Torts

Immunity – Medical Malpractice – COVID-19

***Wren v. Columbia St. Mary's Hosp. Milwaukee Inc.*, 2026 WI 11 (filed April 10, 2026)**

HOLDING: Healthcare providers had immunity under a statute that applied during the COVID-19 pandemic.

SUMMARY: The plaintiff gave birth to a stillborn child during the COVID-19 pandemic. The birth occurred during a "window of immunity" granted to healthcare providers by Wis. Stat. section 895.4801 for a period surrounding the state of emergency. The circuit court dismissed the plaintiff's claims of medical malpractice pursuant to the statutory immunity. In a published decision, the Wisconsin Court of Appeals reversed, concluding the statute was facially unconstitutional for depriving litigants of their right to a jury trial under the Wisconsin Constitution. *See* 2025 WI App 22.

In a unanimous opinion authored by Chief Justice Karofsky, the Wisconsin Supreme Court reversed the court of appeals. Essentially, because the plaintiff had no viable cause of action, she had no right to a jury trial. In the court's words: "As the legislature abrogated Wren's asserted causes of action, she has pled no viable cause of action against the defendants upon which the right to a jury trial could attach" (¶ 17).

Asbestos – Workplace – Punitive Damages – Summary Judgment

***Estate of Lorbiecki v. Pabst Brewing Co.*, 2026 WI 12 (filed April 15, 2026)**

HOLDING: The safe-place statute did not bar recovery and sufficient evidence supported a punitive-damages award, but the court of appeals misapplied the damages cap in Wis. Stat. section 895.043(6).

SUMMARY: In the mid-1970s, Gerald Lorbiecki worked for an independent contractor as a steam fitter, cutting out and replacing insulated pipes at the Pabst brewery. While the work was performed, Lorbiecki was in the presence of airborne asbestos. When Lorbiecki was diagnosed with mesothelioma in 2017, he sued Pabst and other businesses and independent contractors for whom he had worked, alleging that their negligence caused his illness (*see* ¶ 7). A jury found in favor of Lorbiecki's estate, awarding total damages of nearly $7 million, including punitive damages.

In reviewing the circuit court's rulings, the supreme court affirmed in part and reversed in part in an opinion authored by Justice Dallet. The opinion opened

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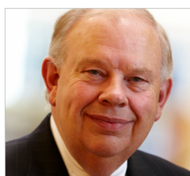

BLINKA HAMMER

In this column, Prof. Daniel D. Blinka and Prof. Thomas J. Hammer summarize all decisions of the Wisconsin Supreme Court (except those involving lawyer or judicial discipline).

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with a clarification that current law negates a rule found in "older cases" by which a party who proceeded to trial is said to have waived the right to appeal a denial of summary judgment. In short, going to trial does not foreclose the party from appealing a denial of its summary-judgment motion (*see* ¶ 13).

"Pabst's primary argument, first raised at summary judgment and reiterated in its motions for judgment as a matter of law and judgment notwithstanding the verdict, is that it cannot be held liable to Lorbiecki as a matter of law under the safe-place statute" (¶ 15). Parsing the record, the statute, and prior case law, the court rejected Pabst's contentions. "We agree with Lorbiecki that a reasonable jury could find that Pabst retained control over the place where he worked" (¶ 23).

Sufficient evidence supported a jury's finding that "Lorbiecki was exposed to the unsafe condition of airborne asbestos at Pabst's brewery" (¶ 25). "As the owner of the brewery, Pabst owed a non-delegable duty under the safe-place statute to frequenters on the premises, a category that includes employees of independent contractors like Lorbiecki. … That duty supersedes the common-law duty of ordinary care, and thus the 'general rule' in *Tatera* [*v. FMC Corp*. 2010 WI 90, 328 Wis. 2d 320, 786 N.W.2d 810] limiting liability to employees of independent contractors does not apply. … A reasonable jury could also find that an 'unsafe condition associated with the structure' – airborne asbestos – existed on the premises, that Pabst knew about it, that Pabst failed to maintain or repair the premises to be as safe as its nature would reasonably permit, and that the failure to do so caused Lorbiecki's injuries" (¶ 28).

Next, the court held that sufficient evidence supported the submission of punitive damages to the jury. "[A]t a minimum," Pabst was aware that its conduct was substantially certain to harm Lorbiecki (¶ 33). There was an issue, however, regarding the cap on punitive damages found in Wis. Stat. section 895.043(6), which provides that "[p]unitive damages received by the plaintiff may not exceed twice the amount of any compensatory damages recovered by the plaintiff or $200,000, whichever is greater."

"The issue [was] whether 'the amount of any compensatory damages recovered by the plaintiff' in this case is the $5,545,163.55 in compensatory damages the jury apportioned among all alleged tortfeasors – Pabst and four non-party companies … or just the $2,328,968.69 in compensatory damages for which Pabst, the sole remaining defendant at trial, was responsible" (¶ 34). "Although § 895.043(6) does not define the word 'recovered,' its usage elsewhere in chapter 895 confirms that it refers only to money or property a plaintiff is legally entitled to receive after prevailing in a case, and thus obtaining a judgment" (¶ 36). In short, the statute applied only to the lower number.

The supreme court expressly observed that "this interpretation does not import principles of comparative negligence into the calculation of punitive damages, and is thus consistent with our prior statement that punitive damages are not damages for negligence and are 'undiminished by proportional negligence.' … The outcome here, that the punitive-damages cap is tied to the amount recoverable against Pabst, follows from the fact Pabst was the only defendant at trial, and thus the only party against whom Lorbiecki could legally receive compensatory damages after obtaining a judgment. The reason Lorbiecki could not recover any of the other compensatory damages included in the verdict is not because of comparative negligence, but simply because the other alleged tortfeasors were not parties, and thus judgment could not be entered against them" (¶ 38).

In a concurring opinion, Justice Dallet, joined by Justice Hagedorn, underscored that the majority opinion did not answer "an important question," namely, "[w]hen reviewing the denial of summary judgment on appeal, should an appellate court rely only on the pre-trial factual record developed in discovery, only on the evidence admitted at trial, or both?" (¶ 41).

Justice Ziegler dissented, joined by Justice R.G. Bradley. They contended that "under Wisconsin law, the majority should be reviewing Pabst's denied motion for summary judgment based upon the record that existed at summary judgment, not based upon the jury's verdict, and the majority errs again when it fails to correctly analyze the law regarding a building owner's liability to an independent contractor's employee as the same arguments were raised in a post-trial motion. If the majority is adopting the federal rules, it is doing so without argument or briefing" (¶ 49). **WL**

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