Civil Procedure

Sanctions – Attorney Misconduct – Dismissal of Claims

***Scudder v. Concordia Univ. Inc.*, 2025 WI App 13 (filed Jan. 8, 2025) (ordered published Feb. 26, 2025)**

HOLDING: The circuit court erroneously exercised its discretion when it imposed a sanctions order dismissing the plaintiff's lawsuit based on her lawyer's violations of discovery rules and a scheduling order.

SUMMARY: Scudder (the plaintiff) sued Concordia University for religious discrimination and related claims. The plaintiff's attorney, however, allegedly failed to comply with various discovery rules and a scheduling order. Nor did the attorney inform the plaintiff of certain deadlines or provide a copy of the scheduling order. After repeated failures, the circuit court imposed sanctions that precluded the plaintiff from offering evidence of damages or calling witnesses on her behalf. The plaintiff's lawyer did not appear at the hearing nor did he give notice of the hearing to the plaintiff. The plaintiff learned about the sanctions and the disposition only after she checked CCAP a month later. The plaintiff later appeared with new counsel and moved for relief from the order, but the circuit court entered summary judgment in favor of Concordia.

The Wisconsin Court of Appeals reversed in an opinion authored by Judge Lazar. Circuit courts may dismiss a civil action as a sanction for egregious conduct only after considering two factors: "(1) the client failed to act in a reasonable and prudent manner in monitoring her attorney's conduct in the litigation and (2) the client had knowledge of, should have known, or was complicit in the attorney's egregious conduct. This is especially true when the attorney is misleading the client" (¶ 49).

"Circuit courts have inherent authority to exercise their discretion in determining whether to impose sanctions for scheduling order violations and other misconduct" (¶ 23). Nonetheless, sanctions, including dismissal of claims, must be imposed "proportionately and appropriately" (¶ 29). The court looked to other sanctions cases in which a party was complicit in, or acted with knowledge of, counsel's misconduct (*see* ¶ 33).

The plaintiff's case was very different. "To summarize, Scudder had no notice that documents and discovery were missing. The circuit court never inquired whether Scudder was aware of the failing course of her litigation. The monetary sanction, with a set deadline for payment that the court imposed on Scudder, was never served on her. There was no warning that further, harsher sanctions (including effectively dismissing her case) were likely.... Under the guidance of *Industrial Roofing* [*Servs. Inc. v. Marquardt*, 2007 WI 19, 299 Wis. 2d 81, 726 N.W.2d 898], we cannot conclude that a court could reasonably conclude that Scudder was sufficiently knowledgeable about, or complicit in, Counsel's misconduct to warrant effectively dismissing her case. The dismissal of Scudder's case did not 'foster sound, speedy administration of justice'" (¶ 43).

The court also emphasized that "dismissals" are not the only available option for "egregious conduct by an attorney." It discussed other options, emphasizing that the circuit court had "alighted on the most draconian" (¶ 47).

Employment Law

Wisconsin Fair Employment Law – Retaliatory Terminations

***Radtke v. Labor & Indus. Rev. Comm'n*, 2025 WI App 14 (filed Jan. 22, 2025) (ordered published Feb. 26, 2025)**

HOLDING: The Labor and Industry Review Commission (LIRC) did not err in concluding that the petitioner failed to establish probable cause to believe that her employer terminated her employment in violation of the Wisconsin Fair Employment Law.

SUMMARY: Radtke began employment at Vaportek Inc. in 1982. In the mid-1990s she was promoted to a supervisory position. In that role she reported to work each day 15-30 minutes before the start of the work shift to set up machinery for other employees. However, she was not paid overtime for this early reporting, even though she often worked more than 40 hours per week. On Jan. 11, 2016, Radtke's supervisors reduced her supervisory responsibilities and hourly pay following an investigation of complaints about her treatment of Vaportek employees. Radtke responded by stating that Vaportek should compensate her for all unpaid overtime dating back more than 30 years. Shortly thereafter, Vaportek agreed to compensate Radtke for overtime for the previous two years and then told her that her services were no longer needed by the company. At no time on or before Jan. 11, 2016, did Radtke indicate that she intended to file a complaint with any governmental agency regarding the unpaid overtime.

Radtke thereafter filed a complaint with the Equal Rights Division (ERD) of the Wisconsin Department of Workforce Development, alleging that Vaportek had terminated her because it believed she was going to file a wage complaint. The ERD determined that no probable cause existed to support the allegation of retaliatory termination.

Radtke appealed but an administrative law judge and LIRC both agreed that there was no probable cause to support her allegations. Radtke then petitioned for judicial review, and the circuit court reversed LIRC's decision. In an opinion authored by Judge Neubauer, the court of appeals reversed the circuit court.

The court of appeals first addressed the petitioner's challenge to LIRC's determination that she did not show probable cause to believe that Vaportek terminated her employment in violation of Wis. Stat. section 111.322(2m)(a). This statute prohibits an employer from retaliating against an employee because the employee "files a complaint or attempts to enforce" certain employment-related rights. In this case, it was undisputed that the petitioner did not file a complaint concerning unpaid overtime until after Vaportek terminated her employment.

LIRC also concluded that Radtke's statement at the Jan. 11, 2016, meeting that Vaportek should compensate her for unpaid overtime did not constitute an "attempt to enforce [her] right" to


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In this column, Prof. Daniel D. Blinka and Prof. Thomas J. Hammer summarize select published opinions of the Wisconsin Court of Appeals. Full-text decisions are available online at www.wisbar.org/wislawmag.

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such compensation under the statute. In LIRC's view, an individual only "attempts to enforce [a] right" under the cited statute if the individual "resort[s] to a governmental agency" (¶¶ 20-21). The appellate court agreed. "[A]n individual does not 'attempt to enforce [a] right' to unpaid overtime under Wis. Stat. § 111.32(2m)(a) merely by asking his or her employer to pay it" (¶ 22).

The court of appeals also addressed a challenge raised under Wis. Stat. section 111.322(2m)(d), which prohibits an employer from discharging an individual if the employer "believes that the individual engaged or may engage in any activity" protected under the statute, including the filing of a wage complaint. The court agreed with LIRC that substantial evidence (which is detailed in the opinion) exists in the record to support its finding that Vaportek did not believe the petitioner might file a wage complaint for unpaid overtime when it fired her (*see* ¶ 2).

Motor Vehicle Law

Implied Consent – "Informing the Accused"

***State v. Gore*, 2025 WI App 11 (filed Jan. 7, 2025) (ordered published Feb. 26, 2025)**

HOLDINGS: 1) The circuit court correctly denied the defendant's motion to suppress the results of a blood draw. 2) The officer's statement that he would seek to obtain a search warrant if the defendant refused a blood draw was not unconstitutionally coercive.

SUMMARY: Gore was the driver of a vehicle involved in a rollover crash that killed a passenger in the vehicle. There was evidence that Gore was driving under the influence of intoxicants. He was conveyed to a hospital, where an officer read the standard "Informing the Accused" form to him, which advised Gore that his operating privilege would be revoked if he refused chemical testing. Gore initially consented to a blood draw but then asked what would happen if he declined. The officer replied that he "would contact a judge and look to get a warrant" (¶ 11). Ultimately, Gore consented to a blood draw. Testing revealed a 0.239 blood-alcohol concentration.

Gore was charged with and convicted of homicide by use of a vehicle with a prohibited alcohol concentration. On appeal, he argued that the circuit court erred in denying his motion to suppress the results of the blood draw. In an opinion authored by Judge Gill, the court of appeals affirmed.

When the officer read the "Informing the Accused" form to Gore, he was not under arrest. The officer was proceeding under Wis. Stat. section 343.305(3)(ar)2., which provides that the implied consent law applies when "a person is the operator of a vehicle that is involved in an accident that causes the death of or great bodily harm to any person and the law enforcement officer has reason to believe that the person violated any state or local traffic law." The defendant argued that *State v. Blackman,* 2017 WI 77, 377 Wis. 2d 339, 898 N.W.2d 774, which also dealt with Wis. Stat. section 343.305(3)(ar)2., compelled suppression of his blood test results.

The court of appeals disagreed. *Blackman* dealt with a situation in which an officer read the "Informing the Accused" form but did not suspect the driver of being under the influence of alcohol (*see* ¶ 29). That form advises the person to whom it is read that a refusal to submit to chemical testing will result in the revocation of the operating privilege. However, at a refusal hearing, the prosecution must establish that the officer had probable cause to believe the person was driving under the influence. If the officer did not have such probable cause, as was the case in *Blackman,* then the subsequent consent to testing would be involuntary because it was obtained under the false premise that revocation would follow a refusal (*see* ¶ 2).

The appellate court concluded that *Blackman* did not apply because the officer had probable cause to believe that Gore had been driving while under the influence. (The facts demonstrating probable cause are detailed in the opinion.) Accordingly, the language in the "Informing the Accused" form that a refusal to submit to testing would result in the revocation of Gore's operating privilege was an accurate description of what would happen if he refused testing (*see* ¶ 42). The court also concluded that the officer's statement that he would seek to obtain a warrant if Gore refused testing was not unconstitutionally coercive (*see id.*).

Torts

Liability – Corporate Officer – Personal Negligence

***Garrett v. Ocean View Swimming Pool Servs. LLC*, 2025 WI App 12 (filed Jan. 2, 2025) (ordered published Feb. 26, 2025)**

HOLDING: A member-owner of a limited liability company (LLC) could be held personally liable for the company's alleged negligent maintenance of a swimming pool.

SUMMARY: A homeowner hired Ocean View Swimming Pool Services LLC (Ocean View) to maintain his in-ground fiberglass swimming pool. He alleged that Ocean View's negligence sufficiently damaged the pool that it would have to be replaced. His complaint named Ocean View and Kelly Brown, a member-owner of the LLC. The circuit court granted summary judgment in favor of Ocean View and Brown, dismissing the latter from the lawsuit.

The court of appeals reversed in an opinion, authored by Judge Gundrum, holding that Brown can be held personally liable. Relying on Wis. Stat. section 183.0304(1), "the circuit court granted Ocean View and Brown's summary judgment motion and dismissed Brown from the suit, concluding Brown was 'an agent and member of the LLC performing services on behalf of the LLC at the time this happened'" (¶ 5). Wisconsin case law, however, has long held that individuals are responsible for their own tortious conduct. This includes corporate agents, who may be personally liable for tortious conduct regardless of whether they acted outside the scope of their corporate authority (*see* ¶ 9).

Turning to Wis. Stat. section 183.0304(1), the court emphasized that the plaintiff is not contending that Brown is liable for damages caused by "the company." "Rather, Garrett contends Brown is legally responsible for how he personally performed the pool maintenance – his own alleged negligence. Additionally, Garrett's claim against Brown personally is not founded at all – much less 'solely' – upon Brown 'being or acting as a member or manager' of Ocean View. *See* § 183.0304(1). Again, it is founded upon Brown's own direct, allegedly negligent actions in performing the maintenance" (¶ 13). Put differently, "a corporate officer may be held personally liable for his own negligent acts like any other employee would be" (¶ 19). **WL**