

Rental Cabin Falls Outside Wisconsin's Valued Policy Statute

By Mitchell R. Olson

Wisconsin Statute § 632.05(2), commonly called the “valued policy law,” provides that when insured real property is wholly destroyed, the amount of the loss shall be the policy limits, not the actual amount of the loss, even if the policy provides otherwise. However, this law only applies if the “real property is owned and occupied by the insured primarily as a dwelling.”

In *Cambier v. Integrity Mutual Insurance Company*, the Wisconsin Court of Appeals clarified the terms “occupied” and “primarily as a dwelling.” Cambier owned a cabin in northern Wisconsin. The cabin was destroyed by fire. Although the cabin was his actual residence in the past, in the 14 months preceding the fire, Cambier had rented the cabin to four different tenants. Cambier had personally stayed in the cabin only 10 days in those 14 months. The fire occurred on the last such day, when he arrived to remove a tenant.

For the valued policy law to apply: (1) a covered dwelling need not be the insured's primary residence; (2) the dwelling must be occupied by the insured as a dwelling; and (3) the building must be used primarily as a residence. Accordingly, “an insured is not using a building primarily as a residence while someone else is renting it for a residence.” Because Cambier's primary cabin use was rental property, the valued policy law did not apply.

Wisconsin is experiencing a large and ever-increasing number of vacation homes. Many owners may seek to rent those homes for a period of a week, a month, or longer. When evaluating fire claims, insurance carriers should carefully assess the owner's use of the home, as the amount of liability may be limited to the actual loss.

Recent Wisconsin Appellate Decisions

by Lori Lubinsky, Ena Seiler, and Jodi Yin

Police and Fire Commissions: Rule promulgated by city's fire and police commission board to implement procedures for filing statutory citizen complaints seeking removal of fire or police department member was invalid where statute only required complainant to set forth sufficient cause for removal but rule implied complainant must cite violation of specific rule or standard operating procedure. *Castaneda v. Welch* (July 17, 2007).

Property Taxation: For purposes of property tax exemption, medical center was not primarily devoted to educational purposes, and property on which its day care facility was located was not exempt from property taxes even though county held title to land. *Milwaukee Reg'l Med. Ctr. v. City of Wauwatosa* (July 17, 2007).

Employment Law: Employer failed to reasonably accommodate employee's disability in violation of WFEA when employer did not allow employee sufficient time to return FMLA form based on time limits imposed in employer's own no-fault attendance policy. *Stoughton Trailers v. LIRC* (July 17, 2007).

Employment Law: When disputed medical and physical qualifications for interstate commercial driving are material to WFEA claim and cannot be resolved by facial application of DOT regulations, carrier should seek determination of medical and physical qualification from DOT if carrier intends to offer defense that driver was medically unqualified. *Szleszinski v. LIRC* (July 18, 2007).

Insurance Coverage: Default judgment against liability insurer in medical malpractice action for insurer's failure to timely serve answer established coverage and insureds' negligence, although insureds timely filed answer, but insurer was entitled to setoff for amount of subrogation claim. *Estate of Otto v. Physicians Ins. Co. of Wis., Inc.* (Ct. App. July 24, 2007), pet. for review granted.

Insurance Coverage: Insured had an objectively reasonable expectation of coverage for damages arising out of trademark infringement claim where insurance

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Recent Wisconsin Appellate Decisions Continued...

policy provided coverage for infringement of title, which, properly construed in favor of coverage, encompassed trademark infringement. *Western Wis. Water v. Quality Beverages of Wis., Inc.* (Ct. App. July 25, 2007).

Property Law: Board of adjustment was justified in determining that property owners' desire for an area variance to retain their non-conforming deck was based on a personal inconvenience rather than unnecessary hardship even though steep slope under deck rendered area useless if deck was removed. *Block v. Waupaca County Bd. of Zoning Adjustment* (Ct. App. July 26, 2007).

Spoilation of Evidence: Physician's destruction of evidence relevant to the issue of informed consent warranted directed verdict as sanction for spoliation of evidence but did not preclude coverage for physician under medical malpractice insurance policy or excess liability policy. *Morrison v. Rankin* (Ct. App. July 26, 2007).

Employment Law: State Apprenticeship Standards for the Automatic Fire Sprinkler Industry allow employer an apprentice if employer has at least one "journey level worker" (i.e., a worker holding a journeyman license, whether a contractor or a journey worker). *Robertson v. Wisconsin Dept. of Workforce Dev.* (Ct. App. Aug. 9, 2007).

Statute of Limitation: Parking lot lessee's claim for compensatory damages under Wis. Stat. §§ 32.05(8), 32.19, and 32.195 were barred by two-year statute of limitation, which began to run when city took physical possession of property. *Coakley Relocation Sys., Inc. v. City of Milwaukee* (Ct. App. Aug. 14, 2007).

Worker's Compensation: Wis. Stat. § 102.07(8m) excludes person from coverage only if person is actually functioning as employer in his or her work for a second employer. *Acuity Ins. Co. v. Whittingham* (Aug. 29, 2007).

Minor Settlement: Guardian ad litem's acceptance of an offer of judgment on behalf of minor resulted in a judgment, not a settlement that required court approval under Wis. Stat. § 807.10(1), and cashing insurer's check demonstrated accord and satisfaction of claims against alleged tortfeasor's parents. *Parsons v. American Fam. Mut. Ins. Co.* (Aug. 29, 2007).

Open Records Law: Under provision of Open Records Law, attorney work product doctrine defeated presumption of access, school district could consider exemption for records containing personally identifiable information, exemption for records regarding potential litigation applied, and request was ambiguous as to whether attorney billing records were covered. *Seifert v. School Dist. of Sheboygan Falls* (Aug. 29, 2007).

Demonstrative Evidence: Trial court properly exercised its discretion in allowing as demonstrative evidence two video animations that purported to depict both parties' theories of events which transpired during angiogram procedure. *Roy v. St. Lukes* (Sept. 5, 2007).

Open Records Law: A "record" under the Open Records Law does not include an identical copy of an otherwise available record, so a record custodian may destroy an identical copy of an otherwise available record. *Stone v. Board of Regents* (Ct. App. Sept. 13, 2007).

Good Samaritan Law: Question of fact existed as to whether a driver who drove his car over a pedestrian made an initial evaluation of pedestrian's condition as part of rendering of emergency care under the Good Samaritan Law. *Clayton v. American Family Mut. Ins. Co.* (Ct. App. Sept. 25, 2007).

Employment Law: A collective bargaining agreement allowing for termination only for "just cause" does not conflict with Wis. Stat. § 50.065, which allows for termination of a health care worker for conviction of a non-serious crime, because the statute is only discretionary, and the just cause provision merely restricts the discretion that would otherwise exist. *Brown County v. WERC* (Ct. App. Oct. 10, 2007).

Product Liability: Supplier of a raw material is not subject to liability for harm caused by the end-product on the strict liability theory of defective design because the design of the raw material is inherent in its nature. *Godoy ex. rel Gramling v. E.I. du Pont de Nemours and Co.* (Ct. App. Oct. 16, 2007).

Open Records Law: An emergency detention report regarding a person taken into custody for a voluntary, or involuntary, evaluation and possible civil commitment that is held by a police department is not a "treatment record" under Wis. Stat. § 51.30(4), and therefore it

must be released under the Wisconsin's Open Records Law. *Watton v. Hegerty* (Ct. App. Nov. 6, 2007).

Government Immunity: Medical professionals' exception to government immunity will not be extended to City Engineer, and thus government immunity applies for discretionary actions including the design of an overall development. *DeFever v. City of Waukesha* (Ct. App. Nov. 28, 2007).

Worker's Compensation: Under Wisconsin worker's compensation law an injured worker may receive a "disfigurement" award based on a limp. *County of Dane v. LIRC* (Ct. App. Nov. 29, 2007).

Stray Voltage: An electric company must use ordinary care to discover any unsafe or defective conditions of its distribution system. The duty is not based on having notice of the unsafe or defective conditions. *Gums v. Northern States Power Co.* (Dec. 6, 2007).

Stray Voltage: A utility company's common-law duty of ordinary care is not abolished by the filed rate doctrine. Question of fact existed as to when a farmer discovered an alleged problem with stray voltage, and consequently when the six-year statute of limitations began to run. *Schmidt v. Northern States Power Co.* (Dec. 6, 2007).

Medical Malpractice Caps: An unlicensed first-year resident employed by an entity other than the hospital was not a borrowed employee to the hospital, and consequently was not a health care provider protected by malpractice caps contained in Chapter 655 of the Wisconsin Statutes. *Phelps v. Physicians Ins. Co. of Wisconsin, Inc.* (Ct. App. Dec. 4, 2007).

Wisconsin Employment Relations Commission ("WERC"): WERC cannot review wrongful termination claims by probationary employee even if he or she had acquired permanent status in a previous position with the same employer. *Kriska v. WERC* (Ct. App. Dec. 11, 2007).

Employment Agreements: A non-competition and non-solicitation agreement which contains a provision extending the time period in each clause by the period of violation is unreasonable and renders both clauses entirely void. *H & R Block Enters. Inc. v. Swenson* (Ct. App. December 20, 2007).

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