Contracts

Asset Purchase Agreement – Survival Clauses – Economic Loss Doctrine

***Ripp Distrib. Co. v. Ruby Distrib. LLC*, 2024 WI App 24 (filed March 21, 2024) (ordered published April 24, 2024)**

HOLDING: An asset purchase agreement (APA) barred contract claims under a survival clause, and claims for misrepresentation were barred by the economic loss doctrine.

SUMMARY: Ruby Distribution sold its assets to Ripp Distributing through an APA. The APA included a "survival clause" stating that Ruby's representations and warranties about its assets would survive "for a period of one year from the Closing Date" (¶ 1). Ripp alleged that it later discovered various operational issues. Eighteen months after the "closing date," Ripp sued Ruby for alleged false representations and warranties. The circuit court denied Ruby's motion to dismiss the claims.

On interlocutory appeal, the court of appeals reversed in an opinion authored by Judge Graham. First, the contract claims were time barred by the APA's survival clause. "There are no Wisconsin cases that specifically address the survival of representations and warranties, or that interpret a survival clause in a purchase agreement" (¶ 21). The court's analysis centered on "principles of contract interpretation and the specific language of the APA's survival clause" (¶ 27). The only reasonable interpretation was that the clause provided a one-year contractual limitation period. Claims for breaches of representation and warranties filed after the one-year period must be dismissed (*see* ¶ 40).

Turning from contract law to tort law, the court also held that the economic loss doctrine barred tort claims sounding in the same allegations. Specifically, it rejected arguments that the "fraud-in-the-inducement exception to the economic loss doctrine" spared Ripp's claims (¶ 52). For example, the complaint failed to allege any misrepresentation that was "extraneous" to the contract (¶ 54). Other arguments were also unavailing.

Criminal Procedure

Vehicle Searches – Canines – "Instinct Exception"

***State v. Campbell*, 2024 WI App 17 (filed March 5, 2024) (ordered published April 24, 2024)**

HOLDING: A police canine's warrantless searches of the interior of the defendant's vehicle violated the Fourth Amendment's protection against unlawful searches and seizures.

SUMMARY: Campbell was stopped for traffic violations. While one officer drafted citations, another ordered Campbell to exit the vehicle, which she did, leaving the driver's side door open. The other officer then walked a dog around the vehicle two times, stopping at the open door on both occasions. When reaching the open door, the officer who was holding the dog's leash blocked the dog's continued exterior scan of the vehicle and allowed the dog to enter the vehicle. The dog alerted to Campbell's purse lying on the vehicle's floor. An officer looked inside the purse and found marijuana. The defendant's motion to suppress this evidence was denied by the circuit court, and the defendant pleaded no contest to possessing THC.

In an opinion authored by Judge Gill, the court of appeals reversed. It concluded that the initial seizure of Campbell for traffic violations was constitutional as was the order that Campbell exit the vehicle.

The sole question on appeal was whether the dog's two entries of the defendant's vehicle constituted searches that violated the Fourth Amendment. The parties agreed that the entries were searches; they both constituted trespasses into the interior of the vehicle. Further, none of the typical exceptions to the warrant requirement for searches appeared to apply in this case; for example, the officers did not have probable cause to search the vehicle before the dog's entries.

However, the circuit court upheld the searches based on the so-called instinct exception to the warrant requirement, which some courts in other jurisdictions have adopted. Under this exception, "canine searches that naturally extend into a vehicle during a traffic stop are constitutional if the canine conducts the search 'instinctively' and without an officer's direction, assistance, or encouragement" (¶ 4).

In this case, the court of appeals concluded "that regardless of whether an 'instinct exception' to the Fourth Amendment's warrant requirement exists when a canine 'searches' a vehicle, the exception does not apply under the facts in this case to excuse the State's obligation to obtain a warrant prior to searching Campbell's vehicle. Here, the canine did not instinctively enter Campbell's vehicle because the officer had full control of the canine and implicitly encouraged it to enter through the driver's side door. We therefore conclude that even if the instinct exception were to be recognized in Wisconsin, the exception would not apply to the canine's searches in this case" (¶ 5).

Environmental Law

Wisconsin's Spills Law – Emerging Contaminants – Formal Rulemaking Required

***Wisconsin Mfrs. & Com. Inc. v. Wisconsin Dep't of Nat. Res.*, 2024 WI App 18 (filed March 6, 2024) (ordered published April 24, 2024)**

HOLDING: The Department of Natural Resources' (DNR) policies at issue in this litigation were unenforceable because the DNR did not promulgate them through Wis. Stat. chapter 227's rulemaking procedures.

SUMMARY: Wisconsin's spills law, which is set forth in Wis. Stat. chapter 292 and Wis. Admin. Code chapters NR 700-799, regulates the discharge of hazardous substances and the remediation of environmental pollution caused by the discharge of hazardous substances.

In this litigation, the plaintiffs argued that the DNR's' policy changes related to its regulation of "emerging contaminants" (including per- and polyfluoroalkyl substances, also known as "PFAS") as hazardous substances under the spills law, the concentration of those contami-

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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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nants, and the DNR's "interim decision" policy regarding issuance of certificates of compliance (COCs) for the voluntary party liability exemption (VPLE) are "rules" within the meaning of Wis. Stat. section 227.01(13) and thus required the DNR to engage in the formal rulemaking process before implementing them.

The DNR argued *inter alia* that the spills law does not require it to promulgate a list of qualifying emerging contaminants or their respective concentrations before the statutes apply to those substances.

The principal issue before the court of appeals was whether the DNR's policies related to the regulation of emerging contaminants as hazardous substances and the concentrations of those contaminants, along with the circumstances under which it would issue certain types of COCs to VLPE participants, are within the statutory definition of a "rule" (*see* ¶ 22).

The Wisconsin Supreme Court "breaks Wis. Stat. § 227.01(13)'s definition of 'rule' into five parts and has explained that for purposes of Wis. Stat. ch. 227, an agency's action is a rule (even if the agency does not refer to it as such) if the action is: (1) a regulation, standard, statement of policy or general order; (2) of general application; (3) having the effect of law; (4) issued by an agency; (5) to implement, interpret or make specific legislation enforced or administered by such agency as to govern the interpretation of procedure of such agency.' *See Citizens for Sensible Zoning, Inc.* [*v. DNR*], 90 Wis. 2d at 814. If an agency's policy meets the five-part definition of a rule, the policy is invalid and unenforceable when it has not been promulgated according to statutory rulemaking procedures" (¶ 24).

In a majority opinion authored by Judge Grogan, the court of appeals applied the five-part test of *Citizens for Sensible Zoning* and concluded that the DNR's regulation of emerging contaminants, including PFAS compounds, as hazardous substances; the concentration of those contaminants; and its interim decision policy indicating that it would not issue COCs that offered broad environmental liability protection for undiscovered and previously unknown hazardous substances to VPLE program participants were all "rules" within the meaning of Wis. Stat. section 227.01(13). Because these new policies constituted "rules," they are invalid and unenforceable because the DNR failed to promulgate them in accordance with Wis. Stat. chapter 227's procedural requirements (*see* ¶ 46).

Judge Neubauer filed a dissenting opinion.

Insurance

Homeowner's Policy – Exclusions – Exceptions

***Bolger v. Massachusetts Bay Ins. Co.*, 2024 WI App 19 (filed March 26, 2024) (ordered published April 24, 2024)**

HOLDING: An exception for utility terrain vehicles (UTVs) in a homeowner's insurance policy gave rise to a triable claim.

SUMMARY: A homeowner's insurance policy provided coverage for "personal liability" and "medical payments" but excluded coverage for the ownership, maintenance, use, loading or unloading of a UTV. An exception to that exclusion reinstated the coverage for lawsuits brought against the insureds for bodily injury arising out of "[t]he ownership, maintenance,

use, loading or unloading of" a UTV that is "[u]sed to service an 'insured's' residence" (¶ 1). The policy covered the insured's primary home, but the UTV accident injuring the plaintiff occurred on a frozen lake near the insured's second home. The circuit court denied the insurer's motion to dismiss, which contended that the exclusion foreclosed any duty to defend and to indemnify the insureds.

The court of appeals affirmed in an opinion authored by Judge Gill. It concluded that the policy was ambiguous and that two reasonable interpretations provided coverage when read in context. "Either the exception: (1) reinstates coverage for an occurrence resulting in bodily injury at the '"insured's" residence' arising out of a conveyance that was servicing that residence at the time of the occurrence; or (2) reinstates coverage for an occurrence resulting in bodily injury at any location arising out of a conveyance that serviced the '"insured's" residence' at some point, but not necessarily at the time of the injury" (¶ 19). The court concluded that the complaint in this case "adequately alleged facts that would require [the insurer] to defend and indemnify the [insureds] under the second of these reasonable interpretations" (¶ 2).

Real Property

Conveyances – Zoning and Land Division Ordinances

***County of Dane v. TCOB2 Irrevocable Tr.*, 2024 WI App 20 (filed March 14, 2024) (ordered published April 24, 2024)**

HOLDING: The property conveyance at issue in this case violated Dane County's minimum-lot-size and certified-survey-map ordinances.

SUMMARY: Mary Johnson owned 160 acres of land that her parents conveyed to her in a deed recorded in 2000. In a deed recorded in 2020, Johnson conveyed a 20-acre portion of her land to defendant TCOB2 Irrevocable Trust (the Trust). As a result of the conveyance to the Trust, a separate 20-acre property that remained in Johnson's possession was no longer contiguous to the rest of Johnson's property; that is, it became an isolated remnant.

Dane County brought enforcement actions against Johnson and the Trust, seeking injunctive relief and forfeitures. Dane County alleged that the 2020 conveyance violated two Dane County ordinances. The alleged violations are based on the premise that the 2020 conveyance created two properties that are each 20 acres in size: the property conveyed to the Trust and the remnant that Johnson still owns. The county alleged that, as a result, the 2020 conveyance violates Dane County Ordinance (DCO) section 10.222(4)(a), which imposes a minimum lot size of 35 acres for land zoned FP-35. The county also alleged that the 2020 conveyance violates DCO section 75.17(1)(a), which requires a certified survey map to be prepared and submitted for approval when a parcel is divided into lots, parcels, or building sites of 35 acres or less in size (*see* ¶ 6).

Following a bench trial, the circuit court concluded *inter alia* that the 2000 deed conveyed, and Johnson subsequently owned, seven "separate legal parcels," which included the two 20-acre properties that are the subject of the alleged ordinance violations. As a result, the court concluded that 1) the 2020 conveyance did not create new lots and thus does not violate the minimum-lot-size ordinance, and 2) the 2020 conveyance "did not divide a parcel" and thus does not violate the certified-survey-map ordinance (¶ 8).

In an opinion authored by Judge Nashold, the court of appeals reversed. It concluded that the 2000 deed (quoted at paragraph 15) unambiguously conveyed a single, 160-acre parcel to Johnson (*see* ¶ 14). However, even if the deed were ambiguous, undisputed extrinsic evidence supported the conclusion that the 2000 deed conveyed a single, 160-acre parcel of land to Johnson (*see* ¶ 25). Accordingly, the 2020 conveyance divided a parcel and created two new lots that were each approximately 20 acres in size, which violated the county's minimum-lot-size and certified-survey-map ordinances (*see* ¶ 11). Finally, the court concluded that enforcement of these ordinances did not violate Wis. Stat. section 66.10015(2)(e) or (4)(a) (*id.*).

Taxation

Tax Exemption for "Machinery, Tools and Patterns Not Including Such Items Used in Manufacturing" – Wis. Stat. § 70.111(27)

***Wisconsin Dep't of Revenue v. Master's Gallery Foods Inc.*, 2024 WI App 21 (filed March 20, 2024) (ordered published April 24, 2024)**

HOLDING: The property at issue in this case did not qualify for a tax exemption under Wis. Stat. section 70.111(27).

SUMMARY: Most property in Wisconsin is assessed for tax purposes by local assessors, *see* Wis. Stat. § 70.05, but certain property involved in manufacturing activities is treated differently. If a business engages in manufacturing activity as defined in Wis. Stat. section 70.995(1)-(2), the business must report its "manufacturing property" used in that activity to the Department of Revenue for assessment. In addition to requiring the department to assess "manufacturing property," Wis. Stat. chapter 70 exempts machinery and specific processing equipment that are used exclusively and directly in a manufacturer's production process (*see* ¶¶ 5-6).

This case focuses on a different statutory exemption that was enacted in 2017. Wis. Stat. section 70.111(27) exempts from general property taxes "machinery, tools and patterns ['MTP'], not including such items used in manufacturing." After the enactment of this statute, the department issued interpretive guidance that this exemption only applies to locally assessed personal property – not to manufacturing personal property that is assessed by the department (*see* ¶ 8).

In this case, the Tax Appeals Commission concluded that Wis. Stat. section 70.111(27) exempts MTP submitted to the department for assessment as long as the MTP is not used in any way in a manufacturing production process. The circuit court disagreed.

In a majority opinion authored by Judge Neubauer, the court of appeals affirmed the circuit court. It concluded that Wis. Stat. section 70.111(27) is ambiguous but that the legislative history surrounding its enactment "demonstrates that the exemption does not apply to MTP that is assessed by the Department under Wis. Stat. § 70.995. Because the property of [respondent] at issue here was submitted to the Department for assessment, it does not qualify for the [Wis. Stat. section] 70.111(27) exemption" (¶ 33).

Judge Grogan filed a dissenting opinion.

User Fees – Transportation

***Wisconsin Mfrs. & Com. Inc. v. Village of Pewaukee*, 2024 WI App 23 (filed March 13, 2024) (ordered published April 24, 2023)**

HOLDING: The village's "transportation user fee" was an unlawful tax.

SUMMARY: The village of Pewaukee created a "transportation utility" to provide funds to maintain its transportation infrastructure. To fund the utility, the village imposed a "transportation user fee"

(TUF) that consisted of a "base fee" and a "usage fee." Wisconsin Manufacturers & Commerce (WMC) challenged the TUF on the basis that it is an "illegal excise tax" that lacked statutory authority or an illegal property tax that violated the Wisconsin Constitution's uniformity clause. The circuit court granted summary judgment in favor of the village.

The court of appeals reversed in an opinion authored by Judge Lazar that relied on a "straightforward" (¶ 7) application of *Wisconsin Property Taxpayers Inc. v. Town of Buchanan,* 2023 WI 58, 408 Wis. 2d 287, 992 N.W.2d 100. The court rejected the village's attempts to distinguish *Town of Buchanan*, resting its conclusion on the Wisconsin Supreme Court's unanimous decision in *Town of Buchanan* that the "fee" in that case was also a "tax" (¶ 8).

Torts

Medical Malpractice – Informed Consent

***Hubbard v. Neuman*, 2024 WI App 22 (filed March 21, 2024) (ordered published April 24, 2024)**

HOLDING: The circuit court properly denied a defendant physician's motion to dismiss and for summary judgment.

SUMMARY: Hubbard (the plaintiff) sued Neuman (the defendant), alleging that the defendant failed to inform the plaintiff of the defendant's recommendation that the plaintiff's ovaries be removed during colon surgery that was performed by another physician (McGauley). The circuit court denied the defendant's motions to dismiss the claim and for summary judgment.

The court of appeals affirmed in an opinion authored by Judge Taylor. The court first addressed the denial of the defendant's motion to dismiss. Informed consent has been "generally" codified in Wis. Stat. section 448.30 (¶ 20). Informed consent, while "rooted in negligence principles," is a distinct form of medical malpractice (¶ 21). The plaintiff's cause of action arose when the defendant failed to inform the plaintiff that she had recommended that the surgeon remove the plaintiff's ovaries; thus, the claim was not that the defendant had failed to obtain the plaintiff's consent to remove the ovaries (*see* ¶ 23).

The facts alleged were sufficient to support this claim under case law (*see* ¶ 25). "We reject Dr. Neuman's argument that it 'would lead to absurd and unworkable results' if a physician who does not perform the procedure at issue has a duty to inform the patient about the availability, benefits, and risks of reasonable alternate treatment options" (¶ 37).

Second, the circuit court properly denied the defendant's motion for summary judgment. The defense motion rested "exclusively on a portion of Dr. McGauley's deposition in a related case in which he testified that he would have removed Hubbard's ovaries regardless of whether Dr. Neuman was present at the surgery and that it was his decision" (¶ 43).

Furthermore, the defense only challenged the element of causation (*see* ¶ 44). Assessing the record, the court of appeals underscored that the evidence gave rise to multiple inferences. "One other inference would be that Dr. McGauley's testimony does not refute an allegation that he relied on, and even followed, Dr. Neuman's recommendation to remove Hubbard's ovaries" (¶ 48). In short, the defense misconstrued the "causation moment" at issue, which was when the plaintiff decided to proceed with the surgery, thinking it was limited to the "partial colon removal" (¶ 49). **WL**