Criminal Law

Possession of Child Pornography – Mandatory Minimum Sentence

***State v. Brott*, 2023 WI App 45 (filed Aug. 30, 2023) (ordered published Sept. 27, 2023)**

HOLDING: The circuit court properly applied the law in sentencing the defendant to a mandatory minimum term of three years of confinement based on his conviction for possession of child pornography.

SUMMARY: Brott was convicted of possession of child pornography, contrary to Wis. Stat. section 948.12(1m). Before the circuit court and again before the court of appeals, he challenged the circuit court's decision denying his request for a departure from the mandatory minimum sentence of three years in prison for this crime as provided for in Wis. Stat. section 939.617(1). He contended that the circuit court was not bound by this statutory mandatory minimum sentence because it conflicts with what he believes is permissive sentencing language in Wis. Stat. section 948.12(1m). Brott further contended that Wis. Stat. section 939.617's mandatory minimum has not been consistently applied throughout the state, thereby violating his constitutional right to equal protection.

In an opinion authored by Judge Grogan, the court of appeals rejected these challenges and affirmed the circuit court.

The court of appeals first concluded that there is no conflict between the statutes in question (*see* ¶ 2). Wis. Stat. section 948.12 codifies multiple child pornography crimes and then uses "may be penalized" language to identify the felony classification of the crimes (classifying them as Class D felonies unless the offender is under 18 years of age at the time of the crime, in which case the offenses are Class I felonies). Wis. Stat. section 939.617 provides in relevant part that if a person is convicted of violating Wis. Stat. section 948.12, the court "shall impose a bifurcated sentence under [Wis. Stat. section] 973.01. The term of confinement in prison portion of the bifurcated sentence shall be at least … 3 years for violations of [Wis. Stat. section] 948.12." [*Note:* This mandatory minimum penalty does not apply if the defendant was under 18 years of age at the time of the crime. In this case the defendant was over that age.]

The court of appeals rejected the defendant's argument that use of the word "may" in Wis. Stat. section 948.12(1m) means that a circuit court is given discretion to impose a bifurcated sentence (*see* ¶ 13). The statutory history of Wis. Stat. section 948.12 confirms that the use of the word "may" relates to the applicable felony classification for Wis. Stat. section 948.12 violations rather than to the circuit court's sentencing discretion (or lack thereof) (*see* ¶ 16). Turning to Wis. Stat. section 939.617, the court of appeals agreed with the state that the plain meaning of the statute requires a circuit court to impose a bifurcated sentence with a three-year minimum term of initial confinement (*see* ¶ 11).

"The circuit court properly applied the law in sentencing Brott to three years of confinement followed by two years of extended supervision because, in doing so, it correctly interpreted and gave effect to both Wis. Stat. § 948.12, which makes possession of child pornography a felony and identifies the corresponding category of felony, and Wis. Stat. § 939.617, which dictates the mandatory minimum sentence for that crime. There is no conflict between these statutes, and there is likewise no ambiguity that renders these statutes irreconcilable. The circuit court therefore properly rejected Brott's request that it disregard [Wis. Stat.] § 939.617's plain dictate requiring a mandatory minimum" (¶ 30).

The court of appeals also concluded that the defendant failed to establish an equal-protection violation. That some other courts have failed to impose a lawfully required sentence in accordance with Wis. Stat. section 939.617's mandatory minimum "does not give rise to an equal protection claim when a court – such as the one here – *does* impose a sentence that is in accordance with the law" (¶ 28).

Municipal Law

Intergovernmental Agreements – Sewerage Services Charges – License Fees

***Mary Lane Area Sanitary Dist. v. City of Oconomowoc*, 2023 WI App 48 (filed Aug. 30, 2023) (ordered published Sept. 27, 2023)**

HOLDING: License fees built into agreements for the city of Oconomowoc to provide sewerage treatment services to nearby municipalities are not "sewerage services charges" for purposes of Wis. Stat. section 66.0821(4)(a) and are not subject to the provisions of Wis. Stat. section 66.0628(2).

SUMMARY: More than 20 years ago, the city of Oconomowoc "entered into written intergovernmental agreements with several neighboring municipalities" and affiliated sanitary districts under which the city agreed to accept, treat, and dispose of their wastewater. The agreements require the municipalities to pay certain charges for sewerage treatment and capital costs. They also include an annual "license fee." The agreements provided for an initial fixed fee per residential equivalent connection and a four percent annual escalator. The city deposits the license fees in its general fund cash account and uses them to pay general expenses.

The issue in this case is whether the license fee is valid and enforceable. The municipalities contended that the license fee violates Wis. Stat. section 66.0821(4)(a), which permits municipalities to "establish sewerage service charges" that relate to the provision of sewerage service. They further argued that the license fee violates


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In this column, Prof. Daniel D. Blinka and Prof. Thomas J. Hammer summarize select published opinions of the Wisconsin Court of Appeals. Full-text decisions are available online at www.wisbar.org/wislawmag.

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Wis. Stat. section 66.0628(2), which requires that fees imposed by municipalities "bear a reasonable relationship to the service for which [they are] imposed." They also argued that the city lacks any other legal authority to charge the fees.

The circuit court rejected these arguments and granted summary judgment to the city, concluding that the undisputed facts established that the license fee is valid and enforceable consideration for extending sewerage service to these extraterritorial entities, which the city was not required to do (*see* ¶ 1).

In an opinion authored by Judge Neubauer, the court of appeals affirmed the circuit court. It agreed with the city that "the license fees do not constitute 'sewerage service charges' under Wis. Stat. § 66.0821(4)(a) and that the statute does not preclude the City from collecting the fees. The language used by the parties to describe the license fees indicates that they are not intended to meet the costs incurred by the City to maintain and operate its treatment system, but instead are consideration for the City's agreement to extend sewerage treatment services to customers located outside the City's borders" (¶ 25).

The court of appeals also rejected the municipalities' argument that even if the license fees are not "sewerage service charges" under Wis. Stat. section 66.0821(4)(a), they are subject to Wis. Stat. section 66.0628(2), which states that "[a]ny fee that is imposed by a political subdivision shall bear a reasonable relationship to the service for which the fee is imposed." The court concluded that the fees were not "imposed" by the city but were included in agreements the city negotiated with the municipalities (¶ 31). Moreover, the fees were not charged for sewerage treatment services. The license fees are separate consideration for the city's agreement to extend wastewater treatment services beyond its borders (*see* ¶ 33).

Lastly, the court of appeals considered a host of other arguments advanced by the municipalities as to why the license fees are invalid, "but none is persuasive" (¶ 34).

Torts

Suit Against Municipality – Notice of Claim – Statute of Limitation – Equitable Estoppel

***Kornreich v. Town of Cedarburg*, 2023 WI App 46 (filed Aug. 16, 2023) (ordered published Sept. 27, 2023)**

HOLDING: The circuit court properly granted summary judgment to the municipal defendant because the plaintiff failed to comply with the six-month statute of limitation codified in Wis. Stat. section 893.80(1g).

SUMMARY: On Aug. 7, 2020, Kornreich broke his clavicle in an accident that occurred while he was riding a bicycle. He alleged that the accident was caused by negligent maintenance of the road by the town of Cedarburg. He served a notice of claim on the town pursuant to Wis. Stat. section 893.80(1d)(b) on Aug. 19, 2020.

The town voted to deny the claim on Oct. 7, 2020. On Oct. 13, 2020, the town sent the plaintiff's attorney a notice of disallowance (*see* Wis. Stat. § 893.80(1)(g)) advising that no action on the claim could be brought against the town after six months from the date of service of the notice.

On Oct. 21, 2022, plaintiff's counsel conferred with the claims manager of Aegis Corp. Aegis was the general administrator of the town's insurer (Community Insurance Corp.). According to plaintiff's counsel, the claims manager told him to disregard the disallowance and to not file suit but instead to proceed with collecting and supplementing the requested medical damages so that they could be considered for settlement negotiations (*see* ¶ 3).

On Nov. 14, 2020, the town served the plaintiff by certified mail with the same notice of disallowance referred to above, informing him that he had six months to file suit. During the next several months, plaintiff's counsel continued to communicate with and provide documentation to Aegis. On May 11, 2020, Aegis sent an email to plaintiff's counsel stating that the insurance carrier and the town would "maintain the denial" on the plaintiff's claim and that the carrier would "await summons and complaint at this time" (¶ 4). The plaintiff filed suit on July 19, 2020 – 11 months after notifying the town of his claim and more than 8 months after the plaintiff was personally served with the notice of disallowance.

The town moved for summary judgment, asserting that the plaintiff's claim was untimely filed under Wis. Stat. section 893.80(1)(g). The plaintiff responded that the town should be equitably estopped from asserting a statute-of-limitation defense. The circuit court granted summary judgment to the town, concluding that the six-month statute of limitation codified in Wis. Stat. section 893.80(1g) barred the plaintiff's claim. In an opinion authored by Judge Lazar, the court of appeals affirmed.

A plaintiff asserting equitable estoppel must show a defendant's action or nonaction that induced the plaintiff's reasonable reliance thereon to the plaintiff's detriment (*see* ¶ 9). Moreover, inequitable or fraudulent conduct must be established to estop a party from asserting a statute-of-limitation defense (*see id.*). [*Note:* The court rejected the plaintiff's argument that the six-month limit in Wis. Stat. section 893.80(1)(g) is not a statute of limitation. The court of appeals relied on *Linstrom v. Christianson,* 161 Wis. 2d 635, 469 N.W.2d 189 (Ct. App. 1991), in which the court characterized the six-month period as a statute of limitation (*see* ¶ 11).]

In this case the plaintiff did not point to any evidence that the town committed fraudulent or inequitable conduct (*see* ¶ 12). Moreover, the court of appeals concluded "that it was not reasonable, as a matter of law, for [plaintiff's counsel], who professed to have experience handling over one hundred similar cases, to interpret the statements of [the Aegis representatives referred to above] as a withdrawal of the Town's Notice or a tolling of the statute of limitations" (¶ 13).

Accordingly, the court of appeals affirmed the grant of summary judgment to the town based on the plaintiff's failure to comply with the statute of limitation codified in Wis. Stat. section 893.80(1g).

Statute of Limitation – "Accidents" – Motor Vehicles

***Estate of Wiemer v. Zeeland Farm Servs. Inc.*, 2023 WI App 47 (filed Aug. 8, 2023) (ordered published Sept. 27, 2023)**

HOLDING: An estate's action was untimely because it was filed beyond the two-year statute of limitation that governs accidents "involving a motor vehicle."

SUMMARY: Kevin Wiemer died when he fell into a "gravity-operated hopper-trailer" attached to a semi-tractor while trying to break corn gluten that had compacted during transport. More than 30 months later, his estate filed a claim against various defendants alleging their negligence in failing to use a different type of trailer for the corn gluten as well as other shortcomings. The defendants moved to dismiss on the ground that the claim was untimely under Wis. Stat. section 893.54(2m), a two-year statute of limitation that governs accidents involving motor vehicles. The trial judge concluded that the statute did not govern the claim.

The court of appeals reversed in an

opinion authored by Judge Stark. First, the tractor-trailer at issue qualified as a "motor vehicle" for purposes of Wis. Stat. section 893.54(2m) (¶ 15). For example, it met the definition of a "commercial motor vehicle" under Wis. Stat. section 340.01(35) as well as other provisions (*see* ¶¶ 19, 21, 24). The estate unsuccessfully contended that because the trailer lacked a motor, it could not be a motor vehicle. "This argument fails because it ignores the definitions of 'motor vehicle' set forth in Wis. Stat. §§ 340.01(35), 344.01(2)(b), and 632.32(2)(at), all of which recognize that a combination vehicle that includes both a self-propelled unit and an attached trailer qualifies as a single motor vehicle" (¶ 26).

Second, Wiemer's death "involved" a motor vehicle, using that term's common meaning (¶ 39). "It is undisputed that the accident occurred when Wiemer climbed on top of the trailer in an attempt to break the bridge, fell into the body of the trailer, became entrapped in the flow of corn gluten inside the trailer, and was smothered. Under these undisputed facts, the tractor-trailer was engaged as a participant in the accident, was a necessary accompaniment to the accident, and was included in the accident" (¶ 41). Moreover, loading and unloading cargo has long been a recognized use of such vehicles (*see* ¶ 42). Finally, the court concluded that Wiemer's death "arose" from an accident within the meaning of the statute (¶ 49).

Defamation – Actual Malice – Public Figure

***Sidoff v. Merry*, 2023 WI App 49 (filed Aug. 3, 2023) (ordered published Sept. 27, 2023)**

HOLDING: A plaintiff was a "limited purpose public figure" and thus had to prove "actual malice" as part of a defamation claim.

SUMMARY: Mary Sidoff and David Sidoff, who at the time were married to each other, rented a home together. A tarp-wrapped body was found on the property. A jury convicted Mary of murder, hiding a corpse, and theft from a person or corpse. In 2020, a lawyer, Merry, who represented Mary, published a book contending that David, not Mary, had killed the victim. David sued Merry for defamation. The trial court granted summary judgment in favor of Merry, finding that David was a limited-purpose public figure who had failed to claim actual malice.

The court of appeals affirmed in an opinion authored by Judge Kloppenburg. The court reviewed the fundamentals of defamation actions, including that it is a question of law whether a person is a limited-purpose public figure (*see* ¶ 19).

Applying a multifactor test, the court first determined that there was a "public controversy" that carried forward in time from the murder in 2005 to the book's publication in 2020 (*see* ¶ 40). Second, David Sidoff's involvement continued as an "involuntary limited purpose public figure": "even though Sidoff avoided publicity related to the controversy, he was the subject of multiple articles and public discussion over the course of the discovery of the murder, the investigation, the trial, and post-trial events" (¶ 45). The third factor addresses "whether the alleged defamation was germane to the plaintiff's participation in the controversy." The undisputed facts established that they were (¶ 52).

In short, David Sidoff's failure to assert actual malice defeated his defamation claim. **WL**