Civil Procedure

Class Actions – Class Certification

***Fotusky v. ProHealth Care Inc.*, 2023 WI App 19 (filed March 15, 2023) (ordered published April 26, 2023)**

HOLDING: The circuit court erred in certifying "this class," and the court of appeals remanded the matter for further proceedings delimiting a proper class.

SUMMARY: This is the most recent case of several cases that have addressed "certification and retrieval fees" imposed by health-care providers for medical records requested by attorneys and the meaning of Wis. Stat. section 146.83(3f)(b). It involves a class action by aggrieved patients. The circuit court certified a class, and the defendant, ProHealth Care, appealed.

The court of appeals reversed in an opinion, authored by Judge Grogan, that discussed the class action requirements of Wis. Stat. section 803.08, particularly its "prerequisites" of "numerosity, commonality, and typicality" in light of case law involving Wis. Stat. section 146.83(3f) and class actions (¶¶ 11, 14).

In *Moya v. Aurora Healthcare Inc. (Moya I),* 2016 WI App 5, 366 Wis. 2d 541, 874 N.W.2d 336, the court of appeals held that attorneys were not among those "authorized by the patient" to secure copies of medical records. But the supreme court reversed in *Moya v. Aurora Healthcare Inc. (Moya II)*, 2017 WI 45, 375 Wis. 2d 38, 894 N.W.2d 405, holding that the provider violated Wis. Stat. section 146.83(3f) "when it charged Moya's attorney the certification and retrieval fees" despite Moya's written authorization (¶ 17).

The court of appeals held that the circuit court erred in this case by including in the certified class patients aggrieved by ProHealth's charges during the 16 months between *Moya I* and its eventual reversal in *Moya II* (*see* ¶¶ 29-32). Although the class certification itself ultimately might be sufficient, the court of appeals remanded the case for a determination of who properly falls within that class.

Judge Neubauer concurred but wrote separately to explain why the "error can be rectified on remand by amending the certification order to exclude the *Moya I* individuals" (¶ 37).

Contracts

Shareholder Agreement – Insurance Coverage – Suicide

***Ryan v. Ryan*, 2023 WI App 21 (filed March 23, 2023) (ordered published April 26, 2023)**

HOLDING: The suicide of a company shareholder did not violate his agreement to "maintain" a life insurance policy.

SUMMARY: Brothers Erin Ryan and Patrick Ryan ran an ambulance business. The brothers executed a shareholder agreement that obligated them to purchase life insurance on the other brother's life such that if one died, the other could purchase the deceased brother's shares. Each brother bought $6 million in life insurance on the life of the other. One policy, issued by Prudential on Patrick's life, contained a suicide exclusion. Erin owned and was beneficiary of the policy.

Patrick committed suicide within the two-year period covered by the Prudential policy's suicide exclusion. Prudential denied payment on the $1 million policy.

Patrick's widow, Alison, sued Erin for breach of contract and unjust enrichment when Erin refused to buy Alison's shares at the price agreed to in the shareholder agreement. Erin counterclaimed, alleging that Patrick breached the agreement by committing suicide – that is, that Patrick failed to "maintain" the Prudential policy. The circuit court ruled that Patrick did not breach the agreement.

The court of appeals affirmed in an opinion authored by Judge Nashold. Under the terms of the agreement, Patrick had no duty to "maintain" insurance on his own life. Rather, his duty was to buy and maintain coverage on Erin's life, which he did. "Patrick had no obligation to 'maintain' the Prudential Policy and did not breach the Agreement by committing suicide" (¶ 11). "[T]he duty to 'maintain' the policies refers solely to the policyholder's obligation to own policies on *the other brother* and to pay the respective premiums" (¶ 13). The agreement contained no "joint obligation to maintain the Prudential, or any other policy" (*id.*) or to "refrain from committing suicide" (¶ 19).

Mental Health

Wis. Stat. chapter 51 Commitments – Sufficient Evidence – Examiner's Report – Mootness

***Outagamie Cnty. v. L.X.D.-O. (In re Mental Commitment of L.X. D.-O.)*, 2023 WI App 17 (filed March 7, 2023) (ordered published April 26, 2023)**

HOLDINGS: The evidence was insufficient to prove that the respondent, L., was incompetent to refuse medication or treatment, and the "examiner's report" need not be admitted into evidence for the court to consider it during the initial commitment proceedings.

SUMMARY: In 2020, L. was subject to an emergency detention and eventually committed under Wis. Stat. chapter 51. The court also found that L. was incompetent to refuse medication or treatment. L. appealed the medication order.

In an opinion authored by Judge Stark, the court of appeals held that "testimony" of the court-appointed examiner was insufficient to prove L.'s incompetency to refuse medication. The court of appeals agreed that no "magic words" are needed to prove incompetency under the statute or the case law but said the record here was "unclear" and did not address the statutory standard (¶ 28).

The court of appeals further held that an examiner's report prepared pursuant to Wis. Stat. section 51.20(9)(a)5. "need not be admitted into evidence for the circuit court to consider the report during initial commitment proceedings" (¶ 34). The court of appeals distinguished the supreme court's decision on a similar issue in *Langlade County v. D.J.W. (In re Mental Commitment of D.J.W.)*, 2020 WI 41, 391 Wis. 2d 231, 942 N.W.2d 277, "on the basis that it involved a recommitment while this case involves an initial commitment" (¶ 35). In a recommitment hearing, the examiner's report "must be received into evidence … because Wis. Stat. § 51.20 does not provide an alternative statutory procedure for the court to review and

BLINKA

HAMMER

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.

Want faster access to Wisconsin Supreme Court and Court of Appeals decisions? Get weekly updates on the previous week's supreme court and court of appeals decisions. Subscribe to CaseLaw Express, a benefit of your membership, delivered to your inbox every Monday.

Prof. Daniel D. Blinka, U.W. 1978, is a professor of law at Marquette University Law School, Milwaukee.

daniel.blinka@marquette.edu

Prof. Thomas J. Hammer, Marquette 1975, is a law professor and director of clinical education at Marquette University Law School, Milwaukee.

thomas.hammer@marquette.edu

consider the examiner's report apart from admission of the report into the record under the rules of evidence in civil actions" (¶ 36).

Finally, the court of appeals also considered and rejected the county's contention that L.'s appeal of the medication order was moot. The issue is likely to arise again and is one that "evades review" (¶ 16).

Public Records

Outright Denial of Release – Subsequent Release of Redacted Documents – Mootness – Attorney Fees

***Wisconsin State J. v. Blazel*, 2023 WI App 18 (filed March 9, 2023) (ordered published April 26, 2023)**

HOLDINGS: The numerous holdings in this case are summarized in the numbered paragraphs below.

SUMMARY: An employee of the Wisconsin State Assembly filed a formal complaint alleging that a former representative, Staush Gruszynski, sexually harassed her after work hours at a non-workplace location. The Legislative Human Resources Office investigated and found the allegations to be substantiated and that Gruszynski had violated policies contained in the Assembly Policy Manual. The Legislative Human Resources Office required certain remedial action.

After the Assembly Democratic Leadership issued a public statement announcing this matter, the plaintiff newspapers submitted public records requests to the Assembly for records relating to the complaint and the investigation. The Assembly did not release any public records responsive to the requests, stating that it had applied the public records balancing test and determined that the public interest in treating employee internal complaints as confidentially as possible and respecting the privacy and dignity of the complainant and witnesses outweighed any public interest in disclosing the requested records. Instead, the Assembly issued a "summary" that provided the information described above.

The newspapers then filed this action in circuit court, seeking an order declaring that the Assembly violated the public records law when it failed to release the requested records, a mandamus order directing the Assembly to release the records, and an award of attorney fees.

Thereafter, one of the newspapers, after being contacted by the complainant, published an article relating details of the sexual harassment incident based on interviews of the complainant and others. Counsel for the Assembly then sent a letter to the newspapers stating that, based on the complainant publicly sharing the details of the incident, the Assembly was releasing the requested records to the newspapers, but because the complainant wanted to remain anonymous, the records would be redacted to the protect the identity of the complainant and the witnesses.

Counsel also stated that the records would be redacted to remove "three references to protected health information or otherwise confidential information" (¶ 11). The redacted records consisted of three documents: the complaint submitted by the complainant, the Legislative Human Resources Office investigation report, and a printout of Facebook Messenger texts between Gruszynski and the complainant on the evening of the incident ("the requested records").

The newspapers then filed an amended complaint reiterating the original claim and adding a claim that the Assembly violated the public records law by providing redacted versions of the requested records. The circuit court determined that the newspapers were entitled to summary judgment and full attorney fees. In a majority opinion authored by Judge Kloppenburg, the court of appeals affirmed in part and reversed in part the circuit court's decision.

The majority addressed multiple legal issues in its lengthy opinion. Those issues and the holdings of the appellate court are summarized as follows:

1) The Assembly violated the public records law when it initially denied outright the requested records because its purported justifications did not sufficiently demonstrate that the public interest in nonrelease outweighed the public interest in release. The Assembly's release of the summary as described above constituted an outright denial of the requested records (*see* ¶ 57).

The Assembly's application of the balancing test (as articulated in the summary) fell short in at least two respects: a) the summary did not describe the records that were responsive to the requests and then apply the balancing test to each record individually to explain why it was not disclosed (*see* ¶ 60); and b) the Assembly's application of the balancing test made only a passing, parenthetical reference to the public interest in shedding light on the workings of government and the official acts of elected officials and employees and it showed a failure to give serious consideration to the specific aspects of the public interest in disclosure of each of the records at issue (*see* ¶ 74).

2) As to the newspapers' cause of action challenging the redactions (other than the redactions of the names of the complainant and interviewed witnesses), the Assembly violated the public records law for five of six redactions. Five of the six were the names of one legislator and one staffer, neither of whom witnessed the harassment incident or was interviewed as part of the investigation. The court rejected as too attenuated and speculative the Assembly's explanation that these redactions were necessary to protect the identity of the complainant and one of the interviewed witnesses (both of whose names were redacted) (*see* ¶ 83). However, the Assembly did sufficiently show that the public interest in the confidentiality of Gruszynski's private health information in this case outweighed the public interest in disclosure of that information (*see* ¶ 91).

3) As to the newspapers' first cause of action, the issues are not moot because a decision on the merits of the newspapers' challenge to the Assembly's outright denial of their records request will have a practical effect on the newspapers' entitlement to attorney fees (*see* ¶ 43). However, even if the issues were moot, several exceptions to the mootness doctrine are applicable, including that the issues are of great public importance, the issues arise often and a decision from the appellate court is essential, the issues are likely to recur and must be resolved to avoid uncertainty, and the issues are likely of repetition and evade review (*see* ¶¶ 46-47).

4) As to both causes of action, counsel for the newspapers are entitled to attorney fees under the "prevailing party" test announced by the supreme court in *Friends of Frame Park U.A. v. City of Waukesha,* 2022 WI 57, 403 Wis. 2d 1, 976 N.W.2d 263.

Real Property

Condemnation – "Pedestrian Ways"

***Sojenhomer LLC v. Village of Egg Harbor*, 2023 WI App 20 (filed March 14, 2023) (ordered published April 26, 2023)**

HOLDING: The condemnation of private property to construct a sidewalk violated Wis. Stat. sections 32.015 and 61.34(3)(b).

SUMMARY: The village of Egg Harbor sought to condemn part of Sojenhomer's property along Highway G to construct a sidewalk. Sojenhomer filed this action seeking to enjoin the condemnation, relying on a statute that prohibits condemnation for purposes of establishing or extending a "pedestrian way." *See* Wis. Stat. § 32.015; *see also* Wis. Stat. § 61.34(3)(b). The village argued that a sidewalk is not a "pedestrian way" within the meaning of Wis. Stat. section 32.015.

The circuit court granted summary judgment to the village. In an opinion authored by Judge Hruz, the court of appeals reversed.

The primary issue before the appellate court was whether a sidewalk is a "pedestrian way" as the term is used in Wis. Stat. sections 32.015 and 61.34(3)(b). Both statutes use the definition of "pedestrian way" provided for in Wis. Stat. section 346.02(8)(a). In the latter statute, *pedestrian way* is defined as "a walk designated for the use of pedestrian travel." The court of appeals concluded that "the term 'pedestrian way' in Wis. Stat. § 32.015 includes sidewalks because a sidewalk is a walk designated for pedestrian travel, *see* Wis. Stat. §§ 340.01(58) and 66.0907(1), and it therefore falls within the general definition of 'pedestrian way' in Wis. Stat. § 346.02(8)(a)" (¶ 38).

The village argued that even if a sidewalk is a "pedestrian way," the circuit court properly granted summary judgment in its favor because the village did not seek to condemn Sojenhomer's property "only for" establishing a sidewalk. It observed that the sidewalk would be one of several improvements to Highway G that included a reconstructed roadway, on-street parking, improved crosswalks, and so on.

The court of appeals responded to this argument: "The Village's focus on all of the improvements to Highway G is misplaced. The plain language of Wis. Stat. § 32.015 prohibits the condemnation of property 'to establish … a pedestrian way.' *See id*. Although the Village's acquisition of Sojenhomer's property might have been part of a broader reconstruction project to Highway G, the undisputed facts show that, regardless of the constellation of improvements made to Highway G, the Village still acquired Sojenhomer's property through condemnation 'to establish' a pedestrian way. Such an acquisition violates the plain language of Wis. Stat. §§ 32.015 and 61.34(3)(b)" (¶ 45).

Zoning

Shoreland Zoning Ordinances – Exemption for "Utility Structures"

***Delavan Lake Sanitary Dist. v. Walworth Cnty. Bd. of Adjustment*, 2023 WI App 22 (filed March 8, 2023) (ordered published April 26, 2023)**

HOLDING: The Walworth County Board of Adjustment proceeded on an incorrect theory of law when it found that the gravel path proposed by the Delavan Lake Sanitary District was not a "utility structure" and thus was not exempt from the county's shoreland zoning ordinance.

SUMMARY: The Delavan Lake Sanitary District is a municipal corporation created and existing under Wis. Stat. chapter 60 (applicable to towns) to operate and maintain a sewage and wastewater collection system for public benefit. The district is not a "public utility" as defined in Wis. Stat. section 196.01(5). The district's wastewater collection system serves residences in the View Crest subdivision located at the west end of Delavan Lake. The district holds an easement on land owned by the Delavan Lake View Crest Estates Corporation to lay, operate, and maintain a sewer system.

Concerned that the pipes and other system components in the subdivision were deteriorating, the district applied to the Walworth County Land Conservation Division for a construction-site-erosion-control permit to lay a gravel path on portions of its easement. The district claimed that the gravel path was necessary for it to bring large vehicles and other equipment onto its easement for inspections and repairs of the sewer system.

The county denied the district's permit application, concluding *inter alia* that construction of the gravel path would violate the county's shoreland zoning ordinance, which restricts construction or placement of structures within 75 feet of navigable waters.

The district then appealed to the Walworth County Board of Adjustment. The board upheld the county's decision, concluding that the gravel path was not a "utility structure" and was thus ineligible under Wis. Stat. section 59.692(1n)(d)5. for an exemption from the shoreland zoning ordinance. On certiorari review, the circuit court upheld the board's decision.

In an opinion authored by Judge Neubauer, the court of appeals reversed the circuit court. It concluded that the board proceeded on an incorrect theory of law when it found that the proposed gravel path was not a "utility structure" under the statute cited above and was thus ineligible for exemption from the shoreland zoning ordinance. The board found that the gravel path constituted a "structure" and neither party challenged that finding on appeal.

Thus, "the crux of the parties' dispute is whether the District is a 'utility'" (¶ 23). Wis. Stat. section 59.692 does not define the term "utility." The court of appeals concluded that the term "utility" is not limited to the definition of "public utility" codified in Wis. Stat. section 196.01(5) (¶ 28). Moreover, it found support in multiple other statutes for the conclusion that the term "utility" encompasses municipal sanitary districts (¶ 29).

Accordingly, the court of appeals held that the district's proposed gravel path constitutes a "utility structure" under Wis. Stat. section 59.692(1n)(d)5. and that the board proceeded under an incorrect theory of law in making a contrary finding (¶ 32). **WL**