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CIVIL PROCEDURE

During the August 1975 term, the Wisconsin Supreme Court continued to decide cases brought prior to the effective date of the new Rules of Civil Procedure.[1] Perhaps because of this fact, the 1975 term produced few decisions significantly affecting procedural law.[2] However, noteworthy decisions deal with the exercise of personal jurisdiction and the propriety of declaratory judgment actions. In addition, in reviewing the former practice, the court took several opportunities to comment at length on the new practice.

I. PERSONAL JURISDICTION

The most significant procedural decision of the 1975 term dealt with the exercise of personal jurisdiction. In *Hasley v. Black, Sivalis & Bryson, Inc.*,[3] the court once again analyzed the Wisconsin long-arm statute[4] and the due process considerations which accompany its application. In this products liability case, the plaintiffs sued both the manufacturer of two horizontal dust scrubbers and the manufacturer of the bull plug pipe fitting contained in each machine. The plaintiffs sought to recover for personal injuries and property damage sustained in a natural gas fire that occured when the plaintiff Hasley attempted to stop a gas leak by tightening the bull plug in one of the machines. The manufacturer of the machine, Black, Sivalls & Bryson, Inc., then cross complained against the component parts manufacturer, J.B. Smith Manufacturing Co., a Texas corporation. Personal jurisdiction over Smith was the only issue in the case. The trial court denied Smith's mo-

1. 67 Wis. 2d 585 (1975) (effective January 1, 1976).

2. Many decisions merely reaffirmed preestablished procedural rules. *See, e.g.*, Ewing v. General Motors Corp., 70 Wis. 2d 962, 236 N.W.2d 200 (1975); Dalton v. Meister, 71 Wis. 2d 504, 239 N.W.2d 9(1976), discussed *infra*.

3. 70 Wis. 2d 562, 235 N.W.2d 446 (1975).

4. WIS. STAT. § 262.05 (1973) (renumbered WIS. STAT. § 801.05 (1973)), has been frequently construed by the court. *See, e.g.*, Afram v. Balfour, Maclaine, Inc., 63 Wis. 2d 702, 218 N.W.2d 288 (1974); Nagel v. Crain Cutter Co., 50 Wis. 2d 638, 184 N.W.2d 876 (1971); Zerbel v. H. L. Federman & Co., 48 Wis. 2d 54, 179 N.W.2d 872 (1970); Dillon v. Dillon, 46 Wis. 2d 659, 176 N.W.2d 362 (1970).

tion to dismiss based on lack of personal jurisdiction. However, the defendant Black, not the plaintiff, appealed the trial court's order. After applying the appropriate section of the long-arm statute, Wisconsin Statute 266.05(4)(d), and after applying the due process analysis developed previously in *Zerbel v. H.L. Federman & Co.*,[5] the court reversed the trial court and held that personal jurisdiction over Smith could not be obtained.

The court acknowledged that the threshold requirements of former Wisconsin Statutes section 262.05(4)(b)[6] were satisfied by the obvious existence of a local injury allegedly caused by a foreign act, but because Smith's only contact with Wisconsin was the manufacture of the bull plugs used in each of the two machines, the court had to determine whether these contacts met requirements of subsection (4)(b), *i.e.*, whether the presence of two of Smith's components in Wisconsin were "[p]roducts, materials or things processed, serviced or manufactured by the defendant [which] were used or consumed within this state in the ordinary course of trade."[7]

In deciding that Smith was within the scope of subsection (4)(b), the court continued its now familiar practice of relying heavily on the Revision Committee comments.[8] These comments reveal that subsection (4)(b) attempted to codify the jurisdictional rules found in many products liability cases that:

> where the action is upon a local injury caused by an act done elsewhere, and there is no element of consensual privity between the parties, respecting the action, a basis exists for personal jurisdiction over the defendant only when he is shown to have some other contact with the state in addition to the facts involved in the particular action sued upon; this concept underlies proposed subsection (4).[9]

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5. 48 Wis. 2d 54, 179 N.W.2d 872 (1970).

6. WIS. STAT. § 262.05(4)(b)(1971) (renumbered WIS. STAT. § 801.05(4)(b) (1973)). This subsection provides:

> (4) LOCAL INJURY; FOREIGN ACT. In any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, provided in addition that at the time of the injury either:
>
> . . . .
>
> (b) Products, materials or things processed, serviced or manufactured by the defendant were used or consumed within this state in the ordinary course of trade.

7. WIS. STAT. § 262.05(4)(b)(1971).

8. 70 Wis. 2d at 577-78, 235 N.W.2d 454. *See also* Afram v. Balfour, Maclaine, Inc., 63 Wis. 2d 702, 218 N.W.2d 288 (1971).

9. WIS. STAT. ANN. § 262.05, Revision Notes, (Supp. 1975).

The court also relied on a factually similar federal case, *McPhee v. Simmonds Saw & Steel Co.*[10] In that case the court refused to permit the extension of personal jurisdiction over a defendant where the sole contact with Wisconsin was the presence within the state of the very component part which gave rise to the suit. The court construed the phrase "products, materials or things processed" in subsection (4)(b) to require that more than one item manufactured by the defendant be within the state at the time of the injury.[11] On the basis of the Revision Committee notes and the *McPhee* holding, the *Hasley* court held that since Smith sold many components to Black with the knowledge that the plugs would be included in products assembled and distributed by Black and since more than one item manufactured by Smith was used within this state at the time of the injury, the requirements of section 262.05 (4)(b) were met.[12] The court reached this result notwithstanding the fact that both plugs reached Wisconsin in a single transaction: "The manner of their arrival is a qualification on the exercise of jurisdiction only in that ordinary commercial practice be involved. A single sale may involve such a number of items that long-arm jurisdiction under the section arises without question."[13] The court thus chose to construe broadly the terms of the long-arm statute and to remedy any resulting abuse or hardship in the second stage of the jurisdictional analysis, the due process analysis.

The due process principles which apply to the exercise of personal jurisdiction in Wisconsin have been relatively settled since the *Zerbel* case.[14] Once the court establishes the existence of a minimum contact of the defendant within Wisconsin and that the cause of action arises out of that contact, the court applies a five-part analysis of the nature and quality of that contact and Wisconsin's interest in the action. By this analysis the exercise of personal jurisdiction is made consistent with fair play and substantial justice.[15] It is at this stage of the analysis

10. 294 F. Supp. 779 (W.D. Wis. 1969).

11. *Id.* at 782.

12. 70 Wis. 2d at 580-81, 235 N.W.2d at 456.

13. *Id.* at 581, 235 N.W.2d at 456.

14. *See* cases cited *supra* note 4.

15. Zerbel v. H. L. Federman & Co., 48 Wis. 2d 50, 62-63, 179 N.W.2d 872, 877 (1970). *Zerbel* applies the principles of due process set out by the United States Supreme Court in Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); and International Shoe Co. v. Washington, 326 U.S. 310

that jurisdiction over Smith fails. The court distinguished cases such as *Campbell Construction Co. v. Palombit*[16] and *Keckler v. Brookwood Country Club,*[17] where the manufacturer of component parts relied on a single network of distributors to reach the ultimate consumer, with Smith's situation, where Smith's sales to original equipment manufacturers like Black are but a small part of its business and where Smith's sales to Black constituted a mere .4% of Smith's total sales volume.[18]

The court noted that Wisconsin's adoption of a strict liability theory of products liability represents an important state policy of protecting its residents from defective products. This policy is similar to California's desire to protect its citizens from the abuse of the life insurance industry which the United States Supreme Court held to justify the exercise of personal jurisdiction over a nonresident insurance company in *McGee v. International Life Insurance Co.*[19] Nevertheless, the court found this analogy to *McGee* unpersuasive, since the state policy protecting consumers was invoked on appeal by Black, a defendant, and not by the plaintiffs. The court therefore found that the exercise of personal jurisdiction over Smith failed to satisfy due process.

The *Hasley* decision is unsatisfactory, both in its application of the long-arm statute and in its due process analysis of the case. The long-arm statute was drafted to embody the principles of due process underlying long-arm jurisdiction.[20] Although a finding that a particular cause of action is within the terms of the statute should not preclude consideration of the larger question of whether exercise of personal jurisdiction in a particular case comports with due process, it is unfortunate that the court has chosen to construe the terms of the statute independently of the due process concepts which it was intended to embody. Thus the application of subsection (4)(b)

(1945). The five-part analysis of whether the exercise of personal jurisdiction comports with fair play and substantial justice, as required by the Supreme Court in *International Shoe,* includes the following considerations: (1) the quantity of contacts, (2) the nature and quality of contacts, (3) the source of the cause of action, (4) the interest of Wisconsin in the action, and (5) the convenience of the litigants. 48 Wis. 2d at 65-66, 179 N.W.2d at 878.

16. 347 Mich. 340, 79 N.W.2d 915 (1956).

17. 248 F. Supp. 645 (N.D. Ill. 1965).

18. 70 Wis. 2d at 586, 235 N.W.2d at 459.

19. 355 U.S. 220 (1957), *cited at* 70 Wis. 2d at 587, 235 N.W.2d at 459.

20. *See* note 9 *supra.*

now turns on whether one or more than one item processed by the defendant is used in Wisconsin. A manufacturer like Smith who sends two pipe fittings to Wisconsin in a single sale is thus amenable to suit, while a manufacturer who sends only one is not. Yet there may be no qualitative difference in their contacts with Wisconsin, as the court's due process analysis reveals. Instead of being construed in a way consistent with the due process concepts on which the statute was originally based, in *Hasley* the long-arm statute has become little more than an outer boundary marking those cases which the legislature has determined cannot possibly satisfy due process. Given this negligible role in the determination of a jurisdictional question, it is difficult to see a purpose for the enactment of a long-arm statute at all.

The *Hasley* court's due process analysis is also unsatisfactory. The court makes the exercise of personal jurisdiction over a component parts manufacturer depend not upon whether the defendant has a national distribution system for its products, as did Smith, but upon the nature of the peculiar chain of distribution which has brought the component giving rise to the suit to Wisconsin. *Hasley* seems clearly to suggest that had the plaintiff purchased the defective dust scrubber containing the defective component part from one of Smith's regular distributors rather than from an original manufacturer like Black, Smith would have then been amenable to suit, even though the pattern of Smith's business activities and product distribution and the number of its contacts with Wisconsin remain unchanged.[21]

The court acknowledged Wisconsin's policy of favoring recovery by consumers in products liability cases, but refused to give that fact weight because it was invoked by another manufacturer instead of a consumer. The essential question to

21. The court's conclusion here is all the more surprising in view of the restrictive interpretation it takes of Hansen v. Denckla, 357 U.S. 235 (1958), the case most troublesome for any court which seeks to extend personal jurisdiction over a defendant on the basis of the defendant's national distribution of a defective product. In *Hansen* the court stated that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." 357 U.S. at 253. The court adopts the Seventh Circuit interpretation of this passage which stresses the foreseeability that defendant's products would arrive in Wisconsin, instead of the purposefulness of the defendants' activities in making this occur. 70 Wis. 2d at 584-85, 235 N.W.2d at 457.

be resolved by the due process analysis is whether there exist "such contacts of [the defendant] with the state of the forum as make it reasonable in the context of our federal government, to require the [defendant] to defend the particular suit which is brought there."[22] It is difficult to perceive how the answer to this question is affected by which party happens to argue the jurisdictional question, especially in view of the economy resulting from the litigation of plaintiff's claim and defendant's cross claim for contribution in the same action.

II. JOINDER OF CLAIMS

Dalton v. Meister[23] represents a reaffirmation of the joinder principles established in *Rogers v. City of Oconomowoc.*[24] Thus in *Dalton* the court held that a cause of action against the defendant bank for fraud in a Hawaiian property deal designed to dispose of the defendant's estate outside the reach of his creditors was properly joined with an action for conspiracy to defraud Meister's creditors. Even though that claim does not affect all parties to the action, the court held that as long as one primary right—the adjudication of the disposition of Meister's property—was the subject of the suit, the claims were properly joined. Moreover, this analysis of party joinder, permitting the plaintiff to sue various defendants on various theories of action to recover for the invasion of a single primary right even if the form of relief does not affect the parties equally, applies to the new joinder rules.[25]

Dalton also held that under former section 263.04 a plaintiff could properly join a special proceeding with a civil action as long as the joinder of claims was otherwise proper.[26] The court criticized contrary language in *Wisconsin Brick & Block Corp. v. Vogel*[27] to the effect that actions and special proceedings cannot be consolidated under former section 269.05.[28] The *Dalton* court further stated that under the new rules, which

22. International Shoe Co. v. Washington, 335 U.S. 220, 317 (1945), *quoted at* 70 Wis. 2d at 581, 235 N.W.2d at 456.

23. 71 Wis. 2d 504, 239 N.W.2d 9 (1976); *see also,* Ewing v. General Motors Corp., 70 Wis. 2d 962, 236 N.W.2d 200 (1975).

24. 16 Wis. 2d 621, 115 N.W.2d 635 (1962).

25. Ewing v. General Motors Corp., 70 Wis. 2d 962, 236 N.W.2d 200 (1975).

26. 71 Wis. 2d at 516, 239 N.W.2d at 16.

27. 54 Wis. 2d 321, 324, 195 N.W.2d 664, 666 (1972).

28. WIS. STAT. § 269.05 (1971) (repealed and replaced by WIS. STAT. § 806.04 (1973)).

speak only of the joinder of "claims," and not of "actions" as did former section 263.04, the same result is reached.[29] The court's criticism of *Wisconsin Brick & Block* suggests that the consolidation of an action and a special proceeding is now unquestionably permissible under new section 805.03.

III. POST-EVIDENCE MOTIONS

In *Household Utilities, Inc. v. Andrews Co.*[30] the court resolved the disputed question[31] of which standard the trial court must apply in ruling on a motion to dismiss brought at the close of the plaintiff's case in a trial to the court. Moreover, this case has continuing precedential value because its holding expressly takes into account new Wisconsin Statutes, section 805.14. In *Household Utilities,* a simple contract action tried to the court, the defendant moved for a nonsuit at the close of the plaintiff's evidence, on the grounds that the plaintiff failed to prove a contract. The trial court weighed the evidence presented in the plaintiff's case in chief and then granted the motion.[32] The defendant appealed, contending that the proper standard for ruling on a motion for nonsuit in Wisconsin is whether the plaintiff presented any credible evidence to support his claim.

In affirming the trial court's decision, the court made it clear that the motion for nonsuit and its accompanying standard of viewing the evidence in the light most favorable to the plaintiff is inappropriate in a trial to the court.[33] As the court pointed out, in a trial to the court, the court is the ultimate trier of fact.[34] Because the plaintiff has the burden of persuading the trier of fact, in ruling on a motion to dismiss at the close of the plaintiff's evidence, the court should weigh the evidence. The court's decision to grant the motion must therefore constitute a disposition of the case on the merits.[35]

This view of the standard to be applied when ruling on a motion to dismiss at the close of the plaintiff's case is consis-

29. 71 Wis. 2d at 516, 239 N.W.2d at 16.

30. 71 Wis. 2d 17, 236 N.W.2d 663 (1976).

31. *Compare* Newton v. Newton, 33 Wis. 2d 182, 147 N.W.2d 328 (1967) *with* J. CONWAY, WISCONSIN AND FEDERAL PROCEDURE § 61.02 (1975).

32. 71 Wis. 2d at 23, 236 N.W.2d at 666.

33. *Id.* at 24, 236 N.W.2d at 667.

34. *Id.*

35. *Id.* at 24-25, 236 N.W.2d at 667.

tent with the position taken by the Federal Rules of Civil Procedure.[36] However, it conflicts with the rule of an earlier Wisconsin case, *Newton v. Newton,*[37] ironically, a decision also written by Justice Beilfuss. In *Newton,* the court held that in ruling on a motion to dismiss in a trial to the court, the court must apply the same standard as it uses in ruling on a motion for nonsuit in a jury trial and must view the evidence in the light most favorable to the plaintiff.[38] Moreover, in *Newton* the court also held that if a defendant whose motion to dismiss is denied fails to rebut the prima facie case made out by the plaintiff in presenting his own case, the plaintiff would be entitled to judgment on the merits, even though the plaintiff, although making a prima facie case, has not met his burden of persuading the trier of fact.[39] In *Household Utilities,* Justice Beilfuss resolved the confusion left by *Newton* over the standards which apply to a motion to dismiss in a trial to the court. The contrary language of *Newton* was overruled.

Household Utilities also resolved the uncertainty in the standard to be applied by the appellate court in reviewing the trial court's ruling on the motion to dismiss. The *Newton* case indicated that the trial court's ruling would not be reversed on appeal unless the appellate court found it to be unsupported by any rational view of the evidence,[40] while *State ex rel. Skibinski v. Tadych* expressly held that the standard for the trial court and that of the appellate court were the same — the evidence viewed in the light most favorable to the plaintiff.[41] *Household Utilities* now makes it clear that the standard to be applied in reviewing a ruling on a motion to dismiss is exactly the same as the standard to be applied to any final judgment of a trial to the court: whether the trial court's findings are against the great weight and clear preponderance of the evidence.[42] The court expressly overruled the contrary holding of *State ex rel. Skibinski v. Tadych.*

In *Household Utilities* the court applied its holding to the

36. 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2371 (1971).

37. 33 Wis. 2d 182, 147 N.W.2d 328 (1967).

38. *Id.* at 187, 147 N.W.2d at 330.

39. *Id.*

40. *Id.* at 188, 147 N.W.2d at 331.

41. 36 Wis. 2d 36, 152 N.W.2d 865 (1967).

42. 71 Wis. 2d at 28, 236 N.W.2d at 669.

current procedure under Wisconsin Statutes section 805.14.[43] The court pointed out that Wisconsin Statutes section 805.14 abolishes the motion for a nonsuit and substitutes the motion to dismiss in both a trial to the court and a trial before a jury. However, the court also stated that "the rule draws no apparent distinction in application between a trial to the court and one before a jury. Indeed, standing alone, [Wisconsin Statutes section 805.14(1)] appears to be equally applicable to both types of cases."[44] Wisconsin Statutes section 805.14(1) provides:

> No motion challenging the sufficiency of the evidence as a matter of law to support a verdict. . . . shall be granted unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party.

Contrary to the court's statement, the reference to the sufficiency of the evidence "as a matter of law to support a verdict" in the statute makes it apparent that this standard applies only to jury trials and not to trials to the court. Unfortunately, at the time *Household Utilities* was decided the statute did not also contain a similar statement of the standard to be applied in trials to the court. The omission lead to an easy misreading of the statute. The new rules have since been amended to specify expressly the differing standards which apply to a motion to dismiss in a trial to the court and one to a jury.[45]

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43. WIS. STAT. § 805.14 (1973).

44. 71 Wis. 2d at 28, 236 N.W.2d at 668.

45. The holding of Household Utilities, Inc. v. Andrews, 71 Wis. 2d 17, 236 N.W.2d 663 (1976), is reflected in the recently adopted amendments to the new Wisconsin Rules of Procedure. The changes, which became effective on January 1, 1977, are as follows:

Amend Section 805.14(3) to read:

(3) MOTION AT CLOSE OF PLAINTIFF'S EVIDENCE. At the close of plaintiff's evidence *in trials to the jury,* any defendant may move for dismissal on the grounds of insufficiency of evidence. If the court determines that the defendant is entitled to dismissal, the court shall state with particularity on the record or in its order of dismissal the grounds upon which the dismissal was granted and shall render judgment against the plaintiff.

Renumber Sections 805.17(1), (2) and (3) to (2), (3) and (4) and create (1): *805.17 TRIAL TO THE COURT (1) MOTION AT CLOSE OF PLAINTIFF'S EVIDENCE. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving*

IV. DECLARATORY JUDGMENTS

The 1975 term produced two noteworthy constructions of the Wisconsin declaratory judgments statute.[46] In *State ex rel. Lynch v. Conta,*[47] an original declaratory judgment action, the district attorney for Dane County sought a declaration that the Wisconsin open meeting statute[48] applied to a series of private meetings held by state legislators during the 1976 budget bill deliberations. Since the open meeting statute includes a forfeiture provision for violations[49] and is therefore penal in nature, the legislators contended that an action would be improper if brought by the district attorney, the person seeking to enforce the statute, and not the person threatened by the statute. The court held that although declaratory judgment actions brought by the prosecutor are to be avoided, they are nonetheless proper as long as the parties are genuinely adverse and as long as the controversy is otherwise appropriate for declaratory relief:[50]

> [T]his court, or any trial court, while not encouraging those charged with law enforcement to petition for declaratory judgments, will accept such cases in the exercise of discretion. Such exercise would be guided by the normal principles of declaratory judgment. In most situations, the action should be refused until the order of parties is reversed so that the party subject to the penal law is plaintiff.[51]

As the court pointed out, this result is consistent with earlier Wisconsin case law as well as the language of the declaratory judgments statute. That statute states that it must be liberally construed[52] and provides that "any person . . . whose rights, status or other legal relations are affected by a statute"

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his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff on that ground or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in sub. (2). Unless the court in its order for dismissal otherwise specifies, a dismissal under this section operates as an adjudication upon the merits.

49 WIS. B. BULL. 70-71 (August, 1976).

46. WIS. STAT. § 269.56 (1973) (renumbered WIS. STAT. § 806.04 (1973).)

47. 71 Wis. 2d 662, 239 N.W.2d 313 (1976).

48. WIS. STAT. § 66.77 (1973).

49. WIS. STAT. § 66.77(10) (1973).

50. 71 Wis. 2d at 671, 239 N.W.2d at 323.

51. *Id.* at 672, 239 N.W.2d at 324.

52. WIS. STAT. § 269.56(12) (1973).

may seek declaratory relief.[53] Since the open meeting statute gives the district attorney a right of enforcement when he has received a citizen's complaint, and since such a complaint was made in this case, the court concluded that the district attorney was a proper plaintiff under Wisconsin Statutes section 269.56(2). The court then found that the other requirements for declaratory relief were met and declared that the private meetings were within the "partisan caucus" exception of the statute and were exempt from the requirements of the open meeting law.

In *State ex rel. Lynch* the Dane County district attorney, a state officer, encountered no difficulty in bringing an action for declaratory relief. However, in *Lister v. Board of Regents*,[54] where the parties were reversed, the private citizens who sought a declaratory judgment against state officers, the Board of Regents, as defendants were unable to surmount the obstacle of the state's immunity from suit.

The plaintiffs in this case, former Wisconsin law school students, joined claims for declaratory and injunctive relief with a claim for money damages against the Board of Regents. They sought a declaration that at the time they attended the law school, they were residents of Wisconsin entitled to pay in-state tuition fees under former Wisconsin Statutes section 36.16.[55] The court pointed out that declaratory judgment actions, like all civil actions, are barred by the principles of sovereign immunity. However, in view of the appropriateness of the declaratory judgment action for resolving questions of the constitutionality and application of statutory provisions, courts engage in the fiction that allows such actions to be brought against a state official on the theory that where the official has misapplied a state statute, he has acted beyond his constitutional and jurisdictional authority and has lost his immunity to suit.[56] In *Lister* the court made it clear that, for purposes of permitting declaratory relief, a finding that a state officer has acted outside his authority is not conclusive as to whether he has

53. WIS. STAT. § 269.56(2) (1973).

54. 72 Wis. 2d 282, 240 N.W.2d 610 (1976).

55. WIS. STAT. §§ 36.16(1)(a), (ab), (ac), (ae), (ak), (b) and (3) (1969) were repealed and WIS. STAT. § 36.27(2) (1973) was created by 1973 Wis. Laws ch. 335 §§ 7, 15 which changed the standards for determining residency contained in the former statute.

56. 72 Wis. 2d at 299, 240 N.W.2d at 621.

exceeded his authority for purposes of disposing of the substantive claim against him.[57] Thus, in *Lister*, where the plaintiffs joined their action for declaratory relief with a claim for damages, the court held that at least in theory, a declaratory judgment action would lie against the Board of Regents, even though they are immune from liability on the substantive damage claim.

However, the court ultimately denied the propriety of plaintiffs' declaratory action on the grounds that the students failed to present a justiciable controversy since they were no longer law students and did not anticipate future enrollment:

> The dictum that an action for declaratory relief from the erroneous application of a statute is really against the individual officer or agency acting in excess of his or its authority becomes too apparent to be adhered to where no anticipatory or preventative objective will be served. A declaration which seeks to fix the state's responsibility to respond to a monetary claim is not authorized by Wisconsin's Declaratory Judgments Act.[58]

The court thus made Wisconsin law consistent with the general view that a declaration of the state's duty to refund or pay money which cannot actually be recovered, due to the doctrine of sovereign immunity, and which is sought merely to obtain an adjudication of legal rights is not a proper declaratory action.[59] However, the court did leave open the possibility that such a suit can be brought where plaintiff anticipates future assessments[60] under the statute or in circumstances justifying the court's decision to entertain a declaratory judgment action albeit otherwise improper in matters of great public importance.[61]

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57. *Id.*
58. 72 Wis. 2d at 308, 240 N.W.2d at 625.
59. *See* 1 W. ANDERSON, ACTIONS FOR DECLARATORY JUDGMENTS § 179 (2d ed. 1951).
60. 72 Wis. 2d at 307, 240 N.W.2d at 625.
61. 72 Wis. 2d at 309-10, 240 N.W.2d at 626.