

# Litigation

# NEWS



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## Message From The Chair

Thomas Kent Guelzow, Chair

I am both grateful and honored to be able to serve as chair of the Litigation Section during this next year. As I begin my tenure, I wish to thank Past Chair Jack Teetaert for his leadership during the past year. Also, I would be remiss if I did not also thank George Burnett who, as you all know, is now president-elect of the State Bar and as such, had to surrender his seat on the Litigation Section. His input in the past will be difficult to replace; fortunately, we will have his guidance even from "a higher place".

With the beginning of the new year, the Litigation Section to some degree, must hit the ground running. There are two issues which I wish to call to your attention.

First, the Litigation Section, in particular the board, has been asked for input regarding whether Wisconsin would adopt essential Federal Rule 11. This matter has been before us for a number of months, and is making its way through a formal petition to the Wisconsin Supreme Court wherein such changes, as I currently understand them, will be proposed. There appears to be wide support by both plaintiff and defense lawyers across the State. I urge that all Litigation members stay well versed in this matter, and let your opinions be known in that the adoption of Rule 11, should this be the

case, could certainly impact on every lawyer's practice.

Secondly, as many of you may be aware, in the last several years, there appears to be difficulty that various reconstruction experts and others have had in obtaining access to vehicles which have been involved in accidents. For example, it appears without valid reason, various sheriff's departments across the state, have denied access to inspection of vehicles by experts, some of which were subsequently released and "crushed," thereby destroying valid evidence. Needless to point out, this is a problem for both plaintiff and defense. Accordingly, State Bar President Patricia

Ballman has asked that I appoint a committee to investigate this matter and ultimately report back to the Bar's Executive Committee. I am in the process of doing just that, and would request that any of you who have experienced the same or similar problems, contact me by e-mail or otherwise (see page 12), to inform me of these problems, so we might have some idea of the pervasiveness or lack thereof, of this problem.

In closing, if there is any other issue that members feel needs to be addressed by the Litigation Section, feel free to contact me.

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# Litigation Section's Legislative Victory

## Medical Records Photocopy Fee Language Enacted Into Law

Jenny Boese

State Bar Senior Government Relations Coordinator

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Finally putting closure to the six-month saga of how to fill the state's \$1.1 billion fiscal hole, on July 26 Governor McCallum signed budget reform legislation into law as 2001 WI Act 109. By signing the legislation, Governor McCallum enacted language long sought after by the Litigation Section to require the Dept. of Health and Family Services (DHFS) to create a new administrative rule for the fees that can be charged for obtaining copies of medical records, *regardless of whether an action has been commenced*.

### Summary of Enacted Language

In essence, the enacted language requires the DHFS to create a new rule for fees based on an approximation of actual costs, sets the ground rules for what the DHFS considers in determining fees and creates an advisory committee on fees composed of impacted parties.

### Details of Enacted Language

The enacted language states that the new rules on fees shall be "based on an approximation of actual costs" plus applicable tax, actual postage or actual delivery costs. In determining the approximation of actual costs for fees, the DHFS may consider factors such as:

- operating expenses, including wages, rent, utilities and the like;
- varying cost of retrieval of records from differing media;
- cost of separating requested patient health care records from those not requested; and
- impact of costs of advances on technology.

By January 1, 2006, and every three years thereafter, the DHFS is required

to revise the rules to reflect changes in actual costs.

### Advisory Committee Created

The DHFS is required to establish an advisory committee "composed of members who represent a balance of persons who maintain patient health care records and persons who request patient health care records." The advisory committee will assist the DHFS in determining the amount of fees to be set under the new rule.

### Effective Date

The new rules are to be promulgated within 10 months.

### Follow Up Thanks Are In Order

This legislation would not have been enacted were it not for the tireless efforts of **Senator Russ Decker** (D-Schofield), author and chief proponent of this legislation for many years. Sen. Decker used his position on the powerful Joint Finance Committee and as a budget conference committee member to continue to advocate for these changes. **Please, please make sure you thank him for his support.** Correspondence can be sent to Sen. Decker at:

Senator Russ Decker  
Wisconsin State Senate  
PO Box 7882  
Madison, WI 53707-7882

There are many other legislators to thank, such as **Rep. Phil Montgomery** (R-Ashwaubenon) who worked last year to help broker compromise language, as well as Governor McCallum who saw fit to finally enact this legislation.

Rep. Phil Montgomery  
Wisconsin State Assembly  
PO Box 8953  
Madison, WI 53708

Governor Scott McCallum  
115 East, State Capitol  
Madison, WI 53702

**Much thanks goes out to all Litigation Section members** who have been vigilant and active on this issue, contacting legislators and the governor to urge a solution to this problem. Your grassroots efforts on this issue made all the difference. Thank you.

The State Bar's government relations program also worked with a diverse coalition on these changes. The coalition included the Wisconsin Insurance Alliance, the Association of Health Information Outsourcing Services, the Wisconsin Academy of Trial Lawyers, and the Civil Trial Counsel. We thank them for this collaborative effort to find an equitable solution on this issue.

### Two Budget Reform Provisions Removed Before Enactment

The following two items were removed from the budget reform bill prior to enactment.

Immunity from liability for local governments for damages resulting from highway defects – The Litigation Section opposed this provision.

Medical malpractice claims against state employees – The Litigation Section and the State Bar supported this provision.

Access the complete text of Act 109 online (a 300-page PDF document) at: <http://www.legis.state.wi.us/2001/data/acts/01Act109.pdf>

If you have questions on this or other issues in the budget reform act please contact Jenny at (800) 444-9404, ext. 6045; direct at (608) 250-6045 or email at [jboese@wisbar.org](mailto:jboese@wisbar.org).

## Recent Wisconsin Decisions

### Stacking of Insurance Coverage — Ambiguity of Antistacking Provision

The circuit court held that an automobile insurance policy antistacking provision was ambiguous. The court also held that the provision did not preclude payment under the policy's uninsured motor vehicle provision even though payment had been made under the uninsured motor vehicle provision of the plaintiff's ex-wife's insurance policy.

In this case, the plaintiff's daughter was killed in an auto accident while riding as a passenger in an uninsured motor vehicle. The plaintiff and his ex-wife each had a car insured with the same insurer. Each of the two policies provided \$50,000 uninsured motor vehicle coverage per person and each included an antistacking provision. As a result of the daughter's death, the insurer paid the plaintiff and his ex-wife \$50,000—the policy limit under the uninsured motor vehicle provision of her policy. Consequently, the insurer applied the antistacking provision of the plaintiff's policy and denied his claim for an additional \$50,000 payment.

On appeal, the plaintiff argued that the antistacking provision of the policy was inapplicable. He also argued that Wis. Stat. § 632.35(5)(f) was unconstitutional by denying him substantive due process of law. The court of appeals rejected both arguments. *Schroeder v. State Farm Mutual Automobile Ins. Co.*, 2002 WI App 11, 250 Wis.2d 269, 640 N.W.2d 215.

### Personal Jurisdiction — Service of Process by False Representations — Transient Rule — Physical Presence in State to Negotiate Settlement — Attorney's Fees

The defendant argued that the court of appeals should adopt a rule forbidding service of process on a person

who comes to Wisconsin for settlement discussions. The court of appeals noted that some jurisdictions follow the rule the defendant proposed. However, the court said, such a rule would represent a wholesale change in the law of personal jurisdiction in Wisconsin. It declined to adopt the defendant's proposed rule and affirmed the circuit court.

At the supreme court, the defendant asked the court to expand or interpret broadly the fraud exception to the transient rule of personal jurisdiction to prohibit service of a lawsuit on a person who comes to Wisconsin for settlement negotiations. The supreme court concluded that the public policies at stake are best served by the fraud exception to the transient rule as it presently stands, and the court declined to extend the exception proposed by the defendant. The court said that expanding immunity from service of process to cover parties in settlement negotiations may limit and obfuscate the availability of a Wisconsin forum for Wisconsin litigants. *Manitowoc Western Co., Inc. v. Montonen*, 2002 WI 21, 250 Wis. 2d 452, 639 N.W.2d 726.

### Defective Summons and Complaint — Lack of Signature by Licensed Attorney — Delegation to Agent not Permitted

The circuit court held that because the plaintiff's summons and complaint were signed by an attorney who was not licensed to practice in Wisconsin, they contained a fundamental defect, which deprived the circuit court of jurisdiction even though the signature was made on behalf of and at the direction of an attorney who was licensed in Wisconsin. This case was certified to the supreme court. The supreme court affirmed the judgment of the circuit court. It concluded that the pleadings in the case were defective, the defect was fundamental rather

than technical, and that the defect was not cured by any action taken by the plaintiff. Therefore, the supreme court said the circuit court had properly granted the defendant's motion for summary judgment. *Schaefer v. Riegelman*, 2002 WI 18, 250 Wis.2d 494, 639 N.W.2d 715.

### Attorney — Client Privilege Corporation's Attorney

This case arose from the termination of the plaintiff by his employer. The issues before the court related to the parties' discovery dispute. During discovery, the plaintiff filed a subpoena requesting documents from an attorney and his law firm regarding their representation of the plaintiff. The plaintiff also filed a subpoena requesting production of documents from third parties. The defendant filed motions to quash the subpoenas. The circuit court denied both motions.

The case came to the supreme court on certification. Specifically, the court addressed: (1) whether a corporation can invoke the lawyer-client privilege against a former member of the corporation's board of directors; (2) whether an attorney's billing records are protected by the lawyer-client privilege; (3) whether the circuit court erred in ordering production of documents reflecting communications with third party; (4) whether the circuit court should conduct an in camera review of records when otherwise privileged records are sought under the crime-fraud exception to the attorney-client privilege; and (5) whether documents created prior to an employee's termination are protected as work product. The court also reviewed the circuit court's award of attorneys' fees.

The supreme court concluded that the defendant can effectively assert the lawyer-client privilege against the plaintiff. It said the plaintiff's status as a former director did not allow him to

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waive the lawyer-client privilege as a representative of the defendant, nor did the plaintiff's status preclude the current board of directors from asserting the lawyer-client privilege against him regarding documents prepared during his tenure.

Second, the court concluded that attorney billing records are protected by the lawyer-client privilege. The supreme court said the circuit court erroneously exercised its discretion by failing to examine the nature of the billing records in this case, specifically that the records revealed the nature of legal services provided in the substance of lawyer-client communications.

Third, the supreme court concluded that the circuit court did not erroneously exercise its discretion in ordering production of nonprivileged documents reflecting communications with third parties.

Finally, the court concluded that the circuit court did not erroneously exercise its discretion in concluding that the plaintiff established a prima facie case that the crime-fraud exception to the lawyer-client privilege applies. The court also held, however, that the circuit court did err in failing to conduct an in camera review. The supreme court said the trial court failed to apply the proper standard and did not conduct an in camera review to determine if the documents were prepared or obtained in anticipation of litigation.

As a final issue, the supreme court concluded that the circuit court's award of half the attorneys' fees and expenses pertaining to two motions was reasonable and was not an erroneous exercise of discretion. *Lane v. Sharp Packaging Systems, Inc.*, 2002 WI 28, 251 Wis.2d 68, 640 N.W.2d 788.

### **Negligence — Duty of Care — Designated Driver — Gratuitous or Voluntary Undertaking**

The court of appeals affirmed an

order of the circuit court holding that when an individual indicates to a bartender that he will drive an intoxicated person home, thereby allowing the bartender to serve the intoxicated person more alcohol, that individual assumes a legal duty to drive the intoxicated person home. The court of appeals held, pursuant to the duty, when the individual who agrees to drive subsequently does not drive the intoxicated person home, that individual can be held liable for any injury or damage caused by the intoxicated person's driving. The court of appeals also held that immunity under Wis. Stat. § 125.035 does not apply in such a case.

The supreme court reversed the court of appeals decision and held that the plaintiff's claim against the defendant-designated driver should have been dismissed. The supreme court concluded that while it agreed that the case fits the framework of Restatement (2nd) of Torts, Section 324A, regarding a voluntary undertaking, under the facts of the case, the designated driver's liability was precluded by both section 125.035 and by public policy. *Stephenson v. Universal Metrics, Inc.*, 2002 WI 30, 251 Wis.2d 171, 641 N.W.2d 158.

### **Underinsured Motorist Liability — Reducing Clause in Policy**

This case involved an automobile liability insurance policy that provided UIM coverage and had a reducing clause that conformed to Wis. Stat. § 632.32(5)(i). The reducing clause of the policy provided that the limit of UIM liability would be reduced by payments made to the insured by or on behalf of parties responsible for damages caused by an underinsured motorist. In this case, after the insured suffered injuries in an accident involving an underinsured motorist, and after the insured received payments from the underinsured motorist, the insurer applied the reducing clause in the insured's policy to reduce its liability

to its insured by the amount of the payments received from the underinsured motorist. The insured moved for a judgment declaring the UIM provisions invalid. The circuit court agreed determining that the insurance policy was illusory. The court of appeals reversed.

The supreme court held that while the reducing clause complied with the provision in section 632.32(5)(i), its limitation on UIM coverage was ambiguous in the context of the entire policy. The court believed that a reasonable insured would not realize or expect that the insured's recovery under the UIM provisions would be reduced by the payments received from the underinsured motorist. Thus, in the context of the entire policy, the court held that the reducing clause was ambiguous and rendered the UIM coverage illusory. *Badger Mutual Ins. Co. v. Schmitz*, 2002 WI 98, \_\_\_ Wis.2d \_\_\_, 647 N.W.2d 223.

### **Employment-At-Will Doctrine — Firing in Retaliation for Actions of Non-Employee Spouse**

The plaintiff worked at a retail store. Her husband was a police officer. The owner of the store's wife was arrested for drunk driving. The plaintiff's husband assisted in the arrest by administering a breathalyzer test. Shortly thereafter, the plaintiff was fired from the store, allegedly in retaliation for her husband's participation in the arrest of her boss's wife. The plaintiff sued for wrongful discharge, invoking the public policy exception to the employment-at-will doctrine. The circuit court dismissed her complaint for failure to state a claim. The court of appeals affirmed.

On appeal, the supreme court declined to recognize a cause of action for wrongful discharge under the public policy exception to the employment-at-will doctrine for terminations in retaliation for the conduct of a non-employee spouse. The court noted that the public policy exception to the employment-at-will

doctrine is a narrow exception. The court said that it has never been extended to terminations in retaliation for conduct outside the employment relationship. The court said to allow it would expand the exception beyond its present boundaries with no logical limiting principles. *Bammert v. Don's SuperValu Inc.*, 2002 WI 85, \_\_\_ Wis.2d. \_\_\_, 646 N.W.2d 365.

### **Insurance Coverage — Made Whole Doctrine — Insurer's Right to Recover Medical Expenses**

This appeal came before the supreme court on certification. The circuit judge applied the "made whole" doctrine to a self-funded group insurance benefit plan to preclude the plan from recovering money paid by a tortfeasor to the plan's insured before the insured was fully compensated for his damages. The issue on certification was whether the parties to an insurance contract may override the madewhole doctrine by expressly stating in the insurance contract the intention to do so. Specifically, may the parties to an insurance contract override or negate the madewhole doctrine by writing specific, unambiguous contractual language stating that the insurer's rights to subrogation are superior to the insured's right to be made whole?

The supreme court said it accepted certification to clarify any perceived inconsistency between its decisions in *Garrity v. Rural Mutual Ins. Co.*, 77 Wis.2d 537, 253 N.W.2d 512 (1997), in which the court held that the made-whole doctrine applied because the insurance contract contained no language to the contrary, and *Rimes v. State Farm Mutual Ins. Co.*, 106 Wis.2d 263, 316 N.W.2d 384 (1982), in which the court concluded that one who claims subrogation rights is barred from recovery unless the insured is made whole.

The circuit court rejected the insurer's position that it had a contractual right to recover medical expenses it paid to its insured even though the insured was not made whole. The court

followed the *Garrity* and *Rimes* cases, determining that a subrogation clause in an insurance contract may not override the madewhole doctrine no matter how clearly the contract states the parties' intention to do so. The supreme court agreed with the circuit court and held that an insured must be made whole before the insurer may exercise subrogation rights against the insured, even when unambiguous language in the insurance contract states otherwise. *Ruckel v. Gassner*, 2002 WI 67, \_\_\_ Wis.2d. \_\_\_, 646 N.W.2d 11.

### **Relationship between Private Nuisance and Public Nuisance — Negligence Claim**

The circuit court in this action and the court of appeals both concluded that the petitioners were liable for maintaining a public nuisance, consisting of tree branches obstructing the view of a stop sign at a highway intersection. The supreme court reviewed what it called "the important, but often confusing" relationship between public nuisance and negligence. The court provided the proper framework for determining liability for public nuisance. It clarified the relationship between public nuisance and negligence and ultimately held that liability for maintaining a public nuisance is based on the following three elements, plus public policy: first, the existence of the public nuisance itself; second, actual or constructive notice of the public nuisance; and third, that the failure to abate the public nuisance was a cause of the plaintiff's injuries. For comparing and apportioning responsibility for an accident and for determining contribution among culpable parties, the court concluded that when all of those elements are proven, a defendant's failure to abate a public nuisance is analogous to negligence per se. The court also held that liability for maintaining a public nuisance can be limited on public policy grounds. *Physicians Plus Ins.*

*Corp v. Midwest Mutual Ins. Co.*, 2002 WI 80, \_\_\_ Wis.2d. \_\_\_, 646 N.W.2d 777.

### **Municipal Immunity — Known Danger Exception — Ministerial Duty to Perform Manual Traffic Control**

The plaintiff was injured in an intersection accident at which the traffic control lights were inoperable because of an evening storm. The town had dispatched a police officer to the scene. The plaintiff sued the officer and the town, claiming that the officer negligently failed to control traffic at the intersection and that the town was liable for the officer's negligence under respondent superior theory. The circuit court granted summary judgment in favor of the officer and the town, concluding that they were immune from liability. The court of appeals reversed, concluding that the known danger exception to immunity applied, and that the material factual issues regarding the adequacy of the officer's response to the known danger precluded summary judgment. The supreme court reversed the court of appeals.

The supreme court said the known danger exception to municipal and public officer immunity under section 893.80(4) is a narrow, judicially-created exception that arises only when there exists a danger that is known and compelling enough to give rise to a ministerial duty on the part of a municipality or its officers. The court said the plaintiff contended that the danger created by the inoperative stoplights at the intersection gave rise to a ministerial duty on the part of the officer. The supreme court concluded that the situation at the intersection, while dangerous, nevertheless allowed for the exercise of officer discretion as to the mode of response, and, therefore, did not give rise to a ministerial duty to perform manual traffic control. *Lodl v. Progressive Northern Ins. Co.*, 2002 WI 71, \_\_\_ Wis.2d. \_\_\_, 646 N.W.2d 314.

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### **Underinsured Motorist Coverage — Date of Loss — Statute of Limitations**

The plaintiff was injured in an automobile accident caused by the alleged negligence of two other drivers. At that time, the plaintiff was insured under an automobile insurance policy which contained an underinsured motorist coverage provision. Approximately seven and onehalf years later, the plaintiff settled her claims against the two other drivers and reserved any claims she might have under her own underinsured motorist policy. She then conducted settlement negotiations with the insurer that proved unsuccessful. Pursuant to the policy, the parties commenced arbitration proceedings. Almost nine and one-half years after the accident, the insurer terminated the arbitration process and advised her that the statute of limitations under Wis. Stat. § 893.43 had expired. This statute required that an action upon a contract be commenced within six years after the cause of action accrues.

The plaintiff filed a complaint against the insurer. The complaint alleged bad faith, breach of contract, declaratory relief and estoppel. The insurer moved for dismissal. The insurer argued that the statute of limitations barred the plaintiff's action. The insured argued that the statute of limitations commenced on the date on which the insurer allegedly breached the insurance contract by terminating the arbitration proceedings. The plaintiff argued that until the insurer denied the requested underinsured motorist benefits, they did not have a viable claim for breach of contract. She also argued that the doctrine of laches and equitable estoppel did not apply because before the insurer discontinued the arbitration process, there was no indication that the insurer had breached the insurance policy contract by refusing to pay underinsured motorist coverage benefits. The circuit court denied the

insurer's motion to dismiss. The court of appeals affirmed.

On appeal to the supreme court, the court considered two issues. First, the court examined whether the plaintiff's action was timely filed. Second, the court examined whether the action was barred under the doctrine of laches or equitable estoppel. The supreme court agreed that the action was commenced within the statute of limitations, but concluded that the appropriate date of loss was the date of settlement with the tortfeasors. It said for actions seeking coverage under an underinsured motorist policy the statute of limitations begins to run from the date of loss. This is the date on which a final resolution is reached and the underlying claim against the tortfeasor, be it through denial of that claim, settlement, judgment, execution of releases, or other form of resolution, whichever is the latest. *Yocherer v. Farmers Ins. Exchange*, 2002 WI 41, 252 Wis. 2d 114, 643 N.W.2d 457.

### **Striking of Answer — Timely Filing — Default Judgment**

This case came to the supreme court on certification. The circuit court struck a defendant's answer to the plaintiff's complaint on grounds that the answer was not timely filed with the court. The court concluded that timely service of the defendant's answer without filing it within a reasonable time after service was not sufficient to join issue. Thus, it entered a default judgment for the plaintiff. The defendant appealed.

The supreme court said that the case presented several questions about the interpretation and enforcement of Wis. Stat. § 801.14(4). The court listed the following four questions:

(1) What is a reasonable time after service for a defendant to file an answer with the court?

(2) May a circuit court strike a defendant's answer if the answer is not filed within a reasonable time after service?

(3) If a circuit court has discretion to strike a defendant's answer when the answer is not filed within a reasonable time after service, may the court strike the answer without finding that either the moving party or the court was prejudiced by the late filing?

(4) If a circuit court has discretion to strike a defendant's answer when the answer is not filed within a reasonable time after service, may the circuit court also enter a default judgment?

The court concluded that a circuit court may not enter a default judgment against a defendant on the grounds that the defendant failed to file an answer with the court within a reasonable time after service unless the court first determines that the late filing prejudiced either the plaintiff or the court. Because the circuit court neither discussed prejudice nor made any finding of prejudice before entering a default judgment against the defendant, the supreme court said the trial court erroneously exercised its discretion. *Split Rock Hardwoods, Inc. v. Lumbar Liquidators, Inc.*, 2002 WI 66, \_\_\_ Wis.2d \_\_\_, 646 N.W.2d 19.

### **Statutory Definition of "Operate"**

The plaintiff was severely injured while snowmobiling at night. At the time of the accident, the plaintiff was traveling on new highway lanes under construction. The accident occurred when the plaintiff swerved to avoid hitting another snowmobiler who had stopped and shut off his snowmobile on the same path the plaintiff was using. Before trial, the plaintiff moved for a determination that the driver of the stopped snowmobile was negligent per se for violating Wis. Stat. § 350.09 which requires head and tail lamps to be illuminated when a snowmobile is operated at night. The circuit court denied the motion concluding that a snowmobile completely stopped with its engine off was not being operated within the meaning of the statute. The court of appeals reversed. The supreme court disagreed.

The supreme court said the snowmobile statutes define “operate” as the exercise of physical control over the speed or direction of a snowmobile or the physical manipulation or activation of any of the controls of a snowmobile necessary to put it in motion. The court said this definition does not include merely sitting on a stopped snowmobile with the engine off. *Burg v. Cincinnati Casualty Ins. Co.*, 2002 WI 76, \_\_\_ Wis.2d \_\_\_, 645 N.W.2d 880.

### **Medical Malpractice Action — Dismissal — Failure to Comply with Wis. Stat. § 655.44(5) — Statutory Mediation**

The question for the supreme court in this appeal was whether a circuit court must dismiss an action when a chapter 655 claimant fails to comply with the provisions in section 655.44(5) which states that no court action may be commenced until the expiration of the mediation period under section 655.465(7). The plaintiff was treated on October 17, 1996. She alleged that she sustained an injury to her arm after a nurse negligently injected her with a drug. The plaintiff mailed a request for mediation to the director of state courts on October 8, 1999. On October 18, 1999, well before the end of the mediation period, the plaintiff filed a summons and complaint in circuit court. No party’s answer to the complaint raised the issue of the premature commencement of the action. Because of scheduling problems, mediation was not held within the statutory period. Instead the mediation session was conducted on February 4, 2000, approximately three weeks outside the mediation period. A few days later, the plaintiff filed an amended summons and complaint, essentially to drop a party from the action but she otherwise repeated the originally asserted allegations against the remaining defendants. On February 17, 2000, the statute of limitations expired. Subsequently, the defendant raised the

noncompliance with section 655.44 by asserting that the court lacked jurisdiction over the defendants.

The circuit court concluded that the suit must be dismissed. The court of appeals concluded that the expiration of the mediation period was a condition precedent to the commencement of a filing of a medical malpractice action and that noncompliance required dismissal. The supreme court reversed. It agreed with the plaintiff that failure to comply with the statutory provision regarding the filing of a claim until the end of the statutory mediation period did not require as a remedy the circuit court’s dismissal of the action. *Ocasio v. Froedtert Memorial Lutheran Hospital*, 2002 WI 89, \_\_\_ Wis.2d \_\_\_, 646 N.W.2d 381.

### **The Safety Helmet Defense — Comparison of Negligence — Verdict Formulation**

This case involved an ATV accident and presented the issue of the availability and effect of the so-called “helmet defense” in Wisconsin. The case raised two central questions: (1) is the helmet defense governed by the same principles as the seat belt defense, and if so, should those principles be modified for purposes of the helmet defense?; and (2) can an ATV owner be liable for failing to require adult users of the ATV to wear a safety helmet?

The special verdict contained separate questions about the parties’ respective causal negligence regarding the accident and the plaintiff’s failure to wear and helmet. The jury concluded both the ATV owners and the plaintiff were negligent and separately apportioned the accident negligence (70 percent for the plaintiff/ 30 percent for the owners and the helmet negligence 60 percent for the owners and 40 percent for the plaintiff). The jury also concluded that 90 percent of the plaintiff’s injuries were attributable to his failure to wear a helmet.

On motions after verdict, the trial court struck the special verdict questions regarding the owners’ negligence for the plaintiff’s failure to wear a safety helmet and limited the plaintiff’s recovery to the damages attributable to the owners’ negligence in causing the negligence. Thus, the trial court reduced the plaintiff’s recovery by his contributory negligence (30 percent) and by a further 90 percent for his failure to wear and helmet.

The supreme court concluded that the issue of a plaintiff’s negligent failure to wear a safety helmet while operating an ATV is properly governed by the principles applicable to a plaintiff’s negligent failure to wear a seat belt established in *Foley v. City of West Allis*, 113 Wis.2d 475, 335 N.W.2d 824 (1983). For “purposes of the helmet defense,” the supreme court modified *Foley*’s second collision framework to the extent that it calls for an allocation of damages rather than an apportionment of negligence on the issue of a plaintiff’s helmet negligence. The court said the jury in a helmet defense case should be asked to compare the plaintiff’s helmet negligence as against the total combined negligence of the defendants.

As a final matter, the supreme court concluded that for reasons of public policy an ATV owner cannot be held liable for failing to require adult users of the ATV to wear an available helmet. The court said the jury should not have been asked to determine whether the ATV owners were negligent in failing to require the plaintiff to wear a safety helmet or to engage in a separate comparison of helmet negligence as between the plaintiff and the ATV owners. *Stehlik v. Rhoads*, 2002 WI 73, \_\_\_ Wis.2d \_\_\_, 645 N.W.2d 889.

# Consumer Information Pamphlet Series Gets a Facelift

The State Bar's series of consumer information pamphlets is undergoing a redesign. The new design carries an updated, professional appearance that will make a positive impact on current and potential clients.

The new pamphlet features the State Bar's new brand tagline on the front cover – "Wisconsin Lawyers. Expert Advisers. Serving You." This tagline reinforces that the pamphlet series is a public service of Wisconsin lawyers, who are expert advisers, problem solvers, and committed to community service.

By distributing these pamphlets in your community, you support educating the public about the value Wisconsin lawyers provide to their clients and society. Display the pamphlets in your office, distribute them as handouts during community presentations, donate copies to your community resource centers ... you will find many ways to disseminate this basic legal information.

## Pamphlets double duty as marketing tools

Now comprising 18 titles, the series covers legal issues that many people face sooner or later in their lives. Each pamphlet answers the questions most commonly asked by people facing such issues for the first time. Basic terms are defined and concepts explained in clear, easy-to-understand "plain English." Each pamphlet also describes the need for, and role of, an attorney in dealing with the issue under discussion.

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Pamphlets are available for purchase in quantities of 50 or more for less than \$20 per package (discounts for larger orders apply.) Six- and nine-pocket lucite racks also are available.



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# Law Reviews

## Evidence:

Jones, Gregory Todd and Reidar Hagtvedt, *Sample Data as Evidence: Meeting the Requirements of Daubert and the Recently Amended Federal Rules of Evidence*, 18 Ga. St. U. L. Rev., pp. 721-48 (2002).

Mauet, Thomas A., *The New World of Experts in Federal and State Courts*, 25 Am. J. Trial Advoc., 223-39 (2001).

Russell, Michael L., *Previous Acts of Employment Discrimination: Probative or Prejudicial?*, 25 Am. J. Trial Advoc., pp. 297-314 (2001).

Tomko, Christine M., Comment. *Can You Keep a Secret?: Discoverability and Admissibility of Confidential Settlement Agreements Amounts in Ohio*, 52 Case W. Res. L. Rev., pp. 83360 (2002).

## Environmental:

Klein, Andrew R., *Fear of Disease and the Puzzle of Futures Cases in Tort*, 35 U.C. Davis L. Rev., pp. 965-1004 (2002).

## Insurance Law:

Garrett, Larry, Note. *Comparative Fault in Legal Malpractice and Insurance Bad Faith: An Argument for Symmetry*, 21 Rev. Litig., pp. 663-99 (2002).

## Jurisdiction:

Thomson, Matt N. Jr., Case note. *Civil Procedure—The Conspiracy Theory of Personal Jurisdiction—Imputation of Jurisdictional Contacts to Coconspirators*. (**Chenault v. Walker**, 36 S.W.3d 45, Tenn. 2001.) 69 Tenn. L. Rev., pp. 221-43 (2001).

## Legal Profession:

Cummisford, Mark Richard, *Resolving Fee Disputes and Legal Malpractice Claims Using ADR*, 85 Marq. L. Rev., pp. 975-1002 (2002).

Engerrand, Kenneth G., *Pursuing and Defending Attorneys' Fees*

*Claims: Recent Changes in the Fifth and Ninth Circuits*, 14 U.S.F. Mar. L.J., pp. 155-84 (2001-2002).

Heintz, Michael E., Note. *The Digital Divide and Courtroom Technology: Can David Keep up with Goliath?*, 54 Fed. Comm. L.J., pp. 567-89 (2002).

Helvey, Aubree, Note. *Income tax: The Assignment of Income Doctrine and its Misapplication to Contingent Attorneys' Fees*, (**Kenseth v. Commissioner**), 114 T.C. 399, 2000.) 54 Okl. L. Rev., pp. 837-57 (2001).

Mastro, Sandy, Note. *Courtroom Bias: Gender Discrimination Against Pregnant Litigators*, 8 Wm. & Mary J. Women & L., pp. 155-73 (2001).

## Medical Jurisprudence:

Hecht, Alexander N., *Legal and Ethical Aspects of Sports-Related Concussions: The Merrill Hoge Story*, 12 Seton Hall J. Sport L., pp. 17-64 (2002).

Peters, Philip G., Jr. *The Role of the Jury in Modern Malpractice Law*, 87 Iowa L. Rev., pp. 909-69 (2002).

## Practice and Procedure:

Miller-Stover, Leslie, Note. *Employing Common Sense in West Virginia Trial Courts: Encouraging Juror Note-taking and the Questioning of Witnesses by Jurors*, 102 W. Va. L. Rev., pp. 869-90 (2000).

## Products Liability:

Feeley, Sandra L., Note. *Dancing Around the Issue of FIFRA Preemption: Does it Really Still Matter That the Supreme Court Has Not Made a Decision?*, 16 J. Nat. Resources & Envtl. L., pp. 125-50 (2001-2002).

Hayden, Lisa N., Comment. *Does the Future of Product Liability Actions Change after . . . (Hawkins v. Leslie's Pool Mart, Inc.)*, 184 F.3d

244, 3d Cir. 1999.) 16 J. Nat. Resources & Envtl. L., pp. 167-78 (2001-2002).

Kirk, Trent., Comment. *Fraud-on-the-FDA & Buckman—The Evolving Law of Federal Preemption in Products Liability Litigation*. (**Buckman Co. v. Plaintiffs' Legal Committee**, 531 U.S. 341, 2001.) 53 S.C. L. Rev., pp. 673-99 (2002).

## Professional Ethics:

Boettcher, Matthew J. and Eric G. Tucciarone, *Concerns over Attorney-Client Communication Through E-Mail: Is the Sky Really Falling?* 2002 Law Rev. Mich. St. U. Det. C.L., pp. 127-47 (2002).

Schiess, Wayne, *Ethical Legal Writing*, 21 Rev. Litig., pp. 527-50 (2002).

## Torts:

Cantu, Charles E., *An Essay on the Tort of Negligent Infliction of Emotional Distress in Texas: Stop Saying it Does Not Exist*, 33 St. Mary's L.J., pp. 455-68 (2002).

D'Amico, Daniela, Note. *Torts—Negligence in the Protection of Third Parties During Youth Sports Programs . . . (Hills v. Bridgeview Little League Assoc.)*, 745 N.E.2d 1168, Ill. 2000.) 12 Seton Hall J. Sport L., pp. 107-29 (2002).

Feldman, Daniel L., *Not Quite High Noon for Gunmakers: But It's Coming: Why Hamilton Still Means Negligence Liability in Their Future*, 67 Brook. L. Rev., pp. 293-328 (2001).

Flynn, Michael, *The sign said, "Beware of Duffers"—The Liability of Golf Course Operators for Failing to Post Warning Signs*, 12 Seton Hall J. Sport L., pp. 1-15 (2002).

Jones, William K., *Tort Triad: Slumbering Sentinels, Vicious Assaultants, and Victims Variously*

## 10 Litigation News

*Vigilant*, 30 Hofstra L. Rev., pp. 253-96 (2001).

Kleinberger, Daniel S. and Peter Knapp, "Apparent Servants" and Making Appearances Matter: A Critique of *Bagot v. Airport & Airline Taxi Cab Corporation*, 28 Wm. Mitchell L. Rev., pp. 152742 (2002).

Klein, Andrew R., *Fear of Disease and the Puzzle of Futures Cases in Tort* 35 U.C. Davis L. Rev., pp. 965-1004 (2002).

Lytton, Timothy D., *Should Government Be Allowed to Recover the*

*Costs of Public Services from Tortfeasors?: Tort Subsidies, the Limits of Loss Spreading, and the Free Public Services Doctrine*, 76 Tul. L. Rev., pp. 727-81 (2002).

Pato, David M., Note. *Legal Malpractice—Membership in a Professional Corporation Does Not Confer upon an Attorney-Shareholder a Limitation on Personal Liability for Attorney's Breach of Duty*, (*Sanders, Bruin, Coll & Worley, P.A. v. McKay Oil Corp.*, 123 N.M. 457, 943 P.2d 104, 1997.) 31 N.M. L. Rev., pp. 63749 (2001).

Speziale, Loren, Comment. *Walking Through the New Jersey Equine Activity Statute: A Look at Judicial Statutory Interpretation in Jurisdictions with Similar Limited Liability Laws*, 12 Seton Hall J. Sport L., pp. 65-105 (2002).

Whitten, Kristian D., *The Economics of Actual Malice: A Proposal for Legislative Change to the Rule of *New York Times v. Sullivan**, 32 Cumb. L. Rev., pp. 519-71 (2001-2002).

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## Section Subcommittee to Analyze Worker's Compensation Law Provision

The State Bar's Litigation Section Board has assembled a subcommittee to analyze Wis. Stat. sec. 102.29. The committee is comprised of Merrick Domnitz, Michael Eckert, Catherine La Fleur, and Willard Techmeier.

The subcommittee seeks input from attorneys who have had problems or successes with this statute in cases they have handled. Please feel free to contact any of the above with your comments, questions or concerns.

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