

# DIGEST OF INSURANCE LAW

## WISCONSIN

Courtesy of  
**Crivello Carlson S.C.**  
Milwaukee, Wisconsin

### CIVIL JUDICIAL SYSTEM

#### Courts of Original Jurisdiction

Judicial power of this state shall be vested in unified court system, consisting of one supreme court, a court of appeals, a circuit court, such trial courts of general uniform statewide jurisdiction as the legislature may create by law, and a municipal court if authorized by the legislature under section 14. Art. VII, § 2.

Circuit courts have original jurisdiction in all civil and criminal matters. Art. VII, § 8. Wisconsin is divided into judicial circuits by county and ten judicial administrative districts. Art. VII, § 6; Wis. Stat. § 753.06. Circuit courts are geographically limited to the county of their location.

Municipal courts shall have uniform jurisdiction limited to actions and proceedings arising under ordinances of municipality in which established. Art. VII, § 14. Small claims court is limited to civil and replevin actions concerning \$5,000 or less and evictions, regardless of amount. Wis. Stat. §§ 799.01(1)(a), (c)-(d).

#### Appellate Courts

Circuit Courts have appellate jurisdiction of cases decided by municipal and other inferior courts as provided by legislative acts creating latter.

Court of Appeals has appellate jurisdiction of cases decided by Circuit Courts and other inferior courts as provided by legislative act creating Court of Appeals. Art. VII, § 5. Wisconsin is divided into four districts, each district electing one or more judges for term of six years. *Id.* Court of Appeals has original jurisdiction only for issue of prerogative writs. *Id.* The Court of Appeals may issue all writs necessary in aid of its jurisdiction. *Id.* Appeal is to Wisconsin Supreme Court by petition for review.

Supreme Court is court of last resort, civil and criminal. It is composed of a Chief Justice and six Associate Justices elected from State at large. It has original jurisdiction to issue certain original writs, and exercises

that jurisdiction in cases of state wide interest. *See also* Wis. Stat. Chs. 751, 752, 808, and 809.

#### Special Jurisdiction

Circuit Court of Dane County sits as reviewing court of proceedings by, and hearings and proceedings before Commissions. This jurisdiction is exercised over Commissioner of Insurance, Workers' Compensation Insurance Board, and Industrial Commission as well as other commissions or boards. Appeals can be taken from Circuit Court of Dane County in these matters same as in any ordinary case, although there is some variance in statutory procedure as to time and manner of perfecting appeals.

### LAW

#### Abbreviations

- F.2d – Federal Reporter, Second Series.
- F.3d – Federal Reporter, Third Series.
- F. Supp. – Federal Supplement.
- F. Supp. 2d – Federal Supplement, Second Series.
- N.W. – North Western Reporter.
- N.W.2d – North Western Reporter, Second Series.
- U.S. – United States Reports (Supreme Court).
- Wis. – Wisconsin Reports.
- Wis. 2d – Wisconsin Reports, Second Series.
- WI – Wisconsin Public Domain Citation, Supreme Court.
- WI App. – Wisconsin Public Domain Citation, Court of Appeals.
- Wis. Stat. – Wisconsin Statutes.

### ACCIDENT AND HEALTH INSURANCE

See “ACCIDENTAL MEANS” and “DISABILITY.”

Contract Law. Cancellation. Anniversary cancellation upon 60 days notice, and compliance with Wis. Stat. § 631.36(4m) if canceling a policy “solely because of the termination of an insurance marketing intermediary’s contract with an insurer,” but not more than 75 days nor



less than 10 days before the due date of the premium. Wis. Stat. § 631.36(3)-(4). Notice must state with reasonable precision the facts on which insurer's decision is based. Wis. Stat. § 631.36(6). Except with regard to new policies, midterm cancellation only for failure to pay premium or ground stated in policy (limited by statute to material misrepresentation, substantial change in risk, substantial breach of contract, or attainment of age specified as terminal age). Wis. Stat. § 631.36(2)(a) & (2)(c). Ten-day notice required. New policies may be canceled within 60 days of effective date upon ten days notice. Wis. Stat. § 631.36(2).

**Renewal.** When insurer offers to renew policy with less favorable terms or higher premium, renewal notice must give insured right to cancel. Wis. Stat. § 631.36(5). Notice is not required when reduction in coverage is triggered by the action of the legislature, not the insurer. *Roehl v. Am. Family Mut. Ins. Co.*, 222 Wis. 2d 136, 585 N.W.2d 893 (Ct. App. 1998). Notice of renewal sent to group policyholder, not individual member, was effective to alter policy terms to provide reduced coverage. *Schaefer v. Physicians Plus Ins. Corp.*, 174 Wis. 2d 488, 497 N.W.2d 776 (Ct. App. 1993).

**Disease Induced by Accident.** Accidental injury to leg causing infection resulting in death was within terms of accident policy. *French v. Fidelity & Cas. Co.*, 135 Wis. 259, 115 N.W. 869 (1908). No recovery where an existing disease was aggravated by accident, and death soon followed. *Herthel v. Time Ins. Co.*, 221 Wis. 208, 265 N.W. 575 (1936). Coverage for total disability not allowed when accident was not sole cause of injury. *Egan v. Preferred Accident Ins. Co.*, 223 Wis. 129, 269 N.W. 667 (1936).

**Excepted Risks.** Any limitation of liability by insurer must be set forth in clear language. Wis. Stat. § 631.45. Use of bold face type is sufficient. *Berry v. Merchants' Life & Cas. Co.*, 181 Wis. 487, 195 N.W. 335 (1923).

Insured held "operating automobile" within meaning of restrictive accident policy while pushing auto. *Merklein v. Indem. Ins. Co.*, 214 Wis. 23, 252 N.W. 280 (1934). Death of insured, following injuries received while standing on running board of automobile, held caused "by being struck while standing in or on highway by any automotive vehicle." *Merritt v. Great N. Life Ins. Co.*, 236 Wis. 1, 294 N.W. 26 (1940). Insured killed while repairing tire that exploded not covered as within definition of operating auto. *Miller v. Washington Nat'l Ins. Co.*, 237 Wis. 475, 297 N.W. 359 (1941). Where group policy was restricted to employees actively at work, hospitalized executive not entitled to coverage. *Rabinovitz v. Travelers Ins. Co.*, 11 Wis. 2d 545, 105 N.W.2d 807 (1960). Physician excluded from group dis-

ability policy because he was not practicing full time. *Spitz v. Continental Cas. Co.*, 40 Wis. 2d 439, 162 N.W.2d 1 (1968). Estate of employee killed on company picnic has no cause of action against employer for breach of contract where policy purchased by employer restricted coverage to employment. *Knapmiller v. Am. Ins. Co.*, 15 Wis. 2d 219, 112 N.W.2d 586 (1961).

**Notice and Proof of Loss.** An insured's notice is not deemed untimely and precluding recovery if it is furnished as soon as reasonably possible and within one year after time notice was required by terms of the policy unless insurer prejudiced and it was reasonably possible to meet time limit. Wis. Stat. § 631.81(1). Where notice is given more than one year after time required by the policy, there is a rebuttable presumption of prejudice. *Gerrard Realty Corp. v. Am. States Ins. Co.*, 89 Wis. 2d 130, 277 N.W.2d 863 (1979). The burden of proof on the issue of prejudice shifts to the insurer only if notice is furnished as soon as reasonably possible within one year. *Neff v. Pierzina*, 2001 WI 95, 245 Wis. 2d 285, 629 N.W.2d 177.

School district's benefits specialist is immune from liability based on exercise of governmental discretion when he incorrectly told plaintiff that he and his wife could not apply for benefits when in fact they could, because the statute did not direct that he act in any particular way, or at all. *Kierstyn v. Racine Unified Sch. Dist.*, 228 Wis. 2d 81, 596 N.W.2d 417 (1999). However, this does not mean that responsibility to comply with a statute or regulation always involves the exercise of discretion, as this would eliminate ministerial duties altogether. *Umansky v. ABC Ins. Co.*, 2001 WI App. 101, ¶¶ 45-46, 313 Wis. 2d 445, 756 N.W.2d 601.

**Damages - Double Indemnity.** Insurer held not liable for double indemnity under provision limited to death from injuries sustained by burning of building where insured died as result of explosion. *Gleisner v. U.S. Fidelity & Guar. Co.*, 25 Wis. 2d 33, 130 N.W.2d 286 (1964). Good health condition held valid. *Martinson v. N. Central Life Ins. Co.*, 65 Wis. 2d 268, 222 N.W.2d 611, 225 N.W.2d 604 (1974). Insurer acting in bad faith may be required to pay insured's attorney's fees in prosecution of action. *DeChant v. Monarch Life Ins. Co.*, 200 Wis. 2d 559, 547 N.W.2d 592 (1996). The Supreme Court emphasized that an insurer is liable for all economic damages that are the proximate result of the bad faith, which may include damages that could also be recoverable independently in a breach of insurance contract action. *Jones v. Secura Ins. Co.*, 2002 WI 11, ¶¶ 34-36, 249 Wis. 2d. 623, 638 N.W.2d 575.

**ERISA.** Uninsured employee benefits plan's purchase of stop loss insurance did not convert policy into

insured plan. *Ramsey County Med. Ctr., Inc. v. Breault*, 189 Wis. 2d 269, 525 N.W.2d 321 (Ct. App. 1994).

### ACCIDENTAL MEANS

Definition. Foreseeability eliminated as determinative of whether injury or death was accidental. *Kennedy v. Washington Nat'l Ins. Co.*, 136 Wis. 2d 425, 401 N.W.2d 842 (Ct. App. 1987). "Average Man" test is adopted. *Id.*

Accidents. Negligence on part of insured will not preclude recovery. *Vennen v. New Dells Lumber Co.*, 161 Wis. 370, 154 N.W. 640 (1915). Injury intentionally inflicted on insured by another is "accidental injury" if unintentional on part of insured. *Wisconsin Transp. Co. v. Great Lakes Cas. Co.*, 241 Wis. 523, 6 N.W.2d 708 (1942). "Accidental" means death by carbon monoxide poisoning. *Wiger v. Mutual Life Ins. Co.*, 205 Wis. 95, 236 N.W. 534 (1931). Heat prostration or sunstroke held to be injury affected externally, violently, and accidentally. *O'Connell v. New York Life Ins. Co.*, 220 Wis. 61, 264 N.W. 253 (1936); *Hruzek v. Old Line Life Ins. Co.*, 221 Wis. 279, 265 N.W. 566 (1936). Autoerotic asphyxiation of physician held accidental. *Kennedy v. Washington Nat'l Ins. Co.*, 136 Wis. 2d 425, 401 N.W.2d 842 (Ct. App. 1987).

Not Accidental. Determination of whether injuries resulting from an assault and battery were caused by "accident" or "accidentally sustained" must be made from standpoint of the injured party. However, the rule is inapplicable where the injured party was the aggressor or in some way provoked the insured into inflicting injuries. *Tomlin v. State Farm Mut. Auto. Liab. Ins. Co.*, 95 Wis. 2d 215, 290 N.W.2d 285 (1980).

Two requirements must be met in order for an intentional acts exclusion to preclude insurance coverage in a given case. First, insured must intentionally act and second, insured must intend some injury or harm to follow from that act. Intent to inflict injury requirement may be actual or it may be inferred from the nature of insured's intentional act. Once it is found that insured intended some injury or harm to victim, coverage will be precluded even though actual harm which occurs is different in character or magnitude of that intended. *Raby v. Moe*, 153 Wis. 2d 101, 450 N.W.2d 452 (1990).

Intentional acts exclusion precludes coverage where intentional act is substantially certain to produce injury even if insured asserts that he did not intend any harm. *Ludwig v. Dulian*, 217 Wis. 2d 782, 579 N.W.2d 795 (Ct. App. 1998).

Insured was injured after an attempt to take car keys away from a drunken acquaintance to keep him from driving. Court of Appeals denied insured's motion

for Summary Judgment because no causal connection between insured's injuries and the inherent "use" of acquaintance's truck. *Sentry Ins. v. Schrank*, 287 Wis. 2d 716, 707 N.W.2d 276 (Ct. App. 2005).

### ADJUSTERS

Definition. Represents insurer or insured for settlement of claim against insurer due to coverage provided by policies. Wis. Stat. § 601.02(1).

Licensing. No licensing requirements.

### AGE

See "AUTOMOBILES"; "LIABILITY INSURANCE, Coverage"; "NEGLIGENCE."

### AGENTS AND BROKERS

In General. An agent has an obligation to endeavor to write policies in companies he represents and, if they refuse the risk, to promptly notify the insured. *Gegare v. Fox River Land & Loan Co.*, 152 Wis. 548, 140 N.W. 305 (1913).

For Whom. Agent is not personally liable upon default of company as he is merely acting as agent for insured. *Ferm v. L'Activite Ins. & Reinsurance Co.*, 201 Wis. 273, 229 N.W. 77 (1930). Agency salesman who delivered policy and collected premium while retaining portion as his fee, held agent of insurer under Wis. Stat. § 209.05 (now Wis. Stat. § 628.32). *Pouwels v. Cheese Makers Mut. Cas. Co.*, 255 Wis. 101, 37 N.W.2d 869 (1949). In group life policy, employer held agent of insurer in receiving notice of change of beneficiary. *Kaiser v. Prudential Ins. Co.*, 272 Wis. 527, 76 N.W.2d 311 (1956).

Fraud. Insurer may not set up as defense false statements in application made by agent without knowledge of insured. *Fehrer v. Midland Cas. Co.*, 179 Wis. 431, 190 N.W. 910 (1922). Insurance company bound by payment of premium to agent. *Scott v. Home Ins. Co.*, 53 Wis. 238, 10 N.W. 387 (1881).

Where insured and agent of insurer conspired to defraud insurance company by making false statements in applications, insurer was not deprived of its defense. *Wilhelm v. Order of Columbian Knights*, 149 Wis. 585, 136 N.W. 160 (1912).

Knowledge of agents. Knowledge by agent at time policy is issued or application made shall be knowledge of company, and any fact that breaches condition of policy and is known to agent when policy is issued or application made shall not void policy or defeat recovery thereon in event of loss. Wis. Stat. § 631.09(1); *Jeske v. General Accident Fire & Life Assurance Corp.*, 1

Wis. 2d 70, 83 N.W.2d 167 (1957); *Trible v. Tower Ins. Co.*, 43 Wis. 2d 172, 168 N.W.2d 148 (1969). Rule not abrogated by adoption of standard policy of fire insurance. *Gould v. Pennsylvania Fire Ins. Co.*, 174 Wis. 422, 183 N.W. 245 (1921). Local agent cannot waive terms of fire insurance policy after its issuance. *Knudson v. Hekla Fire Ins. Co.*, 75 Wis. 198, 43 N.W. 954 (1889). Agent's knowledge not imputed to insurer when not acquired within scope of his authority or duty as agent, *Bloomer v. Cicero Mut. Fire Ins. Co.*, 183 Wis. 407, 198 N.W. 287 (1924), nor while agent is transacting business for other insurance companies after policy has been issued, *Prentiss-Wabers Stove Co. v. Millers' Mut. Fire Ins. Ass'n*, 192 Wis. 623, 211 N.W. 776, 213 N.W. 632 (1927). No waiver by agent orally where policy provided for written waiver only. *Stillman v. North River Ins. Co.*, 192 Wis. 204, 212 N.W. 67 (1927). Under statute, insurance company is chargeable with all facts to any act necessary or proper to fulfill his agency within his expressed or implied authority. *Sachs v. North American Life Ins. Co.*, 201 Wis. 537, 230 N.W. 612 (1930).

Agent's knowledge of insured's use of garage as automobile repair shop did not constitute waiver of policy requirement. *Ziebarth v. Fidelity & Guar.*, 256 Wis. 529, 41 N.W.2d 632 (1950). *But see Ensz's Estate v. Brown Ins. Agency, Inc.*, 66 Wis. 2d 193, 223 N.W.2d 903 (1974).

Agent's oral misrepresentation of provisions of unambiguous coverage does not modify insurance policy. *Albert v. Home Fire & Marine Ins. Co.*, 275 Wis. 280, 81 N.W.2d 549 (1957).

Agent sent application to company for windstorm policy. Building demolished before application received by company. No coverage. *Londo v. Integrity Mut. Ins. Co.*, 249 Wis. 281, 24 N.W.2d 628 (1946).

Insured, deterred from paying premium within grace period by collection agent of insurer, did not forfeit policy. *Harms v. John Hancock Mut. Life Ins. Co.*, 253 Wis. 448, 34 N.W.2d 687 (1948).

Adjuster's alleged promise to plaintiff that insurer would pay damages resulting from auto accident did not constitute contract binding on insurer. *Goetz v. State Farm Mut. Auto Ins. Co.*, 31 Wis. 2d 267, 142 N.W.2d 804 (1966).

Liability of Agent. Failure to procure policy. Absent "special circumstances," agent has no duty to advise insured of available coverages. *Nelson v. Davidson*, 155 Wis. 2d 674, 456 N.W.2d 343 (1990). However, an agent may be sued for failure to procure coverage that is specifically requested by the insured. *Appleton Chinese Food Serv., Inc. v. Murken Ins. Inc.*, 185 Wis. 2d 791, 519 N.W.2d 674 (Ct. App. 1994). But an agent is not

exposed to liability if the client request coverage and the agent did not agree to procure it. *Avery v. Diedrich*, 294 Wis. 2d 769, 720 N.W.2d 103 (Ct. App. 2006), *aff'd*, 301 Wis. 2d 693, 734 N.W.2d 159 (2007). An insurance agent must agree to procure coverage before he or she has a duty to do so. *Id.* Neither status as an independent nor advertising as a "highly skilled expert" constitutes "special circumstances." *Tackes v. Milwaukee Carpenters Dist. Council Health Fund*, 164 Wis. 2d 707, 476 N.W.2d 311 (Ct. App. 1991). Agent has no duty to advise customer as to specific policy limits or to increase its coverage limits. *Lisa's Style Shop, Inc. v. Hagen Ins. Agency, Inc.*, 181 Wis. 2d 565, 511 N.W.2d 849 (1994); *Lenz Sales & Serv., Inc. v. Wilson Mut. Ins. Co.*, 175 Wis. 2d 249, 499 N.W.2d 229 (Ct. App. 1993). Agent, not insurer, held liable for failure to procure insurance. *Hause v. Schesel*, 42 Wis. 2d 628, 167 N.W.2d 421 (1969). Insured may seek recovery from agent or alternatively from insurance company, but may not have double recovery. *Trible v. Tower Ins. Co.*, 43 Wis. 2d 172, 168 N.W.2d 148 (1969).

Insolvent Company. If agent places business with solvent company, agent is not liable for later insolvency (test is solvency and agent's knowledge at time of placement). *Master Plumbers Ltd. Mut. Liab. Co. v. Cormany & Bird, Inc.*, 79 Wis. 2d 308, 255 N.W.2d 533 (1977).

License and Regulation. See Wis. Stat. §§ 628.03, 628.04, 628.07, 628.09, and 628.10. Policy held valid although issued by unlicensed, non-resident agent. *Ocean Accident & Guar. Corp. v. Combined Locks*, 162 Wis. 255, 156 N.W. 156 (1916). *See also* Wis. Stat. § 628.03(3).

Reformation. Insurance policy may be reformed where insured was inadequately covered due to Agent's negligence. *Gilbert v. U.S. Fire Ins. Co.*, 49 Wis. 2d 193, 181 N.W.2d 527 (1970). A cause of action for reformation of a policy is allowed if the party seeking reformation can show that because of fraud or mutual mistake the policy does not contain provisions which were desired and intended to be included. *Sprangers v. Greatway Ins. Co.*, 175 Wis. 2d 60, 70, 498 N.W. 858, 863 (Ct. App. 1993), *aff'd*, 182 Wis. 2d 521, 514 N.W.2d 1 (1994). Mutual mistake is established when the party applying for insurance proves that certain statements were made to the agent concerning desired coverage, but the issued policy did not provide such coverage.

## ARBITRATION

Where insured sued under uninsured motorist coverage, insurer waived defense of failure to arbitrate by proceeding to trial. *Schramm v. Dotz*, 23 Wis. 2d 678, 127 N.W.2d 779 (1964). (Mere presence of arbitration



clause in insurance policy, however, will not prevent insured from suing company, although company may - if it desires - obtain statutory stay.)

In suit between insured and insurer, defendant may not raise defense that plaintiff failed to institute arbitration proceedings within required time when alleged delay was caused by defendant's insistence that plaintiff await outcome of passenger's suit. Allocation of negligence in passenger's suit is not *res judicata* as to allocation that may be found by arbiter. *Worthington v. Farmers Ins. Exch.*, 77 Wis. 2d 508, 253 N.W.2d 76 (1977). Issues of coverage subject to arbitration. *Maryland Cas. Co. v. Seidenspinner*, 181 Wis. 2d 950, 512 N.W.2d 186 (Ct. App. 1994). There are four situations where court will not enforce contractual terms and will enjoin arbitration: 1) where fraud or duress renders the agreement voidable; 2) where there is no bona fide dispute; 3) where performance which is subject of demand for arbitration is prohibited by statute; and 4) where a condition precedent to arbitration has not been fulfilled. *Seidenspinner*, 181 Wis. 2d at 956. Where impasse, court has authority to appoint arbitrator. *Employers Ins. of Wausau v. Jackson*, 190 Wis. 2d 597, 527 N.W.2d 681 (1995).

Arbitrator has authority to award punitive damages and attorney fees under contract, but attorney fees are not awarded for defense of an action brought to set aside the award. *Winkelman v. Kraft Food Inc.*, 279 Wis. 2d 335, 693 N.W.2d 756 (Ct. App. 2005).

Undocumented assertions that attorney testified falsely at arbitration hearing are insufficient to defeat summary judgment upholding award, particularly where opponent could have discovered alleged fraud before arbitration. *Steichen v. Hensler*, 283 Wis. 2d 755, 701 N.W.2d 1 (Ct. App. 2005).

Arbitration provision may be invalid where both procedurally and substantively unconscionable. Provision invalidated where lender in business of providing loans with automobile titles as collateral was highly experienced in drafting such loan agreements and had substantially greater bargaining power than indigent borrower in need of money. Agreement was an adhesion contract forcing borrower to take-it-or-leave-it. Provision substantively unconscionable because lender had no duty to arbitrate disputes rather than proceed in court while borrower limited to arbitration. *Wisconsin Auto Title Loans, Inc. v. Jones*, 290 Wis. 2d 514, 714 N.W.2d 155 (2006).

## ATTORNEYS

Appointment and Authority. In general, insurer has the right to control the defense. *Patrick v. Head of the Lakes Coop. Elec. Ass'n*, 98 Wis. 2d 66, 295 N.W.2d

205 (Ct. App. 1980). An insurer owes a general duty to its insured to settle or compromise a claim made against the insured. *Mowry v. Badger State Mut. Cas. Co.*, 129 Wis. 2d 496, 385 N.W.2d 171 (1986). This duty is implied from the terms of the contract which give the insurer the absolute control of the defense of the action against the insured. *Id.* Because the insured has given up something of value to the insurer - namely, the right to defend and settle a claim - the insurer is said to be in the position of a fiduciary with respect to the insured's interest in settlement of a claim. *Id.* The insurer has the right to exercise its own judgment in determining whether a claim should be settled or contested; but in order to be made in good faith, a decision not to settle a claim must be based on a thorough evaluation of the underlying circumstances of the claim and on informed interaction with the insured. *Id.* This duty gives rise to several obligations on the part of the insurer. *Id.* First, the insurer must exercise reasonable diligence in ascertaining facts upon which a good faith decision to settle or not settle must be based. *Id.* Second, where a likelihood of liability in excess of policy limits exists, the insurer must so inform the insured so that the insured might properly protect himself. *Id.* Third, the insurer must keep the insured timely abreast of any settlement offers received from the victim and of the progress of settlement negotiations. *Id.*

An insurer may still reject the tender of defense and permit the insured to pursue its own defense not subject to the insurer's control. See *Production Stamping Corp. v. Maryland Cas. Co.*, 199 Wis. 2d 322, 544 N.W.2d 584, 588 (Ct. App. 1996). This course of action is the most risky of available options, but in the end the insurer "is not liable to the insured unless there is, in fact, coverage under the policy or coverage is determined to be 'fairly debatable.'" *Id.*

Conflict of Interest. Where conflict of interest exists, insurer may appoint independent counsel or pay for insured's personal counsel's services. *American Motorists Ins. Co. v. Trane Co.*, 544 F. Supp. 669 (W.D. Wis. 1982), *aff'd*, 718 F.2d 842 (7th Cir. 1983) (applying Wisconsin law).

Legal Malpractice. See "MALPRACTICE."

Fees. If the insurer refuses to defend, it will be liable for all reasonable costs and fees incurred in defense if loss ultimately covered. *Patrick v. Head of the Lakes Coop. Elec. Ass'n*, 98 Wis. 2d 66, 295 N.W.2d 205 (Ct. App. 1980).

Attorney for the witness in a John Doe proceeding where an order of secrecy was already in place did not have to take an additional oath of secrecy that was initially demanded by the judge in the John Doe proceed-



ing. The judge did not have statutory or inherent authority to demand such oath when the entire case was already under an order of secrecy. *State ex rel. Individual Subpoenaed v. Davis*, 281 Wis. 2d 431, 697 N.W.2d 803 (2005).

Attorneys who successfully defend a portion of the charges against them still can be assessed full costs from the Office of Lawyer Regulation and attorney fees as long as the charges are “substantially related” to the charges that the respondent attorney did not successfully defend against. *Disciplinary Proceedings Against Konnor*, 279 Wis. 2d 284, 694 N.W.2d 376 (2005) and *Disciplinary Proceedings Against Polich*, 279 Wis. 2d 266 (2005). SCR 22.21(1m) contains new provisions that list the factors for the assessment of costs in disciplinary proceedings.

### AUTOMOBILES

See “LIABILITY INSURANCE”; “NEGLIGENCE”; “NO-FAULT.”

Age. Wis. Stat. Chs. 340 to 349 provides comprehensive code governing operation of automobiles.

Agency. Negligent Entrustment. Parent’s consent to minor’s operation of motorcycle on public highway in violation of Wis. Stat. § 343.45 constitutes negligence per se. *Bankert v. Threshermen’s Mut. Ins. Co.*, 110 Wis. 2d 469, 476, 329 N.W.2d 150 (1983). See Wis. II - Civil 1014; Restatement (Second) of Torts § 308 (1965). Section 308, by its terms, does not apply to self-inflicted harm by one to whom item is allegedly negligently entrusted to. *Stehlik v. Rhoads*, 2002 WI 73, 253 Wis. 2d 477, 646 N.W.2d 19. *LaCount v. General Cas. Co.*, 2006 WI 14, 288 Wis. 2d 358, 709 N.W.2d 418 (2006). Wis. Stat. § 632.32, Wisconsin’s omnibus statute, does not provide for separate limits of liability to both a person permissively using the covered vehicle and the named insured who is liable by statute for imputed negligence for the minor’s negligent operation of a vehicle.

Respondent Superior. Employer not liable for injuries caused by employee’s negligent driving to and from work or company event, even if attendance required, unless employer exercises control over method of travel. *DeRuyter v. Wisconsin Elec. Power Co.*, 200 Wis. 2d 349, 354-362, 546 N.W.2d 534 (Ct. App. 1996), *aff’d by an equally divided court*, 211 Wis. 2d 169, 565 N.W.2d 118 (1997). Employee acting within scope of employment while driving to and from work only if employer exercises control over method or route of employee’s travel. *Id. Murray v. Travelers Ins. Co.*, 229 Wis. 2d 819, 601 N.W.2d 661 (Ct. App. 1999). Court of Appeals distinguished, applying general *respondent superior* rules, in circumstances where travel is an essential ele-

ment of employment and travel actuated by a purpose to serve employer.

Mere Deviation Rule. Farmhand’s use of owner’s auto more than mere deviation and was outside scope of permission in using vehicle after working hours. *Kitchenmaster v. Mutual Auto Ins. Co.*, 248 Wis. 554, 22 N.W.2d 479 (1946). Mere deviation rule provides coverage only where deviation from scope of permission was minor. *Employers Ins. of Wausau v. Pelczynski*, 153 Wis. 2d 303, 451 N.W.2d 300 (Ct. App. 1989). Scope of permission determined on case-by-case basis. *Id.*

Epileptics and diabetics negligent if foreseeable seizure of incapacitation causes accident. *Jankee v. Clark County*, 2000 WI 64, FN 12, 235 Wis. 2d 700, 763, 612 N.W.2d 297.

Truck driver, not employer, held liable for accident resulting from epileptic seizure. *Eleason v. Western Cas. & Sur. Co.*, 254 Wis. 134, 35 N.W.2d 301 (1948).

Independent Contractor. See *Thurn v. La Crosse Liquor Co.*, 258 Wis. 448, 46 N.W.2d 212 (1951). Right to control is dominant test in determining whether someone is employee instead of independent contractor. *Pamperin v. Trinity Mem’l Hosp.*, 144 Wis. 2d 188, 199, 423 N.W.2d 848 (1988). Other factors considered include place of work, time of employment, method of payment, nature of business or occupation, which party furnishes instrumentalities or tools, intent of parties to contract, and right of summary discharge. *Id.* at 199.

Sponsorship of Minor. Adult sponsor who signed application for license has imputed negligence or willful misconduct of person under 18 years. Wis. Stat. § 343.15(2). Stepmother who had acted as minor’s mother for over 10 years and had signed his driver’s license application as his mother was “parent” within meaning of Wis. Stat. § 343.15(2) so that both stepmother and minor’s father were liable for damages caused by minor’s negligence while operating motor vehicle. *Ynocencio v. Fesko*, 114 Wis. 2d 391, 338 N.W.2d 461 (1983). Parent sponsors liable under Wis. Stat. § 343.15 for punitive damages assessed against child. Evidence of the sponsors’ wealth not admissible for assessment of punitive damages against underage driver. *Franz v. Brennan*, 150 Wis. 2d 1, 440 N.W.2d 562 (1989). Parents in position to act quickly to withdraw sponsorship if minor child shows signs of irresponsibility. There is incentive to do so because the liability imputed to them is strict, and without limit. *Mikaelian v. Woyak*, 121 Wis. 2d 581, 594-95, 360 N.W.2d 706 (Ct. App. 1984).

Discharge of firearm towards group of pedestrians by minor operating motor vehicle on highway does not fall within scope of § 343.15(2). Statute not meant to

impose liability on parents for child's participation in drive-by shooting. *Reyes v. Greatway Ins. Co.*, 227 Wis. 2d 357, 597 N.W.2d 687 (1999).

Comparative Negligence. See "LIABILITY INSURANCE," "NEGLIGENCE."

Emergency doctrine excuses individual from negligence when following elements met: 1) party must be free from negligence that contributed to creation of the emergency; 2) time involved must preclude deliberate and intelligent choice of action; and 3) element of negligence must concern management and control. *Totsky v. Riteway Bus Service, Inc.*, 2000 WI 29, 233 Wis. 2d 371, 607 N.W.2d 637. Insect flying into driver held not emergency. *Garceau v. Bunnell*, 148 Wis. 2d 146, 434 N.W.2d 794 (Ct. App. 1988).

Choice of Law. Presumption that law of jurisdiction where accident occurred governs action against tortfeasor unless clear non-forum contacts have greater significance. *State Farm Mutual Auto. Ins. v. Gillette*, 2002 WI 31, 251 Wis. 2d 561, 641 N.W.2d 662. Five factors considered: 1) Predictability of results; 2) maintenance of interstate and international order; 3) simplification of judicial task; 4) advancement of forum's governmental interests; and 5) application of better rule of law.

When an accident involving only Wisconsin residents occurred in Wisconsin, fact that decedent had been employed in Minnesota conferred jurisdiction on Minnesota courts and Minnesota insurance law was applicable. *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981). Wisconsin law applied in action for contribution where Illinois residents were injured in Wisconsin accident. *Zelinger v. State Sand & Gravel Co.*, 38 Wis. 2d 98, 156 N.W.2d 466 (1968). Wisconsin law applied to Wisconsin accident where nonresident passenger brought action against nonresident host driver. *Conklin v. Horner*, 38 Wis. 2d 468, 157 N.W.2d 579 (1968). Wisconsin made-whole doctrine applies when victim is seeking tort recovery in Wisconsin. *Drinkwater v. American Family*, 2006 WI 56, 714 N.W.2d 568 (2006).

Coverage. Action arises out of use of auto where causal connection exists between accident producing injury and inherent use of vehicle. *Trampf v. Prudential Prop. & Cas. Co.*, 199 Wis. 2d 380, 544 N.W.2d 596 (Ct. App. 1996). Bite from dog tethered to bed of truck connected to use of vehicle to transport dogs. *Id.* Child's injuries "arose out of use of automobile" where child hit by one vehicle while exiting insured vehicle. *Tasker by Carson v. Larson*, 149 Wis. 2d 756, 439 N.W.2d 159 (Ct. App. 1989). Police officer's injuries did not arise out of use of auto where stopped driver attacked officer. No inherent causal nexus between use of auto and attack. *Tomlin v. State Farm Mut. Auto. Liab. Ins. Co.*, 95

Wis. 2d 215, 290 N.W.2d 285 (1980). "Use" as contemplated by an automobile liability policy means the use of a vehicle as such and does not include a use which is completely foreign to a vehicle's inherent purpose. *Id.*

Where handicapped individual had a permit allowing him to hunt from a stationary vehicle, a shooting accident during such an activity "arose out of the use" of that vehicle. *Thompson v. State Farm Mut. Auto. Ins. Co.*, 161 Wis. 2d 450, 468 N.W.2d 432 (1991). *Thompson* expanded to include illegal hunting from motor vehicle. *Kemp v. Feltz*, 174 Wis. 2d 406, 412-13, 497 N.W.2d 751, 754 (Ct. App. 1993). Injury to driver shot by homeowner who discovered vehicle's passengers vandalizing mailbox did not arise out of use of vehicle. *Snouffer v. Williams*, 106 Wis. 2d 225, 227, 316 N.W.2d 141, 142 (Ct. App. 1982). Claim from murder of daughter by individual who encountered daughter while driving truck did not result from use of vehicle. *Van Dyn Hoven v. Pekin Ins. Co.*, 2002 WI App. 256, 258 Wis. 2d 133, 653 N.W.2d 320, review dismissed, 2003 WI 1, 258 Wis. 2d 111, 655 N.W.2d 130 (No. 02-0722). An insured's verbal cues and hand gestures while sitting in his running vehicle, instructing plaintiff to cross the roadway, constitutes "use" of that vehicle. *Garcia by Ladd v. Regent Ins. Co.*, 167 Wis. 2d 287, 481 N.W.2d 660 (Ct. App. 1992). "Miss and Run." *Wegner v. Heritage Mut. Ins. Co.*, 173 Wis. 2d 118, 496 N.W.2d 140 (Ct. App. 1992). Coverage was not required under Wis. Stat. § 632.32(4)(a)2.b., where auto that initially started the chain of events did not strike vehicle sustaining damage. Court rejected argument that unidentified vehicle was presumed to be uninsured, thereby requiring that the unidentified vehicle meet the criteria of a statutory hit-and-run in order to cause it to be an uninsured vehicle for which coverage was required. *See id.* Legislature was confronted with two distinct policy choices: One, it could define uninsured motor vehicle to include an unidentified motor vehicle involved in an accident, regardless of whether physical contact occurred; or two, it could define uninsured motor vehicle to include an unidentified motor vehicle involved in a "hit-and-run" accident. The legislature chose the second alternative. *Dehnel v. State Farm Mut. Auto. Ins. Co.*, 231 Wis. 2d 14, 604 N.W.2d 575 (Ct. App. 1999) (citing *Hayne v. Progressive Northern Ins. Co.*, 115 Wis. 2d 68, 339 N.W.2d 588 (1983)).

Stacking. Wis. Stat. §§ 632.32(5)(f)-(j) validate anti-stacking and reducing clauses and authorize a limited "drive other car" uninsured motorist coverage exclusion where: 1) Exclusion pertains to car owned by insured or relative residing in insured's household; 2) car to which exclusion applies must not be described in policy under which uninsured motorist claim is made; and 3) the car must not be covered as newly acquired or re-



placement vehicle. *Blazekovic v. City of Milwaukee*, 2000 WI 41, 234 Wis. 2d 587, 610 N.W.2d 467. *Progressive Cas. Ins. Co. v. Bauer*, 301 Wis. 2d 491, 731 N.W.2d 378 (Ct. App. 2007). Statute allowing motor vehicle insurance policies to prohibit “stacking” of coverage limits did not apply to situation in which motorcycle passenger sought per-person liability coverage limit for motorcycle driver’s alleged negligence and per-person limit for owner’s alleged negligent entrustment of motorcycle; there was only single motorcycle, single coverage, and two insureds, both of whom were entitled to full and equal protection under statute governing motor vehicle policies. Wis. Stat. §§ 632.32(3)(a), (5)(f).

No policy issued pursuant to Ch. 344 may exclude coverage for persons related by blood or marriage to the operator, as mandated by Wis. Stat. § 632.32(6)(b)1. *Bindrim v. Colonial Ins. Co.*, 190 Wis. 2d 525, 527 N.W.2d 321 (1995). Statutory prohibition against excluding coverage for persons related to the insured by blood, marriage or adoption applies to indemnity coverage when issued as part of an automobile policy containing liability insurance. Excluding a passenger from definition of insured under mother’s policy was valid since son owned his own vehicle. *Vieau v. American Family Mut. Ins. Co.*, 2006 WI 31, 289 Wis. 2d 552, 712 N.W.2d 661 (2006).

Wis. Stat. § 632.32(6)(b)(2) prohibits a policy from excluding from coverage or benefits any person who is named insured or passenger in or on the insured vehicle, with respect to bodily injury, sickness or disease, including death resulting therefore, to that person. Separate policy limits for minor driver and her parent were not required by omnibus statute. *LaCount v. General Cas. Co.*, 2006 WI 14, 709 N.W.2d 418 (2006).

Although owner’s son loaned car to another against father’s express wishes, record permission under (2) is presumed as a matter of law if son’s custody and control is such that son is car’s real owner. Permissive use viewed the same under sub. (2) or omnibus coverage of Wis. Stat. § 204.30(3), 1975 Wis. Stat. [now § 632.32(2)]. *Gross v. Joecks*, 72 Wis. 2d 583, 241 N.W.2d 727 (1976).

The financial responsibility statute’s requirement that insurer give 10 days notice to DMV before cancellation extends only to liability coverage, not to uninsured motorist coverage. *Nutter v. Milwaukee Ins. Co.*, 167 Wis. 2d 449, 481 N.W.2d 701 (Ct. App. 1992). The financial responsibility statutes do not mandate insurance of the vehicles owned by named insurance and certification of compliance does not expand the policy to provide such coverage. *Cardinal v. Leader Nat’l Ins. Co.*, 166 Wis. 2d 375, 480 N.W.2d 1 (1992). Financial responsibility bond specifies conditions precedent to suit. Wis.

Stat. § 344.36(3); *Vangsguard v. Progressive N. Ins. Co.*, 188 Wis. 2d 584, 525 N.W.2d 146 (Ct. App. 1994). Direct action statute, Wis. Stat. § 632.24, does not apply to actions in which principal on bond under this section causes injury. Section 344.36(3) requires judgment against principal before action brought against surety. *Id.* Requirements of financial responsibility statute, Wis. Stat. § 344.33, do not apply to all automobile insurance policies issued in this state, only those that provide proof of financial responsibility under §§ 344.31 or 344.32. *Beerbohm v. State Farm Mut. Auto. Ins. Co.*, 2000 WI App. 105, 235 Wis. 2d 182, 612 N.W.2d 338. Proof of financial responsibilities. Wis. Stat. Ch. 344. Also, Mandatory Uninsured Motorist Coverage. Wis. Stat. § 632.32.

Alcohol/DWI. For civil liability for furnishing intoxicating beverages to minor, see Wis. Stat. § 125.035. An individual who provides alcohol to underage person that is substantial factor in causing accident that ultimately injures individual cannot be third party under Wis. Stat. § 125.035(4)(b) and cannot take advantage of exception to immunity for providers of alcohol to pursue action against other providers. *Meier v. Champ’s Sport Bar & Grill, Inc.*, 2001 WI 20, 241 Wis. 2d 605, 623 N.W.2d 94. Person who agreed to be designated driver, freeing bartender to serve possibly intoxicated person more alcohol, brought about acquisition of the alcohol, “procuring” it for purposes of Wis. Stat. § 125.035(2), but was immune from liability when did not provide ride and intoxicated person drove and caused fatal collision. *Stephenson v. Universal Metrics, Inc.*, 2002 WI 30, 251 Wis. 2d 171, 641 N.W.2d 158.

If injured claimant is third party to transaction by which defendant provided alcohol to underage person, and alcohol was substantial factor in causing third party claimant’s injury, exception to immunity under § 125.035(4)(b) applies and defendant may be liable. Third party’s contributory liability for providing alcohol does not affect immunity determination, but may bear on ultimate liability of defendant. *Anderson v. American Family Mutual Ins. Co.*, 2003 WI 148, 267 Wis. 2d 121, 671 N.W.2d 651.

Charge of intoxicated use of automobile could not lie where the premises driven upon were not held out to the public for use of motor vehicles, such as private employee parking lot. *City of Kenosha v. Phillips*, 142 Wis. 2d 549, 419 N.W.2d 236 (1988). Whether supplier be “peer” or “social host,” he has violated statute and, therefore, his conduct is negligence per se. *Harmann by Bertz v. Hadley*, 128 Wis. 2d 371, 382 N.W.2d 673 (1986); but see Wis. Stat. § 125.035. A minor who consumed alcoholic beverages sold by a liquor vendor to another minor has a cause of action for common law



negligence and negligence per se against the vendor for injuries he sustained as a result of his consumption. *Paskiet by Fehring v. Quality State Oil Co. Inc.*, 164 Wis. 2d 800, 476 N.W.2d 871 (1991); see Wis. Stat. § 125.07(1)(a)(1).

Damages. Wis. Stat. § 895.043 allows punitive damages if evidence shows defendant acted maliciously toward plaintiff or intentionally disregarded rights. Punitive damages may be awarded in automobile accident cases whether or not driver had been drinking. *Franz v. Brennan*, 146 Wis. 2d 541, 546, 431 N.W.2d 711, 713 (Ct. App. 1988), *aff'd*, 150 Wis. 2d 1, 440 N.W.2d 562 (1989) (decided prior to adoption of Wis. Stat. § 895.85(3)). *Strenke v. Hogner*, 279 Wis. 2d 52, 694 N.W.2d 296 (2005). Drunk Driving case will only give rise to punitive damages when the conduct is so aggravated that it meets the elevated standard of an “intentional disregard of rights” and only in such case should issue be sent to the jury. Wis. Stat. § 895.85(3). *Henrikson v. Strapon*, 314 Wis. 2d 225, 758 N.W.2d 205 (Ct. App. 2008). Punitive damages claim dismissed in “run of the mill accident with the use of alcohol,” where driver did not have prior OWIs, was not driving on the highway and had a blood alcohol concentration that was “relatively low.” Punitive damages award upheld where collision occurred in plaintiff’s lane and defendant driver’s speed was approximately 80 miles per hour. *Franz v. Brennan*, 150 Wis. 2d 1, 440 N.W.2d 562 (1989).

Family Purpose Doctrine. Affecting liability of automobile owner, not adopted in Wisconsin. *Crossett v. Goelzer*, 177 Wis. 455, 188 N.W. 627 (1922). Wis. Stat. § 343.15 provides basis for liability of parent sponsors.

Guest. Guest may sue host in Wisconsin for negligence. Wife may sue husband under this rule. *Wait v. Pierce*, 191 Wis. 202, 209 N.W. 475 (1926). Chapter 766, Wisconsin Marital Property Act, provides spouses with specific causes of action against one another and remedies for damage to marital property and other property of other spouse through Wis. Stat. § 766.70. Also recognizes spouses may sue one another for other types of injury through Wis. Stat. § 766.97(2). Duty of host is to use ordinary care. *Poneitowcki v. Harres*, 200 Wis. 504, 228 N.W. 126 (1929). In Wisconsin, everyone has duty to act with reasonable care. Public policy provides limit on liability for breach of duty. *Rockweit v. Senecal*, 197 Wis. 2d 409, 425, 541 N.W.2d 742 (1995). Negligence of driver of vehicle not imputed to guest. *Reiter v. Grober*, 173 Wis. 493, 181 N.W. 739 (1921); *Chase v. American Cartage Co.*, 176 Wis. 235, 186 N.W. 598 (1922). Duty of guest to exercise some care for own safety. *Belongy v. Kewaunee Green Bay & W. Ry. Co.*, 184 Wis. 374, 199 N.W. 384 (1924). Host liable only for

defects of auto known to him and of which guest is unaware. *Sweet v. Underwriters’ Cas. Co.*, 206 Wis. 447, 240 N.W. 199 (1932). Owner may be guest in his own automobile. *Schweidler v. Caruso*, 269 Wis. 438, 69 N.W.2d 611 (1955). Statutory duty to refrain from deviating from lane of travel is for protection of all persons including guest. *Cherney v. Simonis*, 220 Wis. 339, 265 N.W. 203 (1936). Guest injured while riding in truck with employee contrary to instructions held covered by policy. *Hardware Mut. Cas. Co. v. Milwaukee Auto. Ins. Co.*, 229 Wis. 215, 282 N.W. 27 (1938). Named insured may sue his carrier for negligence of guest-driver. *Schenke v. State Farm Mut. Auto. Ins. Co.*, 246 Wis. 301, 16 N.W.2d 817 (1944).

Imputed Negligence/Joint Enterprise. See “Agency,” “Guest,” this section.

Ownership/Title. Permission. Permission cannot be presumed from the knowledge that a person has a driver’s license or from the fact that a person has not been forbidden to drive. *Dahlke v. Roeder*, 14 Wis. 2d 582, 587, 111 N.W.2d 487, 490 (1961). Permission requires proof of some awareness on the owner’s part. *Derusha v. Iowa Nat’l Mut. Ins. Co.*, 49 Wis. 2d 220, 226, 181 N.W.2d 481, 484 (1970). Where insured permits another to drive car, and permittee subsequently allows another to drive it, permission of insured may be implied as to second permittee where first permittee is for all practical purposes real owner of car. *American Family Mut. Ins. Co. v. Osusky*, 90 Wis. 2d 142, 279 N.W.2d 719 (Ct. App. 1979). When use deviates from scope of permission, coverage only provided where deviation is minor. *Employers Ins. of Wausau v. Pelczynski*, 153 Wis. 2d 303, 451 N.W.2d 300 (Ct. App. 1989). Implied consent in emergencies depends upon the state of mind of the permitter, but may be proven by circumstantial evidence. *Meshbeshier by Spence v. State Farm Mut. Auto. Ins. Co.*, 157 Wis. 2d 473, 459 N.W.2d 615 (Ct. App. 1990).

Pedestrian. Requirement of pedestrian to yield right-of-way under statute is absolute regardless of any negligence on the part of the driver, and failure to yield constitutes causal negligence as a matter of law except when involuntary acts place him/her in position of danger. *Staples for Staples v. Glienke*, 142 Wis. 2d 19, 416 N.W.2d 920 (Ct. App. 1987).

No-Fault. Court will apply no-fault rules of other states. *Petry v. St. Paul Fire & Marine Ins. Co.*, 151 Wis. 2d 343, 444 N.W.2d 428 (Ct. App. 1989).

Seat Belts. Expert testimony is necessary to establish that nonuse of seat belt contributed to injuries. *Holbach v. Classified Ins. Corp.*, 155 Wis. 2d 412, 455 N.W.2d 260 (Ct. App. 1990). Negligence in failing to



wear available seatbelt, which is not cause of collision but does contribute to partial injury, is not used to determine injured party's contributory negligence and thus possibly bar all recovery, but is used only to reduce amount of damages recoverable. *Foley v. City of West Allis*, 113 Wis. 2d 475, 335 N.W.2d 824 (1983). Per statute, only 15% reduction generally available. Wis. Stat. § 347.48(2m)(g).

Jury in helmet defense case asked to compare plaintiff's helmet negligence to total combined negligence of defendants. Public Policy prevents imposition of liability on owner of ATV for failing to require adult user of ATV to use helmet. *Stehlik v. Rhoads*, 2002 WI 73, 253 Wis. 2d 477, 646 N.W.2d 19.

Service of Process Upon Nonresident Motorists. By entering state and driving upon highways, non-resident motorists appoint Secretary of Transportation as agent for service of process. Wis. Stat. § 345.09. Service of process on Secretary of Transportation and sent to last known address of defendant sufficient to give court jurisdiction. *Skinner v. Mueller*, 1 Wis. 2d 328, 84 N.W.2d 71 (1957). Process mailed to last known address of defendant sufficient. *Sorenson v. Stowers*, 251 Wis. 398, 29 N.W.2d 512 (1947). Service upon nonresident's father at father's residence was insufficient for personal jurisdiction over nonresident in diversity case, despite claimed actual notice, when no attempt made to comply with Wis. Stat. § 345.09. *Chilcote v. Shertzer*, 372 F. Supp. 86 (1974).

Uninsured and Underinsured Endorsements. See "UNINSURED MOTORIST."

### AVIATION

Tort law applicable on land governs liability of owner, lessee and pilot of aircraft or spacecraft operated over Wisconsin lands and waters for injuries or damages to persons or property. Rebuttable presumption of liability of owner, lessee, and pilot where injury or damage is caused by dropping or falling of aircraft or of any object or material therefrom, with burden of proof on owner, lessee and pilot. Wis. Stat. § 114.05.

Airline held liable for low flying plane that caused damage to mink. *Maitland v. Twin City Aviation Corp.*, 254 Wis. 541, 37 N.W.2d 74 (1949).

The Federal Aviation Act preempts state common-law failure to warn claims. *Miezen v. Midwest Express Airlines*, 284 Wis. 2d 428, 701 N.W.2d 626 (Ct. App. 2005).

### BROKERS

See "AGENTS AND BROKERS."

### BURGLARY INSURANCE

Insurer not liable under policy indemnifying against robbery by force where insured failed to show by "direct and affirmative evidence" how loss occurred. *Schnick v. Nat'l Sur. Corp.*, 229 Wis. 490, 282 N.W. 559 (1938). Burglary of undetermined amount of cash and checks held outside burglary policy requiring accurate records. *Pelitsie v. Nat'l Sur. Corp.*, 272 Wis. 423, 76 N.W.2d 327 (1956). No coverage under theft policy or mysterious disappearance provision where one of three stones was missing from ring and there was evidence it was lost, not stolen. *Ruby v. Farmers Mut. Auto Ins. Co.*, 274 Wis. 158, 79 N.W.2d 644 (1956).

The term theft as included in a policy is a broad term that includes a variety of wrongful acts aimed at depriving a person of his property, and when it is defined as an act of stealing, it has an ambiguous meaning. Thus, a fraudulent transfer is a "theft" under such ambiguous terms of an insurance policy. *Katze v. Randolph & Scott Mut. Fire Ins. Co.*, 116 Wis. 2d 206, 341 N.W.2d 689 (1984). Pursuant to coverage exclusion for criminal acts committed by authorized representatives, technical college was not entitled to recovery, under computer fraud and funds transfer fraud coverage provisions in policy with insurer, of damages incurred when a contractor it hired as a claims adjuster defrauded it of over \$1.6 million in workers' compensation payments, even though the college did not "authorize" the acts that caused the damage. *Milwaukee Area Technical Coll. v. Frontier Adjusters of Milwaukee*, 2008 WI App. 76, 312 Wis. 2d 360, 752 N.W.2d 396.

### CANCELLATION

See "ACCIDENT AND HEALTH INSURANCE, Contract Law"; "LIABILITY"; "FIRE INSURANCE, Contract Law."

See generally Wis. Stat. § 631.36. Notice provisions vary. Cancellation can be had by one of the parties only by strict compliance with terms unless such compliance is waived by other party. *Northern Pine Crating Co. v. Liverpool & London & Globe Ins. Co.*, 143 Wis. 433, 128 N.W. 70 (1910). See also *Putman v. Deinhamer*, 270 Wis. 157, 161, 70 N.W.2d 652 (1955).

Where insured had given no written notice of cancellation provided by policy, agent had mailed policy to insurer for cancellation without stating effective date, and insurer had not acted prior to casualty, attempted cancellation by insurer by pre-dated notice held ineffective. Conduct of insurer excused insured from filing Proof of Loss and other conditions precedent to right of action by insured. *Liner v. Mittelstadt*, 257 Wis. 70, 42 N.W.2d 504 (1950). *Liner* stands for proposition that

insured is excused from complying with contract which insurer has repudiated. However, Wisconsin Supreme Court later clarified circumstances under which insurer waives proof of loss. *See Ehlers v. Colonial Penn Ins. Co.*, 81 Wis. 2d 64, 259 N.W.2d 718 (1977) (Generally held that denial of liability by insurer, made during period prescribed by policy for presentation of proofs of loss, will ordinarily be considered as a waiver of provision requiring proofs to be submitted. Therefore, to determine whether defendant's denial of liability constituted waiver of proofs of loss requirement, it is necessary to determine whether denial of liability occurred during period in which proofs could have been timely submitted.)

Agent may be authorized by insured to waive statutory notice required for cancellation. *Homeland Ins. Co. v. Carolina Ins. Co.*, 261 Wis. 378, 52 N.W.2d 782 (1952).

Proof of mailing notice of cancellation sufficient though notice not received. *Olson v. Hardware Dealers Mut. Fire Ins. Co.*, 45 Wis. 2d 569, 173 N.W.2d 599 (1970).

Date renewal premium is received, not mailed, determines whether policy is in force. *Kamikawa v. Keskinen*, 44 Wis. 2d 705, 172 N.W.2d 24 (1969).

Notice of cancellation not required in case of lapse in coverage as a result of insured's failure to make policy payments. *Peterson v. Truck Ins. Exch.*, 65 Wis. 2d 542, 223 N.W.2d 579 (1974).

Affidavit of plaintiffs on information and belief that notice of cancellation was not sent and that cross-examination would develop that notice was not mailed held question for jury. *Putman v. Deinhamer*, 265 Wis. 307, 61 N.W.2d 319 (1953).

Written notice of cancellation required by fire policy applied to both named insured and mortgagee. *Seeburger v. Citizens Mut. Fire Ins. Co.*, 267 Wis. 213, 64 N.W.2d 879 (1954).

Cancellation. Insurer not estopped from cancellation previously made by subsequent acceptance of payment on premium. *Vick v. Haas*, 15 Wis. 2d 479, 113 N.W.2d 157 (1962). Where application for hospital medical policy was made by plaintiff's brother-in-law and contained material misrepresentations, plaintiff was bound by acts of brother-in-law and insurer was entitled to cancel. *Pollack v. Reserve Life Ins. Co.*, 15 Wis. 2d 336, 112 N.W.2d 907 (1962).

Insured who wrote ambiguous notice of cancellation of policy should bear loss of improper cancellation, not broker. *Production Credit Ass'n v. Gorton Farms*, 216 Wis. 2d 1, 573 N.W.2d 549 (Ct. App. 1997).

Agent not authorized to revoke notice of cancellation and reinstate policy. *Ingalls v. Commercial Ins. Co.*, 18 Wis. 2d 233, 118 N.W.2d 178 (1962).

Non-payment of assessments of town mutual insurance company suspends coverage provided in policy. Such suspension is not cancellation and is not covered by statute requiring notice of cancellation. *Bastman v. Stettin Mut. Ins. Co.*, 92 Wis. 2d 542, 285 N.W.2d 626 (1979).

Failure of insurer to comply with notice requirement of financial responsibility law, Wis. Stat. § 344.34 precludes it from asserting that previously certified policy lapsed and is no longer in effect. *Lang v. Kurtz*, 100 Wis. 2d 40, 301 N.W.2d 262 (Ct. App. 1980). Failure to advise insured of insured's right to cancel policy invalidated insurer's attempt to alter policy terms. *Hanson v. Prudential Prop & Cas. Ins. Co.*, 224 Wis. 2d 356, 591 N.W.2d 619 (Ct. App. 1999).

Liability Insurance. Wis. Stat. § 631.36(2)(c) requires insurer to give insured ten days notice of mid-term cancellation of new policies and such requirement applies to policy binders. Five-day cancellation notice ineffective and insurer liable for insured's accident eight days after notice. *Terry v. Mongin Ins. Agency*, 105 Wis. 2d 575, 314 N.W.2d 349 (1982).

## CHATTEL MORTGAGE

See "FIRE INSURANCE."

## CONSTRUCTION OF POLICY

Interpretation of insurance policies controlled by rules of contract construction. *General Cas. Co. v. Hills*, 209 Wis. 2d 167, 175, 561 N.W.2d 718 (1997). In construing insurance policy, goal is to determine and carry out intentions of parties. *Id.* Court must interpret policy language to mean what a reasonable person in insured's position would understand it to mean. *Id.*

Ambiguity of Terms. Policy is ambiguous when it is reasonably susceptible to two meanings. *Stanhope v. Brown County*, 90 Wis. 2d 823, 280 N.W.2d 711 (1979). If policy is ambiguous, it is strictly construed against the insurer. *Kopp v. Home Mut. Ins. Co.*, 6 Wis. 2d 53, 94 N.W.2d 224 (1959). If policy is not ambiguous, rule of strict construction is not applied. *Westerman v. Richardson*, 43 Wis. 2d 587, 168 N.W.2d 851 (1969). Clear and unambiguous provision of policy may become ambiguous in context of entire policy. Policy language should not be made ambiguous by isolating small part from context of whole. *Folkman v. Quamme*, 2003 WI 116, 264 Wis. 2d 617, 655 N.W.2d 857.

Inconsistent policy terms and endorsements. Policy and endorsements must be read together; where policy and endorsements conflict, terms of endorsements prevail. *Inter-Insurance Exch. of Chicago Motor Club v. Westchester Fire Ins. Co.*, 25 Wis. 2d 100, 130 N.W.2d 185 (1964). Insured is not required to sift through numerous documents to ascertain rights under renewed policy. *Hanson v. Prudential Prop & Cas. Ins. Co.*, 224 Wis. 2d 356, 591 N.W.2d 619 (Ct. App. 1999). Policy Terms. Use of 'contaminants' in pollution exclusion clause incorporated bacteria when giving plain meaning.

Oral Binders. Binders of insurance are construed to contain terms identical to previous policy (upon renewal) unless changes in coverage are highlighted and in conspicuous print. *Gross v. Lloyds of London Ins. Co.*, 121 Wis. 2d 78, 358 N.W.2d 266 (1984).

### CONTRIBUTION

In action by insurer for contribution, attorney may testify as to reasonableness of negotiated settlement. *Milwaukee Auto. Mut. Ins. Co. v. Nat'l Farmers Union Prop. & Cas. Co.*, 23 Wis. 2d 662, 128 N.W.2d 12 (1964).

A covenant not to sue is no defense to action for contribution. *State Farm Mut. Auto. Ins. Co. v. Continental Cas. Co.*, 264 Wis. 493, 59 N.W.2d 425 (1953).

Release of one joint tortfeasor with reservation of rights against other treated as covenant not to sue and does not destroy right to contribution. First joint tortfeasor and insurer paid \$7,500 to injured person for release and covenant not to sue. Injured person released them from direct liability and agreed that, in the event injured person obtained judgment against second joint tortfeasor, claims and causes of action would be credited and satisfied on behalf of first joint tortfeasor and insurer to extent of such judgment. In this scenario, second joint tortfeasor not entitled to right of contribution even though damages of \$20,000 might be established by injured person because, under release, second tortfeasor would never become liable to injured person for more than half amount of such damages or be required to pay more than appropriate share of damages. *Heimbach v. Hagen*, 1 Wis. 2d 294, 83 N.W.2d 710 (1957).

Payment by insurer of non-negligent driver to passengers does not reduce amount owed by negligent tortfeasor. *U.S. Fid. & Guar Co. v. Milwaukee & Suburban Transp. Corp.*, 18 Wis. 2d 1, 117 N.W.2d 708 (1962).

Common liability must be established in an action for contribution. *Bauman v. Gilbertson*, 7 Wis. 2d 467, 96 N.W.2d 854 (1959).

Comparative negligence statute provides that contributory negligence does not bar recovery in action by any person to recover damages for negligence resulting in death or injury to person or property, if that negligence was not greater than negligence of person against whom recovery sought. Damages allowed diminished in proportion to amount of negligence attributed to person recovering. Negligence of plaintiff measured separately against negligence of each person causally negligent. Liability of each person causally negligent whose percentage of causal negligence is less than 51% is limited to percentage of total causal negligence attributed to that person. Person found to be causally negligent whose percentage of causal negligence is 51% or more shall be jointly and severally liable for damages allowed. Wis. Stat. § 895.045(1).

A negligent driver could not recover by way of contribution from beneficiaries of estate of other negligent driver fatally injured in accident. *Wurtzinger v. Jacobs*, 33 Wis. 2d 703, 148 N.W.2d 86 (1967).

A solvent non-settling tortfeasor is not required to equitably share part of judgment uncollectible from insolvent non-settling tortfeasor. *Chart v. General Motors Corp.*, 80 Wis. 2d 91, 258 N.W.2d 680 (1977).

A release satisfying that portion of total amount of damages of plaintiff of which settling tortfeasor's negligence was causal is effective for purposes of barring non-settling tortfeasor's right to contribution. *Pierringer v. Hoyer*, 21 Wis. 2d 182, 124 N.W.2d 106 (1963). Plaintiff's release of intentional tortfeasor relieved non-settling negligent joint tortfeasor of liability to plaintiff in amount equal to intentional joint tortfeasor's liability. A "Pierringer" release imputes to plaintiff whatever liability in indemnity as well as contribution settling defendant may have to non-settling defendants. *Fleming v. Thresherman's Mut. Ins. Co.*, 131 Wis. 2d 123, 388 N.W.2d 908 (1986). A defendant which settles with plaintiff on the basis of a "Pierringer" release may not sue for contribution against non-settling tortfeasor defendants. *Unigard Ins. Co. v. Ins. Co. of N. Am.*, 184 Wis. 2d 78, 516 N.W.2d 762 (Ct. App. 1994).

### DAMAGES

Appellate Review. Additur-Court determines after trial that the jury verdict was inadequate and increases. New trial unless defendant accepts. *Parchia v. Parchia*, 24 Wis. 2d 659, 130 N.W.2d 205 (1964). Remittitur-Court determines after trial that jury verdict excess and decreases. New trial unless plaintiff accepts. *Powers v. Allstate Ins. Co.*, 10 Wis. 2d 78, 102 N.W.2d 393 (1960). See Wis. Stat. § 805.15(6) for statute governing additur and remittitur.



Wisconsin's Comparative Negligence Statute, Wis. Stat. § 895.045, requires that in negligence cases involving multiple tortfeasors, negligence of plaintiff is compared to individual negligence of each defendant rather than to combined negligence of all defendants. Joint and several liability concept is affirmed. *Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Constr. Corp.*, 96 Wis. 2d 314, 291 N.W.2d 825 (1980). 1995 legislative act modified Wis. Stat. § 895.045 by limiting joint and several liability to persons 51% or more causally negligent. 1995 Wis. Act 17, § 1. Wis. Stat. § 895.045 does not apply to strict products liability. *Fuchsgruber v. Custom Accessories, Inc.*, 2000 WI 81, 244 Wis. 2d 758, 628 N.W.2d 833.

**Indemnification.** Indemnity contracts require insurer to make insured whole after insured has sustained actual loss. *Agnew v. American Family Mut. Ins. Co.*, 150 Wis. 2d 341, 441 N.W.2d 222 (1989). Indemnity is an equitable remedy that shifts the loss from one who has paid it to the one who should have paid it. *Swanigan v. State Farm Ins. Co.*, 99 Wis. 2d 179, 299 N.W.2d 234 (1980). Where an insured is sued for contribution of costs to remediate contamination under a comprehensive general liability policy, the claim constitutes a claim for damages. *Johnson Controls v. Empl. Ins. of Wausau*, 264 Wis. 2d 60, 665 N.W.2d 257 (2003). When the federal or state government brings suit or issues a potentially responsible party letter, for cleanup costs or to impose a remediation plan, that action is a suit seeking damages and triggers a duty to defend. *Id.* A negligent tortfeasor is entitled to indemnification from intentional tortfeasor. *Jacobs v. General Accident*, 14 Wis. 2d 1, 109 N.W.2d 462 (1961).

**Psychological Injuries. Mental Pain and Suffering.** Emotional distress resulting from intentional tort is compensable. *Alsteen v. Gehl*, 21 Wis. 2d 349, 124 N.W.2d 312 (1963). See also WI JI Civil 2725. Emotional distress resulting from negligent tort is compensable. *Bowen v. Lumbermen's Mut. Cas. Co.*, 183 Wis. 2d 627, 517 N.W.2d 432 (1994); *Camp v. Anderson*, 2006 WI App. 170, ¶ 18; 295 Wis. 2d 714, 721 N.W.2d 146.

**Punitive Damages.** A plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff. Wis. Stat. § 895.043(3). Under the statute, a plaintiff is required to show that a defendant acted maliciously to the plaintiff or intentionally disregarded the rights of the plaintiff, not that a defendant intended to cause harm or injury to the plaintiff. *Wischer, et al. v. Mitsubishi Heavy Industries America, Inc. et al.*, 2005 WI 26, 694 N.W.2d 320. If the plaintiff establishes a prima facie case for the allowance of punitive damages, the plaintiff may intro-

duce evidence of the wealth of the defendant and the judge shall submit to the jury a special verdict as to damages or, if the case is tried to the court, the judge shall issue a special verdict as to punitive damages. Wis. Stat. § 895.043(4). The rule of joint and several liability does not apply to punitive damages. Wis. Stat. § 895.043(5). Requirement that the defendant act "in an intentional disregard of the rights of the plaintiff" requires defendant act with purpose to disregard plaintiff's rights or be aware that his or her conduct is substantially certain to result in plaintiff's rights being disregarded. No requirement of intent to injure or cause harm. *Id.*

**Collateral Source Rule.** Payments received by plaintiff from other insurance policies do not have effect on tortfeasor's obligation to make payment pursuant to the verdict. *Vonch v. American Standard Ins. Co.*, 151 Wis. 2d 138, 442 N.W.2d 598 (Ct. App. 1989). Where Plaintiff's insurer is barred from pursuing subrogation claim, collateral source rule does not apply and tortfeasor is entitled to reduction in judgment for amount of subrogation claim. *Lambert v. Wrensch*, 135 Wis. 2d 105, 399 N.W.2d 369 (1987).

Collateral source rule prohibits parties in personal injury action from introducing evidence of amount paid by the injured person's health insurance company, a collateral source, to prove the reasonable value of the medical treatment. *Leitinger v. Dbart*, 2007 WI 84, ¶ 7, 302 Wis. 2d 110, 116, 736 N.W.2d 1.

**Statutory Caps on Awards.** There is a \$500,000 per occurrence cap for deceased minor children and a \$350,000 per occurrence cap for deceased adults for loss of society and companionship in wrongful death actions. Retroactive application of increase in cap on damages for loss of society and companionship unconstitutional. *Schultz v. Natwick*, 257 Wis. 2d 19, 653 N.W.2d 266 (2002). Minor siblings are now eligible to receive damages for loss of society and companionship. Wis. Stat. § 895.04(4). The \$350,000.00 statutory limitation on non-economic damages resulting from a medical malpractice injury is deemed unconstitutional. *Ferdon v. Wisconsin Patients Compensation Fund*, 284 Wis. 2d 573, 701 N.W.2d 440 (2005). There is a \$750,000.00 limit on non-economic damages in a medical malpractice action, subject to adjustment. Wis. Stat. § 893.55 (4)(d)1.

Claims against municipalities are limited by statute. Damages generally capped at \$50,000.00 per person. Wis. Stats. § 893.80. Damages capped for negligent operation by employee of motor vehicle owned by municipality at \$250,000.00 per person. Wis. Stats. § 345.05.

## DEATH

See Law Digest Tables.

**Abatement and Survival.** A right of action for wrongful act or negligence in this state causing death survives in favor of personal representative of deceased. Actions for property damage also survive. Joint actions not abated by death of any of parties, if cause of action survives. Wis. Stat. §§ 895.01, 895.03, and 895.04. Damages may be recovered for pain and suffering between injury and death. *Estate of Hegarty ex rel. Hegarty v. Beauchaine*, 297 Wis. 2d 70, 727 N.W.2d 857 (Ct. App. 2006). Such cause of action is separate cause from one brought for actionable negligence causing death and may be joined in one complaint. *Koehler v. Waukesha Milk Co.*, 190 Wis. 52, 208 N.W. 901 (1926); *Bartholomew v. Wisconsin Patients Compensation Fund and Compcare Health Services Ins. Corp.*, 293 Wis. 2d 38, 717 N.W.2d 216 (2006). A cause of action survives for wrongful death even though accident is also fatal to tortfeasor. Wis. Stat. § 895.01(1)(bm).

A claim for personal injury survives decedent's demise and punitive damages incident to pain and suffering pass to the estate. *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W.2d 437 (1980). An estate is not entitled to punitive damages in survival action where compensatory damages are not available due to the apportionment of negligence pursuant to Wis. Stat. § 895.045; *Tucker v. Marcus*, 142 Wis. 2d 425, 418 N.W.2d 818 (1988).

**Action for Wrongful Death.** Wis. Stat. § 895.03 provides a cause of action for wrongful death. Wis. Stat. § 895.04 provides classes of persons to whom recovery is payable, including parents. Mother of adult daughter, who died without estate, permitted to sue for wrongful death and funeral expenses assumed by mother. *Schwab v. Nelson*, 249 Wis. 563, 25 N.W.2d 445 (1946). A parent may not recover for loss of society and companionship of an adult child in a medical malpractice action. *Estate of Wells by Jeske v. Mount Sinai Med. Ctr.*, 183 Wis. 2d 667, 515 N.W.2d 705 (1994). Under 895.04(4), an adult child may recover for loss of society and companionship of a parent. *Pierce v. American Family Mut. Ins. Co.*, 303 Wis. 2d 726, 736 N.W.2d 247 (Ct. App. 2007). A parent of a deceased adult child may not bring a claim to recover for lost inheritance damages. *Estate of Lamus v. American Hardware Mutual Insurance Co.*, 314 Wis. 2d 731, 761 N.W.2d 38 (Ct. App. 2008). Under 895.04(4), Judgment for damages for pecuniary injury from wrongful death may be awarded to any persons entitled to bring a wrongful death action. Additional damages are not to exceed \$500,000.00 per occurrence in the case of a deceased minor or \$350,000.00 per occurrence in the case of a deceased adult, for loss of society

and companionship which maybe awarded to the spouse, children or parents of the deceased, or to siblings of the deceased, if the siblings were minors at the time of death. Wis. Stats. § 895.04(4). Furthermore, a cause of action for damages for loss of society and companionship that accrues before April 28, 1998 is capped at \$150,000.00 and not the \$500,000.00 cap under the 1997 Wis. Act 89 which amended the caps of § 895.04(4). *Schultz v. Natwick*, 249 Wis. 2d 317, 638 N.W.2d 319 (2001).

A viable infant who receives injury and as consequence is stillborn is "person" within meaning of wrongful death statute. *Kwaterski v. State Farm Mut. Ins. Co.*, 34 Wis. 2d 14, 148 N.W.2d 107 (1967). See also *Pierce v. Physicians Ins. Co. of Wisconsin, Inc.*, 278 Wis. 2d 82, 692 N.W.2d 558 (2005) (Mother's dual negligent infliction of emotional distress claims arising out of stillbirth of daughter, both for the daughter's injuries and for her own injuries, were not a single claim of medical malpractice subject to a single cap for noneconomic damages.)

Wis. Stat. § 895.04 permits decedent's spouse, parents, or children, whether unemancipated, emancipated, dependent, or independent, to recover for loss of society and companionship.

Each of decedent's children is entitled to recover the statutory maximum recoverable from municipal entities. Wis. Stat. § 893.80(3); *Boles by McKinney v. Milwaukee County*, 150 Wis. 2d 801, 443 N.W.2d 679 (Ct. App. 1989).

Loss of society and companionship is merely additional element of damages recoverable in action for wrongful death. *Papke v. American Auto. Ins. Co. of St. Louis, Mo.*, 248 Wis. 347, 21 N.W.2d 724 (1946).

In death case, jury is permitted to determine rate of discount to be applied to computing present value of decedent's wages had he lived and is not bound by statutory 5% rate as in contract cases. *Miller v. Tainter*, 252 Wis. 266, 31 N.W.2d 531 (1948). Action for wrongful death does not survive death of all beneficiaries named in Wis. Stat. § 895.04; *Lornson v. Siddiqui*, 302 Wis. 2d 519, 735 N.W.2d 55 (2007).

Minor children may maintain cause of action for loss of society and companionship where medical malpractice causes death of parent. *Jelinek v. St. Paul Fire & Cas Ins. Co.*, 182 Wis. 2d 1, 512 N.W.2d 764 (1994). In all other cases, minor children have no cause of action for wrongful death where one parent survives. *Xiong ex rel. Edmondson v. Xiong*, 255 Wis. 2d 693, 648 N.W.2d 900 (Ct. App. 2002). However, an adult child of a deceased parent lacks standing to recover for a loss of society and companionship in a wrongful death case based



on medical malpractice. *Czapinski v. St. Francis Hosp., Inc.*, 236 Wis. 2d 316, 613 N.W.2d 120 (2000); Wis. Stats. §§ 893.55(4)(f), 895.04(4).

The mother is a necessary party plaintiff with father in bringing action for wrongful death of their son. *Truesdill v. Roach*, 11 Wis. 2d 492, 105 N.W.2d 871 (1960).

Children of deceased mother have cause of action for her death against estate of father and his insurer. *Krause v. Home Mut. Ins. Co.*, 14 Wis. 2d 666, 112 N.W.2d 134 (1961).

An illegitimate son may not recover under wrongful death statute. *Krantz v. Harris*, 40 Wis. 2d 709, 162 N.W.2d 628 (1968). However, the child may recover if paternity has been established pursuant to Wis. Stat. § 895.04(2).

Where parents recover for wrongful death of child and dispute arises as to division of proceeds, better rule is to permit division based on actual loss suffered by each parent. *Keithley v. Keithley*, 95 Wis. 2d 136, 289 N.W.2d 368 (Ct. App. 1980). In an action for wrongful death of a child caused by one parent, the non-negligent spouse is not limited to one-half of the statutory recovery, nor is the non-negligent spouse's recovery reduced by any negligence attributable to the negligent spouse. *Chang v. State Farm Mut. Auto. Ins. Co.*, 182 Wis. 2d 549, 514 N.W.2d 399 (1994). Life insurance policy relevant to claim of loss of inheritance in wrongful death action. *Schaefer v. American Family Mut. Ins. Co.*, 192 Wis. 2d 768, 531 N.W.2d 585 (1995).

An action for wrongful death is statutory in nature and punitive damages are not recoverable under Wisconsin's wrongful death statute, Wis. Stat. § 895.04(4). *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W.2d 437 (1980); *Tucker v. Marcus*, 142 Wis. 2d 425, 418 N.W.2d 818 (1988).

Unexplained Absence. An absence for seven years under unambiguous circumstances raises a presumption of death. *Hubbard v. Equitable Life Assur. Soc'y*, 248 Wis. 340, 21 N.W.2d 665 (1946).

Statute of Limitations. See "LIMITATIONS OF TIME FOR COMMENCEMENT OF ACTIONS."

## DISABILITY

See "ACCIDENT AND HEALTH INSURANCE."

A crucial factor in establishing permanent total disability is proof of total and permanent impairment of earning capacity. *Balczewski v. DILHR*, 76 Wis. 2d 487, 251 N.W.2d 794 (1977).

The right to recovery is restricted to the time insured was wholly disabled and prevented from prosecution of any and every kind of business pertaining to his occupation where policy insured against loss of time for continuous total disability. *Saveland v. Fid. & Cas. Co.*, 67 Wis. 174, 30 N.W. 237 (1886).

A jury finding that ironworker was totally disabled notwithstanding his return to work for 10 months following accident affirmed. *Harker v. Paul Revere Life Ins. Co.*, 28 Wis. 2d 537, 137 N.W.2d 395 (1965).

Insurance policy may define "totally disabled" to exclude those who could reasonably become qualified for occupation by reason of education, experience or training. *Peterson v. Pennsylvania Life Ins. Co.*, 265 Wis. 2d 768, 669 N.W.2d 151 (Ct. App. 2003).

Proof of insanity excuse for failure to comply with requirement respecting proof of disability. *Schlitz v. Equitable Life Assur. Soc'y*, 226 Wis. 255, 276 N.W. 336 (1937). Disability benefits under life policy requiring proof of total disability effective on date insurer received proof, not date of disability. *McGuinness v. New York Life Ins. Co.*, 254 Wis. 475, 36 N.W.2d 675 (1949).

Where insured was allegedly totally and permanently disabled and died within three months during which time policy lapsed for nonpayment of premium, insurer was held not liable because of failure to give notice and proof of disability despite lack of prejudice to insurer. *Kraus v. Wisconsin Life Ins. Co.*, 27 Wis. 2d 611, 135 N.W.2d 329 (1965).

Where employee under Worker's Compensation Act unreasonably refused to undergo operation, disability that employee suffered thereafter, after allowing reasonable time for recovery, was not proximately caused by accident. *Lesh v. Illinois Steel Co., L.R.A.*, 163 Wis. 124, 157 N.W. 539 (1916).

The insured was entitled to benefits under group policy despite temporary layoff which did not interrupt "continuous employment". *Garnsky v. Metro. Life Ins. Co.*, 232 Wis. 474, 287 N.W. 731 (1939).

Where a policy excluded liability for first three months' loss of time it was held there is no recovery for loss of business where disability continued for only two months. *Torphy v. Cont'l Cas. Co.*, 259 Wis. 197, 47 N.W.2d 740 (1951).

Where mutual mistake made as to amount of benefits, policy will be reformed regardless of which party benefits from mistake. *Schmidt v. Prudential Ins. Co. of Am.*, 235 Wis. 503, 292 N.W. 447 (1940).

## FINANCIAL RESPONSIBILITY LAW

See Law Digest Tables.

## FIRE INSURANCE

Arson. Where policy does not state whether obligations of insured are joint or several, innocent insured is not barred from recovery merely because innocent insured's spouse intentionally caused damage to insured property. *Hedtcke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 326 N.W.2d 727 (1982). Where policy contains concealment or fraud clause and damage intentionally caused by one insured, innocent insured's claim is held properly declined. *State Farm Fire & Cas. Ins. Co. v. Walker*, 157 Wis. 2d 459, 459 N.W.2d 605 (Ct. App. 1990). Insurer's refusal to pay fire loss believed caused by arson was not bad faith where the insured business was in poor financial condition, even though insured was acquitted of criminal charges and found not to have committed the arson in a civil trial. *Mills v. Regent Ins. Co.*, 152 Wis. 2d 566, 449 N.W.2d 294 (Ct. App. 1989). An action on a fire insurance policy must be commenced within 12 months after the inception of the loss. This fire limitation applies also to riders and endorsements attached to a fire insurance policy covering loss or damage to property. Wis. Stats. § 631.83. Moreover, this 1-year limitation is not tolled by the provisions of payment by the insurer made under § 885.285(1). *Weiting Funeral Home of Chilton v. Meridan Mut. Ins. Co.*, 277 Wis. 2d 442(2004).

Assignment. There appears to be no impediment to assignment of claims under fire policies. *Gimbels Midwest, Inc. v. Northwestern Nat. Ins. Co. of Milwaukee*, 72 Wis. 2d 84, 240 N.W.2d 140 (1976).

Chattel Mortgage. Mortgagee has insurable interest. Coverage of standard fire policy did not extend to property encumbered by chattel mortgage despite statutory provision that representation or warranty inoperative to avoid policy, unless made with intent to deceive or such matter increased risk or contributed to loss. *Moe v. Allemannia Fire Ins. Co. of Pittsburgh*, 209 Wis. 526, 244 N.W. 593 (1932). A policy excluding coverage on encumbered property was held, under particular facts, not to cover property encumbered by chattel mortgage even though chattel mortgage was invalid because of increased moral hazard and possibility of seizure by mortgagee. *Mielke v. National Reserve Ins. Co.*, 216 Wis. 148, 256 N.W. 776 (1934).

Contract Policy Binder. Bailee of truck requested fire insurance, it was held an oral contract of insurance was in effect and the bailor could maintain action directly against insurer. *Richartz v. Martin*, 252 Wis. 108, 31 N.W.2d 158 (1948). Oral contract for tornado insur-

ance was valid, although insurer was not identified. *Moore v. Suburban Mobile, Inc.*, 30 Wis. 2d 527, 141 N.W.2d 185 (1966).

Cancellation. See "CANCELLATION."

Mortgage Clause. Since mortgagor's title is not divested by foreclosure judgment alone he continues to have "unconditional and sole ownership" during period of redemption. *Koch v. Transcontinental Ins. Co.*, 223 Wis. 105, 269 N.W. 539 (1936). One in possession of premises under written land contract or oral contract so far executed as to entitle him to specific performance is unconditional and sole owner and owner in fee simple, within meaning of fire insurance policy. *Kurowski v. Retail Hardware Mut. Fire Ins. Co. of Minn.*, 203 Wis. 644, 234 N.W. 900 (1931). Where vendee in land contract was in default, but no forfeiture of contract by vendor had occurred, nor any acts by vendee amounting to abandonment of his rights under contract, there was "no charge in interest, title, or possession" of insured in premises. *De Keyser v. National Liberty Ins. Co.*, 216 Wis. 566, 257 N.W. 673 (1934). Where vendee has terminated contract by agreeing with vendor to hold premises as tenant and thereafter totally abandons premises and all rights thereto, there is such change. *Korntved v. American Ins. Co.*, 216 Wis. 470, 257 N.W. 670 (1934). A policy payable to vendee "as his interest may appear" does not make him assignee of policy so that he would have independent right of recovery, but he is merely appointee to receive money under it in right of insured. *Wunderlich v. Palatine Fire Ins. Co.*, 104 Wis. 395, 80 N.W. 471 (1899). Nor can mortgagee in such case sue alone and insured must sue in his own name, but mortgagee may be joined as a codefendant. *Williamson v. Michigan Fire & Marine Ins. Co.*, 86 Wis. 393, 57 N.W. 46 (1893). A policy covering mortgaged premises, to extent that it is payable to mortgagee, represents additional collateral to mortgaged debt and, in event of loss, it becomes duty of mortgagee to apply proceeds to satisfaction of mortgage. *Lichtstern v. Forehand*, 181 Wis. 216, 194 N.W. 421 (1923). Execution of second mortgage by insured without notice to insurer, was held such could increase risk or hazard within meaning of fire policy and relieve insurer of liability. *Nemojeski v. Bubolz Mut. Town Fire Ins. Co.*, 271 Wis. 561, 74 N.W.2d 196 (1956). Second mortgage may preclude coverage although policy covers first mortgage. *Straw v. Integrity Mut. Ins. Co.*, 248 Wis. 96, 20 N.W.2d 707 (1945).

Reformation. Wis. Stat. § 631.09 does not preclude reformation after loss to cover property omitted by mutual mistake. *Schafer v. Shelby Farmers Mut. Ins. Co.*, 246 Wis. 592, 18 N.W.2d 365, 19 N.W.2d 241 (1945). Fire policy may be reformed because of fraud or mutual



mistake. *Artmar, Inc. v. United Fire & Cas. Co.*, 34 Wis. 2d 181, 148 N.W.2d 641 (1967).

A fire insurer was bound by mistake of independent agent. *Trible v. Tower Ins. Co.*, 43 Wis. 2d 172, 168 N.W.2d 148 (1969).

A standard fire policy covered damage to barn when adjacent silo collapsed. *Schluckebier v. Arlington Mut. Fire Ins. Co.*, 8 Wis. 2d 480, 99 N.W.2d 705 (1959). Fire and extended coverage did not cover collapse of basement walls due to defective mortar. *Thornwell v. Indiana Lumbermens Mut. Ins. Co.*, 33 Wis. 2d 344, 147 N.W.2d 317 (1967).

An owner is covered by policy notwithstanding loss caused by his spouse. *Shearer v. Dunn County Farmers Mut. Ins. Co.*, 39 Wis. 2d 240, 159 N.W.2d 89 (1968). A policy is avoided if hazard is increased by any means or control of knowledge of insured. Insured wearing apparel, while at place of repair, and hence not in its accustomed place of deposit, remains insured. *Noyes v. Northwestern Nat'l Ins. Co.*, 64 Wis. 415, 25 N.W. 419 (1885). Horse was held to be insured under policy covering live stock on certain farm, although burned while at another barn for purpose of being broken. *Lathers v. Mutual Fire Ins. Co.*, 135 Wis. 431, 116 N.W. 1 (1908). Building uninhabited with broken doors and windows was held to be increase of risk. *Conway v. Providence Washington Ins. Co.*, 201 Wis. 502, 230 N.W. 630 (1930). Knowledge of tenants alone is not sufficient to charge owner with notice of increase of risk. *Joslin v. National Reserve Ins. Co.*, 201 Wis. 506, 230 N.W. 711 (1930). Clause including lightning includes destruction by tornado where electrical disturbances presenting usual characteristics of lightning, was active agent in its destruction. *Spensley v. Lancashire Ins. Co.*, 54 Wis. 433, 11 N.W. 894 (1882).

No recovery on policy could be had where insured separated undamaged property and sold it and shipped it away before arrival of adjuster. *Oshkosh Match Works v. Manchester Fire Assurance Co.*, 92 Wis. 510, 66 N.W. 525 (1896). It is duty of insured to save and preserve insured property after fire and his negligence or prevention of so doing discharges policy pro tanto. *Wolters v. Western Assurance Co.*, 95 Wis. 265, 70 N.W. 62 (1897). Insurer has option to rebuild even in case of total destruction, notwithstanding standard policy makes insurance written conclusive as to value of property. *Temple v. Niagara Fire Ins. Co.*, 109 Wis. 372, 85 N.W. 361 (1901). Where a barn, basement, and silo, constituting single instrumentality were destroyed by windstorm, it was held insurer could have exercised its right to rebuild but it should have offered to rebuild entire structure. *Gowan v. Homestead Mut. Ins. Co.*, 272 Wis. 127, 74 N.W.2d 634 (1956). Standard policy is held to be man-

datory. *Wojtzak v. Hartland Farmers' Mut. Fire Ins. Co.*, 200 Wis. 118, 227 N.W. 255 (1929). Although standard fire insurance policy is not construed against insurer, rider of such policy is construed in that manner when ambiguous. *Lewis v. Insurance Co.*, 203 Wis. 324, 234 N.W. 499 (1930). Insurer is not entitled to summary judgment for failure to commence action within 12 months after fire where there had been negotiations for settlement during that period. *Dishno v. Home Mut. Ins. Co.*, 256 Wis. 448, 41 N.W.2d 375 (1950).

When an insurer mailed notice of assessment required under Wis. Stat. § 612.54 to an old address, though the insured had notified insurer of change of address and notice was not received, insurer was held liable for fire loss. *Huenger v. Door County Mut. Ins. Co.*, 258 Wis. 95, 44 N.W.2d 915 (1950).

Insured may be relieved of requirement that notice of loss be given to insurer as soon as practicable when insured reasonably believes loss is not covered by policy. *Kolbeck v. Rural Mut. Ins. Co.*, 70 Wis. 2d 655, 235 N.W.2d 466 (1975).

Substantial performance with proof of loss provisions of contract is necessary for insured to recover under policy. Tort of bad faith applies to first party claim where insurer lacks reasonable basis for denying benefits under policy. *Davis v. Allstate Ins. Co.*, 101 Wis. 2d 1, 303 N.W.2d 596 (1981).

Under Wis. Stat. § 631.07(4), no insurance policy is invalid merely because policy holder lacks an insurable interest. *Martin v. Tower Ins. Co.*, 119 Wis. 2d 48, 349 N.W.2d 90 (Ct. App. 1984). Where policy covered property at specified location and insured moved it, property was not covered though company continued to collect assessment. *Summers v. Oakfield Town Mut. Fire Ins. Co.*, 245 Wis. 40, 13 N.W.2d 518 (1944).

A location clause contained in policy is not subject to waiver by agent. *Schuster v. Germantown Mut. Ins. Co.*, 40 Wis. 2d 447, 162 N.W.2d 129 (1968).

Ownership. Unconditional ownership of property is defined as an ownership of an estate without condition. *Miller v. Yorkshire Ins. Co.*, 237 Wis. 551, 297 N.W. 377 (1941).

A fire policy issued to owner of real property and legal representatives construed to cover heirs, devisees, and legatees. *Loomis v. Vernon Mut. Fire Ins. Co.*, 14 Wis. 2d 470, 111 N.W.2d 443 (1961).

Damages. Where fire destroyed barn so that it lost its character and identity as barn, it was held to be total loss, though concrete walls remained standing. *Fischer v. Harmony Town Ins. Co.*, 249 Wis. 438, 24 N.W.2d 887 (1946).

Insured may recover expense of litigation against third party from fire insurer who wrongfully denies coverage. *City of Cedarburg Light & Water Comm'n v. Glens Falls Ins. Co.*, 42 Wis. 2d 120, 166 N.W.2d 165 (1969).

Fire policy limiting liability to actual loss must yield to "valued policy." Wis. Stat. § 632.05(2) requires face value recovery when fire damage to property constitutes total loss. *Gambrell v. Campbellsport Mut. Ins. Co.*, 47 Wis. 2d 483, 177 N.W.2d 313 (1970).

Bulging and crackling of basement wall of home amounted to collapse of building within coverage. *Bradish v. British Am. Assurance Co.*, 9 Wis. 2d 601, 101 N.W.2d 814 (1960).

Submission to arbitration of fire loss estops insurer from policy defenses but not from defense of failure of insured to protect property from further damage. *Quinn v. New York Fire Ins. Co.*, 22 Wis. 2d 495, 126 N.W.2d 211 (1964).

Excepted Risks. Explosion. Breaking of radiator in insured's residence due to mechanical failure was held not caused by explosion. *Hicks v. New York Fire Ins. Co.*, 266 Wis. 186, 63 N.W.2d 59 (1954). The bursting of cylindrical steel tank containing wheat was explosion. *Aetna Cas. & Sur. Co. v. Osborne-McMillan Elevator Co.*, 35 Wis. 2d 517, 151 N.W.2d 113 (1967).

Evidence of sudden bursting of insured's silo was held insufficient to prove explosion was caused by carbon dioxide gas within silo rather than by silage pressure. *Bauman v. Midland Union Ins. Co.*, 261 Wis. 449, 53 N.W.2d 529 (1952).

Fixtures. A portable pier extending into lake was held not to be household goods as defined in policy insuring against loss from any cause. *Warshauer v. Employers' Fire Ins. Co.*, 247 Wis. 469, 19 N.W.2d 876 (1945).

Friendly fires. An overheated furnace causing smoke and escaping heat charring furniture, wall paper and mop, boards, though there was no ignition outside of furnace, is "hostile" fire; damage resulting was considered a "direct loss and damage by fire." *O'Connor v. Queens Ins. Co. of Am.*, 140 Wis. 388, 122 N.W. 1038 (1909).

Earth Movement. The earth movement exclusion is narrowly construed. *Wisconsin Builder's, Inc. v. General Ins. Co. of Am.*, 65 Wis. 2d 91, 221 N.W.2d 832 (1974).

Business Interruption. "Business interruption" endorsement does not cover loss of business caused by civil disturbance curfew. *Adelman Laundry & Cleaners,*

*Inc. v. Factory Ins. Ass'n*, 59 Wis. 2d 145, 207 N.W.2d 646 (1973).

Excessive Policies. Reporting form insurance is intended to prevent necessity of being over insured to be fully covered, but must not be construed so as to have no limits but total value of loss. *Lakeside Plywood & Bldg. Materials, Inc. v. Aetna Cas. & Sur. Co.*, 75 Wis. 2d 484, 250 N.W.2d 1 (1977).

Contribution Between Companies. Provisions in standard policy that, if insured has other insurance without express agreement, that insurer shall not be liable for any loss, operate to relieve insurer only partially. Insurer remains liable for pro rata liability with other insurers, not to exceed actual loss or damage, regardless of any knowledge by insurer of other insurance. Wis. Stat. § 631.43. Paying insurer in fire loss is entitled to reimbursement from other insurer on same risk on pro-rata basis. *Reedsburg Farmers Mut. Fire Ins. Co. v. Koennecke*, 8 Wis. 2d 408, 99 N.W.2d 201 (1959).

Where a manufacturer and distributor both had insurable interests in warehoused goods destroyed by fire, each was entitled to one half of proceeds of two policies under pro rata liability clause. *Ben-Hur Mfg. Co. v. Firemen's Ins. Co.*, 18 Wis. 2d 259, 118 N.W.2d 159 (1962).

## GUEST CASES

See "AUTOMOBILES, Guest."

## HOSPITALS

Evidence-Records. Records of hospital governing bodies are discoverable and not protected by statutory confidentiality provisions. Wis. Stat. § 146.38(2); *Mallow v. Angove*, 148 Wis. 2d 324, 434 N.W.2d 839 (Ct. App. 1988). Certified hospital records are admissible in evidence without necessity of testimony. Wis. Stat. § 908.03(6m).

An order under Wis. Stat. § 252.15(5)(a), which states HIV test results may be disclosed under "a lawful order of a court of record," need not relate solely to public health and safety considerations. *Doe by Doe v. Roe*, 151 Wis. 2d 366, 444 N.W.2d 437 (Ct. App. 1989).

Immunity. Hospitals do not have immunity.

## HUSBAND AND WIFE

See Law Digest Tables.

Community Property [Marital Property]. See Wis. Stat. Ch. 766.

Wife was entitled to recover 100% of loss where fire was intentionally set by husband. *Felder v. North*



*River Ins. Co.*, 148 Wis. 2d 130, 435 N.W.2d 263 (Ct. App. 1988).

Where both spouses are causally negligent, award to spouse claiming medical expenses and loss of consortium is reduced twice, by both negligence attributable to claiming and injured spouse. *White v. Lunder*, 66 Wis. 2d 563, 225 N.W.2d 442 (1975).

In suit by wife against husband, domiciled in Wisconsin, for personal injuries arising out of automobile accident in Nebraska, it was held that law of Wisconsin governs on demurrer. Court adopts grouping of contacts doctrine. *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965). See also, *Conklin v. Horner*, 38 Wis. 2d 468, 157 N.W.2d 579 (1968) (Wisconsin has adopted flexible methodology based on qualitative analysis of the contacts that one or more jurisdictions have with relevant facts).

One spouse's auto insurance covers the other spouse. *Belling v. Harn*, 65 Wis. 2d 108, 221 N.W.2d 888 (1974). However, mere fact of being legally married is not sufficient to apply. *Wall v. Heritage Mut. Ins. Co.*, 151 Wis. 2d 691, 446 N.W.2d 75 (Ct. App. 1989).

Interspousal Immunity. No interspousal immunity doctrine in torts. *Zelinger v. State Sand & Gravel Co.*, 38 Wis. 2d 98, 111, 156 N.W.2d 466, 472 (1968); *Wait v. Pierce*, 191 Wis. 202, 209 N.W. 475 (1926). Chapter 766, Wisconsin Marital Property Act, provides spouses with specific causes of action against one another and remedies for damage to marital property and other property of other spouse through Wis. Stat. § 766.70. Also recognizes spouses may sue one another for other types of injury through Wis. Stat. § 766.97(2).

Wis. Stat. § 766.97(2) provides either spouse has right to own and exclusively manage his or her non-marital property, enter into contracts with third parties or with spouse, institute and defend civil actions in name and maintain action against spouse for damages resulting from intentional act or negligence.

Wis. Stat. § 766.97(3) provides common law rights of spouse to compel domestic and sexual services of other spouse are abolished. Nothing in this subsection affects spouse's common law right to consortium or society and companionship.

Wis. Stat. § 895.04(4) provides additional damages not to exceed \$500,000 per occurrence for deceased minor, or \$350,000 for deceased adult, for loss of society and companionship may be awarded to spouse, children or parents of deceased, or to siblings of deceased, if siblings were minors at time of death. Retroactive increase in damages for loss of society and companionship found unconstitutional. *Schultz v. Natwick*, 2002 WI 125, 257

Wis. 2d 19, 653 N.W.2d 266. Retroactive increases in the statutory damage limits were unconstitutional (cause of action accrued before statutory increase but case filed after effective date of increase). *Neiman v. American Nat'l Prop. & Cas. Co.*, 2000 WI 83, 236 Wis. 2d 411, 613 N.W.2d 160. See also *Schultz v. Natwick*, *supra*. See also, *Bartholomew v. Wisconsin Patients Compensation Fund and Compcare Health Serv. Ins. Corp.*, 2006 WI 91, 293 Wis. 2d 38, 717 N.W.2d 216, holding that cap on wrongful death actions does not apply to predeath, noneconomic damages when a victim of medical malpractice dies, overruling *Maurin v. Hall*, 2004 WI 100, 274 Wis. 2d 28, 682 N.W.2d 866. See also, *Czapinski v. St. Francis Hosp., Inc.*, 2000 WI 80, 236 Wis. 2d 316, 613 N.W.2d 120. (Wis. Stat. § 893.55(4)(f) does not violate the equal protection clause of the Wisconsin Constitution.)

Adult children do not have claim for loss of society of companionship from death of parent. *Czapinski v. St. Francis Hosp., Inc. supra*.

## INFANTS

See "AUTOMOBILES, Age"; "LIABILITY INSURANCE, Coverage"; "NEGLIGENCE, Age."

## INLAND MARINE INSURANCE

See Ins. Wis. Admin. Code § 6.76(2).

## LIABILITY INSURANCE

Cancellation. See "CANCELLATION."

Compromise of Claims. Insurance carrier has duty to exercise good faith and ordinary diligence to insured in matter of possible adjustment, investigation, and defense of claims. If it fails to exercise good faith in matters of possible adjustment, investigation, or defense, it becomes liable to insured for his loss, regardless of policy limits. *Hilker v. Western Auto Ins. Co.*, 204 Wis. 1, 231 N.W. 257, 235 N.W. 413 (1930); *Lanferman v. Maryland Cas. Co.*, 222 Wis. 406, 267 N.W. 300 (1936).

Neither the tort victim nor a third-party claimant may bring a bad faith claim against tortfeasor's insurer for failing to settle. *Kranzush v. Badger State Mut. Cas. Co.*, 103 Wis. 2d 56, 307 N.W.2d 256 (1981); *Bruheim v. Little*, 103 Wis. 2d 96, 307 N.W.2d 276 (1981). Where the issue of coverage is "fairly debatable," and insurer seeks a bifurcated trial pursuant to Wis. Stat. § 803.04(2), a failure to settle within policy limits prior to determination of the coverage issue does not constitute bad faith. *Mowry v. Badger State Mut. Cas. Co.*, 129 Wis. 2d 496, 385 N.W.2d 171 (1986). Insurer cannot rely upon trial court finding of no coverage, however; duty to defend continues until all rights of appeal are



exhausted. *Newhouse by Skow v. Citizen Sec. Mut. Ins. Co.*, 176 Wis. 2d 824, 501 N.W.2d 1 (1993). The phrase “fairly debatable” necessitates a showing of the absence of a reasonable basis for denying the defendant’s knowledge or reckless disregard of a lack of reasonable basis for denying the claim. A “fairly debatable” claim exists where genuine dispute over status of law or fact exists at the time decision is made. *Madsen v. Threshermen’s Mut. Ins. Co.*, 149 Wis. 2d 594, 439 N.W.2d 607 (Ct. App. 1989). Insurer acting in bad faith may be required to pay insured’s attorney’s fees in prosecution. *DeChant v. Monarch Life Ins. Co.*, 200 Wis. 2d 559, N.W.2d 592 (1996).

Insurer may be liable for failure to advise insured of probability of recovery in excess of policy limits and of all settlement offers. *Baker v. Northwestern Nat’l Cas. Co.*, 22 Wis. 2d 77, 125 N.W.2d 370 (1963); *Howard v. State Farm Mut. Auto. Ins. Co.*, 60 Wis. 2d 224, 208 N.W.2d 442 (1973).

Offer of judgment of policy limits by insurer, although relevant to question of bad faith, does not as matter of law preclude such finding. *Howard v. State Farm Mut. Auto. Liab. Ins. Co.*, 70 Wis. 2d 985, 236 N.W.2d 643 (1975). Submission of legally binding offer by claimant to settle within policy limits is not necessary condition antecedent to maintenance of bad-faith excess-liability action. *Alt v. American Family Mut. Ins. Co.*, 71 Wis. 2d 340, 237 N.W.2d 706 (1976).

Every insurance contract includes an implied covenant of good faith and fair dealing and duty to so act is eminent in contract whether insurer is attending to claims of third persons against insured or claim of insured himself. When insurer unreasonably and in bad faith withholds payment or claim of insured, it is subject to liability in tort. *Anderson v. Continental Ins. Co.*, 85 Wis. 2d 675, 271 N.W.2d 368 (1978). Insurer not liable for bad faith merely because it conducted a flawed investigation. *Mills v. Regent Ins. Co.*, 152 Wis. 2d 566, 449 N.W.2d 294 (Ct. App. 1989). Insurer not liable for bad faith for settling a claim without insured’s consent where the policy had a clause requiring insured to pay the first \$25,000 of any claim as self-insurance. *United Capitol Ins. Co. v. Bartolotta’s Fireworks Co.*, 200 Wis. 2d 284, 546 N.W.2d 198 (Ct. App. 1996). The acceptance of an offer of settlement directed only at the insurer for its policy limits, after the insurer’s reasonable efforts to settle the claim against its insured have been refused, creates no reasonable grounds to fear a bad faith claim. *Blank v. USAA Property & Cas. Ins. Co.*, 200 Wis. 2d 270, 546 N.W.2d 512 (Ct. App. 1996).

Bad faith claim is controlled by two-year statute of limitations for intentional torts rather than Wis. Stat. § 631.83(1), which governs actions on an insurance pol-

icy. See Wis. Stat. § 893.57; *Warmka v. Hartland Cicero Mut. Ins. Co.*, 136 Wis. 2d 31, 400 N.W.2d 923 (1987).

Contribution. See “NEGLIGENCE.”

Co-operation of Insured in Defense of Action. The scope of the duties imposed upon an insurer and its insured are defined and controlled by the terms of the insurance contract. Any condition in the policy requiring cooperation on the part of the insured is one of great importance and its purpose should be observed. The basic purpose of a cooperation clause is to protect the insurer’s interests and to prevent collusion between the insured and the injured party. *State v. Hydrite Chem. Co.*, 220 Wis. 2d 51, 72-73, 582, N.W.2d 411 (Ct. App. 1998) (citing *Waste Mgmt., Inc. v. International Surplus Lines Inc. Co.*, 144 Ill.2d 178, 161 Ill. Dec. 774, 579 N.E.2d 322 (1991)). Provision requiring co-operation with insurer by insured does not require latter to combine in sham defense. Fair disclosure is required. If insurer renounces insurance contract by disclaimer, insured is under duty to defend in good faith, and not to allow default. *Buckner v. Buckner*, 207 Wis. 303, 241 N.W. 342 (1932); *Jenkinson v. New York Cas. Co.*, 241 Wis. 328, 6 N.W.2d 192 (1942).

Motion at time of trial to withdraw, for lack of co-operation was denied as not timely where facts known for several years. *Laughnan v. Aetna Cas. & Sur. Co.*, 1 Wis. 2d 113, 83 N.W.2d 747 (1957). Whether false statements by insured with respect to identity of driver constituted lack of cooperation could not be determined on motion for summary judgment. *Kurz v. Collins*, 6 Wis. 2d 538, 95 N.W.2d 365 (1959).

No requirement that insurer demonstrate prejudice to avoid policy for non-cooperation. *Schaefer v. Northern Assurance Co.*, 182 Wis. 2d 148, 513 N.W.2d 615 (Ct. App. 1994).

Where insured misrepresented facts about drinking prior to accident, policy was voided and injured third person had no direct claim against insurer. *Hunt v. Dollar*, 224 Wis. 48, 271 N.W. 405 (1937). New trial held proper where insured changed story materially about happening of accident. *Hoffman v. Labutzke*, 233 Wis. 365, 289 N.W. 652 (1940).

Where insurer prepared answer alleging automobile involved in accident was used for hire (which would exclude coverage) and insured—minor—signed answer that was served, and no guardian ad litem was appointed until month later, and insurer withdrew from defense two months later, insured did not violate cooperation clause. *Buchberger v. Mosser*, 236 Wis. 70, 294 N.W. 492 (1940). In automobile policy where driver, additional insured under Omnibus Statute disappeared, question of lack of cooperation by driver and diligence of insurer are

for jury, if submitted timely. *Modl v. National Farmers Union Prop. & Cas. Co.*, 272 Wis. 650, 76 N.W.2d 599, 77 N.W.2d 607 (1956).

Perjury of insured in course of trial may constitute violation of cooperation condition in liability policy. *Dunlavy v. Dairyland Mut. Ins. Co.*, 21 Wis. 2d 105, 124 N.W.2d 73 (1963).

Coverage. Construction of Terms. See "CONSTRUCTION OF POLICY."

Insured husband cannot recover "as damages" medical and hospital expenses furnished to wife under his family automobile policy where husband was not cause of injury. *Fee v. Heritage Mut. Ins. Co.*, 17 Wis. 2d 364, 117 N.W.2d 269 (1962), *overruled on other grounds, in re Stromsted's Estate*, 99 Wis. 2d 136, 299 N.W.2d 226 (1980). Costs of complying with injunction requiring desegregation of schools not payable "as damages." *School Dist. of Shorewood v. Wausau Ins. Cos.*, 170 Wis. 2d 347, 488 N.W.2d 82 (1992). If equitable relief is remedial in nature then relief is considered "damages." Overruling *Shorewood* distinction between equitable and legal relief to determine what constitutes "damages." *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, 264 Wis. 2d 60, 665 N.W.2d 257. CERCLA response costs payable "as damages." *Id.* "Damages...because of bodily injury" within statutory uninsured motorist provision encompasses those elements of damage that comprehensive definition of "bodily injury" allows and can't be limited by insurance policy. *Siegel v. American Interstate Ins. Corp. of Wis.*, 72 Wis. 2d 522, 241 N.W.2d 178 (1976).

Omnibus Provisions. Omnibus Statute. Under Wis. Stat. § 632.32, every policy of auto insurance issued in Wisconsin must provide at least as much protection as the statute requires, although insurers may broaden the coverage. *Wegner v. Heritage Mutual Insurance Company*, 173 Wis. 2d 118, 496 N.W.2d 140 (Ct. App. 1992); *Dehnel v. State Farm Mut. Auto. Ins. Co.*, 231 Wis. 2d 14, 604 N.W.2d 575 (Ct. App. 1999). General liability insurance policy that excludes coverage for liability arising out of use of automobile, but contains optional endorsement for non-owned automobile liability is governed by Omnibus Motor Vehicle Coverage Statute even though policy is a general liability policy. *Heritage Mut. Ins. Co. v. Wilber*, 248 Wis. 2d 111, 635 N.W.2d 631 (Ct. App. 2001). Omnibus Statute, Wis. Stat. § 632.32 allows insurance policy provisions that exclude coverage based on motorcycle use. *Beerbohm v. State Farm Mut. Auto. Ins. Co.*, 235 Wis. 2d 182, 612 N.W.2d 338 (Ct. App. 2000). Permission to operate may be either direct or implied; permission for specific use may not be extended to all general uses. *Brochu v. Taylor*, 223 Wis. 90, 269 N.W. 711 (1936). Insurer held liable

under omnibus clause covering driver operating truck with permission of minor owner, even though such owner was not personally liable under doctrine of respondeat superior by reason of minority. *Hoefler v. Last*, 221 Wis. 102, 266 N.W. 196 (1936). Insurer may not exclude coverage for spouse pursuant to Wis. Stat. § 632.32. § 632.32(6)(b). *Bindrim v. Colonial Ins. Co.*, 181 Wis. 2d 799, 512 N.W.2d 209 (Ct. App. 1994), *aff'd sub nom, Bindrim v. B & J Ins. Agency*, 190 Wis. 2d 525, 527 N.W.2d 320 (1995).

Coverage under home policy extended to mobile home hit by auto. *Beaulieu v. Minnehoma Ins. Co.*, 44 Wis. 2d 437, 171 N.W.2d 348 (1969). Coverage under homeowner's liability policy will not be extended to include misrepresentation and breach of contract in a sale of that home absent plain language to the effect. *Qualman v. Bruckmoser*, 163 Wis. 2d 361, 471 N.W.2d 282 (Ct. App. 1991).

Standard liability policy requires coverage of auto while being operated by any person with permission of named insured, when for purposes and in manner described in policy. No coverage for grocery truck used after regular hours by employee to move furniture when employer had no knowledge of use, though permission to use for regular purpose was given. *Drewek v. Milwaukee Auto Ins. Co.*, 207 Wis. 445, 240 N.W. 881 (1932). Permission to back car out of garage for washing held not to include consent to operate on public highway. *Kowalsky v. Whipkey*, 240 Wis. 59, 2 N.W.2d 704 (1942).

Driver of used car with permission of owner's son, but without expressed permission of owners, was subject to exclusionary provisions under owners' automobile insurance policy for non-relatives using car without owner's permission. *Heaton v. Mountin*, 233 Wis. 2d 154, 607 N.W.2d (Ct. App. 2000).

Adult live-in girlfriend of insured was involved in accident while using insured's car without expressed or implied permission. Court held there was coverage under Omnibus Statute. Statute requires coverage of any person using vehicle of an adult member of insured's household. Adult member of household is deemed capable of giving themselves permission to drive. Any adult member of household will be able to grant permission to use insured's vehicle or grant themselves to use insured's vehicle, thereby, establishing coverage under statute. *Arps v. Seelow*, 163 Wis. 2d 645, 472 N.W.2d 542 (Ct. App. 1991); *Home Ins. Co. v. Phillips*, 175 Wis. 2d 104, 499 N.W.2d 193 (Ct. App. 1993).

Insured was in accident while on duty as firefighter. Insured sought coverage under uninsured motorist coverage of personal automobile policy. Insurer denied cov-

erage based on use of non-owned emergency type vehicle. Court found coverage based on fact that insured's use of non-owned emergency type vehicle in connection with employment did not meet statutory requirements for "drive other car" exclusions. *Blazekovic v. City of Milwaukee*, 234 Wis. 2d 587, 610 N.W.2d 467 (2000).

Provision in automobile insurance policy preventing stacking of similar type policies does not have to follow exact language of Wis. Stat. § 632.32(5)(f) in order to be invalid. *Gragg v. American Fam. Mut. Ins.*, 248 Wis. 2d 735, 637 N.W.2d 477 (Ct. App. 2001).

Policy held to cover although employee permitted guest to ride in automobile contrary to instructions. *Hardware Mut. Cas. Co. v. Milwaukee Auto Ins. Co.*, 229 Wis. 215, 282 N.W. 27 (1938). Plaintiff, guest, and employee of third person was permitted to recover from insurer of third party's truck although truck was being used on third party's business and plaintiff was engaged in employment for third party. Exclusion clause in policy not material. *Buck v. Home Mut. Cas. Co.*, 258 Wis. 538, 46 N.W.2d 749 (1951).

Insured's son, age 22, who lived with his mother prior to entering Army was still adult member of his mother's household capable of giving permission to third person. *Raymond v. Century Indem. Co.*, 264 Wis. 429, 59 N.W.2d 459 (1953).

Liability is established although vehicle is operated by unlicensed, underage permittee. *Derusha v. Iowa Nat'l Mut. Ins. Co.*, 49 Wis. 2d 220, 181 N.W.2d 481 (1970).

Emergency exception to consent requirement does not apply where passenger grabbed steering wheel from unlicensed driver and driver's conduct indicated she did not consent. *Meshbeshier by Spence v. State Farm Mut. Auto Ins. Co.*, 157 Wis. 2d 473, 459 N.W.2d 615 (Ct. App. 1990)

Exclusion for damage caused by unlicensed driver under collision policy held valid and not in conflict with Wis. Stat. § 204.30 (renumbered 632.32(5)(e)). *Schaal v. Great Lakes Mut. Fire & Marine Ins. Co.*, 6 Wis. 2d 350, 94 N.W.2d 646 (1959).

"Family exclusion clause" valid in state of issuance, will be given effect in Wis., notwithstanding omnibus statute which forbids insurance policies from excluding coverage to persons related by blood or marriage. *Knight v. Heritage Mut. Ins. Co.*, 71 Wis. 2d 821, 239 N.W.2d 348 (1976).

Garage liability policy does not cover bailee's operation of loaned vehicle. *Maziasz v. Anderson*, 45 Wis. 2d 664, 173 N.W.2d 585 (1970).

Garage policy held not to cover auto owned by named insured. *Westerman v. Richardson*, 43 Wis. 2d 587, 168 N.W.2d 851 (1969).

Insurer owes coverage to father who sponsored son's license even though father's car was not involved in accident. *Klatt v. Zera*, 11 Wis. 2d 415, 105 N.W.2d 776 (1960); *Asleson v. Hardware Dealers Mut. Fire Ins. Co.*, 11 Wis. 2d 624, 106 N.W.2d 330 (1960); *Mancheski v. Derwae*, 11 Wis. 2d 467, 105 N.W.2d 773 (1960). Sponsor's liability under Wis. Stat. § 343.15(2)(b), not covered by sponsor's insurer. *Limpert v. Smith*, 56 Wis. 2d 632, 203 N.W.2d 29 (1973).

Father occasionally operating automobile of son in military service was excluded from non-ownership coverage on father's car where son was found to be member of his father's household. *Giese v. Karstedt*, 30 Wis. 2d 630, 141 N.W.2d 886 (1966).

Separate policy limits for minor driver and her parent were not required by omnibus statute, liability coverage provided to named insured applied in same manner and under same provisions to any permissive user. *La-Count v. General Cas. Co.*, 2006 WI 14, 709 N.W.2d 418. Insurer may not exclude coverage if vehicle covered under other policy. *Kettner v. Wausau Ins. Cos.*, 191 Wis. 2d 723, 530 N.W.2d 399 (Ct. App. 1995).

Auto dealer's liability policy held not to cover prospective purchaser unaccompanied by dealer or his representative. *Ruby v. Ohio Cas. Ins. Co.*, 37 Wis. 2d 352, 155 N.W.2d 121 (1967). "Customer" exclusion directed at risk, not person's status. *Johnson v. Heritage Mut. Ins. Co.*, 188 Wis. 2d 261, 524 N.W.2d 900 (Ct. App. 1994).

Adult member of household of owner of automobile had right to give permission to another to drive, but such permission was restricted to same use for which initial permission was granted. *Harper v. Hartford Accident & Indem. Co.*, 14 Wis. 2d 500, 111 N.W.2d 480 (1961).

Where employee was provided a car by employer specifically for travel from a Wisconsin to Illinois job site and was injured in Illinois returning from social engagement, Wisconsin law applies if substantial Wisconsin contacts. *Employers Ins. of Wausau v. Pelczynski*, 153 Wis. 2d 303, 451 N.W.2d 300 (Ct. App. 1989). Not every vehicle designed for roadway use is motor vehicle within meaning of Wis. Stat. § 632.32, coverage determined by purchaser. *Rea by and through Wargo v. Transportation Ins. Co.*, 191 Wis. 2d 271, 528 N.W.2d 79 (Ct. App. 1995).

Choice of Law. In determining which state's statute of limitations applies, courts look to "the final signifi-

cant event giving rise to a suable claim” to determine where the cause of action arises. *Abraham v. General Cas. Co. of Wisconsin*, 217 Wis. 2d 294, 576 N.W.2d 46 (1998).

**Direct Action Against Insurer.** Wis. Stat. §§ 803.04(2)(a) and (b) provide for joinder of insurance company as proper party in all cases where, by policy, insurer assumes or reserves right to control prosecution, defense, or settlement of claim or agrees to prosecute or defend action, to engage counsel, or to pay costs of litigation. Court may, in its discretion, order separate trial of cross issues pertaining to coverage and may order trial between plaintiff and insured as to issues of liability before determination of coverage. Canadian insurer’s policy, not issued or delivered in this state, was not subject to direct action statute. *Kenison v. Wellington Ins. Co.*, 218 Wis. 2d 700, 582 N.W.2d 69 (Ct. App. 1998).

Insurer shall be liable to persons entitled to recover for death of any person, or for injury to person or property, irrespective of whether such liability is presently established or is contingent and to become fixed or certain by final judgment against insured, such liability not to exceed amount stated in said bond or policy. Wis. Stat. § 632.24. Under this section automobile liability company is directly liable for negligence of operation, etc., on policies written in this state. *Heinzen v. Nuprienok*, 208 Wis. 512, 243 N.W. 448 (1932). Subcontractor’s insurer liable for indemnification under comprehensive general liability policy for negligence that caused contamination where remediation was ordered by Wisconsin DNR. *Wisconsin Pub. Serv. Corp. v. Heritage Mut. Ins. Co.*, 200 Wis. 2d 821, 548 N.W.2d 544 (Ct. App. 1996), *aff’d* 209 Wis. 2d 160, 561 N.W.2d 726 (1997).

Direct action statute will not be applied retroactively. *Hasselstrom v. Rex Chainbelt, Inc.*, 50 Wis. 2d 487, 184 N.W.2d 902 (1971).

Voluntary filing of resolution for foreign insurer constituted waiver of no-action clause. *Pinkerton v. United Servs. Auto Ass’n*, 5 Wis. 2d 54, 92 N.W.2d 256 (1958).

Insurer of non-moving tractor-trailer truck used during hay-loading operation could be sued directly. *Wiedenhaupt v. Van Der Loop*, 5 Wis. 2d 311, 92 N.W.2d 815 (1958).

No-action clause in policy issued in Illinois to Wisconsin corporation on trucks to be used in Wisconsin held void. *Schultz v. Hastings*, 5 Wis. 2d 265, 92 N.W.2d 846 (1958).

Automobile liability insurer issuing policy in Wisconsin may be interpleaded in loading and unloading

case notwithstanding no-action clause. *Ermis v. Federal Windows Mfg. Co.*, 7 Wis. 2d 549, 97 N.W.2d 485 (1959).

**Duty to Defend.** No duty to defend under homeowner’s liability policy covering property damage when only pecuniary damages are alleged. *Qualman v. Bruckmoser*, 163 Wis. 2d 361, 471 N.W.2d 282 (Ct. App. 1991). Conspiracy alleged against architect not covered by errors and omissions policy. *Grieb v. Citizens Cas. Co. of New York*, 33 Wis. 2d 552, 148 N.W.2d 103 (1967). Insurer owed no duty to defend insured in a sexual harassment case before the Equal Rights Division of DILHR (now known as Department of Workforce Development) where no “damages” were available to plaintiff in administrative action. *Nichols v. American Employers Ins. Co.*, 140 Wis. 2d 743, 412 N.W.2d 547 (Ct. App. 1987).

Duty to defend is based solely upon allegations of complaint. Insurer’s duty to defend focuses on nature of claim and not merits of claim. *Smith v. Katz*, 226 Wis. 2d 798, 595 N.W.2d 345 (1999). Insurer must defend all claims even if only some claims potentially fall within scope of coverage. *School Dist. of Shorewood v. Wausau Ins. Cos.*, 170 Wis. 2d 347, 488 N.W.2d 82 (1992). Defense tendered when insured puts insurer on notice of claim. *Towne Realty v. Zurich Ins. Co.*, 201 Wis. 2d 260, 548 N.W.2d 64 (1996). Insurer with valid coverage defense may avoid obligation to defend potentially covered claim only by staying proceedings in underlying action and resolving coverage issues prior to trial of insured’s liability and damages. *Elliott v. Donahue*, 169 Wis. 2d 310, 485 N.W.2d 403 (1992). Insurer is not required to pay costs of insured’s attorney fees expended solely in establishing coverage if insurer bifurcates issues of liability and coverage and stays the liability portion of case pending determination of coverage. *Reid v. Benz*, 245 Wis. 2d 658, 629 N.W.2d 262 (2001).

Notice to insurance company from one of its insureds of a lawsuit in a multi party lawsuit does not count as notice from any other potential insureds in same lawsuit. There is no duty to defend insured that fails to give notice of lawsuit. *Town of Mt. Pleasant v. Hartford Acc. & Indem. Co.*, 241 Wis. 2d 327, 625 N.W.2d 317 (Ct. App. 2001). If insurer is made aware of lawsuit against one of its insureds, then burden is on insurer to clarify needs of insured in connection with duty to defend. *Id.* Insurer has not breached its contractual duty to defend by denying coverage where the interest of coverage is clearly debatable as long as insurer provides coverage and defense once coverage is established. *Elliott v. Donahue*, 169 Wis. 2d 310, 45 N.W.2d 403 (1992); *Reid v. Benz*, 245 Wis. 2d 658, 629 N.W.2d 262 (2001).



Insurer may terminate duty to defend insured by tendering policy limits for settlement; however, the insured must receive adequate notice and the “tendered for settlements” language must be highlighted in the policy or binder in a conspicuous means (i.e. bold, italicized, or colored type), which gives the insured clear notice that insurer may be relieved of its duty to defend by tendering policy limits for settlement. *Gross v. Lloyds of London Ins. Co.*, 121 Wis. 2d 78, 358 N.W.2d 266 (1984).

**Liability Between Insurers.** Primary. Public liability policy and automobile policy may cover same risks and render both insurers jointly liable. *U.S. Guarantee Co. v. Liberty Mut. Ins. Co.*, 244 Wis. 317, 12 N.W.2d 59 (1943).

There is no contribution between insurers of same defendant until policy limit is paid and then only as to excess paid over one-half of judgment. *Frawley v. Kittel*, 254 Wis. 432, 37 N.W.2d 57 (1949).

In interpretation of “other insurance” provisions of automobile insurance policies, fundamental principle is protection of insured. Intent of parties should be given effect, and unless conflicting the provisions should be effectuated. Where provisions directly conflict, loss will be prorated. *Schoenecker v. Haines*, 88 Wis. 2d 665, 277 N.W.2d 782 (1979). Under “other insurance” clause of personal auto policy, insurer is liable for prorated share of police officer’s damages up to policy limit for officer’s injuries in course of employment. *Am. Family Mut. Ins. Co. v. City of Milwaukee*, 148 Wis. 2d 280, 435 N.W.2d 280 (Ct. App. 1988).

**Excess.** Where truck leased to employer was used by owner-employee for personal business, policy naming lessee and lessor was primary and policy naming only lessor was excess. *Continental Cas. Co. v. Transport Indem. Co.*, 16 Wis. 2d 189, 114 N.W.2d 137 (1962). Excess insurer may be liable where primary insurer becomes insolvent; dependent upon policy language. *Lechner v. Scharrer*, 145 Wis. 2d 667, 429 N.W.2d 491 (Ct. App. 1988). If two policies exist, one with pro rata clause, one with excess clause, pro rata policy is deemed primary. *Duncan v. Ehrhard*, 158 Wis. 2d 252, 461 N.W.2d 822 (Ct. App. 1992).

Where automobile, belonging to garage, was being operated by employee of customer at time of accident, employee was additional insured covered by policies of two insurers of garage, on pro-rata basis, and by insurer number three who insured employer, but as to excess only. *Lubow v. Morrissey*, 13 Wis. 2d 114, 108 N.W.2d 156 (1961).

**Who Is Insured.** Policy providing coverage to named insured and spouse while operating non-owned automobiles does not extend to son of named insured

when operating vehicle owned by third party. *Gray v. Rural Cas. Ins. Co.*, 47 Wis. 2d 663, 177 N.W.2d 817 (1970). Members of same household are not required to be under one roof to be in same household. *Ross v. Martini*, 204 Wis. 2d 354, 555 N.W.2d 381 (Ct. App. 1996). However, language that coverage only applies to a person who resides “primarily” in a certain household is unambiguous. *Bauer v. USAA Cas. Ins. Co.*, 2006 WI App. 152, ¶¶ 8,11, 295 Wis. 2d 481, 720 N.W.2d 187. If liability coverage for partnership names both partnership and individual partners as insureds, individual partners are covered for acts not necessarily related to status as partners. *Grotelueschen v. Am. Family Mut. Ins. Co.*, 171 Wis. 2d 437, 492 N.W.2d 131 (1992).

**Interest.** Insurer is liable under standard interest clause for interest on entire judgment, although in excess of policy limits. *McPhee v. Am. Motorists Ins. Co.*, 57 Wis. 2d 669, 205 N.W.2d 152 (1973). No liability for post-judgment interest where insurer tenders policy limits prior to judgment. *Weimer v. Country Mut. Ins. Co.*, 216 Wis. 2d 705, 575 N.W.2d 466 (1998).

**Exclusions. Intentional Acts.** In Wisconsin an “intentional-acts” exclusion precludes coverage where the insured acts intentionally and intends some harm or injury to follow from the act. *Loveridge v. Chartier*, 161 Wis. 2d 150, 168, 468 N.W.2d 146 (1991). Moreover, an intentional-acts exclusion precludes insurance coverage where an intentional act is substantially certain to produce injury even if the insured asserts, honestly or dishonestly, that he did not intend any harm and even if the harm that occurs is different in character or magnitude from that intended by the insured. *Id.* at 169. No coverage exists for an intended assault, even if mistaken identity. *Smith v. Keller*, 151 Wis. 2d 264, 444 N.W.2d 396 (Ct. App. 1989). In action for bystander’s emotional distress resulting from witnessing insured’s intentional commission of murder-suicide, insurer was dismissed, as policies contained exclusion for damage “expected or intended by insured.” *Ramharter v. Secura Ins.*, 159 Wis. 2d 352, 463 N.W.2d 877 (Ct. App. 1990). Policy language precluding coverage for intentional act of “any insured” barred coverage for all insureds. *Taryn E.F. by Grunewald v. Joshua M.C.*, 178 Wis. 2d 719, 505 N.W.2d 418 (Ct. App. 1993). The court held that the intentional acts exclusion precluded coverage where parents were held financially responsible under statute, because underlying cause of their exposure under statute was sexual molestation, which was an intentional act. *Id.* Resisting arrest is not intentional act. *Ludwig v. Dulkan*, 217 Wis. 2d 782, 579 N.W.2d 795 (Ct. App. 1998). Intentional acts exclusion precludes coverage for one who knew or should have known of sexual abuse by one’s spouse. *Jessica M.F. v. Liberty Mut. Fire Ins. Co.*, 209 Wis. 2d 42, 561 N.W.2d 787 (Ct. App. 1997).



**Workers' Compensation Exclusion.** Fellow employee exclusion clause applies where injured party and tortfeasor are employees of named insured and injury arises in course of work duties. *Dahm v. Employers Mut. Liability Ins. Co.*, 74 Wis. 2d 123, 246 N.W.2d 131 (1976). Wis. Stat. § 204.34(5) (renumbered as Wis. Stat. § 632.32) requires that exclusion from coverage in automobile policy as to bodily injury sustained by passenger including co-employees, be stated prominently on face of policy in contrasting color. *Davison v. Wilson*, 71 Wis. 2d 630, 239 N.W.2d 38 (1976). However, any clause making an exclusion provision inapplicable is considered an attempt to extend coverage to the persons previously excluded, which acts as a waiver of the Exclusive Remedy provisions of Workers' Compensation law (Wis. Stat. § 102.03), allowing a plaintiff to pursue remedies other than Workers' Compensation. *Maas v. Ziegler*, 172 Wis. 2d 70, 492 N.W.2d 621 (1992).

**Collision Exclusion.** Policy for damage from "missiles or falling objects," but excluding "collisions," held to cover all damage when chunk of ice flew off passing bus and hit car, causing it to go out of control and into an embankment. *Guenther v. Am. Indem. Co.*, 246 Wis. 478, 17 N.W.2d 570 (1945).

**Auto Exclusion.** Where pedestrian was killed by village truck, village was insured against liability arising out of street or road construction, but policy excluded coverage for accident caused by operation of truck, there was neither coverage nor liability to assume defense of action, regardless of allegations in complaint of negligence of village. *Village of Luck v. Hardware Mut. Cas. Co.*, 268 Wis. 223, 67 N.W.2d 306 (1954).

**Insured's Own Property Exclusion.** Insurer held not liable for damage to tractor leased to and operated by insured under exclusion in policy for injury to property owned by, rented to, in charge of, or transported by insured. *Faust v. Dawes*, 257 Wis. 353, 43 N.W.2d 365 (1950). Owned property exclusion applied to off-site contamination where origin of contamination was city property. *State, et al. v. City of Rhinelander*, 2003 WI App. 87, 263 Wis. 2d 311, 661 N.W.2d 509. Coverage precluded for environmental remediation costs under an umbrella policy's "owned property" exclusion. *Id.*

**Racing Exclusion.** Policy exclusion relating to racing held invalid. *Krempel v. Noltze*, 41 Wis. 2d 454, 164 N.W.2d 227 (1969).

**Pollution Exclusion.** Absolute pollution exclusion dependent on fact or occurrence of property damage. *Prod. Stamping Corp. v. Maryland Cas. Co.*, 199 Wis. 2d 322, 544 N.W.2d 584 (Ct. App. 1996). Pollution exclusion does not preclude coverage where pollution is neither expected nor intended by insured; terms "sud-

den" in exception to exclusion means "unexpected." *Just v. Land Reclamation, Ltd.*, 155 Wis. 2d 737, 456 N.W.2d 570 (1990). Operation of gravel pit constituting long continuing nuisance is not "accident" within meaning of liability policy. *Clark v. London & Lancashire Indem. Co. of Am.*, 21 Wis. 2d 268, 124 N.W.2d 29 (1963). Absolute pollution unambiguously precluded coverage for cost of cleanup of fuel spill. *Am. States Ins. Co. v. Skrobis Painting & Decorating, Inc.*, 182 Wis. 2d 445, 513 N.W.2d 695 (Ct. App. 1994). The meaning of the term "contaminant" in an insurance contract pollution exclusion is well settled in Wisconsin, and not susceptible to multiple interpretations. *Landshire Fast Foods v. Employers Mut. Cas.*, 2004 WI App. 29, 269 Wis. 2d 775, 676 N.W.2d 528.

**Insured's Product Exclusion.** Where comprehensive general liability insurance policy excluded both property damage to insured's products arising out of such products and property damage to work performed by or on behalf of insured, there is coverage for damage to other tangible property caused by defect in product or work. *Sola Basic Indus., Inc. v. U.S. Fidelity & Guar.*, 90 Wis. 2d 641, 280 N.W.2d 211 (1979). However, if insured's defective product does not render claimant's other property "unusable," loss of use damages are not recoverable. *Trio's, Inc. v. Jones Sign Co.*, 151 Wis. 2d 380, 444 N.W.2d 443 (Ct. App. 1989). Wisconsin adopts rule that comprehensive general liability policy containing certain exclusionary language does not afford coverage to business risk. *Am. Fam. Mut. Ins. Co. v. Am. Girl, Inc.*, 2004 WI 2, 268 Wis. 2d 16, 673 N.W.2d 65; *Bulen v. West Bend Mut. Ins. Co.*, 125 Wis. 2d 259, 371 N.W.2d 392 (Ct. App. 1985); *Jacob v. Russo Builders*, 224 Wis. 2d 436, 592 N.W.2d 271 (Ct. App. 1999).

The business risk exclusion also excludes coverage for repair or replacement damages associated with the insured's faulty workmanship or property damage to the insured's own work or product. *Am. Fam. Mut. Ins. Co. v. Am. Girl, Inc., supra.*

**Business Pursuits Exclusion.** When there is an exception to business pursuits exclusion in homeowner's policy, coverage will extend to liability which arises, even if connected with business purposes of insured, where act or omission is ordinarily not associated with or related to insured's business pursuits. *Bartel v. Carey*, 127 Wis. 2d 310, 379 N.W.2d 864 (Ct. App. 1985). "Business pursuit" exclusion of homeowner's policy does not offend public policy as expressed in statute permitting co-employee suits. There are two elements necessary to show business pursuits: continuity and profit motive. *Bertler v. Employers Ins.*, 86 Wis. 2d 13, 271 N.W.2d 603 (1978).

Insured's homeowner's policy excluded coverage under "business pursuits exclusion" clause for negligent supervision and wrongful death when defendant, who had been hired by plaintiffs to provide day care for son, took him to the beach where son disappeared and drowned. *Ruff v. Graziano*, 220 Wis.2d 513, 583 N.W.2d 185 (Ct. App. 1998).

Coverage under the exception to the business pursuits exclusion must be extended to liabilities arising from an act or admission, even though the act or admission is connected in some manner with the insured's business pursuits, as long as the act or admission is also connected in some manner with an activity ordinarily not associated with the insured's business pursuits. The court held that a parent's alleged negligent supervision of her child while providing home day care to other children fell within the exception to the business pursuits exclusion. *Vandenberg v. Continental Ins. Co.*, 2001 WI 85, 244 Wis. 2d 802, 628 N.W.2d 876.

Malpractice/Professional Service Exclusion. Under malpractice/professional service exclusion, production of prefabricated home is not a professional service. *Leverence v. U.S. Fidelity & Guar.*, 158 Wis. 2d 64, 462 N.W.2d 218 (Ct. App. 1990), *overruled on other grounds*.

Liquor Liability Exclusion. VFW hall, although non-profit, was in business of selling liquor and exclusion applied. *Sprangers v. Greatway Ins. Co.*, 182 Wis. 2d 521, 514 N.W.2d 1 (1994).

Definition. Insured Location. There must be a correlation between negligence giving rise to liability and condition of premises for exclusion for liability arising out of premises owned or rented to insured, which are not the insured location to apply. *Newhouse v. Laidig, Inc.*, 145 Wis. 2d 236, 426 N.W.2d 88 (Ct. App. 1988).

Occupant. Physical contact with automobile is not necessary for person to be termed "occupant" under automobile insurance policies. The question of when process of alighting is complete rests with the facts of each case. *Sentry Ins. Co. v. Providence Washington Ins. Co.*, 91 Wis. 2d 457, 283 N.W.2d 455 (Ct. App. 1979); *Quinlan v. Coombs*, 105 Wis. 2d 330, 314 N.W.2d 125 (Ct. App. 1981). The test for determining whether a person is "occupying" a vehicle is whether the party was vehicle-oriented or highway-oriented at the time of the injury, which involves a consideration of the nature of the act engaged in at the time of the injury and the intent of the person injured, as well as whether the party was "within the reasonable geographical perimeter of the vehicle." *Kreuser v. Heritage Mut. Ins. Co.*, 158 Wis. 2d 166, 172, 461 N.W.2d 806 (Ct. App. 1990).

Unloading. Accident resulting from delivery of gasoline instead of oil and attempting to correct error constituted unloading within meaning of liability coverage. *Peterson v. Sinclair Refining Co.*, 20 Wis. 2d 576, 123 N.W.2d 479 (1963). Loading and unloading coverage applies to trucker in stacking lumber on ground at construction site. "Complete operation" doctrine adopted. *Komorowski v. Kozicki*, 45 Wis. 2d 95, 172 N.W.2d 329 (1969). There is no coverage under trucker's insurance for defective unloading facilities. *Continental Nat'l Ins. v. Carriers Ins. Co.*, 55 Wis. 2d 533, 200 N.W.2d 584 (1972); *Sampson v. Laskin*, 66 Wis. 2d 318, 224 N.W.2d 594 (1975). To be covered, a party must have been actively or actually participating in the loading or unloading process. *Bauer v. Century Sur. Co.*, 2006 WI App. 113, ¶¶ 14-16, 293 Wis. 2d 382, 718 N.W.2d 163. Where truck driver unloading beer opened trap door in sidewalk and then moved truck to permit another car to move in traffic and pedestrian fell into trap door opening—truck, driver was engaged in unloading. *Hardware Mut. Cas. Co. v. St. Paul Mercury Indem. Co.*, 264 Wis. 230, 58 N.W.2d 646 (1953).

Use of Auto. Truck driver's fall on ice near loading dock area did not come within "use" provision of his employer's automobile liability policy because vehicle was merely transportation to the scene of the accident and ice was a subsequent "independent force" that caused his fall. *Saunders v. Nat'l Dairy Prods. Corp.-Kraft Foods Div.*, 39 Wis. 2d 575, 159 N.W.2d 603 (1968). Insured, when passenger in his own car, is covered under "use" clause of policy when operation by additional insured with his permission benefits him directly or indirectly; hence, insured is subject to comparative negligence statute in suit by deceased operator's estate. *Blashaski v. Classified Risk Ins. Corp.*, 48 Wis. 2d 169, 179 N.W.2d 924 (1970). A step-parent's call and gesture to step-daughter to cross road and enter stopped vehicle constitutes use of vehicle. *Garcia v. Regent Ins. Co.*, 167 Wis. 2d 287, 481 N.W.2d 660 (Ct. App. 1992). Independent act causing gasoline to be discharged on plaintiff's property is not "caused by" insured's truck even under broad "arising out of the use of" provision. *Lee & Assocs., Inc. v. Peters*, 206 Wis. 2d 509, 557 N.W.2d 457 (Ct. App. 1996).

Customer Exclusion. Person not intending to purchase car, but who test drives car, was "customer" within car dealerships garage liability policy exclusion. *Johnson v. Heritage Mut. Ins. Co.*, 188 Wis. 2d 261, 524 N.W.2d 900 (Ct. App. 1994).

Turning on ignition key of customer's automobile by service station attendant is "use" of premises of station and not "use" of automobile and, therefore, is cov-



ered by garage policy. *Gullickson v. Western Cas. & Sur. Co.*, 17 Wis. 2d 220, 116 N.W.2d 121 (1962).

Person holding spare tire against rear bumper of automobile held entitled to medical payment benefits as being “upon” automobile. *Moherek v. Tucker*, 69 Wis. 2d 41, 230 N.W.2d 148 (1975).

Where homeowner’s policy excluded coverage for liability for bodily injury arising out of ownership, maintenance, operation, or use of any motor vehicle, coverage was excluded for automobile accidents that occurred after insured’s negligent entrustment of automobile to minor son. *Mut. Serv. Cas. Co. v. Koenigs*, 110 Wis. 2d 522, 329 N.W.2d 157 (1983). Motorist’s assault upon a police officer did not arise out of use of automobile. *Tomlin v. State Farm Mut. Auto Liab. Ins. Co.*, 95 Wis. 2d 215, 290 N.W.2d 285 (1980). There must be some causal relationship between the injury and the risk for which coverage is provided; the injury must have some causal relationship to the inherent use of the vehicle. Firing a pistol into an auto full of people found not arising out of use of automobile. *Snouffer v. Williams*, 106 Wis. 2d 225, 316 N.W.2d 141 (Ct. App. 1982). Court held not arising from use of truck where motorist approached jogger in truck, pulled her into truck, murdered her in truck, and used truck to drive away. *Van Dyn Hoven v. Pekin Ins. Co.*, 2002 WI App. 256, 258 Wis. 2d 133, 653 N.W.2d 320.

**Family Exclusion.** The Family Exclusion Clause precludes coverage for any insured or resident of the household. The Family Exclusion Clause is valid involving both a direct suit against an insured family member or an indirect action, such as the contribution claim by a third party. The liability faced by the family member is identical whether a direct or indirect claim is made. *Rabas v. Claim Mgmt. Servs., Inc.*, 205 Wis. 2d 483, 556 N.W.2d 410 (Ct. App. 1996).

**Residents of Household.** Persons unrelated by blood, marriage, or adoption who are living together under the same roof can be considered “residents of same household” under “Drive-Other-Cars” clause in auto liability policy. *Quinlan v. Coombs*, 105 Wis. 2d 330, 314 N.W.2d 125 (Ct. App. 1981). An adult live-in girlfriend was considered a resident of household, and the court established the “deemed permission” rule, which allows an adult resident of a household to give herself permission to drive an insured vehicle. *Arps v. Seelow*, 163 Wis. 2d 645, 472 N.W.2d 542 (Ct. App. 1991). However, the “deemed permission” rule does not apply to a rental car, which is not owned by the insured and not described in the policy. *Venerable v. Adams*, 2009 WI App. 76, 2009 WL 1119268. Legal custody coupled with parent’s intent to continue long established living situation sufficient to establish residency even if child tempo-

rarily absent from household. *Ross v. Martini*, 204 Wis. 2d 354, 555 N.W.2d 381 (Ct. App. 1996).

SR-21. Where insurer issued operator’s liability policy to husband together with certificate filed with Department of Motor Vehicles and where insured was involved in accident while driving vehicle then registered in wife’s name, insurer was estopped to deny liability coverage. *Van Erem v. Dairyland Mut. Ins. Co.*, 5 Wis. 2d 450, 93 N.W.2d 511 (1958). Filing of SR-21 estopped insurer from denying coverage. *Challoner v. Pennings*, 6 Wis. 2d 254, 94 N.W.2d 654 (1959). No estoppel where insurer alleges that insured failed to obtain permission from owner. Insurer of operator is not required to file SR-21. *Nelson v. Zeimetz*, 150 Wis. 2d 785, 442 N.W.2d 530 (Ct. App. 1989).

SR-22. Wisconsin’s Financial Responsibility Law, Chapter 344, Wisconsin Statutes, is divided into two subchapters: 1) Security for Past Accidents, Wis. Stat. §§ 344.12 to 344.22, and 2) Proof of Financial Responsibility for the Future, Wis. Stat. §§ 344.24 to 344.41. Under the Proof of Financial Responsibility for the future subchapter, motorists whose licenses have been revoked because of poor driving records are required to supply proof of financial responsibility in order to have their operator’s license reinstated. *Nutter v. Milwaukee Ins. Co.*, 167 Wis. 2d 449, 481 N.W.2d 701 (Ct. App. 1992)

The methods by which motorists may satisfy the financial responsibility requirement as specified in Wis. Stat. § 344.30. One method is by providing certification of insurance. Wis. Stat. § 344.31. The purpose of the financial responsibility statute is to provide a method of compensating for damages that may result from future accidents caused by negligence of the operator with a court driving record. The financial responsibility statutes described above only apply to motor vehicle liability policies. It does not apply to additional insurance coverages such as uninsured motorist coverage. *Nutter v. Milwaukee Ins. Co., supra.*

**Temporary Substitute Auto.** Newly acquired automobile covered by policy although it was not replacement. *Luckett v. Cowser*, 39 Wis. 2d 224, 159 N.W.2d 94 (1968). A substitute for a leased vehicle is also covered, despite the fact that it is not owned by driver/insured. *Binon v. Philadelphia Indem. Ins. Co.* 218 Wis. 2d 38, 580 N.W.2d 365 (Ct. App. 1998).

“Automatic insurance” clause covers temporary substitute or replacement automobile notwithstanding failure to give notice. *Offerdahl v. Glasser*, 5 Wis. 2d 498, 93 N.W.2d 362 (1958); *Binion v. Philadelphia Indem. Ins. Co.*, 218 Wis. 2d 38, 580 N.W.2d 365 (Ct. App. 1998). Farm truck held to be temporary substitute



automobile. *Lewis v. Bradley*, 7 Wis. 2d 586, 97 N.W.2d 408 (1959). Motorcycle is not temporary substitute automobile within meaning of automobile liability policy. *Mittelstadt v. Bovee*, 9 Wis. 2d 44, 100 N.W.2d 376 (1960). A “temporary substitute automobile” is one that must be used for the same purpose as a regular automobile. *Strozewski v. Am. Family Mut. Ins. Co.*, 46 Wis. 2d 123, 174 N.W.2d 550 (1970).

“Auto.” A farm tractor is not a motor vehicle within Wis. Stat. § 632.32(2)(a). Wisconsin adopts majority rule that vehicle can reach condition of such disrepair that it can no longer be considered automobile for insurance purposes. *State Farm Mut. Auto Ins. Co. v. Recheck*, 125 Wis. 2d 7, 370 N.W.2d 787 (Ct. App. 1985).

Waiver. Statute limiting effect of conditions in employers’ liability policies, Wis. Stat. § 632.25, applies to conditions, not exclusions, in policy. *Bortz v. Merrimac Mut. Ins. Co.*, 92 Wis. 2d 865, 286 N.W.2d 16 (Ct. App. 1979).

Reservation of Rights. Insurance company, under written disclaimer, may, without prejudice to its right on coverage, defend named insured in action by third person. *Glatz v. Kroger Bros.*, 175 Wis. 42, 183 N.W. 683 (1921); *Sanderfoot v. Sherry Motors, Inc.*, 33 Wis. 2d 301, 147 N.W.2d 255 (1967); *Mowry v. Badger State Mut. Cas. Co.*, 129 Wis. 2d 496, 385 N.W.2d 171 (1986); *Hickey v. Wisconsin Mut. Ins. Co.*, 238 Wis. 433, 300 N.W. 364 (1941). Insurer may not require insured to sign reservation of rights agreement. *Wisconsin Transp. Co. v. Great Lakes Cas. Co.*, 241 Wis. 523, 6 N.W.2d 708 (1942).

Insurer that assumed defense under reservation of rights and made settlement was not entitled to reimbursement from insured on theory of unjust enrichment, but is entitled to reimbursement on theory of implied promise to reimburse. *Gen. Accident Fire & Life Assur. Corp. v. Bergquist*, 15 Wis. 2d 166, 111 N.W.2d 900 (1961). Insurer defending lawsuit under reservation of rights is authorized to bring action for declaratory relief. *Iowa Nat’l Mut. Ins. Co. v. Liberty Mut. Ins. Co.*, 43 Wis. 2d 280, 168 N.W.2d 610 (1969).

Liability insurer faced with an insured’s request for a defense against an underlying suit can use the following procedures to preserve the right to challenge coverage: (1) the insurer and the insured can enter into a non-waiver agreement in which the insurer would agree to defend, and the insured would acknowledge the right of the insurer to contest coverage; (2) the insurer can request a bifurcated trial or a declaratory judgment so that the coverage issue can be resolved before the liability and damage issues; or (3) the insurer can file a reservation of rights which allows the insured to pursue his or

her own defense not subject to the insurer’s control, but the insurer agrees to pay for the legal fees incurred. *Radke v. Fireman’s Fund Ins. Co.*, 217 Wis. 2d 39, 577 N.W.2d 366 (Ct. App. 1998).

Insolvency of Insured. Every liability insurance policy must provide that bankruptcy or insolvency of the insured does not diminish any liability of the insurer to third parties. Wis. Stat. § 632.22. Sole recourse for loss of liability insurance caused by insurer liquidation is through WISF, which was created to provide coverage in event of insurer insolvency. *Faber v. Musser*, 207 Wis. 2d 132, 557 N.W.2d 808 (1997).

Jury. In automobile accident case where two prospective jurors held non-assessable liability policies with plaintiff’s liability insurer, where one had long acquaintance with plaintiff, and another had sold to plaintiff current insurance policy on his home, such jurors were not disqualified as matter of law. *Kanzenbach v. S.C. Johnson & Son, Inc.*, 273 Wis. 621, 79 N.W.2d 249 (1957).

Voir dire examination on subject of insurance is limited. Disclosure of insurance limits is prejudicial error. *Filipiak v. Plombon*, 15 Wis. 2d 484, 113 N.W.2d 365 (1962).

Notice. Statutory provision of notice of accident provides, in substance, that notice or proof of loss included in first class postage prepaid envelope addressed to insurer is sufficient. Wis. Stat. § 631.81.

Insured need not make report unless he has reasonable grounds to believe he has been involved in accident. *Vande Leest v. Basten*, 241 Wis. 509, 6 N.W.2d 667 (1942). Wis. Stat. § 631.81(2) requires that insured send notice of accident to insurer; it does not require that notice be received. *Heimbecher v. Johnson*, 258 Wis. 200, 45 N.W.2d 610 (1951).

Letter from claimant’s attorney received by insured is sufficient notice of claim. Insured who did not notify insurer until 23 months later violated condition of this policy. *Al Shallock, Inc. v. Zurich Gen. Accident & Liab. Ins. Co.*, 266 Wis. 265, 63 N.W.2d 89 (1954).

Where defendant insurer pleaded failure to comply with required written notice of accident by insured and where attorneys were retained by insurer to conduct investigation, it was held that such attorneys could be subject to adverse examination by plaintiff. *Tomek v. Farmers Mut. Auto Ins. Co.*, 268 Wis. 566, 68 N.W.2d 573 (1955).

Failure to forward process until after insured’s deposition had been taken by plaintiff’s attorney did not constitute breach of condition of policy unless insurer proved prejudice. *Stippich v. Morrison*, 12 Wis. 2d 331, 107 N.W.2d 125 (1961); see also Wis. Stat. § 631.81(1).

Lack of notice does not bar liability under insurance policy unless insurer is prejudiced by the failure, but risk of non-persuasion rests on the party claiming no prejudice. *Neff v. Pierzina*, 2001 WI 95, 245 Wis.2d 285, 629 N.W.2d 177 (2001). Statute requires insured give notice as soon as reasonably possible and within one year of time required by policy. Failure to do so results in rebuttable presumption of prejudice to insurer. *Gerrard Realty Corp. v. Am. States Ins. Co.*, 89 Wis.2d 130, 277 N.W.2d 863 (1979). Determination of whether notice given as soon as practical based on all facts and circumstances; insurer has burden of proving untimely notice. *N.N. by Donovan v. Moraine Mut. Ins. Co.*, 148 Wis.2d 311, 434 N.W.2d 845 (Ct. App. 1988), *rev'd on other grounds*, 153 Wis.2d 84, 450 N.W.2d 445 (1990).

**Punitive Damages.** A homeowner's liability insurance policy that covered "all sums which insured shall become legally obligated to pay as damages because of bodily injury" was broad enough to obligate insurer to pay treble damages imposed under statute upon insured owner/or keeper for injury to person by dog after being notified of prior injury to person. Wis. Stat. § 174.02; *Cieslewicz v. Mutual Serv. Cas. Ins. Co.*, 84 Wis.2d 91, 267 N.W.2d 595 (1978). Such language also covers punitive damages. *Brown v. Maxey*, 124 Wis.2d 426, 369 N.W.2d 677 (1985).

**Premium.** Where policy extended coverage for 60 days after death of named insured, no notice was given to insurer, and accident occurred 94 days after death, it was held that insurer's retention of renewal premium until after action was commenced did not create estoppel. *Whirry v. State Farm Mut. Auto. Ins. Co.*, 263 Wis.2d 322, 57 N.W.2d 330 (1953).

**Policy Limits.** Wife and children of individual seriously injured in motor vehicle accident are not entitled to medical expenses and loss of consortium damages in excess of bodily injury limitation under automobile insurance policy since policy plainly and unambiguously limited recovery for bodily injury for each person to \$100,000 where only one person was injured. *Richie v. Am. Family Mut. Ins. Co.*, 140 Wis.2d 51, 409 N.W.2d 146 (Ct. App. 1987). An insurer admitting coverage and failing to plead limits of policy or to introduce policy into evidence is liable for judgment in excess of the limits despite the absence of bad faith. *Price v. Hart*, 166 Wis.2d 182, 480 N.W.2d 249 (Ct. App. 1991).

A single policy owner with multiple vehicles may not stack liability coverage. *Agnew v. Am. Family Mut. Ins. Co.*, 150 Wis.2d 341, 441 N.W.2d 222 (1989). Further, two separate policies applicable to a truck and trailer may not be stacked under one loss because they were insured for different risks. *Weimer v. Country Mut. Ins. Co.*, 216 Wis.2d 705, 575 N.W.2d 466 (1998).

No stacking where son listed as occasional user found to be regular user and excluded under regular user exclusion. *Martin v. Am. Family Mut. Ins. Co.*, 2002 WI 40, 252 Wis.2d 103, 643 N.W.2d 452.

Action by husband for his own injuries and for wrongful death of his wife seeks recovery for two separate injuries and, therefore, is within upper limits of 10/20 policy. *Ryan v. Friede*, 18 Wis.2d 138, 118 N.W.2d 208 (1962).

An automobile liability insurer may stipulate as to liability without admitting damages. *Chitek v. Horn*, 257 Wis.2d 9, 42 N.W.2d 162 (1950).

Where several claims arising from one accident are joined in one suit against insurer whose maximum liability under policy is inadequate to pay in full amounts to the claimants entitled, proceeds are to be distributed on pro rata basis; amounts recovered through "Pierringer" releases are irrelevant to pro rata distribution. *Wondrowitz v. Swenson*, 132 Wis.2d 251, 392 N.W.2d 449 (Ct. App. 1986).

**Medical Payment.** A provision in automobile policy was held as a separate contract permitting guest to recover medical expenses under said provisions and also against tortfeasor. *Severson v. Milwaukee Auto Ins. Co.*, 265 Wis.2d 488, 61 N.W.2d 872 (1953). An insured could recover under medical payments clause notwithstanding recovery under contract with Blue Cross. *Kopp v. Home Mut. Ins. Co.*, 6 Wis.2d 53, 94 N.W.2d 224 (1959). Collateral source rule applies to medical expenses paid under Medicare program as well as under private health insurance plan. *Merz v. Old Republic Ins. Co.*, 53 Wis.2d 47, 191 N.W.2d 876 (1971).

**Investigation.** Statement made by insured to his liability insurer prior to commencement of litigation is held not privileged. *Jacobi v. Podevels*, 23 Wis.2d 152, 127 N.W.2d 73 (1964). However, while routine reports to an insurer are not protected, other material and information "collected and adopted by a lawyer after retainer in preparation of litigation...[should] be initially classified as work product of the lawyer and not subject to inspection or discovery unless good cause for discovery is shown." *State ex rel. Dudek v. Circuit Court for Milwaukee County*, 34 Wis.2d 559, 589, 150 N.W.2d 387, 404-05 (1967). Statement of witness taken by attorney is required to be produced where witness takes stand. *Wiegand v. Gissal*, 28 Wis.2d 488, 137 N.W.2d 412 (1965).

## LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables; Wis. Stat. Ch. 893.

In Contract. A provision in policy that no action be sustained unless commenced within twelve months after fire is valid, and limitation runs from date of fire. *Rite-way Builders, Inc. v. First Nat'l Ins.*, 22 Wis. 2d 418, 126 N.W.2d 24 (1964). Such provision may be waived by parties, or company may estop itself by its acts from taking advantage thereof, *Killips v. Putnam Fire Ins.*, 28 Wis. 472 (1871), or where company at all times admitted liability, *Frels v. Little Black Farmers Mut. Ins. Co.*, 120 Wis. 590, 98 N.W. 522 (1904). Wis. Stat. § 893.43 provides that “[a]n action upon any contract, obligation or liability...shall be commenced within 6 years after cause of action accrues or be barred.”

Accrual. Where adoption agency voluntarily represented child’s health as perfect, which it was not, action for negligent misrepresentation accrues when it’s demonstrated to reasonable degree of medical certainty that extensive medical care will be incurred. *Meracle v. Children’s Serv. Soc’y*, 149 Wis. 2d 19, 437 N.W.2d 532 (1989).

Continuum of negligent medical treatment adopted in *Tamminen* applies to successive actors as well as single actor. *Robinson by Robinson v. Mount Sinai Med Ctr.*, 137 Wis. 2d 1, 402 N.W.2d 711 (1987).

Discovery Rule. Under the “discovery rule,” tort claims accrue at time injury is discovered or with reasonable diligence should have been discovered, whichever occurs first. *Hansen v. A.H. Robins, Inc.*, 113 Wis. 2d 550, 335 N.W.2d 578 (1983). Plaintiffs action for medical malpractice brought 22 years after surgery performed on him when he was 5½ months old, and which allegedly rendered him sterile, was subject to the discovery rule, and where plaintiff’s action did not accrue at time of injury, but rather at time claim was discovered or with reasonable diligence should have been discovered. *Kohnke v. St. Paul Fire & Marine Ins. Co.*, 140 Wis. 2d 80, 410 N.W.2d 585 (Ct. App. 1987), *aff’d*, 144 Wis. 2d 352, 424 N.W.2d 191 (1988). Assault and battery claim accrues when plaintiff discovers, or with reasonable diligence should have discovered, identity of tortfeasor. *Spitler v. Dean*, 148 Wis. 2d 630, 436 N.W.2d 308 (1989). To bring a timely action, it is not the injury that the plaintiff must discover, but rather it must be shown that the “nature of injury” is or reasonably ought to have been known to plaintiff. *Borello v. U.S. Oil Co.*, 130 Wis. 2d 397, 388 N.W.2d 140 (1986) (holding also that *Hansen v. A.H. Robins* may be applied retroactively to causes of action that occurred prior to the *Hansen* mandate). Plaintiff must make reasonably diligent inquiry into status of defendant to see if 120-day notice of claim is required. *Renner by Renner v. Madison Gen. Hosp.*, 151 Wis. 2d 885, 447 N.W.2d 97 (Ct. App. 1989). No cause of action where plaintiff “repressed”

memory of sexual abuse for 27 years. *Pritzlaff v. Archdiocese of Milwaukee*, 194 Wis. 2d 302, 533 N.W.2d 780 (1995).

An absolute bar to any recovery for injuries resulting from medical malpractice after passage of five years from date of act or omission of negligence did not create an impermissible classification of tortfeasors in violation of equal protection under the law. *Miller v. Kretz*, 191 Wis. 2d 573, 531 N.W.2d 93 (Ct. App. 1995).

Wisconsin Statute § 893.12, which extends the statute of limitations to three years from date of last payment by insurer, applies only when plaintiff personally receives such payment. *Riley v. Doe*, 152 Wis. 2d 766, 449 N.W.2d 83 (Ct. App. 1989). “Payment” under Wis. Stat. § 885.285 must be related to considerations of fault or liability to toll or extend statute of limitations under Wis. Stat. § 893.12. *Gurney v. Heritage Mut. Ins. Co.*, 188 Wis. 2d 68, 523 N.W.2d 193 (Ct. App. 1994).

The partial payment by surety to hospital prior to expiration of statute of limitations period tolled statute and set it running from date of payment, thereby preserving hospital’s claim against Principle. *St Mary’s Hosp. Med. Ctr. v. Tarkenton*, 103 Wis. 2d 422, 309 N.W.2d 14 (Ct. App. 1981).

Specific Time Limitations. Statute provides that no policy of insurance shall be delivered in this state limiting time for beginning action on policy to time less than that prescribed by statute of limitations of this state or specifically authorized by law. Wis. Stat. § 631.83(3). See also *Nixon v. Farmers Ins. Exch.*, 56 Wis. 2d 1, 201 N.W.2d 543 (1972).

The court has held that a surety’s right of action against principal is barred after six years. *Maryland Cas. Co. v. Beleznav*, 245 Wis. 390, 14 N.W.2d 177 (1944).

Where plaintiff’s action against insurer commenced within 2 year limitation, the action was not defeated by his failure to commence action against insured within two years. *Kujawa v. American Indem. Co.*, 245 Wis. 361, 14 N.W.2d 31 (1944).

Where Plaintiff’s action against tortfeasor was commenced within two-year limitation, insurer was proper party, although not served with complaint until after two-year period. *Doucha v. Mayer*, 249 Wis. 453, 25 N.W.2d 80 (1946).

The six year statute governs action by insured against insurer under uninsured motorists endorsement; statute begins to run at time of breach. *Effert v. Heritage Mut. Ins. Co.*, 160 Wis. 2d 520, 466 N.W.2d 660 (Ct. App. 1990); *Sahloff v. Western Cas. & Sur. Co.*, 45 Wis. 2d 60, 171 N.W.2d 914 (1969).

Wis. Stat. § 893.92 provides a one year limitation as to action for contribution based on tort.

Subcontractor must commence suit against surety of prime contractor that furnished bond within one year and completed its work under principal contract. *Honeywell, Inc. v. Aetna Cas. & Sur. Co.*, 52 Wis. 2d 425, 190 N.W.2d 499 (1971).

Wis. Stat. § 893.87, which allows state 10 years to commence action, applies only where action is of such type that it does not fall under any other limitations set forth in limitations chapter of statutes. *State v. Holland Plastics Co.*, 111 Wis. 2d 497, 331 N.W.2d 320 (1983).

A malpractice action based on breach of contract is governed by same statute of limitations that is applicable to malpractice action sounding in tort. *Kohls' Estate v. Brah*, 57 Wis. 2d 141, 203 N.W.2d 666 (1973). See also *Acharya v. Carroll*, 152 Wis. 2d 330, 448 N.W.2d 275 (Ct. App. 1989).

Action is commenced for purposes of statute of limitations if Summons and Complaint are filed with Court before statutory period has passed and Court then has subject matter jurisdiction. Wis. Stat. §§ 801.02 and 893.02. Plaintiff then has 90 more days to obtain personal jurisdiction over any defendant in action. *Id.*

Wis. Stat. § 893.89 applies to real property improvements substantially completed after effective date of statute. *United States Fire Ins. Co. v. E. D. Wesley Co.*, 105 Wis. 2d 305, 313 N.W.2d 833 (1982).

Wis. Stat. § 893.89 protects persons involved in design, planning, or construction of improvements to real property, not manufacturers of component parts incorporated into improvement. *Swanson Furniture Co. v. Advance Transformer Co.*, 105 Wis. 2d 321, 313 N.W.2d 840 (1982).

The statute of limitations does not begin to run in medical malpractice case until continuous negligent conduct has ceased. *Tamminen v. Aetna Cas. & Sur. Co.*, 109 Wis. 2d 536, 327 N.W.2d 55 (1982). But see *Westphal v. E.I. DuPont de Nemours & Co.*, 192 Wis. 2d 347, 531 N.W.2d 386 (Ct. App. 1995) (holding that amount of time between each negligent act is a primary factor in determining continuum of negligent treatment for purposes of extending period).

Plaintiff seeking to bring a medical malpractice suit against a government body or its officers, agents, or employees must first give notice of the claim to the government. *Snopek v. Lakeland Med. Ctr.*, 223 Wis. 2d 288, 588 N.W.2d 19 (1999).

Under Wis. Stat. § 893.07(1), action is untimely if statute of limitation in foreign state has expired. *Thimm*

*v. Automatic Sprinkler Corp of Am.*, 148 Wis. 2d 332, 434 N.W.2d 842 (Ct. App. 1988). However, foreign tolling provisions are not borrowed, but instead Wisconsin's tolling provisions are applied. *Scott by Ricciardi v. First State Ins. Co.*, 155 Wis. 2d 608, 456 N.W.2d 152 (1990).

## MALPRACTICE

Medical Malpractice. Statutory requirements and limitations. See Wis. Stat. Ch. 655 and Wis. Stat. §§ 893.01 to 893.23.

The patients Compensation Fund was abolished and was replaced by legislative scheme setting up mediation process. See Wis. Stat. § 655.42-.61. Mediation is not jurisdictional; it is directory, not mandatory, upon the parties. *Eby v. Kozarek*, 153 Wis. 2d 75, 450 N.W.2d 249 (1990). Circuit court can determine appropriate remedy, short of dismissal, for failure to participate in mediation. *Schulz v. Nienhuis*, 152 Wis. 2d 434, 448 N.W.2d 655 (1989).

Under Wis. Stat. § 655.44, patient may file request for mediation rather than file suit. When person requests mediation, expiration of ninety day mediation period is condition precedent to commencement of malpractice action. *Hoffman v. Rankin*, 2002 WI App. 189, 256 Wis. 2d 678, 649 N.W.2d 350. Mediation period of ninety days may be extended by written agreement. Wis. Stat. § 655.465(7).

Limitation of Actions. Cause of action accrues when there is claim capable of present enforcement, suable party against whom it may be enforced and party who has present right to enforce it. *Crawford v. Shepard*, 86 Wis. 2d 362, 365-66, 272 N.W.2d 401 (Ct. App. 1978). Cause of action in a negligent construction case does not accrue until an injury occurs. *Hunter v. School District*, 97 Wis. 2d 435, 442-43, 293 N.W.2d 515, 519 (1980). In architectural negligence cases, applicable statute of limitations begins to run when plaintiff suffers injury. *Crawford v. Shepherd*, 86 Wis. 2d 362, 272 N.W.2d 401 (Ct. App. 1978).

Limitation periods under Wis. Stat. § 893.55 (1)(a) and (b) tolled by filing of request for mediation under Wis. Stat. § 655.44(4). *Landis v. Physicians Ins. Co. of Wis. Inc.*, 2001 WI 86, 245 Wis. 2d 1, 628 N.W.2d 893. Wis. Stat. § 893.55(5) does not mandate dismissal for filing action before expiration of statutory mediation period. When plaintiff fails to comply with sub. 655.44(5), circuit court retains discretion to determine appropriate sanction. *Ocasio v. Froedtert Mem. Lutheran Hosp.*, 2002 WI 89, 254 Wis. 2d 367, 646 N.W.2d 381.

Standard of Care/Requirement of Expert Testimony. Expert testimony is necessary to prove causal



negligence of a defendant in medical malpractice case, unless situation is one within common knowledge of laymen. *Kasbaum v. Lucia*, 127 Wis. 2d 15, 377 N.W.2d 183 (Ct. App. 1985). Medical experts may rely on reports and records of others in forming opinions within scope of their own expertise. *State v. Cadden*, 56 Wis. 2d 320, 326, 201 N.W.2d 773, 775 (1972). The question in medical malpractice is not whether there was mistake in diagnosis, but whether there was failure to conform to accepted standard of care. In determining whether proper care and skill were exercised, expert testimony is required unless common knowledge of laymen affords basis of finding negligence. *Christianson v. Downs*, 90 Wis. 2d 332, 279 N.W.2d 918 (1979). Expert testimony is necessary to prove dental malpractice. *Albert v. Waelti*, 133 Wis. 2d 142, 394 N.W.2d 752 (Ct. App. 1986); *Shier v. Freedman*, 58 Wis. 2d 269, 206 N.W.2d 166 (1973) (abrogating the locality rule), *modified*, 58 Wis. 2d 269, 208 N.W.2d 328 (1973). Res ipsa loquitur is rule of evidence that permits jury to draw permissible inference of physician's negligence without direct or expert testimony as to conduct at time negligence occurred. *Hoven v. Kelble*, 79 Wis. 2d 444, 449, 256 N.W.2d 379, 381 (1977). Doctrine invoked in medical malpractice action when: 1) evidence event in question would not ordinarily occur unless negligence; 2) agent or instrumentality that caused harm was within defendant's exclusive control; and 3) evidence allows more than speculation but does not fully explain the event. *Fiumefreddo v. McLean*, 174 Wis. 2d 10, 17, 496 N.W.2d 226, 228 (Ct. App. 1993).

**Informed Consent.** Wis. Stat. § 448.30 provides physician who treats patient shall inform patient about availability of all alternate, viable medical modes of treatment and about benefits and risks of treatments. Physician's duty to inform patient does not require disclosure of: 1) information beyond what reasonably well-qualified physician in similar medical classification would know; 2) detailed technical information that in all probability patient would not understand; 3) risks apparent or known to patient; 4) extremely remote possibilities that might falsely or detrimentally alarm patient; 5) information in emergencies where failure to provide treatment would be more harmful to patient than treatment; 6) information in cases where patient incapable of consenting. Duty imposed by informed consent statute depends upon facts of situation and varies from case to case. *Martin by Sceptur v. Richards*, 192 Wis. 2d 156, 531 N.W.2d 70 (1995). Patient must be informed of diagnostic options; 1% to 3% chance of development of further injury is not "extremely remote possibility" so as to exempt physician from notifying patient about its occurrence. *Martin by Sceptur v. Richards*, 192 Wis. 2d 156, 531 N.W.2d 70 (1995). Evidence regarding physi-

cian's failure to advise of and refer patient to better doctors and facilities is relevant in case premised on failure to obtain informed consent. *Johnson by Adler v. Koke-moor*, 199 Wis. 2d 615, 545 N.W.2d 495 (1996).

The theory of strict liability is not cognizable in malpractice action for injury allegedly arising out of surgical procedure. *Hoven v. Kelble*, 79 Wis. 2d 444, 256 N.W.2d 379 (1977). An inaccurate statement by doctor did not expose plaintiff to unreasonable risk of harm. *Black v. Gunderson Clinic, Ltd.*, 152 Wis. 2d 210, 448 N.W.2d 247 (Ct. App. 1989).

**Wrongful Birth/Wrongful Life.** A physician is not liable under the strict liability doctrine for misrepresentation. *Hoven, supra*. An inaccurate statement does not itself constitute negligence as a matter of law. Whether the statement exposes the patient to an unreasonable risk of harm is a question for the jury. *Black, supra*. A doctor's failure to diagnose multiple pregnancy may be actionable if plaintiff can prove increased risk of premature birth. *Ehlinger v. Sipes*, 148 Wis. 2d 260, 434 N.W.2d 825 (Ct. App. 1988), *aff'd in part and remanded*, 155 Wis. 2d 1, 454 N.W.2d 754 (1990). The cost of raising child to age of majority can be recovered as damages caused by negligently performed sterilization operation. *Marciniak v. Lundborg*, 153 Wis. 2d 59, 450 N.W.2d 243 (1990). A plaintiff's recovery for loss of companionship in wrongful death action premised on medical malpractice is not governed by Wis. Stat. § 895.04(4). *Rineck v. Johnson*, 155 Wis. 2d 659, 456 N.W.2d 336 (1990) (but see "damages" below). Child born after unsuccessful abortion has no cause of action for battery, but may sue for negligence. *Vandervelden v. Victoria*, 177 Wis. 2d 243, 502 N.W.2d 276 (Ct. App. 1993). Retroactive application of statutory cap on non-economic damages in medical malpractice action is unconstitutional. *Martin by Sceptur v. Richards*, 192 Wis. 2d 156, 531 N.W.2d 70 (1995); *Vandervelden, supra*.

**Damages.** Retroactive increase of cap on damages for loss of society and companionship in wrongful death cases is unconstitutional. *Schultz v. Natwick*, 2002 WI 125, 257 Wis. 2d 19, 653 N.W.2d 266. If a settlement or judgment resulting from act or omission that occurred on or after May 25, 1995, provides for future medical expense payments exceeding \$100,000, portion of future medical expense payments in excess of \$100,000 plus amount sufficient to pay collection costs attributable to future medical expense, including attorney fees, shall be paid into Wisconsin Patients Compensation Fund. Wis. Stat. § 655.015. Amount of non-economic damages recoverable by a claimant under Chapter 655 for health-care provider acts or omissions occurring on or after April 6, 2006, are limited to \$750,00.00 Wis. Stat.



§§ 655.017 and 893.(4)(d) and (f); *Ferdon*, 284 Wis. 2d 573 (2005). Damages recoverable under Wis. Stat. § 893.55 against healthcare providers or employees thereof are subject to Wisconsin's comparative negligence and joint and several liability statute, Wis. Stat. § 895.045. Collateral source rule applies to medical malpractice claims. Wis. Stat. § 893.55. Wrongful death cap on damages for loss of society and companionship due to medical negligence set at \$350,000 per occurrence in case of deceased adult or at \$500,000 per occurrence in case of deceased minor. Wis. Stat. § 895.04(4). Wis. Stat. § 893.55(4)(c) requires assessment of non-economic damages by judge or the jury without regard to cap, with subsequently entered judgment conforming to cap's limits. *Guzman v. St. Francis Hosp., Inc.*, 2001 WI App. 21, 240 Wis. 2d 559, 623 N.W.2d 776.

**Impact of Physician-Patient Privilege.** Physician-patient privilege is a testimonial rule of evidence applying only in judicial settings, defense counsel may engage in limited ex parte communications with plaintiff's treating physician if no discussion of confidential information. *Steinberg v. Jensen*, 194 Wis. 2d 439, 534 N.W.2d 361 (1995). Wis. Stat. § 905.04(2) provides patient has privilege to refuse to disclose and prevent other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of patient's physical, mental or emotional condition among patient's physician, nurse, chiropractor, psychologist, social worker, marriage and family therapist, professional counselor, or person, including family members, who are participating in diagnosis or treatment under direction of above individuals. Exceptions to privilege set forth in Wis. Stat. § 905.04(4). When a therapist had reasonable cause to believe patient was dangerous and contacting police would prevent harm and facilitate patient's hospitalization, patient's statements fell within dangerous patient exception to privilege. *State v. Agacki*, 226 Wis. 2d 349, 595 N.W.2d 31 (Ct. App. 1999). Psychotherapist duty to warn. *Id.*

Nursing home resident does not have reasonable expectation of privacy in assaultive conduct. Presence of third party nursing home residents defeated privilege. *Crawford v. Care Concepts, Inc.*, 2001 WI 45, 243 Wis. 2d 119, 625 N.W.2d 876. Information regarding assaultive or disruptive behavior by a patient contained in medical records is not protected by privilege. *Id.*

**Hospital.** Hospital liable for negligent selection or retention of employee to extent harm is caused by quality of employee which employer had reason to suppose would be likely to cause harm. *LLN v. Clauder*, 209 Wis. 2d 674, 563 N.W.2d 434 (1997). Malpractice action may be maintained against hospital for negligence

of physician working in hospital even though physician not employed by hospital if hospital made it appear to patient that physician is hospital employee and patient relied on appearance. *Kashishian v. Port*, 167 Wis. 2d 24, 39-47, 481 N.W.2d 277, 282-286 (1992). Mother who suffered stillbirth of infant as a result of medical malpractice has personal injury claim as patient for personal injuries, including negligent infliction of emotional distress, in addition to derivative claim for wrongful death of infant. *Pierce v. Physicians Ins. Co. of Wis., Inc.* 2005 WI 14 278 Wis. 2d 82, 692 N.W.2d 558. Statutory and common-law basis for bystander claims for negligent infliction of emotional distress discussed in *Finnegan v. Wisconsin Patients Compensation Fund*, 2003 WI 98, 263 Wis. 2d 574, 666 N.W.2d 797. There are two caps that apply in the event of death resulting from medical malpractice: a medical malpractice cap for noneconomic damages for predeath claims and a wrongful death cap for noneconomic damages for postdeath claims. *Bartholomew v. Patients Compensation Fund*, 2006 WI 91, 293 Wis. 2d 38, 717 N.W.2d 216.

**Charitable Hospital.** Charitable immunity doctrine was abolished for all claims arising after January 10, 1961. *Kojis v. Doctors Hosp.*, 12 Wis. 2d 367, 107 N.W.2d 131 (1961), *supplemented by*, 12 Wis. 2d 367, 107 N.W.2d 292 (1961). Doctrine of apparent authority broadened to include persons admitted to hospital by personal attending physician. *Kashishian v. Port*, 167 Wis. 2d 24, 481 N.W.2d 277 (1992). Surgeon not vicariously liable for negligence of hospital nurses who failed to count accurately sponges used in surgery; Wisconsin declined to adopt "captain of the ship" theory, an outgrowth of defunct charitable immunity doctrine. *Lewis v. Physicians Ins. Co.*, 2001 WI 60, 243 Wis. 2d 648, 627 N.W.2d 484.

**Chiropractor Malpractice.** Chiropractors must exercise that degree of care, diligence, judgment, and skill that is exercised by reasonable chiropractors under like or similar circumstances. If the patient presents a problem outside the scope of chiropractic treatment, chiropractor is under a duty to inform patient, but there exists no duty to refer him to a medical doctor. Further, chiropractor must refrain from additional chiropractic treatment if plaintiff's condition will not be responsive to such treatment. *Kerkman v. Hintz*, 142 Wis. 2d 404, 418 N.W.2d 795 (1988). Chiropractors do not have a duty to recognize medical problems. *Goldstein v. Janusz Chiropractic Clinics S.C.*, 218 Wis. 2d 683, 582 N.W.2d 78 (Ct. App. 1998). Chiropractor has duty of informed consent. *Hannemann v. Boyson*, 2005 WI 94, 282 Wis. 2d 664, 698 N.W.2d 714.

Parents may maintain negligence action for loss of society and companionship of injured minor child.



*Shockley v. Prier*, 66 Wis.2d 394, 225 N.W.2d 495 (1975). No such cause of action for death of adult child, *Estate of Wells by Jeske*, 174 Wis.2d 503, 497 N.W.2d 779 (Ct. App. 1993), or for adult child's loss of parent, *Dziadosz v. Zirneski*, 177 Wis.2d 59, 501 N.W.2d 828 (Ct. App. 1993).

Adult children do not have a cause of action for their emotional distress arising out of a medical malpractice action for the negligent infliction of injuries to a parent. *Ziulkowski v. Nierengarten*, 210 Wis.2d 98, 565 N.W.2d 164 (Ct. App. 1997).

No recovery for loss of society and companionship by person outside of nuclear family. *Conant v. Physicians Plus Med. Group, Inc.*, 229 Wis.2d 271 (1999). No claim for fiancé who married injured person two months after injury. *Denil v. Integrity Mut. Ins. Co.*, 135 Wis.2d 373, 401 N.W.2d 13 (Ct. App. 1986).

**Legal Malpractice.** In legal malpractice action, claimant has initial burden of proving existence of attorney-client relationship. *Security Bank v. Klicker*, 142 Wis.2d 289, 418 N.W.2d 27 (Ct. App. 1987). The elements of a legal malpractice action are: 1) existence of attorney-client relationship; 2) acts constituting alleged negligence; 3) attorney's negligence proximately caused clients injuries; 4) the fact and extent of the injury alleged; and 5) that the client would have been successful in prosecution of the action but for the attorney's negligence. *Glamann v. St. Paul Fire & Marine Ins. Co.*, 144 Wis.2d 865, 424 N.W.2d 924 (1988). See also *Olfe v. Gordon*, 93 Wis.2d 173, 286 N.W.2d 573 (1980). The Court of Appeals declined to expand Supreme Court precedent, extending liability to expected beneficiaries of other professionals' work such as accountants and psychiatrists. *Rendler v. Markos*, 154 Wis.2d 420, 453 N.W.2d 202 (Ct. App. 1990). Attorney not negligent in supervising execution of will when he had reasonable basis for believing that existing legal precedents were distinguishable from current circumstances. *DeThorne v. Bakken*, 196 Wis.2d 713, 539 N.W.2d 695 (Ct. App. 1995). Expert testimony is required to show a breach of the standard of care unless the breach is so obvious it may be determined as a matter of law or when it is within the ordinary knowledge and experience of laypersons. *Theiry v. Bye*, 228 Wis.2d 231, 597 N.W.2d 449 (Ct. App. 1999).

Legal malpractice does not involve injury to the person, which connotes bodily injury. Thus, statute of limitations for legal malpractice is six years per Wis. Stats. § 893.53. *Hemberger v. Bitzer*, 216 Wis.2d 509, 574 N.W.2d 656 (1998).

**Accountant's Liability.** Accountant's liability extends beyond client and can encompass other parties that

may have been damaged by the malpractice. *Citizens State Bank v. Timm, Schmidt & Co.*, 113 Wis.2d 376, 335 N.W.2d 323 (1983). Liability to third-parties determined under accepted principles of Wisconsin negligence law; foreseeability that third-party could rely on accountant's work. *Chevron Chem. Co. v. Deloitte & Touche*, 168 Wis.2d 323, 483 N.W.2d 314 (Ct. App. 1992).

## NEGLIGENCE

See Law Digest Tables.

See "AUTOMOBILES."

Age. Parents may sue unemancipated children under wrongful death statute. *Munsert v. Farmers Mut. Auto Ins. Co.*, 229 Wis. 581, 281 N.W. 671 (1938).

Children of tender age may be trespassers, even though too young to be chargeable with contributory negligence. *Baumgart v. Spierings*, 2 Wis.2d 289, 86 N.W.2d 413 (1957).

Parent-child immunity in negligence was abolished as of June 28, 1963, with certain exceptions. *Goller v. White*, 20 Wis.2d 402, 122 N.W.2d 193 (1963). Parent is not immune from suit where negligent act involves play activity of child. *Cole v. Sears, Roebuck & Co.*, 47 Wis.2d 629, 177 N.W.2d 866 (1970). In absence of negligence by child, parents failure to exercise proper control is not actionable. *Zelco v. Integrity Mut. Ins. Co.*, 190 Wis.2d 74, 527 N.W.2d 357 (Ct. App. 1994), *abrogated in part by*, *Gritzner v. Michael R.*, 2000 WI 68, 235 Wis.2d 781, 611 N.W.2d 906 (2000).

Wisconsin has adopted the Restatement (Second) of Torts § 316, *Duty of Parent to Control Conduct of Child*, as an applicable standard of conduct in negligence actions. See *Gritzner v. Michael R.*, 2000 WI 68, 235 Wis.2d 781, 611 N.W.2d 906 (2000). Section 316 provides: A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent (a) knows or has reason to know that he has the ability to control his child, and (b) knows or should know of the necessity and opportunity for exercising such control.

Restatement (Second) of Torts § 316. Wisconsin's civil jury instructions restate this standard of conduct as follows: A parent must use ordinary care to control his or her minor child so as to prevent the child from intentionally harming others or from conducting himself or herself so as to create an unreasonable risk [of] bodily harm to others, if the parent knows or should know: 1) that [he or she] has the ability to control the child; 2) that



there is a necessity for exercising such control; and 3) that there is an opportunity to do it. Wis JI-Civil 1013.

**Attractive Nuisance.** Doctrine is discussed in *Schulte v. Willow River Power Co.*, 234 Wis. 188, 290 N.W. 629 (1940). In short, the doctrine of attractive nuisance imposes a duty upon possessors of property “to keep those parts of their land on which they know, or ought to know, children are likely to be present, free from artificial conditions which involve an unreasonable risk of bodily injury or death to children.” See also *Massino v. Smaglick*, 3 Wis. 2d 607, 89 N.W.2d 223 (1958). Doctrine is applicable where third person is injured by dangerous object removed from land by trespassing child. *Christians v. Homestake Enters., Ltd.*, 101 Wis. 2d 25, 303 N.W.2d 608 (1981). The injury at issue in *Christians*, however, occurred prior to the applicability of the decision in *Antoniewicz v. Reszczyński*, 70 Wis. 2d 836, 236 N.W.2d 1 (1975), wherein the court abolished the special immunities applied to licensees and invitees in negligence cases and discussed the general trend toward abolition of distinctions between licensees, invitees, and trespassers. Thus, on the issue of whether the duty of a possessor or owner of land to nontrespassers is the same as the duty applicable in the usual negligence case, guidance should be sought in the *Antoniewicz* line of decisions. Under *Antoniewicz*, a landowner owes a duty of reasonable care to all persons who come upon property with the consent of the owner. Although the doctrine of attractive nuisance often obviates a young child’s status as trespasser, courts nonetheless recognize that they may have this status. See *Hofflander v. St. Catherine’s Hosp. Inc.*, 2003 WI 77, 262 Wis. 2d 539, 664 N.W.2d 545 (2003).

**Assumption of Risk.** Wisconsin has abolished assumption of risk as an absolute defense. *Moulas v. PBC Productions Inc.*, 213 Wis. 2d 406, 570 N.W.2d 739 (Ct. App. 1997). Assumption of risk is no longer defense in farm employer-employee cases, *Colson v. Rule*, 15 Wis. 2d 387, 113 N.W.2d 21 (1962), or in automobile cases, *McConville v. State Farm Mut. Auto Ins. Co.*, 15 Wis. 2d 374, 113 N.W.2d 14 (1962).

**Comparative Negligence.** Comparative negligence is recognized by statute. Wis. Stat. § 895.045; *Schwandt v. Milwaukee Elec. Ry. & Transp. Co.*, 244 Wis. 251, 12 N.W.2d 18 (1943). Where T’s automobile collided with G’s stalled automobile, and where plaintiff insurer of T settled claim of wrongful death and sued insurer of vehicle operated by G’s son for contribution, it was held that negligence of wife who left stalled automobile must be added to negligence of G in comparing negligence of G’s son. *Western Cas. & Sur. Co. v. Dairyland Mut. Ins. Co.*, 273 Wis. 349, 77 N.W.2d 599 (1956).

The language of the amended comparative negligence statute codifies the requirement that plaintiff’s contributory negligence be compared against the separate rather than aggregate negligence of the defendants and to partially eliminate joint and several liability in negligence actions. However, § 895.045 does not apply to strict liability claims. *Fuchsgruber v. Custom Accessorie, Inc.*, 244 Wis. 2d 758, 628 N.W.2d 833 (2001).

Special verdict must afford jury opportunity to consider negligence of all parties to transaction whether or not they be parties to lawsuit. *Connar v. West Shore Equip.*, 68 Wis. 2d 42, 227 N.W.2d 660 (1975).

In action for contribution by one insurer against another insurer, plaintiff has burden to prove its own driver causally negligent as well as prove defendant’s driver casually negligent. *Mutual Auto. Ins. Co. v. State Farm Mut. Auto Ins. Co.*, 268 Wis. 6, 66 N.W.2d 697 (1954). A settlement that includes a reduction based on plaintiff’s contributory negligence and the application of a comparative negligence statute constitutes “full damages” for purpose of the “made whole” subrogation rule, thereby requiring reimbursements of medical payments to medical insurers. *Sorge v. National Car Rental System, Inc.*, 162 Wis. 2d 622, 470 N.W.2d 5 (Ct. App. 1991).

Stacking of policy limits is not to be taken into consideration when determining contribution amounts between insurers. *Heritage Mut. Ins. Co. v. St. Paul-Mercury Ins. Co.*, 141 Wis. 2d 141, 413 N.W.2d 664 (Ct. App. 1987).

**Conflict of Laws.** When examining a conflict of laws issue, if the laws of the two states are the same, courts apply Wisconsin law. *Sharp v. Case Corp.*, 227 Wis. 2d 1, 595 N.W.2d 380 (1999). Choice of law considerations, which were established by *Heath v. Zellmer*, 35 Wis. 2d 578, 151 N.W.2d 664, 672 (1967), involve predictability of results, maintenance of interstate and international order, simplification of the judicial task, advancement of the forum’s governmental interest and application of the better rule of law. These factors are evaluated in light of the quantity and quality of contacts each state has with the parties and with the transaction. *Wilcox v. Wilcox*, 26 Wis. 2d 617, 634, 133 N.W.2d 408, 417 (1965). The first rule in the choice of law analysis is that the law of forum should presumptively apply unless it becomes clear that nonforum contacts are of the greater significance. If it is not clear that nonforum contacts are of the greater significance, then the court applies five choice influencing factors. *Drinkwater v. American Family Mut. Ins. Co.*, 2006 WL 1491634 (2006). Where tire sold in Wisconsin blew out, injuring plaintiff in Indiana, issues of warranty are governed by Wisconsin law and issues of negligence are governed by



Indiana law. *Wojciuk v. U.S. Rubber Co.*, 13 Wis. 2d 173, 108 N.W.2d 149 (1961).

Contribution. Wis. Stat. § 895.447 does not void certain indemnity agreements in construction contracts as long as they do not eliminate or limit liability to third persons. *Gerdman by Habush v. United States Fire Ins. Co.*, 119 Wis. 2d 367, 350 N.W.2d 730 (Ct. App. 1984). A cause of action for contribution accrues when one of the joint tortfeasors pays more than his or her proportionate share of damages. *State Farm Mut. Auto. Ins. Co. v. Schara*, 56 Wis. 2d 262, 201 N.W.2d 758 (1972).

A garage owner's insurer is not entitled to contribution from auto owner's insurer where latter's policy excepted garages, etc. *Paine v. Finkler Motor Car Co.*, 220 Wis. 9, 264 N.W. 477 (1936).

Amount of contribution between joint tortfeasors bore interest from date of payment to injured persons. *Employers Mut. Liab. Ins. Co. v. Derfus*, 259 Wis. 489, 49 N.W.2d 400 (1951).

Negligence of each defendant compared to that of plaintiff. Parties whose percentage of casual negligence is 51% or more are jointly and severally liable for damages allowed. Wis. Stat. § 895.045(1).

Concerted Actions. Joint and several liability remains where two or more parties act in accordance with common scheme or plan. Wis. Stat. § 895.045(2). Parties to conspiracy are jointly and severally liable for all damages and lose shelter of "51% rule." Wis. Stat. § 895.045(2).

Joint and several liability rule not applicable to punitive damages. Wis. Stat. § 895.043(5).

A joint tortfeasor, upon paying whole judgment, may compel contribution from others where there is no willful or conscious wrong between parties. *Ellis v. Chicago & N.W. Ry. Co.*, 167 Wis. 392, 167 N.W. 1048 (1918). Payment must be made first by joint tortfeasor seeking to hold other liable. *Sattler v. Neiderkorn*, 190 Wis. 464, 209 N.W. 607 (1926). Good faith is required. *Trampe v. Wisconsin Tel. Co.*, 214 Wis. 210, 252 N.W. 675 (1934). Must establish negligence of joint tortfeasor. *Western Cas. & Sur. Co. v. Milwaukee Gen. Constr. Co.*, 213 Wis. 302, 251 N.W. 491 (1933); *Ledvina v. Ebert*, 237 Wis. 358, 296 N.W. 110 (1941).

Negligent driver could not recover by way of contribution from beneficiaries of estate of other negligent driver fatally injured in accident. *Wurtzinger v. Jacobs*, 33 Wis. 2d 703, 148 N.W.2d 86 (1967).

Damages. Compensatory damages are damages awarded to compensate injured party for injuries sustained and to make good or replace the loss caused by

the wrongs of another. Compensatory damages include all recoverable damages other than punitive and multiple damages. Compensatory damages have further been broken down into general and specific damages. General damages are defined as those losses which naturally, or necessarily, result from the defendant's conduct and the type of the injury the plaintiff sustained. *Musa v. Jefferson County Bank*, 240 Wis. 2d 327, 620 N.W.2d 797 (2001). Special damages are defined as natural, but not the necessary result of an alleged wrong, but amount and nature is specific to each individual plaintiff. *Id.*

Nominal damages are not recoverable in negligence actions because actual loss is needed to sustain a negligence cause of action. *Wright v. St. Mary's Hosp.*, 265 Wis. 502, 505, 61 N.W.2d 900 (1953).

An injured party may also recover damages for bodily injury in a negligence cause of action, including pain and suffering, emotional or mental distress, loss of earning capacity and medical expenses.

Wisconsin also recognizes the right of a third party, a so-called secondary tort victim, to bring an action for loss of society and companionship and for loss of consortium. *Theama v. City of Kenosha*, 117 Wis. 2d 508, 344 N.W.2d 513 (1984). However, Wisconsin's comparative negligence rules apply to all claims for loss of society and companionship and for loss of consortium. W.S.A. § 895.045.

A third party may also bring a claim for loss of services. *The Law of Damages in Wisconsin*, Chapter 15.

Recovery may be allowed for physical injuries resulting from fright alone, and such recovery would not be defeated by fact that there was no direct physical impact of defendant's truck on decedent's person who was sleeping in his house when truck struck house and allegedly caused his death from heart failure produced by fright. *Colla v. Mandella*, 1 Wis. 2d 594, 85 N.W.2d 345 (1957). Wife may sue for loss of consortium of husband. *Moran v. Quality Aluminum Casting Co.*, 34 Wis. 2d 542, 150 N.W.2d 137 (1967), modified by, *Fitzgerald v. Meissner & Hicks, Inc.*, 38 Wis. 2d 571, 157 N.W.2d 595 (1968). Court refused to grant damages to Downs Syndrome child born after automobile accident. *Puhl v. Milwaukee Auto Ins. Co.*, 8 Wis. 2d 343, 99 N.W.2d 163 (1959), overruled on other grounds, *Stromsted v. St. Michael Hosp. of Franciscan Sisters*, 99 Wis. 2d 136, 299 N.W.2d 266 (1980). Where landowner has legal duty to restore environment after discharge of hazardous substance by gas tank in possession of another, landowner may recover cost of repair where cost exceeds diminished property value. *Nischke v. Farmers & Merchants Bank & Trust*, 187 Wis. 2d 96, 522 N.W.2d 542 (Ct. App. 1994). Recovery from a tortfeasor or its insurer for



property in an accident was not limited to the lesser of two measures: 1) costs of repair; or 2) the difference in the property's fair market value immediately before and immediately after the accident. Instead, property owner can also recover for loss of value of the property after repair. *Hellenbrand v. Hilliard*, 275 Wis.2d 741, 687 N.W.2d 37, 2004 WI App. 151 (Ct. App. 1994).

**Punitive Damages.** Plaintiff may receive punitive damages where evidence submitted showing defendant acted maliciously toward plaintiff or with intentional disregard of plaintiff's rights. Wis. Stat. § 895.043(3). If plaintiff proves punitive damages, plaintiff can introduce evidence of defendant's wealth. Wis. Stat. § 895.043(4)(a). Punitive damages not awardable in cases of double, treble, or statutory exemplary damages. Wis. Stat. § 895.043(2). The constitutionality of a \$94 million punitive damages award was remanded to the Wisconsin Court of Appeals. *Wishcer v. Mitsubishi Heavy Indus. of Am.*, 279 Wis.2d 4, 694 N.W.2d 320 (2005).

**Claims for Emotional Distress.** Emotional distress resulting from intentional tort is compensable. *Alsteen v. Gehl*, 21 Wis.2d 349, 124 N.W.2d 312 (1963). Emotional distress resulting from negligence is compensable. *Bowen v. Lumbermens Mut. Cas. Co.*, 183 Wis.2d 627, 517 N.W.2d 432 (1994). Recovery is permitted if the claimant witnessed an "extraordinary event" - that is, either an incident causing death or serious injury or the gruesome aftermath of such an event minutes after it occurs. *Id.* *Bowen* held that physical manifestation of emotional distress ("physical injury") was no longer necessary, but also held that recovery for negligent infliction was limited to a spouse, parent, child, grandparent, grandchild or sibling of the victim. Emotional distress caused by damage to property not compensable. *Kleinke v. Farmers Co-op. Supply & Shipping*, 202 Wis.2d 138, 549 N.W.2d 714 (1996).

Trial Court may offer plaintiff right to accept reasonable amount in excess verdict case rather than lowest amount jury might determine. *Powers v. Allstate Ins. Co.*, 10 Wis.2d 78, 102 N.W.2d 393 (1960). Use of mathematical formula for pain and suffering in closing argument was held reversible error. *Affett v. Milwaukee & Suburban Transp. Corp.*, 11 Wis.2d 604, 106 N.W.2d 274 (1960). In claim for loss of inheritance, evidence concerning decedent's life insurance policy is relevant to establishing decedent's propensity for thrift and savings and decedent's earning in excess of expenses. *Schaefer v. American Family Mut. Ins. Co.*, 192 Wis.2d 768, 531 N.W.2d 585 (1995).

As general rule, no recovery is allowed for damages caused by negligent interference with contractual relations. This rule extends to negligent interference with

employment contract. *Hartridge v. State Farm Mut. Auto Ins. Co.*, 86 Wis.2d 1, 271 N.W.2d 598 (1978).

Recovery should be allowed for negligent infliction of emotional distress when such recovery would not open way for fraudulent claims or enter field with no sensible stopping point. *Garrett by Kravit v. City of New Berlin*, 122 Wis.2d 223, 362 N.W.2d 137 (1985); See also *Bowen v. Lumbermens Mut. Cas. Co.*, 183 Wis.2d 627, 517 N.W.2d 432 (1994).

Bystander's recovery for negligent infliction of emotional distress should be reduced according to jury's apportionment of comparative negligence. Wis. II-Civil 1510.

**Sports Injuries.** Participant in activity that involves physical contact between persons in a sport may only be liable for injury caused intentionally or recklessly. Wis. Stat. § 895.525(4m). To obtain the benefit of immunity, defendant must be (1) participating in a recreational activity; (2) recreational activity must include physical contact between persons; (3) the persons must be participating in a sport; and (4) the sport must involve amateur teams. *Noffke v. Bakke*, \_\_\_ Wis.2d \_\_\_, 760 N.W.2d 156 (2009). For example, cheerleading met these four requirements. *Id.*

**Governmental Immunity.** No civil action or proceeding may be brought against any state officer, employee or agent for any act committed during discharge of the officer's, employee's or agents duties. W.S.A. § 893.82(3).

The Wisconsin Constitution gives legislature exclusive control on determination of immunity from lawsuits. It is up to legislature to effect a change on doctrine of governmental immunity for local governments. *Cords v. State*, 80 Wis.2d 525 (1974).

Ministerial duties are not shielded from immunity. *Cords v. Ehly*, 62 Wis.2d 31 (1974).

Inoperative traffic lights allowed for the exercise of officer discretion as to the mode of response, and therefore did not give rise to ministerial duty to perform manual traffic control. *Lodl v. Progressive Northern Ins.*, 253 Wis.2d 323 (2002).

Medical examiner's discretion to conduct or order an autopsy can be characterized as quasi-judicial. However, actual performance of an autopsy, although involving judgment and discretion, does not involve judgment and discretion encompassed in term "quasi-judicial" as used in Wis. Stat. § 895.43(4) (now Wis. Stat. § 893.80(4)). Quasi-judicial acts are synonymous with discretionary acts. *Scarpaci v. Milwaukee County*, 96 Wis.2d 663 (1980).

Professor's duty was discretionary (inspecting equipment is not a duty the law imposes: his job was to teach) he was entitled to public officer immunity, and job description for university safety officer was written in discretionary terms and thus, he was entitled to public officer immunity. *Kimps v. Hill*, 187 Wis. 2d 508, 523 N.W.2d 281 (Ct. App. 1994).

Under Wis. Stat. § 893.80(4), municipal entities, employees and officials are immune from personal liability for injuries resulting from discretionary acts performed within the scope of their official duties.

State of Wisconsin is immune from suit for damages arising out of automobile collision involving state employee. *Forseth v. Sweet*, 38 Wis. 2d 676, 158 N.W.2d 370 (1968). A public employee who acts within scope of his official authority and in line of his official duties is immune from personal liability. However, municipality does not share that same immunity. See Wis. Stat. § 893.80. Where police officer promised plaintiff protection and arrest, such conduct was discretionary and doctrine of immunity afforded protection. *Barillari v. City of Milwaukee*, 194 Wis. 2d 247, 533 N.W.2d 759 (1995).

Under Wis. Stat. § 893.80(4), a municipality is immune from "any suit" for "acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions." These functions are synonymous with discretionary acts. *Lifer v. Raymond*, 80 Wis. 2d 503, 511-12, 259 N.W.2d 537 (1977). A discretionary act involves the exercise of judgment in the application of a rule to specific facts. *Id.* Municipal immunity does not apply to the performance of: 1) ministerial duties; 2) duties to address a "compelling known danger;" 3) actions involving medical, nongovernmental functions such as an autopsy; and 4) actions that are "malicious, willful, and intentional." *Kierstyn v. Racine Unified Sch. Dist.*, 228 Wis. 2d 81, 596 N.W.2d 417 (1999). A ministerial act, in contrast to an immune discretionary act, involves a duty that "is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion." *C.L. v. Olson*, 143 Wis. 2d 701, 422 N.W.2d 614 (1988).

Municipal Liability for Automobile Accidents Under Wis. Stats § 345.05. Discretionary act immunity under § 893.80 is inapplicable to § 345.05 claim. *Frostman v. State Farm Mut. Ins. Co.*, 171 Wis. 2d 138, 491 N.W.2d 100 (Ct. App. 1992). Under § 345.05(2), "[a] person suffering any damage proximately resulting from the negligent operation of a motor vehicle owned and operated by a municipality, which damage was occasioned by the operation of the motor vehicle in the

course of its business, may file a claim for damages against the municipality concerned and governing body thereof may allow, compromise, settle and pay the claim." This section is applicable when the injury can be traced to incidents of vehicle operation on the highway rather than a collateral use such as loading. *Rabe v. Outagamie County*, 72 Wis. 2d 492, 241 N.W.2d 428 (1976). This section did not apply to an injury caused by negligent supervision of bus passengers. *Hamed v. Milwaukee County*, 108 Wis. 2d 257, 321 N.W.2d 199 (1982).

The single statutory cap under Wis. Stat. § 895.04 does not apply to predeath non-economic damages for wrongful death caused by medical malpractice. *Bartholomew v. Wis. Pat. Comp. Fund*, 293 Wis. 2d 38, 717 N.W.2d 216 (2006) overruling *Maurin v. Hall*, 274 Wis. 2d 28, 682 N.W.2d 866 (2004).

Public Policy. The doctrine of public policy may limit the scope of the defendant's liability. *Bowen v. Lumbermens Mut. Cas. Co.*, 183 Wis. 2d 627, 517 N.W.2d 432 (1994). Thus, after negligence has been found, a court may nevertheless limit liability for public policy reasons. *Gritzner v. Michael R.*, 235 Wis. 2d 781, 611 N.W.2d 906 (2000). The public policy considerations that may preclude liability are: 1) the injury is too remote from the negligence; 2) the injury is too wholly out of proportion to the tortfeasor's culpability; 3) in retrospect it appears too highly extraordinary that the negligence should have resulted in the harm; 4) allowing recovery would place too unreasonable a burden on the tortfeasor; 5) allowing recovery would be too likely to open the way for fraudulent claims; or 6) allowing recovery would enter a field that has no sensible or just stopping point. *Id.* Public policy factors limiting liability should be considered only after a full resolution of the facts at trial. *Alvarado v. Sersch*, 262 Wis. 2d 74, 206 N.W.2d 174 (2003). Public policy considerations may even be employed under the dog-bite statute, § 174.02. See *Fandrey v. American Fam. Mut. Ins. Co.*, 2004 WI 62, Case No. 02-2628 (June 3, 2004). Public policy reasons did not support extending to police officer the firefighters rule, which barred recovery in tort by injured firefighter from negligent landowner, and therefore officer could sue for injuries from dog bite. *Cole v. Husbanks*, 272 Wis. 2d 539, 681 N.W.2d 147 (2004).

Religious Institution. Immunity of religious institutions for negligence was abolished as to all claims arising on or after July 1, 1963. *Widell v. Holy Trinity Catholic Church*, 19 Wis. 2d 648, 121 N.W.2d 249 (1963).

Imputed Negligence. Negligence of operator was not imputed to passenger. *Hynek v. Milwaukee Auto Ins. Co.*, 243 Wis. 591, 11 N.W.2d 352 (1943), nor of hus-



band to wife, *Fox v. Kaminsky*, 239 Wis. 559, 2 N.W.2d 199 (1942). See “AUTOMOBILES. Guest Cases.”

**Workers’ Compensation.** Exclusive remedy provision of Worker’s Compensation Act, Wis. Stat. § 102.03(2) does not bar action against supervisory co-employee. *Lampada v. State Sand & Gravel Co.*, 58 Wis. 2d 315, 206 N.W.2d 138 (1973), *superseded by*, Wis. Stat. § 102.03(2). Exclusivity of recovery now extends to any other employee of the same employer except in certain limited circumstances. Wisconsin follows borrowed servant rule, not “dual liability.” *DePratt v. Sergio*, 102 Wis. 2d 141, 306 N.W.2d 62 (1981).

**Liquor Liability.** Retail seller of liquor is liable for injuries caused to third persons by a minor if he sells intoxicating beverages to that minor whom he knew or should have known was minor. *Sorenson by Kerscher v. Jarvis*, 119 Wis. 2d 627, 350 N.W.2d 108 (1984), *modified by*, Wis. Stat. § 125.035(2). A liquor retailer who sold beer to two minors may be liable to a third minor who drank that beer where it was foreseeable that such action would cause injury and the sale of beer was a substantial factor. *Paskiet by Fehring v. Quality State Oil Co.*, 164 Wis. 2d 800, 476 N.W.2d 871 (1991).

**Negligence Per Se.** Three questions must be answered to determine if violation of statute automatically imposes civil liability: 1) harm inflicted was of type the statute was designed to prevent; 2) person injured was within class of persons sought to be protected; and 3) there is some expression of legislative intent that statute become a basis for civil liability. *Antwaun A. ex rel. Muwonge v. Heritage Mut. Ins. Co.*, 228 Wis. 2d 44, 596 N.W.2d 456 (1999).

Wisconsin law requires that before a statutory violation may constitute negligence per se, there must be some expression of legislative intent that statute may provide a basis for imposing civil liability. Negligence per se arises when legislature defines a person’s standard of care in specific instances. *Taft v. Derricks*, 235 Wis. 2d 22, 613 N.W.2d 190 (Ct. App. 2000).

The standard of conduct specified in safety statute will be applied as standard of conduct in negligence actions when statute provides in specific terms or by necessary implication that violation should entail civil liability; otherwise, the court will generally accept statute as defining standard of conduct for purposes of a tort action, although under no compulsion to do so. *Wells v. Chicago & Northwestern Transp. Co.*, 91 Wis. 2d 565, 283 N.W.2d 471 (Ct. App. 1979).

Violation of provisions of the Wisconsin Administrative Code requiring covers or railings for floor openings at a construction site constitute negligence per se.

*Nordeen v. Hammerlund*, 132 Wis. 2d 164, 389 N.W.2d 828 (Ct. App. 1986).

**Premises Liability.** The common law distinction between duties owed by occupier to licensees and invitees have been abolished; duty owed is that of ordinary care. *Antoniewicz v. Reszcynski*, 70 Wis. 2d 836, 236 N.W.2d 1 (1975). As to trespassing child, possessor has no duty to inspect, but if facts known that reasonable person would infer existence of dangerous condition possessor charged with knowledge. *Christians v. Homestake Enters. Ltd.*, 101 Wis. 2d 25, 303 N.W.2d 608 (1981). The injury at issue in *Christians*, however, occurred prior to the applicability of the decision in *Antoniewicz v. Reszcynski*, 70 Wis. 2d 836, 236 N.W.2d 1 (1975), wherein the court abolished the special immunities applied to licensees and invitees in negligence cases and discussed the general trend toward abolition of distinctions between licensees, invitees, and trespassers. Thus, on the issue of whether the duty of a possessor or owner of land to nontrespassers is the same as the duty applicable in the usual negligence case, guidance should be sought in the *Antoniewicz* line of decisions. Recreational immunity statute limiting property owner’s liability did not apply to person not engaged in recreational activity, injured while walking uninformed onto neighbors dock to communicate a greeting. *Sievert v. American Family Mut. Ins. Co.*, 190 Wis. 2d 623, 528 N.W.2d 413 (1995). Responsibilities of participants in recreational activities set forth in Wis. Stat. § 895.525(4) imposes no greater duty on individual than duty existing under common law of ordinary care. *Rockweit by Donohue v. Senecal*, 197 Wis. 2d 409, 541 N.W.2d 742 (1995).

There exists no duty to protect plaintiffs from dangers that are known to him/her, are obvious and apparent, and can reasonably be expected to be discovered. A landowner is not liable for injuries sustained by plaintiff while diving into shallow water. *Colip v. Travelers Ins. Co.*, 141 Wis. 2d 363, 415 N.W.2d 525 (Ct. App. 1987). Landowner has no duty to invitee for open and obvious danger of a purely natural origin, and landowner has no duty to remedy such condition even though they may be highly dangerous or inconvenient to others. *Brueggeman v. Continental Cas. Co.*, 141 Wis. 2d 406, 415 N.W.2d 531 (Ct. App. 1987). Where firefighters were present in emergency, landowner must warn of hidden hazards and known hazards if reasonable person would have done so. *Wright v. Coleman*, 148 Wis. 2d 897, 436 N.W.2d 864 (1989). An open and obvious danger defense applies whenever plaintiff confronts a condition that a reasonable person would recognize as such. A party host is not liable for injuries sustained by guests diving into a shallow swimming pool. *Griebler v. Doughboy Recreational, Inc.*, 160 Wis. 2d 547, 466 N.W.2d 897 (1991). An open and obvious danger defense also applies to ac-



tions under the safe place statute. *Wisnicky v. Fox Hills Inn & Country Club, Inc.*, 163 Wis.2d 1023, 473 N.W.2d 523 (Ct. App. 1991). Open and obvious danger defense does not bar a minor under age seven from bringing negligence action. *Rockweit by Donohue v. Senecal*, 197 Wis. 2d 409, 541 N.W.2d 742 (1995).

A landlord must exercise ordinary care toward tenant and others who are on premises with permission. Common law immunity is abrogated as to landlords. *Pagelsdorf v. Safeco Ins. Co. of Am.*, 91 Wis. 2d 734, 284 N.W.2d 55 (1979).

Wis. Stat. § 895.52 immunizes landowners from liability for injuries sustained as a result of recreational activities upon the land. A frequenter injured while searching for directions may recover for injuries, but a frequenter who searches for an intended destination without asking directions and who is injured in a non-public area, may not. *Monsivais v. Winzenried*, 179 Wis. 2d 758, 508 N.W.2d 620 (Ct. App. 1993).

Third party purchaser of real estate has cause of action against negligent appraiser although not in privity of contract. *Costa v. Neimon*, 123 Wis. 2d 410, 366 N.W.2d 896 (Ct. App. 1985).

**Safe Place.** Wisconsin's safe-place statute, Wis. Stat. § 101.11, imposes a duty on employers and owners of public buildings to maintain safe premises for employees and frequenters. The duty imposed is more stringent than ordinary care, but it does not render an employer an insurer. *Topp v. Continental Ins. Co.*, 83 Wis. 2d 780, 266 N.W.2d 397 (1978). The primary question to be answered in a safe-place claim is whether the employer has rendered the premises as safe as their nature reasonably permits. *Bobrowski v. Henne*, 270 Wis. 173, 177, 70 N.W.2d 666, 669 (1955); *McGuire v. Stein's Gift & Garden Ctr., Inc.*, 178 Wis. 2d 379, 398, 504 N.W.2d 385, 393 (Ct. App. 1993). Solitary or occasional business-related pursuits in private residence do not constitute "industry, trade or business" for safe place purposes. *Geiger v. Milwaukee Guardian Ins. Co.*, 188 Wis. 2d 333, 524 N.W.2d 909 (Ct. App. 1994). Where plaintiff slipped on banana peel in grocery store parking lot, court refused to hold store owner liable for unsafe condition under safe place statute beyond doors of store absent any "length of time evidence." *Kaufman v. State Street, Ltd. P'ship*, 187 Wis. 2d 54, 522 N.W.2d 249 (Ct. App. 1994). To recover under the safe-place statute, a plaintiff must show either actual notice of the unsafe condition that caused injury, or constructive notice, which exists when the hazard existed for sufficient time that a vigilant owner would have discovered and remedied the condition. *Strack v. Great Atl. & Pac. Tea Co.*, 35 Wis. 2d 51, 54, 150 N.W.2d 361 (1967). But, when there is "a reasonable probability that an unsafe condi-

tion will occur because of the nature of the business and the manner in which it is conducted," an injured person does not have to prove the dangerous condition existed for a sufficient period of time to allow an owner to correct the condition. *Id.* Rather, "a much shorter period of time, and possibly no appreciable period of time under some circumstances, need exist to constitute constructive notice." See *Megal v. Green Bay Area visitor & Convention Bureau, Inc.*, 274 Wis. 2d 162, 682 N.W.2d 857, 2004 WI 98. Evidence was insufficient for patron to establish claim under safe-place statute after slipping a French fry while exiting an arena. Whether arena's failure to locate and remove French fry from stair constituted lack ordinary care was genuine issue of material fact. *Id.*

**Miscellaneous.** One with right of way may be negligent if he does not do what he can to prevent accident. *Leckwee v. Gibson*, 90 Wis. 2d 275, 280 N.W.2d 186 (1979). In negligence claim against minor who hosted a party where parents were out of town and guest was injured, court held social host/guest association was not a recognized special relationship in Wisconsin. Therefore, minor host only had duty to exercise ordinary care toward guests. *Zelco v. Integrity Mut. Ins. Co.*, 190 Wis. 2d 74, 527 N.W.2d 357 (Ct. App. 1994), *abrogated on other grounds*, *Gritzner v. Michael R.*, 231 Wis. 2d 781, same duty applied to parents of minor host. *Id.*

Negligence of one parent does not bar recovery by other parent for loss of services of child or medical expenses incurred in caring for child. *Buckett v. Republic Ins. Co.*, 101 Wis. 2d 634, 305 N.W.2d 156 (Ct. App. 1981).

Gross negligence has been abolished. *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

A minor child can recover for loss of society and companionship of parent. *Theama by Bichler v. City of Kenosha*, 117 Wis. 2d 508, 344 N.W.2d 513 (1984). A parent may not recover for loss of society and companionship of an adult child. *Estate of Wells by Jeske v. Mount Sinai Med. Ctr.*, 183 Wis. 2d 667, 515 N.W.2d 705 (1994).

**Proximate Cause.** Proximate cause embraces not cause in fact but policy factors, *i.e.*, whether, despite the negligent act, which in fact caused a harm, liability should not be imposed because of some policy reason. *Colla v. Mandella*, 1 Wis. 2d 594, 85 N.W.2d 345 (1957). See public policy discussion above.

Plaintiff can recover for emotional distress caused by fear of future harm if there is reasonable basis for fear and if possibility of that harm developing was increased by negligently caused injury. *Brantner v. Jenson*, 120

Wis. 2d 63, 352 N.W.2d 671 (Ct. App. 1984), *aff'd*, 121 Wis. 2d 658, 360 N.W.2d 529 (1985).

Res ipsa loquitur is applicable where automobile leaves highway for no apparent reason. *Novakofski v. State Farm Mut. Auto Ins. Co.*, 34 Wis. 2d 154, 148 N.W.2d 714 (1967).

Ordinarily a mentally disabled person is responsible for his torts; however, if institutionalized and lacks capacity to control/appreciate conduct, not liable for injuries to paid caretakers. *Gould v. American Family Mut. Ins. Co.*, 198 Wis. 2d 450, 543 N.W.2d 282 (1996).

Exculpatory Clauses and Liability Waivers. Overbroad and inconspicuous liability waiver is against public policy. See *Atkins v. Swimwest Family Fitness Ctr.*, 277 Wis. 2d 303, 691 N.W.2d 334 (2005) (swimming facility's liability waiver operation and management). Generally, courts analyze exculpatory clauses using contract principles, which is a question of law. *Ford Motor Co. v. Lyons*, 137 Wis. 2d 397, 460, 405 N.W.2d 354 (Ct. App. 1987). Exculpatory clauses or liability releases are also reviewed on a public basis. *Atkins*, 277 Wis. 2d 303, ¶ 13. Wisconsin case law does not favor these exculpatory clauses. *Id.* at ¶ 12. A release of liability must "clearly, unambiguously, and unmistakably inform the signer of what is being waived." *Id.* at ¶ 15. Moreover, courts strictly construe such releases against the party seeking to rely on them. *Id.* at ¶ 12.

## NO-FAULT INSURANCE

Wisconsin does not have No-fault Insurance.

## PENALTY AND ATTORNEYS' FEES

Test of frivolousness when seeking award of reasonable attorney fees is whether reasonable attorney or litigant knew or should have known that there was no reasonable basis for recovery. Wis. Stat. § 802.05 (trial court proceedings); § 809.25(3)(c)2 (appellate proceedings); *Sommer v. Carr*, 99 Wis. 2d 789, 299 N.W.2d 856 (1981). Action for cost of frivolous claim under Wis. Stat. § 802.05 can only be brought in original proceeding in which frivolous claim was commenced, used, or continued. *Tower Special Facilities, Inc. v. Inv. Club, Inc.*, 104 Wis. 2d 221, 311 N.W.2d 225 (Ct. App. 1981).

Where insurer refused to defend insured, insured was entitled to recover from insurer full amount of its defense expenses for defending action. *Patrick v. Head of the Lakes Coop. Elec. Ass'n*, 98 Wis. 2d 66, 295 N.W.2d 205 (Ct. App. 1980). Insurer liable for insured's attorney's fees incurred in proving insurer had duty to defend. *Elliott v. Donahue*, 169 Wis. 2d 310, 485 N.W.2d 403 (1992). Insurer liable for entire judgment in excess of policy limits where insurer declined to defend

or seek stay of action after trial court granted summary judgment. *Newhouse v. Citizens Sec. Mut.*, 176 Wis. 2d 824, 501 N.W.2d 1 (1993). Wis. Stat. § 628.46 interest applicable to uninsured motorist claims. *Fritsche v. Ford Motor Credit Co.*, 171 Wis. 2d 280, 491 N.W.2d 119 (Ct. App. 1992).

Wis. Stat. § 802.05 authorizes a circuit court to sanction a party for *commencing* a frivolous action, while § 802.05 alone authorizes the imposition of sanctions upon a party *maintaining* a frivolous action. *Jandrt v. Jerome Foods, Inc.*, 227 Wis. 2d 531, 597 N.W.2d 744 (1999). The purpose of the frivolous claim and appeal statutes is to deter litigants from commencing or continuing frivolous actions and to punish those who do. *Tigerton v. Minniecheske*, 211 Wis. 2d 777, 565 N.W.2d 586 (Ct. App. 1997).

Pursuant to § 802.05(1), a person who signs a pleading, motion or other paper makes three warranties: that it was not interposed for an improper purpose; that to his or her best "knowledge, information and belief formed after reasonable inquiry" the paper is "well grounded in fact"; and the signer certifies he or she has conducted a reasonable inquiry and the paper is warranted by existing law or a good faith argument for a change in it. *Jandrt*, 227 Wis. 2d at 548. To determine if attorney signing pleading made reasonable inquiry into facts and law, court uses objective standard, asking what a reasonable attorney should have done under the circumstances that existed at time of challenged filing. *Jandrt*, 227 Wis. 2d 531.

Wisconsin Stat. § 802.05, authorizes a court to sanction a party or attorney for commencing a frivolous action.

A determination of frivolousness is "an especially delicate area"; a court must be cautious in declaring an action frivolous, *Radlein v. Indus. Fire & Cas. Ins. Co.*, 117 Wis. 2d 605, 345 N.W.2d 874 (1984), lest it stifle "the ingenuity, foresightedness and competency of the bar..." *Id.* The *Danner* court cited *Radlein* for proposition that insurance company may challenge fairly debatable claims and will be found liable only when it has intentionally denied a claim without a reasonable basis. The discussion in *Radlein* of a reducing clause was disapproved of as dicta in *Nicholson v. Home Ins. Co.*, 137 Wis. 2d 581, 405 N.W.2d 327 (1987), which was not an issue in *Radlein*. *Danner v. Auto-Owners Ins.*, 245 Wis. 2d 49, 629 N.W.2d 159. The decision to award attorney fees under § 802.05 is thus discretionary. *Jandrt*, 227 Wis. 2d 531. "Because it is only when no reasonable basis exists for a claim or defense that frivolousness exists, the statute resolves doubts in favor of the litigant or attorney." *Juneau County v. Courthouse Employees*, 221 Wis. 2d 630, 585 N.W.2d 587 (1998) (emphasis added).



Wisconsin Stat. § 802.05 contains “safe harbor” provision; motions for sanctions may not be filed until 21 days after service of proposed motion on party potentially subject to sanctions and after failure of party to withdraw objectionable pleading.

Appeal will not be dismissed as frivolous unless entire appeal is frivolous. Wis. Stat. § 809.25(c)(3); *State ex rel. Robinson v. Town of Bristol*, 264 Wis. 2d 318, 667 N.W.2d 14.

When there are disputed issues of fact necessary to a determination on sanctions under § 802.05(1), the trial court must hold an evidentiary to resolve them. *See Kelly v. Clark*, 192 Wis. 2d 633, 531 N.W.2d 455 (Ct. App. 1995). When determining whether insurer had a duty to defend, the court should consider the insurance policy, policy exclusions, and the complaint filed against the insured. *Menasha Corp v. Lumbermans Mut. Cas. Co.*, 361 F. Supp. 2d 887 (E.D. Wis. 2005).

### PRIVILEGED COMMUNICATIONS

**Doctor/Patient.** Where a party made a physical condition an element of his defense, privilege did not apply to the existing records or an order for a compulsory exam. *Ranft v. Lyons*, 163 Wis. 2d 282, 471 N.W.2d 254 (Ct. App. 1991).

Wis. Stat. § 804.01(2)(c) provides party may obtain documents and tangible things otherwise discoverable and prepared in anticipation of litigation or for trial by or for a party only upon showing party seeking discovery has substantial need and unable to obtain substantial equivalent without undue hardship.

Unfiled pretrial materials in civil action between private parties not public records and neither public nor press has either a common law or constitutional right of access to those materials. *State ex rel. Mitsubishi v. Milwaukee County*, 2000 WI 16, 233 Wis. 2d 1, 605 N.W.2d 868.

Once matter classified as work product, party moving for discovery must make adequate showing that information sought is unavailable from other sources and denial of discovery would prejudice movant’s trial preparation. *Lane v. Sharp Packaging Systems*, 2002 WI 28, 251 Wis. 2d 68, 640 N.W.2d 788.

Psychotherapists have affirmative duty to warn patient’s potential victims. *Schuster v. Altenberg*, 144 Wis. 2d 223, 424 N.W.2d 159 (1998); *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976).

Under Wis. Stat. § 905.04(4)(g), history of pregnancy is discoverable. Court may permit discovery of history as long as information regarding mother’s sexual relations outside of conceptive period eliminated. *In re*

*Paternity of J.S.P.*, 158 Wis. 2d 100, 461 N.W.2d 794 (Ct. App. 1990).

Under Wis. Stat. § 905.04(4)(f) no privilege for chemical tests for intoxication, results of test taken for diagnostic purposes admissible in OWI trial. *City of Muskego v. Godec*, 167 Wis. 2d 536, 482 N.W.2d 79 (1992).

**Spousal Privilege.** Wis. Stat. § 905.05(1) provides person has privilege to prevent spouse or former spouse from testifying against person as to private communications by one to other made during marriage. Wis. Stat. § 905.05(3) provides no privilege in proceedings where spouse is charged with crime against person or property of the other or a child or either, or with crime against person or property of third person committed in course of crime against the other. Testimony of spouse was admissible where individual charged with sexual assault of third party, committed in the course of committing crime of adultery against spouse. *State v. Richard G.B.*, 2003 WI App. 13, 259 Wis. 2d 730, 656 N.W.2d 469.

**Waiver.** Attorney-client privilege, as with all privileges recognized by Chapter 905, may be waived. Wis. Stat. § 905.11 provides holder of privilege waives privilege through voluntary disclosure or consent to disclosure of significant part of matter or communication.

Public policy required limited exception to therapist-patient privilege and to confidentiality in patient health care records where negligent therapy caused false accusations against parents for sexually abusing their child. *Johnson v. Rogers Memorial Hosp.*, 283 Wis. 2d 384, 700 N.W.2d 27 (2005).

Child-abuse exception to the therapist-patient privilege applied to any confidential communications made by child at counseling sessions regarding sexual assault allegedly committed by defendant for purposes of treatment. *State v. Denis L.R.*, 283 Wis. 2d 358, 699 N.W.2d 154 (2005).

### PRODUCTS LIABILITY

**Strict Liability.** Wisconsin Supreme Court considered whether comparative negligence statute applied to cases involving strict product liability actions, and it concluded that the statute did not apply because strict liability for injuries caused by defective and unreasonably dangerous products is liability in tort, not liability for negligence. *Fuchsgruber v. Custom Accessories, Inc.*, 244 Wis. 2d 758, 628 N.W.2d 833 (2001). Product is defective when it is unreasonably dangerous for its intended or foreseeable use. *Netzel v. State Sand & Gravel Co.*, 51 Wis. 2d 1, 186 N.W.2d 258 (1971). Strict liability expanded to protect bystanders. *Howes v. Hansen*, 56 Wis. 2d 247, 201 N.W.2d 825 (1972). Component part



manufacturers may be liable in strict liability. Where there are multiple defendants, all in chain of distribution, negligence of each should be compared to determine issue of contribution. *City of Franklin v. Badger Ford Truck Sales, Inc.*, 58 Wis.2d 641, 207 N.W.2d 866 (1973). A *res ipsa* type of inference may be used to establish defect. *Jagmin v. Simonds Abrasive Co.*, 61 Wis. 2d 60, 211 N.W.2d 810 (1973). Objective test employed to determine whether product is unreasonably dangerous. *Vincer v. Esther Williams All-Aluminum Swimming Pool Co.*, 69 Wis. 2d 326, 230 N.W.2d 794 (1975). In order for a direct action to be commenced against an insurer, the policy in question must have been delivered or issued for delivery in the State of Wisconsin. *Kenison v. Wellington Ins.*, 218 Wis. 2d 700, 705-06, 582 N.W.2d 69 (1998). If the accident, injury or negligence occurs in Wisconsin, and the insurance policy was issued or delivered outside Wisconsin, although a plaintiff may not pursue the insurer directly because of the limitations under Wis. Stat. § 631.01(1), he or she may join the insurer as a proper party defendant provided the insured is also a party. *Id.* Product case may be submitted to jury on both theories of strict liability and negligence. *Howes v. Deere & Co.*, 71 Wis. 2d 268, 238 N.W.2d 76 (1976).

Strict liability imposed only on manufacturers, distributors, and sellers, who place or maintain product in stream of commerce. *St. Clare Hosp. v. Schmidt, Garden, Erickson, Inc.*, 148 Wis. 2d 750, 437 N.W.2d 228 (Ct. App. 1989). Successor corporation succeeds to any product liability based obligations when purchase of the manufacturer is defacto. *Sedbrook v. Zimmerman Design Group, Ltd.*, 190 Wis. 2d 14, 526 N.W.2d 758 (Ct. App. 1994) (holding distributor who plays active role in decisions regarding marketing of product stands in such relationship to public as to allow finding of strict liability).

Where manufacturer has no expectation that product would reach user without substantial change, as in case of manufacturer designing and producing conveyer, but not electrical control system, it may be found that product is not unreasonably dangerous when it leaves manufacturer's hands. *Shawver v. Roberts Corp.*, 90 Wis. 2d 672, 280 N.W.2d 226 (1979).

Where a manufacturer supplies product to another that substantially changes product, the original manufacturer may not be liable for subsequent injury. *Westphal v. E. I. DuPont de Nemours & Co.*, 192 Wis. 2d 347, 531 N.W.2d 386 (Ct. App. 1995).

Strict liability applies to used products. *Nelson by Hibbard v. Nelson Hardware, Inc.*, 153 Wis. 2d 218, 450 N.W.2d 491 (Ct. App. 1989), *aff'd*, 160 Wis. 2d 689. Evidence of subsequent remedial changes admissible in case involving allegations of both negligence and strict

theory; defendant can request limiting instruction. *D.L. by Friederichs v. Huebner*, 110 Wis.2d 581, 329 N.W.2d 890 (1983). Relevant evidence of subsequent remedial measures by a third person is admissible. *Wheeler v. General Tire & Rubber Co.*, 142 Wis. 2d 798, 419 N.W.2d 331 (Ct. App. 1987).

Electricity is product subject to principles of strict liability in tort. *Ransome v. Wisconsin Elec. Power Co.*, 87 Wis. 2d 605, 275 N.W.2d 641 (1979).

In "second collision" or crashworthiness case, plaintiff must only prove defective product was substantial factor in causing injuries; he need not prove extent of enhancement of injuries. *Sumnicht v. Toyota Motor Sales USA, Inc.*, 121 Wis. 2d 338, 360 N.W.2d 2 (1984).

In DES case, plaintiff need only establish by preponderance of evidence that plaintiff's mother took DES, that DES caused plaintiff's subsequent injuries, that defendant produced or marketed type of DES taken by plaintiff's mother, and that defendant's conduct in producing or marketing DES constituted breach of legally recognized duty to plaintiff. Plaintiff need not allege or prove any facts related to time or geographical distribution of subject DES. *Hansen v. A.H. Robins, Inc.*, 113 Wis. 2d 550, 335 N.W.2d 578 (1983).

Damages. Punitive damages are recoverable in product liability case based on either strict liability or negligence. *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W.2d 437 (1980) (punitive damages may be recovered in a product liability suit if the defendant's conduct was "outrageous."). Punitive damages may be awarded in product liability suits if the plaintiff proves by clear and convincing evidence that the harm suffered was the result of the manufacturer's reckless disregard for the safety of product users, consumers or others who might be harmed by the product. *Sharp v. Case Corp.*, 227 Wis. 2d 1, 595 N.W.2d 380 (1999). Special attention should be paid to Wis. Stat. § 895.043(3). This statute has been interpreted to require a plaintiff to show that a defendant acted maliciously to the plaintiff or intentionally disregarding the rights of the plaintiff, **not** that a defendant intended to cause harm or injury to the plaintiff. *Wischer v. Mitsubishi Heavy Indus. Am.*, 279 Wis. 2d 4, 694 N.W.2d 320, 2005 WI 26 (2005), *reversing*, 2003 WI. App. 202, Case No. 01-0724, 267 Wis. 2d 638, 673 N.W.2d 303 (Ct. App. 2003).

Defenses. Open and obvious danger. An open and obvious condition exists when a reasonable person in the position of the plaintiff would recognize the condition and the risk the condition presents. A reasonable person in the position of the plaintiff need not appreciate the gravity of the harm threatened by the open and obvious condition for the defense to be applicable. *Griebler v.*

*Doughboy Recreational, Inc.*, 160 Wis.2d 547, 466 N.W.2d 897 (1991).

Contributory/Comparative Negligence. In strict liability action for wrongful death, on question of contributory negligence, negligence to be compared is negligence causative of death and not negligence causative of accident. *Austin v. Ford Motor Co.*, 86 Wis. 2d 628, 273 N.W.2d 233 (1979).

Although accident initially caused by plaintiff's contributory negligence in becoming entangled in corn picker and not manufacturer's negligence, enhanced injury theory against manufacturer is available for not providing accessible emergency shut-off device to one already entangled. *Farrell by Lehner v. John Deere Co.*, 151 Wis. 2d 45, 443 N.W.2d 50 (Ct. App. 1989). However, directed verdict granted to manufacturer where farm worker's negligence clearly exceeded manufacturer's. *Krantz v. Gehl Co.*, 146 Wis. 2d 398, 431 N.W.2d 675 (Ct. App. 1988).

## RELEASE

See also "CONTRIBUTION."

See Law Digest Tables.

Contract law-general. Release of tortfeasor by insured releases insurer from liability. *Sims v. La Prairie Mut. Fire Ins. Co.*, 101 Wis. 586, 77 N.W. 908 (1899).

Amount paid by one joint tortfeasor is release of other joint tortfeasor to extent of payment. *Haase v. Employers Mut. Liab. Ins. Co.*, 250 Wis. 422, 27 N.W.2d 468 (1947).

Reservation of rights against one party in release given to another valid. *Greene v. Waters*, 260 Wis. 40, 49 N.W.2d 919 (1951).

Release by wife for her injuries did not include her claim for husband's death three weeks later. *Rensink v. Wallenfang*, 8 Wis. 2d 206, 99 N.W.2d 196 (1959).

Where insurer of driver No. 1 takes release from passenger and driver No. 2, insurer is estopped to recover contribution from driver No. 2's insurer. *Travelers Indem. Co. v. Home Mut. Ins. Co.*, 15 Wis. 2d 137, 111 N.W.2d 751 (1961).

General release of original tortfeasor does not release medical malpractice claim unless expressly stated. *Krenz v. Medical Protective Co.*, 57 Wis. 2d 387, 204 N.W.2d 663 (1973).

In determining whether release is general release acting to relieve all joint tortfeasors, principal consideration is intent of parties. Test of intent is whether obligee

receives full satisfaction. *Brown v. Hammermill Paper Co.*, 88 Wis. 2d 224, 276 N.W.2d 709 (1979).

Fraud and Misrepresentation. Release set aside where adjuster falsely stated no liability under policy. *Allison v. Wm. Doerflinger Co.*, 208 Wis. 206, 242 N.W. 558 (1932).

Where insurer obtained release from defendant in settlement of personal injury case held that said company as collision insurer was estopped from recovering under deductible collision policy. *Wm. H. Heinemann Creameries v. Milwaukee Auto Ins. Co.*, 270 Wis. 443, 71 N.W.2d 395, 72 N.W.2d 102 (1955). *But see A.B.C.G. Enters., Inc. v. First Bank Southeast, N.A.*, 178 Wis. 2d 370, 504 N.W.2d 382 (Ct. App. 1993), *aff'd*, 184 Wis. 2d 465, 515 N.W.2d 904 (1994).

Special Release Forms. There are two different types of releases that are typically used when a party wishes to reserve rights against a non-settling party: *Pierringer* Releases and *Loy* Releases. The purpose of the *Pierringer* Release is to release one or more but not all joint tortfeasors to the action, while reserving the right to pursue non-settling parties. *Eden Stone Co. v. Oakfield Stone Co.*, 166 Wis. 2d 105, 479 N.W.2d 557 (Ct. App. 1991). This is exclusively for use when there are joint tortfeasors. *Id.* The negligence of all the joint tortfeasors must still be apportioned according to their degree of culpability. *Payne v. Bilco Co.*, 54 Wis. 2d 424, 195 N.W.2d 641 (1972). A verdict determining the negligence of all parties and non-parties should be reached regardless of the release. *Pierringer v. Hoger*, 21 Wis. 2d 182, 124 N.W.2d 106 (1963). A *Pierringer* release operates to impute to the settling plaintiff whatever liability in contribution or indemnity the settling defendant may have to the non-settling defendants and to bar subsequent contribution or indemnity actions against the settling defendants. The plaintiff agrees that the amount paid for the release will satisfy whatever percentage of causal negligence is ultimately assigned to a settling defendant. *City of Menomonee v. Everson Dodge, Inc.*, 163 Wis. 2d 226, 471 N.W.2d 513 (Ct. App. 1991). Release that satisfies portion of total amount of damages of plaintiff attributable to settling tortfeasors negligence is effective for purpose of barring non-settling tortfeasors right to contribution. *Pierringer v. Hoger*, 21 Wis. 2d 182, 124 N.W.2d 106 (1963). *Pierringer* release of intentional joint tortfeasor relieves negligent tortfeasor of liability to plaintiff. *Imark Indus. Inc. v. Arthur Young & Co.*, 148 Wis. 2d 605, 436 N.W.2d 311 (1989); *Fleming v. Threshermen's Mut. Ins. Co.*, 131 Wis. 2d 123, 388 N.W.2d 908 (1986).

Release instrument that released minor from liability did not as matter of law release sponsor of minor's driver's license since release contained reservation of



rights against parties not specifically named in instrument. Wis. Stat. § 343.15(2); *Swanigan v. State Farm Ins. Co.*, 99 Wis. 2d 179, 299 N.W.2d 234 (1980).

Plaintiff's release of minor defendant by *Pierringer* type release precludes claim for contribution by non-settling defendants against sponsor of minor's drivers license where period of limitation within which plaintiff could have brought action against sponsor has expired. *Jackson v. Ozaukee County*, 111 Wis. 2d 462, 331 N.W.2d 338 (1983).

Plaintiff may settle with primary insurer but reserve rights against excess insurer provided settlement protects insured from any personal liability; primary insurer owes no duty to "coincidental" excess insurer. *Loy v. Bunder-son*, 107 Wis. 2d 400, 320 N.W.2d 175 (1982).

*Loy* extending partial release is valid in true primary/excess situation. *Teigen v. Jelco, Inc.*, 124 Wis. 2d 1, 367 N.W.2d 806 (1985).

In tort action based exclusively on active negligence of joint venturer, valid release of sole actively negligent joint venturer also releases other joint venturers from liability, even where release specifically reserves claims against all other persons. *Schroeder v. Pedersen*, 131 Wis. 2d 446, 388 N.W.2d 927 (Ct. App. 1986).

Releases that absolved race sponsors from all liability are valid when executed by plaintiff who knew condition of track from inspection. *Trainor v. Aztalan Cycle Club, Inc.*, 147 Wis. 2d 107, 432 N.W.2d 626 (Ct. App. 1988).

Mistake. Release of claim for personal injury valid though injuries proved more serious than known at time release signed. *Jandrt v. Milwaukee Auto. Ins. Co.*, 255 Wis. 618, 39 N.W.2d 698 (1949).

Mutual mistake of fact is sufficient to set aside release. *Bryan v. Noble*, 5 Wis. 2d 48, 92 N.W.2d 226 (1958).

Plaintiff attempted to settle the case with the primary liability insurer for \$3,000 under the policy limit. Plaintiff notified the underinsured motorist carrier of the settlement and stated that it intended to pursue a UIM claim and that the UIM carrier would be given a credit for the full limit under the primary liability policy. The court denied coverage under the UIM policy based on a provision that required payment of UIM benefits only "after the limits of liability under any bodily injury liability bonds or policies have been exhausted by payment of judgments or settlements." A settlement plus a credit to the UIM carrier up to the policy limit did not fall under the definition of exhaustion by payment of judgments or settlements as defined by the policy. *Dan-*

*beck v. American Family Mut. Ins. Co.*, 245 Wis. 2d 186, 629 N.W.2d 150 (2001).

Even though release expressly covers unknown injuries, it is not bar to action for such unknown injuries if it can be shown that such unknown injuries were not within contemplation of parties when settlement was agreed on. *Krezinski v. Hay*, 77 Wis. 2d 569, 253 N.W.2d 522 (1977).

## REPRESENTATIONS AND WARRANTIES

Statutory Provisions. Wis. Stat. § 631.11(1)(a) provides no statement, representation or warranty made by person other than insurer or agent of insurer in negotiation for insurance contract affects insurer's obligations under policy unless stated in policy, written application signed by person and made part of policy by attachment or endorsement, or written communication by insurer to insured within 60 days of policy's effective date.

Wis. Stat. § 631.11(1)(b) provides no misrepresentation, and no breach of affirmative warranty, made by person other than insurer or agent of insurer in negotiation for or procurement of insurance contract constitutes grounds for rescission or affects insurer's obligations unless, if misrepresentation, person knew or should have known representation was false, and unless insurer relies on misrepresentation or affirmative warranty that is material or made with intent to deceive, or fact misrepresented or falsely warranted contributes to loss. See *Nolden v. Mutual Benefit Life Ins. Co.*, 80 Wis. 2d 353, 259 N.W.2d 75 (1977).

Absent written rules prohibiting medical examiners from issuing certificates of insurability, insurers are estopped by Wis. Stat. § 632.50 from asserting various defenses to coverage. *Grosse v. Protective Life Ins. Co.*, 182 Wis. 2d 97, 513 N.W.2d 592 (1994).

Misrepresentations. Failure of individual to disclose hospitalizations relating to angina pectoris, asthma, and nervous tension in application for surgical and hospital insurance was misrepresentation that, as matter of law, increased risk, and therefore, voided policy under Wis. Stat. § 209.06(1) (renumbered as Wis. Stat. § 631.11). *Delaney v. Prudential Ins. Co.*, 29 Wis. 2d 345, 139 N.W.2d 48 (1966).

Insurer is entitled to reasonable time to investigate insured's misrepresentation. *Ryder v. State Farm Mut. Auto Ins. Co.*, 51 Wis. 2d 318, 187 N.W.2d 176 (1971). Under Wis. Stat. § 631.11(4)(b), insurance company is required to notify insured of insurer's intent to rescind policy for misrepresentation within 60 days of insurer acquiring knowledge of misrepresentation.

Failure to disclose previous heart damage, which had subsequently healed, does not constitute misrepresentation. *Fuchs v. Old Line Life Co.*, 46 Wis. 2d 67, 174 N.W.2d 273 (1970). Misrepresentation as to amount of loss may void policy where policy so provides. *Tempelis v. Aetna Cas. & Sur. Co.*, 169 Wis. 2d 1, 485 N.W.2d 217 (1992).

Failure to disclose material medical information after application and before issuance of life policy sufficient to avoid policy. *Fjeseth v. New York Life Ins. Co.*, 20 Wis. 2d 295, 122 N.W.2d 49 (1963).

Vendor's misrepresentations to purchasers about value of real property did not constitute "property damage" under vendor's insurance policy. *Benjamin v. Dohm*, 189 Wis. 2d 352, 525 N.W.2d 371 (Ct. App. 1994).

Recognized majority view misrepresentation does not produce 'property damage' but rather economic damage. Additional allegation of physical damage to tangible property, loss of use of property, or claim for relief beyond money damages resulting from misrepresentation may constitute claim for property damage for purposes of insurance coverage. *Jares v. Ullrich*, 2003 WI App. 156, 266 Wis. 2d 322, 667 N.W.2d 843.

If question on form calls for applicant's judgment or opinion, ambiguity construed against insurer. *Nolden v. Mutual Benefit Life Ins. Co.*, 80 Wis. 2d 353, 259 N.W.2d 75 (1977).

Insured's contradictory statements constituted breach of duties of notice and cooperation. *Dietz v. Hardware Dealers Mut. Fire Ins. Co.*, 88 Wis. 2d 496, 276 N.W.2d 808 (1979). Duty of cooperation usually requires that insured provide information reasonably requested to assist insurance company's investigation, and insurer does not need to pay claims when duty is materially breached. *McDonnell v. Hestnes*, 47 Wis. 2d 553, 177 N.W.2d 845 (1970).

Third parties may recover against insurer even though insured's fraudulent application voided policy as to insured under Wis. Stat. § 631.11. *Rauch v. American Family Ins. Co.*, 115 Wis. 2d 257, 340 N.W.2d 478 (1983).

In order to make written application form part of insurance policy by endorsement, insurer must specifically write across the application that it is endorsement and part of policy. *Smith v. Dodgeville Mut. Ins. Co.*, 212 Wis. 2d 226, 568 N.W.2d 31 (Ct. App. 1997).

Ordinarily certificate of insurance does not become part of insurance contract; however, insurer is estopped from denying coverage when the coverage, conditions and limitations of the policy differ from the certificate

and only certificate is provided to insured. *Riske v. Nat'l. Cas. Co.*, 268 Wis. 199, 207, 67 N.W.2d 385 (1954).

Wis. Stat. § 631.11(3) does not apply to policy that has not become effective due to failure of condition precedent, which relates to attachment of risk and precedes the existence of the policy. Death of applicant prior to providing blood sample required for policy to be effective prevented policy from taking effect. *Fox v. Catholic Knights Ins. Society*, 2003 WI 87, 263 Wis. 2d 207, 665 N.W.2d 181.

## SERVICE OF PROCESS

See Law Digest Tables.

Upon Non-Resident Motorists. See "AUTOMOBILES."

Service of summons in manner prescribed by statute a condition precedent to valid exercise of personal jurisdiction, regardless of actual knowledge by defendant. *Danielson v. Brody Seating Co.*, 71 Wis. 2d 424, 238 N.W.2d 531 (1976). Failure to obtain personal jurisdiction over the defendant by statutorily proper service of process is a fundamental defect fatal to the action, regardless of prejudice; "technical defects" do not deprive of personal jurisdiction absent prejudice. *Am. Family Mut. Ins. Co. v. Royal Ins. Co.*, 167 Wis. 2d 524, 481 N.W.2d 629 (1992).

The general statutory requirements for commencement and service of a civil action are contained in Wis. Stat. § 801.02(1). "[A] civil action in which a personal judgment is sought is commenced as to any defendant when a summons and a complaint naming the person as defendant are filed with the court, provided service of an authenticated copy of the summons and of the complaint is made upon the defendant under this chapter within 90 days after filing." Wis. Stat. § 801.02(1).

By statute, when a defendant challenges the sufficiency of service, the serving party must provide an affidavit of service from the process server indicating: 1) the time and date, place and manner of service; 2) that the server is an adult resident of the state of service (or if service in Wisconsin, an adult resident of Wisconsin, Illinois, Michigan, Minnesota or Iowa) and not a party to the action; 3) that the server knew the person served to be the defendant named in the summons; and 4) that the server delivered to and left with the defendant an authenticated copy of the summons. Wis. Stat. § 801.10(4)(a). A party is required to show strict compliance with the requirements of this section when service is challenged. See *Dietrich v. Elliott*, 190 Wis. 2d 816, 528 N.W.2d 17 (Ct. App. 1995).

Service of unauthenticated photocopy of authenticated summons and complaint does not meet statutory requirement. *American Family Mut. Ins. Co. v. Royal Ins. Co. of Am.*, 167 Wis.2d 524, 481 N.W.2d 629 (1992). Time to file an answer in civil cases is 20 days; however if defendant is an insurance company, state, state agency or state officer, or any cause of action or counterclaim is raised in tort, the time to answer is 45 days. Wis. Stat. § 802.06(1).

### SUBROGATION

Wis. Stat. § 893.92 is the applicable statute in a subrogation action.

In General. Insurer may not recover by right of subrogation from its own insured. *Hallmark Ins. Co. v. Crary Enters., Inc.*, 72 Wis.2d 472, 241 N.W.2d 171 (1976). However, despite such general rule, where the vehicle in the accident was not named a vehicle in the policy, and such policy included a reimbursement clause, the insurer is entitled to reimbursement from its insured. *Rural Mut. Ins. Co. v. Peterson*, 134 Wis.2d 165, 395 N.W.2d 776 (1986).

Under ordinary subrogation principles, an insurer is subrogated to the rights of its insured against third persons when the insurer pays its insured for damages inflicted on the insured by those third persons. *Wisconsin State Local Gov't Prop. Ins. Fund v. Mason*, 2008 WI App. 49, ¶ 10, 308 Wis.2d 512, 748 N.W.2d 476. If there are two insurers, and one insurer breaches its contract with the insured, the non-breaching insurer can pursue subrogation against the breaching insurer. *Zurich Am. Ins. Co. v. Wisconsin Physicians Serv. Ins. Corp.*, 2007 WI App. 259, 306 Wis.2d 617, 743 N.W.2d 710.

An insured who has settled his/her part of the claim against the tortfeasor has to be made whole before a subrogated insurer may bring a subrogated claim against a tortfeasor or his/her insurer. *Schulte v. Frazin*, 176 Wis.2d 622, 500 N.W.2d 305 (1993).

Insurer not entitled to subrogation from insured out of proceeds insured received from insurer of tortfeasor, for amounts paid by insurer, since amount received by insured from his insurer and tortfeasor's insurer was less than his total damages. *Valley Forge Ins. Co. v. Home Mut. Ins. Co.*, 133 Wis.2d 364, 396 N.W.2d 348 (Ct.App. 1986). See also *Rimes v. State Farm Mut. Auto Ins. Co.*, 106 Wis.2d 263, 316 N.W.2d 348 (1982).

*Muller v. Society Ins.*, 2008 WI 50, ¶ 60, 309 Wis.2d 410, 750 N.W.2d 1 summarizes the "made whole doctrine" after *Rimes*. First, the made whole doctrine is not applicable in all situations, and thus the test of "wholeness" stated in *Rimes* is not the sole criterion for determining whether an insurer may pursue its sub-

rogation interest. Second, the made whole doctrine does not apply when the inequitable prospect of an insurer competing with its own insured for limited settlement funds is absent. Third, the existence of an indemnification agreement between the plaintiff and tortfeasor indirectly creates a limited pool of settlement funds between the plaintiff and his insurer. Finally, subrogation rests on several equitable principles including, but not limited to: 1) ensuring that the plaintiff is fully compensated for loss; 2) preventing unjust enrichment; and 3) ensuring that the wrongdoer is held responsible for his conduct and not allowed to go scot-free by failing to respond to damages while another, the plaintiff's insurer, is required to do so.

Underinsured motorists carrier's claim against underinsured tortfeasor sounds in subrogation, not implied indemnity, and is subject to three-year statute of limitations, which begins running as of the time of the plaintiff's injury. *Jones v. General Cas.*, 218 Wis.2d 790, 582 N.W.2d 110 (Ct. App. 1998). However, insurer does not have separate action when causes of action are joined in one suit, insured reaches settlement with tortfeasor, and court finds insured is not made whole. *Schulte v. Frazin, supra*; *Ives v. Coopertools.*, 208 Wis.2d 55, 559 N.W.2d 571 (1997). Insurer's contractual right to subrogation prevails over defendant insurer's uninsured motorist policy language, eliminating such right. Insurer considered to be a "person injured" under Wis. Stat. § 632.32(4)(a). *WEA Ins. Corp. v. Freiheit*, 190 Wis.2d 111, 527 N.W.2d 363 (Ct. App. 1994).

Parties to Action. Wis. Stat. § 803.03(2)(b) requires subrogee to participate in litigation or have party who joined subrogee represent its interest or suffer dismissal with prejudice. *Radloff v. Gen. Cas. Co.*, 147 Wis.2d 14, 432 N.W.2d 597 (Ct. App. 1988).

Accident Insurance. Where accident policy is not merely for indemnity and does not provide for subrogation, insurer paying loss is not entitled to be subrogated to rights of insured against third person, as such insurance is more in nature of investment contract instead of indemnity contract as is the case of fire insurance. *Gatzweiler v. Milwaukee Elec. Ry. & Light Co.*, 136 Wis. 34, 116 N.W. 633 (1908). For explanation of investment/indemnity contracts, see *Cunningham v. Metro. Life Ins. Co.*, 121 Wis.2d 437, 360 N.W.2d 33 (1985).

Health Insurance. Health insurance company entitled to subrogation pursuant to its contract from negligent third party. *Associated Hosp. Serv., Inc. v. Milwaukee Auto. Mut. Ins. Co.*, 33 Wis.2d 170, 147 N.W.2d 225 (1967).

Liability Insurance. Insurer covering riot damage cannot recover from municipality. *Am. Ins. Co. v. City of Milwaukee*, 51 Wis. 2d 346, 187 N.W.2d 142 (1971).

Where liability policy provided for subrogation, liability insurer of one of two joint tortfeasors paying judgment against them was entitled to right of contribution, which insured would have against other joint tortfeasor. *Frankfort Gen. Ins. Co. v. Milwaukee Elec. Ry. & Light Co.*, 169 Wis. 533, 173 N.W. 307 (1919).

Mortgage Insurance. Where insurance was procured at expense of mortgagor and for benefit of mortgagee and mortgagor, and insurer denied all liability as to both, mortgage debt having been satisfied after loss, there was no right of subrogation in favor of insurer. *Prentiss-Wabers Stove Co. v. Miller's Mut. Fire Ins. Ass'n*, 192 Wis. 623, 211 N.W. 776 (1927).

No-Fault Insurance. After receiving no-fault insurance proceeds from her decedent's insurer, surviving spouse of deceased passenger sued deceased driver's excess insurer, St. Paul. Court held St. Paul not entitled to set off for no-fault proceeds because no-fault insurer's subrogation claim did not exist until plaintiff obtained double recovery. *Petry v. St. Paul Fire & Marine Ins. Co.*, 151 Wis. 2d 343, 444 N.W.2d 428 (Ct. App. 1989). Hypothetical scenarios cannot be used to try to prove contextual ambiguity. *Remiszewski v. Am. Family Ins. Co.*, 200 WI 138, 276 Wis. 2d 30, 689 N.W.2d 57.

Fire Insurance. Though fire insurer is subrogated to rights of insured, insurer may not recover from such person if insured by lease has relieved third person of liability. *Frederick v. Great N. Ry. Co.*, 207 Wis. 234, 240 N.W. 387 (1932), *modified on other grounds*, 207 Wis. 234, 241 N.W. 363 (1932).

Insurer, under policy that insured contents of building occupied by insured as tenant and contained subrogation clause prohibiting insured from doing anything "after loss" to prejudice insurer's subrogation rights, was not entitled to recover from insured where insured, after policy was issued, but before loss was suffered, entered into agreement that exculpated landlord from liability for loss, which subsequently was sustained by insured as result of negligence of landlord's employees and was paid for by insurer. *Ins. Co. of N. Am. v. Universal Mortgage Corp.*, 82 Wis. 2d 170, 262 N.W.2d 92 (1978).

Action for subrogation accrues when payment is made. *Gen. Accident Ins. Co., v. Schoendorf & Sorgi*, 202 Wis. 2d 98, 549 N.W.2d 429 (1996).

## UNINSURED AND UNDERINSURED MOTORIST

Coverage. Uninsured motorist coverage requires physical contact with uninsured auto. *Amidzich v. Char-*

*ter Oak Fire Ins. Co.*, 44 Wis. 2d 45, 170 N.W.2d 813 (1969). *See also Theis v. Midwest Sec. Ins. Co.*, 232 Wis. 2d 749, 606 N.W.2d 162 (2000) ("Physical contact" requirement was met and UM coverage was provided for an accident occurring when a motor vehicle part was propelled into the insured's vehicle by an unidentified motor vehicle.) Where there was no physical contact between the insured's vehicle and an unidentified vehicle, which insured swerved to avoid, no coverage was afforded under the uninsured motorist coverage pursuant to Wis. Stat. § 632.32(4)(a); *Hayne v. Progressive N. Ins. Co.*, 115 Wis. 2d 68, 339 N.W.2d 588 (1983). *But see Zarder v. Humana Ins. Co.*, \_\_\_ N.W.2d \_\_\_, 2009 WL 385414 (Ct. App. 2009) (Omnibus statute required automobile insurer to provide coverage for an accident involving a collision with an unidentified motor vehicle where the driver stopped and asked if the insured was injured, but left before providing identifying information. Wis. Stats. §§ 632.32(4)(a), 346.67(1)). While no requirement in Wis. Stat. § 632.32(4) requires individual must be struck or hit by motor vehicle to obtain coverage, dog bite occurring when dog tethered to vehicle is consistent with reasonably contemplated use of vehicle. *Trampf v. Prudential Property & Cas. Co.*, 199 Wis. 2d 380, 544 N.W.2d 596 (Ct. App. 1996).

Where passenger sought UIM coverage on each of three vehicles listed in drivers auto insurance policies, policy did provide UIM coverage to passengers of unlisted automobiles driven by named insured. *Markunas v. Sentry Ins. Co.*, 185 Wis. 2d 852, 519 N.W.2d 688 (Ct. App. 1994). Where a driver, who was injured in an accident while operating his own auto during the course of his employment, sought UM coverage and medical payments coverage under his employer's commercial auto policy, the court held that § 632.32 does not require an insurer to provide a driver with UM coverage when operating a personal car that is not described in the UM coverage section of the employer's commercial auto policy. Additionally, § 632.32(4)(b) permits the named insured to reject medical payments coverage. *Mittnacht v. St. Paul Fire and Casualty Insurance Co.*, 2009 WI App. 51, \_\_\_ Wis. 2d. \_\_\_ (Ct. App. 2008).

Emotional distress suffered by insured, solely as a result of witnessing wife's death had to be compensated out of wife's "per person," uninsured motorist liability limit, not insured's "per person" limit, even though insured was, himself, physically injured in the automobile accident in which wife was killed. *Mullen v. Walszak*, 2003 WI 75, 262 Wis. 2d 708, 664 N.W.2d 76 (2003).

Territorial Exclusion. A territorial exclusion clause in an insurance policy can be applied to uninsured mo-



torist coverage. *Clark v. American Family Mut. Ins. Co.*, 218 Wis. 2d 169, 577 N.W.2d 790 (1998).

“Uninsured motorist” in Wis. Stat. § 632.32(4) and in insurance policy may include vehicle where either owner or operator is not insured by liability insurance. *Hull v. State Farm Mut. Auto Ins. Co.*, 222 Wis. 2d 627, 586 N.W.2d 863 (1998).

Where uninsured, non-permissive driver of an insured vehicle became “insured” by vehicle’s insurer, plaintiff precluded from collecting under own uninsured motorist policy provision. *Arlt v. American Family Mut. Ins. Co.*, 191 Wis. 2d 599, 530 N.W.2d 21 (Ct. App. 1995). “For a covered auto” language in a business auto policy precluded the named insured’s son from recovering UIM benefits regarding an accident that occurred while the son, who was an insured under the policy, was a passenger in the vehicle that was owned by the named insured but was not covered under the policy. *Lisowski v. Hastings Mut. Ins. Co.*, 759 N.W.2d 754 (2009).

“Deemed permission rule.” All adult members of the household of the named insured must be deemed capable of giving themselves permission to drive for purposes of statutes requiring coverage of any person using vehicle with permission of an adult member of the insured’s household. Wis. Stat. § 632.32(3)(a), (5)(a). Under a named insured’s automobile policy, coverage extended to girlfriend as adult household member, even though named insured never gave his girlfriend permission to drive the insured vehicle on the evening of the accident or blanket permission to drive it anytime; her use of the car was with permission of an adult household member—herself; thereby mandating coverage. *Arps v. Seelow*, 163 Wis. 2d 645, 472 N.W.2d 542 (Ct. App. 1991). The “deemed permission rule” does not extend to situations where an adult resident of the household crashes a rental car that he was not authorized to drive. *Venerable v. Adams*, 2009 WI App. 76, \_\_\_ Wis. 2d. \_\_\_ (Ct. App. 2008).

A self-insured entity, pursuant to Wis. Stat. § 344.16, need not provide protection to public that includes uninsured motorist coverage to operators and occupants of vehicles it owns. *Classified Ins. Co. v. Budget Rent-a-Car of Wisconsin, Inc.*, 186 Wis. 2d 478, 521 N.W.2d 177 (Ct. App. 1994).

Notice of accident provision is distinct and different from proof of claims requirement of uninsured motorist endorsement and, while denial of coverage under former requires showing of prejudice to insurer, no such showing is required under latter. *Martinson v. American Family Mut. Ins. Co.*, 63 Wis. 2d 14, 216 N.W.2d 34 (1974). Wis. Stat. § 632.32 (4m)(d) requires that insurers writing motor vehicle liability policies that do not contain UIM

coverage provide policyholders notice of availability of UIM coverage. An insurer’s failure to provide notice of availability of such coverage entitled insureds to a level of coverage necessary to conform to statutory minimum UIM coverage, not to coverage at the level of policy’s liability coverage. Wis. Stats. §§ 631.15 (3m), 632.32 (4m)(d); *Stone v. Acuity*, 308 Wis. 2d 558, 747 N.W.2d 149 (2008).

Neither arbitration nor action against other insured tortfeasors are conditions precedent to suit under uninsured motorist coverage. *Collicott v. Economy Fire & Cas. Co.*, 68 Wis. 2d 115, 227 N.W.2d 668 (1975). Arbitration clause broad enough to require coverage issues (rather than just liability and damages) to be submitted to arbitration. *Maryland Cas. Co. v. Seidenspinner*, 181 Wis. 2d 950, 512 N.W.2d 186 (Ct. App. 1994).

Insured’s failure to give prior notice to his insurer of settlement with a tortfeasor does not bar a claim for underinsured motorist coverage, absent prejudice. (Insured must prove lack of prejudice by the greater weight of evidence.) *Ranes v. American Family Mut. Ins. Co.*, 219 Wis. 2d 49, 580 N.W.2d 197 (1998).

Stacking - Reducing Clauses. New legislation eliminated stacking and allowed the application of reducing clauses and drive other car exclusions as of Statute’s effective date, July 15, 1995. Wis. Stat. § 632.32(5)(i) permits two UIM carriers with two separate policies to each reduce their respective UIM coverages by the liability limits paid by a single tortfeasor. *Progressive Northern Ins. Co. v. Kirchoff*, 313 Wis. 2d 138, 756 N.W.2d 635 (Ct. App. 2008).

Defendant contained automobile policy liability limits of \$150,000 per person and \$300,000 per accident. Plaintiff’s injuries exceeded limits of liability, therefore, plaintiff attempted to find coverage through underinsured motorist coverage provisions contained in two automobile policies they owned. The two policies defined underinsured motor vehicle as a land motor vehicle or trailer of any type to which bodily injury liability bond or policy applies at the time of accident, but its limit for bodily injury liability is less than limit of liability for this coverage. Limit of liability for each UIM policy was \$100,000 per person and \$300,000 per accident. Defendants’ liability policy provided coverage up to \$150,000, therefore, plaintiff attempted to stack its two underinsured policies to total \$200,000 in coverage in order for the defendant’s vehicle to be defined as an underinsured vehicle. Court held there was no UIM coverage because the policies prevented stacking. Therefore, defendant’s vehicle would not be an underinsured vehicle under either policy. *Kendziora v. Church Mut. Ins. Co.*, 2003 WI App. 83, 263 Wis. 2d 274, 661 N.W.2d 456 (Ct. App. 2003).



Reducing clauses in UM and UIM policies are valid in Wisconsin. Wis. Stat. § 632.32(5)(i). The reducing clause should mirror the language of the statute. The reducing clause should be similar to the language of the statute. The reducing clause cannot be contextually ambiguous. *Folkman v. Quame*, 264 Wis.2d 617, 665 N.W.2d 857 (2003); *Dowhower v. Marquez*, 2004 WI App. 3, 268 Wis.2d 823, 674 N.W.2d 906 (Ct. App. 2003); *Van Erden v. Sobczak*, 2004 WI App. 40, 271 Wis.2d 163, 677 N.W.2d 718 (Ct. App. 2004); *Commercial Union Midwest v. Vorbeck*, 2004 WI App. 11, 269 Wis.2d 204, 674 N.W.2d 665 (Ct. App. 2003). Therefore, in order to be valid, the reducing clause itself must be unambiguous and the reducing clause in the context of the entire insurance policy must be unambiguous. *Id.* There is contextual ambiguity if phrases of an insurance contract, when read in the context of the policy's other language, are reasonably or fairly susceptible to more than one construction. *Id.* The language of the policy should be interpreted as to what a reasonable person in the position of the insured would have understood the words in the policy to mean. *Id.* In helping to determine whether there is any contextual ambiguity, one should analyze whether the policy's declaration page and the reducing clause are consistent. The declarations page does not need to specifically address the reducing clause. *Van Erden v. Sobczak*, 2004 WI App. 40, 271 Wis.2d 163, 677 N.W.2d 718 (Ct. App. 2004). The declarations page does not need to specifically state where in the policy the UM or UIM endorsements are contained. *Id.*

Underinsurer has right of subrogation against tortfeasor and his insurer to extent that underinsurer has paid benefits to its own insured prior to release of tortfeasor and his insurance company. *Vogt v. Schroeder*, 129 Wis.2d 3, 383 N.W.2d 876 (1986). SR-22 filing under Wisconsin's financial responsibility laws only applies to motor vehicle liability insurance and not other types of insurance. Court held financial responsibility statutes do not affect provisions of uninsured motorist policy because uninsured motorist policy is not liability insurance. *Nutter v. Milwaukee Ins. Co.*, 167 Wis.2d 449, 481 N.W.2d 701 (Ct. App. 1992). Automobile insurer is prohibited from excluding uninsured motorist coverage when a insured is driving a vehicle other than that listed on the policy, unless the exclusion meets the requirements of the valid "drive other car" exclusions found in Wis. Stat. § 632.32(5)(j). *Blazekovic v. City of Milwaukee*, 234 Wis.2d 587, 610 N.W.2d 467 (2000). These requirements are: 1) the exclusion must pertain to a car owned by the insured or a relative residing within the insured's household; 2) the car to which the exclusion applies must not be described in the policy under which the uninsured motorist claim is made; 3) the car

must not be covered under the policy as a newly acquired or replacement vehicle.

### WAIVER AND ESTOPPEL

In General. Under standard fire policy local agent cannot, either in writing or by parol, at time insurance is in effect, change or waive any provision that would be inconsistent with or constitute waiver of required terms of standard policy. *Bourgeois v. Northwestern Nat'l Ins. Co.*, 86 Wis. 606, 57 N.W. 347 (1893). Rule that knowledge of insurance company, through its agent at time of issuing policy, of facts rendering it void, estops company from setting up those facts to escape liability on policy, was not abrogated by adoption of standard policy. *Welch v. Fire Ass'n*, 120 Wis. 456, 98 N.W. 227 (1904). See Wis. Stat. § 631.09. Company waives answers to questions that are not answered or are not fully answered in application, and policy is issued thereon. *Fehrer v. Midland Cas. Co.*, 179 Wis. 431, 190 N.W. 910 (1923).

By inducing insured to delay commencing action, company waived 12 month limitation. *Fischer v. Harmony Town Ins. Co.*, 249 Wis. 438, 24 N.W.2d 887 (1946).

Insurer estopped from asserting 12-month suit provision of multiperil policy where it wrongfully withheld delivery of policy to insured. *Heezen v. Hartland Cicero Mut. Ins. Co.*, 63 Wis. 2d 449, 217 N.W.2d 272 (1974).

An insurer's duty to defend exists up to the point at which its policy defenses to coverage are resolved, despite the fact that coverage "was fairly debatable." *Radke v. Fireman's Fund Ins. Co.*, 217 Wis. 2d 39, 577 N.W.2d 366 (1998). See also, *Deminsky v. Arlington Plastics Machinery*, 2003 WI 15, 259 Wis. 2d 58, 657 N.W.2d 411. ("When a party's conduct leads an indemnitee to conclude that the defendant is ignoring the claim, some responsibility must fall to the potential indemnitor").

Defendant city may waive defense of immunity from tort liability as part of liability policy contract. *Marshall v. City of Green Bay*, 18 Wis. 2d 496, 118 N.W.2d 715 (1963). Mere purchase of insurance in excess of statutory limit upon municipal liability is not waiver of same. *Sams v. City of Brookfield*, 66 Wis. 2d 296, 224 N.W.2d 582 (1975).

Coverage clause cannot be waived; forfeiture clause can be waived. *Shannon v. Shannon*, 150 Wis. 2d 434, 442 N.W.2d 25 (1989).

Failure of insurance company to deny driver's SR-21 statement to Department of Motor Vehicles that vehicle was insured does not estop company from denying existence of policy. *Hain v. Biron*, 26 Wis. 2d 377, 132 N.W.2d 593 (1965). However, where insurer failed to



timely notify Secretary of Transportation that person driving the insured vehicle did not have owners permission to operate vehicle, insurer was estopped from denying coverage under Wis. Stat. § 344.15(5). *Arlt v. American Family Mut. Ins. Co.*, 191 Wis. 2d 599, 530 N.W.2d 21 (Ct. App. 1995).

Investigation of accident by insurer did not waive policy defense. *Olson v. Hardware Dealers Mut. Fire Ins. Co.*, 38 Wis. 2d 175, 156 N.W.2d 429 (1968).

Failure of insurance company to deny coverage on ground of no permission to operate in SR-21 estops company from relying on that defense. *Duveneck v. Western Cas. & Sur. Co.*, 56 Wis. 2d 479, 202 N.W.2d 1 (1972), but see, *Nelson v. Zeimetz*, 150 Wis. 2d 785, 442 N.W.2d 530 (Ct. App. 1989) (Wis. Stat. § 344.15 does not estop an insurer of an operator from raising the defense of non-permissive use.)

Equitable estoppel requires reliance either in form or action or non-action causing detriment. *Worthington v. Farmers Ins. Exch.*, 77 Wis. 2d 508, 253 N.W.2d 76 (1977).

## WARRANTIES

See “REPRESENTATIONS AND WARRANTIES.”

## WORKERS' COMPENSATION

See Law Digest Tables.

Original Jurisdiction. Department of Workforce Development has original jurisdiction. Wis. Stat. § 102.14.

Benefits. Worker's Compensation Act bars any claim by noninjured spouse for loss of consortium deriving from employee-spouse's injury. *Franke v. Durkee*, 141 Wis. 2d 172, 413 N.W.2d 667 (Ct. App. 1987). Social security offsets may be used to reduce temporary disability benefits paid during the period that a workers' compensation claimant is engaged in a vocational rehabilitation program. Wis. Stats. §§ 102.43(5), 102.44(5), 102.61. *Michels Pipeline Const. v. Labor And Industry Review Com'n*, 309 Wis. 2d 470, 750 N.W.2d 485 (Ct. App. 2008).

“Award” as used in Worker Compensation Act is construed to mean award that has become final under Wis. Stat. § 102.18(3). *Warren v. Link Farms, Inc.*, 123 Wis. 2d 485, 368 N.W.2d 688 (Ct. App. 1985). Once an award is made, statutes provide only limited provision for reopening. Section 102.18(4)(c) allows an award to be modified, or reversed because of a mistake or newly discovered evidence for up to a year after the date of the order. The statutes do not, however, provide for the re-

opening of an award two years after it was rendered in the event the employer rehires the employee. *Schrieber Foods, Inc. v. Labor and Industry Review Com'n*, 2009 WI App. 40, \_\_\_ Wis. 2d \_\_\_ (Ct. App. 2009).

Death Benefits. Death benefits extend to illegitimate children, but not to illegitimate posthumously born children. *Larson v. DILHR*, 76 Wis. 2d 595, 252 N.W.2d 33 (1977).

Loaned Employee. Workers' compensation statutes governing temporary help agencies are not limited to employers who are in the business of placing employees with other employers. Wis. Stats. §§ 102.01(2)(f), 102.29(6); *Gansch v. Nekoosa Papers, Inc.*, 158 Wis. 2d 743, 463 N.W.2d 682 (1990).

Employee of one party to joint venture is not necessarily employee of all for worker compensation purposes. Right to control test is applied. *Bulgrin v. Madison Gas & Elec. Co.*, 125 Wis. 2d 405, 373 N.W.2d 47 (Ct. App. 1985).

Dual Capacity. An employer having a second persona fully separate from and unrelated to his function as an employer may be liable to an employee for injuries incurred in the work place. This is the “dual persona” concept. *Schweiner v. Hartford Acc.*, 120 Wis. 2d 344, 354 N.W.2d 767 (Ct. App. 1984). Where employee is injured in course of employment, he/she may bring action against third party; however, third party may not receive contribution or indemnification from employer where employee fails to establish involvement of employer in his injury as persona distinct from its status as employer. *Henning v. GM Assembly Div.*, 143 Wis. 2d 1, 419 N.W.2d 551 (1988). Dual persona principle applied to injured factory employee, holding he could sue the individual lessors of the factory despite insufficient evidence of control under safe-place statute. *Couillard v. Van Ess*, 152 Wis. 2d 62, 447 N.W.2d 391 (Ct. App. 1989).

Exclusive Remedy. Exclusive remedy provision of Workers' Compensation Statute bars cause of action for contribution against employer by negligent third party even though employer was substantially more at fault than third party. *Mulder v. Acme-Cleveland Corp.*, 95 Wis. 2d 173, 290 N.W.2d 276 (1980). Parent corporation may be liable to employee of subsidiary. *Miller v. Bristol-Myers Co.*, 168 Wis. 2d 863, 485 N.W.2d 31 (1992).

Wis. Stat. § 102.18(1)(bp) provides in part that department may include a penalty in an award to an employee if determined that employer's or insurance carrier's suspension of, termination of or failure to make payments or failure to report injury resulted from malice or bad faith. This penalty is the exclusive remedy against an employer or insurance carrier for malice or bad faith.



This penalty does not apply to the Wisconsin Workers' Compensation Uninsured Employers Fund. Wis. Stat. §§ 102.18(1)(bp) 102.87(1)(a).

Wis. Stat. § 102.23(5) unambiguously requires an employer to make payment to a disabled employee pending appeal of a date of injury defense, where the employer's liability is not disputed and the only question is who will pay benefits. *Bosco v. Labor & Indus. Review Comm'n*, 272 Wis. 2d 586, 681 N.W.2d 157 (2004). An employer may be subject to bad faith penalties under Wis. Stat. § 102.18(1)(bp) independent from its insurer, when it fails to pay benefits in accord with Wis. Stat. § 102.23(5). *Id.* Worker's Compensation Act is exclusive remedy for former employer's alleged refusal to rehire an employee because of back injury, but not for alleged refusal to hire due to mental retardation. *Norris v. DILHR*, 155 Wis. 2d 337, 455 N.W.2d 665 (Ct. App. 1990). Exclusive remedy provision does not bar discrimination claim brought under Wisconsin Fair Employment Act when same torts might support discrimination and workers' compensation claim. *Byers v. LIRC*, 208 Wis. 2d 388, 561 N.W.2d 678 (1997).

Exclusive remedy provision bars contribution claim against employer for negligent treatment of employee's injuries where employer assumes no obligation by providing medical treatment other than that imposed by Worker's Compensation Act. *Jenkins v. Sabourin*, 104 Wis. 2d 309, 311 N.W.2d 600 (1981). Wis. Stat. § 102.03(2) provides an exception to the exclusive remedy provision allowing employee to sue co-employee for negligent operation of motor vehicle "not owned or leased by the employer." *Ross v. Foote*, 154 Wis. 2d 856, 454 N.W.2d 62 (Ct. App. 1990). Worker's Compensation Act, Wis. Stat. § 102.18(1)(bp) is exclusive remedy for bad faith claims. *Messner v. Briggs & Stratton Corp.*, 120 Wis. 2d 127, 353 N.W.2d 363 (Ct. App. 1984).

Arising out of and in the course of. The typical employee going to or from work is not covered until he or she reaches the employer's premises. An employee going to work is ordinarily in the prosecution of his or her own business, not performing services incidental to employment. *Doering v. LIRC*, 187 Wis. 2d 472, 523 N.W.2d 142 (Ct. App. 1994). Although personal comfort doctrine extends compensation coverage to brief pauses from labors within time and space of employment, it does not extend to injury sustained while employee was traveling to eat lunch away from place of employment where employment does not require travel. *Marmolejo v. DILHR*, 92 Wis. 2d 674, 285 N.W.2d 650 (1979). However, injuries are arising out of the course of employment if they are incurred by traveling employees who participate in reasonable recreational activities such as

downhill skiing on their days off. *CBS v. LIRC*, 213 Wis. 2d 285, 570 N.W.2d 446 (Ct. App. 1997). *But see McRae v. Porta Painting, Inc.*, 2008AP1946, 2009 WL 1393400 (Ct. App. 2009) (Publication recommended.) (Employee, who was injured while running an errand, was not covered while traveling to work because he was not asked to conduct any work-related errands while traveling to his job site. Plaintiff's employer did not provide his transportation, was not reimbursing him for the use of his personal vehicle, and was not compensating him for travel time. There were no facts to establish that the employment relationship continued while the employee was traveling to and from work.)

Mental Injury. Recovery may be had under Worker's Compensation Act for non-traumatic mental injury where such injury includes emotional stress without physical trauma if it arises from exposure to circumstances beyond everyday events. *International Harvester v. LIRC*, 116 Wis. 2d 298, 341 N.W.2d 721 (Ct. App. 1983). Worker's Compensation Act applies to accidental injuries and not to intentional infliction of emotional distress. *Jenson v. Employers Mut. Cas. Co.*, 154 Wis. 2d 313, 453 N.W.2d 165 (Ct. App. 1990).

Pre-Existing Injury. If work activity precipitates disability even though disability would not have been caused in absence of congenital weakness, disability may be compensable under workers' compensation law. *E. F. Brewer Co. v. DILHR*, 82 Wis. 2d 634, 264 N.W.2d 222 (1978).

Disfigurement. The plain meaning of "disfigurement" in the workers' compensation statute providing compensation for permanent disfigurement encompasses an impairment that significantly affects the appearance of a person. Wis. Stat. § 102.56(1). This statute does not limit recovery to situations where the claimant's injuries consist of visible burns, scars or amputations. *County of Dane v. Labor and Industry Review Com'n*, 759 N.W.2d 571, 2009 WI 9 (2009).

Fellow Employee Rule. There is no action against supervisory co-employee for breach of proper supervision as this is duty owed only to employer. *Lupovici v. Hunzinger Constr. Co.*, 79 Wis. 2d 491, 255 N.W.2d 590 (1977).

Miscellaneous. Workers' compensation insurer of general contractor may recover from subcontractor who breached contract to procure workers' compensation insurance. *New Amsterdam Cas. Co. v. Acorn Products Co.*, 42 Wis. 2d 127, 166 N.W.2d 198 (1969).

Employer violated Wis. Stat. § 102.35(3) when employee terminated for work-related injury absences. *Great N. Corp. v. LIRC*, 189 Wis. 2d 313, 525 N.W.2d 361 (Ct. App. 1994).



Subrogation. Compensation carrier entitled to share in proceeds of settlement between employee and third-party tortfeasor if carrier serves notice of reimbursement. Participation in third party action is not necessary. *Guyette v. West Bend Mut. Ins. Co.*, 102 Wis. 2d 496, 307 N.W.2d 311 (Ct. App. 1981). Carrier's reimbursement via Wis. Stat. § 102.29(1) is from proceeds of "claim," even if part of claim is for additional injury from medical treatment. *Holdmann v. Smith Labs., Inc.*, 151 Wis. 2d 813, 447 N.W.2d 69 (Ct. App. 1989).

Employer's workers' compensation insurer not prevented from bringing third-party action when injured employees have not assigned their claims. *Employers Mut. Liab. Ins. Co. v. Liberty Mut. Ins. Co.*, 131 Wis. 2d 540, 388 N.W.2d 658 (Ct. App. 1986). These claims include all the claims available to the employee against the

third party tortfeasor including claims for the employee's pain and suffering. *Threshermens Mut. Ins. Co. v. Page*, 217 Wis. 2d 451, 577 N.W.2d 335 (1998).

Under Wis. Stat. § 102.35(3), formal application for rehire by employee injured in the course of employment is not a prerequisite to recovery, where reapplication would be futile and impose an unreasonable burden on the employee. *Dalco Metal Prods., Inc. v. LIRC*, 142 Wis. 2d 595, 419 N.W.2d 292 (Ct. App. 1987), *abrogated on other grounds*, *West Bend Co. v. LIRC*, 149 Wis. 2d 110, 438 N.W.2d 823 (1989). Absent unanimous agreement between parties that sets method of distribution of settlement, governing statute controls. *Skirowski v. Employers Mut. Cas. Co.*, 158 Wis. 2d 242, 462 N.W.2d 245 (Ct. App. 1990).