A REVIEW OF SELECTED CIVIL CASES DECIDED IN 2014 BY THE WISCONSIN SUPREME COURT AND COURT OF APPEALS

Judge Charles P. Dykman
Reserve Judge
Wisconsin Court of Appeals

INDEX

ADMINISTRATIVE LAW

Prof'l Police Ass'n v. Employment Relations Comm'n, 2013 WI App 145, 352 Wis. 2d 218, 841 N.w.2d 839. This case involves statutory construction of the Municipal Employment Relations Act (MERA), Wis. Stat. § 111.70. Indirectly, it involves litigation from Act 10. Oftentimes, Act 10-type cases are not reportable because they involve specialized labor agreements unique to the employer. But *Professional Police* interprets MERA, which is applicable to all municipalities. In an opinion issued shortly before *Professional Police*, the Court of Appeals noted that Act 10 excluded most public safety employees from Act 10's restrictions on collective bargaining. However, 2011 Wis. Act 32 changed that in some respects. As pertinent here, Act 32 created Wis. Stat. § 111.70(4)(mc)6., which modified Act 10 for public safety employees and created a ban on bargaining over particular subjects.

At issue in *Professional Police* was whether § 111.70(4)(mc)6. prohibited bargaining over the allocation of responsibility between public safety employees and their employers to pay deductibles under a health care plan. The issue arose because Eau Claire County selected a plan that set deductibles for individuals and families. The Association proposed that, if the County chose a plan that included a deductible, the employees would be responsible for paying the first $250 (individual) or $500 (family) of the deductible. The County would be responsible for paying the rest. The county asserted that the proposal presented a subject that could not be bargained under § 111.70(4)(mc)6. The Court of Appeals concluded that § 111.70(4)(mc)6. does not prohibit bargaining regarding the deductible amount to be paid respectively by the employee and the employer. This is a very important case involving municipalities and their obligation to bargain under certain circumstances.

Rice Lake Harley Davidson v. LIRC, 2014 WI App 104, 357 Wis. 2d 621, 855 N.W.2d 882. This is a Wisconsin Fair Employment Act case involving wage discrimination on the basis of sex. Rice Lake hired two motorcycle salespeople, a man and a woman. They paid the man a significantly higher salary than the woman. This case is a good example of what is necessary to prove up a sex discrimination case. Another issue was attorney's fees. The Court of Appeals reversed the trial court's order requiring attorney's fees of only two-thirds of the actual fees. The Court explained why this was error under the circumstances. The reasoning the Court used is duplicable in future cases. Thus, this case should be kept in mind when approaching a future sex discrimination case.

ADVERSE POSSESSION

Wilcox v. Estate of Hines, 2014 WI 60, 355 Wis. 2d 1, 849 N.W.2d 280. This is an adverse possession case. Adverse possession continues to be discussed in cases brought to the Court of Appeals, and the jurisprudence has always been a little uncertain. *Wilcox* addresses whether a party's subjective intent to claim title to property is relevant to rebut the presumption of hostility arising when all other elements of adverse possession are established. Wisconsin Stat. § 893.25 outlines these requirements. Here, a party, the Somas, used a lakefront strip which actually belonged to two estates. The Somas believed that the lakefront strip was not owned by the estates but by another entity, the Wisconsin Ducks. Accordingly, the Somas asked the Ducks for permission to improve and use the strip. Eventually the Somas' property was sold to the Wilcoxes, who brought a claim for title by adverse possession against the owners of the lakefront strip. The Supreme Court concluded that where all other elements of adverse possession are proven, the subjective intent of an occupier is relevant in determining whether the property has been adversely possessed. The Somas did not know of or consider that the lakefront strip was owned by the two estates. The Somas believed that it was owned by the Ducks and that they had permission to use it. Thus, the Somas were using the property with permission and not under a claim of right. The Supreme Court reversed the Court of Appeals, concluding that where all other elements of adverse possession are shown, the subjective intent of a possessor of land is relevant to show that the possessor does not claim the real estate as a matter of right. Accordingly, the Wilcoxes could not tack ownership onto the Somas' ownership, resulting in the dismissal of their claim. As usual, it is important to read the latest case or cases on adverse possession when beginning one of these cases.

ARBITRATION

First Weber Group, Inc. v. Synergy Real Estate Group, 2014 WI App 41, 353 Wis. 2d 492, 846 N.W.2d 348, reversed 2015 WI 34. Here, the dispute was whether the arbitrator or the trial court was authorized to decide whether the petition for arbitration was filed within the 180-day limit found in the parties' agreement to arbitrate. While this issue seems to be a bit arcane, issues of arbitrability continue to exist. The trial court examined the parties' agreement to arbitrate, and concluded that a court could decide whether the 180-day requirement was met. The Court of Appeals agreed with the trial court on this issue. The Court also determined that the 180-day requirement was not met, and that the date the trial court set as to the beginning of the 180-day limit was correct. The Court examines much of the precedent leading to its conclusion. The case is therefore good for an understanding of what is arbitrable under an agreement. Arbitration clauses are be-

coming more frequent, and issues such as this will continue to arise. A summary of the Supreme Court's reversal will appear in next year's outline.

ATTORNEY'S FEES

Betz v. Diamond Jim's Auto Sales, 2014 WI 66, 355 Wis. 2d 301, 849 N.W.2d 292. This case started as a lemon law case. Betz hired Attorney Megna to represent him in his lemon law dispute with Diamond Jim's. Wisconsin's lemon law allows the winning plaintiff to recover reasonable attorney's fees from the defendant. Betz and Megna entered into a written fee agreement which did not explicitly state that if Betz settled the case on his own with the defendant and did not pay Megna, Diamond Jim's would be liable for Betz's attorney's fees. It is unclear whether such an agreement would require Diamond Jim's to pay those fees. Perhaps, if Diamond Jim's had been provided with a copy of the agreement, or the fee shifting part of the agreement. The majority reversed the Court of Appeals, concluding that the statutory attorney's fees under the lemon law were owned by Betz, and that he did not assign these to Megna. Justice Abrahamson dissented, concluding that the fee shifting part of the contract did assign these statutory fees to Megna. While this issue may not arise often, there are instances where clients settle their cases and their attorneys have contingent interests. Additionally, attorneys will adapt their fee agreements with their clients to try to avoid the result in *Betz*. Still, this is an important case in both lemon law situations and other assignment situations.

CIVIL PROCEDURE

CED Prop. LLC v. City of Oshkosh, 2013 WI App 75, 348 Wis. 2d 305, 836 N.W.2d 654 (reversed by 2014 WI 10, 352 Wis. 2d 613, 843 N.W.2d 382). The facts are not important to this rules interpretation case. The Court of Appeals concluded that the notice pleading and relation back statutes apply to special assessment appeals, but that because the complaint and the amended complaint did not pertain to the same thing, there was no relation back and no notice pleading issue in this case. This is an excellent case discussing these issues and they should be understood by all attorneys. Court of Appeals Judge Reilly's dissent is also interesting and important, but it is not as universally usable as the majority opinion. If a complaint is carefully drafted in the first place, the issue of relation back will rarely occur. The Supreme Court reversed *CED* on March 6, 2014, including the "notice pleading" discussion, but did not address the Court of Appeals' discussion of "relation back" issue, which is helpful for its analysis, but is not citable. The whole case has been nullified because the Supreme Court has held that any reversal of a Court of Appeals decision, no matter how small, "evaporates" the entire opinion.

Kochanski v. Speedway SuperAmerica, S.A., 2014 WI 72, 356 Wis. 2d 1, 850 N.W.2d 160. The "absent witness" instruction has been interpreted to require three factors before the instruction should be given. These are: (1) materiality; (2) more natural for one party to call the witness; and (3) the failure to call a witness must lead to the conclusion that the party is unwilling to allow the jury to have the full truth. The Supreme Court explains all three requirements in some detail. Because these determinations are decided under a deferential review, the Supreme Court's conclusion that the trial court erroneously exercised its discretion in this case is valuable because we know what will not pass muster under the absent witness rule. This is especially true since the Court concluded that none of the three requirements for the absent witness instruction were met. The case is a close one, however, because three Justices dissented. This means that a slight change in the facts of a future case could lead to a different decision.

O'Donnell v. Kaye, 2015 WI App 7, 359 Wis. 2d 511, 859 N.W.2d 441. This case is a warning about the need for care when serving process. It involves service by publication, which also requires that a copy of the summons be mailed to the defendant's last known address. O'Donnell published the legal notice required by § 801.11(1)(c) and mailed an authenticated copy of the summons and complaint. The plaintiff made two errors in addressing the pleadings that he mailed to the defendant: (1) using the wrong street number ("W138" instead of "W136"); and, (2) using the wrong street name ("Avenue" instead of "Drive"). The plaintiff argued that these were minor errors and were a technical defect, not requiring dismissal of the action. The Court of Appeals disagreed and said, "Close enough is not good enough." A second issue was the terminology for the standard of review for findings of fact by a trial court. The Court of Appeals previously held that this terminology was changed to "clearly erroneous." *See Noll v. Dimiceli's,* 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983) (citing Wis. Stat. §805.17, which was enacted in 1975 by 67 Wis. 2d 585, 712). However, later cases including *O'Donnell,* used the older common law terminology: "against the great weight and clear preponderance of the evidence." Recent Supreme Court cases have used both iterations, or a hybrid of the two. Is there a difference? Probably not. But Judge Gartzke thought there was.

CONDOMINIUMS

Fouts v. Breezy Point Condo Ass'n, 2014 WI App 77, 355 Wis. 2d 487, 851 N.W.2d 845. Fouts was a director of the Breezy Point Condominium Association. In 2010 he requested that the Association give him access to its past and present records including all attorney-client files, without redaction or claim of privilege. The Association's attorney reviewed the Association's files to remove confidential communications and provided the redacted files to Fouts. Nothing deemed by the

attorney to contain privileged attorney-client communications was given to Fouts. Fouts sued. The circuit court concluded that Fouts was not entitled to the records. The Court of Appeals affirmed. It concluded that statutory protections for condominium directors were not involved. However, the Court apparently suggests that there might be ways for a director to obtain the information Fouts wanted, but that because Fouts had requested punitive damages, his interests were not aligned with that of the Association. Suits against condominium associations by directors or members are not uncommon, and *Fouts* is a necessary read whether a client, director or association is considering a potential lawsuit.

CONSTITUTIONAL LAW

Dumas v. Koebel, 2013 WI App 152, 352 Wis. 2d 13, 841 N.W.2d 319. This case has three causes of action arising out of a television station's broadcast which identified Dumas as having been convicted of prostitution. Dumas worked for the Milwaukee Public School District as a bus driver. The court considered the three causes of action, invasion of privacy, intentional infliction of emotional distress and intentional interference with a contract. The court concluded that the latter two causes of actions were precluded by the First Amendment to the United States Constitution, and that the invasion of privacy claim failed because the information was a matter of public record. These types of claims seem to be more prevalent nowadays. This is a good case to understand when litigating one of these claims. Petition for review denied.

Kimble v. Land Concepts, Inc., 2014 WI 21, 353 Wis. 2d 377, 845 N.W.2d 395. This case involves the due process limit for punitive damages. Here, a title company insured a property and then deceived the property owner by asserting that the title policy did not insure a route of access. A jury awarded $1 million in punitive damages for the title company's bad faith and the Court of Appeals affirmed. A majority of the Supreme Court reversed. It concluded that the dispositive issues were that there were only economic damages involved, that the title company's deception did not endanger safety, that the plaintiffs were not financially vulnerable, this was an isolated incident though it did involve deception. The Supreme Court found that there was no intentional malice and little reprehensibility. The Court concluded that the relationship between the compensatory and punitive damages was 33:1. The Court concluded that the real damages plus attorney's fees plus the cost of an easement to satisfy the title problem were $70,000, still a problematic 14:1. The Court concluded that normally, punitive damages would not exceed a single digit ratio, and that four times the difference between actual and punitive damages would be close to the line. The Court ordered the trial court to enter a judgment for punitive damages of 3:1. In other words, the actual damages were multiplied by three. That was the appropriate measure of punitive damages.

This is a very important case because punitive damages are not rare, and because the Court effectively held that a 4:1 ratio would be close to the line differentiating due process violations from reasonable punitive damages. The dissent argued that this result could not be correct because the end result is that the wrongdoer was enriched by its wrongdoing. Land Concepts and the title company ended up paying less in damages than it would have paid had it acted properly and paid the claim. This seems like a rational dissent, but as we know, dissents are what the law is not. This case is mandatory reading if a punitive damage claim is considered or put in a complaint. Petition for writ of certiorari to U.S. Supreme Court denied.

CREDITOR'S RIGHTS

Associated Bank v. Collier, 2014 WI 62, 355 Wis. 2d 343, 852 N.W.2d 443. This is a dispute between two creditors of Jack Collier and some corporations in which he was involved. One of the creditors, Decade Properties, Inc., asserted that when it served Collier with an order to appear at supplemental proceedings, it had perfected a common law creditor's lien on all of Collier's personal property. Another creditor, SB1, argued that Decade did not have a lien on Collier's personal property because Decade's judgment was not docketed before it served the order to appear. The Court concluded that supplemental proceedings under Ch. 816 are a discovery tool in aid of judgment collection. Serving Collier with an order to appear for supplemental proceedings did not constitute a blanket lien on all of Collier's personal property preventing SB1 from pursuing collection. The Court concluded that SB1 was the first judgment creditor with a docketed money judgment to levy on Collier's specific, non-exempt personal property. The Court was careful to assert that there was no blanket lien on all of Collier's personal property. The dissent reads, "The majority opinion reaches its erroneous conclusion today by operating in its own imaginary world, divorced from reality." The majority's decision isn't that important. What is important is that everybody understands what the rule is: a creditor obtains an interest in a debtor's identified, non-exempt personal property superior to other unsecured creditors when it dockets its money judgment, identifies specific personal property, and levies on that property. This case is interesting reading if one has the spare time to dissect the majority and dissenting opinions' analyses. However, it is valuable if an attorney is litigating one side or the other of a dispute between creditors.

DISCRIMINATION

Burlington Graphic Systems, Inc. v. Dep't of Workforce Development, Equal Rights Division, 2015 WI App 11, 359 Wis. 2d 647, 859 N.W.2d 446. Karen Alvarez was employed by Burlington for nearly 10 years as a printing press operator.

Alvarez was an undocumented worker. She discovered pain in her left cheek, visited a walk-in clinic and eventually had a surgical procedure to remove a piece of glass in her face. When she returned to work, she was fired for being absent too many times. Burlington counted at least one of Alvarez's recovery days as an unexcused absence. Alvarez filed a complaint under the Wisconsin Family and Medical Leave Act (FMLA). Burlington immediately rehired Alvarez and then terminated her for not being a legal worker. An administrative law judge held for Alvarez and awarded nearly $9,000 in attorney's fees, but rejected Alvarez's request for back pay because she was unauthorized to work during that period of time. The circuit court affirmed, as did the Court of Appeals. The Court of Appeals held that a ruling in Burlington's favor would create an incentive for employers to hire undocumented workers, whose medical leave rights the employers could violate with impunity. This would be contrary to the purposes of the Wisconsin FMLA. While the issue is narrow, there are many undocumented workers in Wisconsin, and attorneys should know that while an undocumented worker is prohibited from working in Wisconsin, Wisconsin's laws concerning employment are not void as against these workers.

EVIDENCE

State v. Griep, 2014 WI App 25, 353 Wis. 2d 252, 845 N.W.2d 24. Though *Griep* is a criminal case, this case will apply to first offense OWI prosecutions. The issue is whether state laboratory reports are admissible without the testimony of the person making the report. The Court of Appeals concluded that under present law, the answer is "yes." Nonetheless, the Court commented favorably on cases which are pending in the United States Supreme Court. The Court of Appeals concluded that the present state of the law required that it affirm Griep's conviction, but that the United States Supreme Court will eventually conclude laboratory reports need to be verified by a witness. Otherwise the report itself would violate the confrontation clause. Oral argument heard November 12, 2014. Awaiting decision.

FAMILY LAW

Becker v. Becker, 2014 WI App 76, 355 Wis. 2d 529, 851 N.W.2d 816. This case is a mine run application of much previously reported law. What is important is the standard of review that the Court applied on the issue of the "reasonableness" of a payor's decisions leading to reduction of income (often referred to as "shirking"), and hence ability to pay family support. The Court concluded that reasonableness was a question of law determined independently by the appellate court, but with appropriate deference to the circuit court because the legal conclusion is extensively intertwined with factual conclusions. Because the factual matters in cases

such as this are usually undisputed, the conclusion is that *shirking* and *reasonableness* are questions of law which appellate courts will review de novo. Petition for review denied.

Derleth v. Cordova, 2013 WI App 142, 352 Wis. 2d 51, 841 N.W.2d 552. The Court of Appeals addressed three issues. First, the Court held that the circuit court did not have authority to restrict an intrastate move under 150 miles. Secondly, it affirmed the trial court's decision not to consider fringe benefits as income because doing so was a compromise in light of another maintenance determination. Thirdly, it reversed the trial court's decision to value a retirement plan at only 80% of its mathematical value because the trial court concluded that 20% of a retirement plan was unvested. These are important issues in divorce cases, and since most family law cases involve exercise of discretion, this is a good case to consider because here, the Court of Appeals determined that the trial court erroneously exercised that discretion.

Droukas v. Estate of Gregory Felhofer, 2014 WI App 6, 352 Wis. 2d 380, 843 N.W.2d 57. For determination of what constitutes survivorship marital property, see this case summarized under **Real Estate**.

Guardianship of Elizabeth M.H., a person under the age of 18 v. Richard H., 359 Wis. 2d 204, 857 N.W.2d 432. This is an appeal of the circuit court's order dismissing the Ch. 54 guardianship petition filed by Elizabeth H.'s foster parents, and a cross-appeal challenging the Ch. 48 change-of-placement petition filed by Elizabeth H.'s father, Richard H. Elizabeth H. had been living with the foster parents for five years when Richard H. filed a petition seeking to change Elizabeth's placement to his home. The foster parents objected, and also filed guardianship petitions under Ch. 48 and Ch. 54. The circuit court heard Richard's and the foster parents' petitions at the same time. The circuit court denied Richard's petition and granted the foster parents' Ch. 48 and Ch. 54 petitions for guardianship. On reconsideration, the court concluded that it had lost competency over the Ch. 54 petition by failing to hold a hearing within 90 days after the petition was filed. The circuit court left in place its prior decisions to deny Richard H.'s change of placement petition and to grant the foster parents' Ch. 48 guardianship petition.

The first issue on appeal was whether the circuit court lost competency over the Ch. 54 guardianship petition because it was heard after 90 days from the date the petition was filed. The Court determined that despite Richard H.'s attorney's agreement that the case could be heard after the 90-day period, was inapplicable. The statutory limit could not be waived. In a well written decision, the Court of Appeals affirmed the trial court's decision to dismiss the Ch. 54 guardianship petition.

The Court then addressed Richard H.'s cross-appeal where he argued that: (1) he was denied his right to due process; (2) the circuit court erroneously exercised its discretion by applying the best interest of the child standard; (3) the circuit court erred by refusing to permit the county to participate as a party in the proceedings and in sequestering a witness from the county; and (4) reversal in the interest of justice was warranted. Again, in a well written and lengthy opinion, the Court of Appeals affirmed the trial court's holding that though the foster parents' Ch. 54 guardianship petition must be dismissed, the Ch. 48 guardianship petition and the Ch. 48 change of placement petition were correctly decided. The Court explained each issue well. The Court's reasoning on these four issues can be understood by reading the opinion. However, guardianships and change of placement petitions are often heard in Wisconsin's trial courts. Thus, an attorney whose practice includes these issues should be familiar with this case.

Hill v. D.C., 2014 WI App 99, 357 Wis. 2d 483, 855 N.W.2d 880. This case is an appeal from an order granting a harassment injunction against D.C., a juvenile. The issue was whether the Court lost competency to issue the injunction because it twice adjourned the injunction hearing. The Court had a relatively easy time interpreting the applicable statute, Wis. Stat. § 813.125(3)(c) and concluded that the circuit court lost competency because it adjourned the hearing for a second time.

INSURANCE

Barrows v. American Family Ins. Co., 2014 WI App 11, 352 Wis. 2d 436, 842 N.W.2d 508. This is a case under Wisconsin's wrongful death statute. Barrows's son, A.B., was in the custody of his mother (LaValla) and her husband/boyfriend (Renfrow). A.B. found a loaded handgun in Renfrow's unlocked nightstand and shot and killed himself. Barrows began this wrongful death action against American Family, LaValla, and Renfrow. American Family contested liability because it had an intra-insured clause in its policy. The Court of Appeals concluded that the intra-family exclusion applied. The Court distinguished *Day v. Allstate Indemn. Co*., 2011 WI 24, 332 Wis. 2d 571, 798 N.W.2d 199, because Day involved a different issue. Barrows argued that the damages were not to his son but to him, because he was deprived of his son's society and companionship and included his grief and sorrow. The Court of Appeals reviewed several cases from out-of-state, which with one exception, concluded that an intra-insured clause in a policy prevented third-parties not insured under the policy from recovering from an insurance company. The sole minority view was from Louisiana, and the Wisconsin Court of Appeals concluded that Louisiana's wrongful death statute was different from Wisconsin's. While it may appear that an intra-insured exclusion would not prevent insurance companies' liability to non-insured persons, the case law from other jurisdictions does not go this way. Even though Barrows was suing for his

injuries and not the death of his son, the court followed the majority rule elsewhere and concluded that the intra-insured provision in the policy barred Barrows's recovery from the insurer. While the opinion may seem contraintuitive, the Wisconsin Court of Appeals followed the foreign cases because they were the considerable majority of cases addressing this issue. Is Barrows inconstant with *Day v. Allstate Ins. Co*., 2011 WI 24, 332 Wis.2d 571, 788 N.W.2d 199? *Day* is probably distinguishable, but both cases need to be considered in a future case of this sort. Petition for review dismissed.

Blasing and *Burgraff* explore slightly different issues under nearly identical fact situations. In both cases, a Menard employee was loading sold merchandise onto a customer's vehicle. Because this constitutes the use of the vehicle, Menard correctly asserted that the customer's liability insurance for the vehicle covered the employee's negligence. Menard also was self-insured up to $500,000 and covered by a commercial liability policy. The dispute in each case was between the customer's insurance company and Menard's insurance company. The cases involved other insurance clauses, duty to defend, primary and secondary policies and the method by which each insurance company will share damages.

Blasing v. Zurich American Ins. Co., 2014 WI 73, 356 Wis. 2d 63, 850 N.W.2d 138. This is an interesting case arising under Wis. Stat. § 632.32, Wisconsin's "omnibus" statute. The question was whether the customer's liability insurance carrier (American Family) was required to defend and indemnify Menard or whether Menard's insurance carrier (Zurich) was required to do so. The Court determined that the customer's insurance company, American Family, had to defend and indemnify Menard because the Menard employee was in the process of "using" the customer's motor vehicle. There were other questions having to do with the dispute between American Family and Zurich. The majority did not delve into these. There is a three-Justice dissent. Both opinions must be read in order to determine exactly what is being decided and how this case applies to future cases. The majority opinion is of course the law. However, there will be situations which are not covered by the majority opinion and thus reading the dissent will help in some of those situations.

Burgraff v. Menard, Inc., 2014 WI App 85, 356 Wis. 2d 282, 853 N.W.2d 574. Burgraff was injured when a Menard employee was loading Burgraff's trailer. Burgraff sued Menard, which tendered the defense of the claim to Burgraff's car insurer. Menard raised two issues on appeal. First, whether the "other insurance" clause from the customer's policy was applicable under these circumstances. Second, that the trial court erred by determining that the customer's insurer did not have a duty to defend Menard after the company settled its proportionate share of Burgraff's claim for less than the policy's limit. The Court of Appeals concluded that the settlement did not extinguish the customer's insurer's duty to defend. The

customer's insurer would share responsibility for paying any settlement Burgraff obtained pro rata. This holding could be described as counterintuitive, so attorneys should be aware of this case and *Blasing* whenever someone other than the named insured is using the named insured's motor vehicle. Petitions for review and cross-review granted.

The following cases address an insurance company's responsibility to pay the policy value for a structure badly destroyed by fire. These cases should be considered when addressing a claim of this sort.

Coppins v. Allstate Indem. Co., 2014 WI App 125, 359 Wis. 2d 179, 857 N.W.2d 896. This is a case involving an insurance dispute over the amount which must be paid for a building which was very badly destroyed by a fire. *Coppins* addressed how a court should interpret an insurance policy which promised to pay the actual cash value of the property. Allstate and its expert witness apparently misunderstood what "actual cash value" meant, and thus Allstate initially only paid what it called the property's "market value." These two are quite different. The Court of Appeals held that where a structure is totally destroyed or damaged to the point where repair is uneconomic, the insurance company must pay the amount for which the property was insured. Most insurance policies are alike unless the insurance industry decides it will change its policies, and the Wisconsin Insurance Commissioner agrees to that. *Coppins* will therefore apply for valuation where a property is heavily damaged. Petition for review denied.

Haynes v. Am. Fam. Ins. Co., 2014 WI App 128, 359 Wis. 2d 87, 587 N.W.2d 478. Haynes is a good discussion of the statutes involved when an insured home is badly damaged, and the municipality, the owner, and the insurance company must decide whether the property was a total loss. Here, the city issued a raze order under Wis. Stat. § 66.0413(1)(c). However, American Family got a cost of repair estimate which, had this been accepted, would have been adequate to restore the home to its original state. The Court of Appeals examined Wis. Stat. § 632.05(2) and Wis. Admin. Code § INS 4.01(2)(h). The Court determined that § INS 4.01 applied because it was consistent with the statute. The Court of Appeals concluded that § 632.05(2) governed and that the statute's command trumps any contrary analysis by American Family or its agents. The Court concluded, "Simply put, the focus is on whether repairs are reasonable under the statutory formula, not whether elements of the structure survived the fire. The unappealed Raze Order, which… applied the mandated statutory formula, is conclusive." Therefore, American Family was required to pay Haynes $245,000, the amount for which the home was insured. But Haynes was not entitled to Wis. Stat. § 642.46 12% statutory interest because, if anything, American Family failed to pay a contractual settlement, not an undisputed amount. Petition for review denied.

Fetherston v. Parks, 2014 WI App 2, 352 Wis. 2d 472, 842 N.W.2d 481. The trial court concluded that Parks was not covered under his automobile policy because the injury he caused was intentional and thus fell under the intentional injury exclusion in the policy. The facts upon which the trial court reached its conclusion were that Parks operated his automobile in a reckless fashion because he was traveling 60 m.p.h. in a 25 m.p.h. zone. When a police car began chasing him and activated its lights, Parks continued speeding up to 90 m.p.h. As one might expect, Parks lost control of his vehicle and injured the Fetherstons. The Court of Appeals, relying on precedent, concluded that to be intentional there must be proof of an intent to inflict harm in addition to an intentional act. This conclusion may have a significant effect on future cases. Thus, under *Fetherston*, the question was not whether the act was so egregious that a court would conclude that it was intentional. The question was whether the defendant intended the injuries. It is almost certain that defendants faced with this exclusion are always going to testify that although they were breaking the law and although it might look intentional the defendant knew that there would be no accident, and did not intend to injure anybody. This focus on the intent to injure will be involved in future cases of this sort. *Fetherston* thus opens up the possibility of coverage when one might initially believe that the act was so egregious that the insured did intend to cause the injury.

Singler v. Zurich Am. Ins. Co., 2014 WI App 108, 357 Wis. 2d 604, 855 N.W.2d 707. Zurich agreed to settle this case by paying Singler $1.0 million. After Zurich failed to pay within 30 days, Singler moved the court to impose 12% annual interest on the settlement amount beginning 30 days after the settlement agreement was reached. The trial court granted the motion and awarded Singler $23,000 in interest, computed at 12%. The Court of Appeals considered Wis. Stat. § 628.46 and concluded that this applied to failure to pay an undisputed claim. Thus, this statute was inapplicable because the case involved failure to pay a settlement resolving a disputed claim. The Court concluded that the proper statute was Wis. Stat. § 138.04 which provides for 5% interest. The Court also concluded that interest should accrue starting 30 days after the settlement. Verdicts and settlements are common, and litigators should be aware of *Singler.*

State Farm Mut. Auto Ins. Co. v. Hunt, 2014 WI App 115, 358 Wis. 2d 379, 856 N.W.2d 633. This is an underinsured motorist case. Although it pertains to statutory language which has since been repealed, underinsured motorist coverage is still available at extra cost from most automobile insurance companies. Thus this case may be repeated if an insured has chosen underinsured coverage. Barry Hunt sustained serious injuries as a result of a collision with a Dane County snowplow. The accident was caused by a county employee's negligence. Wisconsin Stat. § 345.05(3) caps damages recoverable from a county and its employee at $250,000. The county conceded $250,000 damages and negligence. However, State Farm began this action for a declaratory judgment because Hunt was claiming an addi-

tional $100,000 in damages under his own underinsured motorist policy. This is a nicely written and understandable opinion in which the Court construed State Farm's policy as applicable under the circumstances. The Court also concluded that State Farm's exclusion for government vehicles was not prohibited by Wis. Stat. § 632.32(6). Therefore, State Farm was liable under its underinsured motor coverage. Insurers may now choose to redraft auto policies to prevent this result. However, the situation, though not unique, should not happen very often. Time will tell whether this opinion will continue to have effectiveness. Petition for review pending.

Estate of Waranka v. Wadena Ins. Co., 2014 WI 28, 353 Wis. 2d 619, 847 N.W.2d 324. A snowmobile accident caused Waranka's death. His widow sued in Wisconsin. The estate asserts that there is a correlation between Wis. Stat. § 895.03, Wisconsin's wrongful death statute, and Wis. Stat. § 895.04, which limits damage expenses. Michigan's Wrongful Death Act applied to damages but does not contain the limit on damages. Wisconsin does. So the question here was whether the Wisconsin or the Michigan act applied. The Supreme Court concluded that this was not a conflict of laws case because there was no conflict between the statutes. The Court concluded that Wisconsin's wrongful death statute did not apply to deaths occurring outside of the State of Wisconsin. Thus, the Michigan statute applied. Therefore, there was no cap on damages that the estate could recover. This is the Supreme Court's 7-0 response to injuries and deaths occurring outside of the state of Wisconsin but litigated in Wisconsin. It is thus necessary reading for anybody litigating an injury or death occurring outside the state of Wisconsin.

Wilson Mut. Ins. Co. v. Falk, 2014 WI 136, 360 Wis. 2d 67, 857 N.W.2d 156. Cow manure that the Falks spread on their farm fields as fertilizer contaminated neighbors' wells. Wilson Mutual Insurance Company began a declaratory judgment action, asserting that its policy did not cover the well damage because of a pollution exception in its policy. There are two other less important issues which do not need explanation. Pollution exceptions are present in almost all liability policies. This decision is important because it leaves farmers and probably others with no economical way to insure against damages caused by the usual operation of farms. The majority opinion is a straightforward analysis of the exclusion exception, concluding that is unambiguous. The Court of Appeals and the dissent concluded that a reasonable person in the position of the farmers would not consider manure a pollutant under the policy's pollution exclusion clause. Instead, cow manure, far from being a pollutant, is viewed as "liquid gold" to most farmers. The majority decided the case on summary judgment. The dissent would remand to the trial court to inquire into representations that Wilson Mutual may have made to the Falks about their coverage. A lawyer who handles pollution exception cases should be aware of *Wilson Mutual*.

JUDGMENTS AND LIENS

Attorney's Title Guar. Fund v. Town Bank, 2014 WI 63, 355 Wis. 2d 229, 850 N.W.2d 28. This case examines two interesting issues. First, is an assignment of the potential proceeds from a legal malpractice claim valid? Second, who is entitled to the proceeds—a creditor with a perfected security interest, or a creditor who later obtains a superior interest by levy? The Court concluded that the proceeds were assignable. In addition, the Court concluded that one of the creditors, Heartland Wisconsin Corp., was entitled to the proceeds because it had perfected a security interest in the proceeds before the other creditor, Town Bank, obtained its interest in the proceeds by levy. Whether the Court's conclusion will be extended more broadly is not known today. However, in determining priorities under the Uniform Commercial Code, *Attorney's Title Guaranty Fund* is a necessary case to read.

NEGLIGENCE

Brandenburg v. Briarwood Forestry, 2014 WI 37, 354 Wis. 2d 413, 847 N.W.2d 395. This case examines when a person who hires an independent contractor will be liable for the negligent acts of the contractor. The facts are easy. Luethi hired an independent contractor to spray herbicide on his property. The herbicide traveled to neighboring properties and damaged trees on those properties. The question was whether Luethi was liable to the neighbors for the damage to their trees. The majority concluded that the matter had to be remanded to the circuit court for a determination whether Luethi exercised ordinary care to prevent damage to the neighbors' properties. This is an important and new distinction, which serves to make recovery less available to persons damaged by independent contractors. A three-Justice concurrence/dissent claimed that the majority opinion ignored the fact that the complaint only asserted a claim against the independent contractor and not against Luethi as the employer. The dissent thus synopsized the majority's opinion into a rule that vicarious liability attaches to the employer as a matter of law for his or her independent contractor's torts in performing an inherently dangerous activity, but that such an employer can nonetheless avoid liability if he or she exercised ordinary care. It may be difficult to apply *Brandenburg* outside of the facts of this case. The question will be what steps the employer of the independent contractor is required to take in order to avoid liability. This question is open for future cases.

Dakter v. Cavallino, 2014 WI App 112, 358 Wis. 2d 434, 856 N.W.2d 523. This case involves an accident occurring at an intersection between an automobile and a semi truck. Wisconsin's negligence instructions include what is called the "truck

driver instruction." The instruction essentially says that because the defendant was a professional truck driver, operating a semi tractor under a commercial driver's license, it was the truck driver's duty to use the degree of care, skill and judgment which reasonable semi truck drivers would exercise under the same or similar circumstances. Many cases dealing with challenges to jury instructions conclude that an instruction was error, but the error was harmless. These cases are therefore not valuable as precedent. However, even though that was the result here, the Court of Appeals held that it saw some danger that the truck driver instruction could be interpreted to suggest that the truck driver should be held to a higher standard of care than other drivers. Although the Court did not say that giving this instruction was erroneous, it did say that a jury could erroneously interpret the truck driver instruction under some circumstances. Therefore, this case is important whenever an accident occurs involving a truck and its driver who has a commercial driver's license. Supreme Court oral argument scheduled for April 22, 2015.

Legue v. City of Racine, 2014 WI 92, 357 Wis. 2d 250, 849 N.W.2d 837. This case reexamines immunity for municipal governments as codified in Wis. Stat. § 893.80. This rule has existed since *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962). The rule is clear for municipal government actors: The rule is liability – the exception is immunity. This has been developed into governmental immunity for acts done in the exercise of legislative, judicial, quasi-legislative and quasi-judicial functions. On the other hand, there is no immunity for liability associated with the performance of ministerial duties imposed by law. This case examines the juncture of Wis. Stat. § 893.80, governing immunity of a municipal government, its officers and employees, and Wis. Stat. § 346.03, governing the rules of the road for emergency vehicles. What occurred here was a collision between a police car responding to an emergency and a driver of a passenger car. The Court noted that until perhaps two seconds before the accident, neither driver could see the other. The jury must have felt the same because it apportioned the liability 50% to each driver. The majority analyzed Wis. Stats. §§ 893.80 and 346.03 and concluded that the trial court erred by dismissing the case. This was a close case. A three-Justice dissent concluded that immunity applied and that the case was properly dismissed in the trial court. Because the ministerial exception will continue, this sort of case will arise again. Therefore, when faced with one of these case, it is important to understand *Legue*.

OPEN RECORDS

John K. MacIver Institute v. Erpenbach, 2014 WI App 49, 354 Wis. 2d 61, 848 N.W.2d 862. This case pertains to Wisconsin's Freedom of Information Act. Erpenbach, a state Senator, resisted revealing e-mails identifying the sender. The Institute sued and the Court of Appeals concluded, in a majority opinion and two

concurrences, that there was no exception in the public records law for e-mails sent to legislators. The opinion and the concurrences explained concerns about this requirement of the open records law, but concluded that the Legislature's decision to make everything subject to the open records law unless an exception was legislatively enacted, was the public policy that the Court had to follow. While the opinions show that this is not a black and white case, they also show that the Court of Appeals has concluded that it will carefully examine refusals to disclose information. Thus, since open records requests are often made, this case is necessary reading when an attorney is faced with such a case.

State ex rel. Ardell v. Milwaukee Bd. of Sch. Directors, 2014 WI App 66, 354 Wis. 2d 471, 849 N.W.2d 894. Wisconsin's open records law has usually been liberally construed, allowing persons access to public records. Here, however, the Court of Appeals was faced with a situation where the person requesting the records had a probably illegal reason to want the records: he could use them to harass a public school employee. The Court of Appeals concluded that first of all, the trial court could consider the reasons for an applicant's request, and secondly that a requestor's history of violence against the employee and violations of a domestic abuse injunction were sufficient to warrant nondisclosure even without an *in camera* review. This is a common sense conclusion though not totally consistent with Wisconsin's open records law. However, the case probably will lead to new cases in which the intent of the requestor is being questioned. Previously, this was held not to be relevant. Petition for review denied.

PERSONAL INJURY

Watertown Reg'l Med. Ctr. v. Gen. Cas. Ins. Co., 2014 WI App 62, 354 Wis. 2d 195, 848 N.W.2d 890. The facts here are common to many personal injury cases, although the law firm representing the injured party pushed the envelope further than it is usually pushed. Nathanial McGuire was injured in an auto accident and hired Hupy and Abraham to represent him. The tortfeasor's insurance company was General Casualty. The hospital where McGuire received treatment filed a lien under the hospital lien statute. Hupy and Abraham settled the case with General Casualty for $30,000. General Casualty made the settlement check payable to Hupy's trust account. Hupy then distributed the funds to McGuire and others with an interest in the proceeds. At the time of the settlement Hupy was aware that McGuire owed the medical center for medical expenses related to his injury but Hupy did not distribute funds to the medical center. The medical center sued General Casualty and Hupy and Abraham, seeking recovery from each of them. The Court of Appeals concluded that as far as the hospital lien statute was concerned, General Casualty, not Hupy, was liable to the medical center under Wis. Stat. § 779.80(4). The Court held that Hupy was not required to indemnify General Casu-

alty for the lien amount. The Court concluded that General Casualty's contract claim failed because nothing in the settlement document showed that Hupy agreed to be responsible for paying the lien amount. The Court concluded that Hupy was not liable under either a negligence or an equitable estoppel theory. Release agreements and hospital lien documents are likely to be changed. It is probable that General Casualty, having been required to pay twice, is going to change its method of paying claims. Other insurance companies are likely to follow General Casualty's lead.

PERSONAL JURISDICTION

Midland Funding v. Mizinski, 2014 WI App 82, 355 Wis. 2d 475, 854 N.W.2d 371. This is a wage garnishment. Mizinski worked for Danco, which had property in Wisconsin and did business in Wisconsin. Mizinski argued that the circuit court did not have jurisdiction because his wages were, until they were electronically transferred, located at Danco's headquarters in Texas. In addition, he asserted that he only did 3% of his work for Danco in Wisconsin and worked mainly in Minnesota. The Court of Appeals explored whether the circuit court had personal jurisdiction over Danco. Mizinski argued that the Restatement (Second) of Conflict of Laws applied, and that older Wisconsin cases supported his position. The Court of Appeals concluded that the latest Supreme Court decision governed over older cases, and that *Dalton v. Meister*, 71 Wis. 2d 504, 239 N.W.2d 9 (1976), was the latest case on the subject. The Court of Appeals had quite a bit to say about garnishments and personal jurisdiction and therefore attorneys who do collections certainly should be aware of this case. Petition for review denied.

PRO SE LITIGATION

2014 WI 49, is not a case, but a change in Wisconsin rules which was adopted by the Supreme Court. It is found in 355 Wis. 2d xvii, Order #13-14, effective July 1, 2014. The rule follows an extensive inquiry into the assistance that judges, particularly trial judges, may give to pro se litigants without violation of the rule requiring judges to be impartial. The rule is discretionary and does not require judges to explore the bounds of impartiality. There are comments on the rule which are not adopted but which may be used for guidance in interpreting and applying the new rule. The comments to the new rule allows steps a judge may take in the exercise of this discretion: (1) construe pleadings to facilitate consideration of the issues raised; (2) provide information or explanation about the proceedings; (3) explain legal concepts in everyday language; (4) ask neutral questions to elicit or clarify information; (5) modify the traditional order of taking evidence; (6) permit narrative testimony; (7) allow litigants to adopt their pleadings as their sworn testimo-

ny; (8) refer litigants to any resources available to assist in the preparation of the case or enforcement and compliance with any order; and (9) inform litigants what will be happening next in the case and what is expected of them. Justice Prosser, joined by Justice Roggensack, concurred but with concerns as to: (1) the scope of the new rule; (2) the expectations, if not directives, it places on judges; and (3) the impact it will have on the practice of law. Because the new rule might have unintended consequences, the Court has provided for a review of the rule in three years. It is controversial how much help a judge may give to pro se litigants. Trial judges have expressed concern about this over several years. The new rule appears to open up the options of trial judges who choose to use the new rule. Still, there is no bright line as to how far a trial judge may go without violating rules requiring impartiality. Thus, this is a rule which must be considered, and trial judges will have to decide whether to use the rule, and how far it extends. Because the rule is discretionary, the standard of review for discretionary decisions will probably result in the affirmance of most trial court decisions. But only the future will determine how far the rule extends.

REAL ESTATE

Ash Park v. Alexander & Bishop, 2014 WI App 87, 356 Wis. 2d 249, 853 N.W.2d 618. This is an action for specific performance of a real estate purchase contract. The contract was not consummated because the purchaser, Alexander & Bishop, did not have money available to complete the purchase. The trial court gave a judgment of specific performance to Ash Park, the seller, but could not compel Alexander & Bishop to purchase the property because Alexander & Bishop did not have the money to do so. Re/Max Select, LLC, the real estate broker, intervened, asserting it was entitled to a broker's commission. The Court of Appeals concluded that Re/Max was entitled to its commission because under the terms of the Department-approved WB-3 Listing Contract, Re/Max earned a commission if Ash Park entered into an enforceable contract with a buyer. The Court of Appeals concluded there was an enforceable contract even though Ash Park was not able to enforce the trial court's judgment of specific performance. Failed listing contracts do not occur very often. Still, when they do, Ash Park is required reading. Supreme Court oral argument held March 4, 2015. Awaiting decision.

Bank of America, N.A. v. Prissel, 2015 WI App 10, 359 Wis. 2d 561, 859 N.W.2d 172. This is a foreclosure case. The borrowers assert that the bank failed to publish a notice of foreclosure sale during the borrowers' six-month redemption period. The bank's decision to use a six month redemption period meant that it was waiving any deficiency. The borrowers moved to vacate the foreclosure judgments under Wis. Stat. § 806.07(1)(h). The circuit court denied the motions and the Court of Appeals affirmed. The Court of Appeals recognized this as a statutory interpre-

tation case. The Court interpreted Wis. Stat. § 846.101(2) and held that despite the statutory language using the words "notice of a foreclosure sale *shall* be given within the six-month redemption period," the statute was directory, not mandatory. Courts sometimes but not usually adhere to the plain language of a statute, except, whereas here, the court concluded that following the plain meaning rule would reach an absurd result.

Bank of New York v. Carson, 2013 WI App 153, 352 Wis. 2d 205, 841 N.W.2d 573. This is another real estate foreclosure case. The trial court concluded that the owner of the property was not entitled to require the bank to sell the property pursuant to Wis. Stat. § 846.102. This statute allows foreclosure time to be reduced to five weeks when the property is abandoned. The dispute was whether Carson, the defendant, had the right to force the bank to sell the property within five weeks. The Court of Appeals reversed, and concluded that Wis. Stat. § 846.102 requires that the property be sold within five weeks if either the plaintiff or the defendant demanded that this be done. This is an important case, particularly in areas where abandoned properties are subject to vandalism. The Supreme Court affirmed the Court of Appeals' decision. 2015 WI 15, 361 Wis. 2d 23, 859 N.W.2d 422. More about its opinion next year.

Dow Family v. PHH Mortgage Corp., 2014 WI 56, 354 Wis. 2d 796, 848 N.W.2d 728. Mortgage foreclosures continue, though not in the volume of previous years. This was a lawsuit by a plaintiff against a mortgage company holding a mortgage on its condominium. At the time of purchase, Dow inquired about a nine-year old mortgage that was listed on the title commitment. The sellers' attorney informed Dow that this mortgage was mistakenly listed on the title commitment. This information was wrong. Eventually PHH Mortgage commenced a foreclosure action. Dow resisted, arguing that the doctrine of equitable assignment was now inapplicable in Wisconsin. Dow also made arguments having to do with the fact that the financing industry has developed a process known as the Mortgage Electronic Recording System (MERS). This system allows MERS to record a mortgage to itself and then assign the mortgage note to whatever financial institution is interested in buying it. The difficulty with this is that although the mortgage was recorded in Wisconsin, it is not possible to know who has the note. In this case PHH Mortgage asserted that they owned the note but this was not known at the time the foreclosure took place. The Supreme Court concluded that the doctrine of equitable assignment was applicable to the modern mortgage system. The case was remanded to the circuit court to allow PHH Mortgage to prove up its ownership of the note. MERS makes foreclosures much easier for lenders but renders the public record useless by masking the beneficial ownership of mortgages and eliminating records of assignments altogether. It saves the mortgagees the cost of recording assignments but at the loss of transparency. Justice Abrahamson's concurrence explained the problem with this system, and suggested that the Wis-

consin Legislature remedy some of these problems by enacting remedial legislation. This is a very important case in Wisconsin.

Droukas v. Estate of Gregory Felhofer, 2014 WI App 6, 352 Wis. 2d 380, 843 N.W.2d 57. Before reading this case you should note that Footnote 8 has the definition of ambiguity backwards. If your volume of the report does not contain an errata sheet, then you need to change the word "unambiguous" to "ambiguous". While Gregory and Mary were dating they purchased a vacant lot without the assistance of counsel. Later they closed on a construction loan to construct a home on the property. While the construction of the home was ongoing, Gregory and Mary married. They moved into their new home later. They both lived in the home until Gregory's death. Gregory died intestate. The dispute is between his children, who assert that the deed transferring the real estate to Gregory and Mary listed them as single persons, and thus did not constitute survivorship marital property. If the property was survivorship marital property under Wis. Stat. § 766.605, the property would be solely owned by Mary. If not, the rules of intestate division would apply, and the children would be given a significant interest in the property. Wisconsin Stat. § 766.605 classifies a homestead acquired after the effective date of § 766.605 is enactment as marital property held exclusively between spouses if no intent to the contrary is expressed on the instrument of transfer or in a marital property agreement. The Court of Appeals looked at all three requirements of the statute. In a well written opinion, the court concluded that the real estate was survivorship marital property as defined in the statute. The opinion uses a logical and consistent analysis to reach a conclusion that should be valuable in further cases of this sort. A slight problem exists because the opinion says the decedent had an opportunity to state his intentions when he signed the warranty deed. Grantees of deeds do not ordinarily sign deeds.

Gagliano & Co., v. Openfirst, 2014 WI 65, 355 Wis. 2d 258, 850 N.W.2d 845. This case addresses a commercial leasing dispute between a corporate landlord and multiple corporate tenants. The Supreme Court's majority addressed two issues: (1) whether the landlord gave proper notice when it exercised its right to extend the lease; and (2) whether a previous tenant conveyed an assignment or a sublease to a subsequent tenant (Quad Graphics). The facts surrounding the notice issue are complicated. The notice issue arose from the fact that the landlord addressed the notice to extend the lease to Robert Kraft (the president of the tenant corporation, New Electronic Printing Systems) in his individual capacity; the notice was not addressed to New Electronic, the entity that was the tenant when the notice was given. Regarding notice, the majority concluded that the landlord's notice was valid because New Electronic had actual notice that the landlord was exercising its right of extension. The majority also concluded that the landlord cannot hold Quad Graphics liable for failing to pay rent because Quad Graphics was a subtenant and not an assignee. Justice Bradley concurred in part, agreeing

that Quad Graphics was not an assignee. In a dissent joined by Justice Bradley, Chief Justice Abrahamson concluded that the notice was not proper because it was sent to an individual, rather than a corporate entity. All three opinions need to be read in order to determine what the Court is and is not deciding, but it is certain that this case will be important in assignments and situations where a tenant does not have a contractual relationship with the landlord. Motion for reconsideration denied.

Kaitlin Woods Condo. Ass'n v. N. Shore Bank, 2013 WI App 146, 352 Wis. 2d 1, 841 N.W.2d 562. This case follows previous appeals by condominium associations attempting to get developers to pay taxes on undeveloped lots. In *Kaitlin Woods*, the court concluded that because the declaration provided that the real estate developer did not have to pay taxes on undeveloped units, the condominium association probably ended up paying the taxes on the undeveloped units. This follows *Aluminum Industries*, 194 Wis. 2d 574, 535 N.W.2d 74, and *Saddle Ridge*, 2010 WI 47, 325 Wis. 2d 29, 784 N.W.2d 527, which pertained to a slightly different matter, real estate assessments themselves. This case is needed information for both parties – persons buying condominium properties and for real estate developers who are developing a condominium.

MS Real Estate v. Donald P. Fox Fam. Trust, 2014 WI App 84, 356 Wis. 2d 307, 853 N.W.2d 627. The issue in this case was whether a right of first refusal which covers both sale and lease of the real estate was indefinite and therefore unenforceable. The Court concluded that in both situations, the right of first refusal was not indefinite even though no time was identified as to when the right of first refusal would terminate. Though this case refers only to this particular right of first refusal, there is significant discussion of indefiniteness in real estate transactions. Thus, when drafting a right of first refusal, *MS Real Estate* is important to understand. Oral argument heard March 3, 2015. Awaiting decision.

Prezioso v. Aerts, Sr., 2014 WI App 126, 358 Wis. 2d 714, 858 N.W.2d 386. This is a well-explained case where drafting errors left the description of an easement in a mess. The facts were important, of course, but the issue was whether the statute of frauds, Wis. Stat. § 706.001 applied. The Aertses argued that the deed by which they took title to property made no mention of an easement for a road over one side of their property. The road pre-existed the Aertses' ownership of their lot. The Aertses argued that the easement for the road was indefinite and thus could not meet the requirements of the statute of frauds. The Court of Appeals held otherwise. The parties agreed that a recorded "declaration" covering several of the properties along the road was ambiguous. The Court of Appeals examined several cases concerning real estate descriptions which either violated or met the statute of frauds. The Court concluded, "There is a clear distinction between the proper admission of extrinsic evidence for the purpose of applying a description to identi-

fied property versus the improper supplying of a description or adding to a description that is on its face insufficient." The line between these two statements is fuzzy, and as the Court next stated, "Of course, the question of indefiniteness depends largely on the facts of the case." The Court hence held that the description of the easement was sufficient such that parol evidence was necessary only for identification purposes. This case is somewhat helpful, but no two cases have exactly the same facts. *Prezioso* explains the analysis that a court should use in determining a statute of frauds issue.

TJ Auto v. Mr. Twist Holdings, 2014 WI App 81, 355 Wis. 2d 517, 851 N.W.2d 831. Many attorneys are not aware that an easement is only valid for a certain number of years, unless mentioned in a subsequent recorded document. Wis. Stat. § 893.33. The easement in this case was created in 1928 and last recorded in 1945. Thus, the applicable 60-year period had expired when TJ Auto began this lawsuit. The court concluded that the easement was no longer legally enforceable by operation of Wis. Stats. §§ 893.33(6) and 893.33(8) against a subsequent purchaser, TJ Auto. The court concluded that this is possibly unfair, but there are no exceptions to the statute.

REAL ESTATE TAXATION

3301 Bay Rd. LLC v. Town of Delevan, 2014 WI App 18, 352 Wis. 2d 721, 845 N.W.2d 666. The Town of Delevan overassessed more than 50 lakefront properties. At the same time it underassessed offlake properties, violating both Wis. Stat. § 70.32 and the uniformity requirement of the Wisconsin Constitution. The Court of Appeals discussed these violations and concluded that the trial court's remedy for these violations was not an erroneous exercise of discretion. The Court also determined that the taxpayers, who numbered enough to fill two pages of the Wisconsin Reports, were each entitled to $300 of fees charged by the expert witness. A good case to understand in real estate taxation issues, particularly because the Court discussed this as statutory and constitutional violations.

Northbrook Wisconsin, LLC v. City of Niagara, 2014 WI App 22, 352 Wis. 2d 657, 843 N.W.2d 851. Wisconsin does not require tax districts to send notifications to property owners if the assessment has not changed. Nonetheless, Northbrook filed a claim after receiving no notice of assessment because the assessed property value remained the same. The Court of Appeals concluded that despite receiving no notice, Northbrook was required to challenge the assessment before the Board of Review as a prerequisite to filing its excessive assessment claim. The Court concluded that this did not offend due process and affirmed the trial court's dismissal of Northbrook's claim. Because nonreceipt of an assessment does not trigger a concern about real estate taxation to a property owner, property owners may

decide that an assessment is too high but may fail to understand the procedure and proper timeframe for challenging the assessment. Explanation of this problem to clients concerned with real estate taxation will advance a client's opinion of his or her lawyer. Petition for review denied.

Walgreen Co. v. City of Oshkosh, 2014 WI App 54, 354 Wis. 2d 17, 848 N.W.2d 314. This is an appeal from the assessment of real estate taxes against Walgreens. The facts of the case are not as important as the analysis by the Court of Appeals. The Court went through the required statutory and case law process for objecting to an assessment. The Court's analysis is well done and will be of significant value for attorneys whose clients come to them with an objection to a real estate assessment. When one of these cases comes to an attorney's desk, *Walgreen Co*. is necessary reading.

West Capitol, Inc. v. Village of Sister Bay, 2014 WI App 52, 354 Wis. 2d 130, 848 N.W.2d 875. This is an attack on the value of real estate property that West Capitol owns in the Village of Sister Bay. The case is important, because it examines in some detail how the parties tried this case in the circuit court. The Court of Appeals reversed the circuit court's decision to proceed to judgment without ordering an assessment, because there was no evidence in the record to support a number of the circuit court's findings. As the Court explained, a number of necessary facts were not developed. So, when an assessment case lands on an attorney's desk, and the issue is an attack on an assessment, West Capitol is required reading. In addition, West Capitol helps practitioners understand what a Wis. Stat. § 74.37(3)(d) lawsuit is all about. This is also a good case on classification of property. That makes a great difference in the assessed value and hence the taxes. Petition for review denied.

SAFE PLACE STATUTE

Viola v. Wisconsin Elec. Power Co., 2014 WI App 5, 352 Wis. 2d 541, 842 N.W.2d 515. Wisconsin's Safe Place statute, Wis. Stat. § 101.11(1), requires that every employer must furnish employment which will be safe for employees and furnish a place of employment which shall be safe for employees and frequenters. The case law has developed a distinction between unsafe structural defects and unsafe conditions and reckless or negligent acts of persons on the premises. The latter is known as the "acts of operation" rule. Viola installed asbestos covering for pipes at one of Wisconsin Electric Power Company's plants. Viola developed malignant mesothelioma and died. A doctor attributed his death to the exposure to the asbestos. The trial court concluded that this was an act of operation, and granted Wisconsin Electric Power Company's motion for summary judgment. The Court of Appeals reversed, concluding that the presence of asbestos dust in the air was

an unsafe condition and therefore Viola's amended complaint alleged a negligence claim asserting a violation of the Safe Place statute. Asbestos cases continue to be litigated and it is important to know that these can, under the proper conditions, permit recovery under Wisconsin's Safe Place statute. *Viola* is a significant case.

Crisanto v. Heritage Relocation Serv., 2014 WI App 75, 355 Wis. 2d 403, 851 N.W.2d 771. Crisanto sued Heritage Relocation Services for injuries he sustained when his foot was crushed while riding on a freight elevator without a safety gate. The issue was whether the ten-year statute of repose found in Wis. Stat. § 893.89 applied. This statute prohibits lawsuits after ten years for a structural defect. Crisanto made a number of arguments but the dispositive one was whether the lack of a safety gate on the elevator was a structural defect. These kinds of cases arise, not often, but certainly are litigated. The Court concluded that § 893.89, together with case law interpreting that statute, required a conclusion that Crisanto's safe-place statute and negligence claims be dismissed. While the issue is debatable, the Court concluded that an elevator lacking a safety gate was a structural defect. Though the facts underlying the Court's holding are narrow, the Court's reasoning as to what constitutes a structural defect is of value in any case where there is a question about a defect being a structural defect. Petition for review denied.

STATUTORY CONSTRUCTION/INTERPRETATION

Bank of America, N.A. v. Prissel, 2015 WI App 10, 359 Wis. 2d 561, 859 N.W.2d 172. See also summary under **Real Estate.**

Bd. of Regents - UW Sys. v. Decker, 2014 WI 68, 355 Wis. 2d 800, 850 N.W.2d 112. This case decided that Wisconsin's harassment injunction statute, Wis. Stat. § 813.125, can extend injunctive protection to institutions such as the University of Wisconsin. The circuit court granted the injunction, and the Court of Appeals reversed. The Supreme Court reversed, concluding that institutions are protected. However, because the parties agreed that the injunction was overbroad, the Court remanded for the circuit court to take further evidence and to issue an injunction, should it conclude that the statute's requirements were met. The first issue was whether Wis. Stat. § 813.125 can extend injunctive protection to institutions. Both the majority and the dissent concluded that the answer was "yes." The opinion on this subject is extensive and must be read when one of these cases arises. The next question was whether Decker's conduct constituted harassment that could be enjoined under Wis. Stat. § 813.125. Decker's conduct was egregious. He was arrested several times for interference in University proceedings and the police dragged him out of meetings on several other occasions. He certainly disrupted the proceedings. Decker, however, asserted that he had a legitimate purpose in protesting student fees and that the First Amendment to the United States Constitution pro-

tected him. The Court disagreed. The Court's discussion is informative and extensive. For attorneys and judges, it is important to read and understand the analysis of both the majority and the dissent. This is a significant case. There were over 6,000 injunctions issued in one year in Wisconsin. These issues will continue to arise.

Data Key Partners v. Permira Advisers, 2014 WI 86, 356 Wis. 2d 665, 849 N.W.2d 693. This is a fascinating case in several respects. As a statutory construction case, it interprets Wis. Stat. § 180.0828(1), Wisconsin's version of the "business judgment rule." This rule immunizes individual directors from liability and protects the board's actions from undue scrutiny by the courts. The majority adopted the U.S. Supreme Court's view in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007). In *Twombly*, the Court discussed the need at the pleading stage for allegations plausibly suggesting that the plaintiff was entitled to recovery. The U.S. Supreme Court concluded that *Twombly* was the correct interpretation of Federal Rule 8(a)(2).

In Wisconsin, the majority is backing off of what is known as "notice pleading" which Wisconsin adopted in 1975 67 Wis. 2d 585, 616-619. Thus, the majority, following *Twombly*, concluded that notwithstanding Wisconsin's notice pleading requirements, the plaintiffs had not pleaded a case under the business judgment rule. *Data Key Partners*, written by Justice Roggensack, continued her view in previous cases that notice pleading is often not enough. The three-Justice dissent is unique. Instead of writing the usual dissent, the Chief Justice writes, "Rather than provide a detailed critique of the majority opinion, I am setting forth the opinion I think should have been written by this court." This suggests that the dissent was once a majority opinion and that one of the now-majority Justices changed his or her mind, making what would have been a dissent into the majority opinion. The dissent notes, "No one is sure what *Twombly* means: 'Exactly how implausible is implausible remains to be seen….'" (Citing *Courie v. Alcoa Wheel & Forged Prods*., 577 F.3d 625, 630 (6th Cir. 2009)). The dissent complains that *Twombly* was not argued or briefed in this case. *Data Key Partners* can be read as adopting a more expansive pleading requirement in Wisconsin. Attorneys should recognize that they may be held to a higher pleading standard in the future, and should be prepared to file enhanced pleadings. For this reason, *Data Key Partners* is a very important case.

Evans v. Dep't. of Justice, 2014 WI App 31, 353 Wis. 2d 289, 844 N.W.2d 403. Cases continually arise on whether a conviction for disorderly conduct was a "misdemeanor crime of domestic violence" under 18 U.S.C. § 921(a)(33)(A). The analysis is technical, and extensive. As pertinent to the case, 18 U.S.C. § 921(a)(33)(A) requires that a qualifying crime have "as an element" the use of physical force, and also that the crime be committed by a person who was in a

specified domestic relationship with the victim. One such relationship is a person "similarly situated" to a parent of the victim. The victim here was Evans' step-daughter. Ultimately the Court of Appeals concluded that Evans, a stepparent "similarly situated" to a parent, qualified under the applicable statute. Therefore, the Court of Appeals decided that Evans, a stepparent, was the equivalent of a parent, and thus was governed by § 947.01(1) and 18 U.S.C. § 921(a)(33)(A). Thus, Evans could not require the Department of Justice to issue him a license to carry a concealed weapon.

Force v. Am. Fam. Mut. Ins. Co., 2014 WI 82, 356 Wis. 2d 582, 850 N.W.2d 866. This case is a stark example of two methods of statutory interpretation. It involves Wisconsin's wrongful death statutes, Wis. Stats. §§ 895.03 and 895.04. Section 895.04(2) enumerates the persons to whom an amount recovered in a lawsuit belongs. First is a surviving spouse. Next are lineal heirs. However, Linda Force was separated from her husband for 11 years prior to his death in an accident, and they had no children together. The circuit court concluded that Linda Force had no compensable damages under the wrongful death statute and dismissed her wrongful death claim. This was not appealed. However, the deceased's three minor children appealed the dismissal of their claim. A majority of the Supreme Court concluded that the separated wife was not a "surviving spouse" under the wrongful death statute. The majority concluded that if it interpreted the statute literally, "the wrongdoers would escape liability and the minor children would not be compensated for their losses." The majority looked to the purpose of the wrongful death statute to conclude that the children could recover. Justice Prosser concurred, concluding that dismissing the children's action would produce an absurd result. Justice Roggensack, joined by Justices Ziegler and Gableman, dissented, claiming that the plain meaning of the statute was impossible to avoid. They would have affirmed the trial court's dismissal of the case. Justice Ziegler also wrote a separate dissent. As a result of the multiple opinions, there is something in this case for everyone. While the Supreme Court will probably distinguish *Force* in almost all future cases, it provides an insight into all Justices' views where a dismissal will produce a harsh result but the language of the statute unambiguously requires dismissal.

State v. Toliver, 2014 WI 85, 356 Wis. 2d 642, 851 N.W.2d 251. This is a criminal case. Still, Justice Abrahamson who wrote the majority opinion in *Force*, dissented in this case, arguing that the majority did not follow the plain meaning of the statute.

Masri v. State Labor & Indus. Rev. Comm'n, 2014 WI 81, 356 Wis. 2d 405, 850 N.W.2d 298. Statutory interpretation comes up in this case which is capable of repetition. Both the Supreme Court majority and dissent interpreted two sections of Wisconsin's whistleblower's statute, Wis. Stat. § 146.997, which protects

against retaliation for revealing illegal or unethical behavior of an employer. The majority focused on one part of Wisconsin's whistleblower statute, Wis. Stat. § 146.997, which speaks of employees of a health care facility or health care provider. The same section refers to "any person." The majority focused its decision on the word "employee" while the dissent focused on the words "any person". Masri was an unpaid intern and hence could be identified as a non-employee. A reader will have to determine which opinion is the better one. However, when handling whistleblower cases, an attorney must be familiar with *Masri*. As usual, the majority opinion prevails.

Mayo v. Boyd, 2014 WI App 37, 353 Wis. 2d 162, 844 N.W.2d 652. Wisconsin Stat. § 893.82(3) requires that when suing the state, an applicant must go through a number of procedures, including explaining the time at which the event giving rise to the claim for injury occurred. In this case, the plaintiffs were being taken from one penal institution to another in a state van, which ran off the road and overturned, injuring the plaintiffs. The Court concluded that though § 893.82(3) required a plaintiff to give "the time" of the event giving rise to the claim, it was unreasonable to interpret the statute to require "the time" when the negligence occurred over a period of time. The Court concluded that the statute did not require giving the approximate time, and therefore the statute was unreasonable and unenforceable where it was impossible to give "the time" of the negligence. This is an important case because plaintiffs often come to attorneys at the last minute, and it may be difficult to pinpoint a time to the minute when the negligence or other conduct occurred. So, this case should be in the minds of attorneys who either do or probably will get a claim against the state.

Madison Metro. Sch. Dist. v. Evers, 2014 WI App 109, 357 Wis. 2d 550, 855 N.W.2d 458. Questions about service of documents have always been litigated. The trial court dismissed the school district's petitions for review of four Department of Public Instruction decisions. The trial court concluded that under Wis. Stat. § 990.001(4)(c), the school district failed to timely serve the petitions on DPI. The school district filed the petitions before a Saturday deadline but served the petitions on DPI by sending them via certified mail on the following Monday. The Court of Appeals' decision is moderately complex and examines the relationship between Wis. Stats. §§ 990.001(4)(c) and 801.15. The Court determined that Wis. Stat. § 801.15 did not apply and that § 990.001(4)(c) did. The opinion is persuasive. The lesson to be learned from this case, as from all cases of this sort, is to not wait until the last minute to serve any process which has a time limit requirement.

Village of Grafton v. Seatz, 2014 WI App 23, 352 Wis. 2d 747, 845 N.W.2d 672. This is an ordinance violation for OWI. The issue is easy but one which is likely to be widely used. The issue is: Must a court order the installation of an ignition interlock device when a defendant is convicted of first-offense operating while in-

toxicated offense and also has a prior conviction for an OWI offense? The court is succinct in answering, "yes." The court also explained why this is so. Practitioners who litigate ordinance violation cases should be familiar with *Village of Grafton*.

TORTS

Partenfelder v. Rohde, 2014 WI 80, 356 Wis. 2d 492, 850 N.W.2d 896. Collisions and accidents involving trains are becoming more common. Therefore, practitioners should be aware of the Federal Railroad Safety Act (FRSA), which generally preempts state law. The dispute between the majority and the dissent was whether an exception to the FRSA was the only exception to Wisconsin's tort law. The case involved a collision between a train and an automobile at a railroad crossing during a Memorial Day parade. Both opinions are important to understand. The majority identified a Memorial Day parade as not a "specific, individual hazard" which would allow state law to preempt FRSA. The dissent characterized the majority opinion as holding that all state tort law claims are preempted except for those alleging a "specific, individual hazard." However, the issue in the case was whether the parade was a specific, individual hazard, and that was the question the majority answered. Future cases will probably decide other issues in cases like this and ultimately we will see whether the majority or the dissent's view of the FRSA is correct. Petition for writ of certiorari to U.S. Supreme Court denied.

WEA Prop. & Cas. Ins. Co. v. Krisik, 2013 WI App 139, 352 Wis. 2d 73, 841 N.W.2d290. *Krisik* involves the Wisconsin recreational immunity statute, § 895.52(1)(g). The facts leading to dismissal of Krisik's claim were that he was injured while cutting tree branches. His primary responsibility was to tie a rope around trees, though the Court of Appeals found this fact not relevant. The Court of Appeals concluded that "cutting wood" is specifically enumerated as a recreational activity by the statute and therefore Krisik was engaged in a recreational activity at the time of his injury. The Court discussed other assertions of error but it is unnecessary to get to these because Krisik was precluded from bringing his case by the recreational immunity statute. Petition for review denied.

WIS. STAT. §100.18

Mueller v. Harry Kaufmann Motor Cars, Inc., 2015 WI App 8, 359 Wis. 2d 597, 859 N.W.2d 451. If the issue involved a new car, this would be a lemon law case. But because the car was a used 1995 Mercedes-Benz, sold in 2011, Wisconsin's lemon law did not apply. Therefore, Mueller alleged violations of Wis. Stats. §§ 100.18 and 218.0116(1)(f) and also alleged intentional misrepresentation. This is a well written and thoroughly explained case. The Court of Appeals concluded that §

100.18 did not permit rescission of the purchase contract. However, the Court held that § 100.18 permits a plaintiff, in some instances, to recover the purchase price. There is a considerable discussion of the term "monetary loss." Mueller also was asked "What's that vehicle worth today to you?" The trial court, *sua sponte*, would not let Mueller answer this question. The Court of Appeals concluded that Mueller's answer to this question, in conjunction with her testimony as to the purchase price, was sufficient evidence of damages to survive the defendant's motion for directed verdict. The Court of Appeals also held that the alleged misrepresentations were a jury question. This is a very important case for attorneys representing either plaintiffs or defendants in actions based upon the sale of a used car. These cases occur often. Petition for review pending.

WORKER'S COMPENSATION

Adams v. Northland Equip. Co., Inc., 2014 WI 79, 356 Wis. 2d 529, 850 N.W.2d 272. This case examined the intersection between workers' compensation law and common law negligence. Adams was injured in the course of employment when the blade of the snowplow he was driving struck the lip of a sidewalk. He was then thrown into the ceiling of the cab of his truck and was injured. The insurance company representing Adams' employer, the Village of Fontana, offered to settle the case for $200,000. Adams refused the offer. The insurance company moved the circuit court to compel Adams to accept the offer. The Supreme Court concluded that the trial court's order compelling Adams to accept the settlement was correct. The Court interpreted Wis. Stat. § 102.29(1), a workers' compensation statute. The Court rejected Adams' assertion that he had the unfettered right to sue Northland Equipment, the company that last serviced the plow by tightening the plow's springs. This made the plow less likely to retract when it hit a solid object. Adams asserted this caused his injury. The Court rejected Adams' statutory argument and his argument that he was entitled to a jury trial on his claim against Northland Equipment. The Court also rejected Adams' due process assertion that the trial court did not hold an evidentiary hearing where he could present witnesses. The dissent challenged what it asserted was the majority's unsupportable assertion that the common law right of the employee to bring a tort action against a negligent third party was abrogated by Wis. Stat. § 102.29. This is a very important case because employees' suits against third parties are common, and, in the past, the issue of forcing a settlement did not arise.