Administrative Law

Utilities – Ratemaking – Wisconsin Energy Priorities Law

***Sierra Club v. Public Serv. Comm'n of Wis.*, 2024 WI App 52 (filed Aug. 6, 2024) (ordered published Sept. 25, 2024)**

HOLDINGS: 1) The ratemaking decisions of the Public Service Commission of Wisconsin (PSC) are not "rules" and therefore are not subject to the Wis. Stat. chapter 227 rulemaking process. 2) The ratemaking decision in this case did not violate Wisconsin's energy priorities law (EPL).

SUMMARY: The PSC approved a settlement agreement that allowed Madison Gas and Electric (MGE) to set its fixed utility rates at specific amounts greater than those suggested by the Sierra Club. A circuit court affirmed the PSC's decision. In an opinion authored by Judge Gill, the Wisconsin Court of Appeals affirmed.

Before 2012, the PSC's policy was to limit fixed charges for electrical and gas service to costs such as meter reading, billing, and connection costs. However, in 2012, the PSC adopted a new policy that permitted fixed charges to cover other aspects of providing utility services, including administrative and general costs. The Sierra Club and Vote Solar (hereinafter the Sierra Club) argued that this new policy constituted a "rule" that was required to be promulgated under Wis. Stat. section 227.10(1) (*see* ¶ 18).

The court of appeals disagreed. It concluded that the PSC's ratemaking decisions are not "rules" and therefore are not subject to the rulemaking process outlined in Wis. Stat. chapter 227. "Under Wis. Stat. § 227.01(13), a '[r]ule' is defined as 'a regulation, standard, statement of policy, or general order of general application that has the force of law and that is issued by an agency to implement, interpret, or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency.' Crucial to this opinion, a rule 'does not include, and [Wis. Stat. section] 227.10 does not apply to, any action or inaction of an agency, whether it would otherwise meet the definition under this subsection, that '[f]ixes or approves rates, prices or charges, unless a statute specifically requires them to be fixed or approved by rule.' Sec. 227.01(13)(n)" (¶ 3).

"In this case, the PSC's decision involved approving MGE's fixed rates pursuant to Wis. Stat. §§ 196.026(7)(c) and 196.03(1), neither of which requires rates to be fixed or approved by rule. Thus, no statute requiring a rule was implicated, negating the need for the rulemaking process" (*id.*).

The Sierra Club also contended that the PSC ratemaking decision in this case violated Wisconsin's EPL. *See* Wis. Stat. §§ 1.12(4), 196.025(1). Again, the court of appeals disagreed. It concluded that "the PSC's decision did not violate the EPL, which requires the PSC to apply the energy priorities listed in Wis. Stat. § 1.12(4) to ratemaking 'to the extent cost-effective, technically feasible and environmentally sound.' See *id.*; Wis. Stat. § 196.025(1)(ar). The PSC determined that the fixed rates suggested in the settlement agreement were both 'just and reasonable' and encouraged '[e]nergy conservation and efficiency.' See Wis. Stat. §§ 196.026(7)(c), 1.12(4). The PSC's factual determinations are supported by substantial evidence" (¶ 4).

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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Legal Malpractice – Limited Scope – Third-party Claims

***Freude v. Berzowski*, 2024 WI App 53 (filed Aug. 7, 2024) (ordered published Sept. 25, 2024)**

HOLDING: The circuit court properly dismissed the plaintiff's claim for legal malpractice.

SUMMARY: An individual (the plaintiff) was injured in a slip-and-fall accident while working as a security guard. He retained a lawyer and a law firm (the defendants) to represent him. The retainer agreement limited the scope of representation to the plaintiff's worker's compensation claim; it specifically provided that the law firm was not employed to pursue any third-party claims.

Several years later, the plaintiff alleged that he became aware that he could pursue a third-party claim against his employer and the cleaning crew allegedly responsible for the slip-and-fall accident. The plaintiff filed this legal malpractice action, alleging that the defendants had a duty to advise him regarding the third-party claims. The circuit court disagreed, dismissing the legal malpractice claim.

The court of appeals affirmed in an opinion authored by Judge Neubauer. The retention agreement provided that the law firm was employed "solely to prosecute a worker's compensation claim … and that the firm has not been employed to bring actions against third parties as a result" of the plaintiff's injury. It also provided that a separate fee agreement would be needed to pursue any other claims. The parties agreed that this language was "unambiguous" (¶ 13). By "expressly carving third-party claims out of the scope" of the retention agreement, the parties thereby eliminated the basis for a duty as to such claims (¶ 15). The plaintiff failed to identify any case "in which a legal malpractice claim based on a specifically excluded representation survived" (¶ 19).

Finally, the court rejected the plaintiff's "undeveloped invitation to recognize, as a matter of public policy, a duty to advise clients about potential third-party claims even though the terms of a written retainer agreement expressly excluded representation as to such claims" (¶ 22).

Judge Grogan dissented. "In this particular context, I conclude that in entering this Agreement, the parties entered into an attorney-client relationship, thus establishing the first element of a legal malpractice claim, and that the role of the limited-scope Agreement is instead more properly addressed within the context of the second legal malpractice element – negligence" (¶ 28).

Criminal Procedure

Sixth Amendment – Attachment of Right to Counsel

***State v. Robinson*, 2024 WI App 50 (filed Aug. 6, 2024) (ordered published Sept. 25, 2024)**

HOLDINGS: Among the several holdings in this case, the court of appeals concluded that the Sixth Amendment

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right to counsel attached at a probable-cause hearing following the defendant's warrantless arrest.

SUMMARY: Within 48 hours after Robinson (the defendant) was arrested, without a warrant, for robbery of a financial institution, a Milwaukee County circuit court commissioner completed a CR-215 form. Completion of this form indicated that the commissioner had reviewed the probable-cause statement from the arresting officer, found that there was probable cause to believe that the defendant committed the offense, and set bail. The defendant did not appear at this probable-cause determination but is included on the distribution list for the completed CR-215 form.

The next day, a Milwaukee police detective conducted a live identification lineup that included Robinson but at which Robinson did not have counsel. An employee of the financial institution (a bank teller) identified Robinson as the perpetrator of the robbery. He was thereafter charged with and convicted of the robbery.

The defendant claimed that his attorney was ineffective for failing to challenge evidence of the lineup, which occurred without benefit of counsel. To resolve this issue, the court of appeals had to determine whether the defendant's Sixth Amendment right to counsel had attached at the time of the lineup.

In an opinion authored by Chief Judge White, the court of appeals concluded that the Sixth Amendment right to counsel attaches during Milwaukee County's CR-215 process – an all-paper review during which a judicial official determines probable cause and sets bail after a warrantless arrest (*see* ¶ 1). (In a footnote, the court noted that this case focused on the process used in Milwaukee County. However, said the court, "the (CR-215) form is published by the Wisconsin Court System. To the extent that the same form and process is used statewide, our holding applies" (¶ 1 n.2).)

While the attachment of the right to counsel during the CR-215 process does not necessitate counsel during that process, it requires access to counsel for all "critical stages" of the case after that point. "An identification lineup occurring after the probable cause determination and bail setting, such as the CR-215 process, is a critical stage of the prosecution" (¶ 24).

Nevertheless, the court of appeals concluded that the defendant failed to allege sufficient material facts showing that his attorney was deficient for failing to seek suppression of the lineup evidence; therefore, he was not entitled to a *Machner* hearing on this claim of ineffectiveness. *See State v. Machner,* 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). When defense counsel was formulating trial strategy in 2017, the law was not settled about the attachment of the right to counsel at a CR-215 probable-cause determination (*see* ¶ 35). An attorney is not deficient for failing to pursue unsettled propositions of law (*see* ¶ 32). Though the law is now settled, the court of appeals concluded that Robinson's attorney was not deficient for failing to pursue suppression of the lineup evidence in 2017 based on a violation of the Sixth Amendment right to counsel (*see* ¶ 35).

The court of appeals also concluded that the defendant failed to make a sufficient showing that would have entitled him to a *Machner* hearing on his other claims of attorney ineffectiveness regarding identification evidence in this case. It also found that there was sufficient circumstantial evidence to establish that the bank that was robbed was a "financial institution" within the meaning of Wis. Stat. section 943.87.

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Evidence

Prior Convictions – Sexual Assault – "Greater Latitude"

***State v. Hill*, 2024 WI App 51 (filed Aug. 6, 2024) (ordered published Sept. 25, 2024)**

HOLDING: The defendant's 1984 Minnesota conviction for sexually assaulting a child was admissible in this Wisconsin prosecution.

SUMMARY: Hill (the defendant) was charged with two counts of first-degree sexual assault of a child. The state appealed the trial judge's ruling that excluded the defendant's conviction in Minnesota in 1984 for child sexual assault.

The court of appeals reversed in an opinion, authored by Judge Stark, that construes "the prior conviction statute" (Wis. Stat. § 904.04(2)(b)2.). This statute permits admission of prior conviction evidence for first-degree sexual assault, first-degree sexual assault of a child, or a comparable offense in another jurisdiction in a subsequent criminal proceeding also alleging a first-degree sexual assault crime.

The court summarized its key conclusions as follows: "First, in order to determine whether an offense in another jurisdiction is 'comparable' to first-degree sexual assault of an adult or a child in Wisconsin, the circuit court conducts a comparison of the criminal statutes at issue, including the titles of the statutes and elements of the offenses, subject to the greater latitude rule. Second, prior conviction evidence permitted under Wis. Stat. § 904.04(2)(b)2. encompasses only the fact of the conviction, not the underlying details of the prior case. Thus, if the court determines that prior conviction evidence is admissible, the jury should be informed only that the individual has been previously convicted of first-degree sexual assault or first-degree sexual assault of a child in Wisconsin, whichever is applicable, or a comparable offense in another jurisdiction" (¶ 2).

"Third, to determine whether the prior conviction is 'similar to the alleged violation,' the court reviews the underlying circumstances of the current charge(s) and those of the prior conviction to determine whether they are similar, also subject to the greater latitude rule. Fourth, and finally, the other-acts evidence analysis, as developed under *Sullivan* [*State v. Sullivan,* 216 Wis. 2d 768, 576 N.W.2d 30 (1998)] and its progeny for [Wis. Stat.] § 904.04(2)(a) evidence, is inapplicable to the prior-conviction statute. Instead, the admission of prior conviction evidence is subject to Wis. Stat. § 904.01 [Definition of "Relevant Evidence"] and Wis. Stat. § 904.03 [Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time]" (*id.*).

Here, the circuit court erred in finding that the "circumstances" of the 1984 and the current offenses were not "similar" under the statute and in assuming that the jury would hear the details of the 1984 conviction. The court of appeals remanded the case for consideration under the proper standard.

Real Property

Easements – Construction of High-voltage Electric Transmission Lines

***William C. & Nancy K. Hanson Revocable Tr. v. American Transmission Co.*, 2024 WI App 55 (filed Aug. 29, 2024) (ordered published Sept. 25, 2024)**

HOLDINGS: The multiple holdings in this case are summarized in the discussion below.

SUMMARY: Landowners initiated these actions to challenge the right of American Transmission Co. LLC (ATC) to take easements on their respective properties, which were zoned or used for agricultural purposes, for the purpose of constructing a high-voltage electric transmission line. The landowners principally claimed that ATC's jurisdictional offers were defective in two ways.

First, ATC offered just compensation in the form of annual payments, as required by Wis. Stat. section 32.09(6r)(a), but limited the duration of those payments to 40 years. According to the landowners, the 40-year limit violates Wis. Stat. section 32.09(6r)(a).

Second, the landowners argued that the easements described in the jurisdictional offers violate Wis. Stat. section 182.017(7)(h) because they would allow ATC to remove "hazard trees" and tree parts on portions of the landowners' properties "beyond the boundaries of the easements" (¶ 2).

In each action, ATC attempted to negotiate with the landowners to purchase an easement on their properties and, after the negotiation process failed, served jurisdictional offers on each landowner. Such offers must specify the amount of compensation offered and must specify two alternative methods of just compensation: "a lump sum representing just compensation … for outright acquisition of the easement"; and "an amount payable annually …, which amount represents just compensation … for the taking of the easement for one year." *See* Wis. Stat. § 32.09(6r)(a).

Wisconsin Statutes section 32.06 provides two distinct legal processes or "tracks" by which a landowner who rejects a jurisdictional offer may challenge issues that arise during the condemnation process: a "condemnation-and-valuation proceeding" and a "right-to-take action."

"Condemnation-and-valuation proceedings are initiated in the first instance by the utility, and they are the legal process by which the utility obtains title to the easement after the landowner rejects a jurisdictional offer. See § 32.06(7). As relevant here, the landowner can challenge the adequacy of the just compensation offer during the course of the condemnation-and-valuation proceedings. By contrast, a right-to-take action is initiated by the landowner to challenge aspects of a taking other than the adequacy of the amount of compensation offered" (¶ 19). The right-to-take action and the condemnation-and-valuation proceedings take place independently from each other and may go on simultaneously.

The landowners in these cases did not accept ATC's jurisdictional offer, and ATC initiated condemnation-and-valuation proceedings, which are still pending in the circuit court. Meanwhile, each landowner also filed separate right-to-take actions, which are at issue in the current appeal. As indicated above, the landowners challenged the 40-year limit that ATC placed on the annual-payment method of compensation, arguing that Wis. Stat. section 32.09(6r) requires that annual payments continue as long as the property is zoned or used for agricultural purposes. They also argued that the easements violate Wis. Stat. section 182.017(7)(h) because they grant ATC the right to access lands and remove hazard trees "beyond the boundaries of the easements(s)" (¶ 23).

The circuit court granted summary judgment to ATC in each of the landowners' cases. It concluded that the landowners could not challenge the 40-year limit on annual payments in a right-to-take action, and that even if they could, that limit does not violate Wis. Stat. section 32.09(6r). The court also concluded that the hazard-tree-rights provision does not violate Wis. Stat. section 182.017(7)(h) (*see* ¶ 25). In an opinion authored by Judge Graham, the court of appeals af-

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firmed in part and reversed in part.

The court of appeals first addressed whether the landowners can challenge the 40-year limit in ATC's jurisdictional offer in a right-to-take action. ATC argued that this challenge raises an issue about the amount of just compensation offered and therefore should be addressed in the pending condemnation-and-valuation proceedings instead of in these right-to-take actions. The landowners did not identify any reason that the arguments they raise could not be addressed in the condemnation-and-valuation proceedings. Nevertheless, given the rather expansive view that the Wisconsin Supreme Court has taken about the types of claims that are properly brought in a right-to-take action, the court of appeals concluded that the landowners' challenges are proper subjects of their right-to-take actions (*see* ¶¶ 41-42).

Turning to the lawfulness of the 40-year limit the ATC jurisdictional offer placed on the annual-payment method of compensation, the court of appeals concluded that "Wis Stat. § 32.09(6r)(a) does not allow ATC to limit the duration of the annual payments to any specific number of years. Putting to the side any situations in which a landowner waives the right to receive payment, the statute unambiguously requires a utility to offer annual payments (the amount of which reflects the value of the taking of the easement for one year) that will continue until the land is no longer zoned or used for agricultural purposes. We therefore conclude that the 40-year limit that ATC placed on its annual payment offers violates [Wis. Stat.] § 32.09(6r)(a)" (¶ 54).

The court of appeals next considered the remedy for the Wis. Stat. section 32.09(6r)(a) violation. If it were to conclude that the 40-year limit is a "jurisdictional" defect in the jurisdictional offers, then the offers are void and ATC did not validly commence the condemnation-and-valuation proceedings in which it obtained title to the easements. If the defect is not "jurisdictional," the violation can be cured and does not void the ongoing condemnation-and-valuation proceedings (*see* ¶ 55).

The court of appeals concluded that the landowners failed to persuade it that the statutory violation is a jurisdictional defect (*see* ¶ 68). "[I]t would make no sense to void the jurisdictional offers and the easements that ATC has now obtained in the condemnation-and-valuation proceedings based on the defects in the jurisdictional offers, which can be (and indeed already have been) remedied in the separate condemnation-and-valuation proceedings that are pending in the circuit court" (¶ 56). At the end of the condemnation-and-valuation proceedings, the landowners will have the opportunity to choose between receiving a lump sum or annual payments that comply with Wis. Stat. section 32.09(6r)(a) (*see* ¶ 67).

The court also concluded that the easement documents, which grant ATC the right to remove hazard trees in an area adjacent to the transmission line easement strip, do not violate Wis. Stat. section 182.017(7)(h) (*see* ¶ 86).

Said the court: "[W]e reject the landowners' argument that the hazard-tree-rights provision grants ATC the right to remove hazard trees outside of the 'boundaries of the easement,' in violation of Wis. Stat. § 182.017(7)(h). As used in that statute, the 'easement' encompasses all rights, including but not limited to a right-of-way, that the utility takes and pays for. Here, the easements grant ATC the right to 'enter in a reasonable manner' the property adjacent to the transmission line easement strip for the purpose of cutting down and removing trees and parts of trees 'outside of' the transmission line easement strip that

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are 'dead, dying, diseased, decayed, [or] leaning,' and that might 'interfere with' the use of the right-of-way or 'pose a threat to' the transmission line. Therefore, because the easements grant these rights to ATC, its exercise of those rights will be within the boundaries of its easement" (¶ 84).

Worker's Compensation

Eligibility – Termination – Excessive Absences

***Bevco Precision Mfg. Co. v. Wisconsin Lab. & Indus. Rev. Comm'n*, 2024 WI App 54 (filed Aug. 21, 2024) (ordered published Sept. 25, 2024)**

HOLDING: An individual (the worker) was properly terminated from employment because of absences.

SUMMARY: An employer required its employees to sign a "no-fault attendance policy" that assessed "points" for absences or tardiness, excluding sick days and vacation days. In this case, a worker was terminated for excessive absences and tardiness. He then filed a claim for unemployment benefits. An investigator and an administrative law judge (ALJ) determined that the worker had been terminated for substantial fault and was thus ineligible, but the Labor and Industry Commission (the commission) reversed, concluding that the absences were for "valid reasons." The circuit court reversed the commission, applying Wis. Stat. section 108.04(5)(e) and *Wisconsin Department of Workforce Development v. Wisconsin Labor & Industry Review Commission*, 2018 WI 77, 382 Wis. 2d 611, 914 N.W.2d 625 (*Beres*).

The court of appeals affirmed in an opinion, authored by Judge Lazar, that reviewed the commission's decision (*see* ¶ 7). "The legal question before us is whether termination for violation of an employer's absenteeism policy that differs from the absenteeism policy in Wis. Stat. § 108.04(5)(e) (with respect to notice and valid reason for absence) constitutes termination for misconduct as defined by that statute and, therefore, results in denial of unemployment benefits" (¶ 11).

"If the *Beres* court had meant to rest its decision on the fact that, although the reason for the absence was valid, the employee's notice was inadequate under the statute (versus noncompliant with the employer's policy) – the distinction the [c]ommission urges us to make by asserting that 'lack of notice was undisputed' – we cannot fathom why it would not have said so. Nor is it apparent to us why the court would have said the clause in Wis. Stat. § 108.04(5)(e) regarding reason and notice was not relevant to the issue with which it was presented, or why it would have worded its holding as it did: that the statute 'plainly allows an employer to adopt its own attendance (or absenteeism) policy' and that 'violation of [that] policy will result in disqualification'" (¶ 17). The court rejected a bevy of distinctions urged by the commission.

Judge Neubauer concurred, writing separately to "clarify why the [c]ommission's interpretation is unsupported and unreasonable" (¶ 27). For example, "the [c]ommission's interpretation would preclude a finding of 'misconduct' if even one of an employee's permitted number of absences is with notice and a valid reason, regardless of whether the employer's policy permits three, five, ten, or even more absences" (*id.*). **WL**

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