



# WISCONSIN SUPREME COURT TURNS SAFE-PLACE STATUTE INTO STRICT LIABILITY FOR PROPERTY OWNERS

## OVERVIEW

In *Estate of Lorbiecki v. Pabst Brewing Co.*, [2026 WI 12](#), a 5-2 Wisconsin Supreme Court held that a property owner could be held liable under Wisconsin's safe-place statute, [Wis. Stat. § 101.11](#), to the employee of an independent contractor who was hired to work with asbestos-insulated pipes — even though the owner did not direct the work and the asbestos was undisturbed until the contractor's own employees disturbed it. The majority further held that the evidence supported submitting punitive damages to the jury. Pabst did win one important point: the punitive-damages cap in [§ 895.043\(6\)](#) is tied to the amount recoverable against the remaining defendant, not the full verdict against non-parties. Justices Ziegler and Grassl Bradley dissented.

## WHAT YOU SHOULD KNOW

- » The decision expands owner liability under the safe-place statute well beyond the traditional rule that owners are absolved of liability when they relinquish control of safe premises to an independent contractor. See *Potter v. City of Kenosha*, 268 Wis. 361 (1955); *Barth v. Downey Co.*, 71 Wis. 2d 775 (1976).
- » The majority rejects the argument that the general rule in *Tatera v. FMC Corp.*, 2010 WI 90, bars a safe-place claim by an independent contractor's employee, ruling that the safe-place statute "supersedes" the common-law duty of ordinary care in that context.
- » The jury was permitted to find "control" based on Pabst's ownership, its daily inspections, and a memo requiring contractors to notify Pabst before welds or cuts to prevent fire — routine safety practices that the Court treats as evidence of retained control.
- » "Unsafe condition" was satisfied by asbestos that became airborne because of the contractor's work, not by any pre-existing airborne contamination. The dissent describes this as strict liability for any building that contains undisturbed asbestos.
- » The Dallet concurrence (joined by Hagedorn) flags an unresolved question: after a full trial, what record does an appellate court review on a denied summary-judgment motion — the pre-trial record, the trial record, or both?
- » On the one point Pabst won, punitive damages are capped at twice the compensatory damages actually recoverable *against Pabst* (\$4,657,937.38), not twice the full verdict apportioned across

non-party tortfeasors (the jury awarded \$20 million in punitive damages, but only allocated 20% of overall responsibility to Pabst).

## WHAT COULD HAPPEN

The practical consequences for Wisconsin property owners, employers, and the businesses that serve them are substantial. **Any owner of an older commercial, industrial, or institutional building** — breweries, factories, schools, hospitals, municipal buildings, warehouses — now faces meaningful safe-place exposure to the employees of contractors hired specifically to remediate, repair, or replace the hazard the contractor was retained to address. The building owner's compliance posture does not clearly protect it: under the majority's reasoning, routine safety practices like requiring advance notice of cuts and welds, conducting daily walk-throughs, and imposing OSHA-compliance requirements on contractors can be read as evidence that the owner retained "control" of the premises for safe-place purposes.

The summary-judgment implications are equally significant. The majority reviewed the denial of summary judgment using the full trial record rather than the record as it existed at the summary-judgment stage, and the Dallet concurrence openly acknowledges that the proper record for post-trial review of a denied summary-judgment motion remains unresolved. The dissent warns this will render such denials "de facto unreviewable," because a plaintiff who survives summary judgment on a thin record can cure the defect through trial evidence that the defendant was never permitted to test before proceeding to a jury.

Defense-side counsel should expect more safe-place claims to survive summary judgment, more aggressive framing of routine owner conduct as "control," and more punitive-damages questions reaching juries on theories of knowing exposure. Owners with legacy asbestos, lead, or similar hazards should reassess contractor-selection, indemnification, scope-of-work documentation, and insurance coverage.

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## LEGAL BACKGROUND

Wisconsin's safe-place statute, enacted during the Progressive Era, imposes a heightened, non-delegable duty on employers and owners of places of employment to construct, repair, and maintain such places "as safe" as their nature reasonably permits. [Wis. Stat. § 101.11\(1\)](#). The duty extends not only to employees but also to "frequenters," which includes the employees of independent contractors working on the premises. *Barth v. Downey Co.*, 71 Wis. 2d 775, 778 (1976).

For decades, however, Wisconsin law recognized a significant limit on owner liability to an independent contractor's employees. Under *Potter v. City of Kenosha*, 268 Wis. 361 (1955), and *Barth*, an owner who relinquishes "complete control and custody" of a safe premises to an independent contractor is not liable under the safe-place statute for injuries caused when that contractor's own work changes the premises and creates a hazard. The common-law rule in *Tatera v. FMC Corp.*, 2010 WI 90, reinforced the point: a principal employer ordinarily is not liable in tort for injuries to an independent contractor's employee performing the contracted work, subject to narrow exceptions for affirmative negligence and extrahazardous activity.

*Lorbiecki* substantially narrows both doctrines in the safe-place context. The majority holds that *Tatera's* "general rule" does not apply to safe-place claims at all because the safe-place statute "supersedes" the common-law duty of ordinary care. The majority then treats the *Potter* exception — complete turnover of control of a safe premises — as a fact question for the jury rather than a legal bar, and finds that the jury could have concluded Pabst

“retained control” because it owned the brewery, inspected work areas daily, and required notice before welds or cuts. Finally, the majority holds that airborne asbestos generated by the contractor’s own work qualifies as an “unsafe condition associated with the structure” for which the owner may be liable, relying on *Neitzke v. Kraft-Phenix Dairies, Inc.*, 214 Wis. 441 (1934), and *Viola v. Wis. Elec. Power Co.*, 2014 WI App 5.

The dissent reads the prior cases very differently. Justice Ziegler, joined by Justice Grassl Bradley, argues that *Potter* and *Barth* squarely require a pre-existing unsafe condition *before* the contractor’s work begins, and that the cases the majority relies on (*Viola*, *Anderson*, and *Calewarts*) all involved airborne asbestos that predated the plaintiff’s work on the premises. In the dissent’s view, “[t]he mere presence of asbestos on the property, particularly in an undisturbed state, does not qualify as an ‘unsafe condition’ on this record.”

## ZOOM IN

The most doctrinally consequential move in *Lorbiecki* may not be the safe-place holding itself, but the treatment of summary-judgment review on appeal. Under longstanding Wisconsin practice, Wis. Stat. § (Rule) 809.10(4) preserves a party’s right to appeal a denied summary-judgment motion after final judgment, without the need for interlocutory review. Practitioners understood that denial to be entitled to *de novo* review on the summary-judgment record.

The *Lorbiecki* majority instead evaluates Pabst’s summary-judgment challenge using the whole trial record — while expressly “express[ing] no view” on whether federal-style abandonment of the pre-trial record (see *Ortiz v. Jordan*, 562 U.S. 180 (2011)) should apply in Wisconsin. Justice Dallet’s concurrence, joined by Justice Hagedorn, candidly acknowledges the question remains open and invites the Court to resolve it in a future case.

The dissent warns that the majority’s approach makes denied summary-judgment motions “de facto unreviewable” because the legal sufficiency of the motion is effectively folded into a sufficiency-of-the-evidence review of the verdict. Until the Court answers the question Dallet flags, defense counsel should assume that losing summary judgment functionally means losing the case’s best shot at a pre-trial exit, and should preserve their legal theories aggressively through motions in limine, Rule 805.14 motions at close of evidence, and JNOV motions — because that paper trail may be the only record the appellate court looks at.

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