Civil Procedure

Summons – Form

***Flanagan v. Stumble Inn LLC*, 2023 WI App 31 (filed May 3, 2023) (ordered published June 28, 2023)**

HOLDING: A defective summons did not deprive the court of personal jurisdiction.

SUMMARY: Flanagan sued a tavern after he was injured in a fight. The summons, however, incorrectly stated that the defendant had to answer in 20 days instead of the statutory 45-day period. The trial judge ruled that the mistake deprived the court of personal jurisdiction, and the judge dismissed the claims.

The court of appeals reversed in an opinion authored by Judge Gundrum. Although the summons was clearly wrong, the mistake constituted a technical defect that resulted in no prejudice to the defendant. The opinion discussed the law on defective summonses, holding that case law continues to distinguish between a "technical defect" (this case) and a "fundamental defect." The cases, for example, do not "meaningful[ly]" distinguish between an omission of a "deadline-to-answer notice" and an incorrect deadline, as here (¶ 9). Finally, no prejudice resulted from the mistake made in this summons (*see* ¶ 10).

Consumer Law

Wisconsin Consumer Act – "Good Faith" – "Unconscionability" – Counterclaims

***CreditBox.com LLC v. Weathers*, 2023 WI App 37 (filed June 22, 2023) (ordered published July 26, 2023)**

HOLDING: A debtor could maintain counterclaims for bad faith and unconscionability under the Wisconsin Consumer Act.

SUMMARY: Weathers borrowed $500 from CreditBox.com; the one-year loan carried a conditional finance charge of $1,455. CreditBox later filed a small claims action against Weathers alleging his default on the loan agreement. Weathers at first represented himself but later appeared by counsel, who had the case reopened. When CreditBox moved to voluntarily dismiss the lawsuit, Weathers opposed dismissal and filed an answer alleging counterclaims under the Wisconsin Consumer Act. The circuit court later granted CreditBox's motion to voluntarily dismiss its claim as well as Weathers' two counterclaims.

The court of appeals affirmed in part and reversed in part in an opinion authored by Judge Blanchard. The first issue addressed by the court was Weathers' good-faith counterclaim under Wis. Stat. section 421.108. The court held that one set of allegations (the right-to-cure allegations) stated a claim, but the other two sets (involving EFT withdrawals and charge-off allegations) did not (*see* ¶ 12).

"In sum regarding the content of the Act's good faith provision, parties are obligated to act in good faith in the performance or enforcement of an agreement subject to the Act and to the performance or enforcement of a provision of the Act. Further, the honesty-in-fact requirement is violated when a party lacks an honest intention to abstain from taking unfair advantage of another by activities that render the transaction unfair, and the fair-dealing requirement is violated when a party does not observe reasonable commercial standards of fair dealing, which contemplates the application of an objective set of standards" (¶ 28).

As to the valid "right to cure allegations": "CreditBox violated the Act's notice and right to cure requirement as part of a dishonest attempt to gain an unfair advantage over Weathers and violated reasonable commercial standards of fair dealing by intentionally and unfairly depriving him of his lawful opportunity to attempt to stave off acceleration and a meritorious lawsuit against him" (¶ 68).

The court next addressed Weathers' unconscionability claim under Wis. Stat. section 425.107 as interpreted by *Duncan v. Asset Recovery Specialists Inc.*, 2022 WI 1, 400 Wis. 2d 1, 968 N.W.2d 661. "We conclude that *Duncan*'s interpretation of Wis. Stat. § 425.102 does not address the circumstances here. We further conclude that, under the most reasonable interpretation of § 425.102, the fact that CreditBox moved for voluntary dismissal of its claim before Weathers brought his unconscionability counterclaim does not prevent Weathers from pursuing it.... Thus, unlike the non-judicial repossession context in *Duncan*, Weathers' counterclaim was brought in response to an action against him filed by CreditBox" (¶ 74).

"[A] contrary ruling would effectively allow a creditor to decide whether a counterclaim alleging that it had committed unconscionable conduct under Wis. Stat. § 425.107 may be pursued against it. Notably, a creditor could obtain voluntary dismissal of a claim whenever a debtor retains counsel or the creditor suspects that the debtor has some personal understanding of the debtor's legal rights, perhaps including proof of actionable unconscionable conduct by the creditor. This is an easily foreseeable scenario. Thus, the construction urged by CreditBox is not one designed to promote the protection of customers from unfair practices, *see* Wis. Stat. § 421.102(2)(b), (c), and would significantly limit the practical utility of § 425.107" (¶ 77).

Criminal Procedure

Zealous Advocacy – Structural Error

***State v. Tung*, 2023 WI App 33 (filed June 20, 2023) (ordered published July 26, 2023)**

HOLDING: Trial counsel did not abandon her role as a zealous advocate nor did the adversarial process break down.

SUMMARY: Tung was convicted of sexually assaulting a child. He made varying statements to an assortment of people, including police officers, the victim's father, and his trial counsel. Essentially, trial counsel contended that Tung had touched the child but had done so without sexual intent.

The court of appeals affirmed the conviction in an opinion authored by Judge White. On appeal, Tung argued that "structural error" by the trial court had violated his rights and a new trial was necessary. The court of appeals first concluded that trial counsel did not violate Tung's right to maintain his innocence as set forth in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), and *State v. Chambers*, 2021

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.

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WI 13, 395 Wis. 2d 770, 955 N.W.2d 144. Trial counsel never conceded Tung's guilt (*see* ¶ 23). Second, the court held that Tung failed to prove that he instructed trial counsel to pursue a defense of innocence (*see* ¶ 24). In short, the record revealed no structural error.

Nor did the record reflect a "breakdown in the adversarial process" as condemned by *United States v. Cronic*, 466 U.S. 648 (1984) (¶ 25). The charges against Tung were subject to "adversarial testing," as when trial counsel argued that the state failed to show his sexual intent in touching the victim (¶ 31). The court of appeals also reviewed the procedures that govern a lawyer's duty of candor, particularly when the lawyer believes that a client might testify falsely.

Evidence – Credibility – Opinions – Ineffective Assistance of Counsel

***State v. Mader*, 2023 WI App 35 (filed June 7, 2023) (ordered published July 26, 2023)**

HOLDING: Testimony by two witnesses about the statistical "rarity" of false accusations in sexual assault cases was inadmissible, but any error was harmless.

SUMMARY: A jury convicted the defendant of multiple sexual assaults of a child that spanned years. The circuit court rejected his claims of ineffective assistance of trial counsel on a variety of grounds.

The court of appeals affirmed the convictions in an opinion authored by Judge Neubauer that addressed a wide variety of alleged deficient performance. The state offered testimony by a sexual assault therapist and a police investigator about the "statistical likelihood" – actually, their ballpark guesses – regarding the rarity of false complaints.

Although prior case law had left open the admissibility of such evidence, the court held that the "day ha[d] arrived" for the court to declare such testimony inadmissible because it impermissibly vouched for the victim's credibility. Thus, trial counsel's failure to object constituted deficient performance (¶¶ 38, 40). This omission, however, as well as trial counsel's failure to object to evidence regarding the young victim's virginity, were found to be nonprejudicial under the *Strickland* standards (*see* ¶¶ 31, 79-87). *See Strickland v. Washington*, 466 U.S. 668 (1984).

The court rejected other alleged wide-ranging deficiencies by trial counsel, including his failure to call an expert witness to rebut the state's statistical evidence (*see* ¶ 45), to object to the defendant's "diminished interest in sex" with adults during the pertinent time of the assaults (¶ 49), and to object to evidence regarding the victim's sexual conduct with others (for example, the victim's use of birth control was not barred by the sexual-assault shield statute) (*see* ¶ 53). Nor was defense counsel deficient in his failure to introduce evidence of the victim's current employment as an adult selling "sexual aids" (¶ 58).

Other issues involved defense counsel's failure to object to comments on the jurors' own experiences with sexual assault and the handling of the jury's request for statements by several witnesses. As to the latter, and distinguishing prior case law, the court observed that the issue here was ineffective assistance and, moreover, the trial judge's response did "not effectively block the jury" from rehearing the interview (¶ 78).

Penalty Enhancers – Plea Withdrawal – Sentence Modification – Resentencing – Sufficiency of Search Warrant Application

***State v. Hailes*, 2023 WI App 29 (filed May 9, 2023) (ordered published June 28, 2023)**

HOLDINGS: The penalty enhancers codified in Wis. Stat. sections 939.62 and 961.48 cannot both be applied to the same crime. Additional holdings are summarized in the discussion that follows.

SUMMARY: The defendant was convicted of three felony drug offenses in addition to other crimes. The state added two penalty enhancers to the charges for each offense: one for the defendant being a repeat offender under Wis. Stat. section 939.62 (the habitual criminality statute) and the other for the defendant being a second or subsequent drug offender under Wis. Stat. section 961.48 (a repeat offender statute codified in the Controlled Substances Act).

On appeal, the defendant argued that the application of both penalty enhancers to his crimes was erroneous. He further contended that he is entitled to plea withdrawal, sentence modification, or resentencing on the ground that he was erroneously charged with and pleaded guilty to the drug charges with both penalty enhancers attached to them. He

also challenged the circuit court's denial of his motion to suppress evidence. In an opinion authored by Judge Dugan, the court of appeals affirmed.

With regard to the application of multiple penalty enhancers to each of the defendant's drug offenses, the court concluded that this was erroneous. It looked to the plain meaning of Wis. Stat. section 973.01(2)(c), which states that either Wis. Stat. section 939.62 "or" Wis. Stat. section 961.48 can be applied to the drug charges, but not both (*see* ¶ 2).

However, the court also concluded that the defendant is not entitled to plea withdrawal, sentence modification, and resentencing on the basis that these two penalty enhancers were erroneously applied to him. Said the court: "Hailes fails to demonstrate that the penalty enhancers in any way induced him to plead guilty, such that he is entitled to plea withdrawal, and he fails to demonstrate that the penalty enhancers played any role at the sentencing hearing, such that he is entitled to sentence modification or resentencing" (*id.*).

Lastly, the court of appeals concluded that the circuit court properly denied the defendant's motion to suppress evidence because the affidavits attached to the search warrants authorizing searches of two apartments established probable cause to search those premises. The court engaged in a fact-intensive analysis, not included in this summary, of the evidence in support of the warrants.

Employment Law

Wisconsin Fair Employment Act – Reasonable Accommodation of Disabilities

***Wingra Redi-Mix Inc. v. LIRC*, 2023 WI App 34 (filed June 8, 2023) (ordered published July 26, 2023)**

HOLDING: The employer violated the Wisconsin Fair Employment Act (WFEA) by refusing to reasonably accommodate the employee's disability even though the employee was not formally diagnosed with a disability until after termination of his employment.

SUMMARY: Wingra Redi-Mix delivers ready-mix concrete to construction sites. Gilbertson was employed by Wingra in June 2011 as a ready-mix truck driver. Wingra had two types of ready-mix trucks in its fleet: "gliders" and "non-gliders." The gliders were older models that were equipped with cable-operated gas pedals and lacked shock absorbers. The non-gliders were newer models that were generally less physically demanding and more comfortable to drive. Wingra's practice was to assign each of its drivers to a specific truck; Gilbertson was assigned to one of the glider vehicles.

After working for Wingra for more than one year, Gilbertson began experiencing low back pain and pain that radiated down his right leg, ankle, and foot, which he attributed at least in part to the mechanics of operating his glider truck. Gilbertson notified Wingra of the physical issues that he was experiencing and requested reassignment to a non-glider truck. Wingra refused this request, citing long-standing company policy of not allowing its drivers to switch truck assignments.

In October 2013, Gilbertson arrived at a job site but was struggling to work due to pain; he returned to the company's office and placed his time card, fuel card, and truck key on a supervisor's desk. He did not return to work thereafter though he indicated a willingness to do so if Wingra

would assign him to a non-glider truck. Despite attempts to find other employment, Gilbertson remained unemployed from October 2013 until April 2018, when he accepted a position with a different employer.

Following his separation from employment at Wingra, Gilbertson saw a primary care physician for the first time to address his pain; this was followed by his seeking treatment from a chiropractor and a spine specialist, both of whom diagnosed him with conditions, including degenerative disc disease.

Gilbertson filed a complaint with the Department of Workforce Development alleging that Wingra refused to reasonably accommodate his disability, which resulted in his termination from employment. At a hearing on the merits of his claim, an administrative law judge concluded that Gilbertson failed to establish that Wingra violated the WFEA.

Gilbertson appealed to the Labor and Industry Review Commission (LIRC). "LIRC concluded that Wingra violated the [WFEA] by refusing to reasonably accommodate Gilbertson's disability. It determined that Gilbertson is an individual with a disability, and that he had the disability at the time he was employed by Wingra. LIRC found that Gilbertson notified Wingra of the physical issues that he was experiencing; that he requested an accommodation to address those issues; and that, based on the information Gilbertson had provided, Wingra should have been on notice that he was making a disability accommodation request. LIRC concluded that Gilbertson's requests triggered Wingra's duty to provide an accommodation – or at least to request further information from Gilbertson – but that Wingra 'immediately and categorically' denied the request for business reasons" (¶ 37).

"LIRC found that reassignment to a non-glider truck would have been an available accommodation, and it determined that it would have been a reasonable one. LIRC concluded that a reassignment would have permitted Gilbertson to remain employed as a ready-mix truck driver; that Wingra could have provided such an accommodation without hardship to its business; and that Wingra did not deny the request based on a belief that Gilbertson did not have a disability" (*id.*).

LIRC also determined that Gilbertson did not voluntarily resign his employment with Wingra and that Wingra terminated his employment on Oct. 23, 2013. It awarded Gilbertson back pay, attorney fees, and costs. The circuit court affirmed LIRC's order.

In an opinion authored by Judge Graham, the court of appeals affirmed. It agreed with LIRC that Wingra violated the WFEA by refusing to reasonably accommodate Gilbertson's disability. The court rejected Wingra's contention that, under the circumstances of this case, it did not have an obligation to accommodate Gilbertson's disability and cannot be liable for failing to do so. Wingra advanced various arguments to support this contention "but they are all variations on a single theme – the fact that Gilbertson was not diagnosed with a disability until 2014, after his employment with Wingra had ended, forecloses any liability Wingra could have for refusing to accommodate his disability" (¶ 54).

The court rejected this argument, largely on the basis of the facts as found by LIRC (summarized above), which Wingra has not shown to be erroneous (*see* ¶ 2).

At the contested-case hearing, Gilbertson was required to prove that he had a disability at the time he was employed by Wingra. "However, Wingra's argument that a contemporary diagnosis was required to satisfy that burden of proof does not square with any statutory language in the [WFEA]" (¶ 64).

As for the employer's knowledge about an employee's disability, the court concluded that "under Wis. Stat. § 111.34(1)(b), an employee need not provide medical evidence of a disability alongside an accommodation request in order to put the employer on notice that it has a duty of reasonable accommodation under the [WFEA]. It is sufficient if the factual information known by the employer would reasonably lead the employer to recognize that the employee likely has a disability, as that term is defined by Wis. Stat. § 111.32(8) and Wisconsin case law" (¶ 96).

"If the employer questions whether it has a duty of reasonable accommodation under the [WFEA], it has a right to ask for additional information, including medical information, to confirm the employee's disability" (¶ 97).

The court of appeals also affirmed LIRC's determination that Wingra terminated Gilbertson's employment as well as its award of back pay and attorney fees (*see* ¶ 3). It remanded the matter to the circuit court to determine an appropriate award of fees for the judicial review proceedings (*see* ¶ 128).

Environmental Law

Wisconsin Environmental Protection Act – Capacity to Sue – Standing

***Friends of Blue Mound State Park v. Wisconsin Dep't of Nat. Res.*, 2023 WI App 38 (filed June 27, 2023) (ordered published July 26, 2023)**

HOLDING: The organization Friends of Blue Mound State Park has the capacity to sue the Department of Natural Resources (the department) and has standing to seek judicial review under Wis. Stat. chapter 227 of the department's decision to create a snowmobile trail in Blue Mound State Park.

SUMMARY: Friends of Blue Mound State Park (hereinafter Friends) is a small nonprofit organization dedicated to supporting and assisting the Wisconsin Department of Natural Resources in providing recreational, interpretive, scientific, historical, educational, and related visitor services to enhance Blue

Mound State Park. Friends is incorporated as a non-stock corporation under Wis. Stat. chapter 181. Friends has entered into an agreement with the department that authorizes the organization to be recognized as a "Friends group" and to be eligible for certain benefits in accordance with department regulations.

In 2021, the department adopted a revised master plan for Blue Mound State Park that authorized the creation of a new snowmobile trail. Friends responded by filing a petition for judicial review challenging the department's adoption of the revised master plan; it claimed that the department failed to conduct an adequate environmental analysis of the impact of the new trail. Friends filed a second petition for judicial review challenging the department's decision to deny Friends' petition for a contested case hearing.

The department moved to dismiss the petitions, arguing that Friends lacked capacity and standing to seek judicial review of the department's actions. The circuit court granted the department's motions to dismiss both petitions. In an opinion authored by Judge Dugan, the court of appeals reversed.

The appellate court concluded that Friends has the capacity to sue under Wis. Stat. section 181.0302(1). Friends is a Wis. Stat. chapter 181 corporation and as a general matter has the capacity to sue and be sued (*see* ¶ 11). The legislature has not prohibited friends groups generally from suing the department. Though municipal corporations and quasi-governmental entities are not permitted to sue the state or other government agencies, Friends is a Wis. Stat. chapter 181 corporation – not a municipal corporation or quasi-governmental agency (*see* ¶ 17). The appellate court also concluded that the department's administrative regulations do not prohibit friends groups from suing the department and that Friends' articles of incorporation do not waive its right to sue the department. Accordingly, Friends has the capacity to sue the department.

The court of appeals also concluded that Friends has standing to seek judicial review of the department's decision under Wis. Stat. chapter 227. Wisconsin uses a two-step test to determine whether a particular petitioner has standing under these statutes. "Wisconsin courts typically … ask first whether the decision of the agency directly causes injury to the interest of the petitioner and second, whether the interest asserted is recognized by law" (¶ 25) (internal quotations omitted). Friends alleged direct injuries to the organization and its members, including the negative impact of the new trail on their preservation work and ecological restoration efforts.

The department did not dispute that Friends satisfied the first prong of the test for standing (*see* ¶ 27). As for the second prong, Friends' petition alleged harm to its conservation and ecological interests due to the new snowmobile trail. These interests are within the broad environmental interests protected by the Wisconsin Environmental Protection Act (*see* ¶ 32).

Lastly, the court of appeals considered whether Friends has standing to seek judicial review of the department's denial of its contested-case petition under Wis. Stat. section 227.42. Said the court: "Because we have concluded that the Friends has standing to bring their underlying claim, we also conclude that the Friends has standing to petition for a contested case hearing" (¶ 40).

Legislation

Direct Legislation Statute – Towns

***State ex rel. Meessmann v. Town of Presque Isle*, 2023 WI App 36 (filed June 20, 2023) (ordered published July 26, 2023)**

HOLDING: The direct legislation statute (Wis. Stat. section 9.20) is not applicable to towns, even if the towns have adopted village powers.

SUMMARY: The petitioners (hereinafter residents) are residents and electors in the town of Presque Isle. Concerned that hazardous boat wakes created on the town's waterways were interfering with their rights under the public trust doctrine, the residents sought to employ the provisions of the direct legislation statute, Wis. Stat. section 9.20, to force the town board to act on the matter. They submitted a petition and proposed ordinance to the town, requesting that the town either adopt the ordinance or submit it to a vote by the electors. The town did not act on the petition, arguing that it was not required to do so because Wis. Stat. section 9.20 is not applicable to towns.

The residents then sought a writ of mandamus in the circuit court, which was denied. In an opinion authored by Judge Stark, the court of appeals affirmed.

The issue before the court of appeals was whether Wis. Stat. section 9.20 places a positive and plain duty on the town to act on the residents' petition. The court concluded that it does not. "Given the plain language of the relevant statutes, we conclude that § 9.20 does not assign such a duty, as that statute is not applicable to towns" (¶ 4).

This is true even though the town has adopted village powers under Wis. Stat. sections 60.10(2)(c) and 60.22(3). Section 60.22(3) provides that in certain circumstances, town boards may exercise powers relating to villages and conferred on village boards under Wis. Stat. chapter 61, and section 61.342 provides that the provisions of section 9.20 relating to direct legislation apply to villages.

However, the plain language of the statutes does not clearly provide that the provisions of Wis. Stat. section 9.20 are applicable to towns that have adopted village powers (*see* ¶ 19). The town thus had no legal duty either to adopt the proposed ordinance or to place the issue on the ballot (*see* ¶ 40). Accordingly, the residents were not entitled to a writ of mandamus in this case.

Torts

Independent Contractor Rule – Safe Place – Summary Judgment

***Martinez v. Rullman*, 2023 WI App 30 (filed May 10, 2023) (ordered published June 28, 2023)**

HOLDINGS: The independent contractor rule did not bar the plaintiff's claim against the general contractor, and the evidence supported a safe-place claim.

SUMMARY: A general contractor agreed to perform a $1.7 million remodel of a home based on a "handshake" deal (¶ 6). While working on the home, an employee of a subcontractor (a painter) was seriously injured when he fell down the unfinished elevator shaft. The injured employee sued the general contractor and others. The circuit court granted summary judgment dismissing the general contractor and finding no disputed issues of material fact regarding the plaintiff's safe-place claim.

The court of appeals reversed in an opinion authored by Judge Grogan. First, the court held that the independent contractor rule did not bar the plaintiff's claim against the general contractor. The opinion reviews the pertinent case law. Although the court found no "affirmative negligence" by the general contractor itself that would have blocked liability (¶ 24), the general contractor nonetheless assumed "sole responsibility to protect the workers and subcontractors" through its contract with the elevator company (¶ 27).

Second, the evidence supported the claim under the safe-place statute. The elevator shaft was properly constructed but the record revealed disputed issues of fact regarding whether it was properly maintained (*see* ¶ 32). Third, the circuit court properly dismissed a claim against an individual defendant, an employee of the general contractor, because he was not a party to the contract with the elevator company and his negligence, if any, would be attributed to the general contractor through respondeat superior (*see* ¶ 34).

Finally, because the circuit court did not explain its finding, the record did not support the dismissal of an insurer (Acuity) on grounds that it had not been properly served. **WL**