Construction Law

Statewide Commercial Building Code – Preemption of Local Ordinances

***Associated Builders & Contractors of Wis. Inc. v. City of Madison*, 2023 WI App 59 (filed Oct. 5, 2023) (ordered published Nov. 29, 2023)**

HOLDING: The statewide commercial building code does not preempt the city of Madison's bird-safe-glass ordinance.

SUMMARY: The Wisconsin Legislature has directed the Department of Safety and Professional Services to adopt a statewide commercial building code that will render places of employment and public buildings safe (*see* ¶ 16). Wis. Stat. section 101.02(7r)(a) provides, in relevant part, that "no county, city, village, or town may enact or enforce an ordinance that establishes minimum standards for constructing, altering, or adding to public buildings or buildings that are places of employment unless that ordinance strictly conforms to the applicable rules under [Wis. Stat. section 101.02](15)(j)." In this case the parties agreed that this provision was adopted to prevent local governments from enacting or enforcing building code standards that are stricter than the statewide commercial building code (*see* ¶ 1).

The issue in this case was whether a Madison ordinance that was enacted to mitigate the risk of bird collisions is preempted by Wis. Stat. section 101.02(7r).

BLINKA

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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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The bird-safe-glass ordinance pertains to new construction and to the expansion of existing buildings, and it requires the treatment of certain exterior glass surfaces to increase their visibility to birds, thereby reducing the risk of fatal or injury-causing collisions, and it identifies several permissible methods to increase the visibility of glass (*see* ¶ 43).

A consortium of five membership-based trade associations filed a complaint against the city and sought a declaration from the circuit court that the ordinance is preempted by Wis. Stat. section 101.02(7r)(a). The circuit court granted summary judgment in the city's favor and dismissed the complaint. In an opinion authored by Judge Graham, the court of appeals affirmed.

The court of appeals concluded that "Wis. Stat. § 101.02(7r)(a) is most reasonably interpreted as withdrawing local authority to enact or enforce minimum standards that address building code issues that are not in strict conformity with the statewide commercial building code. The evident purpose of [Wis. Stat.] § 101.02(7r)(a) is to establish a statewide code that is uniform across the state, and local ordinances that impose different building code standards logically conflict with the statute, defeat its purpose, and violate its spirit" (¶ 37).

The court next considered whether Madison's bird-safe-glass ordinance constitutes a local building code standard (even though it was passed as a zoning ordinance). Said the court: "We discern a more reliable and reasonable test to determine, for purposes of the preemption issue presented here, whether a local ordinance imposes a standard that is effectively a building code standard. This test takes into account the subject matter of the local ordinance, and also its specific content and its regulatory purpose. We inquire whether the local ordinance sets minimum standards that are meant to ensure that buildings are constructed in such a way that they are structurally sound, and are equipped with systems and components – whether electrical, gas, plumbing, mechanical, or some other – such that the buildings are safe for employees, frequenters, and the public" (¶ 55).

"Applying this test here, the Ordinance sets standards that relate in some respects to building materials, and building materials are a common subject of building codes. However, the standards set by the Ordinance are not meant to address the structural integrity of buildings or any of their systems or components. Nor is the Ordinance about making the buildings safe for employees, frequenters, and the public. Instead, the Ordinance's standards require the treatment of exterior glass windows in certain buildings, and its stated and evident purpose is to set standards that will make these exteriors visible to birds. We therefore conclude that the standards set by the Ordinance are not effectively a building code standard and are not preempted by Wis. Stat. § 101.02(7r)(a). Accordingly, we do not reach the question of whether the Ordinance's standards strictly conform to those in the statewide code" (¶ 56).

In sum, the court concluded that Wis. Stat. section 101.02(7r)(a) does not preempt Madison's bird-safe-glass ordinance. [*Editors' note:* In this case the court did not need to decide whether a determination that a local ordinance was (or could have been) promulgated as a zoning ordinance is necessarily dispositive of whether the ordinance is preempted by Wis. Stat. section 101.02(7r)(a) (*see* ¶ 41).]

Contracts

Revision of Contract to Add Arbitration Clause – Assent to Contract Changes by Failure to Opt Out of Revised Provisions

***Pruett v. WESTconsin Credit Union*, 2023 WI App 57 (filed Oct. 24, 2023) (ordered published Nov. 29, 2023)**

HOLDINGS: 1) The contractual authority of a credit union to change the terms of its membership and account agreement did not permit it to add an arbitration clause that contained new terms that the parties did not address or contemplate in the original contract. 2) Under the facts of this case, the credit union member did not affirmatively assent to the new arbitration clause by failing to opt out of its provisions and continuing to use his account.

SUMMARY: WESTconsin Credit Union (WCU) is headquartered in Menomonie, Wis. Plaintiff Pruett opened an account with WCU in 1991 and agreed to comply with the terms and conditions of WCU's membership and account agreement (the "Agreement") at that time. In 2021, Pruett commenced a class action alleging that WCU improperly charged its members overdraft fees between 2017 and 2020.

In response, WCU filed a motion to

compel arbitration based on an arbitration and class action waiver agreement (the "Arbitration Clause") that WCU added to its membership and account agreement in 2021. The Arbitration Clause provided that either WCU or a member may compel arbitration in a dispute between the parties, subject to some exceptions not relevant in this case, and the clause withdrew the right for its members to participate in a class action, as either a class representative or a class member. The Arbitration Clause applied to "*any dispute* between us concerning your Membership, your accounts, or the services or products related to your accounts[,]" meaning, as WCU argued, the amendment had retroactive application (¶ 1) (emphasis added).

WCU alleged that Pruett received notice of the Arbitration Clause, and it further argued that Pruett agreed to the amendment by failing to opt out of its application using the specified procedure – that is, Pruett's silence and continued use of his account signaled his assent to the Arbitration Clause. The circuit court denied WCU's motion to compel arbitration pursuant to Wis. Stat. section 788.02. In an opinion authored by Judge Stark, the court of appeals affirmed.

The first issue the court of appeals considered was whether the change-of-terms provision of the Agreement provided WCU with the contractual authority to unilaterally add the Arbitration Clause to the parties' contract. The Agreement reserved WCU's right to "change the terms of this Agreement." The court concluded that "WCU's contractual authority to 'change the terms of this Agreement' did not authorize it to unilaterally add the Arbitration Clause absent evidence that the Arbitration Clause was the type of change contemplated by the parties at the time of the original Agreement. No evidence has been presented that the Arbitration Clause involved terms that were previously in the Agreement or were contemplated by the parties at its inception" (¶ 16).

"The Arbitration Clause introduces *additions* to the contract limiting the rights of the parties on issues that were not contemplated in the original Agreement – arbitration and class actions – rather than amending existing terms" (¶ 41). "Therefore, WCU did not have the contractual authority under the change-of-terms provision to unilaterally add the Arbitration Clause, and the Arbitration Clause is not a part of WCU's contract with Pruett" (¶ 16).

In Wisconsin, every contract carries with it a duty of good faith and fair dealing (*see* ¶ 44), and the court concluded that WCU did not act in good faith when it attempted to add a new term to the original Agreement seeking to retroactively deprive another party of a legal right (*see* ¶ 45).

The second major question the court of appeals considered was whether Pruett's failure to opt out of the Arbitration Clause and continued use of his WCU account constituted his agreement to the terms of the Arbitration Clause. The court held that "WCU's purported offer to modify its Agreement with its members did not provide sufficient clarity to reasonably convey to Pruett what was required such that we can infer assent to the modification from his silence. Therefore, the Arbitration Clause may not be enforced against him" (¶ 17).

The terms of the opt-out provision were ambiguous (one reading of the provision suggested that Pruett had to opt out within 60 days after opening his account, which would have been in 1991), and Pruett's failure to opt out did not constitute his assent to the amended terms (*see* ¶ 55).

Commercial Lease – Breaches – Rent Abatement

***Pheasant West LLC v. University of Wis. Med. Found. Inc.*, 2023 WI App 55 (filed Oct. 11, 2023) (ordered published Nov. 29, 2023)**

HOLDING: In a dispute over commercial property, the tenant was entitled to some level of rent abatement; the case was remanded for a determination of both the amount of rent abatement and the appropriate award of attorney fees.

SUMMARY: The University of Wisconsin Medical Foundation leased a 200,000-square-foot building from its landlord, Pheasant West LLC. In 2018 a "historic storm" badly damaged the building, and the Foundation relocated 600 employees. Clean-up costs were over $2.8 million. This dispute involves breach-of-contract claims between the parties over repairs, payments, and rent. The circuit court granted summary judgment on various claims and counterclaims. Both parties appealed.

In an opinion authored by Judge Lazar, the court of appeals affirmed in part, reversed in part, and remanded the matter. Conceding the "complex nature of the lease and the historic nature of the storm," the court resolved the appeal under a "standard breach-of-contract analysis" (¶ 16). It held that the circuit court correctly interpreted various disputed lease provisions but incorrectly applied the rent abatement doctrine (*see* ¶ 17).

Specifically, the lease assigned liability for repair of flood damage to Pheasant West, including repair of the building's improvements, alterations, and additions. The lease also enabled the Foundation to abate proportionate rent until the repairs were completed and "untenantable" areas were available (¶ 28).

The circuit court, however, erred by finding that full rent abatement was appropriate for the time that the Foundation was "out of the building." The lease addressed untenantability "in whole or in part" and provided for proportionate rent abatement (¶ 36). The court also held that the landlord's specific-performance claim was properly dismissed because the Foundation had adequately replaced its damaged property (*see* ¶ 38).

Turning to the landlord's counterclaims, the court of appeals held that the circuit court's rulings were "partially correct" (¶ 41). Specifically, the landlord had improperly charged insurance premium costs to the Foundation and then failed to timely refund that cost (*see* ¶ 43). Also, "[p]rinciples of rent abatement require that the Foundation be reimbursed for that portion of August rent corresponding to days when the Building was untenantable" (¶ 47). On remand, the Foundation is "potentially entitled to an award of attorneys' fees on the issue of rent abatement, as allowed by the lease" (¶ 53).

Criminal Procedure

Search Warrants – "Execution" Within Five Days – Forensic Analysis of Computer's Digital Content

***State v. Drachenberg*, 2023 WI App 61 (filed Oct. 12, 2023) (ordered published Nov. 29, 2023)**

HOLDING: The deadline to execute a search warrant in Wis. Stat. section 968.15(1) applies to the search of the places, and seizure of the items, designated in a search warrant and does not apply to later, off-site analysis of those items that is also authorized in the warrant.

SUMMARY: This appeal involved the meaning of "execute[]" in the statute that sets a five-day deadline for police to

execute a search warrant. *See* Wis. Stat. § 968.15(1) ("A search warrant must be executed and returned not more than 5 days after the date of issuance."); *see also* Wis. Stat. § 968.15(2) ("Any search warrant not executed within the [five-day deadline] provided in [Wis. Stat. § 968.15(1)] shall be void and shall be returned to the judge issuing it.").

On Jan. 29, 2021, the circuit court issued a search warrant authorizing a search of defendant Drachenberg's residence for designated items allegedly containing child pornography. Among other things, the affidavit in support of the warrant requested permission to "'[s]eize and remove from the premises any computers, computer storage media and any other electronic device' – including, for example, cell phones and modems – and then, after the search had been completed, to forensically analyze the contents of the devices at off-site locations, *i.e.*, places other than the place of the search" (¶ 4).

The warrant itself described in detail the types of items the police could search for and seize. It also specifically authorized the following: "'the media … and data contained' in the seized devices 'may be forensically analyzed at a law enforcement facility at a later date in order to examine the contents for contraband or other evidence'" (¶ 5). The warrant was executed on Feb. 1, 2021; the police seized numerous digital devices from the defendant's residence, including a desktop computer the defendant owned. However, the forensic analysis of the seized devices, which amounted to 14 terabytes of data, was not completed until March 29, 2021.

The defendant was charged with multiple counts of possessing child pornography and sexually exploiting a child. He moved to suppress images and videos found on the computer, arguing that the officers did not fully execute the warrant within five days after it was issued as required by Wis. Stat. section 968.15(1) because the forensic analysis of the digital devices authorized in the warrant was not completed until almost two months after the warrant was issued. The circuit court denied the motion, and the defendant pleaded no contest to one count of possessing child pornography. In an opinion authored by Judge Blanchard, the court of appeals affirmed.

No Wisconsin case has interpreted the meaning of execution of a search warrant under Wis. Stat. section 968.15(1) and whether the statute imposes the five-day deadline on all tasks authorized in the warrant, including later, off-site analysis of items lawfully seized under the warrant (*see* ¶ 16). In this case, the court of appeals concluded that "the circuit court properly denied the motion to suppress, because the deadline to execute a search warrant in Wis. Stat. § 968.15(1) applies to the search of the places, and seizure of the items, designated in a search warrant and does not apply to later, off-site analysis of those items that is also authorized in the warrant" (¶ 3). (The court noted that in some cases, the later, off-site analysis of seized items can be challenged as unreasonably delayed under the Fourth Amendment, but here the defendant did not rely on the Fourth Amendment (*id.*).)

Said the court: "[T]he details in the affidavit and warrant also reflect the practical reality that, while police must conduct the searches of places and seizures of items that a warrant authorizes within five days, they may seek further authority in the warrant to conduct off-site forensic analysis, which need not occur within the five days" (¶ 29). In this case, the affidavit in support of the warrant "transparently alerted the reviewing judge that the anticipated forensic analysis would be 'complicated and time-consuming' and therefore would need to be conducted off-site, after execution of the warrant was complete" (*id.*).

"In sum, for purposes of applying Wis. Stat. § 968.15(1), police here 'executed' the search warrant within five days after it was issued by finishing their search of the designated places for the designated digital devices and seizing them. The later, off-site analysis of these devices pursuant to the investigative path authorized by the warrant was not part of the warrant's execution" (¶ 38).

Probate

Joint Accounts – Survivorship – Accounts of Convenience – Presumption – Evidence

***Henke v. Estate of Klawitter*, 2023 WI App 60 (filed Oct. 12, 2023) (ordered published Nov. 29, 2023)**

HOLDING: The circuit court properly found that an estate was the sole owner of two joint accounts.

SUMMARY: Carla Henke and her father, Clarence, owned two joint bank accounts. After Clarence died, Carla claimed the funds as hers, but Clarence's estate contended that it owned the accounts and that they were created as "accounts of convenience." The circuit court ruled in favor of the estate in a declaratory-judgment action.

The court of appeals affirmed in an opinion authored by Judge Graham. The opinion features an overview of the law governing joint accounts, including survivorship rights (*see* ¶ 25). The parties agreed that the joint accounts here included wording sufficient to create survivorship rights. Nonetheless, joint accounts can take different forms and can serve many purposes, including being so-called accounts of convenience (*see* ¶ 28).

"In sum, although the language on the signature cards signed by Clarence and Carla gives rise to the presumptions that the intention was to create an account with both joint ownership and survivorship rights, both of those presumptions are rebuttable" by "clear and convincing evidence" of different intentions (¶ 29).

The court next discussed the kinds of evidence that can be used to determine the governing intentions, observing that even statements made after the accounts' creation may be used as proof of the original intentions (*see* ¶ 34). "Applying [the doctrine of continuity in time of states of mind] in the context of Wis. Stat. § 705.04(1), we conclude that, because a party's intention for a joint account may persist after its creation and may manifest in the party's post-creation statements and conduct, post-creation evidence of such manifestations may be relevant. Depending on the facts of a given case and the strength of the available evidence, a fact finder may be able to infer from a party's post-creation expressions of their post-creation intention that the party held the same intention at the time the account was created" (¶ 35).

The court of appeals rejected Carla's contention that the circuit court had committed reversible error in admitting evidence of the parties' intentions and in concluding that the true intention had been to create an account of convenience without survivorship rights in Carla. In particular, the court carefully assessed the hearsay rule, especially Wis. Stat. section 908.03(3), and the relevance of statements to the parties' intentions. The circuit court properly admitted statements Clarence made some years after the accounts' creation to prove his thinking years earlier (*see* ¶ 53). Any inadmissible evidence did not affect Carla's substantial rights. Finally, sufficient evidence supported the circuit court's determination that the presumption of intent had been rebutted by clear and convincing evidence. (The standard of review is discussed at paragraphs 63 and 64.)

Taxation

Property Tax Assessments – Newly Constructed Rental Units

***Veritas Vill. LLC v. City of Madison*, 2023 WI App 56 (filed Oct. 26, 2023) (ordered published Nov. 29, 2023)**

HOLDING: The plaintiff failed to show that the city of Madison's 2018 assessment of its property was excessive within the meaning of Wis. Stat. section 74.37.

SUMMARY: Veritas Village LLC is the owner of a property consisting of 189 apartments near downtown Madison. Construction of the property was completed in 2017 and leasing began in August 2017. As of Jan. 1, 2018, the property was 28% occupied. It was anticipated that additional leases would be signed, thereby reducing the vacancy rate. The city of Madison assessed the property at $17.78 million based on the appraisal conducted by a city appraiser. Veritas filed an objection to the assessment; its appraiser valued the property at $6.8 million. The difference in the appraised values was due primarily to the differing vacancy rates used by the two appraisers: the Veritas appraiser used a 72% vacancy rate that reflected the vacancy rate of the property on Jan. 1, 2018, and the city appraiser used a vacancy rate that accounted for anticipated future leases.

The Madison Board of Assessors and the Madison Board of Review sustained the city's assessment. Veritas paid the real estate taxes calculated from the 2018 assessment ($17.78 million) and commenced an action against the city for excessive assessment under Wis. Stat. section 74.37. Following a bench trial, the circuit court entered judgment in favor of the city, finding that Veritas did not overcome the presumption of correctness afforded the city's assessment under Wis. Stat. section 70.49(2). [*Editors' note:* This presumption can be overcome if the challenging party establishes that the assessment does not apply the principles set forth in the *Wisconsin Property Assessment Manual* (the *Manual*) or presents significant contrary evidence (*see* ¶ 11).] In an opinion authored by Judge Nashold, the court of appeals affirmed.

The appraisers in this case agreed that the *Manual*'s "tier 3 income approach," which seeks to capture the amount of income the property will generate over its useful life, was the most appropriate method for assessing Veritas's property. The parties agreed that the "overarching issue" in this case was how to account for vacancy under the "income approach" for a new building during the period when leases are being obtained on the new building.

Veritas argued that the city's assessment lost its presumption of correctness because its appraiser failed in multiple ways to follow the principles set forth in the *Manual*. The appellate court disagreed. Among other things, it concluded that the city appraiser did not contravene the *Manual*'s principles of "change" and "anticipation" when he considered future leases in forming his assessment of the current value of the property. Said the court: "[I]t can hardly be clearer under the explicit language of the Manual that anticipated leases are properly considered in determining the present value of the property" (¶ 36).

The court also rejected Veritas' argument that the city appraiser was required to rely *solely* on the vacancy rate as of Jan. 1, 2018, in his appraisal of the property (*see* ¶ 46). The court further held that the city appraiser did not impermissibly "mix and match" the Manual's tier 3 "income" and "sales" approaches in forming his assessment of the property (¶ 53). Lastly, the court of appeals found that Veritas did not show that the city appraiser impermissibly relied on his judgment in adjusting the data used in his approaches to the property's value (*see* ¶ 54).

In sum, the court of appeals concluded that the presumption of correctness of the city's assessment applied (*see* ¶ 64). Veritas failed to show that the city's 2018 assessment of the property was excessive within the meaning of Wis. Stat. section 74.37 (*see* ¶ 66).

Torts

Res Ipsa Loquitor – Electrical Hazard

***Rembalski v. John Plewa Inc.*, 2023 WI App 58 (filed Oct. 24, 2023) (ordered published Nov. 29, 2023)**

HOLDING: The circuit court properly dismissed a negligence complaint against a home remodeling contractor.

SUMMARY: A homeowner hired a contractor to remodel the homeowner's kitchen and living room. The dispute stems from injuries the homeowner (hereinafter the plaintiff) allegedly incurred when he received an electrical shock from an outlet that a cabinetry subcontractor had removed and left to be secured later by an electrician. The defendant never returned to finish the remodeling project because of a dispute between the parties. Essentially, the plaintiff alleged that the defendant's negligence caused his injuries. The circuit court ruled in favor of the defendant.

The court of appeals affirmed in an opinion, authored by Judge White, that closely examined the factual dispute between the parties over how the injury occurred and the condition of the electrical outlet. The court rejected the plaintiff's contention that the judge should have applied the doctrine of res ipsa loquitor, which requires 1) an event that does not ordinarily occur absent negligence, and 2) that the instrumentality must have been within the exclusive control of the defendant (*see* ¶ 12).

The facts failed to support application of the doctrine; for example, an obvious hazard existed because the outlet was energized and left dangling by its wires, and the defendant had last worked on the job several months earlier (*see* ¶¶ 14-15). The plaintiff "chose to use the outlet" even after another electrician had offered to secure it (¶ 16). **WL**