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The Wisconsin Supreme Court Keeps Wisconsin Weird and Applies the Common Law in Its First Look at Wisconsin's Product Liability Statute

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Murphy v. Columbus McKinnon Corp., 2022 WI 109 (Dec. 28, 2022), gave the Wisconsin Supreme Court its first opportunity to interpret Wis. Stat. § 895.047, part of the Wisconsin Legislature's 2011 product liability statute. *Murphy* also presented the court with a choice: In interpreting a statute that borrows liberally from the Restatement (Third) of Torts, should it implement the Restatement's approach wholesale or partially incorporate Wisconsin common law instead? Wisconsin practitioners could have guessed that the court would take the latter course; Wisconsin seems to relish being a bit unique when it comes to tort-based claims.

Murphy involved a design defect claim, arising from the hard work of utility line technicians placing utility poles for power lines. Technicians use tongs attached to a truck-mounted boom and winch to hold and place the poles, and there's a few different designs for those tongs. *Id*. ¶ 4. Unfortunately, the "Dixie" design used here failed to secure one such pole, which fell on Mr. Murphy and injured him, leading to this lawsuit.

Mr. Murphy claimed that the "Dixie" design manufactured by the defendant was unreasonably dangerous, and that there was a safer alternative. The circuit court granted summary judgment for the defendant manufacturer. But the court of appeals reversed, and the Supreme Court affirmed. *Id*. ¶ 2. However, the Supreme Court didn't agree with the court of appeals' reasoning and was unable to reach a majority opinion, producing instead a "4-3" decision where all seven justices were aligned on only some parts of the opinion.

Justice Roggensack's opinion, which was joined in part by three other justices, held that one of five elements for a defective design claim is proof that the "consumer-contemplation standard as set out in § 895.047(1)(b)" is met. *Id*. In analyzing that element, the court of appeals had assumed that, because the statute mirrors much of the language of the Restatement (Third) of Torts, § 2(b), the legislature had adopted the Restatement's "risk utility" test and jettisoned Wisconsin's common law "consumer contemplation" test. *Id*. ¶ 26.

Not so. While the legislature "borrowed language" from the Restatement, it did not, according to the Supreme Court, adopt it wholesale or "enact the Restatement's voluminous comments." *Id*. ¶ 28. The court instead read the statute to codify much of Wisconsin's common law – including in

§ 895.047(1)(a). Yes, that section takes language from the Restatement, but the court held that Wisconsin's common law "consumer contemplation" test continues to be the operative standard. *Id*. ¶ 33.

Justice Karofsky wrote for a three-justice concurrence, which agreed with Justice Roggensack's opinion (joining all but 2 of 52 paragraphs), but wanted to "bolster and clarify" Justice Roggensack's analysis. *Id*. ¶ 62. Justice Hagedorn wrote for a three-justice dissent that agreed with the majority on the negligence claim, but thought that summary judgment should have been granted on the strict liability claim. *Id*. ¶ 73.

Ultimately the court held, like the court of appeals, that material disputes of fact should have precluded summary judgment. *Id.* ¶ 50.

Product liability practitioners should familiarize themselves with this opinion, given that it is a relatively rare exposition of Wisconsin product liability law from the state's highest court. Wisconsin prides itself on being different when it comes to torts. In rebuffing the Restatement approach, the justices touted Wisconsin's "unique hybrid test" (¶¶ 27, 75) for design defect claims, that Wisconsin "did not wholesale adopt strict liability" (¶ 19, n. 15), and that Wisconsin has "long followed" the minority view from the *Palsgraf* dissent (¶ 53, n. 1).

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