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JLO Newsletter Summer 2019

NEW & IMPORTANT APPELLATE DECISIONS IN GOVERNMENT LIABILITY, PROFESSIONAL LIABILITY & EMPLOYMENT LAW

By: Megan A. McDonald

Several recent decisions have impacted the landscape of law in government liability, professional liability, and employment law. These decisions are discussed below including their impact on the legal community.

Government Liability: *Nieves v. Bartlett*, No. 17-1174, 2019 WL 2257157 (May 28, 2019)

The U.S. Supreme Court recently decided the issue "whether probable cause to make an arrest defeats a claim that the arrest was made in retaliation for speech protected by the First Amendment?" In *Nieves v. Bartlett*, the court held that a showing of probable cause will defeat a §1983 First Amendment retaliatory arrest claim. The opinion may have provided a strong defense for police officers, but it also set forth an exception: if an arrested person can demonstrate that police are enforcing a typically unenforced law to harass them (i.e. jay walking), they may be able to bring a claim.

The incident in *Nieves v. Bartlett* arose from an arrest during "Artic Man", a winter sports festival hosted in a remote part of Alaska. According to the facts, Sergeant Nieves was speaking with a group of attendees when a seemingly intoxicated person, Bartlett, started shouting at the group not to talk to the officer. Minutes later, Bartlett approached Trooper Weight while Weight was questioning a minor. Bartlett stood in between the minor and Weight yelling at Weight for talking with a minor. Bartlett allegedly lunged at Weight who responded by pushing Bartlett back. Nieves saw the confrontation and initiated an arrest. Bartlett claims that Nieves told him after being arrested "bet you wish you would have talked to me now."

Bartlett brought a §1983 claim alleging that the officers violated his First Amendment rights by arresting him in retaliation for his speech. The district court granted summary judgment, holding that probable cause existed to arrest Bartlett and precluded his claim. The Ninth Circuit reversed and held that probable cause did not defeat a retaliatory arrest claim. The U.S. Supreme Court reversed the Ninth Circuit and remanded, holding probable cause is enough to defeat any §1983 retaliatory arrest claims under the First Amendment.

Professional Liability: *Warren v. Dinter*, 926 N.W.2d 370 (Minn. 2019)

It has been a longstanding rule in most jurisdictions that in order to succeed in a medical malpractice claim, there must be a duty arising from a physician-patient relationship. As of April 17 of this year, the Minnesota Supreme Court overturned 100 years of precedent by holding a physician-patient relationship is not necessary to maintain a

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Firm Announcement

Welcome to new JLO attorneys **Nancy Younan**, **Joseph Koe**, and **Matthew Praetorius** who have started at JLO as Associate Attorneys.

Nancy received her J.D. from the University of Wisconsin Law School in Madison, Wisconsin. She is assisting clients in the area of Civil Litigation

Joseph received his J.D. from Mitchell Hamline School of Law in St. Paul, Minnesota. Joe is assisting clients in the areas of Workers' Compensation and Civil Litigation.

Matthew received his J.D. from Mitchell Hamline School of Law in St. Paul, Minnesota. Matt is assisting clients in the area of Civil Litigation.

Nancy, **Joseph** and **Matthew** are looking forward to helping our clients resolve their disputes.

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medical malpractice action under Minnesota law. Instead the court held that when there is no express physician-patient relationship; courts should turn to the traditional inquiry of whether a tort duty has been created by foreseeability of harm. The foreseeability standard looks to whether the specific danger was objectively reasonable to expect, not simply whether it was within the realm of any conceivable possibility.

In this case, Plaintiff went to a clinic complaining of abdominal pain, fever, chills, and other symptoms. A nurse practitioner, Simons, at the clinic ordered a series of tests to determine the nature of Plaintiff's illness. The tests showed that Plaintiff had unusually high levels of white blood cells, as well as other abnormalities that led Simons to believe Plaintiff should be hospitalized. Simons then called Fairview Hospital and spoke with Dr. Dinter, who was one of three hospitalists on call that day. Dr. Dinter ultimately concluded that the high level of white blood cells was attributed to diabetes and determined that Plaintiff did not need to be hospitalized. Simons then consulted an internal physician at the clinic who concurred that Plaintiff did not need to be hospitalized. Simons discussed the diabetes diagnosis with Plaintiff, prescribed diabetes and pain medication, scheduled a follow-up appointment, and sent her home. Three days later Plaintiff's son found Plaintiff dead in her home. The autopsy revealed that the cause of death was sepsis caused by an untreated staph infection.

The Minnesota Supreme Court held that Dr. Dinter knew or should have known that the patient would have detrimentally relied on his medical advice and judgment. Simply put, the Court said when duty depends on foreseeability, and the material facts regarding foreseeability are disputed, or there are differing reasonable inferences from undisputed facts (a close call), summary judgment on the element of duty should be denied and the negligence claim should be tried.

The Court addressed concerns over "curbside consultations" by stating "our decision today should not be misinterpreted as being about informal advice from one medical professional to another, this case is about a formal medical decision." This case not only has a significant impact on professional liability cases, but also has been cited in subsequent general negligence foreseeability cases where summary judgment has been denied.

Employment Law: *Fort Bend County, Texas v. Davis*, No. 18-525, 587 U.S. ___ (June 3, 2019)

Title VII, a federal anti-discrimination law, requires as a precondition to filing suit in federal court, that a person who alleges a violation of Title VII must file a charge with the EEOC (within 180 or 300 days of the alleged violation). The EEOC will then notify the employer of the charge, investigate the allegations, and determine if they will pursue the litigation themselves or issue a right-to-sue letter.

The facts prompting this decision arose when plaintiff filed a complaint with her employer, Fort Bend County, alleging that her director had sexually harassed and assaulted her. After she filed this complaint, Plaintiff alleged that her director retaliated against her for filing the complaint. The subsequent retaliation prompted Plaintiff to file a charge with the EEOC alleging sexual harassment and retaliation. The Plaintiff then attempted to supplement her EEOC charge by writing "religion" and "discharge" on an EEOC intake questionnaire without amending her EEOC charge. The EEOC ultimately dismissed her charge and issued a right-to-sue letter. Plaintiff then filed in federal court alleging both retaliation and religious discrimination under Title VII.

After several years of litigation, Fort Bend argued for the first time that Davis failed to exhaust her administrative remedies on the religious discrimination claim as required by Title VII. The district court dismissed Davis's religious claim on the basis that subject matter jurisdiction cannot be waived by failure to challenge it. The Fifth Circuit Court of Appeals reversed the district court and held that the administrative exhaustion requirement was not jurisdictional. The United States Supreme Court affirmed stating "Title VII's charge-filing requirement is a processing rule, albeit a mandatory one, not a jurisdictional prescription delineating the adjudicatory authority of courts." Therefore, employers need to heed this decision and ensure that they assert the defense of failure to exhaust all administrative remedies at the outset of the case or they may lose this defense.

The Wisconsin Supreme Court and the Knowing Violation Exclusion: Insurer Must Defend

By: Nancy M. Younan

W. Bend Mut. Ins. Co. v. Ixthus Med. Supply, Inc., 2019 WI 19, 385 Wis. 2d 580, 923 N.W.2d 550

An insurer's duty to defend is significantly broader than its duty to indemnify. The Wisconsin Supreme Court recently ruled that initial grants of coverage are to be interpreted broadly and exclusions are to be interpreted narrowly in the insured's favor, affirming the four corners rule. Specifically, in advertising injury suits, an insurer's duty to defend is triggered unless an exclusion applies to every single allegation in the complaint in the underlying suit. If even one allegation is *potentially* covered, the insurer must defend the entire suit, though the duty to indemnify is still limited by actual coverage rather than arguable coverage.

I. Facts

Ixthus is a medical supply company operating in Wisconsin. Its commercial general liability insurance policy with West Bend provided, in part, that West Bend will have the right and duty to defend the insured in any suit seeking damages for "personal and advertising injury." *W. Bend Mut. Ins. Co. v. Ixthus Med. Supply, Inc.*, 2019 WI 19, ¶ 3. The policy defines "personal and advertising injury" as injury arising out of one of several offenses which include infringing upon another's copyright, trademark, or slogan in your advertisement. *Id.* The policy contains exclusions for both "Knowing Violation of Rights of Another" and "Criminal Acts." *Id.*

Abbott is a healthcare company that manufactures and sells blood glucose strips in both the domestic and international markets. At issue here is a suit filed by Abbott claiming Ixthus, among other defendants, was importing, advertising, and subsequently distributing Abbott's International test strips in the United States. Id ¶ 4. Their strips are trademarked under the name "FreeStyle." While the test strips are functionally identical in both markets, the labeling, instructional inserts, price, and available rebates differ substantially between the domestic and international packaged boxes.

Upon being sued, Ixthus tendered its defense to West Bend. *Id.*, ¶ 6. West Bend denied Ixthus' tender and sought a declaratory judgment that West Bend had no duty to defend or indemnify Ixthus in Abbott's lawsuit. *Id.* West Bend filed a motion for summary judgment and the circuit court granted the motion concluding that even though Abbott's allegations fell within the initial grant of coverage, the knowing violation exclusion applied and eliminated any duty West Bend had to defend Ixthus. *Id.*

Upon appeal by both parties, the Court of Appeals affirmed that the allegations fell within the initial grant of coverage but disagreed on the applicability of the knowing violation exclusion because some of the pled allegations would not be knocked out by the knowing violation exclusion. *Id.*, ¶ 7. The Wisconsin Supreme Court affirmed the Court of Appeals holding that West Bend does have a duty to defend Ixthus. *Id.*

II. Analysis

The issue before the court was whether West Bend has the duty to defend under terms of the Personal and Advertising Liability provision of the policy. *Id.*, ¶ 10. The Court explained that when assessing whether an insurer has a duty to defend, a court must liberally construe the terms of the policy and resolve any ambiguity in favor of the insured in order to decide whether the allegations in the complaint, which if proven true, would be covered by the policy. *Id.*

The Wisconsin Supreme Court laid out the three-step process used in duty-to-defend cases. The first step is to determine whether the policy language grants initial coverage for the allegations in the complaint. If the allegations do not fall within an initial grant of coverage, the inquiry ends. *Id.*, ¶ 11. Next, the court considers whether any coverage exclusions in the policy apply. *Id.* Exclusions are to be narrowly construed against the insurer if the effect is uncertain. *Id.*, ¶ 13. Finally, if an exclusion removes coverage, the court assesses whether an exception to the exclusion applies to restore coverage. *Id.*, ¶ 11.

A key part of this analysis is that if an insurer is found to have a duty to defend on even just one of the claims in the underlying suit, it has a duty to defend its insured on all the claims in the suit. *Id.*, ¶ 14.

A. Step One

In deciding the first part of the three part test, the court found that the policy language granted initial coverage of the allegations in the complaint. In determining whether allegations in the complaint fall under the initial grant of coverage for advertising provisions of a CGL policy, the Court asks three questions: "(1) Does the complaint allege a covered offence under the advertising injury provision?; (2) Does the complaint allege that the insured engaged in advertising activity?; and (3) Does the complaint allege a causal connection between the plaintiff's alleged

injury and the insured's advertising activity?" *Id.* Questions one and two were not at issue. West Bend only argued that the complaint did not allege a causal connection and that, even if it did, exclusions in the policy apply to remove its duty to defend. *Id.*, ¶ 15.

The test for whether a causal connection has been sufficiently alleged does not focus on whether the injury could have taken place without the advertising but rather whether the allegations sufficiently assert that the advertising did in fact contribute materially to the injury. *Id.*, ¶ 17. This is an easy standard to meet because advertisements almost always are used to advance sales. The mere fact that the complaint included paragraphs alleging that all defendants caused injury to Abbott was enough to create a causal connection. West Bend's assertion that Ixthus was a "distributing" defendant rather than an advertising defendant was not persuasive to the court and did not eliminate coverage at the duty to defend stage. Ixthus does not have to be the "first, last, or only, entity" alleged to advertise to be engaged in covered advertising activity. *Id.* The test is just whether the advertising activity contributed materially to the harm. *Id.*, ¶ 20. Consumer confusion alone satisfies the "contribute materially" causation test. *Id.*, ¶ 21. Therefore the allegations in the complaint fall within the initial grant of coverage.

B. Step Two

Under step two, the court looked to whether there were any applicable exclusions. West Bend argued that two exclusions preclude its duty to defend: Knowing Violation and Criminal Acts.

Knowing Violation

Because Abbott can prevail on a claim without establishing that Ixthus knowingly violated their rights, West Bend's duty to defend is triggered. *Id.*, ¶ 36. The knowing violation exclusion will only preclude coverage if every claim alleged in the complaint requires the plaintiff to prove the insured acted with knowledge that its actions would violate another's rights. *Id.* However, some of the allegations against Ixthus do not require Abbott to prove intent or knowledge, such as violations of the Lanham Act. An exclusion must preclude every pleaded claim and leave no potentially covered advertising-injury claim in order to defeat the duty to defend. *Id.*

The Court does note, however, that if a fact finder finds that Ixthus acted knowingly, West Bend would be relieved of its indemnification obligation under the knowing violation exclusion. *Id.*, ¶ 37. However, the duty to defend is broader than the duty to indemnify because the duty to defend is trigged by arguable, rather than actual, coverage. *Id.*

Criminal Acts

The exclusion for Criminal Acts is an issue of first impression that was not fully analyzed by the courts below and the motion for summary judgement relied solely on the Knowing Violation so the Court did not address this exclusion. Because the complaint alleges acts that are not dependent on showing criminal conduct, the criminal acts exclusion also does not relieve West Bend of its duty to defend.

C. Step Three

The Court did not analyze the third step of the analysis because the exclusions did not remove coverage.

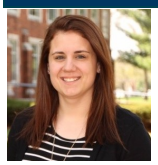
III. Conclusion

The Supreme Court of Wisconsin's holding in this case maintains a broad interpretation of the duty to defend in an advertising injury suit because even one potentially covered claim triggers an insurer's duty to defend the entire suit.

Congratulations to **Joseph E. Flynn, Vicki A. Hruby, Elisa M. Hatlevig, Tessa M. McEllistrem,** and **Lawrence M. Rocheford** who were named to the *2019 list of Minnesota Super Lawyers* and *Rising Stars.*

Super Lawyers is a Thomson Reuters business that provides a rating service of outstanding lawyers from more than 70 practice areas, who have attained a high-degree of peer recognition and professional achievement. The selection process is multi-phased and includes independent research, peer nominations and peer evaluations. Rising Stars selections undergo the same selection process as Super Lawyers but recognizes attorneys who are 40 years old or younger, or have been practicing for 10 years or less. No more than 2.5% of lawyers in Minnesota are named to the Rising Stars list.

About the Authors



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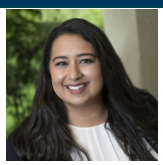
Megan is a law clerk at Jardine, Logan & O'Brien, P.L.L.P. and is pursuing her J.D. as a third-year student at the University of St. Thomas School of Law. She is interested in civil litigation and government liability.



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About the Firm

Jardine, Logan & O'Brien, P.L.L.P., is a mid-sized civil litigation law firm that has handled some of the region's largest and most difficult disputes with outstanding results for clients. Litigation has always been our primary focus. With trial attorneys admitted in Minnesota, Wisconsin, North Dakota, South Dakota, Iowa, and Montona our firm has the ability and expertise to manage cases of any size or complexity. We are trial lawyers dedicated to finding litigation solutions for our clients. View our website at www.jlolaw.com to obtain additional information. Please call us to discuss a specific topic.

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