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Employment Law

Employees Whose Positions Are Important And Closely Linked To The Religious Mission Of A Religious Organization Are Precluded From Bringing Discrimination Claims

Coulee v. LIRC,
2009 WI 88, ___
Wis. 2d ___, 768
N.W.2d 868
(2009)

In *Coulee v. LIRC*, the Wisconsin Supreme Court held that both the Free Exercise Clause of the U.S. Constitution and the Freedom of Conscience Clauses of the Wisconsin Constitution preclude employment discrimination claims by employees of religious organizations, if the employee is closely linked to the religious mission of the organization, as such claims impinge on the employer's right to religious freedom.

The plaintiff was a first grade teacher at a Catholic elementary school. In Spring 2002, the 53 year old female plaintiff was one of ten teachers to not be offered a renewal contract. The plaintiff was replaced by a 35 year old teacher. The plaintiff subsequently filed an age discrimination complaint with the Equal Rights Division against the Catholic School system which included the elementary school.

The First Amendment to the U.S. Constitution, which includes the Free Exercise Clause, states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This has led every jurisdiction which has considered this issue to adopt a ministerial exception regarding the employment decisions which occur at a religious organization. The ministerial exception recognizes that a church's existence depends on whom it selects to lead, preach, teach, and interpret its doctrines to its members and the world at large.

In the seminal case on this issue the court proposed a test for deciding when a position should be considered ministerial and therefore exempt – when their primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship. *Rayburn v. Gen. Conference Of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985). Some jurisdictions have seized on this language and utilized a quantitative approach in which courts classify job duties of the employee as secular

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or religious in order to determine the ‘primary’ duties of the employee. Only if the primary duties are religious is that employee granted the exception.

However, other jurisdictions have focused in on a second statement in *Rayburn* which indicates that the question hinges on whether a position is important to the spiritual and pastoral mission of the church. This is a functional or holistic approach which takes other factors into consideration and does not solely look to see whether a vast majority of an employee’s duties are religious. In *Coulee* the Wisconsin Supreme Court expressly adopted the functional, holistic approach and expressly rejected the quantitative approach, overturning the decisions of the ALJ, the circuit court, and the court of appeals. The Supreme Court reasoned that a functional analysis avoids reducing the significance of a position to a rote quantitative formula and is more true to the First Amendment’s protection of religious freedom.

The court then set forth the following two step analysis. First is an inquiry into whether the organization in both statement and practice has a fundamentally religious mission. Second is an inquiry into how important or closely linked the employee’s work is to the fundamental mission of that organization. In *Coulee*, the court rather easily determined that the Catholic school system at issue had a fundamentally religious mission in both statement and practice. After all, the Catholic school system

at issue is an entity of the Catholic church itself who is subject to the authority of the Bishop of LaCrosse. In addition, the Catholic school system is committed to education rooted in the Gospel of Jesus Christ and accomplishes this by integrating theological and moral principles into each subject.

As to the second step, the court found that the plaintiff was important and closely linked to the fundamental mission of the organization. The plaintiff led prayer for her students, incorporated religious examples into subject areas, helped celebrate school-wide celebrations of religious holidays, and taught Catholic doctrine and practice to students four days per week. Therefore, the Supreme Court held that the plaintiff’s age discrimination claim was barred. The Supreme Court did caution that it was not giving a blanket exception to all religious school teachers as future cases will be highly fact intensive.

A rather scathing dissent by Justice Crooks noted that Wisconsin may be the only state in the nation to apply the ministerial exception, typically reserved for church pastors and leaders, to a first grade lay teacher at a Catholic school. Also, Justice Crooks notes that the decision rendered in *Coulee* may put in jeopardy the continued validity of the Milwaukee Parental Choice Program as the continued validity of the program rests, at least in part, on the proposition that the religious schools participating in the MPCP comply with nondiscrimination laws.

Restrictive Covenants In Employment Contracts Which Are Found To Be Reasonable May Be Enforced If They Are Capable Of Being Understood and Enforced Independent Of Unreasonable Restrictive Covenants

The Wisconsin Supreme Court significantly altered the law in Wisconsin with respect to the enforcement of non-compete agreements following its decision in *Star Direct, Inc. v. Dal Pra*. Based on this Court’s ruling employers in Wisconsin will find it easier to enforce non-compete agreements, or portions thereof, against disloyal former employees. Simply put, covenants restricting post-employment activities that are deemed reasonable will

likely be enforceable even if they are contained in an employment agreement that contains other unenforceable covenants, as long as all covenants in the agreement are divisible.

The defendant worked for a competitor of the plaintiff. The plaintiff acquired the competitor and sought to retain the defendant by offering him a “very good” compensation package, including a \$30,000 bonus, following 30

Star Direct, Inc. v. Dal Pra,
2009 WI 76, ___
Wis. 2d ___, 767
N.W.2d 898
(2009)

continued...

months of service. The plaintiff required the defendant to sign a non-compete agreement as a condition of employment and as part of the bonus. The agreement contained three post-employment restrictions which ran for a period of 24 months following the end of the defendant's employment. The restrictions prohibited the defendant from (1) enticing away current or former customers of the plaintiff with whom he had dealt on behalf of the plaintiff; (2) becoming engaged in a business "substantially similar to or in competition with" the plaintiff's business within a 50-mile radius of Rockford, Illinois; and (3) disclosing certain confidential and proprietary information of the plaintiff.

After working for the plaintiff for four years, and after receiving his bonus of \$30,000, the defendant quit and started his own distribution company and engaged in activities which violated the non-compete agreement. The plaintiff filed suit to enforce the non-compete agreement and recover damages.

The Wisconsin Supreme Court held the customer and confidentiality clauses were reasonably necessary and enforceable. However, it found the business clause to be overbroad and unenforceable. Under previous cases this would typically have been the death knell for the non-compete agreement as a whole. However, the Wisconsin Supreme Court held that one unenforceable covenant does not necessarily mean that other restrictive covenants are also unenforceable. Specifically, if an unreasonable provision is stricken, the other provisions are enforceable so long as the additional covenants are understandable and independently enforceable and are divisible from the unenforceable covenant. This decision at the very least indicates a slight backtrack from the previous animus shown towards non-compete agreements by Wisconsin courts and should allow employers to enforce non-compete agreements, or portions thereof, on a more frequent and consistent basis.

Persons Colluding With an Employee Are Prohibited From Using the Doctrine Of *Respondeat Superior* To Impute the Employee's Conduct To the Employer For the Purpose of Escaping Liability

The Wisconsin Court of Appeals in *James Cape & Sons Co. v. Streu Construction Co.* ruled an employee, and persons colluding with an employee, are prohibited from using the doctrine of *respondeat superior* to impute the employee's conduct to the employer to avoid liability. This decision comports with the policy goal of *respondeat superior* - to provide an alternate source of recovery for injured parties. Given this stated policy goal, in these types of actions in which an employee and others collude against an employer, the colluding parties should not be allowed to use *respondeat superior* as a sword against the injured party itself.

In *James Cape*, the employer sued one of its employees and two companies that colluded with the employee in a bid-sharing scheme. The colluding companies argued that the employee was acting within the scope of his employment because he was benefitting the employer by sharing bid information to ensure that his employer was not "spread too thin."

On summary judgment, the two colluding companies convinced the circuit court that the doctrine of *respondeat superior* applied such that the court was required to view the employer as vicariously liable for its employee's actions, even though the bid-rigging scheme harmed the employer and drove it out of business.

The court of appeals in *James Cape & Sons Company* held that the doctrine of *respondeat superior* is not applicable in actions between an employer and an employee who has committed a wrong against the employer, and reversed the grant of summary judgment. The two colluding companies argued that as third parties they should be able to invoke the doctrine of *respondeat superior* as a defense. The *James Cape* Court wholeheartedly rejected that argument, noting that if the defense is unavailable to the employee (*See Zulke v. Wing*, 20 Wis. 429 (1866)) then it is certainly not available to the employee's co-conspirators either.

James Cape & Sons Co. v. Streu Construction Co., 2009 WI App 144, ___ Wis. 2d ___, ___ N.W.2d ___

Reasonable Precautions Taken By Employer May Prevent Liability For Negligent Hiring, Supervision, And Training Where Alleged Actions Of Employee Are Bizarre, Unexpected, Or Unimaginable

Maypark v. Securitas Sec. Servs. USA, 2009 WI App. 145, ___ Wis. 2d ___, ___ N.W.2d ___ (Ct. App. 2009) (petition for review filed October 1, 2009)

The Wisconsin Court of Appeals recently addressed the degree of responsibility that an employer may have under negligent hiring, training, and supervision jurisprudence for the secret and illicit actions of the employer's employee that cause harm to the employer's employees. In *Maypark v. Securitas Sec. Servs. USA*, the court of appeals foreclosed plaintiffs from holding an employer liable for misconduct of an employee after noting the reasonable attempts the employer made to discourage similar sorts of misconduct.

The *Maypark* Court addressed whether employees of a manufacturing company suffering allegedly severe emotional distress had a cause of action for negligent hiring, training, or supervision against the security services company providing security for the company's facility. The security manager employed by the security services company copied the photographs of female employees taken from their security badges, altered them pornographically, used the altered pictures privately, and posted them on an adult Internet Web site. After a bench trial, the circuit court found the security company's manager liable for defamation and invasion of privacy, and also found the security services company liable for negligent training and supervision of the security manager.

The court of appeals in *Maypark* reversed the circuit court, concluding that, as a matter of law, the security services company had not

been negligent. The security guard shack where some of the Internet access took place fell under the control of the manufacturing company - the customer of the security services company and the employer of the injured women. The manufacturing company also had the ability to track security guard Internet access, and failed to alert the security services company to anything unusual. The security services company provided training concerning sexual harassment and employee theft, and fired the security manager when his actions came to light. The court of appeals concluded that the security manager's misconduct could not have been reasonably foreseen by the security services company - characterizing his actions as bizarre, unexpected, and "unimaginable" - and therefore the court of appeals concluded that the security services company cannot reasonably be expected to have done anything more than it did.

The *Maypark* decision constitutes a recognition that too much second-guessing of the actions of employers in hindsight after secret employee actions come to light will cause an injustice. As the court of appeals has observed in the past, fairness to defendants requires judicial rulings that are not "based on [20/20] hindsight," but instead "based on the specific facts and law as they existed at the time." *Costello v. Godbolt*, 2005 WI App 38, ¶ 19 n. 4, 279 Wis. 2d 517, 693 N.W.2d 147 (UNPUBLISHED).

Employer Exposed To Back-Pay Liability Under Wis. Stat. § 109.01 If Employee Performs Actual Work At Any Time

Under a statute once thought by certain individuals to simply compel employers to issue paychecks promptly, the Wisconsin Court of Appeals has stated that when an employee has performed actual work at any time and the employer has committed to paying the employee under a clear agreement, Chap. 109, Wis. Stats. is available as a mechanism for recovery to the employee including back-pay liability and benefits. *Sliwinski v. City of Milwaukee*. The court did pronounce a two faceted requirement to recovery under this statute. First, the employee must have at some time performed personal services that entitle him or her to the wages. Second, the employee's entitlement to the wages must be clear and already determined by either an agreement or employer's policy.

The plaintiff in question was a detective with the Milwaukee Police Department who was terminated for a rule violation. After various related litigation the plaintiff sought to recover back-pay, benefits, and penalties under Chap. 109, Wis. Stats. The circuit court determined that §109.01(3) required that the employee perform actual work during the time period for which the plaintiff made a wage claim and therefore granted summary judgment to the City of Milwaukee, dismissing the case.

The specific question addressed by the Court of Appeals in *Sliwinski* was whether the plaintiff could seek back-pay and benefits under Chap. 109, Wis. Stats., and more specifically, whether these categories were "wages" under § 109.01(3).

'Wage' or 'wages' mean remuneration payable to an employee for personal services, including salaries...holiday and vacation pay, overtime pay, severance pay or dismissal pay, supplemental

unemployment benefit plan payments... bonuses...

The court found that pursuant to a plain interpretation of the statute, that wages were forms of compensation owed to an employee for personal services. Since several of the examples of owed compensation were for times in which an employee was not actually performing personal services (i.e. holiday and vacation pay, benefits, and severance or dismissal pay), that there was no requirement that the employee be performing services during the time period in which they claimed entitlement to wages. Based on this, the court concluded that entitlement may be based solely on past services performed.

As to second prong, that the employee must be clearly entitled to the determined wages, the court found examples of agreements or policies which make it clear the employee is entitled to the wages are a collective bargaining agreement, an employment contract, or the employer's established policy. The court found this interpretation regarding the second prong to be consistent with the Wisconsin Supreme Court decision in *German v. DOT*, 2000 WI 62, 235 Wis. 2d 576, 612 N.W.2d 50. In that case, the court held that DOT officers were entitled to wages for their on-duty lunch hours pursuant to an administrative code provision which clearly entitled them to the wages.

One reason this particular decision is noteworthy is the new possibility of enhanced damages, penalties, and administrative requirements employers could be subjected to under Chap. 109, Wis. Stats as a result of this decision. Without recounting the entire statute, suffice it to say that employers can be subject to administrative penalties including audits, civil penalties including an additional 100% in damages, and even criminal penalties in extreme situations.

Sliwinski v. City of Milwaukee,
— WI App. —,
— Wis. 2d —,
— N.W.2d —,
2009 Wisc. App.
LEXIS 770 (Ct.
App. 2009).

Insurance Coverage

Coverage Required When Detached Piece Of Unidentified Motor Vehicle Is Propelled Into Insured's Motor Vehicle By Identified Motor Vehicle

Tomson v. American Family Mutual Ins. Co., 2009 WI App. 150, ___ Wis. 2d ___, ___ N.W.2d ___ (Ct. App. 2009)

Several decisions have been issued over the past 5 years in Wisconsin in regards to insurance coverage for so called hit and run cases. In *Tomson v. American Family Mutual Ins. Co.*, the court of appeals addressed a new set of facts in which an insured's vehicle was struck by a 400 pound dual wheel assembly which was propelled at the insured's vehicle by an *identified* semi-trailer. However, the dual wheel assembly had apparently come off of another *unidentified* semi-trailer some time before.

Wisconsin courts have previously addressed similar, yet distinguishable, fact patterns. In *Theis v. Midwest Security Ins. Co.*, 2000 WI 15, 232 Wis. 2d 749, 606 N.W.2d 162, the Wisconsin Supreme Court declared that coverage was mandated by Wisconsin's omnibus statute in a situation in which an insured's vehicle was struck by a leaf spring which came either off an unidentified passing semi-trailer or came off yet another unidentified motor vehicle and was propelled into the insured's vehicle by the passing semi-trailer. The court in *Tomson* relied heavily on the analysis and principles set forth in *Theis*.

Theis set forth that coverage is required under Wisconsin's omnibus statute if three elements are met. (1) There must be an unidentified motor vehicle. (2) An unidentified motor vehicle hit the plaintiff's motor vehicle. (3) The unidentified motor vehicle must have run from the scene. In *Theis*, the court rather easily found that there was an unidentified motor vehicle which ran from the scene thereby

satisfying elements 1 and 3. As to the second element, the court found that neither the case law, statutes, or legislative history mandated a decision and therefore the court in *Theis* relied heavily on the primary purpose of Wis. Stat. § 632.32(4) – to compensate an injured person who is the victim of an uninsured motorist's negligence to the same extent as if the uninsured motorist were insured. Based primarily on this consideration, the court found that the propelling of a leaf spring by an unidentified vehicle into the plaintiff's vehicle satisfied the 'hit' requirement.

The *Tomson* court similarly found that the first and third elements were met as the vehicle which deposited the dual wheel assembly on the road had run from the scene. As to the crucial element requiring a 'hit' of the vehicle, the *Tomson* court relied on the *Theis* analysis and found that the primary purpose of Wis. Stat. § 632.32(4) would be best served if the incident which occurred constituted a 'hit'. The *Tomson* court further added, and clarified, the following two points. First, that the circuit court was incorrect when it concluded that in order for there to be coverage the wheel assembly had to be moving when the identified semi-trailer struck and propelled the wheel assembly at the plaintiff's vehicle. Second, that the hit and run requirements can occur in any order and need not be first a 'hit' and then a 'run.'

Safe Place

Court Confirms Repudiation Of Blanket Rule Precluding Liability For Trips Involving 1/2 To 5/8-inch Flaws In A Sidewalk

The Wisconsin Court of Appeals has issued an opinion in *Gulbrandsen v. H & D* that underscores the difficulties that defendants face when trying to defeat claims of negligence or safe-place statute liability prior to a jury trial. The decision also reiterates Wisconsin law's earlier repudiation of the former bright-line rule precluding one-half to five-eighths-inch flaws in a sidewalk from being deemed unsafe.

The *Gulbrandsen* case concerned a patron's trip and fall over an uneven portion of a sidewalk outside a family restaurant. The circuit court dismissed claims based on common law negligence and Wisconsin's safe place statute on summary judgment, concluding that, as a matter of law, the restaurant received no actual or constructive notice of an unsafe sidewalk condition. The circuit court also ruled, in part, that the deviation in the sidewalk was too minimal to create an unsafe condition, evidently accepting the restaurant's argument that several cases decided at least a half-century ago established that, as a matter of law, a one-half to

five-eighths-inch elevation change in a sidewalk surface failed to qualify as an unsafe condition.

The Wisconsin Court of Appeals reversed, first noting that the supreme court repudiated the mathematical deviation rule – the rule deeming a particular fraction of an inch protrusion or depression in a sidewalk safe – in *Westler v. City of Milwaukee*, 34 Wis. 2d 272, 276, 149 N.W.2d 624 (1967). Next, insofar as the safe place statute claim, the court of appeals noted that witnesses asserted in affidavits that there was a previous tripping incident made known to the restaurant, and that anyone looking could observe the sidewalk “cracked and heaved up.” The *Gulbrandsen* Court concluded these sufficed as sufficient evidence of notice to the restaurant, precluding summary judgment. Finally, insofar as the common law negligence claims, the court of appeals reaffirmed that summary judgment should be regarded as a rare and drastic remedy, and concluded that evidence described above made the unsafeness of the sidewalk a question for a fact-finder.

Gulbrandsen v. H & D, 2009 WI App 138, __ Wis. 2d __, __ N.W.2d __ (Ct. App. 2009)

Collective Bargaining Agreements

Ratification Of Collective Bargaining Agreement By Legislature Is Insufficient To Amend Public Records Law

Milwaukee Journal Sentinel v. Wisconsin Department of Administration, 2009 WI 79, __ Wis. 2d __, 268 N.W.2d 700

The Wisconsin Supreme Court in *Milwaukee Journal Sentinel v. Wisconsin Department of Administration*, ruled that the mere act of ratification of a collective bargaining agreement by the state legislature is insufficient to overcome or amend the public records law as Article IV, section 17(2) of the Wisconsin Constitution requires that any changes to existing law be introduced in a bill or companion bills.

In *Milwaukee Journal Sentinel*, the plaintiff made an open records request for the names of state employees who had been deactivated from the list of those permitted to drive state-owned vehicles. The Department of

Administration (DOA) refused to release the full list of names on the grounds that it violated an article of its collective bargaining agreement with its employees. After consolidation with a similar case involving a similar request from a newspaper, the parties filed cross-motions for summary judgment. In resolving the motions, the circuit court focused on the following three issues: (1) whether the legislature's ratification of the collective bargaining agreement, without companion legislation amended the Public Records Law; (2) if not, whether Wis. Stat. § 111.93(3) nevertheless caused the article of the collective bargaining agreement to supersede the Public Records Law because precluding

continued...

disclosure of the names of employees affected safety and therefore was a “condition of employment”; and (3) if not, whether the balancing test precluded disclosure. The circuit court concluded that although the legislature had ratified the collective bargaining agreement, the ratification did not create an exception to the Public Records Law, and ordered a full disclosure of the names request. The decision was appealed and the court of appeals certified the appeal, which was accepted by the Wisconsin Supreme Court.

The Wisconsin Supreme Court affirmed, ruling that the ratification of the collective bargaining

agreement does not amend the Public Records Law because it was not introduced in a bill or companion bills as required by Wis. Stat. § 111.92(1)(a). The court also reasoned that the disclosure of the employees’ names did not constitute a condition of employment under Wis. Stat. § 111.93(3), therefore, the article in the collective bargaining agreement did not supersede the disclosure requirement of the Public Records Law. Further, the court reasoned that the public interest favoring full disclosure set forth in Wis. Stat. § 19.32(1) outweighed any countervailing interests in precluding disclosure.

Schools - Governmental Immunity

Teacher That Makes Decision To Take No Precautionary Measures Against Known And Compelling Danger Does Not Receive Governmental Immunity

Heuser v. Community Ins. Corp., 2009 WI App. 151, __ Wis. 2d __, __ N.W.2d __ (Ct. App. 2009)

In *Heuser v. Community Ins. Corp.*, the plaintiff suffered a severe cut to his hand while using a scalpel as part of a flower dissection lab while in science class. The teacher had 2 previous incidents involving scalpels earlier that same day. Yet, prior to the plaintiff's use of the scalpel, the teacher only informed the students that the scalpels were sharp and to be careful. No specific instructions or directions were given nor did the teacher do anything to alter the lab exercise in spite of the two previous injuries sustained in using the scalpels earlier that same day. The plaintiff attempted to remove the cap to the scalpel but the cap was stuck. The plaintiff then pulled harder, the cap loosened suddenly, and he sliced his hand severing a tendon.

The school district claimed that it was not negligent, and even if it was, it was protected by governmental immunity. The trial court found that while the school district was negligent that it was protected by governmental immunity. The court of appeals affirmed in part and reversed in part finding that the school district was negligent and that it was not protected by governmental immunity.

Governmental immunity typically acts to shield

governmental entities engaging in discretionary acts. However, one exception to governmental immunity states that when there is a known and compelling danger it strips the decision maker of discretion and creates an absolute, certain, and imperative duty to act.

The court of appeals reasoning on both the negligence and governmental immunity issue centered around the fact that the teacher took absolutely no precautionary measures. In spite of 2 previous incidents involving the scalpels on the very same day the teacher took no additional precautions nor did she change the lesson plan to reduce the risk presented. As the court noted, she could have instructed students to use scissors, she could have done the dissection herself, she could have closely supervised each student, she could have instructed from A to Z, but she did nothing.

While the law states the teacher would have had discretion in selecting which precautionary measure was appropriate, simply put, the teacher could not choose to simply take no precautionary measure. Since governmental immunity did not act to shield the school district, the plaintiff was able to recover against the school district for its negligence.

Mediations

Insurers Face Sanctions If Court Orders Representative To Appear In Person At Mediation And No Such Representative Appears

In *Lee v. GEICO Indemnity Co.*, the court issued sanctions against an insurer for not appearing in person at the mediation. The scheduling order mandated a representative of Geico with settlement authority to appear at the mediation between the parties. The scheduling order also provided that failure to comply with the scheduling order was cause for imposition of sanctions pursuant to Wis. Stat. § 804.12 and 805.03. At the mediation, Geico's counsel appeared in person and the Geico representative with settlement authority was available by phone. The Geico claims representative was located in Macon, Georgia. The mediation proceeded without incident, though the mediation was unsuccessful. The plaintiff did not object to Geico's non-appearance at the mediation at the time.

Prior to trial plaintiff sought sanctions against Geico for its failure to appear at the mediation in violation of the court's scheduling order. The court awarded sanctions for the cost savings enjoyed by Geico - not flying to Milwaukee for the mediation and the ground travel from Macon, Georgia to the Atlanta airport - and \$300.00 for statutory motion costs, resulting in a grand total of \$695.70.

The appellate court upheld the sanctions stating that the scheduling order was clear, the trial court was within its discretion to impose sanctions for violating the scheduling order, and that Geico should have sought modification of the scheduling order if its representative would be appearing by phone for the mediation.

Following this case, insurers who make it standard practice to appear by phone for mediations have three practical options. First, object at the scheduling conference to court ordered mediation as it is not the least costly settlement alternative which is most likely to bring the parties together in settlement and therefore exceeds the judges authority in ordering a form of alternative dispute resolution under Wis. Stat. 802.12(2)(b). Second, if mediation is ordered and a representative of the insured is ordered to appear in person, seek a stipulation from the opposing party that the representative be allowed to appear by phone. Third, appear by phone with full knowledge that the travel expenses saved by not appearing may potentially be imposed as a sanction in the future.

Lee v. GEICO Indemnity Co.,
__ WI App. __,
__ Wis. 2d __,
__ N.W.2d __,
2009 Wisc. App.
LEXIS 741 (Ct.
App. 2009)

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