## Family Law

### Divorce – Motion to Terminate Maintenance

***Borowski v. Borowski*, 2026 WI App 8 (filed Jan. 29, 2026) (ordered published Feb. 25, 2026)**

**HOLDING:** The circuit court correctly denied the former husband's motion to terminate his maintenance obligation to his former spouse.

**SUMMARY:** Steve and Kim divorced in 2020 after 23 years of marriage. For these proceedings, Kim was represented by counsel and Steve represented himself. A marital settlement agreement (MSA), which resolved all issues pending in the divorce, was incorporated in the divorce judgment. The MSA stated, in pertinent part, that Steve waived maintenance from Kim and that Steve would pay maintenance to Kim through January 2029 according to a maintenance schedule that reflected periodic payment increases. The MSA also stated that "[u]pon Kim remarrying or living in a marital-like relationship, it is the intention of the parties that Steve shall have motion privileges to terminate his maintenance obligation to Kim" (¶ 3).

In 2023, Steve moved to terminate his maintenance payments, alleging that Kim had entered into a marital-like relationship by living with a romantic partner. A family court commissioner denied the motion. Following a de novo hearing, the circuit court agreed with the commissioner that Steve failed to demonstrate that Kim was in a marital-like relationship, and the court likewise denied Steve's maintenance-termination motion. In an opinion authored by Judge Taylor, the court of appeals affirmed.

At the heart of this case was the meaning of the terminology "marital-like relationship" in the MSA. Although the court of appeals agreed with Steve that the phrase is ambiguous, it concluded that "the parties intended that it would not be triggered absent proof of more than de minimus financial support provided to Kim by a romantic partner, such as through the sharing of income or holding of joint assets" (¶ 18). Said the court: "[O]ur consideration of dictionary definitions of the individual words included in the phrase marital-like relationship and a broader consideration of the meaning of 'marriage,' together with an examination of the MSA, leads to the conclusion that the parties intended that a marital-like relationship be triggered by proof of a continuous, romantic relationship that provides more than de minimus financial

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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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support for Kim" (¶ 29). Steve conceded as much during his testimony before the circuit court (*see* ¶ 36). That concession was supported by various email communications between Kim's attorney and Steve that were exchanged before the parties agreed to the MSA (*see* ¶ 10).

Steve failed to present evidence in the circuit court proceedings that Kim's relationship with the partner provided her with more than de minimus financial support. Kim's undisputed testimony supported a conclusion that the financial arrangement with her partner was more akin to roommates sharing common living expenses than to a marital-like relationship that provided more than de minimus financial support to Kim (*see* ¶ 51). Accordingly, the appellate court rejected Steve's argument that Kim was in a marital-like relationship and that his maintenance obligation should be terminated (*see* ¶ 18).

## Insurance

### Made Whole Doctrine – Crossclaims – Artificial Issues – Subrogation

***Mani v. Selective Ins. Co. of Am.*, 2026 WI App 6 (filed Jan. 21, 2026) (ordered published Feb. 25, 2026)**

**HOLDINGS:** The made whole doctrine did not apply to Humana's crossclaims because they were not grounded in subrogation, and Humana was not entitled to summary judgment.

**SUMMARY:** While working for his employer, Mani was injured in a car accident caused by an underinsured motorist. Mani later sued the tortfeasor and the tortfeasor's liability insurer as well as Mani's employer's underinsured motorist insurer. Mani also named as involuntary plaintiffs several other insurers, including Humana, which had paid his medical expenses. The parties agreed that damages were the only issue to be addressed at trial and that "although Humana's payments to treatment providers were reasonable in amount and medically necessary, whether the medical treatment was related to the accident remained in dispute" (¶ 6). One insurer paid its policy limits and agreed that about $400,000 would be placed in trust until the resolution of Humana's subrogation lien.

However, Humana did not file a motion on the subrogation lien; instead, it filed an answer and crossclaim for declaratory judgment and breach of contract on the theory that Mani had "wrongfully" allowed Humana to pay excluded claims. "Specifically, Humana asserted that the insurance policy excludes coverage for injuries where 'Workers' Compensation or similar coverage' is available, and that it is entitled to recover any costs from Mani that had been paid out in relation to the accident-related injury" (¶ 8). Humana also moved for summary judgment on the crossclaims.

The circuit court denied the summary-judgment motion. It also concluded that the made whole doctrine applied to Mani's claims and that Humana was making an impermissible "end run" around that rule (¶ 15). The circuit court scheduled a *Rimes* ("made whole") hearing. After all this, Humana filed a motion dismissing its crossclaims and conceding that Mani had not been made whole. The circuit court dismissed Humana's crossclaims with prejudice. Humana appealed.

The court of appeals, in an opinion authored by Judge Geenen, affirmed in part, reversed in part, and remanded the matter. "Humana's appeal revolves around the circuit court's conclusion that the made whole doctrine applied to Humana's crossclaims" (¶ 18). The court ruled in Humana's favor because "[h]aving settled the issue of whether Mani was made whole," the only question remaining was "whether the made whole doctrine applies to Humana's crossclaims" (¶ 22).

The court of appeals held that the crossclaims were not controlled by the made whole doctrine because the crossclaims were not "grounded in subrogation" (¶¶ 24, 28). "In every Wisconsin case cited by Mani where the made whole doctrine was applied, the insurer was exercising subrogation rights" (¶ 32). "A common thread runs through the cases applying the made whole doctrine: the insurers are exercising subrogation rights to recover payments made on claims for which the insurers do not dispute coverage. In subrogation, a third-party tortfeasor causes a covered injury to the insured, triggering the insurer's obligation under the policy to pay medical benefits. Here, Humana's crossclaims assert that it was never obligated to pay Mani's benefits at all because Mani's injuries fell within the scope of a policy exclusion, namely, the Workers' Compensation provision" (¶ 33).

That said, the court ruled that Humana was not entitled to summary judgment. The record was "replete with genuine issues of material fact" (¶ 36).

## Motor Vehicle Law

### OWI – Prior Refusal to Submit to a Warrantless Blood Draw – Effect on Later Criminal Prosecutions

***State v. Sparby-Duncan*, 2026 WI App 9 (filed Jan. 6, 2026) (ordered published Feb. 25, 2026)**

**HOLDING:** The state was not seeking to unlawfully use the defendant's prior refusal to submit to a warrantless blood draw for purposes of increasing the criminal penalty for subsequent operating-while-intoxicated (OWI)-related offenses.

**SUMMARY:** In 2008, defendant Sparby-Duncan was convicted of refusing to submit to a warrantless blood draw under Wisconsin's implied consent law, which was his first OWI-related conviction under Wis. Stat. section 343.307(1) (the statute used to count OWI-related convictions). In 2013, he pled guilty to operating a motor vehicle with a detectable amount of a restricted controlled substance (RCS), which would have been his second OWI-related conviction. As a result of this conviction, his license was revoked and he was ordered to install an ignition interlock device (IID).

In the present case, the defendant is criminally charged with violating the IID order. Further, as a result of the IID order, he is subject by statute to a prohibited alcohol concentration (PAC) of 0.02 and he is also being prosecuted for violating the PAC statute. The circuit court denied a defense motion to dismiss these charges, and the court of appeals granted the defendant's petition for leave to appeal a nonfinal order. In an opinion authored by Judge Gill, the court of appeals affirmed.

In *Birchfield v. North Dakota,* 579 U.S. 438 (2016), the Supreme Court held that criminal penalties may not be imposed for the refusal to submit to a blood test. A subsequent Wisconsin case concluded that it is therefore unconstitutional to increase the criminal penalty for a separate, subsequent OWI because, in a prior instance, the driver refused a warrantless blood draw. *See State v. Forrett,* 2022 WI 37, 401 Wis. 2d 678, 974 N.W.2d 422.

As a result of these decisions, the state did not count the 2008 implied consent violation as a prior OWI-related conviction in the present case and it charged the PAC count and a related OWI count as second offenses. However, in his motion to dismiss, the defendant argued that he was entitled to the additional relief of dismissal, contending *inter alia* that the IID and PAC charges in this case

are inextricably intertwined with his 2008 refusal because, absent that refusal, the sentencing judge in the 2013 case could not have imposed an IID and, absent the IID order, he would not have been subject to a 0.02 PAC (*see* ¶ 7).

The state responded that the IID and PAC charges in the present case do not threaten the defendant with criminal penalties based on his 2008 refusal to submit to a warrantless blood draw. The state argued that the current charges seek to penalize the defendant's violations of civil consequences that were lawfully imposed as a result of that refusal (*see* ¶ 27).

The court of appeals agreed with the state. Under *Birchfield,* it is clear that the government may impose civil penalties on an individual for refusal of a warrantless blood draw and that is what occurred here. "Namely, as a result of Sparby-Duncan's 2008 refusal, the circuit court in his 2013 RCS case ordered him to install an IID in his vehicle, and as a result of that IID order, Sparby-Duncan is subject to a PAC of 0.02. The current charges against Sparby-Duncan threaten him with criminal penalties for violating the IID order and driving with a PAC over 0.02, not for his 2008 refusal. Nothing in *Birchfield, Dalton, or Forrett* prohibits the government from imposing criminal penalties on an individual for his or her violation of civil consequences that were imposed as a result of a refusal to submit to a warrantless blood draw" (¶ 28).

Put another way, "the State is not seeking to treat Sparby-Duncan's 2008 refusal as an offense for purposes of increasing the criminal penalty for a subsequent offense. The State is instead seeking to impose criminal penalties on Sparby-Duncan for his violation of the IID order – a civil consequence of his refusal – and his operation of a vehicle with a PAC" (¶ 31).

Accordingly, the appellate court affirmed the circuit court's order denying the defendant's motion to dismiss the IID and PAC charges in this case.

## Taxation

### Sales Tax – Penalties – Marketplace Provider Law

***StubHub Inc. v. Wisconsin Dep't of Revenue*, 2026 WI App 7 (filed Jan. 13, 2026) (ordered published Feb. 25, 2026)**

**HOLDING:** StubHub was subject to both a sales tax and the penalty for failing to pay it.

**SUMMARY:** "StubHub operates an online marketplace where tickets to sporting events, concerts, theatre, and other live entertainment events are bought and sold. To use StubHub's online marketplace, both ticketholders and ticket buyers register for an account with StubHub. As part of the account registration, users were required to accept StubHub's User Agreement that contained terms and conditions governing their use of StubHub's website" (¶ 2). StubHub's revenue came from fees it collected when a ticket was sold (*see* ¶ 4). For the years 2008-13, about $154 million in ticket sales occurred through StubHub's online marketplace.

In 2014, the Wisconsin Department of Revenue (DOR) audited StubHub and assessed $8.5 million in back taxes, another $8.5 million in interest and penalties, and a 25% negligence penalty (*see* ¶ 8). The Tax Appeals Commission granted summary judgment in favor of the DOR on whether StubHub was subject to the sales tax but ruled that StubHub was not subject to the penalty provisions (*see* ¶ 9). A circuit court ruled that the sales tax statute was ambiguous and StubHub was not subject to the sales tax.

The court of appeals reversed in an opinion authored by Judge Colón. "We conclude that StubHub is both subject to the sales tax and subject to penalties for its failure to pay the sales tax" (¶ 13). The court was not persuaded that StubHub was a mere "facilitator" or an "auctioneer" (¶ 24). In so ruling, the court addressed the Marketplace Provider Law, enacted in 2019. *See* 2019 Wis. Act 10, §§ 11, 12, 22, 24. (¶ 25) "[The] ... Marketplace Provider Law was intended to clarify rather than substantively change the law, and we reject the idea that the Marketplace Provider Law stands for the proposition that StubHub was not subject to the sales tax prior to the passage of the law" (¶ 34).

The court also held that StubHub was subject to the penalty provisions despite arguments by both the commission and StubHub that it was not. The court relied on Wisconsin Tax Bulletin 172, which showed that "DOR considered that StubHub was a ticket broker subject to the sales tax" (¶ 40). **WL**