

## Wisconsin Insurance Law Alert

Axley Brynelson, LLP • June 2010

### News

#### **The Court of Appeals Revisits the Subrogation and Collateral Source Rules, Extends *Paulson v. Allstate Ins. Co.* to Arbitration Context** *by Sara Beachy*

In one of the few published insurance cases so far this year, *Fischer v. Steffen*, 2010 WI App 68, the court of appeals revisited the interplay between two recurring issues in insurance law: subrogation and the collateral source rule.

In *Fischer*, a subrogated insurer arbitrated its subrogation claim and lost. Nonetheless, its insured went on to obtain a jury verdict in excess of the amount of the subrogation claim. On appeal, the plaintiff-insured argued that the insurer waived its subrogation claim by arbitrating and that the collateral source rule entitled him to all amounts awarded by the jury, notwithstanding the amount of the subrogation claim. The court of appeals, however, disagreed.

Plaintiff Fischer and Defendant Steffen were in an automobile accident in which Fischer was injured. Fischer's insurer, American Family Insurance, paid \$10,000 in medical expense coverage, the full amount available under his automobile policy.

American Family then arbitrated its subrogation claim against Steffen and her insurer, Wilson Mutual Insurance Company. Wilson lost at arbitration after the panel found that Steffen was not negligent.

Fischer nonetheless sued Steffen and Wilson Mutual. Fischer also named American Family for the purpose of having American Family's interest determined, if any. American Family answered and claimed a \$10,000 subrogated interest. It also cross-claimed against Steffen and Wilson Mutual for the \$10,000.

Wilson Mutual then informed American Family's counsel that American Family had earlier submitted its subrogation claim to binding arbitration and lost. American Family dismissed itself from the lawsuit with prejudice. Fischer, however, proceeded to trial.

The jury reached the opposite conclusion of the arbitration panel, finding Steffen negligent for the accident. The court found that the medical expenses were \$12,157.14. Steffen and Wilson Mutual requested that the trial court reduce the amount for medical expenses by \$10,000, in recognition of its winning the arbitration. The trial court did so, citing *Paulson v. Allstate Insurance Co.*, 2003 WI 99, 263 Wis. 2d 520, 665 N.W.2d 744. Fischer appealed.

On appeal, the court began by reviewing the collateral source and subrogation rules. Under the "collateral source" rule, a tortfeasor who is legally responsible for causing injury should not be relieved from an obligation to the victim simply because the victim had the foresight to arrange receipt of benefits for injuries and expenses.

On the other hand, "subrogation" allows an insurer to stand in the shoes of its insurer once it has paid its insured money for a loss. A subrogated insurer may seek to recoup its payment from the tortfeasor. Ordinarily, the insured is precluded from seeking the same, or double, recovery

from the tortfeasor. The insurer assumes ownership of the right to seek recovery of that amount from the tortfeasor. In this way, the court of appeals explained, the subrogation right "trumps" the collateral source rule.

There are exceptions to the rule that the subrogation rule "trumps" the collateral source rule. One exception, not present in *Fischer*, is when there is not enough money to make the plaintiff whole (the "made whole" doctrine). Another exception occurs when the subrogee insurer waives its right of subrogation. Waiver can occur either by contract or by conduct inconsistent with the right of subrogation.

Fischer argued that American Family waived its subrogation claim by arbitration, and therefore, Fischer was allowed to recover the amounts waived. Because the insurer had *not* recovered the amount of its subrogation claim, Fischer claimed, the collateral source rule allowed Fischer to do so.

The court of appeals disagreed, based on *Paulson v. Allstate Insurance Co.* In *Paulson*, Paulson's insurance company paid 100 percent of the repair costs, then subsequently settled its subrogation claim with the tortfeasor's insurer for a reduced amount based on plaintiff's alleged contributory negligence. The supreme court held that the plaintiff could not collect the difference under the collateral source rule.

In *Fischer*, the court of appeals found arbitration similar to the decision of the Paulson's insurer to negotiate with the tortfeasor's insurer. As the *Fischer* court explained, once the plaintiff has been made whole, the insurers are entitled to decide which of the insurers bears the loss and how. According to the court, this result encourages settlement of subrogation claims among insurers, reduces litigation expenses, and promotes freedom of contract. The "vehicle" – negotiation or arbitration – is unimportant. What is important is that the insurers were resolving a disputed issue between them.

Finally, the court emphasized, American Family never gave its subrogation rights back to Fischer. Because American Family continued to stand in the shoes of its insured, "it is no business of the plaintiff" how the subrogated insurer goes about seeking reimbursement for its outlay from the tortfeasor and the tortfeasor's insurer. Thus, the court of appeals affirmed the trial court's judgment reducing the judgment by \$10,000 for American Family's subrogation claim.

#### **Bottom Line:**

Once a plaintiff has been made whole, the collateral source rule does not allow a plaintiff-insured to recover the difference between the amount of its insurer's subrogation claim and the amount of the claim that the insurer actually recovers through negotiation, arbitration, or other means.

continued...

## Case Summaries

**Issue Preclusion:** Trial court focused only on whether issue was actually litigated in prior lawsuit by customer against flooring brokerage company and did not address the identity of the parties, and therefore erred in determining that issue preclusion applied in later action brought by flooring brokerage company against flooring sales company. *Flooring Brokers, Inc. v. Florstar Sales*, 2010 WI App 40 (Feb. 10, 2010).

**Evidence; New Trial:** Probative value of evidence of pre-existing easement rights was not substantially outweighed by danger of confusion of the issues or misleading the jury in condemnation action regarding electric utility's new high-voltage transmission line easement; trial court's exclusion of such evidence was not harmless error and electric utility was entitled to a new trial. *Fields v. Am. Transmission Co.*, 2010 WI App 59 (Mar. 16, 2010).

**Lemon Law; Wis. Stat. § 100.18:** Manufacturer and dealership were not liable for installation of aftermarket accessories under Lemon Law; however, consumer was allowed to proceed with his § 100.18 claim against the dealership for its affirmative representation that the vehicle and aftermarket accessories were covered by the manufacturer's warranty. *Goudy v. Yamaha Motor Corp.*, 2010 WI App 55 (Mar. 24, 2010).

**Workers Compensation; Unreasonable Refusal to Rehire:** Employer did not unreasonably refuse to rehire employee because the reasonable cause standard in Wis. Stat. § 102.35(3) does not contemplate requiring employers to either deviate from a facially reasonable and uniformly applied policy, or explain why it would be burdensome to do so, when a returning employee requests the deviation to accommodate a non-work and non-injury-related personal need. *DeBoer Transp., Inc. v. Swenson*, 2010 WI App 54 (Mar. 25, 2010).

**Expert Testimony:** Plaintiff county was not required to introduce expert testimony in lawsuit alleging breach of computer consulting contract because the claim did not present issues so complex as to require expert testimony as a matter of law. *Racine County v. Oracular Milwaukee, Inc.*, 2010 WI 25 (April 2, 2010).

**Service of Process; Reasonable Diligence:** Plaintiff, who made numerous service attempts on Defendant (whose attorney raised service as an affirmative defense) at his Florida address, and served by publication in city where Defendant lived, exercised reasonable diligence in attempting to serve Defendant. *Loppnow v. Bielik*, 2010 WI App 66 (April 7, 2010).

**Insurance; Family Exclusions:** Family exclusion clause barred mother from making wrongful death and survivorship claim for her daughter's death against father and step-mother's insurer because father was an heir. *Day v. Allstate Indem. Co.*, 2010 WL 1443283 (Ct. App. April 13, 2010).

**Wis. Stat. § 893.80; Notice of Injury And Claim:** Chapter 133, Stats., antitrust claims are exempt from the notice requirements under Wis. Stat. § 893.80. *E-Z Roll Off v. County of Oneida*, 2010 WL 1851346 (May 11, 2010).

**Property; Adverse Possession; Doctrine of Acquiescence:** Acquiescence to a property boundary did not alter location of a section corner on government survey. *Northrop v. Opperman*, 2010 WL 1850863 (May 11, 2010).

**Property; Adverse Possession; Doctrine of Acquiescence; Wis. Stat. § 893.25(2)(b)1.:** Plaintiff did not meet burden of proving adverse possession because predecessors' hunting and related activities were not open, notorious, visible, exclusive, or hostile; a swampy area and manmade ditch did not constitute a substantial enclosure under Wis. Stat. § 893.25(2)(b)1., and the doctrine of acquiescence did not apply. *Steuck Living Trust v. Easley*, 2010 WL 1905023 (May 13, 2010).

**UM Coverage; "Hit-and-Run" Vehicle:** Uninsured motorist policy provided coverage for injuries sustained by bicyclist, despite the fact that driver stopped vehicle following

accident to make sure bicyclist was uninjured, because vehicle was considered a "hit-and-run" vehicle under uninsured motorist policy. *Zarder v. Acuity*, 2010 WI 35 (May 14, 2010).

**Summary Judgment; Affidavit; Essential Documents:** Trial court did not err in granting summary judgment based in part on documents attached to a complaint even though documents were not attached to an affidavit in support of summary judgment motion. *Simandl & Murray, S.C. v. Mainstreet Homes, LLC*, 2010 WL 2035819 (May 25, 2010).

**Summary Judgment; Medical Malpractice; Wis. Stat. § 893.55(1m)(b):** Trial court properly dismissed patient's malpractice claim against doctor who allegedly failed to notify patient of cancerous tumor or need for close follow-up, where suit was not commenced within five years of omission and was time-barred under Wis. Stat. § 893.55(1m)(b). *Pagoudis v. Korkos*, 2010 WL 2086159 (May 26, 2010).

**Employment Law; Wis. Stat. § 103.455:** Employer's decision to fire employee who knowingly withheld overpayments of salary was not in violation of public policy, Wisconsin's at-will employee doctrine, or Wis. Stat. § 103.455. *Farady-Sultze v. Aurora Medical Center of Oshkosh, Inc.*, 2010 WL 2178806 (June 2, 2010).

### WISCONSIN INSURANCE LAW ALERT

by: Lori Lubinsky, Ena Seiler and Jodi Yin

The *Wisconsin Insurance Law Alert* is published by the Litigation Practice Group of Axley Brynelson, LLP. Since 1885, Axley Brynelson, LLP has been a leading insurance defense law firm in Wisconsin. The firm's office is on the Capitol Square in Madison, WI.

#### INSURANCE DEFENSE LITIGATORS

Michael Anderson	Claudia Lombardo
Bradley Armstrong	Lori Lubinsky
Timothy Barber	Daniel McAlvanah
Sara Beachy	John Mitby
Andrew Clarkowski	Michael Modl
Paul Curtis	Mitchell Olson
Guy DuBeau	Michael Riley
Timothy Fenner	Ena Seiler
Saul Glazer	Steven Streck
Brian Hough	Troy Thompson
Jason Knutson	John Walsh
Arthur Kurtz	Jodi Yin

Please visit our website at [www.axley.com](http://www.axley.com)

To receive more information about any of the cases noted in this newsletter, please contact us at:  
[law@axley.com](mailto:law@axley.com) • 1.800.368.5661 • FAX 608.257.5444