Construction Litigation

Bench Trials – Amended Pleadings – Home Improvement Practices Act – "Major Renovation" Contracts

***Lowell Mgmt. Servs. Inc. v. Ruecker*, 2026 WI App 20 (filed March 25, 2026) (ordered published April 29, 2026).**

HOLDING: The major-renovations exception to the Home Improvement Practices Act (HIPA) applied to a home remodeling contract.

SUMMARY: This appeal arises from a bench trial involving a construction contract and a plethora of procedural issues. The Rueckers sued Lowell Management Services Inc. (LMS) and its president (Lowell) over the remodeling of their home. The Rueckers prevailed in a bench trial. Lowell appealed, challenging "the trial court's orders finding personal jurisdiction over Lowell; allowing amendment of pleadings mid-trial; applying an administrative code provision; and awarding damages for breach of contract, slander of title, and double damages against" Lowell (¶ 1).

The court of appeals reversed and remanded in an opinion authored by Judge Lazar. The opinion addresses an issue of "first impression" involving the "major renovation exception" to the HIPA. *See* Wis. Admin. Code section ATCP 110.01(2), (2m) (¶ 2).

First, "several rules of civil procedure were not followed," which meant that the court lacked personal jurisdiction over Lowell himself despite an 11th-hour amendment to the pleadings (¶ 41). "Filing an amended pleading right before the 90-day window expires does not 'restart' a service clock for the initial pleading. To hold otherwise would effectively eviscerate the statutory service time period and would resurrect an 'untimely' service period" (¶ 54). Put simply, "a party cannot amend a pleading that is not live or operative" (¶ 55). The court also rejected the related argument that the Rueckers had waived their challenge to the court's personal jurisdiction (*see* ¶ 58), and the same failure extended to the third-party complaint (*see* ¶ 60).

Second, error also occurred when the circuit court permitted various "mid-trial" amendments against the defendant LMS for violations of the HIPA and slander of title. The amendments contravened Wis. Stat. section 802.09(2), which requires a showing that the party consented (expressly or impliedly) to the unpleaded claim or that it was in the "interest of justice" (¶ 65). The circuit court had conducted no such inquiry (*see* ¶ 70).

Third, the court agreed with both parties that it must consider "HIPA's major renovation exception" to fully resolve the appeal. "We conclude, as a matter of first impression, that HIPA's major renovation exception applies to the LMS 'not to exceed' contract and that the trial court erred by holding to the contrary" (¶ 71).

"The plain meaning of the LMS contract was that, for the total price of $511,331.15 as stated twice in the contract ..., LMS agreed to provide a major home renovation for a house that was currently appraised at $415,600. The Rueckers used that total price as the starting point for reductions in order to lower that price below the house's assessed value during the initial bench trial. It was only when the Rueckers decided to alter their approach that they focused solely upon the phrase 'not to exceed.' We conclude the trial court erred when it ruled that the HIPA major renovation exception did not apply to the LMS contract, and we remand with instructions to vacate those portions of the judgment against LMS for damages and attorneys' fees relating to [the] HIPA" (¶ 84).

In a concurring opinion, Judge Grogan addressed the rule concerning citation of unpublished opinions because a party used an unpublished per curiam opinion in this case (*see especially* ¶ 95).

Criminal Procedure

Preliminary Hearings – Bindover Based Upon Reading the Criminal Complaint Into the Record

***State v. Robinson*, 2026 WI App 26 (filed March 12, 2026) (ordered published April 29, 2026)**

HOLDINGS: 1) The criminal complaint that was read into the record at the preliminary hearing provided sufficiently reliable evidence to support a finding of probable cause. 2) The defendant was not deprived of a meaningful ability to cross-examine the state's only witness at the preliminary hearing – an investigator from the district attorney's office who simply read the criminal complaint into the record – nor was he deprived of an opportunity to challenge the plausibility of the complaint's allegations.

SUMMARY: Defendant Robinson was charged with multiple felonies allegedly committed on two separate occasions. At the preliminary hearing, the sole witness was a district attorney's office investigator, called by the prosecutor. The investigator's testimony consisted of reading, verbatim, the entire probable-cause section of the criminal complaint. The investigator also testified that he knew what the person identified in the complaint as Robinson looks like and he then identified Robinson.

The defendant was bound over for trial. Following his arraignment, he moved to dismiss the case. The circuit court denied the motion, and the court of appeals granted the defendant's petition for leave to appeal. In an opinion authored by Judge Blanchard, the court of appeals affirmed.

On appeal, the defendant first argued that the probable-cause section of the complaint failed to provide sufficiently reliable evidence to support the showing of probable cause necessary for bindover. Applying the de novo standard of review, the appellate court rejected this argument. In an extensive probable-cause section, the complaint purports to summarize detailed allegations contained in multiple police reports. This includes reports in which officers purported to directly quote witnesses.

Although the complaint contains multiple layers of hearsay, hearsay statements – even hearsay statements that do not fall within one of the statutory exceptions to the general rule against the admissibility of hearsay – can be considered at a preliminary hearing. *See*


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.

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Wis. Stat. § 970.038. The circuit courts remain the evidentiary gatekeepers and are obligated to consider, on a case-by-case basis, the reliability of the state's hearsay evidence in determining whether it is admissible and assessing whether the state has made a plausible showing of probable cause. *See State v. O'Brien,* 2014 WI 54, 354 Wis. 2d 753, 850 N.W.2d 8.

The appellate court carefully analyzed the allegations in the lengthy criminal complaint. It concluded that "[t]he allegations that we have summarized, when construed in the context of the probable cause section as a whole and the investigator's identification of Robinson, provide sufficiently reliable evidence to support a plausible account" that a felony was probably committed on each of the two dates specified in the complaint (¶ 41). "The circumstances described in the complaint convey, at least on their face, timely accounts by people with first-hand information, given with what could be appropriate motivations to provide accurate information to police" (¶ 44).

The defendant also argued that he was improperly hindered in opposing bindover because cross-examining the investigator could yield nothing of value for the defense. The court rejected this argument "based on the reasoning in *State v. O'Brien*, 2014 WI 54, 354 Wis. 2d 753, 850 N.W.2d 8. The court in *O'Brien* upheld the constitutionality of Wis. Stat. § 970.038, which allows courts to rely on hearsay to establish probable cause. *O'Brien* explains that, after the passage of § 970.038, the pertinent statutes retain a discrete set of adversarial features that benefit defendants [for example, cross-examination of prosecution witnesses and the ability of the defense to call witnesses] but that the rights of defendants are limited to those features, which are not augmented by the constitutional right to confrontation that is available at trial" (¶ 4).

The preliminary examination here was not defective because the prosecution did not call as a witness someone who was a victim, officer, or other witness who was knowledgeable about the allegations in the complaint (*see* ¶¶ 57-58). The complaint in this case was substantial in ways the court described. "But, as we have mentioned, in other cases the defense could argue that the prosecution has relied on the complaint alone to its detriment, because the complaint contains significantly attenuated or unclear hearsay statements or statements that are otherwise illogical or materially inconsistent" (¶ 70).

In a footnote, the court noted, with examples, that it can be difficult to establish generally applicable rules regarding "readers" of criminal complaints at preliminary hearings (¶ 55 n.10).

Disinterment

Application for Disinterment – Requirements – Power of Circuit Court in Disinterment Proceedings

***Papanastasiou v. Sebastian*, 2026 WI App 24 (filed March 18, 2026) (ordered published April 29, 2026)**

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

SUMMARY: This case involved disinterment, which is allowed only with permission from "the coroner or medical examiner of the county in which a decedent's corpse is interred." Wis. Stat. § 69.18(4)(a). There are two legal avenues or "paths" by which a person can apply to the medical examiner or coroner for permission to disinter a grave: 1) a court order from a "court of competent jurisdiction"; or 2) with a written application that must be a) "signed by the person in charge of the disinterment" and b) signed by a person on the priority list "when persons in prior classes are not available at the time of application, and in the absence of actual notice of contrary indications by the decedent or actual notice of opposition by a member of the same or a prior class." *Id.* The statute provides for seven classes of people, in priority order, who may sign as the person applying for a disinterment permit (*see* ¶ 18). As relevant here, spouses have a higher priority than siblings.

In this case, defendant Judy Sebastian sought to disinter the remains of her late husband, who was killed in action while serving in the military in Vietnam in 1967 and was buried in Pinelawn Memorial Park in Milwaukee. Proceeding along path 2 as described above, she planned to reinter him at a different cemetery in an adjacent county and she notified her late husband's sisters about her plans. The sisters objected to the proposed disinterment. The Milwaukee County Medical Examiner's Office issued a disinterment permit, and the sisters filed this lawsuit.

The circuit court concluded that the disinterment permit was invalid because Sebastian's application was not signed by "the person in charge of the disinterment" as required by the statute. Having determined that Sebastian's application was invalid, the circuit court proceeded to analyze the case utilizing path 1 as described above, eventually denying permission for disinterment and permanently enjoining Sebastian from applying to disinter her late husband's remains.

In an opinion authored by Chief Judge White, the court of appeals agreed with the circuit court that the disinterment permit was invalid. The court of appeals interpreted the phrase "the person in charge of the disinterment" to mean a representative of the cemetery authority who effectuates opening and closing the burial place of a decedent, as prescribed by Wis. Stat. section 157.111 (*see* ¶ 12). In this case, Sebastian's application contained the funeral director's signature; however, the cemetery authority over the Pinelawn Cemetery did not sign it. Accordingly, the disinterment permit issued by the medical examiner was invalid (*see* ¶ 14).

The appellate court also concluded, however, that when there is a controversy over a disinterment permit that arises from the application path (path 2), the circuit court is constrained by the statutory framework. Therefore, the circuit court erred when, after concluding the permit was invalid, it switched the disinterment request to the court's "competent jurisdiction" path (path 1) and considered equitable factors (*see* ¶ 21).

Said the appellate court: "The circuit court's decision to address this matter under purely equitable considerations contravened the statute because it ignored that the statutory priority classes govern and resolve most controversies over disinterment. As such, we clarify that a circuit court does not have authority to enjoin a statutorily higher priority class

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person [for example, a spouse] from receiving or exercising a disinterment permit in favor of the wishes of a statutorily lower priority class person [for example, a sibling]. It does not have authority to insert equitable factors when a party pursued disinterment under the application path [path 2], unless a controversy arises that is not resolved by the plain meaning of the priority classes" (¶ 22).

Lastly, the appellate court concluded that the circuit court's finding that Sebastian's application was incomplete and the permit was invalid does not bar Sebastian from starting again, correcting errors, or submitting a new application for a permit. Nothing in the statute itself bars Sebastian from starting over with a new application for a permit (*see* ¶ 23).

Employment Law

Duty Disability Retirement Benefits – Milwaukee Police Department

***State ex rel. Lara v. City of Milwaukee*, 2026 WI App 23 (filed March 18, 2026) (ordered published April 29, 2026)**

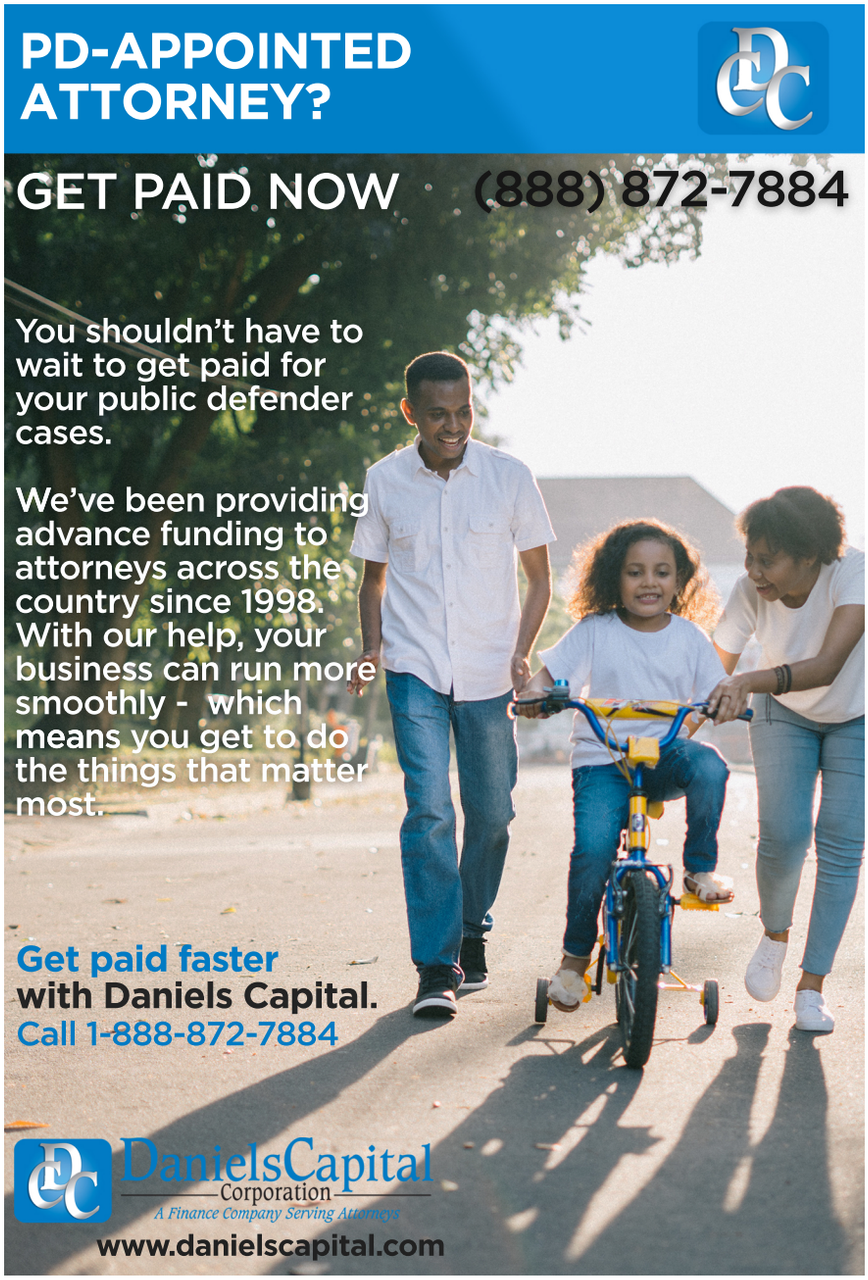
HOLDING: The City of Milwaukee Annuity and Pension Board's decision to deny duty disability retirement (DDR) benefits to a Milwaukee police officer was supported by substantial evidence in the record and was not arbitrary, unreasonable, or contrary to law.

SUMMARY: This case dealt with the long and involved duty disability process that can occur under the Milwaukee City Charter and Wisconsin Statutes. A Milwaukee police officer (Lara) was injured when he hit his head while working at a police facility on Sept. 23, 2019. He filed an application for DDR benefits – a disability program administered under the Milwaukee City Charter. The charter provides that police officers' eligibility for DDR is determined as follows: 1) an applying member must be examined by the Medical Council; 2) the Medical Council "shall make the examination, determination and certification" required in the form prescribed by the [City of Milwaukee Annuity and] Pension Board; and 3) if the Medical Council recommends that the applicant is entitled to DDR benefits, the Pension Board "shall thereupon grant such allowance" (¶ 3).

Lara underwent multiple independent medical examinations (IMEs), all of which concluded that he was not disabled as a result of the workplace injury. The Medical Council reviewed Lara's application for DDR benefits, determined he did not meet the criteria, and recommended denying these benefits. The Pension Board accepted the Medical Council's recommendation.

With that denial, Lara began the municipal administrative review and appeal process codified in Wis. Stat. chapter 68. This process allows a denied benefit claimant to challenge the Medical Council's determination in two parts. First, the claimant may request an independent review of the denial, pursuant to Wis. Stat. section 68.08. Lara petitioned for the independent review, in which the medical evidence and reports in the record were reviewed. The independent reviewer issued a report concluding that Lara's injuries were not a result of the fall on Sept. 23, 2019, and recommending that the Medical Council's decision to deny benefits be affirmed (*see* ¶ 7).

If the claimant is still dissatisfied after the independent review, the claimant can then request an administrative appeal hearing, at which both the appellant and the municipality can be represented by attorneys, present evidence, and examine witnesses. The hearing may "be conducted by an impartial person … designated to conduct the hearing and report to the decision maker." Next, the municipal



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authority must "provide an impartial decision maker … who did not participate in making or reviewing the initial determination" to review the independent hearing examiner's report and make the final determination. The decision-maker makes a final determination and delivers it to the appellant (the claimant) within 20 days after the completion of the hearing and the filing of any briefs (¶ 8).

Lara requested an administrative appeal hearing, which was conducted by the independent hearing examiner (IHE). The IHE issued a report finding that Lara qualified for DDR benefits. The Pension Board returned the report to the IHE for a reassessment of the evidence. The IHE continued to recommend that Lara be considered eligible for DDR benefits.

The Pension Board, however, issued a final determination denying Lara's claim for benefits. The final determination established three reasons for rejecting the IHE's recommendation: 1) the IHE's dismissal of multiple experts who opined that Lara was malingering, 2) multiple factual errors in the IHE's findings, and 3) the conclusory nature of both of the IHE's reports (*see* ¶ 16).

Lara then sought certiorari review in the circuit court, which affirmed the Pension Board's denial of benefits. In an opinion authored by Chief Judge White, the court of appeals affirmed.

A significant issue in this appeal involved Lara's claim that the Pension Board improperly served as the decision-maker for both the initial and final determination of his application for benefits. He argued that the IHE – not the Pension Board – was the proper impartial decision-maker because the board cannot make both the initial and the final determination under Wis. Stat. section 68.11(2) (*see* ¶ 22).

The appellate court disagreed. Although an IHE could be appointed by a municipal authority to serve as the impartial decision-maker, under the statute's plain meaning this is not a requirement. The statute requires only that the impartial decision-maker not participate in the initial determination. Accordingly, the Pension Board had statutory authority to be the decision-maker of the final eligibility determination if it did not make the initial determination on Lara's benefit application (*see* ¶¶ 26-27). The court concluded that the Pension Board's initial action of following the Medical Council's recommendation to deny Lara's application was administrative – the board did not have any discretion at that stage of the proceedings and had to follow the council's recommendation (*see* ¶¶ 29-30).

Said the court: "Considering the initial determination and the final determination procedures, we conclude that the Pension Board did not make both determinations. As noted, the initial determination is driven by the Medical Council's examination determination, and the Pension Board's role in that determination is merely ministerial. In contrast, the Pension Board makes a final determination on a DDR application with consideration of the IHE's report. We conclude that the Pension Board's actions were not contrary to law" (¶ 31).

Lara raised multiple additional issues on appeal, each of which the court of appeals rejected. His claims included allegations that the Pension Board violated the statutory 20-day time limit to issue the final determination, that the board acted unreasonably and contrary to law when it returned the eligibility issue to the IHE for reassessment, and that the board's reliance on the inconsistent IME reports was arbitrary and unreasonable (*see* ¶ 22). With reference to the 20-day time limit, the court concluded that the limit is directory – not mandatory (*see* ¶ 36).

In sum, the court concluded that the Pension Board's decision to deny DDR benefits to Lara was supported by substantial evidence in the record and was not arbitrary, unreasonable, or contrary to law (*see* ¶ 48).

Insurance

Coverage – Exclusions – Ambiguity

***Ramirez v. Voyager Indem. Ins. Co.*, 2026 WI App 21 (filed March 10, 2026) (ordered published April 29, 2026).**

HOLDING: In a case involving two insurers, one policy's exclusion was valid and enforceable and the other was ambiguous and unenforceable.

SUMMARY: A vehicle driven by a Door Dash delivery driver collided with another vehicle in which the plaintiff was a passenger. She sued Door Dash and two insurers, one that insured the Door Dash driver (First Chicago) and another that insured Door Dash (Voyager). The circuit court granted summary judgment in favor of both insurers under exclusions that covered vehicles used for deliveries. The plaintiff appealed.

In an opinion authored by Judge Geenen, the court of appeals reversed the circuit court as to First Chicago and upheld the circuit court as to Voyager. "Basing insurance coverage on whether or not an app was open on [the delivery driver's] phone, especially when no explicit language exists in the policy to address such a situation, would lead to absurd results that frustrate an insured's reasonable expectations" (¶ 15).

Despite a number of "very real public policy concerns" relating to a coverage gap, the court held that there was no coverage under the Voyager policy to begin with (¶ 16). The Voyager policy specifically defined its terms of coverage (*see* ¶ 6).

UIM – Uninsured Vehicle – Unlawful Exclusion – "Drive Other Car"

***Fredrich v. Farmers Grp. Prop. & Cas. Ins. Co.*, 2026 WI App 22 (filed March 10, 2026) (ordered published April 29, 2026)**

HOLDING: An insurance policy contained an unlawful "drive other car" exclusion.

SUMMARY: While riding a bike, Fredrich was hit and injured by a vehicle driven by an uninsured driver. At the time, Fredrich lived with a family member and owned an uninsured vehicle himself. Fredrich claimed coverage under the family member's underinsured motorist (UIM) policy with Farmers Group Property & Casualty Insurance Co.

Farmers denied the claim based on Fredrich's own uninsured vehicle. "Farmers argued that the plain terms of the Policy unambiguously excluded any person who owned an uncovered vehicle from the definition of 'relative,' and because Fredrich owned the uninsured Toyota Corolla, he fell outside the Policy's definition of 'relative'" (¶ 5). The circuit court granted summary judgment in favor of Farmers.

The court of appeals reversed in an opinion authored by Judge Geenen. Parsing the policy's language, the court held that its definition of "relative" "unambiguously excludes any person who owns an uncovered vehicle" (¶ 17). Nonetheless, the court agreed with Fredrich that the policy's manipulation of the term "relative" violated Wis. Stat. section 632.32(5)(j) because it created an unlawful "drive other car" exclusion (*see* ¶ 18). The opinion analyzed the statute's language in light of the case law, conceding that some "tension" existed in the published cases (*see* ¶ 29 n.6). **WL**

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