’s fees and sanctions. Sears appealed the dismissal of its lawsuit and certain defendants cross-appealed the denial of attorney’s fees and sanctions.

On appeal, the court affirmed, finding that Sears needed expert testimony to support its claims against defendants and Sears did not have the necessary expert testimony to support its claims. The court also denied the cross appeal of certain defendants for attorney’s fees based on the prior release, but reversed and remanded the cross appeal of one defendant finding that that defendant was entitled to sanctions against Sears.

Peterson, Johnson & Murray successfully represented defendant Steiner & Associates in the trial court and on appeal.

Worker’s Compensation – Unreasonable Refusal To Rehire – Amalga Composites, Inc. v. LIRC, (Court of Appeals, 16 AP 1445, July 5, 2017) (unpublished)

In this case, the employee claimed compensation pursuant to Wis. Stat. §102.35(3), alleging that her employer unreasonably refused to rehire her following a compensable work-related injury. The employer contended that its refusal to rehire was “reasonable” within the meaning of the statute because it learned after the injury that the employee was an undocumented immigrant ineligible to work under federal law. The appeals court refused to reach a decision on the merits of the claim because it determined that the Labor and Industry Review Commission did not decide whether the employee was in fact an undocumented immigrant. The court reasoned that it could not determine whether federal law barred rehire of the employee if the law did not apply to the employee. The specific issue in the case was whether the employee used a valid social security number. The employer claimed it did not discover a problem with the number until after the work injury and insisted that the employee confirm the validity of the number before it would allow the employee to return to work after the injury. The LIRC had found that the federal law did not bar the claim under Wis. Stat. §102.35(3), but the LIRC never found that the social security number did not belong to the employee. The appeals court did not signal what position it would take on application of federal law, if the required proof was provided.

Worker’s Compensation – Non-Traumatic Mental Injury – Burt-Redding v. LIRC, (Court of Appeals, 16 AP 916, July 18, 2017) (unpublished)

In this non-traumatic mental injury claim, the appeals court affirmed a denial of compensation by the Labor and Industry Review Commission, approving a finding that a police officer was not exposed to extraordinary mental stress. In this case, the officer shot but did not kill a person who belonged to a Hmong street gang. After the shooting, gang members threatened the officer and her family. After several years of this, the officer developed anxiety attacks, chronic depression and post-traumatic stress disorder. She claimed worker’s compensation, but an administrative law judge denied the claim, finding that the officer was not exposed to extraordinary mental stress as required by School District No. 1 v. ILHR Dept., 62 Wis.2d 370, 377-78, 215 N.W.2d 373 (1974). Key evidence in the case was testimony from the officer’s supervisor and a police-science expert that threats of the nature made against the officer were not unusual or atypical for a police officer. Being threatened is a common experience of most police officers. Gang members never acted on their threats and the officer never sought charges against the gang members for making the threats. This decision further confirms that the law on non-traumatic mental stress claims makes it difficult for injured workers. Moreover, the extraordinary stress test is applied to the particular occupation involved, not all occupations, so what would seem outrageous behavior in a common office or factory setting might not be extraordinary to a police officer.

Medical Malpractice – Noneconomic Damages Cap – Unconstitutional – Mayo v. Wisconsin Injured Patients and Families Compensation Fund, (Court of Appeals, 14 AP 2812, July 5, 2017)

Plaintiff sued the defendant doctors for medical malpractice and failure to provide proper informed consent. Plaintiff sustained a catastrophic injury stemming from an untreated septic infection. Ultimately, the untreated infection necessitated amputation of all of plaintiff's extremities. Motions addressing constitutionality of the statutory cap on non-economic damages were filed pre-trial. The circuit court held that the cap was not facially unconstitutional but allowed plaintiff to raise an as-applied challenge to the cap post-trial if plaintiff chose to.

After a lengthy jury trial, the jury awarded plaintiff \$15,000,000 in non-economic damages. Post-trial motions were filed by the defense moving to reduce plaintiff's jury award to the \$750,000 statutory cap on non-economic damages imposed by Wis. Stat. §893.55. Plaintiff argued that application of the cap would violate their constitutional rights.

The circuit court determined that the cap was not facially unconstitutional, but that it was unconstitutional as applied to plaintiff because it violated plaintiff's rights to equal protection and due process.

Both parties appealed the circuit court's decision. Defendants argued that the circuit court erred when it found Wis. Stat. §893.55 unconstitutional as it applied to plaintiff. Plaintiff argued that the circuit court erred when it determined that §893.55 was not unconstitutional on its face.

The court of appeals affirmed, concluding that the statutory cap on non-economic damages was unconstitutional on its face because it violated the same principles the Wisconsin Supreme Court articulated in the Ferdon decision by imposing an unfair and illogical burden only on catastrophically injured patients, thus denying them the equal protection of the laws.

A petition for review has been filed.

Contract – Employment – At-Will – Bukstein v. Dean Health Sys., Inc., (Court of Appeals, 16 AP 920, July 20, 2017)

Dr. Bukstein was employed as a physician by Dean Health Systems. After complaints by patients, Dean Health Systems decided to terminate Dr. Bukstein without cause. Dr. Bukstein then sued Dean Health Systems, claiming breach of contract and breach of the duty of good faith and fair dealing.

Dean Health Systems moved for summary judgment on the basis that the employment relationship was at-will. The circuit court denied the motion. The case proceeded to a jury trial where the jury returned a verdict and substantial damages recovery in favor of Dr. Bukstein. Dean Health Systems appealed.

On appeal, the court reversed the circuit court's denial of summary judgment, finding that Dr. Bukstein could not maintain either claim against Dean Health Systems because his employment relationship was at-will and, therefore, properly terminated.

A petition for review is currently pending.

Legal Malpractice – Burden of Proof – Summary Judgment – Biermeier v. Campbell, (Court of Appeals, 16 AP 1915, August 31, 2017) (unpublished)

Plaintiff sued defendant attorney based on the attorney's representation of plaintiff in a divorce action. As part of the property division in the underlying divorce, the circuit court assigned ownership of the marital house to plaintiff's former husband, along with all debt associated with the house. Subsequently, the mortgage and accompanying note on the marital house went into default and plaintiff was named in the resulting foreclosure action as sharing responsibility with the former husband for the amount due the mortgagee.

Plaintiff subsequently filed this legal malpractice action, alleging that defendant attorney was negligent in not asking the circuit court in the underlying divorce action to include in the judgment of divorce a requirement that the former husband obtain refinancing on the marital house that would have resulted in termination of plaintiff's shared liability with her former husband on the mortgage. Plaintiff alleged that she suffered damages as a result of defendant attorney failing to ask the circuit court for a refinancing provision.

Defendant attorney moved for summary judgment on the basis that plaintiff could not establish the causation or damages elements of her legal malpractice action. The circuit court agreed and granted the motion. Plaintiff appealed.

The court of appeals affirmed, holding that plaintiff's causation and damages theory of legal malpractice were too speculative to support a claim and that the circuit court properly dismissed the action on that basis.

Municipalities – Government Immunity – Summary Judgment – Seitz v. Barrett, (Court of Appeals, 16 AP 1497, September 7, 2017) (unpublished)

Plaintiff sued the City of Prairie du Chien (the "City") after she was injured by a vehicle while attempting to ride her bicycle through a crosswalk alleging the City was negligent in maintaining the crosswalk, namely the crosswalk paint was faded. The City filed a motion for summary judgment on governmental immunity grounds pursuant to Wis. Stat. §893.80. The circuit court denied the motion, holding that there was a genuine issue of material fact as to whether the known danger exception to immunity applied. The City appealed.

The court of appeals reversed, concluding that maintaining the crosswalk was discretionary in nature and that the known danger exception did not preclude summary judgment on governmental immunity grounds.



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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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