Creditor-Debtor Law

Mortgage Liens – Superiority of Lien Over Contract Claims

***Casanova v. Polsky*, 2023 WI 19 (filed March 16, 2023)**

HOLDINGS: 1) Under Wis. Stat. section 128.17, the bondholders' mortgage lien is superior to the contract claims of residents of a senior-living facility. 2) The bondholders did not contract away the superiority of their claims. 3) The *Episcopal Homes* decision (cited below) does not apply to this case.

SUMMARY: The Atrium of Racine Inc. is a nonprofit corporation that owned and operated a senior-living facility. Bonds were sold to finance construction of the facility. After Atrium defaulted on debt service payments to a group of bondholders, Atrium commenced a voluntary assignment for the benefit of creditors under Wis. Stat. chapter 128 and the circuit court appointed a receiver. The receiver sold Atrium's assets, generating more than $4 million. According to the receiver, Atrium owed the bondholders more than $6 million, secured by a valid mortgage lien on Atrium's estate.

Many Atrium residents claimed they were entitled to the proceeds of the sale because, under their residency agreements, they were owed reimbursement for their entrance fees (collectively totaling more than $7 million). The circuit court concluded that the bondholders' mortgage lien was superior to the residents' entrance fee claims.

In an unpublished decision, the court of appeals reversed; it relied on *M&I First National Bank v. Episcopal Homes Management,* 195 Wis. 2d 485, 536 N.W.2d 175 (Ct. App. 1995), to conclude that the residents' claims were superior to the bondholders' lien.

In a unanimous opinion authored by Justice R.G. Bradley, the supreme court reversed the court of appeals. It concluded that under Wis. Stat. section 128.17, the bondholders' mortgage lien (which was properly perfected) is superior to the residents' contract claims (*see* ¶ 2). The bondholders are secured creditors and the residents are unsecured creditors (*see* ¶ 28). When distributing proceeds from the sale of an estate, a receiver must satisfy debts held by secured creditors before satisfying those held by unsecured creditors (*see* ¶ 27). Because Wis. Stat. section 128.17 prioritizes the claims of secured creditors over those of unsecured creditors, the bondholders would receive first payment (*see* ¶¶ 2, 28).

In this case, the residents argued that the bondholders subordinated their secured interest to the residents' interest in their entrance fees. The court rejected this argument. "Nothing in the Financing Documents or the Official Statement [a document prepared by the bond underwriter summarizing the material terms and conditions of the bond issuance] subordinates the bondholders' Mortgage. The provisions cited by the residents merely contemplate the possibility that the Mortgage could be subordinated to other liens. Nothing in the Financing Documents or the Official Statement creates any liens or other encumbrances, much less subordinates the mortgage to them. We therefore apply Wis. Stat. § 128.17, which accords the bondholders' Mortgage priority" (¶ 37).

Lastly, the court declined to apply *Episcopal Homes* to this case because that decision does not apply to the proceeds from the sale of real property with a properly perfected mortgage lien (*see* ¶ 2).

Accordingly, the court concluded that the bondholders are entitled to first payment from the proceeds of the sale of Atrium's assets.

Criminal Procedure

Plea Agreements – Cure of Breaches

***State v. Nietzold*, 2023 WI 22 (filed March 28, 2023)**

HOLDING: A prosecutor made a substantial and material breach of a plea agreement but successfully cured the breach.

SUMMARY: Nietzold entered a plea of no contest to one count of repeated sexual assault of a child pursuant to a plea agreement in which the prosecutor was free to argue for prison but agreed not to recommend a specific term of imprisonment. At the sentencing hearing, the prosecutor asked the court to impose a 27-year sentence, consisting of 12 years of initial confinement (as recommended in the presentence investigation report (PSI)) followed by 15 years of extended supervision. As the prosecutor concluded, with the specific sentence recommendation coming at the end of his remarks, defense counsel began his argument by pointing out the prosecutor's breach of the plea agreement. The prosecutor immediately acknowledged his mistake and then confirmed with the court that all he was recommending was "just a prison sentence" (*see* ¶ 4).

The circuit court indicated that it understood that the prosecutor had withdrawn his earlier comments and was not arguing for a specific prison term. (Although the court in its sentencing remarks mentioned that the "state" recommended 12 years of initial confinement, the court later clarified that its mention of the "state" was a reference to the Department of Corrections' recommendation in the PSI.) The court sentenced the defendant to 15 years of confinement followed by 10 years of extended supervision.

The defendant filed a motion for postconviction relief seeking resentencing based on the state's initial violation of the plea agreement. The circuit court denied the motion. In an unpublished opinion, the court of appeals reversed. It concluded that the prosecutor had materially breached the plea agreement by commenting on the merits of the PSI's recommendation and by recommending a specific sentence.

In a unanimous decision authored by Justice Hagedorn, the supreme court reversed the court of appeals. A plea agreement is breached when a prosecutor fails to abide by the negotiated sentencing recommendation; however, some breaches can be cured. The court concluded in this case that "the prosecutor's immediate and unequivocal retraction of his error – and subsequent actions affirming that retraction – constitute a sufficient cure, transforming the material and substantial breach into a nonmaterial breach" (¶ 14).

The supreme court also concluded that defense counsel did not perform deficiently by failing to contemporaneously object when the prosecutor breached the plea agreement. Said the court: "[C]ounsel did raise the issue in a suffi-

BLINKA

HAMMER

In this column, Prof. Daniel D. Blinka and Prof. Thomas J. Hammer summarize all decisions of the Wisconsin Supreme Court (except those involving lawyer or judicial discipline).

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ciently timely way, enabling the prosecutor to cure his mistake. In doing so, counsel ensured that Nietzold received the benefit of his plea agreement. This comes nowhere close to a Sixth Amendment violation" (¶ 20).

Trials – Right Not to Testify – Closing Argument

***State v. Hoyle*, 2023 WI 24 (filed March 31, 2023)**

HOLDING: In a case in which the defendant decided not to testify at trial, a prosecutor's comment in closing that the evidence was "uncontroverted" did not violate the defendant's Fifth Amendment right not to testify.

SUMMARY: The defendant decided not to testify during his trial for sexually assaulting children. He was convicted. In closing, the prosecutor referred to the victim's testimony as "uncontroverted," which the defendant contended violated his Fifth Amendment right against self-incrimination. In an unpublished decision, the court of appeals reversed the conviction.

The supreme court reversed the court of appeals, thereby reinstating the conviction, in an opinion authored by Chief Justice Ziegler. The opinion reviewed U.S. Supreme Court precedent as well as lower federal court and Wisconsin case law that assessed direct and "indirect" comments on a defendant's silence at trial.

"Based on the Supreme Court's precedent and the test from *Morrison [v. United States*, 6 F.2d 809 (8th Cir. 1925)], unanimously adopted by all federal circuits and applied by the Wisconsin Court of Appeals, we hold that three elements must be present for a prosecutor to violate *Griffin [v. California*, 380 U.S. 609 (1965)]: First, the prosecutor's language must have been 'manifestly intended to be' or was 'of such character that the jury would naturally and necessarily take it to be' a 'comment on the failure of the [defendant] to testify.' Second, the prosecutor's language must also have been 'manifestly intended to be' or was `of such character that the jury would naturally and necessarily take it to be' 'adverse,' meaning comment 'that such silence is evidence of guilt.' Finally, the prosecutor's comments must not have been 'a fair response to a claim made by defendant or his counsel'" (¶ 29) (citations omitted).

Assessing the trial record in this case, the court held that the prosecutor's comment that the evidence was "uncontroverted" did not violate the Fifth Amendment. "The prosecutor instead described the State's evidence as 'uncontroverted' to remind the jury that they could evaluate only the evidence presented at trial and not speculate about other possible evidence. Additionally, the jury likely would not have thought only Hoyle could have controverted the State's evidence because defense counsel explicitly identified other kinds of evidence not presented at trial" (¶ 42).

Justice Hagedorn, joined by Justice R.G. Bradley, filed a concurring opinion to discuss the "original meaning" of the Fifth Amendment right (¶ 44).

Justice Dallet, joined by Justice A.W. Bradley, filed a dissenting opinion stating that the prosecutor indirectly and impermissibly commented on the defendant's decision not to testify (*see* ¶ 93).

Ineffective Assistance of Counsel – Prejudice – Third-Party Defense – Investigation

***State v. Mull*, 2023 WI 26 (filed April 4, 2023)**

HOLDING: The defendant was not deprived of effective assistance of counsel.

SUMMARY: A jury convicted the defendant of first-degree reckless homicide. The victim was shot six times through a closed bedroom door in a "fight bordering on a brawl" at a crowded house party (¶ 3). In postconviction proceedings, the circuit court rejected the defendant's claim of ineffective assistance of counsel, but the court of appeals reversed, holding in an unpublished opinion that trial counsel was ineffective on multiple grounds (*see* ¶ 29).

The supreme court reversed in a majority opinion authored by Justice Roggensack. First, trial counsel was not ineffective for failing to pursue a third-party defense "that implicated one or more alternative suspects" (¶ 42). The court held that trial counsel's decision to instead attack the credibility of the witnesses who testified was objectively reasonable and not deficient (*see* ¶ 51).

Second, trial counsel was not deficient in the handling of evidence that the defendant had "bragged" about killing the victim in a text message. Counsel attacked the evidence on cross-examination, electing not to object or move to strike the testimony. Although a "close call," the supreme court held that counsel's performance fell within the range of "reasonable professional assistance" (¶ 62).

Finally, the court concluded that the defendant was not entitled to a new trial

in the interest of justice, finding no reason to believe a new trial would produce a different outcome (*see* ¶ 75).

Justice Dallet dissented. She "reluctantly" agreed with the disposition on the third-party defense but found counsel's performance deficient as to the defendant's "alleged hearsay confession" (¶ 79).

Employment Law

Milwaukee Firefighters – Calculation of Duty Disability Retirement Benefits

***Milwaukee Police Supervisors Org. v. City of Milwaukee*, 2023 WI 20 (filed March 21, 2023)**

HOLDING: The plain language of the Milwaukee City Charter requires the City of Milwaukee Employees' Retirement System (MERS) to include "pension offset payments" in the calculation of firefighters' duty disability retirement benefits.

SUMMARY: The petitioner in this appeal is the Milwaukee Professional Firefighters' Association Local 215 (although this lawsuit was originally filed by the Milwaukee Police Supervisors Organization with Local 215 entering later as an intervenor). Milwaukee's city charter entitles firefighters injured on the job to receive duty disability retirement (DDR) benefits, which provide monthly wage-replacement payments to firefighters unable to continue active service. These benefits are administered by MERS. Under the city charter, MERS must pay an eligible DDR beneficiary a percentage of the "current annual salary for such position which he held at the time of such injury." The term "current annual salary" is not defined in the charter and its meaning is at the center of this lawsuit.

Under the 2013-16 collective bargaining agreement between the city and the firefighters' union (Local 215), some firefighters are entitled to a 5.8% "pension offset payment" conditioned on an employee-paid pension contribution equal to 7% of salary. All active Local 215 members make this contribution, but DDR beneficiaries do not. Before 2017, MERS included the pension offset payment in the "current annual salary" for purposes of calculating the amount of DDR benefits. However, in 2017, MERS excluded the pension offset payment from the calculation of DDR benefits. This shift in policy resulted in the filing of the present lawsuit. The circuit court granted summary judgment in favor of Local 215, but in an unpublished decision, the court of appeals reversed.

In a unanimous decision authored by Justice R.G. Bradley, the supreme court reversed the court of appeals. It agreed with Local 215 that the pension offset payment must be included in the calculation of DDR benefits for beneficiaries hired before Oct. 3, 2011. "Under the CBA, the current annual salary includes the 5.8% pension offset payment; therefore, the plain language of the Charter requires MERS to include the pension offset payment in the calculation of DDR benefits" (¶ 3).

Health-Care Records

Health-Care Records – Electronic Format – Imposition of Fees Prohibited

***Banuelos v. University of Wis. Hosps. & Clinics Auth.*, 2023 WI 25 (filed April 4, 2023)**

HOLDING: Wis. Stat. section 146.83(3f) does not allow health-care providers to charge fees for electronic records.

SUMMARY: Banuelos signed and submitted a request to University of Wisconsin (UW) Hospitals for copies of her medical records in electronic format, directing and authorizing the records to be transmitted to her attorneys. The request for electronic records was made pursuant to the Health Information Technology for Economic and Clinical Health Act. *See* 42 U.S.C. § 17935(e)(1); 45 C.F.R. § 164.524(c). UW Hospitals complied with the request through its service provider, Ciox, and transmitted electronic copies of the hospital records to plaintiff's counsel along with an invoice for $109.96. This fee was the same as the maximum "per page" charge that is authorized for paper copies under Wis. Stat. section 146.83(3f).

Banuelos filed suit, seeking declaratory and injunctive relief and damages. Her complaint alleged that because the copies of electronic patient health-care records she requested do not fall into one of the enumerated categories contained within Wis. Stat. section 146.83(3f) for which fees are specified, none of the charges permitted under section 146.83(3f) applied to her electronic records request. The circuit court disagreed and granted UW Hospitals' motion to dismiss. In a published decision, the court of appeals reversed. *See* 2021 WI App 70.

In a majority opinion authored by Justice A.W. Bradley, the supreme court affirmed the court of appeals. It concluded that section 146.83(3f) "does not permit health care providers to charge fees for electronic records" (¶ 45).

The majority agreed with the court of appeals that "the statute does not permit charges for copies of electronic records because the statute does not enumerate electronic formats as one of the three formats for which a health care provider may charge a fee" (¶ 24). The three formats listed in the statute are paper copies, microfiche or microfilm copies, and x-ray prints. "Conspicuously missing is any reference to copies of 'electronic records' or any substantially similar term" (¶ 21). Accordingly, the majority concluded that the plaintiff's complaint states a claim upon which relief can be granted that UW Hospitals' charge of $109.96 violated Wisconsin law (*see* ¶ 45).

Justice Roggensack filed a dissenting opinion. Justice R.G. Bradley also filed a dissent that was joined in by Chief Justice Ziegler and Justice Roggensack.

Insurance

Underinsured Motorist Benefits – Worker's Compensation – Reducing Clause

***Secura Supreme Ins. Co. v. Estate of Huck*, 2023 WI 21 (filed March 22, 2023)**

HOLDING: A policy's plain language required payment of underinsured motorist (UIM) benefits based on an estate's recovery after reimbursements to the worker's compensation insurer and collection of the tortfeasor's liability payment had occurred.

SUMMARY: Daniel Keith Huck was struck and killed by a motorist while at work. His employer's worker's compensation (WC) insurer paid more than $35,700 to Huck's estate, and the tortfeasor's insurer paid its limits of $25,000. This in turn triggered a statutory duty by Huck's estate to reimburse the WC insurer for some part of the tortfeasor's insurance payment. The estate paid the WC insurer about $9,700. The estate filed a claim under Huck's UIM policy with Secura Supreme Ins. Co., which had a reducing clause that permitted it to reduce its $250,000 limits by the amounts paid by the WC insurer and the tortfeasor. Secura tendered about $189,000, which reflected the worker's compensation benefit of $35,700 and the tortfeasor's payment of $25,000.

The dispute in this case centered on the $9,700 that the estate was required to reimburse the WC carrier. The circuit court rejected Secura's claim that it was entitled to reduce its UIM coverage by the full amount paid ($35,700) by the WC carrier. In a published decision, the court of appeals affirmed. *See* 2021 WI App 69.

The supreme court also affirmed. In a majority-lead opinion authored by Justice Roggensack, the court held that Secura's UIM policy precluded it from reducing its liability to the estate by the total amount of payments the estate initially received. (The majority-lead opinion extends

to paragraphs 1-2, 4-16, and 29 of the decision.)

"Wisconsin Stat. § 102.29(1)(b)2. obligated the Estate to reimburse the WC insurer with a portion of the settlement it received from the tortfeasor. Secura's UIM policy contemplated payments made in accordance with worker's compensation law in its reducing clause, and obligated the Estate to reimburse the WC insurer. The policy also required the Estate to exhaust any other bodily injury liability bonds or policies and to receive payment from them before Secura would pay UIM benefits. We therefore conclude that the policy's plain language required its payment of UIM benefits based on the Estate's recovery after reimbursements to the WC insurer and collection of the tortfeasor's liability payment had occurred" (¶ 29).

In a concurring opinion that also carried a majority of the court, Justice Dallet wrote that the majority-lead opinion (written by Justice Roggensack) unnecessarily and inappropriately analyzed various policy provisions as well as the omnibus statute (Wis. Stat. § 632.32(5)(i)) (*see* ¶¶ 17-28).

Justice R.G. Bradley dissented, criticizing the analysis of the majority-lead opinion and Justice Dallet's concurrence.

Real Property

Residential Real Estate Sale – Misrepresentations – Limited Liability Companies – Standing

***Pagoudis v. Keidl*, 2023 WI 27 (filed April 4, 2023)**

HOLDING: In a suit over alleged misrepresentations involving residential real estate, only one of "three legally distinct entities" stated a valid claim.

SUMMARY: Pagoudis owns and was the sole member of two different limited liability companies (LLCs) – Sead Properties and Kearns Management. This action arose out of alleged misrepresentations in the sale of residential real estate to Pagoudis by the Keidls. The action was brought in the name of three plaintiffs: Pagoudis and the two LLCs (Sead and Kearns).

The circuit court dismissed the complaint, finding that none of the plaintiffs had standing to assert the claims. In a published decision, the court of appeals reversed, finding that at least one of the three parties had standing and remanding the matter to the circuit court to determine which party had standing. *See* 2021 WI App 56.

The supreme court reversed in part and affirmed in part in an opinion authored by Justice Karofsky. "We now conclude that Pagoudis's and Kearns LLC's claims against Amy Keidl are dismissed without further factual development because both parties failed to state a claim upon which relief may be granted. Sead LLC's claims, however, survive the motion to dismiss, and as a result we remand the case to the circuit court for further proceedings" (¶ 8).

The five claims in the complaint fell into two categories: breach of contract and misrepresentation (*see* ¶ 12). Pagoudis's claims are legally distinct from those of the two LLCs (*see* ¶ 22).

Next the court examined the claims relative to each of the three named plaintiffs. Pagoudis "was not a party to the final contract and did not purchase the Property" (¶ 23). The statutes provide that "property acquired by an LLC, including title to real property, belongs solely to the LLC and not the LLC's members" (¶ 29). Thus, Pagoudis's use of personal funds to purchase the property was not determinative.

"In contrast, Sead LLC's allegations satisfy the elements of its breach of contract claim and its misrepresentation claims. Sead LLC satisfies the elements of its breach of contract claim by alleging: (1) the Keidls entered into a contract with Sead LLC which included a warranty or representation related to the real estate condition report (RECR); (2) the Keidls breached that contract because those affirmations were false; and (3) Sead LLC suffered damages as a result" (¶ 30). Damages, however, are confined to any harm done to Sead (*see* ¶ 35).

Finally, Kearns LLC had no standing. Although it owns the property, it was not a party to the contract with the Keidls (*see* ¶ 36). "Similarly, Kearns LLC's misrepresentation claims must be dismissed because the complaint does not allege that the Keidls made any representations to Kearns LLC" (¶ 37). Although a real estate condition report is required by statute, it does not create third-party liability (*see* ¶ 40).

Chief Justice Ziegler concurred. She agreed with the dismissal of the claims brought by Pagoudis and Kearns but wrote separately to emphasize the court's "limited scope of review" at this procedural point (¶ 44).

Justice Roggensack concurred in part but dissented on the dismissal of the Pagoudis and Kearns complaint, contending that they had standing based on assigned rights and the current record did not support dismissal of possible claims. **WL**