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## Wisconsin Insurance Law Alert

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### News

#### **Donaldson v. West Bend: Filing a personal injury lawsuit tolls a defendant's deadline to file a counterclaim relating to same incident** --by Carol A. Chapman

On December 14, 2009, the Wisconsin Supreme Court denied a petition for review, letting stand a recent Court of Appeals decision holding that when a plaintiff commences an action within the applicable statute of limitations, the time period for the defendant to file a counterclaim relating to the same incident is tolled.

The Court of Appeals' recent decision in *Donaldson v. West Bend*, 2009 WI App 134, -- Wis. 2d --, 773 N.W.2d 470, *petition for review denied* (Dec. 14, 2009), provides new guidance to insurers and their counsel in defending claims brought at or near the expiration of the applicable statute of limitations. In *Donaldson*, the defendant, Berg, was participating in the Milwaukee Lakefront Marathon when he struck the plaintiff, a spectator, with his bike. Both Berg and Donaldson were injured in the incident.

Shortly before the statute of limitations ran, Donaldson sued Berg and his insurer West Bend Mutual Insurance Company. Berg answered the complaint and later filed a counterclaim. Donaldson moved to dismiss the counterclaim as time-barred under the three-year personal injury statute of limitations, Wis. Stat. § 893.54. The trial court agreed and dismissed Berg's counterclaim.

On appeal, the Court of Appeals agreed that the three-year statute of limitations applied to Berg's counterclaim. However, the court examined the provisions of Wis. Stat. § 893.14 to ascertain whether Berg's counterclaim was time-barred. Section 893.14 (Stat.) provides, in relevant part:

Unless otherwise specifically prescribed by law, the period within which a cause of action may be used as a defense or counterclaim is computed from the time of the accrual of the cause of action until the time that the plaintiff commences the action in which the defense or counterclaim is made.

After determining the statute was ambiguous, the court looked to legislative history and case law. The court concluded that the phrase "unless otherwise specifically prescribed by law" in Wis. Stat. § 893.14 only applies to counterclaims that were already barred before the plaintiff filed his or her lawsuit. The court held that a new lawsuit cannot resurrect counterclaims already barred at the time the plaintiff files an action. But, if the defendant's counterclaim is still available on the date the plaintiff's lawsuit was filed, that counterclaim survives, and the statute of limitations applicable to the counterclaim is tolled while the plaintiff's lawsuit is pending.

#### **Bottom Line:**

The *Donaldson* decision adds yet another dimension to defending personal injury lawsuits. In *Barnes v. WISCO Hotel Group*, 2009 WI App 72 (Apr. 21, 2009), the court held that an injured party cannot use either the tolling provision of Wis. Stat. § 893.13 or the relation back doctrine to resurrect claims that were time-barred at the time the party sought to be added as a co-plaintiff to an on-going lawsuit. In *Donaldson*, the court, using a different statute, Wis. Stat. § 893.14, held that when a victim is brought into the lawsuit as a defendant, that victim's claims remain viable for defense and counterclaim purposes, as long as they were not time-barred when the plaintiff commenced his or her lawsuit. Consequently, insureds who are sued may prosecute their counterclaims while a plaintiff's lawsuit against the insured is pending.

### Case Summaries

**Fifth Amendment Privilege:** Trial court did not abuse its discretion in denying party's request to waive the Fifth Amendment privilege against self-incrimination in the middle of a civil trial after invoking privilege throughout discovery period, when doing so would undermine purpose of discovery and prejudice opposing party. *S.C. Johnson & Son, Inc. v. Morris*, 2009 WL 4282936 (Ct. App. Dec. 2, 2009).

**Penal Violation Exclusion:** Coverage was not available under two homeowner's insurance policies containing exclusions for penal law violations where insured intentionally and secretly videotaped and photographed a nude individual without consent but was not convicted of a crime. *Gillund v. Meridian Mut. Ins. Co.*, 2009 WL 4251758 (Ct. App. Dec. 1, 2009).

**Coverage:** Title insurance policy provided coverage for claims of defective title made by condominium association against real estate developer. *Piper v. Nitschke's N. Resort Condo. Owner's Ass'n, LLC*, 2009 WL 3579511 (Ct. App. Nov. 3, 2009).

**Public Electric Utilities:** Under Wis. Admin. Code § 112.08(1), "customer" encompasses a facility receiving and paying for electrical service from a municipal electric utility, even if that facility is owned by the municipality. *Wisconsin Power & Light Co. v. Public Serv. Comm'n of Wis.*, 2009 WL 3462486 (Ct. App. Oct. 29, 2009).

**Employment Agreement; Arbitration Provision:** Mandatory arbitration provision in insurance agent's employment contract with agency compelled agent to arbitrate the issue of whether the agency breached its Agents Agreement to pay termination commissions. *Cirilli v. Country Ins. & Fin. Serv.*, 2009 WL 3447384 (Ct. App. Oct. 28, 2009).

**Economic Loss Doctrine:** Economic loss doctrine did not bar claim of home purchaser against homeowner for fraudulent misrepresentation under Wis. Stat. § 100.18 or against real estate broker for intentional and strict liability misrepresentation arising from homeowner's failure to disclose in real estate condition report that no permits were obtained for basement renovation and resulting property tax reassessment. *Shister v. Patel*, 2009 WL 3447378 (Ct. App. Oct. 28, 2009).

**Chapter 109, Wages:** Back pay and benefits are wages and wage deficiencies within the meaning of Wis. Stat. § 109.01(3) and (4). *Sliwinski v. City of Milwaukee*, (Ct. App. Oct. 6, 2009).

**Governmental Immunity:** Teacher was negligent when third student cut himself after teacher failed to take precautions after two students cut themselves; known and compelling danger exception to immunity applied. *Heuser v. Community Ins. Corp.*, 2009 WI App 151 (Sept. 30, 2009).

continued...

**Property Use; Vested Interest:** Tavern owners that offered adult entertainment for only twelve days prior to the effective date of an amendment to county ordinance that prohibited such use, did not have a vested interest in continuing such use of their property. *Town of Cross Plains v. Kitt's Field of Dreams Korner, Inc.*, 2009 WI App 142 (Sept. 24, 2009).

**Annexation; Breach of Contract:** Town could require developer not to petition for annexation to the city as a condition in granting approval of developer's plan for commercial development in town, where developer readily agreed to requirement and the town was not attempting to extract agreement from developer. *Town of Waukesha v. 164 of Waukesha Ltd. P'ship*, 2009 WI App 147 (Sept. 16, 2009).

**Duty to Defend; Respondeat Superior:** Insurer had no duty to defend lawsuit against insureds under CGL policies when plaintiffs sought only damages arising from criminal construction bid-fixing conspiracy engaged in by insureds' principals and officers, even though plaintiffs' claims were worded in terms of negligent retention and negligent training. *James Cape & Sons Co. ex rel. Polsky v. Streu Const. Co.* 2009 WI App 154 (Sept. 9, 2009); Employee who engaged in bid rigging with two competitors that resulted in employer's bankruptcy were liable to employer; doctrine of respondeat superior did not shield employee from liability to employer, and did not shield competitors from liability to employer. *James Cape & Sons Co. ex rel. Polsky v. Streu Const. Co.*, 2009 WI App 144 (Sept. 9, 2009).

**Principal and Surety:** Surety that issued performance bond on roofing project was liable to property owner on five-year workmanship warranty contained in roofing contract to the same extent that roofer was found at fault, since bond contained no time limitation and became void only when contractor performed all of its obligations under contract or when contractor indemnified owner for any costs arising from failure to perform. *Milwaukee Bd. of Sch. Dir., Inc. v. Bitec, Inc.*, 2009 WI App 155 (Sept. 9, 2009).

**Negligent Training:** Employer was not liable to third parties who were pictured in photographs that employee printed, defaced, and posted on an adult website because the employee's conduct was not foreseeable to the employer. *Maypark v. Securitas Sec. Serv. USA, Inc.*, 2009 WI App 145 (Sept. 1, 2009).

**Safe Place Statute; Negligence:** Restaurant patron who tripped on a sidewalk crack was entitled to a jury trial to determine if restaurant owner had constructive notice of crack in the sidewalk and failed to remedy the problem. *Gulbrandsen v. H & D, Inc.*, 2009 WI App 138 (Aug. 26, 2009).

**Subrogation; Medical Malpractice:** Chapter 655, Stats., extinguished tortfeasor's automobile insurer's subrogation claim against patient's medical service provider for recovery of costs associated with allegedly unnecessary surgery, and application of medical malpractice statutes did not violate public policy or insurer's equal protection rights. *Konkel v. Acuity*, 2009 WI App 132 (Aug. 11, 2009).

## WISCONSIN INSURANCE LAW ALERT

by: Lori Lubinsky, Ena Seiler and Jodi Yin

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