

Summary of Developments

New Developments Reported in the 2023–24 Supplement to the Ninth Edition

The 2023–24 supplement to *The Law of Damages in Wisconsin* discusses recent statutory and case-law developments, including the following:

In a 2023 decision, the Wisconsin Supreme Court discussed the economic loss doctrine. *See* Supp. § 1.9.

The U.S. District Court for the Western District of Wisconsin and the U.S. Court of Appeals for the Seventh Circuit discussed issues relating to punitive damages in *Epic Systems Corp. v. Tata Consultancy Services, Ltd.* *See* Supp. § 2.23.

In a 2023 decision, the U.S. District Court for the Eastern District of Wisconsin decided which parts of a compensatory damages award should be considered when assessing the ratio of compensatory to punitive damages. *See* Supp. § 2.23.

The discussion of when physicians are permitted to offer opinions on future pain and suffering has been expanded and now includes a 2023 Wisconsin Court of Appeals opinion on the issue. *See* Supp. § 5.21.

In 2023, the Wisconsin Court of Appeals issued an opinion discussing, for purposes of a defamation case, when a person becomes a limited-purpose public figure and what a limited-purpose public figure must prove to recover damages. *See* Supp. §§ 11.14, 11.53.

In a 2023 opinion, the Eastern District of Wisconsin discussed the damages that a person detained by a law enforcement officer without probable cause or reasonable suspicion can recover. *See* Supp. § 13.13.

Added material discusses the availability of emotional distress damages in private actions brought under certain federal antidiscrimination statutes, including a 2022 U.S. Supreme Court opinion and a 2023 Eastern District of Wisconsin opinion on the subject. *See* Supp. § 13.17.

In 2022, the Eastern District of Wisconsin decided whether a county could be held liable for widespread practices or customs of a private entity with which the county contracted to provide medical services to county detention facilities. *See Supp. § 13.24.*

The Worker's Compensation – Maximum Wage and Rate Chart was updated in November 2023. *See § 13a.93 (app. 13a.B).*

In a 2023 published opinion, the Wisconsin Court of Appeals discussed the statute of limitation for a wrongful death action in a case in which the death arose from an accident involving a motor vehicle. *See Supp. § 16.6.*

The Eastern District of Wisconsin issued an opinion in 2023 in which court approval of a settlement in a wrongful death action was at issue. *See Supp. § 16.15.*

In a 2023 opinion, the Eastern District of Wisconsin considered application of the broad-evidence rule in an insurance case. *See Supp. § 17.66.*

In a 2023 opinion, the Western District of Wisconsin considered whether accidental seasonal flooding was a compensable taking. *See Supp. § 19.5.*

A 2023 decision by the Eastern District of Wisconsin dealt with abstention when there are parallel state and federal actions. *See Supp. § 19.8.*

A new Note in Supplement section 20.6 deals with statutory and case law categorization of computer software under the Uniform Commercial Code (UCC).

In a published 2023 opinion, the Wisconsin Court of Appeals discussed the interrelationship of an unconscionability counterclaim and a direct action against a creditor. *See Supp. §§ 20.16, 20.34.*

In a 2023 opinion, the Eastern District of Wisconsin considered whether lost profits are consequential damages under the UCC. *See Supp. § 20.17.*

A new Comment in Supplement section 20.17 deals with whether consequential damages can be contractually limited.

Two recent cases in which the courts considered whether an exclusive or limited remedy failed its essential purpose are noted in Supplement section 20.29.

In 2023, the Wisconsin Court of Appeals decided two cases in which it considered whether landlords' leases were illegal. *See* Supp. § 22.23.

In a 2022 unpublished opinion, the Wisconsin Court of Appeals discussed the required level of detail in itemized statements of lessors' claims. *See* Supp. § 22.24.

In a 2023 unpublished opinion, the Wisconsin Court of Appeals considered a wrongful discharge claim in which the plaintiffs alleged they were terminated for refusing a directive to violate the law. *See* Supp. § 23.9.

In a 2022 published opinion, the Wisconsin Court of Appeals discussed a confidentiality restriction in an employee's contract. *See* Supp. § 23.20.

In a 2023 opinion, the Eastern District of Wisconsin considered whether a prospective contract was sufficiently concrete to support a tortious-interference-with-contract claim. *See* Supp. § 24.11.

In a 2023 opinion, the Eastern District of Wisconsin discussed the sufficiency of a complaint that contained unspecific allegations. *See* Supp. § 24.12.

Two recent opinions in which the Eastern District of Wisconsin held that the complaints were sufficient are now mentioned in Supplement section 24.12.

In a 2023 opinion, the Eastern District of Wisconsin considered whether tortious interference with an adoption agreement is a cognizable claim, whether the plaintiffs' evidence showed that the defendants intentionally interfered with an adoption agreement, and whether the plaintiffs plausibly alleged that the defendants were not justified or privileged. *See* Supp. §§ 24.14, 24.24, 24.81.

The potential effect of tortious-interference determinations on bankruptcy cases is discussed in a Practice Tip in Supplement section 24.17.

In a 2023 opinion, the Eastern District of Wisconsin distinguished between choice-of-law analyses in contract law and in tort law. *See Supp.* § 24.39.

In 2022, Congress enacted legislation exempting “small passenger vessels” from coverage under the Limitation of Liability Act. *See Supp.* § 27.29.

The Seventh Circuit decided in a 2023 opinion whether Wisconsin law allows a plaintiff to sue a defendant for bad faith absent contractual privity. *See Supp.* § 28.2.

In a 2023 opinion, the Wisconsin Supreme Court reviewed an unpublished 2021 Wisconsin Court of Appeals opinion regarding alleged legal malpractice. *See Supp.* §§ 29.11, 29.24, 29.28, 29.30.

In a 2023 opinion, the Eastern District of Wisconsin considered whether damages awarded to a former employee must be set off by money earned after the person was terminated. *See Supp.* § 30.8.

In a 2023 opinion, the Eastern District of Wisconsin considered the sufficiency of the evidence on a mitigation-of-damages issue. *See Supp.* § 30.12.

In a 2022 opinion, the Eastern District of Wisconsin discussed mitigation of damages in a personal-injury action involving a governmental defendant. *See Supp.* § 30.16.

The reasonableness of former employees’ mitigation of damages was discussed in two opinions from the Western District of Wisconsin and the Eastern District of Wisconsin. *See Supp.* § 30.21.

In a published 2023 opinion, the Wisconsin Court of Appeals considered mitigation of damages in a case brought under the Wisconsin Fair Employment Act when the employer offered the plaintiff employee a different position. *See Supp.* § 30.21.

In a 2023 opinion, the Wisconsin Supreme Court discussed the effect of a *Pierringer* release. *See Supp.* § 31.33.

The distinctions between subrogation and reimbursement are discussed in Supplement section 32.5.

In a 2023 opinion, the Seventh Circuit considered whether liability for statutory interest extends to claims administrators. *See* Supp. § 35.12.

The discussion in Supplement section 37.21 of “prevailing party” determinations in public records cases has been expanded.

Circuit courts’ use of informal methods of determining the reasonableness of attorney fees is discussed in Supplement section 39.20.

Previous Developments Reported in the 2022–23 Revision

The 2022–23 revision of *The Law of Damages in Wisconsin* incorporates legal developments reported on separate pages of supplements issued after publication of the 2019–20 revision.

The 2022–23 revision also discusses recent statutory and case-law developments, including the following:

The section discussing the definition and purpose of compensatory damages has been revised. *See* § 1.5.

In a 2023 decision, the Wisconsin Supreme Court considered whether a county was liable under 42 U.S.C. § 1983 for a correctional officer’s alleged violation of a county jail inmate’s rights. *See* § 2.10.

The discussion of liability for multiple damages for illegally employing minors has been revised. *See* § 4.31.

New material pertaining to whether expert testimony is required to substantiate the presence or permanency of a scar has been added. *See* § 5.26.

References to jury instructions on disability and loss of enjoyment of life have been added. *See* § 7.13.

In 2022, the Wisconsin Court of Appeals analyzed various communications regarding a business to determine whether they could have defamatory meaning. *See* § 11.5.

A Comment about challenging the sufficiency of a complaint based on the plaintiff's failure to include in the complaint the particular words of an alleged defamation has been added. *See* § 11.21.

The discussion of exhaustion of remedies in cases involving alleged violations of civil rights has been revised. *See* § 13.8.

In 2021, the U.S. Court of Appeals for the 10th Circuit issued a decision about the compensable damages permitted in cases involving alleged violations of civil rights. *See* § 13.18.

In 2022, the Wisconsin Legislature amended the statute governing the average weekly wage for part-time employees; the new calculation of average weekly wage applies to part-time employees injured on or after April 10, 2022. *See* § 13a.8.

Information has been added about when the rate of payment of temporary total disability benefits for a part-time employee is limited. *See* § 13a.11.

The analysis of the statutory conditions that must be met before the Department of Workforce Development (DWD) or the Division of Hearings and Appeals acquires jurisdiction over a workplace injury case has been revised. *See* § 13a.59.

The Wisconsin Legislature has added an item to the list of information that must be included in an employer's request to an employee that the employee submit to a reasonable examination in a worker's compensation case. *See* § 13a.66.

Appendix 13aA, which contains an outline of information from the DWD's website for wage calculations for worker's compensation cases, has been updated. *See* § 13a.92.

The Worker's Compensation – Maximum Wage and Rate Chart was updated in December 2022. *See* § 13a.93 (app. 13aB).

The Wisconsin Supreme Court decided in 2022 whether to dismiss the wrongful death claim of an adult child whose parent was injured while living in a community-based residential facility that was owned by a "healthcare provider" under Wis. Stat. ch. 655. *See* §§ 14.17, 16.27.

In a 2022 decision, the Wisconsin Court of Appeals discussed reasons for requiring that derivative and primary claims be joined. *See* § 14.31.

In 2022, the Wisconsin Supreme Court decided whether an insured under an underinsured motorist (UIM) policy could pursue a wrongful death claim against the insurer if the decedent was not insured. *See* § 16.2.

In a decision issued in 2022, the Eastern District of Wisconsin decided whether to dismiss a wrongful death claim for failure to comply with notice requirements. *See* § 16.8.

The Wisconsin Supreme Court recently decided whether the time for filing commences with the first occurrence of damages or with the discovery of damages. *See* § 18.40.

Recently, several federal and state courts addressed takings claims. *See* § 19.5.

A 2022 Wisconsin Supreme Court decision explained how to calculate damages for the taking of a permanent easement. *See* § 19.12.

The Eastern District of Wisconsin recently considered when contractual service charges assessed on unpaid invoices can be recoverable as damages. *See* § 20.9.

In 2022, the Wisconsin Supreme Court explained when a consumer can raise unconscionability under Wis. Stat. § 425.107 as an affirmative defense to a creditor's claims and whether unconscionability can form the basis of a separate civil action. *See* § 20.16.

Recent cases in the Eastern and Western Districts of Wisconsin considered whether the "notice" given in each situation complied with the purpose of the Wisconsin notice requirement. *See* §§ 20.20, 20.21.

Decisions issued in 2022 by the Wisconsin federal district courts addressed whether parties can agree to extend a warranty period to include future performance beyond the limitation period and when a remedy can be considered exclusive. *See* §§ 20.28, 20.29.

In 2022, the Wisconsin Court of Appeals decided whether contracts not to compete are divisible and enforceable. *See* § 23.19.

In separate 2022 decisions, the Eastern District of Wisconsin discussed the allegations required to state a cognizable claim for tortious interference with contract and noted that a complaint must allege facts that establish a defendant acted intentionally. *See* § 24.14.

In a 2022 decision, the Western District of Wisconsin addressed when an intentional interference claim will survive summary judgment. *See* § 24.14.

In 2022, the Western District of Wisconsin decided whether to disregard an original complaint when considering the sufficiency of an amended complaint, whether an amended complaint can be supplemented, what happens when federal claims drop out of a case, and when a federal court can dismiss an amended pleading with prejudice. *See* § 24.49.

Decisions issued in 2022 by federal courts considered the exercise of supplemental jurisdiction and whether there is a presumption favoring relinquishment of state-law claims. *See* § 24.53.

An unpublished 2022 opinion of the Wisconsin Court of Appeals examined whether evidence supported the punitive-damages award in a company's breach-of-fiduciary-duty suit against a former employee. *See* § 24.65.

The Eastern District of Wisconsin, in 2022, addressed when a formulaic allegation of malice is sufficient under Wis. Stat. § 134.01. *See* § 24.70.

Recent federal and state cases discussed the intra-corporate conspiracy doctrine. *See* § 24.85.

In an unpublished 2021 opinion, the Eastern District of Wisconsin considered whether a third-party expert that was retained after an insurer denied an insured's claim should be treated the same as a third-party expert that was retained before the insurer denied an insured's claim. *See* § 28.8.

The Wisconsin Supreme Court granted review of a case concerning allegations of attorney negligence. *See* §§ 29.11, 29.24, 29.28, 29.30.

In 2022, the Wisconsin Supreme Court discussed the elements a claimant must satisfy to prove a defective-design claim under Wis. Stat. § 895.047. *See* §§ 31.11, 31.44. The same case also involved comparison of negligence among parties. *See* § 31.31.

In a 2019 decision, the Wisconsin Supreme Court discussed situations when a subrogation claim can be waived. *See* § 32.15.

In a 2022 decision, the U.S. Supreme Court decided whether a state Medicaid program can seek recovery from the part of a settlement allocated to future medical costs as well as amounts paid for past medical care. *See* § 32.29.

In an unpublished 2022 opinion, the Wisconsin Court of Appeals considered whether accrued interest on the original judgment in a case could be made part of the principal in a later judgment in a related action. *See* § 35.12.

In 2022, the Wisconsin Supreme Court deviated from precedent regarding the interpretation of whether a party has “prevailed in whole or in substantial part” under Wisconsin’s public records law. *See* § 37.21.

Section 39.21 now discusses Wis. Stat. § 32.09, which dictates the evidence the state’s condemnation commission must consider when valuing land in condemnation and eminent domain cases.

