Civil Procedure

Intervention as of Right – Permissive Intervention

***Braun v. Vote.org*, 2024 WI App 42 (filed July 31, 2024) (ordered published Aug. 28, 2024)**

HOLDING: The circuit court did not err in denying Vote.org's motion seeking to intervene under Wis. Stat. section 803.09(1) (intervention as of right) and 803.09(2) (permissive intervention).

SUMMARY: Braun filed an action against the Wisconsin Elections Commission (WEC) seeking declaratory and injunctive relief related to the WEC's approval of the National Mail Voter Registration Form (the Form) as an accepted method of voter registration in Wisconsin. The Form is a national voter registration form that the United States Election Assistance Commission makes available to voters seeking to register to vote; it has existed since 1993. Unlike most states, Wisconsin is not required to use the Form because Wisconsin allows for same-day voter registration. Nonetheless, it appears that the WEC has accepted the Form for voter registration for many years. Braun contended that the Form "is missing several items" required by Wis. Stat. section 6.33(1) and therefore the WEC erred in approving the Form for use in Wisconsin (¶ 4).

Vote.org is a nonprofit, nonpartisan organization and technology platform dedicated to voter registration and get-out-the-vote efforts. It filed a motion seeking to intervene in the underlying action, asserting that it should be allowed to intervene because if Braun succeeds on the merits – in other words, if the Form is no longer an acceptable method for registering voters in Wisconsin – there will be a direct effect on Vote.org's ability to assist Wisconsin voters with registering to vote, particularly those who are unable to do so online, unless Vote.org "divert[s] significant resources to modify its procedures for registering Wisconsin voters" (¶ 5).

Vote.org argued that it has met all the requirements for intervention as a matter of right under Wis. Stat. section 803.09(1) and for permissive intervention under Wis. Stat. section 803.09(2). The circuit court denied intervention on both bases. In a majority opinion authored by Judge Grogan, the court of appeals affirmed.

To intervene in a lawsuit as a matter of right under Wis. Stat. section 803.09(1), the movant must satisfy four criteria: "(1) that the movant's motion to intervene is timely; (2) that the movant claims an interest sufficiently related to the subject of the action; (3) that disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest; and (4) that the existing parties do not adequately represent the movant's interest" (¶ 14) (internal quotations omitted). These criteria need not be analyzed in isolation from one another, and a movant's strong showing with respect to one requirement may contribute to the movant's ability to meet the other requirements.

The court of appeals concluded that Vote.org satisfied the first three criteria: its motion for intervention was timely; its asserted interest – continued acceptance of the Form in Wisconsin – is directly related to the subject of the action; and the disposition of the action may impede Vote.org's ability to protect that asserted interest.

However, as to the fourth criterion, the court held that Vote.org did not show that the existing parties do not adequately represent Vote.org's interest. "To determine whether an existing party adequately represents a movant's interest, courts look to whether there is a showing of collusion between the representative and the opposing party; if the representative fails in the fulfillment of his duty; or if the representative's interest is adverse to that of the proposed intervenor" (¶ 25) (internal quotations omitted).

Vote.org did not allege collusion between the WEC and Braun, it did not establish that the WEC failed in its duty in litigating its position as to what it believes to be the correct interpretation of the statutes at issue, and it failed to establish that the WEC's interest is adverse to its own (*see* ¶ 28). Although the impact on Vote.org and the WEC may differ (Vote.org contending for example that an adverse outcome in the underlying litigation would cause it financial harm in the form of costs associated with modifying its platform for Wisconsin voters), both parties ultimately seek to establish that the Form complies with Wisconsin law (*see id.* n.11).

The court of appeals also concluded that the circuit court did not erroneously exercise its discretion in denying Vote.org permissive appeal pursuant to Wis. Stat. section 803.09(2). One may be permitted to intervene in the court's discretion "(1) '[u]pon timely motion'; (2) [w]here the 'movant's claim or defense and the main action have a question of law and fact in common'; and (3) '[a]fter the court "[i]n exercising its discretion" considers whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties'" (¶ 37) (internal quotations omitted). In the exercise of discretion, a court need not permit a movant to intervene merely because the movant meets each of these factors (*see id.*).

The circuit court had denied permissive intervention after considering the same criteria required for intervention as of right (as Vote.org suggested it should do) along with whether Vote.org had established an issue of common law and fact. The motion to intervene was timely, and the circuit court implicitly determined that Vote.org had established the existence of a common issue of fact or law. In exercising its discretion to deny permissive intervention, "the [circuit] court explained that it is insufficient to 'simply … show a common interest or common issue of factor [sic], issue of law and that you timely file because' that would render Wis. Stat. § 803.09(1) unnecessary. It then went on to explain why the criteria that counseled against intervention as of right also weighed against permissive intervention, particularly focusing on the adequacy of the WEC's representation in this matter given that the matter was 'about the discrete and narrow issue of' whether the Form 'that WEC has signed off on using [is] in compliance with Wisconsin law'" (¶ 38).

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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In sum, the court of appeals concluded that the circuit court did not err in exercising its discretion when it denied Vote.org's motion for permissive intervention (*see* ¶ 44).

Judge Neubauer filed a dissenting opinion.

Civil Procedure – Property

Right-to-Farm Law – Summary Judgment – Sanctions – Prescriptive Easements – Verdicts

***Buchholz v. Schmidt*, 2023 WI App 47 (filed July 18, 2024) (ordered published Aug. 28, 2024)**

HOLDINGS: The "right to farm law" did not bar a nuisance claim, other claims were properly dismissed as sanctions, and an order incorporated in the judgment exceeded the scope of the verdict in several respects.

SUMMARY: In 2017, Buchholz agreed to rent land to Schmidt under terms of a farm lease agreement. The land was drained by a subsurface drain tile on Schmidt's property that became damaged, so the parties entered into a "drain tile agreement" to manage the repairs in 2019. When Schmidt did not replace the damaged tiles, both properties experienced "significant flooding," for which each blamed the other (¶ 12).

Buchholz sued Schmidt under the agreements. The circuit court ruled on sundry summary-judgment motions and later dismissed various counterclaims as a sanction for disobeying a court order. After a jury trial, the court entered a judgment in favor of Buchholz on prescriptive-easement, private-nuisance, and trespass claims.

The court of appeals affirmed in part, reversed in part, and remanded one issue in an opinion authored by Judge Kloppenburg. First, the court addressed summary-judgment rulings that implicated Wisconsin's right-to-farm law (Wis. Stat. § 823.08), rejecting Schmidt's contention that the law foreclosed the nuisance claims.

"[W]e conclude that it is undisputed that Schmidt has met the first predicate – that the alleged nuisance at issue, his farmland drainage activity on his land, was an agricultural practice – because it was associated with the agricultural use of crop production.... However, we also conclude that Schmidt fails to show that he developed the evidence relevant to meet the second predicate – that what is now his land was in agricultural use, without substantial interruption, before Buchholz began using his property for the farming that Buchholz alleges was interfered with by Schmidt's activity. Therefore, we need not and do not address the third predicate [involving threats to public health or safety]" (¶ 29).

Second, the court affirmed a summary-judgment finding that Schmidt had breached the drain tile agreement and the circuit court's dismissal of Schmidt's counterclaim that Buchholz had breached the farm lease agreement (*see* ¶ 47). This discussion included the circuit court's rejection of a "sham affidavit" filed by Schmidt (¶ 59). The circuit court also properly dismissed Schmidt's counterclaims as a sanction for his failure to comply with various pretrial orders (*see* ¶ 74).

Third, the court of appeals ordered that on remand the judgment should be revised to remove two "terms" that were not reflected in the jury's verdict (¶ 83). The terms related to prescriptive easements in light of dominant and servient estates. The court rebuffed the argument that it could review these issues *de novo*. "We consider persuasive case law stating that the determination of the '"minute details"' of a prescriptive easement

involves an exercise of the circuit court's discretion, based on its review of all of the circumstances of the case" (¶ 88).

Criminal Procedure

Interrogations – Juveniles – Voluntariness – *Miranda*

***State v. Kruckenberg Anderson*, 2024 WI App 45 (filed July 25, 2024) (ordered published Aug. 28, 2024)**

HOLDING: Several (but not all) statements made by the defendant to police officers were involuntary.

SUMMARY: The defendant, Logan Kruckenberg Anderson (Kruckenberg), then age 16, allegedly took his newborn baby into a wooded area very soon after the baby was born, and the baby died. Police officers questioned Kruckenberg over a three-day period, and eventually he was charged with homicide of the baby.

The defendant moved to suppress the statements, contending that they were involuntary and that others were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). The circuit court ordered the suppression of some of the statements. The state appealed.

The court of appeals affirmed in part and reversed in part in an opinion authored by Judge Taylor. The court of appeals discussed in some detail the various statements, obtained over three days from Jan. 9 to Jan. 11, 2021.

The court affirmed the suppression of some statements as involuntarily obtained. On Jan. 10, a police officer told the defendant that the child needed a "proper burial," an interrogation tactic that, according to the court of appeals, exceeded the defendant's ability to resist police.

"However, we reverse the court's exclusion of Kruckenberg's statements during the Brodhead PD interrogation prior to [Special Agent] Pertzborn's '"proper burial"' comment, because we conclude that these prior statements were voluntarily made and that Kruckenberg was not in custody at the time" (¶ 35). The court of appeals discussed the voluntariness test, the nature of "coercion," and the *Miranda* doctrine in some depth, particularly as they relate to juvenile suspects. For example, police officers used a variety of "emotional and moral appeals" in their effort to get the defendant to talk (¶ 54). Especially problematic were questions that "conflated" offers to "help" with overtures of "leniency" along with "powerful misrepresentation[s]" (¶¶ 57-58).

"Assuming without deciding that each technique, described at a generic level, could be deemed not coercive if employed under different circumstances, we conclude that the numerous techniques used to attempt to elicit incriminating statements – in light of Kruckenberg's age – were coercive when considered together" (¶ 63). Moreover, the defendant's "physical, mental, and emotional condition … rendered him particularly susceptible to law enforcement pressure" (¶ 68).

The court held, however, that statements elicited before the "proper burial" sequence of questions were voluntary. The defendant was not in custody at that point (*see* ¶ 84) and had been repeatedly advised of his *Miranda* rights (*see* ¶¶ 87, 91).

Juveniles – Wis. Stat. Section 970.032(1) Preliminary Hearings – Discovery – Reverse Waivers

***State v. Adams*, 2024 WI App 44 (filed July 23, 2024) (ordered published Aug. 28, 2024)**

HOLDINGS: 1) Although juvenile defendants have a limited right to discovery before a Wis. Stat. section 970.032(1) preliminary examination, the defendant was not entitled to the discovery requested in this case. 2) The circuit court did not erroneously exercise its discretion in denying the defendant's reverse-waiver motion.

SUMMARY: The defendant was charged with killing a woman while stealing her vehicle; at the time of the crime, he was 13 years old. The adult criminal court had "exclusive original jurisdiction" in the case because of the defendant's age and the charge (first-degree reckless homicide). The defendant moved for discovery before the preliminary examination provided for by Wis. Stat. section 970.032(1). The circuit court denied the motion and, after hearing testimony, found probable cause that the defendant had committed the charged offense.

The court next heard defense witnesses in a multiday reverse-waiver hearing under Wis. Stat. section 970.032(2). The witnesses addressed various correctional programs and treatment options available to juvenile offenders through both the adult and juvenile criminal justice systems. The circuit court denied the defendant's motion for reverse waiver and retained jurisdiction (*see* ¶ 13).

The court of appeals affirmed in an opinion authored by Judge Geenen. The court held that juvenile defendants in cases such as this are entitled to limited discovery. "We conclude that under *State v. Kleser*, 2010 WI 88, 328 Wis. 2d 42, 786 N.W.2d 144, juvenile defendants are entitled to all evidence that the State intends to introduce at the Wis. Stat. § 970.032(1) preliminary examination to establish probable cause of the alleged jurisdictional offense. The State is required to produce this evidence at a reasonable time before the preliminary examination. Moreover, additional materials exclusively in the possession of the State may be discoverable provided that the juvenile defendant establishes a particularized need for the materials requested by showing that they are likely to be relevant to negate one of the elements of the alleged jurisdictional offense" (¶ 2).

The court underscored that while a typical Wis. Stat. section 970.03(1) preliminary exam requires only a finding that "some" felony was committed, under Wis. Stat. section 970.032(1) the judge must find probable cause that "the violation" occurred (¶ 19).

"[W]e cannot agree with the State's assertion that juvenile defendants are never entitled to discovery prior to a § 970.032(1) preliminary examination. To the contrary, in light of this unique legal framework, we conclude that defendants are entitled to evidence that the State intends to introduce at the § 970.032(1) preliminary examination to establish probable cause of the alleged jurisdictional offense. The State is required to produce this evidence at a reasonable time before the preliminary examination itself because this evidence is necessary for the right established in *Kleser* to be meaningful. Moreover, we conclude that circumstances may be such that other materials exclusively in the possession of the State may be discoverable by the defendant prior to a § 970.032(1) preliminary examination, provided he or she establishes a particularized need for the materials requested by showing that they are likely to be relevant to negate one of the elements of the charged jurisdictional offense" (¶ 22).

On this record the court found that the defendant had failed to make a sufficient particularized showing that additional evidence was needed. Asserting that the defendant and counsel "don't know" what might be useful is not sufficient. To rule otherwise would convert the preliminary exam into a "minitrial" on the charges (¶ 28).

Finally, the court of appeals held that the circuit court properly exercised its discretion in denying the reverse waiver. In particular, the defendant had failed to meet his burden to show the first two factors set forth in Wis. Stat. section 970.032(2), namely, that absent reverse waiver he would not receive "adequate treatment" and that the reverse waiver would not "depreciate the seriousness of the offense" (¶ 30).

Elections

Absentee Ballots – Meaning of the Witness's "Address"

***Rise Inc. v. Wisconsin Elections Comm'n*, 2024 WI App 48 (filed July 11, 2024) (ordered published Aug. 28, 2024)**

HOLDINGS: 1) The word "address" in Wis. Stat. section 6.87 as it relates to the witness of an absentee ballot means a place where the absentee-ballot witness may be communicated with. 2) The standard for applying this definition of "address" must be viewed from the perspective of the municipal clerk, in the reasonable performance of the clerk's duties.

SUMMARY: Wisconsin voters have been statutorily permitted to cast absentee ballots in some form for more than a century. Current absentee voting laws require absentee ballots to be witnessed. Wis. Stat. § 6.87(4)(b)1. The witness must complete a certificate on the absentee ballot envelope providing, among other things, the witness's "address." Wis. Stat. § 6.87(2). The purpose of this requirement is to prevent abuses such as fraud and undue influence by requiring that a witness provide an address so that the witness may be contacted if needed (¶ 56). An absentee-ballot certificate missing the witness's address cannot be counted. Municipal clerks who receive an absentee ballot with an improperly completed certificate may return the ballot to the voter so that the voter can correct the defect and return the ballot within the appropriate time (*see* ¶ 1).

The word address as used in relation to absentee-ballot requirements in Wis. Stat. section 6.87 is not specifically defined in that statute or elsewhere in statutes governing elections nor has it previously been interpreted by Wisconsin courts. In this action, the plaintiffs sought a declaratory judgment seeking *inter alia* a definition of the term address.

On summary judgment, the circuit court declared that an absentee ballot witness's address for the purposes of Wis. Stat. section 6.87 means "a place where the witness can be communicated with" and that the witness-address requirement under Wis. Stat. section 6.87 is satisfied if "the face of the certificate contains sufficient information to allow a reasonable person in the community to identify a location where the witness may be communicated with" (¶ 15). In an opinion authored by Judge Taylor, the court of appeals affirmed in part and reversed in part.

The court of appeals concluded that the word address in Wis. Stat. section 6.87 as it relates to an absentee ballot means "a place where the witness may be communicated with" (¶ 58). Nothing in the record suggested that a specific street number, street name, and municipality are necessary components of a witness's address, so long as the address information provided by the witness is sufficient to identify a place where the witness may be communicated with (*see* ¶ 56).

However, in a departure from the circuit court's decision, the court of appeals held that the standard for applying the definition of a witness's address is "whether the face of the absentee ballot witness certificate contains sufficient information to enable the municipal clerk to reasonably identify a place where the witness may be communicated with" (¶ 67). Put another way, "the standard for applying the definition of 'address' must be viewed from the perspective of the municipal clerk, in the reasonable performance of the clerk's duties, rather than from the perspective of a 'reasonable person in the community' as adopted by the circuit court" (¶ 3). This conclusion follows from municipal clerks' primary role in administering elections, including their statutory role in processing absentee ballots, reviewing the sufficiency of absentee ballot certificates, and communicating with voters (*see* ¶ 62).

Nomination Papers – Substantial Compliance with Wis. Stat. section 8.15

***Hess v. Wisconsin Elections Comm'n*, 2024 WI App 46 (filed July 30, 2024) (ordered published Aug. 28, 2024)**

HOLDING: The nomination papers submitted by a candidate for election to the Wisconsin Assembly substantially complied with the requirements of Wis. Stat. section 8.15.

SUMMARY: Plaintiff Morgan Hess, as executive director of the Assembly Democratic Campaign Committee, filed a complaint with the Wisconsin Elections Commission (WEC) challenging a substantial majority of signatures submitted by Paul Melotik in his nomination papers for candidacy in a special election to fill a vacant Assembly seat. Hess argued that defects in the resolution of the header, the signatory-elector certification, and the circulator certification of the nomination papers caused words on the papers to be obscured, blurry, or missing, thereby failing to comply with mandatory statutory requirements for the content of these sections of the nomination papers. *See* Wis. Stat. § 8.15.

The WEC rejected the challenge. The circuit court affirmed the WEC's decision, concluding that the statutory requirements at issue were "directory" and that the WEC therefore did not commit error when it determined that the nomination papers "substantially complied" with those requirements (¶ 7). In an opinion authored by Judge Colón, the court of appeals affirmed.

The court of appeals concluded that Wis. Stat. section 8.15 "does not require the strict compliance advanced by Hess. Importantly … the legislature authorized WEC to promulgate rules 'in determining the validity of nomination papers and signatures thereon.' Wis. Stat. § 8.07. Under this authority, WEC promulgated Wis. Admin. Code § EL 2.05(5), which specifically requires that information contained within nomination papers is considered complete if it substantially complies with the statutory requirements. By the plain language, strict compliance is not required" (¶ 29).

The court of appeals concluded that "[the] WEC properly applied a substantial compliance standard in evaluating Melotik's nomination papers and placed his name on the ballot. Importantly, as WEC staff noted in the review of Melotik's nomination papers, the information and content required by both Wis. Stat. § 8.15(4)(a) and § 8.15(5) for the header, the signatory/elector certification, and the circulator certification were present or able to be deduced using the surrounding wording on the nomination papers that WEC accepted. While the information may not have been as clear as it could have been as a result of failures in photocopying, the required information was ultimately uncompromised and the obscured, blurry, or missing wording resulting from the poor photocopying was immaterial to meet the requirements of the statutes. In other words, while the information on the forms appeared incomplete due to poor photocopying, the required content was nonetheless available after further review. WEC, therefore, did not erroneously apply the substantial compliance standard to Melotik's nomination papers and place his name on the ballot" (¶ 34).

The court of appeals also addressed whether the issue in this case was moot because the special election has already been held and Melotik was elected to fill the vacant seat. The court concluded that the issue was not moot because the issue is likely of repetition and evades review. Said the court: "[C]hallenges to nomination papers are likely to evade court review when they arise because the nomination papers will be submitted, reviewed, and accepted, and the election will be held prior to the resolution of any court proceedings" (¶ 13).

Municipal Law

Zoning – Telecommunications Towers – County Ordinance Preempted by State Siting-Regulations Statute

***Savich v. Columbia Cnty. Bd. of Adjustment*, 2024 WI App 43 (filed July 18, 2024) (ordered published Aug. 28, 2024)**

HOLDING: The Columbia County Board of Adjustment properly applied the preemp-

tion doctrine to the county's tower-separation ordinance and correctly determined that the ordinance is preempted by the state siting-regulations statute.

SUMMARY: Tillman Infrastructure LLC, joined by mobile service provider AT&T Mobility, applied to the Columbia County Planning and Zoning Department for a permit to construct a new tower at an identified site. The Tillman tower would house telecommunications equipment owned and operated by AT&T and would be located on land zoned for agricultural uses in an unincorporated part of the county. *See* Wis. Stat. § 66.0404(5) (allowing counties to regulate towers and telecommunications equipment "only in the unincorporated parts of the county"). An existing tower owned by SBA Structures LLC is closer than one-half mile to the proposed Tillman tower site. AT&T has leased space on the SBA tower for its telecommunications equipment since 2001. The Tillman-AT&T permit application took the position that AT&T should be allowed to relocate its telecommunications equipment from the SBA tower to the proposed Tillman tower because that would save AT&T tower-leasing costs.

The Columbia County zoning director issued an administrative permit to Tillman allowing construction of the tower at the proposed site. SBA challenged that decision in an appeal to the county board of adjustment (BOA), contending *inter alia* that the permit violated a county ordinance that requires the separation of towers from each other by at least one-half mile ("tower-separation ordinance").

The BOA affirmed the permit. This decision was based in part on the determination that the county's tower-separation ordinance does not stand in the way of the permit because the ordinance is preempted by a state statute that limits how political subdivisions may regulate the siting and construction of telecommunications towers. *See* Wis. Stat. § 66.0404.

On certiorari review, the circuit court reversed the BOA's permit decision. The court ruled that the BOA lacked authority to treat the county's tower-separation ordinance as unenforceable based on preemption. Instead, the court ruled that because the ordinance was duly enacted by the Columbia County Board of Supervisors, the BOA was obligated to enforce it. *See Ledger v. City of Waupaca Bd. of Appeals,* 146 Wis. 2d 256, 430 N.W.2d 370 (1988) (reaffirming general rule that zoning boards of appeals may not declare duly enacted ordinances unenforceable) (*see* ¶ 2).

In an opinion authored by Judge Blanchard, the court of appeals reversed the final orders of the circuit court but affirmed non-final orders that were the subject of a cross-appeal. The court first concluded that the rule of the *Ledger* case referred to above did not bar the BOA from applying the preemption doctrine to the tower-separation ordinance. "This is because a separate Columbia County Ordinance, which the BOA was also required to consider, establishes that all of the county's ordinances are unenforceable to the extent that they conflict with state statutes" (¶ 3).

The court further held that "the tower-separation ordinance logically conflicts with the state statute providing that political subdivisions may not 'enact an ordinance prohibiting the placement of' a tower 'in particular locations within the political subdivision,' and, therefore, the BOA properly deemed the tower-separation ordinance to be preempted and accordingly unenforceable. *See* Wis. Stat. § 66.0404(4)(c)" (¶ 78).

A cross-appeal was filed solely by Buddy Savich, who resides on property near the proposed tower site. In the cross-appeal, he argued that, if the court of appeals reversed the circuit court ruling overturning the BOA's permit decision, the court of appeals should remand for further proceedings. This is because, Savich contended, the circuit court improperly declined to address motions that he made in the circuit court to allow discovery and expand the certiorari record.

The court of appeals affirmed the circuit court orders that Savich challenged in the cross-appeal because he failed to support his argument that additional discovery should be permitted and that the record should be expanded so that he can pursue additional grounds to reverse the BOA's permit decision on remand. The court of appeals also rejected arguments by SBA and Savich to the effect that, separate from the preemption issue, there was not substantial evidence to support the BOA's decision to affirm the permit (*see* ¶¶ 4-5). **WL**