

Criminal Procedure Conservation Wardens – Power to Conduct Investigations

State v. Phelan, 2025 WI App 57 (filed Aug. 14, 2025) (ordered published Sept. 25, 2025)

HOLDING: Certain evidence acquired by a conservation warden should have been suppressed in the defendant's criminal prosecution.

SUMMARY: An on-duty conservation warden with the Wisconsin Department of Natural Resources (DNR) made observations that caused him to believe that defendant Phelan had committed a littering offense on land that was not supervised, managed, and controlled by the DNR. The warden followed Phelan and observed driving behavior indicative of impairment. After the warden stopped Phelan's vehicle, the warden detected the smell of burned marijuana coming from the vehicle and observed that Phelan's eyes were bloodshot and glassy and his speech was slurred. Phelan exited the vehicle, and the warden administered field sobriety tests and a preliminary breath test. Phelan admitted that there was marijuana in the vehicle and that he had ingested marijuana earlier that day.

The warden then requested the sheriff's office to send a "back up" officer and a drug recognition expert to the scene. Phelan showed signs of impairment on the drug recognition test and admitted to the testing officer that he had smoked marijuana about four hours earlier. The other

deputy arrested Phelan. A test of Phelan's blood revealed the presence of Delta 9 THC (a restricted controlled substance).

Based on this incident, the state charged Phelan with criminal law violations that included operating a vehicle with a restricted controlled substance in his blood, specifically Delta 9 THC, as a third offense. Phelan moved to suppress evidence, arguing that the warden could not arrest, detain, or investigate him for any suspected law violation other than littering under applicable statutory provisions.

After the circuit court denied the motion, Phelan was found guilty at a jury trial of operating with a restricted controlled substance in his blood and possession of drug paraphernalia. He appealed the denial of his motion to suppress. In an opinion authored by Judge Blanchard, the court of appeals reversed.

The appellate court concluded as follows:

1) All DNR wardens have limited law enforcement powers that include the authority to stop vehicles to enforce law violations specified in Wis. Stat. section 29.921(1), which include littering.

2) The warden in this case was a "certified warden." A certified warden is one who has completed a law enforcement training program and is certified as qualified to be a law enforcement officer. A certified warden who is on duty and displays a sign of the warden's office may arrest any person anywhere in the state who has committed a crime in the presence of the warden. However, certified wardens "may not conduct investigations for violations of state law," except in identified circumstances. See Wis. Stat. § 29.921(5).

3) During the warden's investigation of suspected littering authorized under Wis. Stat. section 29.921(1), the warden acquired authority under Wis. Stat. section 29.921(5) to arrest Phelan. As a consequence, the warden also had the authority to detain him, based on probable cause to believe that Phelan had committed the crime of possessing THC in violation of Wis. Stat. section 961.41(3g)(e), while Phelan was in the warden's presence (see ¶ 5).

4) Evidence obtained by the warden before he asked Phelan to exit his vehicle was admissible (see ¶ 7). However, by subjecting Phelan to a series of tests after Phelan exited the vehicle and by asking him questions related to driving while impaired, possibly based on marijuana

use, the warden violated the general prohibition on investigations codified in Wis. Stat. section 29.921(5). The appropriate remedy for the warden's prohibited solo investigation of suspected impaired driving is suppression of its evidentiary fruits (see ¶ 6).

5) The evidence obtained by the deputy sheriffs, including the results of a chemical test of Phelan's blood, was properly admitted into evidence (see ¶ 7).

In a footnote, the appellate court indicated that if the stop of Phelan had occurred on land supervised, managed, and controlled by the DNR, "then the prohibition on investigation for any crime committed in the warden's presence, such as possession of THC, would not have applied. See §§ 29.921(1), 29.924(1)" (¶ 62 n.14).

Insurance Directors and Officers Coverage – Exclusions – "Claims Made" – Prior Notice

Somerset Condo. Ass'n v. RC Somerset LLC, 2025 WI App 58 (filed Aug. 20, 2025) (ordered published Sept. 25, 2025)

HOLDING: A prior-notice exclusion in an insurance policy did not apply because potential liability did not turn on related "wrongful acts" in an earlier lawsuit involving a different policy.

SUMMARY: Somerset Condominium Association managed a condominium complex. Erie Insurance Exchange issued an insurance policy to Somerset that contained several forms of coverage, including a directors and officers (D&O) liability form. A failed development project resulted in litigation, including counterclaims brought against Somerset. Erie intervened, seeking a declaration that there was no coverage on the counterclaims against Somerset (see ¶ 14). In a summary-judgment hearing, the circuit court ruled that a "Prior Notice" exclusion in the D&O form barred coverage for the counterclaims against Somerset.

The court of appeals reversed and remanded in an opinion authored by Judge Neubauer. "The Prior Notice exclusion bars coverage for '[a]ny liability arising out of the facts alleged, or to the same or related "wrongful acts" alleged or contained in any "claim" which has been reported, or in any circumstances of which notice has been given, under a prior insurance policy' (¶ 2).

Absent "on-point authority in Wisconsin," the court turned to several



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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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non-Wisconsin cases that had dealt with similar exclusions (¶ 24). The court's conclusion "construes the prior notice exclusion in the context of the D&O Liability Form as a whole and aligns with the type of coverage the form affords.... The D&O Liability Form is a 'claims made' form of coverage. Claims made policies 'are intended by insurers to avoid the hazard of an indefinite future: Once the policy period has expired, the book can be closed on everything except then-pending claims'" (¶ 34).

Summarizing its holding, the court concluded that "this exclusion does not bar coverage with respect to two of the counterclaims asserted against Somerset in this case – tortious interference and slander of title – because Somerset's potential liability for those counterclaims does not arise out of related 'wrongful acts' alleged in a prior lawsuit filed against Somerset in which Erie had provided a defense under a different policy. Based upon our analysis and application of the exclusion, we conclude that the circuit court erred in reaching a contrary conclusion" (¶ 2).

Public Records Law Text Messages – "Records" – Voluntary Release of Requested Records

**Midwest Env't Advocs. Inc. v. Prehn, 2025
WI App 55 (filed July 29, 2025) (ordered
published Sept. 25, 2025)**

HOLDINGS: The multiple holdings in this case are summarized in the text that follows.

SUMMARY: Prehn was a member of the Wisconsin Natural Resources Board (NRB), and his term was set to expire on May 1, 2021. However, he refused to vacate his seat on the NRB when that date arrived. Seeking to learn more about the situation, Midwest Environmental Advocates Inc. (MEA) submitted a public records request for Prehn's communications, including text messages, regarding his tenure on the NRB.

MEA ultimately filed this lawsuit claiming that Prehn violated the public records law by arbitrarily and capriciously denying and delaying production of certain text messages responsive to its request. Prehn moved to dismiss the complaint, contending that the requested commu-

nications were not "records" and that he was not an "authority" under the public records law. The circuit court denied the motion.

The parties then agreed to a forensic inspection protocol that included a schedule and procedure for an independent forensic inspection of Prehn's digital devices to identify additional responsive records for Prehn to produce. The circuit court incorporated into its scheduling order the schedule and procedure set forth in the protocol. In accordance with that procedure, Prehn provided MEA an additional 159 communications responsive to its initial public records request.

After production of the records, MEA and Prehn filed cross-motions for summary judgment. MEA argued in its motion that because it had substantially prevailed on its claims, MEA was entitled to summary judgment, reasonable costs and attorney fees under Wis. Stat. section 19.37(2)(a), and punitive damages under Wis. Stat. section 19.37(3). Prehn argued in his motion that he was entitled to summary judgment because the case became moot after he voluntarily provided all communications responsive to

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MEA's initial public records request under the terms of the protocol.

The circuit court agreed with Prehn, relying on the Wisconsin Supreme Court's decision in *Friends of Frame Park U.A. v. City of Waukesha*, 2022 WI 57, 403 Wis. 2d 1, 976 N.W.2d 263. In this decision, the Wisconsin Supreme Court held that to "prevail in whole or in substantial part" under Wis. Stat. section 19.37(2)(a) such that the requester is entitled to costs and attorney fees, the requester "must obtain a judicially sanctioned change in the parties' legal relationship" (see ¶ 3 n.2). The circuit court concluded that mid-litigation production of the requested records before a judicially sanctioned change in the parties' legal relationship rendered the MEA's lawsuit moot.

On this mootness issue, the court of appeals disagreed with the decision of the circuit court. It relied on *Wisconsin State Journal v. Blazel*, 2023 WI App 18, 407 Wis. 2d 472, 991 N.W.2d 450, which concluded that no majority of justices in *Friends of Frame Park* ruled that voluntary release of requested records during litigation of a public records action renders the action moot (see ¶ 4). The *Blazel* court thus reaffirmed the holding in *Portage Daily Register v. Columbia County Sheriff's Department*, 2008 WI App 30, 308 Wis. 2d 357, 746 N.W.2d 525, that the voluntary disclosure of a requested record does not render the action moot because a ruling on the merits will have the practical effect of determining the

requester's right to recover damages and fees under Wis. Stat. section 19.37(2)(a) based upon the custodian's denial of its request (*id.*). The circuit court thus committed error when it declined to follow the *Blazel* decision.

The court of appeals considered many other substantive and procedural issues in the lengthy opinion authored by Judge Geenen. The following text captures the landscape of the court's holdings:

"We conclude that: (1) Prehn's cross-appeal is timely; (2) Prehn is not aggrieved by the circuit court's order granting him summary judgment, so he cannot cross-appeal that order; (3) the circuit court correctly denied Prehn's motion to dismiss because the requested communications are 'records,' and although Prehn is not an 'authority' under the Public Records Law, he is a necessary party to this litigation under Wis. Stat. § 803.03(1); (4) the circuit court erroneously exercised its discretion when it denied MEA's postjudgment motion because it based its decision on a manifest error of law; (5) extraordinary circumstances exist in this case justifying relief from judgment under Wis. Stat. § 806.07(1)(h); and (6) MEA achieved a judicially sanctioned change in the parties' legal relationship" (¶ 102).

With reference to the third numbered holding above, the text messages were "records" under the public records law because they have a connection to a governmental function and Prehn's office (see ¶ 49). As an example of the sixth

numbered holding – that MEA achieved a judicially sanctioned change in the parties' legal relationship – the court of appeals found that the protocol was incorporated into the circuit court's scheduling order and thereby became a court order for Prehn to cooperate with the search for and production of responsive records (see ¶ 98).

Real Property Zoning – Nonconforming Use *Doubleday v. C. Goeman Props. V LLC*, 2025 WI App 56 (filed Aug. 13, 2025) (ordered published Sept. 25, 2025)

HOLDING: The circuit court correctly ruled that a new owner had no right to a nonconforming use of property.

SUMMARY: The property at issue in this case had been used for many years to operate a bar and restaurant. In 1999, the town of Hartford zoned the area residential but permitted the property's continued nonconforming use as a bar and restaurant. In September 2017, the owner closed the bar and restaurant for financial reasons. A bank later foreclosed on the property and eventually sold it to Goeman. In April 2019, Goeman began operating the property as a bar and restaurant.

Neighbors brought a private zoning enforcement action to prohibit Goeman's nonconforming use. The circuit court enjoined the nonconforming use. The court of appeals affirmed in an opinion authored by Judge Gundrum.

A town ordinance provided that if a "nonconforming use is discontinued for a period of twelve (12) consecutive months, any future use ... shall conform to the regulations of the district in which it is located." The property's use as a bar and restaurant ended in September 2017. "A one-time beer sale to a banker and prospective buyer in a place that, as the circuit court found, was 'never held open to anyone of the public, during which the premises was otherwise entirely unfit for food or beverage service, [and] unfit for occupancy' does not establish that the property was being used as a bar and restaurant during the relevant twelve-month time period" (¶ 13). **WL**

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