## Civil Procedure

### Taxable Costs – Surety Bonds – Premiums – Necessity

***Graef v. Applied Underwriters Inc.*, 2025 WI App 48 (filed July 8, 2025) (ordered published Aug. 27, 2025)**

**HOLDING:** The premium paid for a surety bond was a necessary, taxable disbursement.

**SUMMARY:** Applied Underwriters Inc. (AUI), a prevailing party in a lawsuit, paid a $75,000 premium for a $2.5 million surety bond. The trial judge dismissed the claim against AUI, which then included the premium in its taxable costs. The judge later determined that the premium was "necessary" as required by the taxable-costs statute.

The court of appeals affirmed in an opinion authored by Judge Gill, which addressed two issues of first impression (*see* ¶ 1): "the first being whether a paid surety bond premium under Wis. Stat. § 814.05 is a disbursement under Wis. Stat. § 814.04 that is required to be taxed, if requested by a prevailing party, to the extent a circuit court finds that the premium was 'necessary,' and, if so, whether the circuit court in this case erroneously exercised its discretion by concluding that the entire sum paid for the premium was 'necessary'" (¶ 15).

"An award of taxed costs under Wis. Stat. § 814.04 to a successful plaintiff under Wis. Stat. § 814.01 or a successful defendant under Wis. Stat. § 814.03 is mandatory, not discretionary" (¶ 20). The court, however, retains discretion in determining the amount of costs (*see* ¶ 21). "By its plain text, Wis. Stat. § 814.05 identifies 'the lawful premium paid to an authorized insurer for a suretyship obligation' as recoverable 'costs or disbursements.' It follows, then, that surety bond premiums fall within the catch-all provision in Wis. Stat. § 814.04(2), permitting '[a]ll the necessary disbursements and fees allowed by law' that 'shall' be awarded" (¶ 22).

The disbursement's necessity is left to the judge. In finding that the entire premium was necessary, the court observed that the premium was paid pursuant to a stipulation among the parties (*see* ¶ 5). "[W]ithout evidence or a finding that AUI acted in a fashion that made the expense of the bond unnecessary, it was 'necessary' for AUI to pay the bond premium prior to continuing to litigate the case.... Without the surety bond, a default judgment may have been entered in favor of [AUI's opponent]" (¶ 31).

## Consumer Law

### Fair Debt Collection Practices Act – Attorneys – "Meaningful Involvement" – Federal Standards

***Plaza Servs. LLC v. Burton*, 2025 WI App 51 (filed July 22, 2025) (ordered published Aug. 27, 2025)**

**HOLDING:** A debtor's counterclaims were properly dismissed.

**SUMMARY:** Plaza Services LLC (Plaza) brought a small claims action against Burton to recover consumer debt of $1,800. Several months later, Plaza filed a motion to dismiss with prejudice, which the circuit court granted. Plaza's action came after Burton filed an answer and counterclaims regarding alleged breaches of various consumer laws. Burton appealed the dismissal of her counterclaims.

The court of appeals affirmed in an opinion authored by Judge Stark that compelled the court to consider the Wisconsin Consumer Act (WCA), *Security Finance v. Kirsch*, 2019 WI 42, 386 Wis. 2d 388, 926 N.W.2d 167, and the Fair Debt Collection Practices Act (FDCPA).

First, Burton contended that Wisconsin should "coordinate" the WCA with federal court interpretations of the FDCPA that require that a lawyer be "meaningfully involved" in debt collection (¶ 19). The court of appeals rejected the federal approach, starting with the wording of the WCA. "Thus, the import of Wis. Stat. § 427.104(1)(k) is clear: a debt collector may not falsely represent that a communication is officially or formally approved, distributed, or consented to by an attorney." Such misrepresentations would likely intimidate debtors (*see* ¶ 22). "[W]e are unpersuaded by Burton's argument that we should essentially read language into Wis. Stat. § 427.104(1)(k) merely because the WCA is to be construed to coordinate with the regulations under the FDCPA" (¶ 25).

Burton's second argument, also rejected by the court, turned on Wis. Stat. section 425.109's pleading requirement and the *Kirsch* case. Her allegations did not sufficiently plead Plaza's "willful or intentional" violations of the statute. "Case law provides that when a defendant argues that a complaint fails to meet the pleading requirements, the proper remedy is for the complaint to be dismissed without prejudice or for the plaintiff to be permitted to file an amended complaint" (¶ 34).

Burton's third argument, also drawing on *Kirsch*, related to whether the debtor was properly informed of any right to cure a default (*see* ¶ 36). Rejecting Burton's "convoluted argument," the court held that "the circuit court properly dismissed Burton's counterclaim because the failure to provide proper notice of the right to cure does not, by itself, give rise to a claim for damages under the FDCPA" (¶ 42). *Kirsch* also applied to Plaza's alleged failure to comply with any requirement of a notice of a debt's assignment under Wis. Stat. section 422.409 (*see* ¶ 46). "Regardless, Plaza voluntarily dismissed its complaint with prejudice. Thus, there is nothing further needed to enforce Burton's 'right' to a notice of the right to cure and notice of assignment, and the harm that she suggests that she suffered does not exist" (¶ 48).

## Contracts

### Warranty Claims – Consequential Damages – Remedies – Unconscionability

***Buddy's Plant Plus Corp. v. Viking Masek Global Packaging Techs. LLC*, 2025 WI 46 (filed July 30, 2025) (ordered published Aug. 27, 2025)**

**HOLDING:** A warranty clause limited damages to the amount paid by the plaintiff and foreclosed any consequential damages.

**SUMMARY:** A contract between Viking Masek Global Packaging Technologies LLC (Viking) and Buddy's Plant Plus Corporation (Buddy) called for Viking to manufacture a custom machine to prepare and package bedbug detection

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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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products. Viking failed to deliver the machine. The circuit court found that Viking had breached the contract but also determined that a warranty clause limited damages to the amount that Buddy had paid Viking; the judge denied Buddy's demand for consequential damages.

The court of appeals affirmed in a majority opinion authored by Judge Neubauer. Public policy "favors the freedom of contract" (¶ 23). The parties agreed that the contract was governed by Wis. Stat. chapter 402, part of Wisconsin's codification of the Uniform Commercial Code (UCC), which allows parties to agree to remedies other than those provided by the UCC (¶ 24). Viking breached the contract because it did not provide a working machine within a reasonable period under the UCC (*see* ¶ 31). In this case, the parties "substituted a remedy that is available 'for the Contract and any damages arising out of it' in place of the Code-provided remedies and specified that this remedy is Buddy's 'sole remedy'" (¶ 32). The warranty clause was not limited to a defective product (*see id.*). Here the remedy was a refund of any money paid (*see* ¶ 35). On the facts, the court held that Viking did not unreasonably delay its refund to Buddy; thus, the warranty clause did not fail in its essential purpose (*see* ¶ 39).

Nor was this remedy unconscionable. Buddy failed to carry its "heavy burden" to show that judicial alteration of terms agreed to by "savvy commercial parties" was necessary (¶ 42). The court considered both procedural and substantive unconscionability. Distinguishing other cases, it observed that the refund did not constitute "miniscule compensation"; thus, there was no procedural unconscionability (¶ 54). Focusing on the contract's terms, the court also found no substantive unconscionability. The language favored Viking but was not "unreasonably" favorable (¶ 56).

Judge Grogan dissented on the ground that case law foreclosed the majority's analysis (*see* ¶ 58).

## Criminal Procedure

### Service of Sentences – Length of Extended Supervision Terms Under Initial Version of Truth in Sentencing (1999-2003)

***State ex rel. Kawleski v. State*, 2025 WI App 45 (filed July 3, 2025) (ordered published Aug. 27, 2025)**

**HOLDING:** For a defendant who was sentenced to confinement under Wisconsin's initial version of truth in sentencing (TIS-I) and then released to extended supervision after reconfinement, the period of extended supervision to be served equals the term of extended supervision originally imposed minus the time the defendant has already served on extended supervision.

(This decision applies only to sentences that were imposed under TIS-I, which applied to crimes committed between Dec. 31, 1999, and Feb. 2003.)

**SUMMARY:** Kawleski was convicted in 2001 and received a 20-year bifurcated sentence, consisting of 2.5 years' initial confinement in prison followed by 17.5 years' extended supervision. After Kawleski was released from confinement to extended supervision, his extended supervision was revoked twice, and he was reconfined to prison each time. The issue before the court of appeals involved the calculation of Kawleski's maximum discharge date as of his third release to supervision.

In an opinion authored by Judge Kloppenburg, the court of appeals concluded



that under TIS-I, a defendant's maximum discharge date, as of the defendant's release to extended supervision from reconfinement, is determined by subtracting the time that the defendant has already served on extended supervision from the term of extended supervision originally imposed as part of the bifurcated sentence (*see* ¶ 7).

Said the court: "Accordingly, under a plain language interpretation of Wis. Stat. § 302.113(2), (3), (7), and (9) (1999-2000), read as a whole, for a defendant who is released to extended supervision after reconfinement, the period of extended supervision to be served equals the term of extended supervision portion of the bifurcated sentence minus the time the defendant has already served on extended supervision" (¶ 35).

[*Editors' Note:* The result in this case would be different under the current version of truth in sentencing (TIS-II), which took effect in 2003. Under TIS-II, upon release from reconfinement, the amount of extended supervision faced by the defendant is determined by calculating the total length of the original bifurcated sentence minus time already served in confinement and reconfinement (*see* ¶ 39).]

## Ineffective Assistance of Counsel – Multiplicitous Charges – "Other-Acts" Evidence

***State v. Osornio*, 2025 WI App 53 (filed July 18, 2025) (ordered published Aug. 27, 2025)**

**HOLDINGS:** 1) The defendant is entitled to a new trial based on a successful claim of ineffective assistance of counsel. 2) The trial court did not erroneously admit other-acts evidence.

**SUMMARY:** Defendant Osornio was charged with first-degree reckless homicide by delivery of heroin, based on allegations that he delivered heroin to A.B. and that A.B. overdosed on the heroin and died as a result. Osornio was separately charged with delivery of the heroin that allegedly was a substantial contributor to A.B.'s death. This second charge was a lesser-included offense of the first. [*Editors' Note:* It is permissible for the state to *charge* both a greater-inclusive crime and its lesser-included crime, but it cannot *punish* both (*see* ¶ 38 n. 9).]

The case proceeded to a jury on both counts. At the end of the evidence, the court instructed the jury on the elements of both counts but did not give a lesser-included instruction that would have guided the jury on how to deal with both a greater-inclusive crime and its lesser-included crime. Three hours into the deliberations, the jury sent a note indicating that it could not agree on the homicide charge but did have a conclusion on the lesser-included crime, the delivery charge. The court gave the so-called *Allen* instruction, directing the jury to continue deliberating.

Six hours into the deliberations, the court, the prosecutor, and defense counsel recognized for the first time that the defendant had been charged with both a greater-inclusive crime and its lesser-included crime. At that juncture the court informed the jury that if it could not agree on a verdict on the homicide charge, it should sign the verdict on the delivery charge. About one hour later, the jury returned verdicts convicting the defendant of *both* charges. The court entered a conviction only on the homicide charge.

The defendant sought postconviction relief claiming that his attorneys were ineffective for failing to recognize the multiplicity issue and that if the jury had been instructed on the lesser-included delivery offense from the start, it would have found him guilty, at worst, of the delivery charge (*see* ¶ 3). The circuit court denied the motion.

In an opinion authored by Judge Blanchard, the court of appeals reversed, concluding that the defense attorneys were ineffective. It was deficient performance for counsel to overlook the multiplicity issue; the overlapping elements of the two charged crimes should have prompted double-jeopardy concerns by defense counsel before trial (*see* ¶¶ 59, 61). This deficient performance prejudiced the defendant.

Said the court: "Given that the prosecution decided to pursue both charges at trial, counsel should have called the multiplicity problem to the attention of the circuit court and requested the lesser-included instruction well before counsel eventually took these steps. If that had happened, there is at least a substantial likelihood that the jury would have returned a verdict on the heroin delivery count alone" (¶ 64). Accordingly, the defendant is entitled to a new trial.

As an evidentiary matter, the court of appeals also considered the defendant's contention that the trial court erroneously admitted other-acts evidence elicited by the prosecution. This consisted of testimony by Y.Z. that Osornio delivered heroin to Y.Z. only a few minutes before Osornio allegedly delivered to A.B. the heroin that the state alleged was a substantial factor in causing A.B.'s death. The court concluded that "Osornio fails to establish that the court erred in admitting the other-acts evidence, which the prosecution relied on for the limited purpose of attempting to rebut one of Osornio's defenses, namely, that the drug that he intended to deliver to A.B. was marijuana, not heroin" (¶ 2).

## Family Law

### Adult Children – Guardians – "Isolation"

***Rose v. C.R.R. (In re Guardianship of C.R.R.)*, 2025 WI App 52 (filed July 2, 2025) (ordered published Aug. 27, 2025)**

**HOLDING:** The circuit court properly rejected claims that the guardian of an adult ward knowingly isolated the ward from the ward's father in violation of Wis. Stat. section 54.68(2)(cm).

**SUMMARY:** The petitioner is the father of an adult, Cory, who was placed in a guardianship overseen by the petitioner's ex-wife, Kelly. The petitioner claimed Kelly had "isolated" Cory from him. The circuit court denied one such petition and dismissed two others.

The court of appeals affirmed in an opinion authored by Judge Lazar. "Wis. Stat. § 54.68(2)(cm) provides that '[k]nowingly isolating a ward from the ward's family members or violating a court order under [Wis. Stat. §] 50.085(2)' is 'cause for court action against a guardian.' The statute does not explicitly define what it means to 'isolat[e]' a ward, so we must interpret this term to give effect to the legislature's intent.' The meaning of 'isolate' is relatively plain. To 'isolate' means, among other things, 'to set apart from others'" (¶ 18). It was nonetheless clear that "a guardian's determination that denying contact with a family member is in the ward's best interest is not cause for court action against a guardian" (¶ 19). "[A]mple evidence" showed that Kelly as guardian was acting in the ward's best interest (¶ 23).

The court declined to reach the issue "of whether the court's conclusion that [the ward] did not have capacity to make his own decision regarding association with [the father] is in error" (¶ 25).

## Municipal Law

### Zoning – Short-Term Rentals

***Wisconsin Realtors Ass'n v. City of Neenah*, 2025 WI App 49 (filed July 9, 2025) (ordered published Aug. 27, 2025)**

**HOLDINGS:** 1) The Wisconsin Realtors Association (WRA) had standing to bring this lawsuit. 2) Neenah's tourist housing ordinance conflicts with and is preempted by state law.

**SUMMARY:** In 2017, the city of Neenah adopted a tourist housing ordinance, which prohibits owners of residential property from obtaining the necessary permit for renting that property unless it is the owners' "primary residence." The WRA filed suit claiming that the ordinance's "primary residence requirement" is contrary to and preempted by Wis. Stat. section 66.1014, which was also enacted in 2017 and is titled "Limits on Residential Dwelling Rental Prohibited."

The circuit court granted summary judgment in favor of the city. In an opinion authored by Judge Lazar, the court of appeals concluded that the ordinance conflicts with and is preempted by the state statute.

The court of appeals first considered the issue of the WRA's standing to bring this lawsuit. It concluded that the WRA has "associational standing" because at least one member of the WRA has standing by owning short-term rental property in the city and because the interests at stake in the litigation are germane to the WRA's purposes (including the defense of property rights) (¶¶ 9-10).

As for the zoning issue in the case, the state statute forbids local ordinances that prohibit the rental of "any building … intended to be used as a home, residence, or sleeping place" for seven consecutive days or longer. The Neenah ordinance provides that the city will only grant the required permit to rent out a residential dwelling if it is the applicant's "primary residence." Said the court: "Although it does not define the term 'primary residence,' the term clearly excludes some residential dwellings – those residences that are non-primary – and thus the ordinance prohibits short-term rentals of at least some residential dwellings. It is evident that this logically

conflicts with the statute's prohibition against local limitations on the short-term rental of 'any' residential dwellings" (¶ 14).

### Zoning – Short-Term Rentals – Attorney Fees

***Wildwood Est. LLC v. Village of Summit*, 2025 WI App 47 (filed July 9, 2025) (ordered published Aug. 27, 2025)**

**HOLDINGS:** 1) The municipality violated the plaintiff's procedural due-process rights when it enacted a zoning ordinance regulating short-term rentals without following the proper process. 2) The circuit court exercised reasonable discretion in awarding attorney fees to the plaintiff's counsel.

**SUMMARY:** Wildwood Estate LLC (Wildwood) acquired real property in the village of Summit in 2017. That same year the Wisconsin Legislature enacted Wis. Stat. section 66.1014 (colloquially known as Wisconsin's "right to rent" law). In this statute the legislature declared that short-term rentals – even those fewer than six consecutive days – are permitted in single-family residential districts when the community's general zoning code does not contain time restrictions on occupancy. Within the parameters of the right to rent law, local governments may regulate rentals within their boundaries (*see* ¶ 29).

Throughout 2018 and 2019, Wildwood leased out its property through Vrbo, with the majority of rental periods being less than seven nights. In 2019, the village adopted ordinance 71-2019 (the ordinance) to "create regulation of vacation rental establishments" (¶ 4). Among other things, the ordinance prohibited rental of a residential dwelling for six consecutive days or fewer. In the enactment of this ordinance, the village did not follow the notice and public hearing requirements for making zoning changes as required by Wis. Stat. section 63.23(7)(d)2.

When the village advised Wildwood that it intended to begin enforcing the ordinance, Wildwood applied for a legal-nonconforming-use exemption, which the village refused to grant. Thereafter, Wildwood commenced an action against the village seeking declaratory judgment that the ordinance is unenforceable; it also alleged a procedural due-process violation by the village in violation of 42 U.S.C. section 1983. The circuit court declared the ordinance void and unenforceable as an illegal zoning ordinance; it also awarded attorney fees to the plaintiff's counsel. In an opinion authored by Judge Lazar, the court of appeals affirmed.

After concluding that the circuit court did not erroneously consider the plaintiff's due-process claim, which the village alleged was insufficiently raised by the plaintiff, the appellate court turned to the issue whether the ordinance was a zoning ordinance and therefore subject to notice and public hearing requirements. Making this determination involves consideration of characteristics traditionally associated with zoning ordinances. *See Zwiefelhofer v. Town of Cooks Valley,* 2012 WI 7, 338 Wis. 2d 488, 809 N.W.2d 362.

In this case, several of those characteristics favored a conclusion that the ordinance is a zoning ordinance. The ordinance prohibits certain uses of the land (short-term rentals for less than six days). It directly controls that no short-term rentals will take place in the village. This is a fixed, forward-looking determination applicable to all properties within the village and not one made on a case-by-case basis. And it is unquestionable that before the ordinance was enacted, short-term rentals were permitted (*see* ¶¶ 31-32). "Because the Ordinance changes the allowed uses of property and includes multiple indicia of traditional zoning ordinances, the circuit court correctly concluded that it was a zoning ordinance. And, as the circuit court noted, the Village's passage of the Ordinance sidestepped the proper process to enact a zoning ordinance. We conclude that the Village did violate

Wildwood's procedural due process rights" (¶ 50).

Lastly, the court of appeals concluded that an award of attorney fees, including fees for the time spent preparing the motion for attorney fees, was appropriate. Said the court: "Wildwood articulated that it was seeking declaratory and summary judgment for a violation of its procedural due process rights to have the Ordinance enacted via the process necessary for a zoning ordinance. Wildwood proceeded to obtain relief for that specific violation. The circuit court granted Wildwood the relief it sought and declared that the Ordinance was a zoning ordinance that was improperly enacted by the Village and was void and unenforceable. Wildwood achieved more than partial success on its claim; it achieved complete success on its main goal" (¶ 44).

## Unemployment Insurance

### Salespersons – "Consumer Products"

***Abby Windows LLC v. Labor & Indus. Rev. Comm'n*, 2025 WI App 50 (filed July 23, 2025) (ordered published Aug. 27, 2025)**

**HOLDING:** The respondent salesperson sold "consumer products," the work he performed for the petitioner company fits in the exclusion from the definition of "employment" in Wis. Stat. section 108.02(15)(k)16., and therefore he is ineligible for unemployment insurance.

**SUMMARY:** Respondent Tarpey worked as a sales and design consultant for Abby Windows, an exterior renovation company, for approximately one year. During that time, he went into prospective customers' homes and sold doors, windows, roofs, gutters, and siding. He did not, however, sell stand-alone products; rather, his sales included installation of the products purchased. Abby Windows paid Tarpey on a commission basis for each sale. He did not work in or from an established retail office.

When Abby Windows informed Tarpey that his services were no longer needed, he filed for unemployment insurance (UI) benefits. The Labor and Industry Review Commission determined that he was eligible for these benefits. The circuit court disagreed. In an opinion authored by Judge Grogan, the court of appeals affirmed.

The issue in the case was whether Tarpey's work was within an exclusion from the definition of "employment" in the UI statute. Wisconsin Statutes section 108.02(15)(k)16. provides that the term "employment" does not include service "[b]y an individual who is engaged, in a home or otherwise than in a permanent retail establishment, in the service of selling or soliciting the sale of consumer products for use, sale, or resale by the buyer, if substantially all of the remuneration therefor is directly related to the sales or other output related to sales rather than to hours worked."

It was undisputed that Tarpey did not perform work in a retail setting or that his compensation was commission based on sales rather than on hours worked. The question was whether he sold "consumer products for use, sale, or resale by the buyer." This in turn required the court to determine what constitutes a "consumer product" within the meaning of the statute.

"Consumer product" is not defined in the UI statute, but the appellate court discerned its meaning from dictionaries as unambiguously referring to "physical or tangible items or objects an individual purchases for that individual's personal use in some manner. It is also apparent based on the definitions set forth above that 'consumer products' is broad enough to encompass those physical or tangible items or objects tied to (or that require) an incidental service such as installation or application of the product purchased. In other words, the mere fact that a physical or tangible product requires some type of incidental installation, application, or related service does not automatically transform the fundamental nature of the item into something that is not a 'consumer product'" (¶ 30).

To the extent that the definition of "consumer products" is sufficiently broad to encompass incidental services such as the installation or application that are tied directly to a physical or tangible product, the appellate court was satisfied that "the doors, windows, siding, and roofing Tarpey sold – which included incidental installation of those products – fall within the meaning of 'consumer products' as set forth in Wis. Stat. § 108.02(15)(k)16. Each of these items are clearly products a customer purchases to use to protect the interior of a customer's home, and windows and doors are further used for additional purposes such as accessing the home and circulating or 'airing out' the home under pleasant weather conditions. Had the legislature intended to exclude incidental services related to the installation of such products from falling within § 108.02(15)(k)16's exclusion, it certainly could have done so. It did not" (¶ 33).

In sum, Tarpey sold "consumer products" and the work he performed for Abby Windows was within the exclusion from the definition of "employment" in Wis. Stat. section 108.02(15)(k)16. Accordingly, he is not entitled to UI benefits (*see* ¶ 1). **WL**