

Wisconsin Supreme Court Addresses Issues Concerning the Default Judgment Statute, the Direct Action Statute, and Personal Liability for Corporate Officers

Jul 28 2011

Posted By: Heidi L. Vogt & Jessica M. Reginato

Practice Area: Insurance Coverage and Risk Management

On July 19, 2011, the Wisconsin Supreme Court issued a decision in *Casper, et al. v. American International South Ins. Co., et al.*, 2011 WI 81 (“*Casper*”) in which it addressed three issues: 1) the excusable neglect standard relative to default judgments; 2) whether an insurance policy must be delivered or issued in the State of Wisconsin in order to subject the insurer to a direct action under Wis. Stat. §§ 632.24 and 803.04(2); and 3) whether a corporate officer may be held personally liable for non-intentional torts that occur within the scope of employment.

The *Casper* case arises from a motor vehicle accident. Mark Wearing, a co-employee of Bestway Systems, Inc. (“Bestway”) and Transport Leasing/Contract Inc. (“TLC”), struck the Caspers’ minivan from behind, seriously injuring all five passengers in the Caspers’ vehicle.

Investigators learned that Wearing was under the influence of oxycodone, diazepam, and nordiazepam when the collision occurred. At the time of the accident, Wearing was en route to make a delivery for a Bestway customer. Jeffrey Wenham, the CEO of Bestway, had allegedly approved a driving route for Wearing on this particular delivery that required him to drive 536 miles through several states overnight. Wearing claimed he was told he would be fired if he did not complete the route as planned. However, Wenham had never met Wearing and the route that Wenham apparently approved was designed a year and a half prior to the accident. An expert hired by the Caspers opined that the route violated the hours of service requirements of the Federal Motor Carrier Safety Regulations (“FMCSR”) and was unsafe.

The Caspers brought suit against fourteen named defendants, including: Mark Wearing, his coemployers Bestway and TLC, Bestway's CEO Jeffrey Wenham, and TLC's excess insurer, National Union Fire Insurance Company of Pittsburgh PA ("National Union"). The appeals in this case stem from three orders issued by the trial court, all of which were affirmed by the court of appeals: 1) its order granting National Union's request for a 7-day extension to file its answer and denying the Caspers' motion for default judgment against National Union on the grounds that National Union had demonstrated excusable neglect; 2) its order granting summary judgment to National Union on the grounds that under *Kenison v. Wellington Ins. Co.*, 218 Wis. 2d 700, 582 N.W.2d 69 (Ct. App. 1998) the Caspers could not maintain a direct action against National Union because its insurance policy was not issued or delivered in Wisconsin; and 3) its order denying Wenham's motion for summary judgment on the Caspers' claims for negligent training and supervision. The Wisconsin Supreme Court considered each of these issues separately, and affirmed in part, reversed in part, and remanded with instructions consistent with its decision.

The court affirmed on the first issue, holding that the trial court did not erroneously abuse its discretion by finding that National Union's "lost in the mail" excuse amounted to excusable neglect such that granting an extension and denying the motion for default judgment was appropriate. The court noted that although courts should be skeptical of glib claims that attribute fault to the United States Postal Service," it was satisfied that a reasonably prudent person could neglect a deadline when correspondence gets lost, as was the case with National Union here.

Second, the court reversed on the direct action issue and thereby explicitly overruled *Kenison*. In doing so, the court acknowledged that the court of appeals properly applied *Kenison* as it lacked authority to ignore it. In *Kenison*, the court of appeals concluded that Wis. Stat. § 631.01 limited the application of the direct action statute, § 632.24, to insurance policies issued or delivered in Wisconsin. The *Casper* court disagreed. After carefully examining the plain language and the legislative history of Wis. Stat. §§ 631.01, 632.24, and 803.04(2), the court concluded that "Section 803.04(2) explicitly and § 632.24 by necessary implication are intended to apply to liability insurance policies delivered or issued for delivery outside Wisconsin, so long as the 'accident, injury or negligence occurred in this state.'" Accordingly, the Caspers should have been allowed to maintain a direct action against National Union even though its policy was neither issued nor delivered in Wisconsin because the accident occurred in Wisconsin.

With regard to the third issue, the Wisconsin Supreme Court agreed with the lower courts that there are some instances where corporate officers like Wenham can be held personally liable for non-intentional torts committed in the course of employment. Both the trial court and the court of appeals had ended their inquiries there, finding that issues of fact existed regarding Wenham's alleged negligent supervision and training of Wearing such that summary judgment was not appropriate on those claims. However, the Wisconsin Supreme Court considered and ultimately reversed on public policy grounds, holding that even if Wenham's approval of the route that allegedly violated the FMCSR was a cause of the accident, "the results are so unusual, remote, or unexpected that, in justice, liability ought not be imposed."

Justice Bradley issued an opinion concurring in part and dissenting in part, and Chief Justice Abrahamson joined in Justice Bradley's concurrence/dissent.

von Briesen & Roper Legal Update is a periodic publication of von Briesen & Roper, s.c. It is intended for general information purposes for the community and highlights recent changes and developments in the legal area. This publication does not constitute legal advice, and the reader should consult legal counsel to determine how this information applies to any specific situation.

