Civil Procedure

Certiorari Actions – Commencement by Summons and Complaint – Answer or Responsive Pleading Required

***State ex rel. Kurtzweil v. Sawyer Cnty. Zoning Bd. of Appeals*, 2023 WI App 43 (filed July 25, 2023) (ordered published Aug. 30, 2023)**

HOLDING: When a certiorari action is commenced by the filing of a summons and complaint, the respondent is required to file a timely answer or other responsive pleading.

SUMMARY: After receiving an unfavorable decision from the Sawyer County Zoning Board of Appeals, petitioner Kurtzweil sought certiorari review in the circuit court by filing a summons and complaint. After the board failed to answer or otherwise respond to the complaint in a timely manner, the petitioner moved for a default judgment under Wis. Stat. section 806.02. The circuit court granted the motion, rejecting the board's argument that it was not required to respond to the complaint because the petitioner was seeking certiorari review.

In an opinion authored by Judge Stark, the court of appeals affirmed. There are multiple ways of commencing a certiorari action. *See* Wis. Stat. § 801.02(5). In this case the petitioner opted to proceed by using ordinary civil procedure and filing and serving a summons and complaint (and an amended complaint). This was one of his statutory choices.

Because the petitioner proceeded with the summons and complaint option, the board was required to answer in accordance with the applicable rules of civil procedure. *See Nickel River Invs. v. City of La Crosse Bd. of Rev.*, 156 Wis. 2d 429, 457 N.W.2d 333 (Ct. App. 1990). Because the board failed to file a timely answer or other responsive pleading, the circuit court did not erroneously exercise its discretion by granting the petitioner's motion for default judgment against the board (*see* ¶ 2).

Consumer Law

Deceptive Practices Act – Out-of-state Consumers – Pecuniary Loss

***State v. Talyansky*, 2023 WI App 42 (filed July 25, 2023) (ordered published Aug. 30, 2023)**

HOLDINGS: 1) Wis. Stat. section 100.18(1) applies to misrepresentations made by a Wisconsin business to an out-of-state consumer. 2) The state is not required to establish that someone suffered a pecuniary loss to prove a violation of Wis. Stat. section 100.18(1) and (10r).

SUMMARY: This case involved a consumer protection action filed by the state under the Deceptive Trade Practices Act (Wis. Stat. § 100.18) against multiple defendants. A jury verdict in favor of the defendants resulted in dismissal of the case. In an opinion authored by Judge Donald, the court of appeals reversed and remanded the matter for a new trial.

The appeal presented two principal legal issues. The first was whether Wis. Stat. section 100.18(1) applies to misrepresentations made by a Wisconsin business to an out-of-state consumer. The second was whether the state needed to establish that someone suffered a pecuniary loss to prove a violation of Wis. Stat. section 100.18(1) and (10r).

The court of appeals concluded that the state can enforce Wis. Stat. section 100.18(1) against Wisconsin businesses that reach consumers outside the state (*see* ¶ 30). "The plain language of the statute prohibits anyone from 'mak[ing],' 'publish[ing],' or 'caus[ing] ... to be made ... in this state' an advertisement or other representation that contains an 'untrue, deceptive or misleading' assertion, representation, or statement. The verbs, which

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include 'make,' 'publish,' and 'cause,' focus on the advertiser's conduct or actions, not the recipient or the consumer. After a comma, the statute provides that these actions may not take place 'in this state.' The statute does not proscribe where the recipient or consumer must be or reside" (¶ 30).

Thus, the state can bring an action against in-state businesses for making misrepresentations regardless of whether the misrepresentations are received by out-of-state residents (*see* ¶ 36). The court rejected the defendants' argument that the state did not have standing to bring this action (*see* ¶ 38).

The court of appeals also concluded that the state need not prove a pecuniary loss in an action brought under Wis. Stat. section 100.18(1) and (10r) (*see* ¶ 41). [*Editors' note:* This was not a private-party lawsuit under Wis. Stat. section 100.18(11)(b)2., which must be brought by a person suffering pecuniary loss (*id.*).] There are only two elements of the offense under Wis. Stat. section 100.18(1): 1) there must be an advertisement or announcement; and 2) the advertisement or announcement must contain a statement that is "untrue, deceptive, or misleading" (¶ 42).

Criminal Procedure

Unlawful Seizure – Suppression

***State v. Cundy*, 2023 WI App 41 (filed July 13, 2023) (ordered published Aug. 30, 2023)**

HOLDING: A police officer unlawfully seized the defendant at the defendant's home, so evidence gained after the seizure must be suppressed.

SUMMARY: A police officer went to Cundy's home after Cundy's car was seen being involved in a hit-and-run accident. Speaking with Cundy through the screen door, the officer observed that Cundy smelled of alcohol and was unsteady. He denied driving. Cundy then asked, "Are we done here?" The officer said "no" and "commanded" him to step outside, which Cundy did. The officer took Cundy to the officer's squad car, placed Cundy in the back seat, and drove to the accident scene, where Cundy was identified by a witness (*see* ¶ 10).

Cundy was convicted of operating while intoxicated (OWI) and obstructing an officer. He appealed the denial of his pretrial motion to suppress evidence.

In an opinion authored by Judge Kloppenburg, the court of appeals reversed the denial of Cundy's motion to suppress based on an unlawful seizure. "[A]bsent exigent circumstances, the Fourth Amendment 'prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest.' Pertinent here, when a person does not wish to continue talking with the police at the person's home but is required by the police to do so, that person is 'seized' if a reasonable person would not 'feel free to decline the officers' requests or otherwise terminate the encounter.' A home's occupant is free to elect not to speak to the police 'and may refuse to answer any questions at any time'" (¶ 21) (citations omitted).

The parties agreed that Cundy was seized when ordered to step outside after trying to terminate the contact with the police officer (*see* ¶ 23). Case law applying the *Payton* doctrine (essentially, police officers must have exigent circumstances or a valid arrest warrant to enter a suspect's home to make an arrest) applies to seizures short of arrest (*see* ¶ 26). *See Payton v. New York,* 445 U.S. 573, 601 (1980). Prior (unpublished) case law "rejects the State's reasonable suspicion argument in the context of a warrantless seizure of a person in the person's home or curtilage" (¶ 33). The court also rejected the state's argument that exclusion of evidence was inappropriate. It ordered suppression of all evidence – Cundy's statements, the witness's identification, blood draw results – that followed the unlawful seizure.

Insurance

Commercial General Liability Policies – "Occurrence" – "Impaired Property" Exclusion

***Riverback Farms LLC v. Saukville Feed Supplies Inc.*, 2023 WI App 40 (filed July 26, 2023) (ordered published Aug. 30, 2023)**

HOLDING: A tortfeasor's act, while intentional, created an "occurrence" that was covered by a commercial general liability (CGL) policy.

SUMMARY: Riverback Farms brought this action after it learned that a substance substituted into cattle feed caused physical harm to its cattle as well as a reduction in the quality of the milk produced. Riverback sued the feed company and its insurer. The circuit court granted summary judgment in favor of the insurer, finding that there was no covered "occurrence" within the meaning of the feed company's CGL policy.

The court of appeals reversed in an opinion authored by Judge Lazar. "Whether the standard CGL policies at issue here confer an initial grant of coverage depends on whether there has been 'property damage' caused by an 'occurrence'" (¶ 10) An "occurrence" is an "accident," that is, "'an event or condition occurring by chance or arising from unknown or remote causes' or 'an event which takes place without one's foresight or expectation'" (¶ 11).

The insurer contended that the substituted ingredient in the feed was intentional; thus, the alleged damage could not be a covered occurrence. Relying on recent case law, the court rejected this contention: "The focus is on whether the injury or damages was foreseeable or expected, not on whether the action that caused the damages was intended" (¶ 17). Because a reasonable jury could find that the feed company did not reasonably foresee or expect harm to result, the eventual harm could constitute an "accident/occurrence" (¶ 18).

The court of appeals also held that the physical injury to the cattle constituted property damage within the meaning of the policy (*see* ¶ 19). Nor did the policy's "impaired property" exclusion bar coverage because it only applies to property that has not been physically injured. "In other words, the impaired property exclusion 'addresses situations where a defective product, after being incorporated into the property of another, must be replaced or removed at great expense, thereby causing loss of use of the property'" (¶ 24). **WL**