Civil Procedure

Class Actions – Commonality and Predominance Requirements

***Freeman v. SL Greenfield LLC*, 2025 WI App 30 (filed April 8, 2025) (ordered published May 28, 2025)**

HOLDINGS: 1) The circuit court did not erroneously exercise its discretion when it granted the plaintiff's motion for class certification. 2) The defendant waived its right to enforce the class-waiver agreements in this litigation.

SUMMARY: Freeman filed a complaint on behalf of herself and all other similarly situated employees alleging that SL Greenfield engaged in systemic violations of Wisconsin's wage payment and collection laws at several independent-living and assisted-living facilities operated by SL Greenfield throughout Wisconsin. Specifically, Freeman alleged that SL Greenfield unlawfully failed to pay certain workers for meal periods lasting fewer than 30 minutes, resulting in the denial of compensation and overtime pay.

The circuit court granted Freeman's motion for class certification. The class was defined as all current and former hourly paid, nonexempt employees employed by defendants in Wisconsin between specified dates. The defendants appealed the circuit court's order granting class certification. In an opinion authored by Judge Geenen, the court of appeals affirmed.

Before an action may be certified as a class action, the party seeking certification must first establish statutory prerequisites, including that there are questions of law or fact common to the class (the "commonality" requirement) and that these common questions predominate over any questions affecting only individual members (the "predominance" requirement). *See* Wis. Stat. § 803.08(1)(b), (2)(c). The defendants claimed that these two requirements were not met. The appellate court disagreed.

At the heart of this litigation is SL Greenfield's timekeeping system. Employees were required to record their hours of work at the beginning and end of the workday and at meal times. The timekeeping system automatically calculates the duration of compensable work between clock-in and clock-out times, but SL Greenfield rounded these exact times to the nearest quarter hour under its so-called seven-minute rule. With respect to meal periods, this rounding system may record a meal break lasting fewer than 30 minutes as having lasted a full 30 minutes.

In the view of the appellate court, this raises a common question: "Is a break taken by a class member lasting fewer than thirty consecutive minutes a 'rest period,' in which case SL Greenfield owes compensation, or a 'bona fide meal period,' in which case SL Greenfield does not owe compensation? The answer to this common question is apt to drive the resolution of this litigation" (¶ 19) (internal quotations omitted). [*Editors' Note:* The definitions of "rest" periods and "meal" periods are derived from Wis. Admin. Code section DWD 272.12(2)(c).]

As for the predominance criterion for class certification, the appellate court concluded that the class's claims arise from a common nucleus of operative facts and issues, namely, "the uniform ADP timekeeping system, the application of the 'seven-minute rule' to meal periods, the operation of the same statutes and administrative rules, and SL Greenfield's expectation that employees would immediately begin compensable work upon punching in to work" (¶ 28).

Lastly, the appellate court addressed SL Greenfield's argument that 1,500 members of the proposed class signed an agreement "not to participate as a member or representative in any multi-plaintiff, class, collective or representative action" against SL Greenfield (¶ 30). It concluded that SL Greenfield waived its right to enforce the class-waiver agreements against members of the class in this litigation because this affirmative defense was not set forth in a responsive pleading and thus was waived (*see* ¶¶ 31-32).

Creditor-Debtor Law

Fraudulent Transfers – Uniform Fraudulent Transfer Act – Heightened Pleading Requirement

***Miller Compressing Co. v. Busby*, 2025 WI App 29 (filed April 1, 2025) (ordered published May 28, 2025)**

HOLDINGS: 1) The circuit court correctly dismissed the plaintiff's complaint under the Uniform Fraudulent Transfer Act (UFTA) because its allegations averred fraudulent transfers that were not pleaded with sufficient particularity. 2) The circuit court correctly denied the plaintiff's postjudgment motion for leave to amend the complaint.

SUMMARY: Plaintiff Miller Compressing Co. alleged that between 2012 and 2016, non-party MMC Holding LLC fraudulently transferred money to the defendants to avoid paying a debt it owed to Miller Compressing. The plaintiff sued under the UFTA (Wis. Stat. section 242.04(1)(a)

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 an emeritus professor of law and the former director of clinical education at Marquette University Law School, Milwaukee.

thomas.hammer@marquette.edu

Appellate Drafting

Attorney Erik L. Fuehrer

Experienced appellate lawyer available for handling civil appeals, especially in the areas of personal injury, insurance law, and real estate disputes.

Contact: Erik Fuehrer at
Remley Law, S.C.
(920) 725-2601
efuehrer@remleylaw.com.

RemleyLaw, s.c.

Court of Appeals.indd 60 7/15/2025 2:57:38 PM

(2021-22)), requesting *inter alia* that the circuit court void the transfers. Transfers made "[w]ith actual intent to hinder, delay, or defraud any creditor" are "fraudulent" under the UFTA, which was in effect at the time of the transfers and when this lawsuit was commenced.

The circuit court dismissed without prejudice Miller's amended complaint, concluding that its fraudulent transfer claims under Wis. Stat. section 242.04(1)(a) were not pleaded with particularity and did not satisfy the heightened pleading requirements for fraud claims under Wis. Stat. section 802.03(2), which provides in part that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." The circuit court also denied Miller Compressing's postjudgment motion for leave to amend the complaint or, alternatively, to conduct limited discovery. Miller Compressing appealed both circuit court orders. In an opinion authored by Judge Geenen, the court of appeals affirmed.

The court of appeals concluded that claims brought under Wis. Stat. section 242.04((1)(a) premised on transfers made by a debtor with actual intent to "defraud" a creditor (the situation in this case) must be pleaded with particularity under Wis. Stat. section 802.03(2). However, when certain facts are peculiarly within the defendant's knowledge, the heightened pleading standard may be relaxed and allegations based on information and belief may suffice, so long as the allegations are accompanied by a statement of facts upon which the belief is based (*see* ¶ 40).

To satisfy the heightened pleading requirement under Wis. Stat. section 802.03(2), "the complaint must allege 'the who, what, when, where and how' of the defendant's allegedly wrongful conduct" (¶ 42). In this case the plaintiff's pleadings failed to meet that standard. Miller Compressing's allegations only state that MCC Holding made substantial payments to defendants each year from 2012 to 2016 totaling $2,090,420 per defendant. The plaintiff did not allege the specifics of any of the transactions individually, by recipient, amount, date, or alleged purpose, nor did it allege the number of transfers, even though it possessed such information. Said the court:

"Alleging an unknown number of supposedly fraudulent transfers over a period of five years while asserting only collective totals is, in our view, inadequate to satisfy the particularity requirement of Wis. Stat. § 802.03(2)" (¶ 43).

Moreover, Miller Compressing failed to adequately plead the circumstances of the fraud. It never provided representative examples of defendants' alleged fraudulent conduct, specifying the date, place, and content of their acts and the identity of the actors, and it provided almost no facts describing the fraud other than to say the transfers were claimed by defendants to be justified (*see* ¶ 44). Accordingly, the appellate court held that the circuit court properly dismissed Miller Compressing's claim.

The appellate court also concluded that, although the Wisconsin Rules of Civil Procedure embrace a policy in favor of liberal amendment of pleadings, the circuit court correctly determined that Miller Compressing was not entitled to a presumption in favor of amending its complaint under Wis. Stat. section 802.09(1) because the motion was brought *after* judgment was entered (*see* ¶ 53).

Court of Appeals.indd 61 7/15/2025 2:57:39 PM

Relying on *Mach v. Allison,* 2003 WI App 11, 259 Wis. 2d 686, 656 N.W.2d 766, the circuit court concluded that "parties lose this presumption after judgment has been entered even if the judgment is without prejudice and not on the merits, and the party seeking postjudgment amendment to pleadings must present a reason for granting the motion that is sufficient to overcome the value in the finality of the judgment" (¶ 4). Whether judgment was with or without prejudice is a relevant consideration in the balancing test established in *Mach*. However, in this case, Miller Compressing failed to present a reason sufficient to overcome the value in the finality of the judgment (*see* ¶ 5).

[*Editors' Note:* While this case was pending before the court of appeals, the Wisconsin Legislature amended the UFTA by enacting 2024 Wis. Act 246. That enactment renamed Wis. Stat. chapter 242; it is now titled the Uniform Voidable Transactions Law (UVTL). Among other changes, the UVTL replaced the term "fraudulent" with "voidable" throughout Wis. Stat. chapter 242. Under the UVTL, asset transfers are deemed "voidable," not "fraudulent," if they are made "[w]ith actual intent to hinder, delay or defraud any creditor of the debtor." Wis. Stat. § 242.04(1)(a) (2023-24). The appellate court noted that its conclusion in this case would not change even if the UVTL applied to the challenged transfers. The plaintiffs claimed that the transfers were made with actual intent to "defraud" a creditor. These are averments of fraud and must still be pleaded with particularity. *See* ¶ 24 n.8.]

Choice of Law – Preferential Payments – Public Policy

***Dizard v. Torro LLC*, 2025 WI App 31 (filed April 8, 2025) (ordered published May 28, 2025).**

HOLDING: The presumption of enforceability of forum-selection provisions must give way to the public policy favoring the equal distribution of assets when creditors cannot be fully paid.

SUMMARY: A struggling business, Ridgeway Trailer Co., entered into several "merchant cash advance" (MCA) contracts with Torro LLC. When Ridgeway later went into receivership, the receiver filed a lawsuit in Wisconsin to recover over $137,000 in alleged preferential payments to Torro through the MCA contracts. Torro filed a motion to transfer venue to Utah based on forum-selection and choice-of-law provisions in the MCA contracts. The circuit court granted Torro's motion.

The court of appeals reversed in an opinion authored by Judge Gill. "A forum selection provision is presumptively enforceable unless the contract provision is substantively unreasonable, which can occur if the provision violates a strong public policy of the forum in which the suit is actually brought" (¶ 14) (internal quotations omitted). The key was whether the choice-of-law provisions were enforceable (*see* ¶ 16).

The court also addressed the public policy underlying Wis. Stat. section 128.07, which limits preferential transfers (*see* ¶ 30). It concluded that Wis. Stat. chapter 128 falls within the meaning of "state bankruptcy law[]" as used in prior cases. "Chapter 128 has been referenced as a 'state bankruptcy law,' despite insolvency proceedings differing from federal bankruptcy proceedings in significant respects" (¶ 43). "[A]lthough Wis. Stat. ch. 128 does not allow a debtor to discharge a debt, unlike federal bankruptcy law, it does appear, at least in some form, to mimic federal bankruptcy law by permitting recovery of preferential payments to ensure that a debtor's assets are equally divided among creditors" (¶ 46).

Aside from Torro, neither the receiver nor any of the other 50 creditors had an opportunity to "bargain for or against the preferential payments made to Torro or the choice of law provisions in the MCA contracts" (¶ 52). "Because Utah law permits the preferential transfer of assets to creditors and does not offer a similar alternative to Wis. Stat. § 128.07, Utah law does not afford as much protection to creditors as Wisconsin law.... In other words, the Receiver would not be able to file a similar claim if the choice of law provisions were enforceable and Utah law applied" (¶ 58).

Finally, "a state's important public policy will trump a choice of law provision only if the state's law would be applicable if the parties[‘] choice of law provision was disregarded" (¶ 59) (internal quotations omitted). Case law establishes that the law of the forum presumptively applied unless the nonforum contacts are of greater significance (*see* ¶ 61). The MCA contracts were "negotiated" and "carried out" in Utah. The court speculated that these factors might control in a dispute between Torro and Ridgeway, but this case involved an action between a receiver and Torro regarding a debtor's insolvency in Wisconsin (¶ 62).

"[A]pplying Wisconsin law in this case advances the forum's governmental interests because the legislature has made it an important public policy of this state to favor the equal distribution of assets when creditors cannot be fully paid when an entity is insolvent. Again, Utah law does not have such a policy and does not recognize a claim for preferential payments" (¶ 65).

Court of Appeals.indd 62 7/15/2025 2:57:39 PM

Family Law

CHIPS Cases – Party Status – Mootness

***S.G. v. Wisconsin Dep't of Child. & Fams. (In Int. of S.G.)*, 2025 WI App 32 (filed April 3, 2025) (ordered published May 28, 2025)**

HOLDING: The child's petition was not moot; county corporation counsel did not have party status in an action in which it was not the petitioner.

SUMMARY: S.G. was a "parentless" child receiving services from the Wisconsin Department of Children and Families as a result of a termination of parental rights order, which was scheduled to expire on S.G.'s 18th birthday. Before she was placed into foster care, she had been abused. Two weeks before her birthday, S.G. filed this child in need of protection or services (CHIPS) action seeking a one-year extension of those services, which would cover her through her 18th birthday and high school graduation. The circuit court was prepared to hold all necessary hearings on a single day, as permitted by statute.

The Waupaca County Corporation Counsel intervened, asking to be added as a party and moving to dismiss S.G.'s petition on multiple grounds. The court interpreted Wis. Stat. section 48.09(5) as conferring party status on the corporation counsel, although the corporation counsel neither brought the CHIPS petition nor was named in the petition as a responding party, and on this basis the court allowed the corporation counsel to contest S.G.'s petition. The circuit court ultimately dismissed the petition because the court could not hold the hearing before S.G.'s birthday.

The court of appeals reversed in an opinion authored by Judge Taylor. First, the issue of the corporation counsel's status under Wis. Stat. section 48.09(5) fell within "multiple exceptions to the mootness doctrine" (¶ 4). Specifically, the court agreed with S.G. that her case fit within the exceptions for issues of "great public importance" (¶ 21) and for issues "likely to arise again and [which] should be addressed to resolve uncertainty" (¶ 22).

Second, the court held that because the corporation counsel was not a petitioner it did not have party status under Wis. Stat. section 48.09(5). "Although § 48.09(5) states that the 'interests of the public' shall be represented by a corporation counsel in certain types of actions under Wis. Stat. ch. 48, it does not state that the 'interests of the public' must always be represented in those actions" (¶ 28).

Turning to the statute's "context and structure," the court considered 1) the statutory procedures governing CHIPS actions arising under Wis. Stat. section 48.13, and 2) the statutory procedures governing guardianship actions arising under Wis. Stat. sections 48.977 and 48.9795. Neither consideration supported the conclusion that the corporation counsel had party status when it was not the petitioner (*see* ¶ 29). "In other words, if the legislature had wanted to confer party status on a corporation counsel under § 48.13 when the corporation counsel is not a petitioner, it could have, and presumably would have, expressly done so by adopting similar language as that incorporated in §§ 48.977 and 48.9795" (¶ 36).

Finally, the corporation counsel's position ran contrary to the "express purpose" expressed in Wis. Stat. section 48.095 (¶ 39).

Motor Vehicle Crashworthiness

Since we opened our doors in 1979, Murphy & Prachthauser has been an advocate for safer products and practices. We have been nationally recognized for successfully litigating cases against corporations that design or manufacture defective vehicles, causing serious injuries. Such defects, to name a few, include faulty air bags, car roofs, seat belts, seats, park to reverse, and gas tanks.

In a case involving a defective vehicle, it is crucial that victims work with attorneys who are experienced in vehicle defect and crashworthiness cases. If you have a case involving a vehicle defect, we can work with you to provide mutual benefit to your client.

Please contact attorney

Thadd Llaurado, Michelle Hockers, or Kate Llaurado Scheidt

(414) 271-1011 | murphyprachthauser.com

Murphy & Prachthauser

ATTORNEYS AT LAW

MILWAUKEE | GREENFIELD | WAUKESHA | MEQUON | WEST BEND

Court of Appeals.indd 63 7/15/2025 2:57:40 PM

Municipal Law

Rezoning – Permitted and Conditional Uses

***Dyersville Ready Mix Inc. v. Iowa Cnty. Bd. of Supervisors*, 2025 WI App 33 (filed April 10, 2025) (ordered published May 28, 2025)**

HOLDING: The Iowa County Board of Supervisors relied on a correct theory of law in denying the plaintiff's rezone petition.

SUMMARY: A landowner in Iowa County wants to operate a quarry on a parcel of land that is in a county zoning district where quarrying is prohibited. Accordingly, the landowner petitioned the Iowa County Board of Supervisors (the county board) to reclassify the parcel from its current "exclusive agricultural" zoning district to an "agricultural business" district where quarrying qualifies as a potential conditional use. The parcel is in the town of Brigham. The county board denied the rezone petition. On certiorari review, the circuit court affirmed the county board. In an opinion authored by Judge Blanchard, the court of appeals affirmed the circuit court.

The appellate court concluded that the certiorari record provides a reasonable basis to conclude that the county board rested its denial of the rezone request on a determination that rezoning the parcel in question from exclusive agricultural to agricultural business would not be consistent with the town's comprehensive plan, which prioritizes the preservation of available agricultural land. Such consistency is required by the county's rezoning ordinance.

Said the court: "County Board members could have reasonably denied the rezone petition because amending the zoning map for this parcel into the Business Agricultural district would undermine the Town's agricultural-land rationale, as expressed in the Town's comprehensive plan, by failing to sufficiently preserve land that is available for crop growing, due to the potential for any of the more intensive conditional uses that could be pursued in Business Agricultural" (¶ 34). The court further concluded that the landowner failed to show that in denying its petition the county board erroneously and exclusively relied on a different set of requirements for issuing conditional use permits (*see* ¶ 30).

The plaintiff landowner also argued that the county zoning ordinance "mandates" that the county board grant the rezone petition because the permitted uses in both the existing and the petitioned-for zoning districts are limited to direct agricultural activities, and therefore there could be no justification for denying the rezone petition.

The court of appeals disagreed. It concluded that "the County Board could lawfully deny the rezone petition based on the significant differences in conditional uses that may be allowed in the two zoning districts" (¶ 3).

Lastly, the court of appeals held that the landowner failed to support a constitutional claim that the county board denied it the right to substantive due process. The landowner had argued that, because the permitted uses in both zoning districts are limited to direct agricultural activities, it was clearly arbitrary and unreasonable for the county board to deny the rezone petition based on differences in conditional uses (*see* ¶ 4). **WL**

Landex Research, Inc.
PROBATE RESEARCH

Missing and Unknown Heirs Located
No Expense to the Estate

Domestic & International Service for:
Courts
Lawyers
Trust Officers
Administrators/Executors

1345 Wiley Road, Suite 121, Schaumburg, IL 60173
Telephone: 847-519-3600 Fax: 847-519-3636
Toll-free: 800-844-6778
www.landexresearch.com

Court of Appeals.indd 64 7/15/2025 2:57:40 PM