Administrative Law

Retail Food Establishments – Food Regulations – Constitutionality

***Wisconsin Cottage Food Ass'n v. Wisconsin Dep't of Agric., Trade & Consumer Prot.*, 2024 WI App 69 (filed Nov. 19, 2024) (ordered published Dec. 18, 2024)**

HOLDING: Retail food regulations that the plaintiffs challenged are constitutional.

SUMMARY: The Wisconsin Cottage Food Association (WCFA) challenged certain regulations administered by the Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) that related to "sellers of unbaked, 'not potentially hazardous,'" homemade foods (¶ 1). After a hearing, the circuit court ruled that the regulations were unconstitutional.

The court of appeals reversed in an opinion authored by Judge Colón. Applying a rational-basis review, the court found no violation of equal protection. The first step of the rational-basis test was satisfied. "Each class of food sellers created by the retail food establishment laws has a characteristic about it that makes it different from the other classes. Food sellers under the generally applicable law are able to produce a variety of foods for sale to consumers in whatever quantities they choose, while those food sellers falling under exemptions from the retail food establishment laws are limited by, for example, type or quantity of food sold" (¶ 27).

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

The second step was also met. The DATCP identified two purposes behind the laws: 1) food safety and protection of consumers; and 2) minimizing the risk of adulteration, misbranding, and contamination. "The more food sold, either in quantity or variety, the greater the risk to consumers of misbranding of foods, adulteration of foods, contamination of foods, and overall food safety.... We conclude that requiring food sellers who are not limited by type of food or quantity of food sold to obtain a license and submit to certain requirements and further identifying certain sellers of foods by type or quantity of food sold for an exemption to be germane to the purpose of the law" (¶ 30).

Turning to the fifth step of the rational-basis test (the third and fourth steps were not contested) (*see* ¶ 35), the court again rebuffed the challenge. "WCFA again attempts to compare itself to those food sellers that qualify for exemptions to the retail food establishment laws, and it argues that its foods are safe, or even safer, than foods sold under the exemptions such that the characteristics between them and those who are exempted are not so different as to reasonably suggest different treatment" (¶ 36). Essentially, "the legislature drew a line, and there is a rational reason for where the legislature drew that line based on the foods sold and quantities of those foods sold" (¶ 37).

Criminal Procedure

Searches – Snapchat Account – Child Pornography

***State v. Gasper*, 2024 WI App 72 (filed Oct. 30, 2024) (ordered published Dec. 18, 2024)**

HOLDING: The defendant failed to establish that he had an objectively reasonable expectation of privacy in a child pornography video, and thus a detective's warrantless inspection of the video was not a search subject to the Fourth Amendment.

SUMMARY: The electronic service provider Snapchat submitted a report to the CyberTipline of the National Center for Missing and Exploited Children (NCMEC) that it had detected a child pornography video that had been "saved, shared, or uploaded" to defendant Gasper's Snapchat account. NCMEC traced the IP address tied to Gasper's account to Wisconsin and sent the tip, which included the video, to the Wisconsin Department of Justice (DOJ).

A DOJ policy analyst opened the video and prepared and submitted an administrative subpoena to Gasper's internet service provider seeking the name and mailing address associated with Gasper's IP address. Detective David Schroeder then received a copy of the video reported by Snapchat; he opened the copy of the video and confirmed that it depicted child pornography. He prepared and executed a search warrant at Gasper's home. Electronic devices were seized, and Gasper was arrested. He was charged with 10 counts of possessing child pornography.

Gasper filed a motion to suppress, seeking to exclude the Snapchat video because Schroeder opened it without a warrant (or an exception to the warrant requirement). The circuit court granted the suppression motion after determining that Gasper had a reasonable expectation of privacy because he used a cell phone to access Snapchat. The court relied on U.S. Supreme Court authority that requires a warrant to search cell phones. In an opinion authored by Judge Neubauer, the court of appeals reversed.

The appellate court concluded that Gasper failed to establish that he had an objectively reasonable expectation of privacy in the video and thus the detective's inspection of the video was not a search subject to the Fourth Amendment (*see* ¶ 8). A person challenging a search bears the burden of establishing by a preponderance of the evidence that the person has a reasonable expectation of privacy in the area or object of the search. "The privacy interest is both subjective and objective: a defendant must show he or she subjectively expected privacy in the area or object, and the expectation is one that society recognizes as reasonable" (¶ 10).

In this case, the defendant did not testify nor did he submit any admissible evidence to meet his burden to show that he believed the video downloaded on Snapchat was private. Even if he had testified to a subjective expectation of privacy, Snapchat's policies make it clear that any such subjective expectation would be unfounded. "The evidence presented to the circuit court showed that Gasper agreed to terms that he violated by saving, sharing, or uploading a child pornography video to his account. Snapchat informed him that it would be scanning and accessing his account for content that violated the terms of service like child pornography and would

report violations to NCMEC, as required by federal law, and to law enforcement. The terms to which Gasper agreed vitiate any claimed subjective expectation of privacy" (¶ 21).

Even if Gasper had attested to a subjective expectation of privacy in the Snapchat video, that expectation would be objectively unreasonable given Snapchat's policies regarding sexual content in general and sexually explicit content involving children in particular. Gasper agreed that Snapchat could monitor his account for content violations, and Snapchat reserved the right to access offending accounts, actively scan for child pornography, delete content, and terminate his account, and advised that it would report child pornography to the authorities (*see* ¶ 23). Gasper acknowledged that even if his account were password protected, Snapchat expressly denied him permission, control, or privacy with respect to child pornography, no matter which precautions he took (*see* ¶ 24).

In granting suppression, the circuit court focused on the fact that Gasper accessed his Snapchat account using his cell phone. However, Snapchat acquired the video from Gasper's Snapchat account – not from his cell phone. That made his Snapchat account the relevant "area" that was searched (¶ 12). Snapchat scanned the data held on its own servers and identified the child pornography video in Gasper's account without accessing any of his devices. Thus, the only relevant question was whether Gasper had a reasonable expectation of privacy in the video in his Snapchat account (*see* ¶ 15). As discussed above, he did not.

Evidence

Other Acts – Greater Latitude – Sex Crimes

***State v. Seaton*, 2024 WI App 68 (filed Nov. 6, 2024) (ordered published Dec. 18, 2024)**

HOLDING: The circuit court abused its discretion in declining to admit evidence of a prior sexual assault that the defendant committed.

SUMMARY: The defendant, age 19, was charged with third-degree sexual assault, defined as sexual intercourse without consent, which allegedly occurred in June 2019. The victim was a 17-year-old acquaintance with whom the defendant apparently had been drinking. The state offered evidence of an incident that occurred in 2017 or 2018 that involved an alleged, somewhat similar, sexual assault of another 17 year old (*see* ¶ 4). The circuit court excluded the evidence, finding the "other act" failed to meet the first step of the *Sullivan* test, namely, that it was offered for a permissible purpose. *See State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

The court of appeals reversed in an opinion authored by Judge Gundrum that applies the "greater latitude" analysis as explicated in *State v. Dorsey*, 2018 WI 10, 379 Wis. 2d 386, 906 N.W.2d 158. The court of appeals held that the trial judge erred in finding that the prior act (from 2017 or 2018) was not offered for a permissible purpose; under case law, a permissible purpose of other acts evidence is to show the victim's "credibility" (¶ 19).

Turning to the second *Sullivan* step, the court of appeals held that the prior act was relevant to the victim's credibility in this case. Although earlier cases had disapproved of using prior assaults to prove that a victim had not consented, this authority predated the "greater

latitude" rule (Wis. Stat. § 904.04(2)(b)1.) addressed in *Dorsey*. Essentially, "any similar acts" are admissible to prove guilt in sexual assault and domestic violence cases; thus, "the subsequently codified and expanded greater latitude rule directs that admissibility of 'any similar act' is 'without regard to whether the victim of the crime that is the subject of the proceeding is the same as the victim of the similar act'" (¶ 25). The court of appeals said that the prior act, which it declared to be substantially similar, was relevant to the victim's credibility (¶ 34).

Finally, under the third *Sullivan* step, the evidence was not so unfairly prejudicial that it failed under Wis. Stat. section 904.03.

Insurance

Coverage – Water Damage – "Vacant" Buildings

***Frankenthal Int'l LTD v. West Bend Mut. Ins. Co.*, 2024 WI App 71 (filed Nov. 26, 2024) (ordered published Dec. 18, 2024)**

HOLDING: The circuit court properly found that an insurance policy covered water damage to a building.

SUMMARY: The facts here are undisputed. A building owned by the plaintiff, Frankenthal, was damaged by water. Frankenthal filed a claim with its insurer, West Bend Mutual Insurance Co., seeking coverage. The issue concerned whether the property was "vacant" at the time of the damage. The circuit court ruled that the property was not vacant because it was being used for the plaintiff's "customary operations" when the harm occurred. Thus, the harm caused by the water was covered under the policy. The court and the parties relied on *Myers v. Merrimack Mutual Fire Insurance Co.*, 788 F. 2d 468 (7th Cir. 1986).

The court of appeals affirmed in an opinion authored by Judge Hruz that applied the three-step procedure for interpreting insurance policies (*see* ¶ 20). The parties agreed that the plaintiff was "in the business of leasing space" in the properties (¶ 24). "Given the foregoing considerations, including especially the Policy's language and the agreed-upon purpose of the vacancy provision, we conclude that the term 'customary operations' in the Policy is susceptible to more than one reasonable interpretation. Therefore, the term 'customary operations' in the Policy, at least as applied to the undisputed facts of this case, is ambiguous. Consequently, we construe that term against West Bend and in favor of coverage for Frankenthal. Because we are to decide cases on the narrowest grounds – here, the existence of ambiguous contract language – we need not definitively decide which interpretation is best, either generally or under the facts of this case" (¶ 38).

The court rejected the insurer's contention that "customary operation" was limited to "actual leasing" of space (¶ 40). That the plaintiff was engaged in "ongoing, active efforts to lease space" was crucial (¶ 45). "Had the Policy clarified what was included in 'customary operations' or, as other policies have done, identified each property's use or the owner's business pursuit, the result here may have been different" (¶ 47).

Real Property

Residential Development – Certiorari Review – Standing – Wis. Stat. Section 781.10

***St. Croix Scenic Coal. Inc. v. Village of Osceola*, 2024 WI App 73 (filed Nov. 5, 2024) (ordered published Dec. 18, 2024)**

HOLDING: Petitioners failed to plead specific facts demonstrating their standing to bring a certiorari action challenging a development project.

SUMMARY: The Osceola Bluffs development project (hereinafter the project) is a proposal to build a mixed-use commercial and residential property on the bank of the St. Croix River at the location of an abandoned hospital. The village of Osceola approved the developer's final site plans for the project. The St. Croix Scenic Coalition (a nonprofit charitable organization dedicated to protecting the scenic character of the St. Croix Valley landscape) and eight individual members of the coalition sought certiorari review under Wis. Stat. section 781.10 challenging the validity of the village's approval of the project. The circuit court concluded that the coalition had standing to bring the certiorari action and ultimately granted relief in part to the coalition with respect to its petition for certiorari and reversed the village's decision approving the project. In an opinion authored by Judge Gill, the court of appeals reversed.

The issue before the appellate court was whether the coalition and its members had standing to bring the certiorari action. A statute enacted in 2023 has established a new, exclusive form of certiorari review for any final decision of a political subdivision on an application for a permit or authorization for building, zoning, driveway, stormwater, or other activity related to residential development. As pertinent to this appeal, the statute (Wis. Stat. § 971.10(2)(c)3.) provides in part that a certiorari action "may be filed only by any of the following": "A person that, as a result of the final decision on the application for an approval, *sustains actual damages or will imminently sustain actual damages that are personal to the person and distinct from damages that impact the public generally*." (Emphasis added.) Wisconsin

Statutes section 781.10 dictates that the pleadings for certiorari must specify facts demonstrating that the petitioner has standing to bring the action (*see* ¶ 28).

The parties focused their arguments on whether the coalition and its members sufficiently pleaded allegations to meet the requirements of the statute. The appellate court concluded that they had not. A petitioner under Wis. Stat. section 781.10(2)(c)3. "must experience a real, then-existing, injury or must reasonably be facing such injury in the near future as a result of the local governing body's decision to approve an application" (¶ 18). The actual or imminent actual damages must be personal to the person and distinct from damages that impact the public generally (*see* ¶ 20).

In this case, the petition for certiorari alleged that seven of the eight petitioning coalition members "believe" that the proposed development will decrease their property values if completed, and many expressed concerns that the project will negatively impact their enjoyment of their properties. Some petitioners also expressed their beliefs that the project will increase traffic and parking issues near their residences and impact the utilities infrastructure. Most petitioners also believe that the project will negatively impact the natural and scenic qualities of the St. Croix River. Concerns were also raised about potential tax increases and pollution.

The court of appeals concluded that many of the concerns raised in the petition relate to issues that are not "personal" or "distinct from damages that impact the public generally." These include concerns about the impact of the finished development on the natural and scenic qualities of the St. Croix River, parking and traffic issues, increased property taxes, and infrastructure concerns. Moreover, the members' allegations regarding these issues as well as diminished property values appear from the pleadings to be based on their generalized "beliefs" without supporting evidence (¶¶ 23-24). A member's mere statement that the person's property value may decline due to the proposed development, without more, fails to demonstrate that the member has standing (*see* ¶ 26).

In sum, the court concluded that "the Coalition failed to plead sufficient facts to have standing as it failed to allege real, then-existing, injuries to its individual members, or that the individual members reasonably faced such injury in the near future as a result of the Village's decision to approve the residential development application. The alleged mere possibility of future harm, and harm that is factually indistinguishable from damages that impact the public generally, was insufficient to meet this standard" (¶ 30). Accordingly, the court of appeals reversed the circuit court's decision and remanded for the circuit court to dismiss the certiorari petition.

Securities Regulation

Wisconsin's "Blue Sky Law" – "Offers to Sell" – "Broker-Dealers" – "Agents"

***Leach v. Wisconsin Dep't of Fin. Insts.*, 2024 WI App 70 (filed Nov. 27, 2024) (ordered published Dec. 18, 2024)**

HOLDINGS: The several holdings of the court are summarized in the text that follows.

SUMMARY: Kelly Seago is a Wisconsin resident. Her former coworker Leach and Leach's husband, Cunningham, informed Seago that they were starting a financial services business in California called PV Wealth and that they would be "honored" to have Seago as their first client and would charge her a small percentage of each financial transaction made on Seago's behalf as their fee. Leach directed Seago to Cunningham's Facebook page, on which Cunningham represented that he was a certified financial planner and catalogued a long list of professional financial skills; in fact, Cunningham was not a certified financial planner and did not possess any professional financial skills (*see* ¶ 8).

Seago agreed to invest with PV Wealth a substantial worker's compensation settlement that she had received and her retirement funds; she informed Leach and Cunningham that her financial goal was to preserve her capital and to live off the worker's compensation settlement for the rest of her life. Seago signed limited power-of-attorney applications so that Cunningham could trade securities from Seago's Charles Schwab brokerage accounts on Seago's behalf, and Cunningham thereafter made all trading and investment decisions for Seago's accounts (*see* ¶¶ 11-12).

Shortly after PV Wealth began to manage Seago's brokerage accounts, Leach and Cunningham sought and obtained authorization from Seago to engage in speculative trading activity (which was inconsistent with the original investment plan) without advising her about the risks associated with these types of trades. Within 29 months, 32% of Seago's original investment was lost. Leach and Cunningham did not inform Seago about these losses but instead assured her that her accounts were performing well. It was only after Leach consulted with another financial services firm that she learned the full extent of her losses, that Cunningham had never been a certified financial planner, that PV Wealth was not a registered investment advisor firm, and that PV wealth had not been charging her a fee (*see* ¶¶ 12-15).

The Wisconsin Department of Financial Institutions (DFI) investigated and issued summary orders alleging that Leach, Cunningham, and PV Wealth violated various provisions of Wis. Stat. chapter 551. The hearing examiner denied the appellants' motion to dismiss, which argued that the DFI lacked jurisdiction to pursue the alleged violations of Wis. Stat. chapter 551 because no "sale" or "offer to sell" was made in Wisconsin. The DFI hearing examiner determined that the appellants violated Wis. Stat. section 551.501(2) and (3) by committing fraud in connection with the offer, sale, or purchase of securities; PV Wealth violated Wis. Stat. section 551.401(1) by transacting business as a broker-dealer in Wisconsin without registration; and Cunningham violated Wis. Stat. section 551.402(1) by transacting business as an agent of PV Wealth in Wisconsin without registration (*see* ¶ 17).

On judicial review, the circuit court affirmed the DFI's decision. In an opinion authored by Judge Nashold, the court of appeals affirmed.

The court of appeals found that the DFI had jurisdiction under Wis. Stat. section 551.613 to bring this enforcement action because the appellants' offer to sell securities on Seago's behalf was an "offer to sell" that was made in Wisconsin. An *offer to sell* is defined in pertinent part as including "every … offer to dispose of … a security," which the court concluded can be fairly understood as including both offers to sell securities to individuals and offers to sell securities on behalf of individuals (*see* ¶ 29). There was no dispute that the appellants – though in California – directed the offer to, and the offer was received by, Seago while she was in Wisconsin.

Further, the appellants' offer was an offer to sell even though the appellants did not receive compensation. The statutes define "offer to sell" as including an offer to dispose of a security "for value." In this case the court found that appellants offered to sell securities on Seago's behalf "for value" in that Seago was to receive value in exchange for the securities that appellants sold; that is, the appellants were not offering to give Seago's securities away for free (*see* ¶ 33). Even if the statute were to mean value inuring to the appellants, the original agreement was that they would receive a fee for each transaction. Though they did not collect that fee, the DFI examiner concluded that they expected PV Wealth to build a reputation as a successful financial planner at which point they would start collecting fees. The opportunity to build their business reputation was value that the appellants received in exchange for managing Seago's investments (*see* ¶ 35).

The court of appeals also concluded that PV Wealth acted as a "broker-dealer" and that Cunningham was PV Wealth's "agent." The hearing examiner determined that PV Wealth transacted business in Wisconsin as an unregistered broker-dealer in violation of Wis. Stat. section 551.401 and that Cunningham transacted business in Wisconsin as an unregistered agent of PV Wealth in violation of Wis. Stat. section 551.402. A *broker-dealer* is "a person engaged in the business of effecting transactions in securities for the account of others or for the person's own account." See Wis. Stat. § 551.102(4). An *agent* is "an individual … who represents a broker-dealer in effecting or attempting to effect purchases or sales of securities …." *See* Wis. Stat. § 551.102(2).

In this case, for more than two years PV Wealth routinely traded securities on Seago's behalf with the hope of building a successful business reputation. For these reasons, PV Wealth was a "broker-dealer" and Cunningham was its "agent" because PV Wealth was "engaged in the business of effecting transactions in securities for the account of others" (¶ 42). Receipt of compensation is not necessary to be a broker-dealer (*see* ¶ 45).

Lastly, the appellate court held that the hearing examiner's findings that Seago was a client of PV Wealth was supported by substantial evidence. The appellants raised this issue even though the term "client" is not used in the relevant statutes. The court observed that "the appellants do not explain why the hearing examiner's conclusion that the appellants engaged in the violations alleged depends upon a finding that Seago was a client of PV Wealth" (¶ 57). Nevertheless, the hearing examiner's conclusion was supported by substantial evidence. **WL**