Appellate Procedure

Appeals of Final Judgments and Decisions on Motions for Reconsideration – Timeliness

***Kraemer v. Traun*, 2025 WI App 8 (filed Dec. 5, 2024) (ordered published Jan. 31, 2025)**

HOLDINGS: The several holdings in this case are described in the summary that follows.

SUMMARY: Benjamin Traun and Sarah Kraemer were married in 2015. Kraemer initiated divorce proceedings in 2022, and the circuit court entered a divorce judgment on April 24, 2023. This was a final judgment for purposes of appeal. In that judgment, the court adopted some of Kraemer's proposals for dividing the marital estate and determining child support. As pertinent to this appeal, the court 1) calculated Kraemer's income based solely on the income listed on her W-2 (the "income calculation" determination), 2) made Traun solely responsible for his premarital student loan debt (the "student debt" determination), 3) concluded that Traun's use of his investment accounts constituted marital waste (the "investment account" determination), and 4) did not include proceeds from a sale of Kraemer's stock in its determination of the value of the marital estate (the "stock sale" determination).

Traun filed a timely motion for reconsideration, making various arguments about his student debt, his investment accounts, and Kraemer's stock sale. The motion did not challenge the court's calculation of Kraemer's income. Wis. Stat. section 805.17(3) provides that a timely motion for reconsideration following a trial to the court is "considered denied and the time for initiating an appeal from the judgment commences" if the circuit court does not decide the motion "within 90 days after entry of judgment." Here, this 90-day period elapsed in July 2023, before the circuit court decided Traun's reconsideration motion. On Dec. 4, 2023, the court decided the reconsideration motion: it declined to reconsider its previous investment account and stock sale determinations, but it did grant reconsideration of its prior student debt determination and ultimately reached the same conclusion that Traun was solely responsible for the debt.

On Jan. 18, 2024, Traun filed a notice of appeal challenging the circuit court's determinations on the four subjects listed above. Concluding that its appellate jurisdiction might be in question, the court of appeals ordered the parties to address the timeliness of Traun's appeal as to the divorce judgment and to its ability to consider Traun's appeal of the reconsideration decision. In an opinion authored by Judge Graham, the appellate court concluded as follows:

1) With respect to the circuit court's calculation of Kraemer's income, which the court addressed in the divorce judgment but not in its reconsideration decision, the court of appeals lacked jurisdiction because Traun did not timely appeal the divorce judgment. In a civil case such as the present one in which no notice of entry of judgment was filed, Traun would typically have 90 days from the entry of the divorce judgment to file a notice of appeal (*see* ¶ 17). *See* Wis. Stat. § 809.10(1)(e). However, because Traun timely filed a motion for reconsideration, commencement of the appeal timeline is based on the date of the circuit court's reconsideration decision or the passage of 90 days, whichever occurs first (*see* ¶ 21).

In this case, the circuit court did not decide the reconsideration motion within 90 days following entry of judgment; therefore, the motion was considered denied for appeal purposes on July 24, 2023 (90 days after the April 24 entry of judgment). Traun therefore should have filed the notice of appeal within 90 days after July 24, and he did not do so. Accordingly, the notice of appeal was untimely as to the divorce judgment, and the appellate court lacked jurisdiction to review the circuit court's determination of Kraemer's income (*see* ¶ 28).

2) The court of appeals' jurisdiction over Traun's appeal of the reconsideration decision is governed by *Ver Hagen v. Gibbons*, 55 Wis. 2d 21, 197 N.W.2d 752 (1972), and *Silverton Enterprises Inc. v. General Casualty Co. of Wis.*, 143 Wis. 2d 661, 422 N.W.2d 154 (Ct. App. 1988). The rule from those cases is that "[n]o right of appeal exists from an order denying a motion to reconsider which presents the same issues as those determined in the … judgment sought to be reconsidered." The policy underlying the rule is to prevent a party from reviving an expired appeal deadline by filing a motion for reconsideration that raises the same issues that were decided in a final judgment or order (¶ 42) (citations omitted). By its terms, the *Ver Hagen-Silverton* rule pertains to issues for which the circuit court *denied* reconsideration. In this case, that means the investment-account and stock-sale determinations.

When applying the *Ver Hagen-Silverton* rule, the court of appeals utilized a "new issues test," which required it to compare the issues Traun raised in his reconsideration motion with the issues the circuit court disposed of in the divorce judgment. The court of appeals does not have jurisdiction over the appeal of any issues raised in the reconsideration decision that were disposed of in the divorce judgment (*see* ¶ 45). The court of appeals ultimately concluded that it lacked jurisdiction to review the investment-account and stock-sale determinations because Traun's motion did not present any new issues that the circuit court had not already addressed (*see* ¶ 49).

3) The court of appeals had jurisdiction to review the portion of the reconsideration decision in which the circuit court reconsidered its prior determination about Traun's student debt because the *Ver Hagen-Silverton* rule does not prevent it from reviewing issues for which the circuit court granted reconsideration (*see* ¶ 49). On the facts of this case, the court of appeals concluded that the circuit court's decision to allocate the premarital student debt solely to Traun was reasonable.

4) Kraemer was not entitled to costs and attorney fees. The appellate court rejected Kraemer's claim that Traun's appeal was frivolous. To award costs and attorney fees, the court would have to conclude that the entire appeal was frivolous. That was not the situation here. Traun presented a nonfrivolous challenge to the circuit court's treatment of his student debt (*see* ¶ 57).


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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The court also rejected Kraemer's claim for costs and attorney fees based on the "overtrial" doctrine. The argument in support of this claim was insufficiently developed. Moreover, Kraemer did not identify any authority to support the position that an appellate court may independently determine that a party has engaged in overtrial and impose sanctions on that basis. Case law suggests that a determination about overtrial rests with the circuit court (*see* ¶ 60). In this case, the circuit court did not make a finding that Traun engaged in overtrial.

Contracts

Tortious Interference – Former Employees – Disgorgement – Damages – Attorney Fees

***Frey Construction & Home Improvement LLC v. Hasheider Roofing & Siding Ltd.*, 2025 WI App 4 (filed Dec. 17, 2024) (ordered published Jan. 31, 2025)**

HOLDINGS: Issues of fact precluded summary judgment on a tortious-interference claim; however, disgorgement was a proper remedy on these facts, there was a causal link between any such interference and damages, and the circuit court properly awarded to the plaintiff attorney fees that the plaintiff incurred in prior litigation involving the same former employee.

SUMMARY: A construction company sued a roofing company for tortious interference with contract after the roofing company hired one of its former employees. The circuit court granted summary judgment to the construction company, ordered disgorgement of the roofer's profits for that period, and ordered that the roofer pay attorney fees incurred in a prior lawsuit involving the same former employee's noncompete agreement.

The court of appeals reversed and remanded in an opinion authored by Judge Gill. It held that disputed issues of fact precluded summary judgment on the tortious-interference claim. Specifically, a reasonable jury could find that the roofer did not know, "nor should it have known," that interference with the noncompete agreement was certain or substantially certain to occur (¶ 2). Specifically, the roofer could have relied on representations made by the former employee and his attorney regarding the noncompete agreement (¶ 33).

"[W]hether disgorgement is a proper remedy for tortious interference with contract claims, and whether there exists a causal connection between the disgorgement award and a party's alleged wrongdoing, are matters of first impression in Wisconsin" (¶ 3). Despite reversing on the summary-judgment issue, the court elected to address them. If the trier of fact finds that the roofer acted with the requisite intent, the parties will be placed in substantially the same position as they are now. Disgorgement allays difficulties in proving damages and discourages tortious conduct, especially intentional misconduct (see ¶¶ 44-46). Nonetheless, the roofer can raise a defense that the plaintiff failed to mitigate damages.

The roofer also challenged the award of attorney fees to the construction company. A "'narrow exception' to the American Rule is the third-party litigation exception, which applies when a party is wrongfully drawn into litigation with a third party" (¶ 57) (citations omitted). Here the roofer's alleged intentional misconduct compelled the plaintiff to both

sue the former employee in a prior action and then bring this lawsuit (*see* ¶ 61).

Criminal Procedure

Speedy Trial Right – Delay Caused by Pandemic and Its Aftermath

***State v. Coleman*, 2025 WI App 7 (filed Dec. 27, 2024) (ordered published Jan. 31, 2025)**

HOLDING: The defendant was not denied his constitutional right to a speedy trial.

SUMMARY: The defendant was arrested on June 12, 2019, and charged shortly thereafter with repeated sexual assault of a child. His trial did not commence until nearly 32 months later, on Feb. 7, 2022. Most of the delay was attributable to the shutdown of Wisconsin courts due to the COVID-19 pandemic and the backlog of trials that followed the shutdown. The defendant was ultimately convicted as charged, and he then sought postconviction relief claiming that he was denied his constitutional right to a speedy trial and that his attorney was ineffective for not objecting to the delay and not moving for dismissal on speedy trial grounds. The circuit court denied the motion. In an opinion authored by Judge Graham, the court of appeals affirmed.

Courts use the four-part balancing test articulated in *Barker v. Wingo,* 407 U.S. 514 (1972), to assess whether a defendant's constitutional right to a speedy trial has been violated. The *Barker* test considers 1) the total time that elapsed between arrest and trial, 2) the reasons for any delays, 3) the defendant's assertion of the speedy trial right, and 4) any prejudice to the defendant as a result of the delay (*see* ¶ 24).

In this case, the 32-month delay was presumptively prejudicial and therefore the court of appeals undertook an analysis of all four *Barker* factors. Looking at the first factor (length of the delay), the appellate court concluded that it weighed in favor of the defendant's claim (*see* ¶ 30). The third factor (assertion of the speedy trial right) weighed against the defendant because he never asserted his speedy trial right while he was awaiting trial, but the court did not weigh this factor heavily against him. As for the fourth factor (prejudice), the court concluded that the defendant did not suffer oppressive pretrial incarceration (he was out on bond for 31 of the 32 months) or persuade the court that he suffered significant prejudice in the form of pretrial anxiety and concern, and the defendant's loss of his mother's testimony due to her death was only minimally prejudicial.

Most of the court's *Barker* analysis focused on the second *Barker* factor (reasons for the delay) and the court's need to grapple with the unique situation of the substantial delay caused by the pandemic and its aftermath. Before the shutdown (between June 14, 2019, and March 12, 2020), there were a few adjournments of the case, most of which the court did not weigh against the state (for example, adjournments due to witness availability) or weighed less heavily against the state (for example, an adjournment due to an overcrowded court calendar).

As for the 15-month period during which the Dane County courts were closed because of the pandemic (March 12, 2020, to June 1, 2021), the court concluded that this passage of time constituted a delay properly attributed to the state (because closure of the courts was due to governmental orders), but the court gave the delay no weight against the state (¶ 45). Said the court: "we conclude that the temporary suspension of jury trials was justified due to the COVID-19 public health emergency, and therefore, we do not weigh this 466-day delay against the State" (¶ 57).

Lastly, for the post-COVID backlog delay between June 1, 2021, and the start of the defendant's trial on Feb. 7, 2022, the court weighed this period of 251 days against the state but did not do so heavily. The backlog of cases in the courts was the inevitable result of the court system's efforts to reasonably respond to the pandemic, and "[i]t would not be appropriate to fault the court system for the consequences that arose from the decisions to suspend jury trials…" (¶ 61). As noted above, the defendant was not in custody, and trial priority was given to individuals being held in pretrial custody.

Ultimately, when balancing the four *Barker* factors, the court of appeals concluded that the defendant's constitutional right to a speedy trial was not violated (*see* ¶ 78). The court further held for multiple reasons that defense counsel was not ineffective for failing to file a speedy trial demand or a motion to dismiss on speedy trial grounds (*see* ¶¶ 79-84).

Restitution – SSDI Payments

***State v. Joling*, 2025 WI App 6 (filed Dec. 11, 2024) (ordered published Jan. 31, 2025)**

HOLDING: A restitution order in which a circuit court considered a defendant's Social Security Disability Insurance (SSDI) payments was proper.

SUMMARY: The defendant was convicted of operating while intoxicated causing injury after the vehicle he was driving struck a vehicle with five occupants. Three of the victims sought restitution, totaling nearly $60,000. The judge ordered the defendant to pay $500 per month. Several years later, the defendant claimed that "new factors" warranted revisiting the restitution order: a worsening disease hindered his ability to work and he now qualified for SSDI, which he argued could not be used for restitution. The circuit court declined to reconsider the restitution.

The court of appeals affirmed in an opinion authored by Judge Grogan. First, it rejected the defendant's contention that in assessing his ability to pay, the circuit court was required to disregard the $1,200 per month in SSDI payments. "Numerous courts have concluded that the federal law does not prohibit a court from considering social security income when determining restitution" (¶ 8).

The court also rejected the defendant's contention that such an order had somehow unlawfully subjected his SSDI payments to "legal process," contrary to federal law (¶ 9). Nor did the order offend the "anti-assignment" provision of federal law (¶ 10). The court's order did not "transfer or assign" the defendant's SSDI payments to another person. "Rather, the court here reasoned that because the total amount of Joling's monthly income, which consisted of the SSDI payments and his earned income, exceeded his monthly expenses, Joling could apply his SSDI income toward his expenses and pay the restitution from his earned income" (¶ 11).

Finally, the appellate court rejected the defendant's argument that because the circuit court's decision did not advance the dual purposes of criminal restitution – making the victim whole and rehabilitating the defendant – the decision was "unrealistic" (¶ 12).

Insurance

Water Damage – Coverage – Exclusions

***Cincinnati Ins. Co. v. Ropicky*, 2025 WI App 5 (filed Dec. 26, 2024) (ordered published Jan. 31, 2025)**

HOLDING: An insurance claim for damage done by rainwater was not precluded by a policy's exclusions for construction defects or fungi damage.

SUMMARY: Homeowners filed a claim against their insurance company for extensive water damage following a storm. The insurer based its denial on an exclusion for construction defects and fungi. A circuit court granted summary judgment to the insurer, which had filed this declaratory judgment action.

The court of appeals reversed in an opinion, authored by Judge Grogan, that centered on the policy's exclusions. First, the court construed the policy's construction-defects exclusion. The loss caused by the construction defect is the cost to repair the defect itself (*see* ¶ 38). The court then turned to the policy's "ensuing loss" language, which it held was the loss resulting from rainwater entering as a result of the construction defect (*see* ¶ 40). In short, the "ensuing loss" exception in the construction-defects exclusion reinstated coverage under the policy (*see* ¶ 41). This outcome was supported by Wisconsin cases and authority from other states.

Nor did the "fungi exclusion" apply to block coverage. The policy language describing this exclusion identified two scenarios in which the exclusion itself is "never triggered," thereby narrowing this exclusion's "broad applicability" (¶ 59). The court elaborated upon its reasoning in support of this conclusion at paragraphs 60-67, summarizing it at paragraph 71.

Judge Neubauer concurred. She disagreed, however, with the "never triggered" conclusion (above), contending that is "lacks support in Wisconsin law and does not withstand scrutiny" (¶ 76).

Mental Health Law

Competency – Involuntary Medication

***State v. D.E.C.*, 2025 WI App 9 (filed Dec. 27, 2024) (ordered published Jan. 31, 2025)**

HOLDING: An order for involuntary medication to restore the defendant's competency to stand trial was proper.

SUMMARY: The defendant was charged with various felony offenses. A circuit court found that the defendant was incompetent to stand trial and ordered that he be involuntarily medicated to restore his competency to stand trial. On appeal, the defendant contended that "the involuntary medication order violates his right to due process because it fails to meet two factors required under *Sell v. United States*, 539 U.S. 166 (2003): that it is sufficiently individualized so as to significantly further the State's interest in proceeding to trial, and that it is medically appropriate" (¶ 1).

The court of appeals rejected the defendant's contentions in an opinion authored by Judge Blanchard. "The proposed treatment plan is not unconstitutionally generic and is medically appropriate when it is considered in the context of evidence in the record, which notably includes the testimony of D.E.C.'s treating psychiatrist at an evidentiary hearing" (*id.*).

"Stated more fully, factor two of the *Sell* test requires the State to present sufficient proof that 'involuntary medication will significantly further' the State's interests in trying the defendant because 'administration of the drugs is substantially likely to render the defendant competent to stand trial'" (¶ 37). Here the defendant's argument failed to "account for five significant considerations" that were reflected in the expert medical testimony (¶ 40).

The court considered each of the five: "It is true that the treatment plan provides a relatively broad degree of flexibility to the treating doctors, depending on D.E.C.'s reactions to various medications and dosage levels. But [the treating psychiatrist] provided reasons for this…" (¶ 50). "To recap, the circuit court here was informed – through a combination of the contents of the reports it had received, the individual treatment plan, and [the treating psychiatrist's] testimony on direct and cross examination – as to the specific need for the administration of the antipsychotic medication or medications listed in the plan, in defined dosage ranges and as appropriate for D.E.C. in particular" (¶ 57).

The order was also "medically appropriate," as required by the fourth *Sell* factor. "[O]ur supreme court has explained that '*Sell* requires the circuit court to conclude that the administration of medication is medically appropriate, not merely that the medical personnel administering the drugs observe appropriate medical standards in the dispensation thereof'" (¶ 64). After scrutinizing the detailed medical testimony, the court of appeals concluded that the circuit court had before it a "medically informed record" (¶ 75). It also underscored that the defendant was "ably represented" at the evidentiary hearing (¶ 77).

State Government

Attorney General – Deposit of Settlement Funds – Joint Finance Committee Approval of Civil Enforcement Negotiations

***Wisconsin State Legis. v. Kaul*, 2025 WI App 2 (filed Dec. 18, 2024) (ordered published Jan. 31, 2025)**

HOLDINGS: The several holdings in this case appear in the summary below.

SUMMARY: In this lawsuit, the Wisconsin Legislature and a taxpayer challenged the Wisconsin attorney general's practice of depositing litigation settlement funds into accounts established by legislation that could then be distributed at the attorney general's discretion. The plaintiffs contended that this practice violates recently amended Wis. Stat. section 165.10, which provides that "[t]he attorney general shall deposit all settlement funds into the general fund." The attorney general countered that the new statute says "general fund" – not the "general purpose revenue fund" – and that he could therefore deposit settlement funds into legislatively established accounts over which he exercises spending discretion.

In a majority opinion authored by Judge Lazar, the court of appeals held that the attorney general "is operating contrary to law when settlement funds are deposited anywhere other than in the general purpose revenue fund" (¶ 34). Said the majority: "We … conclude that the plain language of the newly enacted Wis. Stat. § 165.10, when read in conjunction with related statutes (including Wis. Stat. § 20.906(1)) has altered past practices and requires that 'all settlement funds' (as defined; not including those bound to third-parties) shall be deposited into the general fund. Because the legislature has not otherwise specifically provided by law separate accounts or designations, we hold that such settlement funds shall be deposited into the general purpose revenues of the general fund" (¶ 55). In short, the new statute confirms the legislature's control over all Wisconsin Department of Justice (DOJ) settlement funds (*see* ¶ 9).

There was also an issue in the case regarding the meaning of Wis. Stat. section 165.08(1), which requires approval by the legislature's Joint Committee on Finance when civil actions prosecuted by the DOJ are compromised or discontinued. The attorney general failed to seek approval from the Joint Committee on Finance in matters in which the DOJ simultaneously filed complaints with proposed consent decrees; he asserted that in these matters no civil actions were being prosecuted or compromised.

The court of appeals disagreed. It concluded that a compromise of a civil enforcement violation that results in a consent decree being filed in court along with a complaint is a civil action that has been prosecuted and then compromised. Therefore, the provisions of Wis. Stat. section 165.08 require, as a condition precedent to settlement, that the attorney general obtain the Joint Committee on Finance's approval (*see* ¶¶ 54, 56). In a footnote, the court noted that "out-of-court settlements" are not within the ambit of Wis. Stat. section 165.08(1) (*see* ¶ 41 n. 20). (Editors' Note: The constitutionality of Wis. Stat. section 165.08(1) was litigated in *Kaul v. Wisconsin State Legislature,* 2025 WI App 3, which is analyzed below.)

There was also an issue of standing in this case. The court of appeals concluded that the legislature had standing to bring this suit because it was contending that the attorney general was infringing on its legislative powers (*see* ¶ 24). It also held that the taxpayer plaintiff had taxpayer standing (*see* ¶ 28).

Judge Neubauer filed a dissenting opinion.

Separation of Powers – Shared Powers – Constitutionality of Wis. Stat. Section 165.08(1)

***Kaul v. Wisconsin State Legis.*, 2025 WI App 3 (filed Dec. 2, 2024) (ordered published Jan. 31, 2025)**

HOLDING: Wis. Stat. section 165.08(1) does not violate the separation-of-powers doctrine.

SUMMARY: Recently enacted Wis. Stat. section 165.08(1) altered the process of compromise and discontinuance of certain Department of Justice (DOJ) civil actions. Now, the legislature's Joint Committee on Finance must provide oversight and approval before the attorney general can settle such cases. The Wisconsin Supreme Court rejected an early facial challenge to the constitutionality of this statute in which the plaintiffs claimed that the statute violated the separation-of-powers doctrine. *See Service Employees Int'l Union, Local I v. Vos,* 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35 (*SEIU).*

In this litigation, the DOJ filed a complaint alleging that the statute violates the constitutional separation of powers with respect to two categories of civil actions: "(1) civil enforcement actions brought under statutes that the Attorney General is charged with enforcing, such as environmental or consumer protection laws; and (2) civil actions the [DOJ] prosecutes on behalf of executive-branch agencies relating to the administration of the statutory programs they execute, such as common law tort and breach of contract actions" (¶ 9). The circuit court agreed and granted summary judgment in favor of the attorney general and the other plaintiffs. In a majority opinion authored by Judge Lazar, the court of appeals reversed.

The court of appeals agreed with the circuit court that the attorney general's constitutional challenge in this case was a "hybrid challenge" that has characteristics of both a facial and an as-applied challenge because it is a broad challenge to a specific category of applications (¶ 20). A hybrid challenge must meet the standard for a facial challenge as to an identified category of applications. The DOJ thus had the burden of showing that Wis. Stat. section 165.08(1) could never be constitutionally applied to any case within its selected two categories of cases (described above), even if it could be constitutionally applied to other cases in other categories (*see* ¶ 23).

The DOJ argued that the settlement of actions in the two categories of cases cited above constitutes a core executive power – one that cannot be transferred to the Wisconsin Legislature without violating Wisconsin's separation-of-powers doctrine. The appellate court disagreed. While representing the state in litigation is predominantly an executive function, it is within the borderlands of shared powers, most notably in cases that implicate an institutional interest of the legislature. *See SEIU*, 2020 WI 67, 393 Wis. 2d 38.

One such institutional interest – the power of the purse – is sufficient on its own to defeat the attorney general's hybrid constitutional challenge (*see* ¶ 27). Because the legislature has a legitimate institutional interest via its power of the purse in at least some settlements in the two categories of cases (including plaintiff-side civil actions in which funds are obtained by the state for its coffers), there is a sufficient basis to uphold the constitutionality of Wis. Stat. section 165.08(1) in the face of this challenge (*see* ¶¶ 35-36). The appellate court further concluded that the statute does not unduly burden nor does it substantially interfere with the functioning of the executive branch (*see* ¶ 48).

Judge Neubauer filed a dissenting opinion. **WL**