WISCONSIN CIVIL JUSTICE COUNCIL, INC.

Promoting Fairness and Equity in Wisconsin's Civil Justice System

2013 GUIDE TO THE WISCONSIN SUPREME COURT AND JUDICIAL EVALUATION

JANUARY 2013

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2013 Guide to the Wisconsin Supreme Court and Judicial Evaluation

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January 2013

The Wisconsin Civil Justice Council, Inc. (WCJC) was formed in 2009 to represent Wisconsin business interests on civil litigation issues before the legislature and courts. WCJC's mission is to promote fairness and equity in Wisconsin's civil justice system, with the ultimate goal of making the state a better place to work and live.

The WCJC Board is proud to present its second biennial *Guide to the Wisconsin Supreme Court and Judicial Evaluation*. The purpose of this publication is to educate WCJC's board members and the public by providing a summary of the most important decisions issued by the Wisconsin Supreme Court impacting Wisconsin business interests.

BOARD MEMBERS

EXECUTIVE SUMMARY

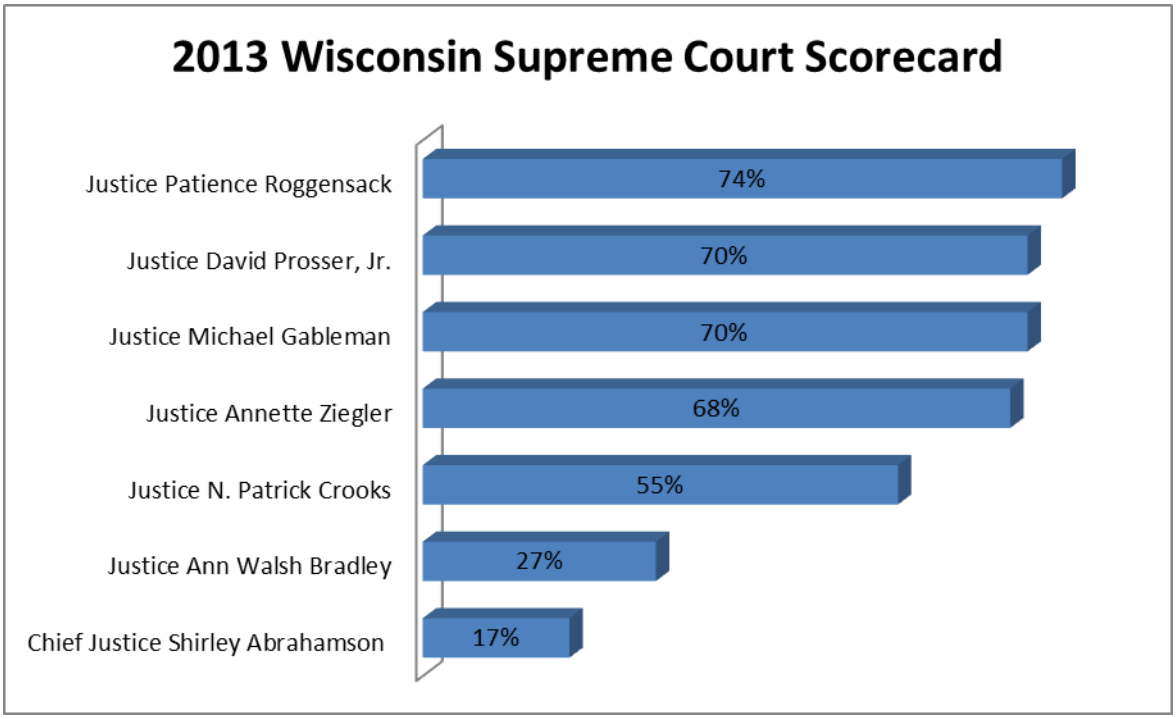
The Wisconsin Supreme Court issues decisions that have a direct impact on Wisconsin businesses and individuals. However, too often the public is unaware of the court's decisions and the issues that are involved in each case.

In 2011, the Wisconsin Civil Justice Council (WCJC) issued its first biennial *Guide to the Wisconsin Supreme Court and Judicial Evaluation* to help educate the public about the Supreme Court and the decisions it issues. WCJC's first biennial report in 2011 provided a discussion of the most important and relevant cases decided by the court during the 2008-09 and 2009-10 terms.

In this second edition, WCJC once again provides a summary of the most important and relevant cases affecting Wisconsin's business community over the past two terms.

In addition to providing background information about the court, the sitting justices, and the role of the judicial branch in government, the *2013 Guide to the Wisconsin Supreme Court and Judicial Evaluation* tracks how the justices decided each case.

Below is the 2013 scorecard for the past two terms (2010-11, 2011-12). The graph indicates how often the individual justices decided cases over the past two terms in favor of the position taken by WCJC.



INTRODUCTION

The purpose of this paper is to educate WCJC's members, partners, and the public about the role of the Supreme Court and how it functions with the other two branches of government. In addition, it provides summaries of cases relevant to the business community and notes how each justice voted in the selected cases.

About the Wisconsin Civil Justice Council (WCJC)
WCJC is a broad coalition of organizations interested in civil liability issues. WCJC's mission is to achieve fairness and equity in Wisconsin's civil justice system, with the ultimate goal of making Wisconsin a better place to work and live. WCJC effectuates this objective through policy development, education, legislative lobbying, and its Appellate Program.

How the Wisconsin Supreme Court Works
The Supreme Court, consisting of seven justices, has appellate jurisdiction over all Wisconsin state courts and has discretion to determine which appeals it will hear. The court may also hear original actions – cases that have not been heard in a lower court. Review is based on criteria described in the Wisconsin Statutes.[1]

Individuals or organizations who are not actual parties to a case before the court may file an *amicus curiae* (friend of the court) brief presenting their unique interests in the case.

The justices meet in private conference to decide the outcome of a case. Immediately after the court reaches its tentative decision, the case is assigned to a justice for preparation of the court's opinion. Any justice not assigned to author the opinion may choose to write either a concurring or dissenting opinion. Once the decisions are drafted and approved by the justices, the court issues its decision. The Wisconsin Supreme Court's opinions can be downloaded and read on the court's website (www.wicourts.gov).

Each term begins in September and runs through June, with opinions being issued into July. To read about the court's internal operating procedures, visit www.wicourts.gov/sc/IOPSC.pdf.

Importance of Supreme Court's Decisions to WCJC Members
Many organizations spend considerable resources attempting to influence elected officials in the legislative and executive branches. Although those two branches significantly impact the business community, the court's decisions can equally affect, negatively or positively, the business community. The Supreme Court has the ultimate authority to interpret or strike down laws and regulations enacted by the legislature or promulgated by state agencies. Virtually every business, medical provider, and insurer is directly affected by at least some of the court's decisions.

[1] *See* Wis. Stat. ch. 809.

WISCONSIN SUPREME COURT MEMBERS

Chief Justice Shirley Abrahamson was appointed to the Supreme Court by Gov. Patrick Lucey in 1976 and has won reelection to the court in 1979, 1989, 1999, and 2009. Since August 1, 1996, she has been Chief Justice based strictly on seniority, and in that capacity serves as the administrative leader of the Wisconsin Court System. To read her full biography, visit www.wicourts.gov/courts/supreme/justices/abrahamson.htm.

Justice Ann Walsh Bradley was elected in 1995 and reelected in 2005. Justice Bradley is up for reelection in 2015. To read her full biography, visit www.wicourts.gov/courts/supreme/justices/bradley.htm.

Justice N. Patrick Crooks was elected in 1996 and reelected in 2006. Justice Crooks is up for reelection in 2016. To read his full biography, visit www.wicourts.gov/courts/supreme/justices/crooks.htm.

Justice David T. Prosser, Jr. was appointed by Gov. Tommy Thompson in 1998, and elected in 2001 and reelected in 2011. Justice Prosser is up for reelection in 2021. To read his full biography, visit www.wicourts.gov/courts/supreme/justices/prosser.htm.

Justice Patience Roggensack was elected to the court in 2003 and is up for reelection in April 2013. To read her full biography, visit www.wicourts.gov/courts/supreme/justices/roggensack.htm.

Justice Annette Kingsland Ziegler was elected to the court in 2007 and is up for reelection in 2017. To read her full biography, visit www.wicourts.gov/courts/supreme/justices/ziegler.htm.

Justice Michael J. Gableman was elected to the court in 2008 and is up for reelection in 2018. To read his full biography, visit www.wicourts.gov/courts/supreme/justices/gableman.htm.

Judicial Evaluation

Cases for the *2013 Guide to the Supreme Court and Judicial Evaluation* were chosen through the Wisconsin Justice Council's Appellate Program process. Input on case selection was provided by attorney and non-attorney representatives from the 18 associations that make up WCJC. WCJC's representatives in turn received input from their respective association members.

The 23 cases selected for inclusion in the *2013 Judicial Evaluation* were decided during the court's past two terms: 2010-11 and 2011-12, and each had a significant impact on one or more of the organizations making up WCJC. Cases were omitted from the *Judicial Evaluation* if they involved issues or parties that created a conflict between any of the organizations or partners making up the WCJC.

Each decision is labeled in the following manner: 1) "WCJC agrees with this decision." or, 2) "WCJC disagrees with this decision." The ranking given to each justice was based on the impact to WCJC.

Overall Score Based on WCJC's Positions*

Justice	2013 Judicial Evaluation	2011 Judicial Evaluation	Overall Score
Chief Justice Abrahamson	17%	36%	24%
Justice Bradley	27%	43%	33%
Justice Crooks	55%	64%	58%
Justice Prosser	70%	100%	82%
Justice Roggensack	74%	100%	83%
Justice Ziegler	68%	100%	80%
Justice Gableman	70%	100%	81%

Case Participation

Justice	2013 Judicial Evaluation	2011 Judicial Evaluation
Chief Justice Abrahamson	100%	100%
Justice Bradley	96%	93%
Justice Crooks	96%	100%
Justice Prosser	87%	100%
Justice Roggensack	100%	93%
Justice Ziegler	96%	93%
Justice Gableman	100%	93%

***** WCJC's first biennial report in 2011 provided a discussion of the cases decided by the court during the 2008-09 and 2009-10 terms. The 2013 Judicial Evaluation covers the 2010-11 and 2011-12 terms.

Supreme Court Review

SUMMARY OF DECISIONS 2010-11 TERM

TAX LAW

***Nestlé USA, Inc. v. Dept. of Revenue*, 2011 WI 4**

Unanimous court affirmed the court of appeals decision denying an appeal of the Department of Revenue's (DOR) tax assessment for Nestlé's powdered infant formula plant in Eau Claire.

How the justices voted: Justice Gableman authored the opinion, Chief Justice Abrahamson, Justices Bradley, Crooks, Prosser, Roggensack, & Ziegler concurred.

***Covenant Healthcare v. City of Wauwatosa*, 2011 WI 80**

Held that St. Joseph Hospital Outpatient Center was used for the primary purposes of a hospital and therefore qualified as tax-exempt property.

How the justices voted: Justice Gableman authored the opinion, Justices Bradley, Crooks, Prosser, Roggensack, & Ziegler concurred; Chief Justice Abrahamson authored dissent.

TORTS - LIABILITY OF CORPORATE OFFICER & CIVIL PROCEDURE - DEFAULT JUDGMENT

***Casper v. American Int. South Ins.*, 2011 WI 81**

Corporate officer held not personally liable for approving the driving route of his employee who injured the plaintiffs. In addition, the court ruled that the trial court properly allowed the insurance company more time to answer the plaintiffs' complaint.

How the justices voted: Justice Prosser authored the opinion, Justices Crooks, Roggensack, Ziegler, Gableman concurred; Chief Justice Abrahamson authored concurring/dissenting opinion, joined by Justice Bradley.

TORTS - LEMON LAW

***Kilian v. Mercedes – Benz USA*, 2011 WI 65**

Unanimous decision holding that Mercedes-Benz's enforcement of a lease after the plaintiff received a refund for the leased car violated Wisconsin's Lemon Law. The court concluded that the plaintiff was entitled to his costs, disbursements, and reasonable attorney fees, but was not entitled to an award for pecuniary loss.

How the justices voted: Justice Gableman authored the opinion, Chief Justice Abrahamson, Justices Bradley, Crooks, Prosser, & Roggensack concurred. Justice Ziegler did not participate.

ENVIRONMENTAL LAW - DEPARTMENT OF NATURAL RESOURCES

***Anderson v. Dept. of Natural Resources*, 2011 WI 19**

The court relied on federalism concepts in deciding to uphold DNR's decision to deny a petition seeking to challenge a Wisconsin Pollutant Discharge Elimination Systems permit for a paper mill in Green Bay.

How the justices voted: Justice Ziegler authored the opinion, Justices Crooks, Prosser, Roggensack, & Gableman concurred; Chief Justice Abrahamson authored dissent, joined by Justice Bradley.

***Lake Beulah Management Dist. v. Village of East Troy*, 2011 WI 54**

Greatly expanded the DNR's regulatory authority when it held that the general provisions under Wis. Stat. §§ 281.11 and 281.12 regulating the waters of the state trumped the specific provisions in Wis. Stat. §§ 281.34 and 281.35 regulating high capacity wells.

How the justices voted: Justice Crooks authored the opinion, Chief Justice Abrahamson, Justices Bradley, Crooks, Prosser, Roggensack, Ziegler, & Gableman concurred.

WORKER'S COMPENSATION

***DeBoer Transportation, Inc. v. Swenson*, 2011 WI 64**
Concluded that a worker's compensation statute (Wis. Stat. §102.35 (3)) does not require an employer to change its legitimate and long-standing safety policies in order to assist an employee in meeting personal obligations.

How the justices voted: Justice Roggensack authored the opinion, Justices Crooks, Prosser, Ziegler, & Gableman concurred; Justice Bradley authored dissent, joined by Chief Justice Abrahamson.

CIVIL PROCEDURE - PERSONAL JURISDICTION OF FOREIGN CORPORATIONS

***Rasmussen v. General Motors et al.*, 2011 WI 52**
The court unanimously held that Wisconsin did not have general personal jurisdiction over Nissan Japan.

How the justices voted: Justice Roggensack authored the opinion, Chief Justice Abrahamson, Justices Bradley, Crooks, Prosser, Ziegler, & Gableman concurred.

TORTS - INTERPRETATION OF INSURANCE POLICY

***Siebert v. Wisconsin American Mutual Insurance Co.*, 2011 WI 35**
Held that because the insurance policy did not cover the driver's alleged negligent operation of the vehicle, the policy likewise did not cover the plaintiff's negligent entrustment claim.

How the justices voted: Justice Ziegler authored the opinion, Justices Prosser, Roggensack, & Gableman concurred; Justice Crooks authored dissent, joined by Chief Justice Abrahamson & Justice Bradley.

***Day v. Allstate Indemnity Co.* 2011 WI 24**
Allstate's family exclusion provision did not preclude coverage for the plaintiff's wrongful death claim when a benefit of coverage accrued to an insured person.

How the justices voted: Justice Bradley authored the opinion, joined by Chief Justice Abrahamson, Justices Crooks & Roggensack; Justice Ziegler authored dissent, joined by Justices Prosser & Gableman.

***Steffens v. BlueCross BlueShield of Illinois*, 2011 WI 60**
The determination by an ERISA benefits plan administrator that BlueCross was entitled to reimbursement of the costs paid for the plaintiff's medical expenses that were the result of an accident by a third party was not arbitrary and capricious.

How the justices voted: Justice Roggensack authored the opinion, Justices Crooks, Prosser, Ziegler, & Gableman concurred; Chief Justice Abrahamson authored dissent, joined by Justice Bradley.

***Brethorst v. Allstate Property and Casualty Insurance Company*, 2011 WI 41**
Finding of wrongful denial of benefits is a condition precedent in a first-party bad faith claim based on wrongful denial of benefits, and to proceed to discovery on a bad faith claim, the injured must satisfy the court that the claimed breach of contract is well founded and can be proved in the future.

How the justices voted: Justice Prosser authored the opinion, Chief Justice Abrahamson, Justices Bradley, Crooks, Roggensack, Ziegler, & Gableman concurred.

SUMMARY OF DECISIONS 2011-12 TERM

TORTS - MEDICAID FRAUD STATUTE

***State of Wisconsin v. Abbott Laboratories, et al.*, 2012 WI 62**

Upheld the lower court's verdict finding Pharmacia Corporation liable for violating Wisconsin's Deceptive Trade Practices Act and the Medicaid fraud statute.

How the justices voted: Justice Gableman authored the opinion, Chief Justice Abrahamson, Justices Roggensack, & Ziegler concurred. Justices Bradley, Crooks, & Prosser did not participate.

TORTS - LEMON LAW

***Marquez v. Mercedes-Benz USA, LLC*, 2012 WI 57**

The plaintiff car buyer and his attorney were allowed to recover over $700,000 in damages under Wisconsin's Lemon Law when the auto manufacturer was unable to refund the car owner within the 30-day timeframe despite the car owner's refusal to provide the necessary information to provide the refund.

How the justices voted: Chief Justice Abrahamson authored the opinion, Justice Prosser, Justices Bradley, Crooks, Ziegler, & Gableman concurred. Justice Roggensack authored concurring/dissenting opinion.

WORKER'S COMPENSATION

***Aurora Consolidated Health Care v. Labor & Industry Review Commission*, 2012 WI 49**

Wis. Stat. § 102.17(1)(d) did not allow Aurora the right to cross-examine a physician appointed by the Labor & Industry Review Commission which determined that the injured employee was permanently and totally disabled as a result of a work injury.

How the justices voted: Justice Bradley authored the opinion, Chief Justice Abrahamson, Crooks, Ziegler, & Gableman concurred. Justice Roggesack authored dissent. Justice Prosser did not participate.

TORTS - MEDICAL LIABILITY

***Jandre v. Wisconsin Injured Patients and Families Compensation Fund, et al.*, 2012 WI 39**

The court issued a split decision that greatly expanded the liability of physicians in medical liability cases. The case involved the scope of a physician's duty to inform a patient, often referred to as "informed consent."

How the justices voted: Chief Justice Abrahamson authored the opinion, Justices Bradley, & Crooks concurred; Justice Prosser authored separate concurring opinion; Justice Roggensack authored dissent, joined by Justices Ziegler & Gableman.

CIVIL PROCEDURE - DEFAULT JUDGMENT

***Johnson v. Cintas Corp. No. 2, et al.*, 2012 WI 31**

Default judgment was void because the summons and complaint named the wrong corporate defendant and thus personal jurisdiction was not obtained over the correct corporate entity.

How the justices voted: Justice Ziegler authored the opinion, Justices Crooks, Roggensack, & Gableman concurred; Justice Bradley authored dissent, joined by Chief Justice Abrahamson. Justice Prosser did not participate.

DAMAGES - STATUTORY CONSTRUCTION

***Heritage Farms v. Markel Ins. Co.*, 2012 WI 26**

An owner of property destroyed by a forest fire that is caused by negligence of another person is automatically entitled to double damages, despite the fact that the statute provided that the trial court "may" award such damages.

How the justices voted: Justice Ziegler authored the opinion, Chief Justice Abrahamson, Justices Crooks, Prosser, Roggensack, & Gableman concurred; Justice Bradley authored dissent.

DAMAGES - COLLATERAL SOURCE RULE

***Orlowski v. State Farm Auto. Ins. Co.*, 2012 WI 21**
Held the collateral source rule applies to cases involving underinsured motorist claims, allowing the plaintiff to receive the full amount of past medical expenses, even those amounts that were written off by the medical providers as a result of a contractual agreement between the medical provider and health insurer.

How the justices voted: Justice Crooks authored the opinion, Chief Justice Abrahamson, Justices Bradley, Prosser, Roggensack, Ziegler & Gableman concurred.

***Weborg v. Jenny, M.D.*, 2012 WI 67**
Upheld a court of appeals decision finding that the circuit court committed "harmless error" by admitting evidence of collateral source payments in a medical malpractice case.

How the justices voted: Justice Ziegler authored the opinion, Justice Crooks, Prosser, Roggensack, & Gableman concurred. Chief Justice Abrahamson authored a dissenting/concurring opinion, which Justice Bradley joined.

TORTS - INTERPRETATION OF INSURANCE POLICY

***Hirschhorn v. Auto-Owners Insurance Co.*, 2012 WI 20**
Held that an insurance policy's "pollution exclusion" clause excluded coverage for the loss of the plaintiff's home that resulted from the accumulation of bat waste.

How the justices voted: Justice Ziegler authored the opinion, Justices Crooks, Prosser, Roggensack, & Gableman concurred. Chief Justice Abrahamson authored dissenting opinion, joined by Justice Bradley.

***Wadzinski v. Auto-Owners Insurance Company*, 2012 WI 75**
Held that the Executive Umbrella policy provided only third-party liability coverage and no first-party coverage.

How the justices voted: Justice Roggensack authored the opinion, Justices Crooks, Prosser, Ziegler & Gableman concurred. Justice Bradley authored dissenting opinion, joined by Chief Justice Abrahamson.

***Maxwell v. Hartford Union High School Dist.*, 2012 WI 58**
Held that the failure to issue a reservation of rights letter cannot be used to defeat, by waiver or estoppel, a coverage clause in an insurance contract.

How the justices voted: Justice Prosser authored the opinion, Justices Rogensack, Ziegler & Gableman concurred; Justice Crooks authored dissenting opinion, joined by Chief Justice Abrahamson & Justice Bradley.

STATUTORY CONSTRUCTION - ALCOHOL LICENSE

***Wisconsin Dolls, LLC v. Town of Dell Prairie*, 2012 WI 76**
Held that the Town of Dell Prairie exceeded its authority when it modified the description of the premises in renewing the alcohol beverage license.

How the justices voted: Justice Prosser authored the opinion, Chief Justice Abrahamson, Justices Bradley, Crooks, Roggensack, Ziegler, & Gableman concurred.

FULL DISCUSSION OF SUPREME COURT DECISIONS 2010-11 TERM

TAX LAW

Nestlé USA, Inc. v. DOR, 2011 WI 4

In *Nestle*, the court unanimously affirmed the court of appeals decision denying an appeal of the Department of Revenue's (DOR) tax assessment for Nestlé's powdered infant formula plant in Eau Claire.

Facts

In 2005, DOR assessed Nestlé's new powdered infant formula production facility for tax purposes. The DOR attempted to apply the comparable sales assessment method, but could not find any facilities in the United States that had been sold for continued use as powdered infant formula production facilities for comparison.

Other less-specialized food processing plants lacked the FDA-required features of the Nestlé plant, so the DOR determined the highest and best use of the facility was for producing formula and assessed it at $10.9 million.

Nestlé appealed the DOR's assessment, arguing that the cost approach was inappropriate. Nestlé agreed that there was little, if any, market for powdered infant formula facilities; however, Nestlé argued the facility's highest and best use was as a food processing plant because it could be converted for such a use. Nestlé's assessor used the comparable sales approach, comparing the sales of food processing plants, and appraised the plant at $3.59 million.

Decision

Writing for the court, Justice Michael Gableman affirmed the decisions of the lower courts and the DOR. Under the "substantial evidence" test, the court determined that DOR's assessment is presumed to be correct until "the challenging party presents significant contrary evidence."

The court further held that "Nestlé failed to introduce significant evidence that no market existed for the Gateway Plant's sale as a powdered infant formula production facility." Specifically, Nestlé's evidence that there were no actual formula facilities sold in the United States was not substantial evidence to establish that there is no market.

According to the court, comparing the facility to other food processing plants would be improper, so a cost approach was the better assessment. The cost approach estimates the cost of replicating the existing facility, and then deducts value for depreciation, functional obsolescence, and tax-exempt components. Applying the cost approach, the DOR assessed the plant at $10,915,000.

Nestle, Inc. v. Dept. of Revenue WCJC disagrees with this decision.	
Justice Michael Gableman	Wrote Opinion
Chief Justice Shirley Abrahamson	Concurred
Justice Ann Bradley	Concurred
Justice Patrick Crooks	Concurred
Justice David Prosser	Concurred
Justice Patience Roggensack	Concurred
Justice Annette Ziegler	Concurred

Covenant Healthcare v. City of Wauwatosa, 2011 WI 80

In a 6-1 decision, the court found that the St. Joseph Hospital Outpatient Center qualifies as tax-exempt property.

Facts

St. Joseph Outpatient Clinic is a freestanding clinic located five miles from St. Joseph Hospital. The Outpatient Clinic was owned by St. Joseph from 2003 to 2006. In 2003, Covenant constructed a building that included three levels of the Outpatient Clinic. Covenant transferred ownership of the building to St.

Joseph, but maintained ownership of the land and leased it to St. Joseph.

Covenant filed timely Property Tax Exemption Requests with the City of Wauwatosa in each year from 2003 to 2006. Covenant claimed property tax exemptions for both the Outpatient Clinic building and the land on which the building is located. The city assessor denied the property tax exemption for each of these four years and Covenant paid the assessed tax, then sued to recover the amount of the City's allegedly unlawful assessment.

Decision
In an opinion by Justice Gableman, the court held that the Outpatient Clinic is used for the primary purposes of a hospital, and is neither a doctor's office nor a property used for commercial purposes, and is therefore tax-exempt property. Further, the court held that no benefit inured to any member of St. Joseph because the term "member" does not include not-for-profit entities.

Through extensive factual analysis, the court concluded that the Outpatient Clinic is used primarily for the purposes of a hospital because the Outpatient Clinic is fully integrated with St. Joseph Hospital. The court concluded that the Clinic "effectively serves as a department of the larger St. Joseph Chambers Street Hospital."

Based on a number of factors, the court held that the Outpatient Clinic was not a doctor's office. Additionally, the court held that the Outpatient Clinic was not used for commercial purposes. The court concluded that just because a not-for-profit may operate "in the black" does not mean it is generating revenue in the commercial sense.

Chief Justice Abrahamson dissented, concluding that the Outpatient Clinic property is used as a doctor's office and therefore does not qualify for the property tax exemption.

Covenant Healthcare v. City of Wauwatosa WCJC agrees with this decision.	
Justice Michael Gableman	Wrote Opinion
Justice Ann Bradley	Concurred
Justice Patrick Crooks	Concurred
Justice David Prosser	Concurred
Justice Patience Roggensack	Concurred
Justice Annette Ziegler	Concurred
Chief Justice Shirley Abrahamson	Wrote Dissent

TORTS - LIABILITY OF CORPORATE OFFICER & CIVIL PROCEDURE - DEFAULT JUDGMENT

Casper v. American Int. South Ins., 2011 WI 81
Casper involved the issue of whether a corporate officer can be held personally liable for non-intentional torts for certain acts that occur within the scope of the person's employment. The case also involved the issue of default judgments.

The Wisconsin Civil Justice Council and the Wisconsin Insurance Alliance filed an *amicus curiae* brief in support of the employer and insurance company sued in the case.

Facts
Members of the Casper family and a friend were injured when their vehicle was rear-ended by a vehicle driven by Mark Wearing. At the time of the accident, Wearing was co-employed by Transport Leasing/Contract, Inc. (TLC) and Bestway Systems, Inc. (Bestway). The truck he was driving had been leased to Bestway by Ryder. Litigation ensued and three separate appeals were filed, two of which went before the Supreme Court.

The first issue presented to the court was wholly procedural and involved the question of what constitutes "excusable neglect" when failing to respond to a complaint within the 45-day requirement. The Caspers filed suit against a number of parties, including, as relevant here,

National Union, as an insurer of one of the driver's co-employers, TLC.

The Caspers served National Union with a copy of the amended complaint on May 5, 2006. National Union failed to timely answer the amended complaint. The Caspers promptly moved for default judgment. National Union filed an answer that was six days late and also moved to extend the time for filing their answer.

The circuit court found that National Union's failure to file its answer in a timely manner was "excusable neglect" under Wisconsin law. Accordingly, the court granted National Union's motion to enlarge time and denied the Caspers' motion for default judgment.

The second issue involved a novel question about the personal liability of a corporate officer, Jeffrey Wenham, the CEO of Bestway, one of the employers of the driver. The Caspers alleged that Wenham was personally liable for approving the route that Wearing (his employee) drove the day of the accident, knowing that the route could not be safely completed pursuant to federal regulations. Initially, the circuit court dismissed all of the Caspers' claims against Wenham as an individual. On reconsideration, however, the circuit court reinstated the negligence claim against Wenham, agreeing with the Caspers that it had erred in finding that there was no evidence or testimony that Wenham personally approved the route. Wenham appealed and the court of appeals affirmed.

The third legal issue was whether under Wisconsin law a direct action claim against an insurer can be maintained where the insurance policy was not delivered or issued for delivery in Wisconsin, but the insurance policy covers the insured "business operations" conducted in this state.

Decision

In a 5-2 decision, the court both affirmed and reversed the lower court.

Default Judgment - Excusable Neglect: The court held that the trial court did not erroneously exercise its discretion in finding excusable neglect and granting National Union's motion to extend the time by seven days to answer the amended complaint. The court found that National Union provided sufficient affidavits explaining its failure to respond to the complaint within the 45 days required by Wisconsin law.

Corporate Officer Liability for Non-Intentional Tort Liability: A corporate officer can be held personally liable for a non-intentional tort liability that occurs while he or she is performing his or her job and which is within the scope of his or her employment. However, the court ruled that in this case Wenham's (the CEO) actions were too remote to provide a basis for liability. According to the court, "any negligence on Wenham's part in approving a route, from his office in Ohio, to be driven entirely in other states, is simply too far removed from the injury the Caspers suffered in Wisconsin."

In reaching its decision, the court cited WCJC's and WIA's brief discussing the "business judgment rule," which "limits judicial review of corporate decision-making when corporate directors make business decisions on an informed basis, in good faith, and in the honest belief that the action taken is in the best interest of the company." According to the court, "the very existence of a business judgment rule reflects public policy that corporate officers are allowed some latitude to make wrong decisions without subjecting themselves to personal liability."

Direct Action: The court ruled that a liability insurance policy need not be delivered or issued for delivery in Wisconsin in order to subject the insurer to a direct action under Wisconsin law. In reaching this decision, the Supreme Court overruled a previous court of appeals decision – *Kenison v. Wellington Insurance Co.* – which reached a different conclusion.

Justice Ann Walsh Bradley and Chief Justice Shirley Abrahamson wrote partial concurrence and partial dissent criticizing the U.S. Supreme Court's decision in *Riegel v. Medtronic.*

According to the minority opinion, "[w]ith one stroke of a pen, [the U.S. Supreme Court] has diminished the states' traditional authority over the development of the common law and substituted instead mandatory adherence to a regulatory standard that may be substandard."

Casper v. American Int. South Ins. WCJC agrees with this decision.	
Justice David Prosser	Wrote Opinion
Justice Patrick Crooks	Concurred
Justice Patience Roggensack	Concurred
Justice Annette Ziegler	Concurred
Justice Michael Gableman	Concurred
Justice Ann Bradley	Wrote Dissent
Chief Justice Shirley Abrahamson	Dissented

TORTS - LEMON LAW

***Kilian v. Mercedes – Benz USA*, 2011 WI 65**

In a unanimous decision, the court held that Mercedes-Benz's enforcement of a lease after the plaintiff received a refund for the leased car violated Wisconsin's Lemon Law. The court concluded that the plaintiff was entitled to his costs, disbursements, and reasonable attorney fees, but no pecuniary damages.

Facts

Kilian leased a Mercedes-Benz from Mercedes-Benz Financial (Financial). After numerous mechanical problems, Kilian returned the vehicle to the dealer and received a refund from Mercedes-Benz under Wisconsin's Lemon Law.

Despite having returned the vehicle, Kilian began receiving phone calls from Financial indicating that his lease was in default. Financial also reported this information to credit bureaus. Kilian filed suit under Wisconsin's Lemon Law arguing that the manufacturer violated the Lemon Law by not refunding Financial the current value of the lease within 30 days of the demand for refund. Kilian also sued Financial for reporting the information to the credit bureaus. Both the trial court and court of appeals ruled in favor of Mercedes-Benz and Financial.

Decision

Even though Kilian sought equitable relief and not pecuniary damages, the court concluded that he could maintain an action under Wisconsin's Lemon Law. In reversing the lower court, the Supreme Court ruled that the court of appeals incorrectly interpreted the Lemon Law statute by limiting its remedy to pecuniary loss.

The court rejected Financial's argument that it made an innocent mistake because there was no way to stop the notices from being mailed by its automated collections system. According to the court, this argument ignored that fact that the statute unambiguously prohibits enforcement of a lease following the issuance of a refund to the customer with no exception for "mistaken enforcement."

The court ruled that Kilian was entitled to his costs, disbursements, and reasonable attorney fees, but was not entitled to an award for pecuniary loss. According to the court, because Kilian had already received a complete refund from Mercedes – Benz, it would be against legislative intent to award him the typical double pecuniary damages.

Justice Ziegler did not take part in this decision.

Kilian v. Mercedes – Benz, USA WCJC agrees with this decision regarding pecuniary damages.	
Justice Michael Gableman	Wrote Opinion
Chief Justice Shirley Abrahamson	Concurred
Justice Ann Bradley	Concurred
Justice Patrick Crooks	Concurred
Justice David Prosser	Concurred
Justice Patience Roggensack	Authored separate concurring opinion
Justice Annette Ziegler	Did not participate

REGULATORY LAW - DEPARTMENT OF NATURAL RESOURCES

Anderson v. Department of Natural Resources, 2011 WI 19

In *Anderson*, the Wisconsin Supreme Court relied on concepts of federalism to determine the Department of Natural Resources' (DNR) authority to overrule the Environmental Protection Agency's (EPA) application of the federal Clean Water Act (CWA).

Facts

The plaintiffs petitioned the DNR for review of a Wisconsin Pollutant Discharge Elimination System (WPDES) permit that the DNR reissued to Fort James Broadway Mill in Green Bay.

The petitioners asked for a public hearing pursuant to Wis. Stat. § 283.63(1)(b), arguing that the permit failed to comply with the CWA and related federal regulations. The DNR denied the request, reasoning that only the EPA has the authority to determine whether state-issued permits comply with federal law, so a hearing would be unnecessary.

Wisconsin Supreme Court Decision

The 5-2 majority opinion, authored by Justice Annette Ziegler, affirmed the DNR's decision not to hold a hearing. Reviewing the DNR's decision *de novo*, but with a great weight of deference to the agency, the court concluded that any other ruling "would undermine the careful federal and state balance created by the Clean Water Act and would thwart the finality of permits properly issued under the WPDES permit program."

Dissent

Chief Justice Abrahamson dissented arguing that the DNR should have the authority to question whether a permit is in line with federal law, even after the EPA has determined it is.

Anderson v. Department of Natural Resources WCJC agrees with this decision.	
Justice Annette Ziegler	Wrote Opinion
Justice Patrick Crooks	Concurred
Justice David Prosser	Concurred
Justice Patience Roggensack	Concurred
Justice Michael Gableman	Concurred
Chief Justice Shirley Abrahamson	Wrote Dissenting Opinion
Justice Ann Bradley	Dissented

Lake Beulah Management District v. Village of East Troy, 2011 WI 54

The underlying issue in *Lake Beulah* was whether the Department of Natural Resources (DNR) has broad authority to regulate high capacity wells beyond the specific provisions set forth in the statutes by the legislature.

Facts

The DNR approved a high capacity well in the Village of East Troy, located 1400 feet from the shores of Lake Beulah, an 834-acre lake. A conservationist group challenged the permit arguing that the DNR failed to consider the environmental effects of the proposed high capacity well. The Village of East Troy countered that the DNR lacked the statutory authority to consider the environmental effects of the well because it is not the type of well that the Wisconsin statutes specifically mandate environmental review for prior to permit approval.

The administrative law judge ruled in favor of East Troy. The judge dismissed the arguments made by the conservationist group that the DNR has plenary authority under the Public Trust Doctrine to limit the type of high capacity well applied for by the Village of East Troy. The circuit court affirmed the administrative law judge's decision.

The court of appeals, however, reversed. In its decision, the court swept aside the specific

provisions in the statutes describing DNR's specific authority with respect to regulating high capacity wells. The court ruled that the agency had plenary authority under the Public Trust Doctrine to consider other factors not included in specific statutes pertaining to high capacity wells.

Decision
The court concluded that the DNR properly issued the permit because there was no "concrete, scientific evidence in the record on review" that would trigger DNR's duty to consider the impact of the high capacity well on the waters of the state. The court also reversed the court of appeals decision to include an affidavit that environmental groups attempted to insert into the record – after the record had been certified – suggesting that the high capacity well is causing environmental harm to Lake Beulah.

In reaching its decision, however, the court concluded that through the statutes describing DNR's general duties and powers, the "legislature has delegated the State's public trust doctrine to the DNR in the context of its regulation of high capacity wells and their potential effect on navigable waters such as Lake Beulah."

For the first time, the court extended the public trust doctrine to allow the DNR to consider "potential environmental harm" to navigable waters from groundwater.

In reaching its decision, the court held that the general provisions under Wis. Stat. §§ 281.11 and 281.12 trumped the specific provisions in Wis. Stat. §§ 281.34 and 281.35 regulating high capacity wells. As a result of the court's decision, the DNR was given significantly more authority and discretion in determining whether to deny or grant a high capacity well permit beyond what was specifically provided for by the legislature.

Lake Beulah Management Dist. v. DNR WCJC disagrees with this decision.	
Justice Patrick Crooks	Wrote Opinion
Chief Justice Shirley Abrahamson	Concurred
Justice Ann Bradley	Concurred
Justice David Prosser	Concurred
Justice Patience Roggensack	Concurred
Justice Annette Ziegler	Concurred
Justice Michael Gableman	Concurred

WORKER'S COMPENSATION

DeBoer Transportation, Inc. v. Swenson, 2011 WI 64
The issue in *DeBoer Transportation* is whether the employer failed to show "reasonable cause" by not rehiring an employee recovering from an injury who refused to participate in the company's mandatory overnight reorientation.

Facts
The employee, Charles Swenson (Swenson), injured his knee at work. After several months away from work, Swenson was cleared to return. His employer, deBoer Transportation, instituted a "reorientation" program for drivers that have been off work more than 60 days. One of the requirements was an overnight "check-ride" that required the driver to spend a number of nights on the road traveling.

Swenson took care of his terminally ill father and therefore requested that deBoer Transportation pay the cost of caring for his father during the overnight check-ride. Because deBoer Transportation refused to pay for the care of Swenson's father and refused to make alternative check-ride arrangements, Swenson decided not to participate in the check-ride. As a result, Swenson was not rehired.

Swenson filed a complaint with the Labor and Industry Review Commission (LIRC), which determined the deBoer Transportation failed to show "reasonable cause" for its refusal to rehire

Swenson. LIRC concluded that deBoer Transportation's actions did not constitute "reasonable cause" because deBoer Transportation offered no explanation for why it could not alter the check-ride to accommodate Swenson's personal need to take care of his father.

Decision
The court held that LIRC incorrectly applied the worker's compensation statute. According to the majority, courts have previously held that merely saving costs is a reasonable cause. The court concluded that Swenson's failure to complete the check-ride, a long-standing "legitimate safety policy" of deBoer Transportation, was reasonable cause for refusing to rehire Swenson. The court further concluded that worker's compensation statute §102.35 (3) does not require an employer to change its legitimate and long-standing safety policies in order to assist an employee in meeting personal obligations.

Dissent
Justice Bradley dissented arguing the check-ride was merely a pretext for a refusal to rehire.

DeBoer Transportation, Inc. v. Swenson WCJC agrees with this decision.	
Justice Patience Roggensack	Wrote Opinion
Justice Patrick Crooks	Concurred
Justice David Prosser	Concurred
Justice Annette Ziegler	Concurred
Justice Michael Gableman	Concurred
Justice Ann Bradley	Wrote Dissenting Opinion
Chief Justice Shirley Abrahamson	Dissented

CIVIL PROCEDURE - PERSONAL JURISDICTION OF FOREIGN CORPORATIONS

Rasmussen v. General Motors et al., 2011 WI 52
The court in *Rasmussen* issued a decision involving personal jurisdiction. The Wisconsin Civil Justice Council filed an *amicus curiae* brief in the case.

Facts
Although the case caption cites General Motors, the issue in this case was whether Wisconsin had personal jurisdiction over Nissan Japan.

The lawsuit involved a class action case against numerous auto manufacturers for alleged anti-trust violations. Specifically, the plaintiffs alleged that Nissan Japan and its wholly owned subsidiary, Nissan North America, conspired to keep new car prices at significantly higher prices than prices in Canada for the same vehicles. They claimed that the defendants arranged for U.S. dealers to not honor warranties on cars imported from Canada to prevent lower priced cars from being imported to the U.S.

The case was dismissed for lack of personal jurisdiction by the trial court, which was upheld by the court of appeals. The Wisconsin Supreme Court addressed whether Wisconsin's personal jurisdiction statute (Wis. Stat. § 801.05) allows for general or specific jurisdiction over a foreign parent corporation based on an agency theory.

Decision
The court, in a 7-0 decision (Chief Justice Abrahamson issuing a separate concurring opinion), upheld the court of appeals and ruled that Wisconsin did not have general personal jurisdiction over Nissan Japan.

The court held:

> We conclude that even assuming *arguendo* that Nissan North Amercia were the agent of Nissan Japan, absent control by Nissan Japan sufficient to cause us to disregard the separate corporate identities of Nissan Japan and Nissan North America, the activities of the subsidiary

corporation are insufficient to subject its nonresident parent corporation to general personal jurisdiction under Wis. Stat. § 801.05(1)(d). We also conclude that Rasmussen [plaintiff] has not met his burden to show that the corporate separateness of Nissan Japan and Nissan North America should be disregarded such that the activities of Nissan North America in Wisconsin should be imputed to Nissan Japan.

Rasmussen v. General Motors WCJC agrees with this decision.	
Justice Patience Roggensack	Wrote Opinion
Chief Justice Shirley Abrahamson	Concurred
Justice Ann Bradley	Concurred
Justice Patrick Crooks	Concurred
Justice David Prosser	Concurred
Justice Annette Ziegler	Concurred
Justice Michael Gableman	Concurred

TORTS - INTERPRETATION OF INSURANCE POLICY

***Siebert v. Wisconsin American Mutual Insurance Co.*, 2011 WI 35**

The court in *Siebert* held that because the insurance policy issued by Wisconsin American Mutual Insurance Company did not cover the driver's alleged negligent operation of the vehicle, the policy likewise did not cover the plaintiff's negligent entrustment claim.

Facts

Jessica Koehler gave permission to her boyfriend, Jesse Raddatz, to drive her father's automobile to a food pantry in Eagle River. Instead of driving to the food pantry, Raddatz picked up four more passengers and proceeded on a joy ride. While attempting to pass another vehicle, Raddatz lost control of the vehicle. The accident killed Raddatz and one other passenger. The remaining passengers, including plaintiff Jessica Siebert, were severely injured.

Siebert filed a direct action against Wisconsin American alleging that Raddatz's negligent operation caused Siebert's injuries. The case went to trial, and the jury found that Raddatz exceeded the scope of the permission he was provided by Koehler. As a result, the policy did not cover the accident.

The plaintiff filed an amended complaint alleging that Koehler negligently entrusted her father's vehicle to Raddatz. The circuit court held that there was no coverage under the policy for Koehler's alleged negligent entrustment. The court of appeals reversed the circuit court.

Decision

In a 4-3 decision, the court reversed the court of appeals and upheld the circuit court's decision. Specifically, the court held that Koehler's alleged negligent entrustment does not constitute an independent concurrent cause of Siebert's injuries sufficient to trigger coverage, when no coverage exists for Raddatz's alleged negligent operation of the vehicle.

Dissent

Justice Crooks, joined by Chief Justice Abrahamson and Justice Bradley dissented, arguing that the independent concurrent cause rule did not apply. The justices reasoned that the negligent entrustment claim should be available despite the fact that Raddatz's negligent operation of the vehicle was not covered.

Siebert v. Wisconsin American Mutual Insurance Co. WCJC agrees with this decision.	
Justice Annette Ziegler	Wrote Opinion
Justice David Prosser	Concurred
Justice Patience Roggensack	Concurred
Justice Michael Gableman	Concurred
Justice Patrick Crooks	Wrote Dissenting Opinion
Chief Justice Shirley Abrahamson	Dissented
Justice Ann Bradley	Dissented

Day v. Allstate Indemnity Co., 2011 WI 24

The issue in *Day* is whether Allstate's family exclusion provision precluded coverage for the plaintiff's wrongful death claim.

Facts

Emma Day, the daughter of plaintiff Wendy Day, had experienced a number of seizures during the day. Emma's step-mother, Holly Day, drew Emma a bath and closed the door. Emma suffered another seizure and drowned in the tub.

Wendy Day sued Holly Day for negligence. The court of appeals concluded that Clinton Day, whose homeowner's policy is at the center of this case, would benefit from the coverage by virtue of his entitlement to half of any recovery Wendy Day received for their daughter's death.

Decision

Justice Bradley writing for the majority reversed the court of appeals. According to the majority, "based upon the examination of the policy, the canons of insurance policy construction, and our case law, we conclude that Allstate has failed to meet its burden to demonstrate that the family exclusion unambiguously precludes coverage."

Dissent

The dissent argued that the court of appeals decision should have been upheld. "While I have tremendous sympathy for the Day family, this court cannot rewrite an unambiguous family exclusion provision in order to cover a risk that Allstate did not contemplate and for which it did not receive a premium."

Day v. Allstate Indemnity Co. WCJC disagrees with this decision.	
Justice Ann Bradley	Wrote Opinion
Chief Justice Shirley Abrahamson	Concurred
Justice Patrick Crooks	Concurred
Justice Patience Roggensack	Concurred
Justice Annette Ziegler	Wrote Dissenting Opinion
Justice David Prosser	Dissented
Justice Michael Gableman	Dissented

Steffens v. BlueCross BlueShield of Illinois, 2011 WI 60

In *Steffens*, the court held that the determination that BlueCross was entitled to reimbursement of costs paid was not arbitrary and capricious.

Facts

John Steffens suffered injuries in an automobile accident with another driver. BlueCross paid $67,477.57 toward Steffens' back and neck related medical expenses under an ERISA plan. The plan had a subrogation clause that allowed the plan administrator to interpret the terms.

Steffens continued to suffer back and neck pain which he attributed to the automobile accident, so he settled with the driver who caused the accident's insurance company for $100,000.

After the settlement, Steffens continued to experience back and neck pain but no longer attributed the pain to the automobile accident. As a result, Steffens argued that he was not required to reimburse BlueCross.

Decision

In a 5-2 decision authored by Justice Roggensack, the court held that the ERISA plan administrator's determination that BlueCross was entitled to reimbursement was not arbitrary and capricious. Steffens consistently asserted that his injuries arose out of the automobile accident prior to the settlement. Accordingly, BlueCross was entitled to reimbursement

because the expenses paid arose from an accident for which a third party may be liable.

Dissent
The dissent argues that nowhere in the record was there a copy of the ERISA plan administrator's interpretation of the plan. The dissent further argues that it "would remand the matter to the circuit court for the determination of what (if any) interpretation and determination the plan administrator (whoever that is) made, when, and why." If the plan administrator did not interpret the ERISA plan, then the circuit court should interpret and apply the plan language "as it would any other contract."

Steffens v. BlueCross BlueShield of Illinois WCJC agrees with this decision.	
Justice Patience Roggensack	Wrote Opinion
Justice Patrick Crooks	Concurred
Justice David Prosser	Concurred
Justice Annette Ziegler	Concurred
Justice Michael Gableman	Concurred
Chief Justice Shirley Abrahamson	Wrote Dissenting Opinion
Justice Ann Bradley	Dissented

***Brethorst v. Allstate Property and Casualty Insurance Company*, 2011 WI 41**
The issue in *Brethorst* was whether evidence of breach of contract is a condition precedent to proceeding with discovery in a first-party bad faith claim based on wrongful denial of benefits.

Facts
Wanda Brethorst and her husband were involved in an automobile accident caused by an uninsured motorist. The Brethorsts had an Allstate automobile insurance policy, which covered injuries caused by an uninsured motorist and $5,000 in medical expenses.

Brethorst submitted a UM claim to Allstate for her injuries caused by the accident, and Allstate offered a settlement above the $5,000 in medical expenses. Brethorst rejected Allstate's offer to settle the uninsured motorist claim and filed an action against Allstate for bad faith. Allstate argued that the insured should be required to proceed and succeed on a breach of contract claim before pursuing a bad faith claim.

Decision
Writing for a unanimous court, Justice Prosser held:

1. Some breach of contract is a fundamental prerequisite for a first-party bad faith claim against an insurer.
2. Breach of contract and first-party bad faith are separate claims.
3. An insured may file a bad faith claim without also filing a breach of contract claim.
4. The insured may not proceed with discovery on a first-party bad faith claim until he or she has: a) Pled a breach of contract by the insurer as part of a separate bad faith claim, and b) Satisfied the court that he or she has established such a breach or will be able to prove such a breach in the future.

Based on the foregoing, the court concluded that Brethorst had supplied sufficient evidence of a breach of contract by the insurer to proceed with discovery on her bad faith claim.

Brethorst v. Allstate Property and Casualty Insurance Company WCJC agrees with this decision.	
Justice David Prosser	Wrote Opinion
Chief Justice Shirley Abrahamson	Concurred
Justice Ann Bradley	Concurred
Justice Patrick Crooks	Concurred
Justice Patience Roggensack	Concurred
Justice Annette Ziegler	Concurred
Justice Michael Gableman	Concurred

2011-12 TERM

TORTS - MEDICAID FRAUD STATUTE

***State of Wisconsin v. Abbott Laboratories, et al.*, 2012 WI 62**

In a 4-0 decision authored by Justice Gableman, the court upheld the lower court's verdict finding the company in this specific case, Pharmacia Corporation, liable for violating Wisconsin's Deceptive Trade Practices Act (DTPA) and the Medicaid fraud statute. Justices Crooks, Prosser, and Bradley did not participate.

The decision is notable because in 2009 the Alabama Supreme Court overwhelmingly (8-1) rejected a similar lawsuit brought by Alabama Atty. Gen. Troy King.

Facts

This case is the latest in a number of lawsuits filed by states, typically represented by contingency fee lawyers, suing virtually the entire pharmaceutical industry for fraud in the reporting of prices for prescription drugs covered by Medicaid programs.

The lawsuit was originated by former Atty. Gen. Peg Lautenschlager and was continued by her successor, J.B. Van Hollen. In 2007, Gov. Jim Doyle and Atty. Gen. Van Hollen hired outside counsel to continue the litigation against the pharmaceutical companies.

For decades, Medicaid agencies have reimbursed pharmacists in Wisconsin for prescription drugs dispensed to Medicaid recipients based on a formula established by the legislature and approved by the governor. One component of the formula is a figure known as "average wholesale price" (AWP), which is supplied by manufacturers to an independent price reporting service known as "First DataBank."

The State of Wisconsin, similar to other states, alleged it was unaware that the listed AWPs did not represent the actual average price sold to pharmacies. Therefore, the State of Wisconsin sued the pharmaceutical companies for alleged fraud.

Pharmacia argued that AWPs have always been a "benchmark" and were never intended to reflect the actual prices for of drugs or their averages. In fact, Pharmacia noted throughout the case that the legislature, and therefore the State of Wisconsin, was aware that AWPs did not reflect the actual costs of their drugs, yet continued to use AWP.

For example, the federal Office of the Inspector General in a letter told Wisconsin officials that "on average, pharmacies buy drugs for 15.5 percent below AWP. We continue to believe that AWP is not a meaningful payment level and that it should not be used for making reimbursements." Based on this information, Wisconsin continued to use the AWP but reduced reimbursement for brand name drugs to AWP minus 10 percent.

Moreover, evidence showed that Wisconsin considered basing reimbursement on actual acquisition costs, but rejected this alternative because it would be "[m]ost unacceptable to providers."

Despite this evidence that the State was aware that AWPs did not accurately reflect the actual prices for drugs, and the fact that the State chose to reduce reimbursement by a certain percentage below the AWPs to reflect the generally inflated rate, the State nonetheless sued numerous pharmaceutical companies alleging fraud.

Trial Court Decision

The lawsuit was filed in Dane County Circuit Court, which found in favor of the State. The jury found Pharmacia liable under the State's DTPA and Medicaid fraud statute and awarded $9 million in damages. The jury originally concluded that Pharmacia violated the Medicaid statute 1,440,000 times, but the trial judge lowered the amount to 4,578 violations, and imposed a $1,000 forfeiture for each violation, totaling $4,578,000. The trial court also awarded

over $8 million in attorney fees and litigation costs to the plaintiff attorneys hired by the State.

Wisconsin Supreme Court Decision
Justice Gableman, writing for the majority, upheld the trial court's decision in its entirety, despite considerable evidence in the record suggesting that the State knew that the AWPs were not the actual average prices.

According to the court:

> The evidence at trial unequivocally revealed that, at all times relevant to the case, Medicaid paid pharmacies AWP minus a specific percentage for brand name drugs. The parties and their witnesses likewise agreed that Pharmacia reported AWPs that did not track the actual prices pharmacies were paying wholesalers for drugs. The dispute is over how reimbursement rates would have changed, if at all, had accurate prices been conveyed to Medicaid. As the following discussion demonstrates, the jury was presented with sufficient credible evidence to support a reasonable inference that reimbursement rates would have been reduced to reflect actual wholesale prices, had they been provided. Accordingly, we conclude that the jury did not impermissibly speculate in reaching its damage award with respect to brand name drugs.

State of Wisconsin v. Abbott Laboratories WCJC disagrees with this decision.	
Justice Michael Gableman	Wrote Opinion
Chief Justice Shirley Abrahamson	Concurred
Justice Patience Roggensack	Concurred
Justice Annette Ziegler	Concurred
Justice Ann Bradley	Did not participate
Justice Patrick Crooks	Did not participate
Justice David Prosser	Did not participate

TORTS - LEMON LAW

Marquez v. Mercedes-Benz USA, LLC, 2012 WI 57
In a 6-1 decision, the Wisconsin Supreme Court held that the plaintiff car buyer and his attorney were due over $700,000 in damages under Wisconsin's Lemon Law when the auto manufacturer was unable to refund the car owner within the 30-day timeframe.

Facts
Marco Marquez, purchased a Mercedes-Benz E-series automobile that had mechanical problems triggering Wisconsin's Lemon Law. Wisconsin law provides that "if a new motor vehicle does not conform to an applicable express warranty," and the nonconformity is not cured after a "reasonable attempt to repair," then the consumer may return the vehicle and elect to receive either: 1) a new comparable vehicle, or 2) a refund.[2]

If the auto manufacturer fails to provide a refund or replace the vehicle within 30 days, the owner is awarded "twice the amount of any pecuniary loss, together with costs, disbursements and reasonable attorney fees, and any equitable relief the court determines appropriate."[3] "Pecuniary loss" includes the cost of the vehicle. The plaintiff is also entitled to pre- and post-judgment interest.

After Mercedes-Benz was alerted that Marquez's car was a lemon, it began working with Marquez and his attorney to remedy the situation. Originally, the owner sought a new vehicle, but instead of seeking a similar E-series he requested an S-series. Mercedes-Benz notified the owner that the 2007 S-series he requested had not yet been released to dealers, but told him that the company would work with him to get such a vehicle as soon as possible.

With just five days left before the 30-day statutory deadline, the owner notified Mercedes-Benz that he changed his mind, and instead of a

[2] Wis. Stat. § 218.0171(2)(a)-(b).
[3] Wis. Stat. § 218.0171(7).

new vehicle, he wanted a refund. This was the day (Nov. 23, 2005) before Thanksgiving.

Because of the holiday, the Mercedes-Benz representative, Wade Messing, did not travel to Wisconsin until Monday, November 28 to issue the refund check to both the owner and his bank, which had issued a loan for the vehicle.

Messing contacted the owner's bank to obtain the auto loan payment information so he could issue the check, but the bank refused to provide the information, citing privacy issues. The bank told Messing that if the owner called the bank and authorized the release of the information, it would provide the information to Messing.

Messing then contacted the owner and asked that he call the bank to provide the release. The owner told him he would do so and that he would call Messing back after he contacted the bank. However, the owner called neither the bank nor Messing. The owner further withheld from Messing that he had already given his loan officer at the bank permission to release information to Messing.

After not hearing from the owner, Messing called the owner's attorney, who was not in the office and could not be reached. The attorney's office did not inform Messing that it had the information Messing needed from the bank.

Because Messing did not have the requisite information to issue a refund check to both the owner and the bank, Mercedes-Benz did not issue a refund check to the owner within Wisconsin's 30-day statutory deadline. The owner's attorney filed a lawsuit the next day alleging Mercedes-Benz violated Wisconsin's Lemon Law. The complaint was even dated November 28, 2005, meaning that the attorney was getting ready to seek the damages the very same day that he and his client were withholding information and failing to respond to Messing's phone calls.

Lower Court Decisions

The case started in Waukesha County Circuit Court, where a judge ruled in favor of the owner. The case was appealed to the court of appeals, which reversed the lower court. The court of appeals held that a consumer who intentionally thwarts a manufacturer's efforts to provide a refund within the 30-day statutory period cannot benefit from the Lemon Law's stiff remedies.

The court remanded the case back to the circuit court for the jury to determine whether the owner intentionally thwarted Mercedes-Benz's attempt to provide a statutory refund within the 30-day period by failing to provide the requisite bank information. On remand, the jury found in favor of Mercedes-Benz. The jury determined that the owner and his attorney acted in bad faith.

The circuit court judge, however, overturned the jury's verdict by issuing a directed verdict in favor of the owner. The judge determined there was no credible evidence that the owner or his attorney intentionally thwarted Mercedes-Benz's efforts to provide a refund.

Wisconsin Supreme Court Decision

In an opinion authored by Chief Justice Shirley Abrahamson, the court upheld the circuit court judge's decision and swept aside the jury's verdict.

Despite the overwhelming evidence pointing to the owner and his attorney acting in bad faith, the majority found that the "jury's verdict impermissibly rest[ed] on 'conjecture and speculation.'"

According to the court, the "jury's finding that on November 28 the consumer intentionally prevented Mercedes-Benz from complying with the Lemon Law was impermissibly speculative." The majority further stated that the record contained no evidence of any such intentional conduct by the owner or his lawyer to bar the manufacturer from the Lemon Law's remedies.

Dissent

Justice Patience Roggensack dissented arguing that the court should have upheld the jury's verdict in favor of Mercedes-Benz. According to Justice Roggensack, there was "credible evidence to sustain the jury's finding that [the

owner] did not act in good faith in his dealings with Mercedes-Benz."

Justice Roggensack cited to all the evidence in the record that proved that the owner was not acting in good faith when dealing with Mercedes-Benz's representative, who attempted to provide the owner the refund within the statutory deadline.

Despite all of the evidence demonstrating that the owner and his attorney did not act in good faith, the majority still upheld the lower court's directed verdict instead of the jury's verdict in favor of Mercedes-Benz.

Marquez v. Mercedes – Benz USA, LLC WCJC disagrees with this decision.	
Chief Justice Shirley Abrahamson	Wrote Opinion
Justice Ann Bradley	Concurred
Justice Patrick Crooks	Concurred
Justice David Prosser	Concurred
Justice Annette Ziegler	Concurred
Justice Michael Gableman	Concurred
Justice Patience Roggensack	Wrote Dissenting-Concurring Opinion

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WORKER'S COMPENSATION

***Aurora Consolidated Health Care v. Labor & Industry Review Commission*, 2012 WI 49**

In a 5-1 decision authored by Justice Ann Walsh Bradley, the court held that Wis. Stat. § 102.17(1)(d) did not allow Aurora Consolidated Health Care (Aurora) the right to cross-examine a physician appointed by the Labor & Industry Review Commission (LIRC) which determined that the injured employee was permanently and totally disabled as a result of a work injury.

Facts

The case involved a long set of facts describing the numerous physical ailments of Jeffrey Schaefer, the employee in this worker's compensation case. Schaefer had a preexisting back injury and necrosis of both hip joints, for which he had hip replacement surgery. The back injury was directly attributed to a work-related slip and fall, but it was not clear his other injuries were work related.

At a Department of Workforce Development (DWD) hearing Schaefer was the only witness. However, pursuant to Wis. Stat. § 102.17(1)(d), both Schaefer and Aurora had submitted reports from medical experts opining on the extent of Schaefer's disability that was work related.

The case was subsequently reviewed by LIRC, which remanded the case to DWD and ordered that the agency appoint an "impartial" physician, pursuant to Wis. Stat. § 102.17(1)(g), to assess what portion of Schaefer's disability was due to his hip condition and hip surgery.

The DWD-appointed physician issued a report stating that Schaefer could only stand, sit, or drive for one half hour before changing positions. The state-appointed physician also said that Schaefer should not lift more than 10 pounds on a frequent basis, with 20 pounds being his maximum. All of the restrictions were attributed to Schaefer's work related injury.

Schaefer argued that the physician's report was incomplete, and therefore LIRC remanded to DWD a second time and ordered the state-appointed physician to answer a number of questions. The state-appointed physician determined that Schaefer could work eight hour days if he remained within the restrictions of the first report and was also given two 10-minute breaks per day. In addition, the physician stated that the chronic back pain might flare up a couple of times a month, and in those circumstances the pain would be so severe that no work would be possible.

Based on the physician's report, Aurora requested a remand to DWD to allow it to rebut the physician's opinion by questioning him, but LIRC denied Aurora's request. Both the circuit court and court of appeals affirmed LIRC's decision and held that neither the statute nor the Wisconsin Constitution gives a party the right to

cross-examine a state-appointed physician's report in a worker's compensation case.

Decision
The majority decided that "rebut" does not mean that parties involved in a worker's compensation case can cross-examine the state-appointed physician.

The majority also rejected Aurora's argument that it has a constitutional right to cross-examine the state appointed physician under Art. I, § 1 of the Wisconsin Constitution:

> We acknowledge the important role that cross-examination plays in the adversarial system, in which the goal is a search for the truth. Nevertheless, it does not rise to the level of a due process right in all instances.

The majority further found that "given our determinations that Aurora had no statutory or constitutional right to cross-examine Dr. Ebert, LIRC's decision to decline Aurora's request was discretionary."

Dissenting Opinion
In her dissent, Justice Roggensack focused on the word "rebut" and determined that it "encompasses more, not less, than a provision providing only for cross-examination." The dissent noted that the "statute affords the parties the opportunity to present additional evidence at a future hearing, which evidence may be presented by direct examination and by cross-examination."

Justice Roggensack further found that in this case Aurora's due process rights were violated because the state-appointed doctor's opinion "could not be explored and it was the basis for LIRC's decision."

Aurora Consolidated Health Care v. Labor & Industry Review Commission WCJC disagrees with this decision.	
Justice Ann Bradley	Wrote Opinion
Chief Justice Shirley Abrahamson	Concurred
Justice Patrick Crooks	Concurred
Justice Annette Ziegler	Concurred
Justice Michael Gableman	Concurred
Justice Patience Roggensack	Wrote Dissenting Opinion
Justice David Prosser	Did not participate

TORTS - MEDICAL LIABILITY

***Jandre v. Wisconsin Injured Patients and Families Compensation Fund, et al., 2012 WI 39*.**
In *Jandre*, the court issued a split decision greatly expanding the liability of physicians in medical liability cases. The case involved the scope of a physician's duty to inform a patient, often referred to as "informed consent."

The three-justice majority decision was authored by Chief Justice Abrahamson, joined by Justices Bradley and Crooks. Justice Prosser authored a concurrance, and Justice Roggensack, joined by Justices Ziegler and Gableman, dissented.

As explained by the dissent, the majority decision greatly expands liability for physicians. The three-justice majority decision, along with Justice Prosser's concurrance, imposes strict liability for a missed diagnosis through the informed consent law. The dissenting opinion argues that this is contrary to the statutes (Wis. Stat. § 448.30) and long-standing precedent.

Facts
The plaintiff, Thomas Jandre, was hospitalized after coffee he was drinking began coming out of his nose and he began drooling and slurring his speech. The left side of Jandre's face also drooped.

Jandre was evaluated in the emergency room by the defendant, Dr. Therese Bullis. Dr. Bullis diagnosed Jandre with Bell's palsy, with the possibility of a stroke. After arriving at her diagnosis, Dr. Bullis ordered a CT scan, which could rule out a hemorrhagic stroke and brain tumors. The results of the scan were normal, but a CT scan could not detect an ischemic stroke.

Dr. Bullis listened to Jandre's carotid arteries with a stethoscope in an effort to detect whether Jandre suffered an ischemic stroke event. Dr. Bullis had the option of also ordering a carotid ultrasound to assess Jandre's carotid arteries, which is typically more reliable than listening with a stethoscope, but she chose not to.

Based on Jandre's symptoms and tests performed, Dr. Bullis ruled out an ischemic stroke event and came to a final diagnosis of a mild form of Bell's palsy. Dr. Bullis informed Jandre of this diagnosis, prescribed medication, and sent him home with instructions to see a neurologist for follow-up care.

Eleven days later, Jandre suffered a full blown stroke. A carotid ultrasound performed at the hospital revealed that Jandre's right internal carotid artery was 95 percent blocked.

Jandre sued Dr. Bullis alleging she negligently diagnosed Jandre as having Bell's palsy, when he had initial symptoms of a stroke. Jandre also sued the physician for negligently failing to inform him about the possibility of having a carotid ultrasound to diagnose whether he had a blocked carotid artery that had caused a stroke.

Trial Court and Court of Appeals Decision
The jury issued a verdict finding that Dr. Bullis was not negligent in her diagnosis of Jandre's ailment. However, the jury then determined that Dr. Bullis was negligent in fulfilling her duty to obtain informed consent. Specifically, the jury found that Dr. Bullis was negligent in failing to inform Jandre of the availability of a non-invasive diagnostic tool (a carotid ultrasound) that had the potential to rule out a stroke.

The court of appeals affirmed the circuit court.

Supreme Court Decision
As noted above, the Supreme Court was divided, issuing three differing opinions.

Three-Justice Majority Decision
In a lengthy 76-page decision, Chief Justice Abrahamson applied a "reasonable patient standard" and ultimately concluded

> "that under the circumstances of the present case Dr. Bullis had a duty to inform Jandre…of the availability of an alternative, viable means of determining whether he had suffered an ischemic stroke event rather than an attack of Bell's palsy.
> …
> A jury could have determined under the facts and circumstances of the present case that Dr. Bullis should have known that information about another available non-invasive diagnostic tool was information a reasonable patient in Jandre's position would have wanted in order to decide intelligently whether to follow Dr. Bullis's recommendations."

Justice Prosser Concurring Opinion
In a separate opinion, Justice Prosser wrote that although the "lead opinion provides a trenchant argument for affirmance… I am unable to join the opinion because of the reservations I have about the direction we are going."

Ultimately, Justice Prosser recommends a "thorough review" of current administrative rules implementing Wis. Stat. § 448.30 by "a blue ribbon committee, including but not limited to medical professionals, so that physicians are given clear guidance as to their obligations under this statute."

Dissent
Justice Roggensack penned a strongly-worded dissent criticizing the majority's decision. The dissent explained that the decision, when combined with Justice Prosser's concurrence affirming the court of appeals decision, "holds a physician strictly liable for a missed diagnosis, contrary to the legislative directive in Wis. Stat. § 448.30 and or long-standing precedent."

According to the dissent, the three-justice majority attempted to expand the statute by:

> "requir[ing] that whenever there is a claim that the correct diagnosis of a patient's ailment was not made, a physician would be liable for failing to tell a patient about all potential diagnoses and all potential tests that could have been employed to evaluate whether different ailment were the source of the patient's symptoms."
> …
> [the majority's reasoning] "would be an entirely new concept that the legislature did not codify when it enacted § 448.30. Accordingly, I conclude that § 448.30 is not implicated in this malpractice action because there was no failure to inform the patient about the risks and benefits of the treatment and procedures that the physician employed."

The dissent further explained the jury's first finding, that Dr. Bullis was not negligent in her care and treatment of Jandre, was inconsistent with its second finding that Dr. Bullis was negligent in regard to her duty to obtain informed consent. As a result of the jury's inconsistent verdicts, the dissenting opinion would remand the case for a new trial.

Jandre v. Wisconsin Injured Patients and Families Compensation Fund, et al. WCJC disagrees with this decision.	
Chief Justice Shirley Abrahamson	Wrote Opinion
Justice Ann Bradley	Concurred
Justice Patrick Crooks	Concurred
Justice David Prosser	Wrote Concurring Opinion
Justice Patience Roggensack	Wrote Dissenting Opinion
Justice Annette Ziegler	Dissented
Justice Michael Gableman	Dissented

CIVIL PROCEDURE - DEFAULT JUDGMENT

Johnson v. Cintas Corp. No. 2, et al., 2012 WI 31

The court ruled that default judgment handed down by the lower courts was void because the complaint was "fundamentally defective" as it failed to name the proper defendant in the summons and complaint. As a result, the Supreme Court ruled that the circuit court lacked personal jurisdiction over the incorrectly named defendant.

Facts

Robert Johnson, an employee for Cintas Corporation No. 2 ("Cintas No. 2"), was injured in a car accident resulting in permanent injury. Johnson was a passenger in the vehicle, which was being driven by a friend. Johnson was required to use this vehicle during the course of his employment and held auto liability insurance through Cintas No. 2. Johnson sought treatment coverage from Cintas No. 2 through its health insurance provider. When Cintas No. 2 refused to pay benefits, Johnson filed suit.

Johnson's attorney filed the original summons and complaint naming "Cintas Corporation" as the defendant, instead of Cintas Corporation No. 2. Cintas Corporation No. 2 is a wholly-owned subsidiary of Cintas Corporation. Cintas Corporation No. 2 is a foreign corporation registered with the State of Wisconsin, whereas Cintas Corporation is a foreign corporation not registered in Wisconsin and does not do business within the State of Wisconsin.

Neither Cintas Corporation No. 2 nor Cintas Corporation responded to the complaint, and Johnson moved for default judgment. Cintas Corporation filed an Emergency Motion to Strike and Dismiss for Lack of Personal Jurisdiction. At the default judgment hearing Johnson was allowed to amend the summons and complaint. The trial court granted default judgment against Cintas Corporation No. 2.

Cintas No. 2 then contacted the trial court and filed its answer to the original and amended complaints, but the court refused to hear the

motions because it had already granted default judgment against Cintas No. 2.

Cintas No. 2 filed a motion for relief from judgment, which the court granted and then vacated the default judgment. Johnson filed a motion for reconsideration and argued that newly obtained information proved that Cintas No. 2 effectively held itself out as Cintas Corporation. The trial court granted Johnson's motion and reinstated the default judgment.

Court of Appeals Decision
The court of appeals reversed the trial court. The court held that because Johnson's summons failed to accurately name the proper defendant (Cintas Corporation No. 2), the service of process failed to confer personal jurisdiction over that defendant.

The court further explained that regardless of how Cintas Corp. No. 2 held itself out to the public, the amendment of the summons and complaint had the effect of bringing a new party into the action. According to the court, added parties must be served with the summons or voluntarily appear. The court further noted that strict compliance with the rules of statutory service upon an amendment naming a new corporate entity is consistent with Wisconsin's policy viewing default judgments with disfavor.

Supreme Court Decision
In a 4-2 decision, the court affirmed the court of appeals' decision. According to the Supreme Court:

> We conclude that service in this case was fundamentally defective because Johnson failed to name Cintas No. 2 as a defendant in his summons and complaint, contrary to Wis. Stat. §§ 801.02(1) and 801.09(1). Therefore, the circuit court lacked personal jurisdiction over Cintas No. 2, regardless of whether or not the defect prejudiced Cintas No. 2 and regardless of the manner in which Cintas No. 2 held itself out to the public or to Johnson specifically.

Dissent
In their dissenting opinion, Justice Bradley and Chief Justice Abrahamson argued that the "summons and complaint contained a mere misnomer – a technical defect that does not deprive the circuit court of jurisdiction."

Specifically, the dissent argued that the omission of "No. 2" was a misnomer, and as a result, did not deprive the circuit court of personal jurisdiction.

According to the dissenting opinion, the majority reached "the wrong result by dodging the applicable standards for mere misnomers" and "craft[ed] an unreasonable and unnecessary rule."

Johnson v. Cintas Corp. No. 2, et al. WCJC agrees with this decision.	
Justice Annette Ziegler	Wrote Opinion
Justice Patrick Crooks	Concurred
Justice Patience Roggensack	Concurred
Justice Michael Gableman	Concurred
Justice Ann Bradley	Wrote Dissenting Opinion
Chief Justice Shirley Abrahamson	Dissented
Justice David Prosser	Did not participate

DAMAGES - STATUTORY CONSTRUCTION

***Heritage Farms v. Markel Ins. Co.*, 2012 WI 26**
In a 6-1 decision authored by Justice Ziegler, the court held that if an owner's property is destroyed by a forest fire that is caused by negligence, then the property owner is automatically entitled to double damages.

Facts
The case involved a forest fire that extensively damaged property owned by Heritage Farms, Inc. The fire started by the defendant was extinguished, but weeks later flared up and entered Heritage Farms' property.

Heritage Farms' owners were awarded $568,422 in compensatory damages in a previous decision after it was determined that the defendant's negligence led to the fire. Heritage Farms then brought a separate motion against the defendant seeking double damages and attorney fees.

Decisions by the Trial Court and Court of Appeals

The issue before the trial court was whether Heritage Farms was automatically entitled to double damages, or whether the statute grants the court discretion when deciding whether to award double damages.

Wis. Stat. § 26.21(1) states that an owner "whose property is injured or destroyed by forest fires, may recover, in a civil action, double the amount of damages suffered, if the fires occurred through willfulness, malice or negligence."

The trial court held that the statute allowed the court to exercise discretion in deciding whether to award double damages. The trial court decided that the defendant's conduct did not warrant punishment, and therefore did not grant Heritage Farms double damages.

The court of appeals upheld the lower court, ruling that the decision to award double damages under the statute is subject to the circuit court's discretion. The court noted that the legislature used the permissive word "may" in the statute in describing the property owner's right to recover double damages in the event that a forest fire results from willfulness, malice, or negligence.

Wisconsin Supreme Court Decision

The Supreme Court reversed, holding that property owners are entitled to double damages. The court reasoned that, "once it is determined that the forest fire occurred through willfulness, malice, or negligence, the property owner is entitled to double damages as a matter of course."

The court further held that their ruling should apply retroactively, not prospectively, thereby ensuring Heritage Farms received double damages.

The court further held that the plaintiff was entitled to interest on the double damages from the date of the jury's verdict (October 13, 2006). At the time the lawsuit was brought, the interest on judgments was 12 percent.

The defendant argued that the 12 percent interest was unconstitutional because the high interest rate is so severe and so far removed from the national prime lending rate that it tends to "chill" defendants from properly defending their claims on appeal.

The court rejected this claim and said that the legislature was the proper branch of government to determine the proper interest rate. The court noted that the legislature this session in fact changed the interest on judgments from 12 percent to the federal reserve prime rate, plus one percent. This law, 2011 Wisconsin Act 69, was championed by the Wisconsin Civil Justice Council and was introduced by Gov. Walker as part of his numerous civil justice reforms.

Dissent

Justice Bradley dissented arguing that the legislature did not intend that the award of double damages in these types of cases be mandatory. Instead, the legislature's use of the word "may" signaled its intent that the courts are to exercise discretion when deciding whether to award double damages.

Heritage Farms v. Markel Ins. Co. WCJC disagrees with this decision.	
Justice Annette Ziegler	Wrote Opinion
Chief Justice Shirley Abrahamson	Concurred
Justice Patrick Crooks	Concurred
Justice David Prosser	Concurred
Justice Patience Roggensack	Concurred
Justice Michael Gableman	Concurred
Justice Ann Bradley	Wrote Dissenting Opinion

DAMAGES - COLLATERAL SOURCE RULE

***Orlowski v. State Farm Auto. Ins. Co.*, 2012 WI 21**

In *Orlowski*, the court held that the collateral source rule applies to cases involving underinsured motorist claims. Therefore, the court held that the plaintiff is entitled to the full amount of past medical expenses, even those amounts that were written off by the medical providers.

Insurers typically have negotiated rates with health care providers. Providers submit a bill for the full price, but due to these contractual rates, the health insurer pays less than the full price. Yet, as the court held in this case and numerous other decisions, the defendant has to pay the full sticker price instead of the amount actually paid. These expenses are often referred to as "phantom damages" because no one ever paid them.

Facts

The plaintiff, Linda Orlowski, was injured in an automobile accident caused by an underinsured driver. Orlowski recovered damages up to the limits of the underinsured driver's insurance. Orlowski also had health insurance coverage which paid a portion of her medical expenses. In addition, Orlowski had an automobile insurance policy with State Farm, including underinsured motorist (UIM) coverage.

Orlowski submitted a claim to State Farm to recover under her UIM coverage. An arbitration panel awarded Orlowski $11,498.55 for the medical service provided to her as a result of the accident. $11,498.55 was the amount that was actually paid to the health care provider, rather than the full amount billed by the medical provider, $72,985.94.

The arbitration panel did not include in its award the amount of Orlowski's medical expenses that had been written off by her medical provider because of discounts through her health insurance coverage. The amount that was written off by the medical provider was $61,487.39. No one paid this amount, yet the plaintiff was seeking the full value of the medical expenses.

Orlowski appealed the arbitration panel's decision to the Milwaukee County Circuit Court, which modified the award. The judge awarded the plaintiff the full amount billed by the medical provider, instead of the amount actually paid. As a result, the plaintiff was awarded $61,487.39 in damages that were written off and never paid to the medical provider.

Decision

The case was appealed to the court of appeals, which certified the case to the Wisconsin Supreme Court. In a 7-0 decision authored by Justice Patrick Crooks, the court upheld the trial court's decision and awarded Orlowski the full amount billed by the medical provider, therefore, handing the plaintiff a windfall of $61,487.39 in damages that neither she nor anyone else paid.

The court cited its previous decisions, all of which have held that the plaintiff is entitled to the full amount of medical expenses, even those amounts that were written off by the medical provider.

According to the court:

> "We reaffirm what our prior precedent has clearly established: an injured party is entitled to recover the reasonable value of medical services, which, under the operation of the collateral source rule, includes written-off medical expenses."

Orlowski v. State Farm Auto Ins. Co. WCJC disagrees with this decision.	
Justice Patrick Crooks	Wrote Opinion
Chief Justice Shirley Abrahamson	Concurred
Justice Ann Bradley	Concurred
Justice David Prosser	Concurred
Justice Patience Roggensack	Concurred
Justice Annette Ziegler	Concurred
Justice Michael Gableman	Concurred

***Weborg v. Jenny, M.D.*, 2012 WI 67**

In *Weborg* the court upheld a court of appeals decision finding that the circuit court committed "harmless error" by admitting evidence of collateral source payments in a medical malpractice case.

The 5-2 decision authored by Justice Ziegler determined that evidence of collateral source payments is admissible in medical malpractice cases only when the evidence is "relevant."

Background

The case involved a medical malpractice lawsuit filed against three physicians by family members of the patient who died of severe coronary artery disease.

William Weborg visited his family physician, one of the defendants, after experiencing chest pains. Neither Weborg's family physician, nor any of the other doctors he visited, detected that Weborg had heart disease. Instead, the physcians suggested Weborg suffered acid reflux or that the chest pain was musculoskeletal in nature. Shortly after visiting the doctors, Weborg died.

Trial Court Decision

The physicians' attorney moved at trial to introduce evidence of collateral source payments, specifically, life insurance proceeds and social security benefits received by Theresa Weborg, William Weborg's widow, as a result of William's death. The plaintiffs objected to the motion, but the trial court allowed the defendants to introduce the collateral source payments.

The physicians also requested the circuit court modify the standard jury instruction on expert testimony by adding the following underlined language to Wis JI-Civil 269: "You are not bound by any expert's opinion, except with regard to the standard of care exercised by medical doctors."

The physicians argued that this language was necessary to be consistent with the jury instruction (Wis JI-Civil 1023) on medical negligence, which provides that the standard of care, skill, and judgment exercised by medical doctors must be determined from expert testimony.

The jury ultimately delivered its verdict in favor of the defendant-physicians finding that none of the doctors were negligent in their care and treatment of Weborg. The plaintiffs subsequently filed a motion seeking a new trial on the grounds that the circuit court erroneously admitted the evidence of life insurance proceeds and social security benefits (collateral source payments) and erroneously modified the standard jury instruction on expert testimony. The circuit court denied this motion and the case was appealed to the appellate court, which agreed with the circuit court.

Supreme Court Decision

In a 5-2 decision, the court upheld the court of appeals and circuit court, ruling on both the collateral source and jury instruction issues.

The court agreed with the court of appeals that the admission into evidence of the collateral source payments was harmless error, and therefore upheld the jury's verdict. According to the court:

> In this case, we conclude that the circuit court applied an improper legal standard in admitting the evidence of life insurance proceeds and social security benefits and therefore erroneously exercised its discretion. Specifically, the circuit court admitted the evidence of life insurance proceeds and social security benefits without first determining in its discretion whether either piece of evidence was relevant to the jury's determination of damages. In doing so, the circuit court adopted the physicians' interpretation of Wis. Stat. § 893.55(7)-an interpretation that we reject today.

The court explained that evidence of collateral source payments is admissible under the statute only if the evidence is relevant. Because the lower court did not determine whether the collateral source payments admitted into evidence were relevant, it erred by allowing the physicians to introduce the evidence.

However, the court ruled that the circuit court's error was harmless and therefore upheld the decision. As the court explained, a circuit court's erroneous discretion in admitting or excluding evidence does not necessarily constitute reversible error. Instead, Wis. Stat. § 805.18(2) provides that the improper admission of evidence is not grounds for reversing a judgment or granting a new trial unless, after an examination of the entire action, it appears that the error "affected the substantial rights of the party" seeking to reverse the judgment or secure a new trial. The court determined that the admission of evidence of collateral source payments in this case did not affect the jury's decision in favor of the physicians.

Similarly, the majority held that the lower court erred by modifying the standard jury instruction on expert testimony, but nonetheless upheld the lower court decision. The court determined that that modification was harmless error in that once again the modification did not alter the plaintiffs' substantial rights. The court upheld the circuit court's decision to dismiss the negligence claims against the three physicians.

Dissenting Opinion
Chief Justice Abrahamson, joined by Justice Bradley, penned a dissent/concurring opinion. While the two justices agreed with the majority's decision that the circuit court erred by admitting the evidence of collateral source payments, the dissenting justices disagree that the error was harmless. The dissenting opinion argues that the amount of the life insurance proceeds are unusually large and therefore the jurors "would very likely remember these sums" when making a decision as to whether the physicians were negligent. As a result, the dissent argues that the error affected the plaintiffs' substantial rights and therefore was not harmless.

Weborg v. Jenny, M.D. **WCJC agrees with the outcome of the decision, but disagrees with the court's reasoning as it relates to the collateral source rule. Therefore, this decision is not factored in when rating the individual justices.**	
Justice Annette Ziegler	Wrote Opinion
Justice Patrick Crooks	Concurred
Justice David Prosser	Concurred
Justice Patience Roggensack	Concurred
Justice Michael Gableman	Concurred
Chief Justice Shirley Abrahamson	Wrote Dissenting/ Concurring Opinion
Justice Ann Bradley	Dissented/Concurred

TORT - INTERPRETATION OF INSURANCE POLICY

Hirschhorn v. Auto-Owners Insurance Co., 2012 WI 20
In a 5-2 decision, the court held that an insurance policy's "pollution exclusion" clause excluded coverage for the loss of the plaintiff's home that resulted from the accumulation of bat guano, or bat waste.

Facts
The plaintiff, a lawyer representing himself, sued Auto-Owners Insurance Company for breach of contract and bad faith. The plaintiff alleged that he was unable to sell his vacation home due to accumulation of bat guano in the house's siding and walls. He claimed that the insurance company was liable for the total loss of the home.

Lower Court Decisions
The trial court ruled in favor of the insurance company. The court of appeals reversed the trial court.

Supreme Court Decision
The Wisconsin Supreme Court reversed the court of appeals and held in favor of the insurance company.

The specific issue was whether the insurance company's pollution exclusion clause excluded coverage of the loss of the plaintiff's home due to the bat guano.

The pollution exclusion clause excluded from coverage any "loss resulting directly or indirectly from: … discharge, release, escape, seepage, migration or dispersal of pollutants…" The policy further defined "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot fumes, acids, alkalis, chemicals, liquids, gases and waste."

First, the court held that the bat guano fell within the policy's definition of pollutant. Second, the court held that the damage to the plaintiff's house was in fact caused by the "discharge, release, escape, seepage, migration or dispersal" of the bat guano. Therefore, the court held that bat guano fell within the policy's "pollution exclusion" absolving the insurance company for the loss of the home.

Hirschhorn v. Auto-Owners Ins. Co. WCJC agrees with this decision.	
Justice Annette Ziegler	Wrote Opinion
Justice Patrick Crooks	Concurred
Justice David Prosser	Concurred
Justice Patience Roggensack	Concurred
Justice Michael Gableman	Concurred
Chief Justice Shirley Abrahamson	Wrote Dissenting Opinion
Justice Ann Bradley	Dissented

***Wadzinski v. Auto-Owners Insurance Company*, 2012 WI 75**

The issue in *Wadzinski* was whether a reasonable insured would read the Executive Umbrella insurance policy in the case to afford $2 million of uninsured motorist (UM) coverage to the plaintiff.

In a 5-2 decision, the court upheld the trial court, which held that the Executive Umbrella policy provided only third-party liability coverage and no first-party coverage.

Facts

Steven Wadzinski was struck and killed by an uninsured motorist while riding his motorcycle. Wadzinski was the chief executive officer of a company that had purchased multiple insurance policies. The policy's grant of coverage provided $1 million in third-party automobile liability coverage, as well as first-party coverage for UM and underinsured motorist (UIM) benefits. Each line of coverage afforded $150,000 per person or $300,000 per occurrence.

In one of the policies, the Executive Umbrella policy, Wadzinksi was named the insured. The Executive Umbrella policy provided $2 million in excess coverage over the underlying policies that were listed in a separate schedule (A).

After Wadzinski's death, Auto-Owners paid Wadzinski's estate the limits of the Commercial Auto policy's UM coverage, $150,000. Auto-Owners refused the estate's claim for payment of the $2 million of UM benefits under the Executive Umbrella policy, and, therefore, Wadzinski's estate sued Auto-Owners.

The policy provision in the Executive Umbrella policy at issue in the case was an endorsement captioned, "Exclusion of Personal Injury to Insureds Following Form." The endorsement further provided as follows: "We do not cover personal injury to you or a relative. We will cover such injury to the extent that insurance is provided by an underlying policy listed in Schedule A."

Decision

The Supreme Court held that the Executive Umbrella policy excluded an additional claim for UM coverage. Specifically, the Court held that the Executive Umbrella policy's grant of coverage provides only one type of coverage: excess third-party liability coverage. According to the court, "neither the exclusion of first-party coverage nor its exception that reaffirms Auto-

Owners' underlying obligations can be read to rewrite the umbrella policy's unambiguous grant of third-party coverage."

Dissent
Justice Bradley and Chief Justice Abrahamson dissented, arguing that the second sentence of the Executive Umbrella policy was ambiguous and therefore should have been construed in favor of coverage.

Wadzinski v. Auto-Owners Ins. Co. WCJC agrees with this decision.	
Justice Patience Roggensack	Wrote Opinion
Justice Patrick Crooks	Concurred
Justice David Prosser	Concurred
Justice Annette Ziegler	Concurred
Justice Michael Gableman	Concurred
Justice Ann Bradley	Wrote Dissenting Opinion
Chief Justice Shirley Abrahamson	Dissented

***Maxwell v. Hartford Union High School Dist.*, 2012 WI 58**
In *Maxwell*, the court held that the failure to issue a reservation of rights letter cannot be used to defeat, by waiver or estoppel, a coverage clause in an insurance contract.

Facts
The case involved a lawsuit filed by a school administrator, Maxwell, who was hired by and entered into a contract with the school district (District) for two years. After the first year, Maxwell was informed that her position was eliminated. Maxwell filed a complaint against the District. The District's insurance company, Community Insurance Corporation (CIC), was not originally named a party to the suit.

The District had a $10 million Public Entity Liability Insurance Policy from CIC that was in effect at the time Maxwell's position was eliminated. The policy included language that excluded coverage "for that part of any award or settlement which is, or reasonably could be deemed to be, compensation for loss of salary or fringe benefits of your employee(s)."

The issue in the case was whether CIC's failure to issue a reservation of rights letter either waived or estopped CIC from asserting its noncoverage defense, thereby requiring CIC to provide coverage not in the insurance contract.

Supreme Court Decision
Based on prior case law, the court held that failure by CIC to issue a reservation of rights letter to the District, before or during its defense of the District, did not defeat the coverage exclusion in the insurance contract by waiver or estoppel.

Dissent
Justice Crooks, joined by Chief Justice Abrahamson and Justice Bradley, argued that the dispute could have been avoided had CIC issued a reservation of rights letter when it provided a defense to the District. According to the dissent, had CIC done so, there would be no question that CIC could later challenge coverage.

Furthermore, the dissent argued that CIC later denied coverage to the District "despite controlling its defense throughout litigation on the merits that resulted in an adverse judgment, and only later raising coverage issues."

Maxwell v. Hartford Union High School Dist. WCJC agrees with this decision.	
Justice Patience Roggensack	Wrote Opinion
Justice David Prosser	Concurred
Justice Annette Ziegler	Concurred
Justice Michael Gableman	Concurred
Justice Patrick Crooks	Wrote Dissenting Opinion
Chief Justice Shirley Abrahamson	Dissented
Justice Ann Bradley	Dissented

STATUTORY CONSTRUCTION - ALCOHOL LICENSE

***Wisconsin Dolls, LLC v. Town of Dell Prairie*, 2012 WI 76**

The court in *Wisconsin Dolls* held that the Town of Dell Prairie exceeded its authority when it modified the description of the premises in renewing the alcohol beverage license.

Facts

In 2004, Wisconsin Dolls was granted a license for Class "B" fermented malt beverages, and in 2005, a Class "B" intoxicating liquor license. On its application form, Wisconsin Dolls listed the premises description as all eight acres of the resort. On subsequent renewal applications with the town, Wisconsin Dolls applied for and was granted permission for all eight acres. In 2009, however, the Town reduced the liquor license to only the main building on the premises, not all eight acres.

Decision

The court addressed two issues: 1) whether the license issued to Wisconsin Dolls was void because it did not particularly describe the premises to which it applied, and 2) whether the town had statutory authority to unilaterally reduce the premises description in the Wisconsin Dolls alcohol beverages license when it renewed the license.

First, the court held that the license that the town issued to Wisconsin Dolls did not fail to comply with the premises description requirement under Chapter 125. That chapter broadly defines "premises" and therefore the license was not void.

Second, the court held that the town did not have authority to modify the premises description in the alcohol license. According to the court, towns may attach conditions to an alcohol beverage license, including limitations to the described premises, when the license is initially granted. If a town later wishes to modify the premises described in the license, it must pass a valid regulation or ordinance under Wis. Stat. § 125.10(1) and follow the procedures under Wis. Stat. § 125.12.

Wisconsin Dolls, LLC v. Town of Dell Prairie WCJC agrees with this decision.	
Justice David Prosser	Wrote Opinion
Chief Justice Shirley Abrahamson	Concurred
Justice Ann Bradley	Concurred
Justice Patrick Crooks	Concurred
Justice Patience Roggensack	Concurred
Justice Annette Ziegler	Concurred
Justice Michael Gableman	Concurred

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