Administrative Law

Wisconsin Public Service Commission – Rulemaking

***Midwest Renewable Energy Ass'n v. Public Serv. Comm'n of Wis.*, 2024 WI App 34 (filed May 31, 2024) (ordered published June 26, 2024)**

HOLDING: The order of the Public Service Commission of Wisconsin under review in this case is an invalid "rule" because it was not promulgated in compliance with Wis. Stat. chapter 227.

SUMMARY: Midwest Renewable Energy Association (hereinafter Midwest) brought an action seeking declaratory and injunctive relief against the Public Service Commission of Wisconsin and its commissioners. Its action challenged a temporary order (hereinafter the order) issued by the commission in 2009 that prohibits the retail customers of Wisconsin's four largest public electric utilities, as well as entities known as "aggregators of retail customers," from engaging in "demand response" activities in federally regulated interstate wholesale electricity markets (¶ 1). The practice of "demand response" operates within the regular auctions for electricity in federal interstate wholesale markets and allows retail customers to submit bids to decrease their electricity consumption by a set amount at a set time for a set price.

"In essence, the practice of demand response pays consumers for commitments to curtail their use of power, so as to curb wholesale rates and prevent grid breakdowns. One way that consumers may participate in demand response is through 'aggregators of retail customers' ("ARCs"), entities that coordinate demand response by aggregating multiple individual retail consumers' demand response bids into one bid and submitting that bid in federal wholesale market auctions" (¶ 7) (internal quotations and citations omitted).

Midwest's complaint sought a declaratory judgment that the order is invalid on the ground that it is a "rule" that the commission adopted without complying with the Wis. Stat. chapter 227 statutory rulemaking procedures. The circuit court disagreed and dismissed the action. In an opinion authored by Judge Taylor, the court of appeals reversed.

The court of appeals concluded that the order is invalid because it meets the statutory definition of a "rule" and should have been but was not proposed and promulgated in compliance with the statutory rulemaking procedures set forth in Wis. Stat. chapter 227 (*see* ¶ 3). The order satisfies the statutory definition of a "rule" under Wis. Stat. section 227.01(13) (2007-08). To constitute a "rule," the provision must be "(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" (¶ 44).

There was no dispute about the fourth element of this test. As for the other elements, the court provided extensive analysis to conclude that the order is a "rule." Because it was not proposed and promulgated in compliance with Wis. Stat. chapter 227, the order is invalid and unenforceable (*see* ¶ 80).

Criminal Law

Drug Offenses – Aggregation of Crimes – Wis. Stat. Section 971.365

***State v. West*, 2024 WI App 35 (filed May 1, 2024) (ordered published June 26, 2024)**

HOLDING: The circuit court properly denied the defendant's motion to withdraw his guilty plea without holding an evidentiary hearing.

SUMMARY: Defendant West was originally charged with four counts of conspiracy to manufacture or deliver cocaine (two counts of not more than one gram and two counts of greater than one gram but not more than five grams), one count of conspiracy to commit possession with intent to deliver cocaine greater than five but not more than 15 grams, and one count of conspiracy to commit possession with intent to deliver tetrahydrocannabinols (THC) 200 grams or less. These offenses allegedly occurred in September 2014. The state later added two additional charges relating to conduct occurring in May 2015: possession of cocaine with intent to deliver more than one but less than five grams (referred to as "Count Seven" below) and obstructing an officer.

The parties entered into a plea agreement under which the state would dismiss all the above-listed charges except Count Seven and would amend Count Seven to one charge of possession of cocaine with intent to deliver greater than five but not more than 15 grams (second or subsequent offense), contrary to Wis. Stat. sections 961.41(1m)(cm)2. and 961.48(1)(b), and West would plead guilty. The amended information identified a date range for the offense: Sept. 24, 2014-May 24, 2015.

The circuit court accepted the amended information and then explained the details of the single charge to West and what the state would be required to prove at trial, including the amended date range, amended amount of cocaine, and potential maximum penalties and terms of imprisonment. When asked, West confirmed that he had engaged in the charged conduct as amended and entered a guilty plea. He was sentenced to 10 years' confinement and three years' extended supervision consecutive to any other sentence.

In 2022, West filed a Wis. Stat. section 974.06 motion seeking to withdraw his guilty plea premised on errors both internal (lack of a factual basis for his plea) and external (ineffective assistance of counsel) to the plea colloquy. His motion "ultimately hinge[d]" on whether a factual basis existed to support his plea (¶ 29). According to West, no such factual basis existed because the state, he claimed, could not aggregate smaller amounts of cocaine from separate transactions charged as part of a conspiracy into one large amount to satisfy the requirements of Wis. Stat. section 961.41(1m)(cm)2. – the statute he pled guilty to having violated.

The circuit court resolved West's challenge by turning to Wis. Stat. section

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.

Want faster access to Wisconsin Supreme Court and Court of Appeals decisions? Get weekly updates on the previous week's supreme court and court of appeals decisions. Subscribe to CaseLaw Express, a benefit of your membership, delivered to your inbox every Monday.

Prof. Daniel D. Blinka, U.W. 1978, is a professor of law at Marquette University Law School, Milwaukee.

daniel.blinka@marquette.edu

Prof. Thomas J. Hammer, Marquette 1975, is an emeritus professor of law and the former director of clinical education at Marquette University Law School, Milwaukee.

thomas.hammer@marquette.edu

971.365(1)(b), which provides that "[i]n any case under … s. 961.41(1m)(cm) … involving more than one violation, all violations may be prosecuted as a single crime if the violations were pursuant to a single intent and design." This statute was never mentioned in either the amended information or the parties' postconviction arguments. The circuit court concluded that under Wis. Stat. section 971.365(1)(b), the state could prosecute West's multiple violations as a single crime. It also concluded that there was a factual basis for the sole count in the amended information. Accordingly, it denied West's postconviction motion without a hearing.

In an opinion authored by Judge Grogan, the court of appeals affirmed. It concluded that Wis. Stat. section 971.365(1)(b) "unambiguously permits aggregation of the amount at issue for each violation of an enumerated statute so that multiple violations identifying smaller amounts may be prosecuted as one violation identifying a larger amount where the multiple violations are 'pursuant to a single intent and design.' The statute does not require that the multiple violations occurred at one *single* time or even with a specific timeframe" (¶ 35).

Though the state did not reference Wis. Stat. section 971.365 in its amended information, the court stated that Wis. Stat. section 971.365 "is not a pleading statute" and it rejected West's claim that the state's failure to reference this statute negated the presence of a factual basis for his plea (¶ 37).

The court of appeals further concluded that there was a factual basis to support West's guilty plea. It looked to the pleadings in this case, West's admissions during the guilty plea hearing, defense counsel's confirmation during the plea hearing that there was a factual basis to support the plea, and West's own statement in his plea withdrawal motion that he understood that the state had aggregated the smaller individual amounts of cocaine at issue into one larger amount (*see* ¶¶ 39-41). It was readily inferable, said the court, that the multiple transactions alleged in the complaint were part of an ongoing "intent and design" to sell cocaine (¶ 43).

The court determined that West failed to establish that he was entitled to an evidentiary hearing on his plea withdrawal motion and the postconviction court did not erroneously exercise its discretion in denying the motion without an evidentiary hearing. The court further held that West failed to otherwise establish that he entered his plea based on an erroneous understanding of the charge to which he pled, that a manifest injustice would occur if he were not allowed to withdraw his plea, or that he did not enter his plea knowingly, intelligently, or voluntarily (*see* ¶ 62).

Criminal Procedure

Sentence Modification – "New Factor"

***State v. Schueller*, 2024 WI App 40 (filed June 20, 2024) (ordered published July 31, 2024)**

HOLDING: The circuit court erred in denying the defendant's motion for sentence modification based on a new factor without holding a hearing.

SUMMARY: Schueller is a Vietnam war veteran with a diagnosed history of posttraumatic stress disorder (PTSD). In 2004, he was charged with first-degree intentional homicide after he was in an altercation at a bar during which he shot and killed an individual. The case was resolved with the entry of a no-contest plea to an amended charge of second-degree intentional homicide.

Schueller's PTSD was a significant focus of the parties' arguments and the court's sentencing decision. The sentencing court specifically commented that Schueller's PTSD diagnosis was "a factor" that "slice[d] both ways" – it mitigated his culpability for the crime to a degree, but it also "aggravate[d] the situation" because Schueller would always pose danger to the community as a result of his PTSD symptoms, which the court considered to be incurable (¶ 1). Ultimately, the court sentenced him to 25 years' initial confinement followed by 15 years' extended supervision.

Nearly 20 years after he was sentenced, Schueller filed a postconviction motion to modify his sentence. He alleged that the availability of new, highly effective PTSD treatments had rendered PTSD in veterans highly treatable and even curable. An expert's report attached to the motion opined that research conducted since Schueller's sentencing demonstrates that, after receiving cognitive processing therapy and prolonged exposure therapy, veterans "can experience a significant reduction in PTSD symptom severity and no longer meet the diagnostic criteria for PTSD'" (¶ 19). These therapies are not available in the Wisconsin prisons and the expert recommended that Schueller receive both therapies at a Department of Veterans Affairs hospital on an outpatient basis. Schueller contended that the treatability of PTSD in veterans is a new factor that warrants sentence modification.

The circuit court denied Schueller's motion without a hearing on the ground that Schueller's allegations failed to establish the existence of a "new factor" that would warrant sentence modification (*see* ¶ 30). In an opinion authored by Judge Graham, the court of appeals reversed the decision of the circuit court.

Circuit courts have inherent authority to modify a criminal sentence when the defendant has demonstrated the existence of a new factor. "A 'new factor' is 'a fact or set of facts' that is 'highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.' The existence of a new factor does not automatically entitle a defendant to sentence modification. If a circuit court determines that a new factor is present, it must also consider whether it justifies sentence modification" (¶ 26) (citations omitted).

In this case, the court of appeals concluded that, if true, Schueller's postconviction materials establish that PTSD in veterans such as Schueller is now highly treatable and even curable; these are facts that were not known to the sentencing court at the time of the original sentencing (*see* ¶ 33).

The court of appeals also concluded that these new facts are highly relevant to the imposition of Schueller's sentence. "[I]n imposing the sentence, the court stated that Schueller would always pose a danger to the community because he would always have PTSD, and it expressly relied on its understanding that PTSD is incurable in determining Schueller's terms of initial confinement and extended supervision" (¶ 2). Accordingly, the court of appeals reversed the circuit court order denying Schueller's motion.

For clarity, the court of appeals articulated the circuit court's options on remand of this case.

1) "The circuit court could decide to hold an evidentiary hearing to address the facts alleged in Schueller's motion and determine whether Schueller has met his burden of establishing a new factor by clear and convincing evidence. If the

court determines that Schueller has met that burden, the court would be required to make a discretionary determination about whether modification of Schueller's sentence is warranted based on all relevant facts in the record, including those proven at the hearing" (¶ 48).

2) "Alternatively, the circuit court could determine, in the exercise of its discretion, that, even if Schueller were to prove each of the facts alleged in the motion at a hearing, which we have concluded established the existence of a new factor as a matter of law, modification of Schueller's sentence is not warranted. In that circumstance, the court would then be required to issue a decision explaining its exercise of discretion, but it would not be required to hold a hearing" (¶ 49).

Firearms

Denial of Application to Purchase Handgun – Prior Conviction of Domestic Violence Crime – Effect of Expungement of Prior Conviction

***Van Oudenhoven v. Wisconsin Dep't of Just.*, 2024 WI App 38 (filed June 4, 2024) (ordered published July 31, 2024)**

HOLDING: The circuit court correctly upheld the decision of the Wisconsin Department of Justice (DOJ) denying the petitioner's application to purchase a handgun in Wisconsin.

SUMMARY: The DOJ denied petitioner Van Oudenhoven's application to purchase a handgun in Wisconsin. The DOJ reasoned that because the petitioner had been convicted of a Wisconsin crime related to domestic violence (misdemeanor battery as an act of domestic violence against a woman with whom he shares a child), the purchase would violate 18 U.S.C. § 922(g)(9), which states that an individual "who has been convicted in any court of a misdemeanor crime of domestic violence" cannot "possess or ... receive any firearm." The DOJ reached this conclusion even though the petitioner's conviction had been expunged under Wisconsin law pursuant to Wis. Stat. section 973.015(1m).

The circuit court sustained the DOJ's decision. In an opinion authored by Judge Gill, the court of appeals affirmed.

The petitioner argued that the DOJ lacked authority to deny his firearm purchase. Rejecting this position, the court of appeals concluded that the DOJ is authorized by federal law to deny a Wisconsin-based firearm purchase if a prospective buyer has been convicted of a misdemeanor crime of domestic violence. "[T]he DOJ has been delegated by the federal government as the federal law liaison for firearm purchases in Wisconsin. Here, the DOJ denied Van Oudenhoven's purchase pursuant to federal law, not state law" (¶ 11). The receipt of a firearm by the petitioner would violate 18 U.S.C. § 922 (quoted above) (*see* ¶ 45) because he had been convicted of a misdemeanor crime of domestic violence.

Van Oudenhoven argued, however, that even if the DOJ had authority to deny his handgun purchase under 18 U.S.C. § 922(g)(9), this statute did not apply to his misdemeanor conviction because it was expunged. *See* 18 U.S.C. § 921(a)(33)(B)(ii) ("A person shall not be considered to have been convicted of [a misdemeanor crime of domestic violence] if the conviction has been expunged or set aside."). The court of appeals rejected this argument.

Said the court: "We also conclude that Van Oudenhoven's misdemeanor

conviction was not 'expunged or set aside' as those terms are used in 18 U.S.C. § 921(a)(33)(B)(ii). As other jurisdictions have articulated, the terms 'expunged or set aside' in § 921(a)(33)(B)(ii) must be construed synonymously, thereby requiring the 'state procedure to completely remove all effects of the conviction at issue.' *See, e.g., Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1245 (10th Cir. 2008). Consistent with our state supreme court's decision in *State v. Braunschweig*, 2018 WI 113, 384 Wis. 2d 742, 921 N.W.2d 199, expungement pursuant to Wis. Stat. § 973.015(1m) does not 'completely remove all effects' of a conviction because the underlying conviction remains valid. *See Braunschweig*, 384 Wis. 2d 742, ¶ 22. Section 973.015(1m) 'merely deletes the evidence of the underlying conviction from court records.' *Braunschweig*, 384 Wis. 2d 742, ¶ 22" (¶ 4).

The conviction remains valid for purposes of denying Van Oudenhoven permission to purchase a firearm in Wisconsin under federal law (*see* ¶ 45).

Insurance

Claims – Appraisal Clause – Breach by Insurer

***Badgerland Restoration & Remodeling Inc. v. Federated Mut. Ins. Co.*, 2024 WI App 36 (filed May 9, 2024) (ordered published June 26, 2024)**

HOLDING: An insured properly stated a claim under an insurance policy's appraisal clause.

SUMMARY: Federated Mutual Insurance Co. issued a policy to Maple Crest Funeral Home Inc. that was in effect when hail damaged Maple Crest's property. Maple Crest assigned its rights under the policy to Badgerland Restoration & Remodeling Inc., a remodeler that repaired the property. "Badgerland alleges that Maple Crest demanded an appraisal pursuant to the appraisal clause in the insurance policy that Federated issued to Maple Crest, and that Federated refused to participate in the appraisal process. Badgerland argues that Federated breached the policy by refusing to participate in the appraisal process" (¶ 1). The circuit court dismissed Badgerland's complaint for failure to state a claim.

The court of appeals reversed in an opinion, authored by Judge Kloppenburg, that addresses appraisal clauses. "When a policy contains an appraisal clause and one party demands an appraisal, the other party is required to participate in the appraisal process unless certain defenses apply" (¶ 21). "An appraisal clause may be invoked when the insured and the insurer provide differing estimates of the damage incurred before any repair work is done" (¶ 22). "A party may sue to set aside an appraisal that has been determined pursuant to an appraisal clause 'only upon the showing of fraud, bad faith, a material mistake, or a lack of understanding or [lack of] completion of the' appraisal assignment" (¶ 23).

"Here, the allegations are that there was a dispute over the value of the loss, Federated refused to abide by the appraisal clause when it was invoked by Maple Crest following the completion of the roof repair work, and Federated did not seek relief in court. Accordingly, the complaint states a claim for breach of the policy" (¶ 26). The court rejected Federated's three contentions that Maple Crest had no right to invoke the appraisal clause, namely, "(1) the parties did not dispute the value of the loss; (2) Maple Crest waived the right to invoke the appraisal clause; and (3) Maple Crest is estopped from demanding appraisal" (¶ 27).

"To recap, here the complaint alleges that Maple Crest demanded appraisal six months after the roof was damaged and before Badgerland filed suit. Federated cites no authority supporting the proposition that this alleged timing constitutes a delay as a matter of law.... Thus, waiver based on unreasonable delay and litigious conduct inconsistent with the right of appraisal cannot be shown based on the allegations in the complaint" (¶ 37). "In sum, Federated's waiver and equitable estoppel arguments are either unsupported by legal authority or premised on facts outside the allegations in the complaint and the documents properly incorporated by reference" (¶ 43).

Pandemic Relief

"Gross income" – Reporting – "Wages"

***Morgan v. Labor & Indus. Rev. Comm'n*, 2024 WI App 39 (filed June 5, 2024) (ordered published July 31, 2024)**

HOLDING: The Wisconsin Labor and Industry Review Commission (LIRC) correctly determined that the plaintiff had underreported self-employment income when she sought pandemic benefits.

SUMMARY: An administrative law judge and LIRC determined that the plaintiff had underreported self-employment income from a sewing business when seeking federal Pandemic Unemployment Assistance (PUA) benefits. LIRC also rejected her request to waive repayment; according to LIRC, the petitioner had been at fault by failing to provide "full information" (¶ 8). The circuit court affirmed the decision.

The court of appeals affirmed in an opinion authored by Judge Neubauer. The "crux" of the dispute centered on what constitutes "gross income" and whether the plaintiff underreported her income by only reporting the "wages" she took from her entity. Wisconsin's unemployment insurance statutes and rules do not define "gross income" (¶ 14).

"We are bound to apply the federal regulations regarding PUA benefits as they are written. Paragraph 625.6(f)(2) of Title 20 of the Code of Federal Regulations requires an offset based on gross income. [Wisconsin Statutes section] 71.03(1) is the only state-law definition of that term that either party has urged us to adopt. Morgan has not convinced us that use of that definition with respect to PUA benefits determinations is inappropriate" (¶ 18). The court rejected the plaintiff's contention that it should treat "wages as gross income when the regulation specifically directs us *not* to do so" (¶ 16).

The court also upheld LIRC's rejection of the plaintiff's request to waive repayment. Although LIRC's decision is discretionary, LIRC reasonably determined "that Morgan did not provide correct and complete information regarding her gross income from the sewing business to the DWD [Department of Workforce Development], and thus that she was at fault for the overpayments" (¶ 21).

Torts

Spoliation – Punitive Damages – Imputed Negligence – Punitive-Damages Caps

***Lorbiecki v. Pabst Brewing Co.*, 2024 WI App 33 (filed May 7, 2024) (ordered published June 26, 2024)**

HOLDING: A brewing company was liable for both compensatory and punitive damages in the death of its former employee, a pipefitter, from mesothelioma caused by asbestos exposure.

SUMMARY: The plaintiff, the widow of a person who had worked as a pipefitter, sued various defendants alleging that exposure to asbestos caused the death of

her husband from mesothelioma. A jury found a violation of the safe place statute and awarded $6.9 million in compensatory and punitive damages.

The court of appeals affirmed in part and reversed in part in an opinion authored by Chief Judge White, which addressed six main issues. First, sufficient evidence supported the jury's finding that the pipefitter was exposed to unsafe conditions at the brewing company where he worked, particularly the removal of asbestos in the bottle house (*see* ¶ 22). Second, the trial judge properly instructed the jury on spoliation based on the destruction of records in the 1980s. The instruction here was "reasonable and responsive," also telling the jury that it could accept or reject a negative inference (¶ 32).

Third, the circuit court properly admitted evidence of the price paid to purchase Pabst in 2014, which in turn was relevant to the price put on potential liabilities at the time of purchase and the company's value (*see* ¶ 37). So too, the circuit court properly admitted relevant evidence of other mesothelioma cases at Pabst (*see* ¶ 43).

Fourth, sufficient evidence ("clear and convincing") supported the submission of punitive damages on the ground that the company had intentionally disregarded the pipefitter's safety and health in the workplace (¶ 50). Fifth, the brewing company was liable for negligence that the jury imputed to the company that delivered the asbestos products to it (*see* ¶ 56). The court also addressed a series of issues that arose in posttrial motions.

The sixth issue was raised by the plaintiff and related to the calculation of punitive damages, particularly the statute capping punitive damages at twice the amount of compensatory damages. In a matter of first impression, the court held that "the proper formulation of the maximum punitive damages to which a plaintiff is entitled under Wis. Stat. § 895.043 is double the total, recoverable compensatory damages after any statutory caps are applied" (¶ 81). **WL**