

WISCONSIN SUPREME COURT
Tuesday, October 7, 2008
9:30 a.m.

06AP1506

Joseph Blunt, Sr., et al. v. Medtronic, Inc.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a ruling of the Milwaukee County Circuit Court, Judge Richard J. Sankovitz presiding.

This is a products liability case involving an implantable cardiac device (defibrillator) that was on the market in two forms: the first had a battery that could fail. The second featured an altered design that corrected the problem.

The first version remained on the market after the manufacturer, Medtronic, discovered and corrected the problem, and distributed the second version. The FDA did not withdraw authorization for the first version and did not require a recall. Joseph Blunt Sr. received one of the first-version defibrillators in May 2004, about seven months after the FDA approved the second version. Blunt eventually was advised that the battery could fail, and, as a precautionary measure, he had it removed. He sued Medtronic alleging negligence, strict product liability and loss of companionship.

In the trial court, Medtronic filed a motion for summary judgment, asking the court to dismiss Blunt's claim. The company argued that, because the device had received approval from the federal Food and Drug Administration (FDA), it was required to market the device in exactly the FDA-approved form. The federal law, Medtronic argued, pre-empts state law negligence and products liability claims. Otherwise, Medtronic maintained, companies would be put in the impossible position of potentially being forced under state law to modify a design that is regulated under federal law.

The Blunts, on the other hand, argued that Medtronic could be held liable under state law because the company had no obligation to continue marketing the device in its originally approved form after the FDA approved the upgraded version. The Blunts argued that it makes no sense to shield a manufacturer from state liability claims simply because the company has obtained pre-market approval from the FDA.

The trial court granted Medtronic's motion for summary judgment, concluding that federal law governs the approval and marketing of this device and that the state is pre-empted from imposing its own regulations. The Court of Appeals affirmed, with a dissent by Judge Ralph Adam Fine, who wrote that Medtronic should not be protected from liability "[W]hen it had the *option* under federal law of selling two approved devices (for shorthand purposes, the good one and the not-so-good-one) but sold the not-so-good-one ... in order to clear its inventory of the obsolete, less-safe devices.

The U.S. Supreme Court recently handled a similar case (Riegel v. Medtronic, Inc.), involving a heart catheter that failed after receiving pre-market approval from the FDA. The Supreme Court held that the preemption clause of the Medical Device

Amendments Act barred common law claims challenging the safety or effectiveness of a medical device marketed in a form that received pre-market approval.

The Supreme Court is expected to determine what effect, if any, Riegel has on this current case, and to decide whether federal law pre-empts state-law claims seeking damages for injuries caused by defective medical devices that have received pre-market approval from the FDA in situations where the FDA also has approved an alternative, non-defective device.

WISCONSIN SUPREME COURT
Tuesday, October 7, 2008
11 a.m.

06AP1744-CR State v. Jordan A. Denk

This is a certification from the Wisconsin Court of Appeals, District III (headquartered in Wausau). The Court of Appeals may certify cases that it believes cannot be resolved by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. The case originated in Pepin County Circuit Court, Judge James J. Duvall presiding.

This case involves a police search. The Supreme Court is expected to determine whether police were acting lawfully when they seized an item that (1) was not inside the automobile that they were searching, and (2) belonged to a passenger who had not been arrested.

Here is the background: A police officer in Pepin County came upon a car parked alongside the road. The officer stopped to see if the motorists needed assistance. He also ran a license-plate check and discovered that the plates did not match the car they were on. When he approached the car to talk to the occupants, he smelled marijuana. He ordered the driver out of the car and searched him, turning up drug paraphernalia. The officer arrested the driver.

Jordan Denk was a passenger in a car. He exited the vehicle at the same time as the driver when ordered to do so by the officer. The officer noticed an eyeglass case lying on the ground next to the passenger door and Denk acknowledged that it was his. The officer asked Denk to retrieve it and Denk did so, placing it on the hood of the car. The officer opened the case and found drug paraphernalia. He then handcuffed Denk and searched him, discovering marijuana and methamphetamine.

Denk ultimately was charged with drug crimes and the circuit court denied his motion to suppress the evidence from the eyeglass case. The Court of Appeals certified this case (sent it directly, without issuing an opinion) to the Wisconsin Supreme Court. The Court is expected to decide if police may search the belongings of a passenger when that passenger has not been arrested, and when the belongings are outside of the vehicle.

WISCONSIN SUPREME COURT
Tuesday, October 7, 2008
2 p.m.

07AP191

Apple Valley Gardens Assoc., Inc. v. Gloria MacHutta

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a ruling of the Waukesha County Circuit Court, Judge Paul F. Reilly presiding.

This case involves a condominium association that initially permitted owners to rent out their units, but then amended its bylaws to forbid rentals. Condo owners Steven and Gloria MacHutta, who owned a rental unit, sued. In a case that may have implications for people who purchase condos as investment properties, the Supreme Court is expected to decide whether, if a condominium declaration permits the rental of units, the bylaws may be amended to forbid rentals.

Here is the background: Steven MacHutta developed Apple Valley in the late 1970s, and rented out more than a dozen of the condos. The other owners were unhappy that Steven's ownership of multiple units gave him a disproportionate vote in the Association. The Association sued Steven, and, in a settlement agreement, Steven promised to use reasonable efforts to sell the remaining 15 condominium units he owned. He was prohibited from continuing to rent any of the units after a certain date unless he had made reasonable efforts to sell. The agreement allowed Steven to retain one unit for his personal use and to transfer up to 4 units to immediate family. Steven kept one of the units, and put a second unit, a rental, in his wife's name.

In 2002, the Association amended the bylaws to require owner occupancy, effectively prohibiting rentals. There was a clause that permitted owners to renew/extend their renters' leases on a case-by-case basis subject to the approval of the Association board. When Gloria went to the board seeking approval of a new tenant, the board turned her down. She installed the tenant anyway, and the Association sued. The MacHuttas filed a counterclaim alleging that the Association had broken the original settlement agreement. The Association won in the trial court and in the Court of Appeals.

At issue is whether the condominium declaration – a written document filed when a condominium complex is built that, among other things, lists the rules affecting the use and transfer of the units – trumps the amended bylaws. In this case, the declaration contains the following language:

PURPOSE—RESTRICTION ON USE. The buildings and each of the units are intended for the purpose of single family residential use only and are restricted to that use. Any lease or oral or written rental agreement shall not relieve an owner from his [or her] obligation to pay common

expenses or any other obligations imposed upon unit owners by this Declaration.

The MacHuttas assert that the second sentence in this paragraph granted them the right to rent their units. The Association, on the other hand, maintains that it doesn't matter whether the declaration permitted renting, because the declaration also permitted the association to enact bylaws – and it enacted one that prohibits renting.

Now the MacHuttas have brought their case to the Supreme Court, where they maintain that the Court of Appeals decision “puts at risk the condominium form of ownership for investment purposes.” The Supreme Court will decide whether a condo association may enact bylaws that change the rules and regulations set out in the original declaration.

WISCONSIN SUPREME COURT
Wednesday, October 8, 2008
9:30 a.m.

07AP5-CR

State v. Dhosi J. Ndina

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed a decision of the Milwaukee County Circuit Court, Judge Dennis P. Moroney presiding. The Moroney decision reversed a conviction in Judge Mary Kuhnmuensch's court.

This case raises a question of what a defendant must do to preserve his right under the Sixth Amendment to a public trial. Among other things, the Supreme Court is expected to decide if a failure to object to a closure is enough to waive this right.

The defendant in this case, Dhosi Ndina, was charged with attempting to kill his nephew at a family gathering in November 2002. The victim was stabbed in the back during an argument.

During the jury trial, there was a disturbance in the courtroom involving Ndina's family. The court warned the disruptive individuals, but the following afternoon there were more problems. The judge expressed concern that family members were walking in and out, engaging in audible conversations and exhibiting animated facial expressions when certain witnesses were on the stand. She also expressed concerns about possible violations of her order that prohibited witnesses from discussing the case with each other. The court ultimately ordered all family members excluded from the courtroom, with the exception of Ndina's mother. Ndina did not object.

After his conviction on charges of attempted first-degree intentional homicide, Ndina filed a motion seeking a new trial based upon the fact that family had been excluded from court – in violation, he argued, of the Sixth Amendment. Another trial court heard the motion and granted it.

The State appealed that ruling to the Court of Appeals, arguing that Ndina waived his right to a public trial by failing to object to the closure. The Court of Appeals agreed, reversing the decision and reinstating the conviction. In its opinion, the Court of Appeals wrote that “the only context within which Ndina's claim can be considered is whether his trial counsel provided ineffective assistance by failing to object ...” and then noted that Ndina's counsel already had acknowledged that an objection should have been made. However, the court concluded that the attorney's failure to object did not prejudice Ndina because there was no reason to believe that the case would have come out differently had the objection been made.

The Supreme Court is expected to determine if a defendant waives his/her right to a public trial by failing to object to closure of the court. The Court also is expected to determine whether the Court of Appeals' conclusion that Ndina's only avenue for appeal was to file an ‘ineffective assistance of counsel’ claim was correct.

WISCONSIN SUPREME COURT
Wednesday, October 8, 2008
11 a.m.

06AP1886

Brittany L. Noffke v. Kevin Bakke

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed in part and reversed in part a ruling of the La Crosse County Circuit Court, Judge Dale Pasell presiding.

This case involves a high school cheerleader who was injured when she fell from the top of a formation during a practice. The Supreme Court is expected to interpret Wisconsin's Recreational Immunity Law, which limits the liability of people who participate in contact sports, to determine whether the state Legislature intended to cover cheerleading under this law.

Here is the background: In 2004, the Holmen High School cheerleading squad was practicing a stunt during a pre-game warm-up in the high school Commons, an area without carpeting or mats. Brittany Noffke and Kevin Bakke were both relatively new to the squad. Noffke was on the top of the base and Bakke was supposed to spot her. Bakke mistakenly moved forward rather than back, and was in the wrong position to catch Noffke, who fell backward and hit her head on the floor. She was injured, and she sued the school, the school district, Bakke, and the defendants' various insurers.

The circuit court granted summary judgment to the defendants, dismissing Noffke's lawsuits. In dismissing the claim against Bakke, the judge reasoned that cheerleading is covered by the state Recreational Immunity Law, Wis. Stat. § 895.525 which gives participants in contact sports immunity from lawsuits arising from injuries suffered during the activity except in cases where the participant who causes the injury is found to have acted recklessly or with intent to injure. The judge found no evidence that Bakke's actions were reckless or intended to harm Noffke.

In dismissing Noffke's claims against the school and the district, the judge reasoned that these entities enjoy governmental immunity under Wis. Stat. § 893.80 (4).

The Court of Appeals affirmed the circuit court ruling that the school and the district could not be sued, but concluded that Noffke could proceed with her lawsuit against her teammate. The Court of Appeals reasoned that cheerleading is not a contact sport within the meaning of the statute because there is no opponent involved.

Both Noffke and Bakke appealed to the Supreme Court, and the Court granted both petitions for review. In her petition, Noffke argues that the school and district should not be granted governmental immunity because the cheerleading coach's negligence in allowing inexperienced cheerleaders to try a stunt without safety equipment breached a ministerial duty. In his petition, Bakke argues that cheerleading is, in fact, a contact sport, and that the Recreational Immunity Law bars Noffke's lawsuit against him.

The Court will decide if Noffke will be permitted to proceed with either, or both, of her claims.

WISCONSIN SUPREME COURT
Wednesday, October 8, 2008
2 p.m.

06AP803

Milton J. Christensen v. Michael J. Sullivan

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed a finding of the Milwaukee County Circuit Court, Judge Clare Fiorenza presiding.

This case arises from a class-action lawsuit filed by 16,662 former Milwaukee County Jail inmates against Milwaukee County and the Milwaukee County sheriff, among others. The lawsuit alleged that overcrowding in the Milwaukee County Jail had created substandard conditions that inflicted pain and suffering and posed a threat to the inmates' mental and physical well being. The lower courts disagreed on whether monetary damages could be imposed. The Supreme Court is expected to decide what remedies, if any, are available to the inmates.

Here is the background: The original class-action lawsuit was filed in 1996. The parties reached a settlement agreement (also known as a consent decree) in 2001 that was supposed to address jail overcrowding, but conditions did not improve and the inmates took the defendants back to court in 2004. The inmates alleged, among other things, that between 2001 and 2004, inmates were: regularly subjected to a booking process that took longer than 30 hours to complete, forced to sleep next to urinals, not given pillows or blankets, forced to sit up for hours and hours on end, kept in unsanitary, bug-infested conditions, and more.

This case is proceeding as a contempt action, rather than as a personal-injury lawsuit. In fashioning remedial sanctions, the courts must abide by Wis. Stat. § 785, which governs contempt of court actions. The circuit court concluded that the county had violated the consent decree, but found that remedies were not available because the problems had, by then, been corrected. The inmates appealed and the Court of Appeals reversed the trial court on the question of damages, finding that sanctions were available and that the inmates should have been awarded damages.

Now, the county and the sheriff have appealed to the Wisconsin Supreme Court, warning that the Court of Appeals decision, if allowed to stand, imposes “an unwarranted, potentially catastrophic financial burden on the Jail and Milwaukee County as a whole.”