LEGAL UPDATE
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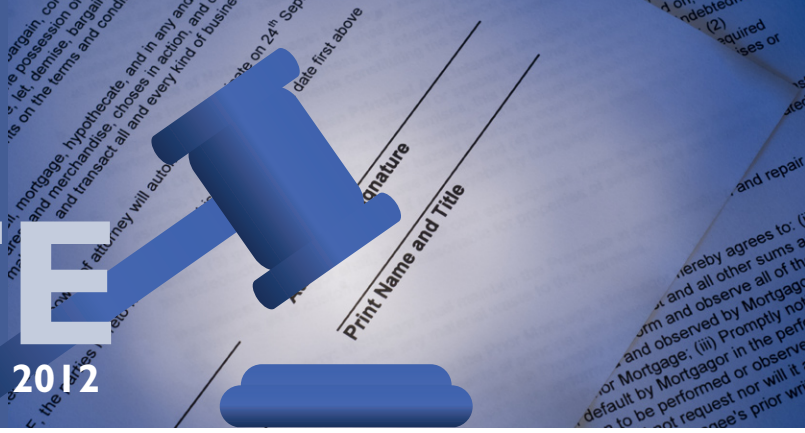

Case Law Update 2012: Land Use and Miscellaneous

The world of real estate is challenging and constantly in motion. It is important for REALTORS® to keep abreast of new legal developments in the Legislature and the courts. The common law, that is, the law that comes from the courts over time, shifts and changes as standard legal principles are applied to new situations. Reviewing recent court decisions allows REALTORS® to see if the courts are interpreting real estate laws and administrative rules as they understand them to be intended. Reading the stories of the case law opinions also provides valuable lessons that can be applied in daily real estate practice.

The Wisconsin REALTORS® Association Legal Action Program becomes involved in litigation, primarily as amicus curiae or "friend of the court," with regard to issues that are important to WRA members, the Wisconsin real estate industry and private property owners in our state. Over this last year the Legal Action Program has weighed in to express viewpoints or highlight legal principles of importance to real estate professionals and Wisconsin property owners in some of these cases on topics ranging from local land use regulations to unemployment compensation.

This *Update* reviews recent real estate-related decisions from the Wisconsin Supreme Court and the Wisconsin Court of Appeals. The cases summarized in this issue cover land use issues and a smattering of other subjects relevant to real estate practice. The case law summaries cover land use topics such as shoreland zoning, police power licensing ordinances disguised as zoning, the determination of the ordinary high water mark, special use permits, adverse possession, highway right-of-ways and nonconforming uses. As far as the other cases related to real estate practice, the *Update* includes case summaries about commission agreements, lease modifications, title insurance payouts, unemployment benefits for part-time real estate agents, misrepresentation regarding association dues for vacant lots and the proper party to sue when an association behaves improperly. Each case summary is followed by one or more REALTOR® Practice Tips.

In This Issue

Case Law Summaries

The following Wisconsin case law summaries overview some of the most important and interesting real estate decisions primarily from September 2011 through October 2012. The cases with a citation beginning with the year, i.e., "2012 WI 98," are published opinions that

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will have precedential value. When a case is a legal precedent, other Wisconsin courts that later decide similar issues generally are obligated to follow the holding of that case.

The cases with the docket number and year in parentheses, i.e., "(No. 2009AP3135, Ct. App. 2011)," are unpublished decisions from the Court of Appeals. Although unpublished cases generally may not be cited as legal precedent, they may have persuasive value and give insight into how issues of interest to REALTORS® are treated in the judicial system. A link to the court's opinion in each case follows the case name and citation.

Shoreland Zoning Issues

Official Zoning Maps: Establishing the Ordinary High Water Mark

Oneida County v. Collins Outdoor Advertising, Inc., 2011 WI App 60 (www.wisbar.org/res/capp/2011/2010ap000084.htm)

Collins Outdoor Advertising, Inc. (Collins) wanted to build a billboard on a business' property west of State Highway 17 in the town of Sugar Camp. Sugar Camp had no zoning of its own, but Oneida County had shoreland zoning authority over all land within 1,000 feet of the ordinary high water mark of navigable lakes. There were two lakes near the sign's proposed location.

Collins negotiated a lease from the owners of land where the proposed sign would be located and obtained the Sugar Camp town foreman's signature on a form stating the property was unzoned. A Department of Transportation sign permit application was approved but Collins was directed to obtain Department of Natural Resources approval because the location bordered a cedar swamp. The DNR inspected and approved the site, but said Collins should check with the County to ensure it did not have shoreland zoning authority.

Multiple Measurements

The County's zoning permit specialist reviewed the proposed sign location in June 2003 using the official zoning map and aerial photographs. The site appeared to be at least 1,200 feet from one lake, but it was recommended that Collins measure to see if the site was at least 1,000 feet from the second lake. Collins walked the lake's shoreline and, using a handheld Global Positioning System (GPS), determined the lake was 1,056 feet away from the proposed location.

Collins built the sign in July 2003. In late October, complaints were made objecting that the sign was illegally constructed in the shoreland zoning area. The County indicated that it and the DNR had, in August 2003, delineated the Ordinary High Water Mark (OHWM) of the first lake that was found to be only 10 feet from the sign because a large wetland field adjacent to the lake was being included as part of the lake when determining the OHWM. In September 2006, the County indicated it had conducted another OHWM determination and this time concluded the OHWM of the first lake was 660 feet from the sign. The County first identified the OHWM at a different location on the lake, decided on an elevation based on shoreline rock stains and vegetation, located that elevation on the other side of the wetland complex, and then measured from there to the sign as best they could given the challenges of the black cedar/spruce swamp. The official map was never modified to reflect any of these determinations.

In August 2008, the County filed a complaint against Collins for injunctive relief and damages. In 2009, the circuit court found in favor of the County, saying that the burden has to be on the builder or the land owner in a zoning case. The court ordered

Collins to remove the sign, remediate the property, and pay over $25,000 in forfeitures. Collins appealed to the Wisconsin Court of Appeals.

Collins argued when the sign was erected, the County's official zoning map identified the lake's shoreline as the OHWM and that later redeterminations cannot make the sign unlawful. Thus, the County had no shoreland zoning jurisdiction over land more than 1,000 feet from the lake's shoreline.

County Shoreland Zoning

Oneida County's Shoreland Protection Ordinance provides: "Determinations of navigability and ordinary high water mark shall initially be made by the Zoning Administrator. When questions arise, the ... Administrator shall contact the Northern Region Service Center of the DNR for a final determination..." The OHWM is defined as "the point on the bank or shore up to which the presence and action of surface water is so continuous as to leave a distinctive mark such as by erosion, destruction or prevention of terrestrial vegetation, predominance of aquatic vegetation, or other easily recognized characteristic." Wis. Admin. Code § NR 115.03(6).

The official Sugar Camp zoning map Collins and the permit specialist reviewed at the zoning department office contained disclaimers saying it was based on aerial photography and other records, it would not reflect topographic and landscape changes, it was intended for planning and general use only, that the zoning districts on the map be too small of a scale to accurately depict, and that the Zoning department should be contacted for exact and current zoning. The zoning map's scale was one inch = 2000 feet, and the scale of the aerial photos was one inch = 400 feet. The County argued it was unreasonable for Collins to rely on this map rather than making on-site measurements.

Elusive OHWM

The Court rejected this logic because before Collins could measure there had to be a determination of where the OHWM was, a determination that was repeatedly changed by the various authorities in this case. The shoreline cannot always be assumed to be the OHWM. Landowners have no authority to determine the OHWM and measurements made by a private citizen have no legal force. The ordinance says only the County and the DNR have the authority to determine the OHWM and they came up with varying results each time they tried to measure in the swampy terrain. Expecting a non-riparian landowner to be familiar with the shoreline's physical characteristics and trespass over others' private property to identify the OHWM and then measure is unrealistic. Collins did exactly what the official zoning map disclaimer said to do – he contacted the zoning department, which said the sign was fine with the first lake.

The Court noted that the County's shoreland zoning authority extends 1,000 feet from the OHWM, which in most cases is at or near the shoreline. The official zoning map shades an area around the lakes extending 1,000 feet from the shoreline. If the public is not entitled to rely on the zoning district boundary maps, why would they be legally required? The County, not the public, must identify the OHWM, and when the sign was erected, the County had identified the OHWM at or near the lake's shoreline. Consequently, if Collins' sign was more than 1,000 feet from the shoreline, it was beyond the County's shoreline zoning jurisdiction.

In any event, the Court observed, the sign would be legal as a non-conforming structure because it was legal per the maps and zoning department pronouncement when it was built. Thus, whether subsequent determinations of the OHWM were accurate is immaterial. The Court thus ordered the circuit court to enter judgment in Collins' favor.

REALTOR® Practice Tip: The state requires counties to adopt and enforce shoreland zoning district ordinances. See Wis. Stat. § 59.692(1m), (6) and Wis. Admin. Code §§ NR 115.01, 115.05(1), (4). "Shoreland" means lands within 1,000 feet from the OHWM of a lake. Every county's shoreland zoning ordinance must include "[m]apped zoning districts and the recording, on an official copy of such map, of all district boundary amendments." Wis. Admin. Code § NR 115.05(4)(i). For discussion of county shoreland zoning, see the September 2010 *Legal Update*, "County Shoreland Zoning Rules," at www.wra.org/LU1009.

REALTOR® Practice Tip: For further discussion of the OHWM, see Pages 12-13 of the February 2007 *Legal Update*, "Water's Edge: Floodplains & the Ordinary High Water Mark," at www.wra.org/LU0702.

REALTOR® Practice Tip: Determining the OHWM involves a seemingly imprecise technique, and it seems to be a moving target as the shorelines change due to natural and man-made forces. Any expectation that a citizen should be expected to even know how to determine and then measure from the OHWM is unrealistic, as the Court found. The setting of the OHWM continues to be an ongoing controversial issue because it has possible ramifications for property ownership, tax bills, lake access, etc. See the DNR resources at http://dnr.wi.gov/topic/waterways/general_info/ohwm.htm.

Shoreland Zoning Issues

"Floor Area" for Shoreland Setback Only the Area to Stand

Propp v. Sauk County, 2010 WI App 25 (www.wisbar.org/res/capp/2010/2009ap000209.htm)

Evelyn Propp owns a lakefront home on Lake Wisconsin with a walkout basement. Propp began construction on a deck above the basement walkout area. The deck was going to extend 45 feet along the house and 15 feet toward the lake. The first five feet from the house is 75 feet or more from the shoreline; when completed, the remaining 400 square-foot (10 by 40 feet) portion of the deck would be within the 75 feet shoreland setback area.

The Sauk County Shoreland Protection Ordinance § 8.06(2) (May 2003) requires that all decks be at least 75 feet from the lakeshore.

After Propp began construction on the deck, she received a notice of violation from the Sauk County Planning and Zoning Department due to the 400 square-foot portion of the deck.

Propp applied for a special land use permit under Wis. Stat. § 59.692(1v) (2007-2008), which the relevant section provides under (b), "The total floor area of all structures in the shoreland setback area of the property will not exceed 200 square feet."

The Sauk County Shoreland Protection Ordinance § 8.06(6) provides in relevant part (b), "The total floor area of all the structures existing and proposed in or extending into shoreland area of the property shall not exceed 200 square feet of floor area." Propp proposed in her application the removal of approximately the outermost five feet of deck floorboards, leaving 200 square feet within the shoreland area. Propp determined this would meet both the requirements of the state statute and the county ordinance and therefore require the granting of a special permit for structures with a total floor area not exceeding 200 square feet.

Both the state statute and county ordinance require more elements when granting such a permit, but the 200 square feet is the only issue raised during this discussion. Propp declared her proposed modifications of removing a portion of the floor area would reduce the square feet to 200 or less even including the support system, which included exposed floor joists, an I-beam and two posts.

Propp's application was denied citing that, "despite the proposed removal of deck surface, the remaining substructure encroaches on the shoreland setback area in excess of the maximum allowable 200 s.f." The decision was upheld by the Board and her application for the special land use permit was denied. Propp went before the circuit court to review the Board's decision.

"Floor Area" – Within Shoreland Setback

The circuit court did not agree with the Board's argument that "floor area" should be interpreted to mean the total area within the perimeter of the deck's support system. The court held that the "floor area" unambiguously means the portion of the deck on which a person can stand. The Board appealed.

On appeal, the Court is to review the Board's decision, not the decision of the circuit court.

The Board argued that the "floor area" includes the entire footprint not just the portion on which a person can stand.

The Court of Appeals determined that the use of "floor area" under both the statute and ordinance is plain and unambiguous and consistent with the circuit court's interpretation. Neither the statute or ordinance define the term "floor area." As the Court stated, "When a term is used in a statute or ordinance but is not specifically defined, the common and approved usage of the word or phrase applies."

The Court of Appeals agreed with the circuit court that the Legislature's use of the term floor would imply that it was the area upon which a person stands, and it would be inappropriate to construe "floor area" to be the total square footage. In addition, the Court held that the use of "floor area" would include only the surface portion and not the support system, as argued by the Board, that extended beyond the floorboards.

The Court held that its interpretation that under certain circumstances someone may need to build a support structure larger than the 200 square feet of flooring is not absurd, and disagreed with the Board that such a holding would encourage people to build support systems much larger than necessary to support the flooring. Therefore the Court concluded that "floor area" would not encompass more than the floor portion of the deck upon which a person is able to stand.

"Floor Area" – Entire Structure

The Board argued that the 200 square-foot calculation includes the "total floor area" of the entire structure, not just the portion within the shoreland setback. In its argument the Board noted that the inclusion of the word total within "total floor area" would mean Propp's proposed 400 square-foot deck still does not comply. The Board argued that her 400 square-foot deck does not comply because the "total floor area" of the entire "structure" is 400 square feet. The Court was not persuaded.

The Court held that the Board's argument is inconsistent with both the statute, which references the total floor area "structures in the shoreland setback area" (§ 59.692(1v)(b)) and

the ordinance, which states "structures in or extending into the shoreland area" (§ 8.06(6)(b)), limiting the discussion to the setback area.

The Court of Appeals was not swayed by either of the Board's arguments and affirmed the circuit court decision.

REALTOR® Practice Tip: When a buyer is purchasing any property, especially shoreland zoned property, the licensee should encourage the buyer to speak with the proper authorities regarding permitting and variances and should include the proper contingencies to safeguard the buyer's ability to walk away if the buyer is unsuccessful in obtaining the desired permits, variances and licensees.

REALTOR® Practice Tip: Licensees should always refer members of the public to the proper authorities regarding their land use rights.

Zoning Versus Licensing Ordinances

Town Frac Sand Mining Ordinance Not Subject to County Review

Zwiefelhofer v. Town of Cooks Valley, 2012 WI 7 (www.wisbar.org/res/sup/2012/2010ap002398.htm)

The town of Cooks Valley (the Town) enacted an ordinance to address development concerns with frac sand mining. A group of Town residents who owned land where nonmetallic mining operations had been conducted sought a declaratory judgment stating that the Town's Nonmetallic Mining Ordinance (the Ordinance) was invalid because it was a zoning ordinance and did not have county board approval as is required for zoning ordinances.

The Ordinance explains that it is adopted pursuant to the Town's village and police powers under Wis. Stat. §§ 60.10(2)(c) & 61.34, and is intended to promote the health, safety, prosperity, aesthetics and general welfare of the Town and its people. The Ordinance is intended to regulate the location, construction, installation, alteration, design, operation and use of nonmetallic mines to keep residents safe from disease and pestilence, further the appropriate use and conservation of land and water resources, and provide penalties for its violations. "Nonmetallic mining" refers to commercial sand and gravel pits and open-pit mines, along with associated drilling, blasting, excavation, grading and dredging.

The Nonmetallic Mining Ordinance

Under the Ordinance a permit is required for the operation of a nonmetallic mine. A detailed eight-page application and an application fee are needed for the permit. The application is reviewed by the Town Plan Commission and copies go to adjoining landowners. The Plan Commission makes a recommendation to the town board, which holds a public meeting. The town board decides if the "mine is in the best interests of the citizens of the Town, and will be consistent with the protection of public health, safety and general welfare," and checks whether any required federal, state and county permits have been obtained. The Town may impose conditions on any permitted nonmetallic mining including restrictive provisions and proof of financial security requirements to ensure funding for reclamation and town road maintenance and repair; restrictions on hours of operation, truck routes and traffic volume in and out of the mine site; restrictions to protect groundwater and public and private drinking and agricultural wells; and restrictions to control air emissions and dust. The Ordinance exempts preexisting mines from the permit requirement, but applies to expansions of preexisting mines.

The circuit court concluded that the Ordinance is a zoning ordinance because it covers the immediate use of land and is a pervasive regulation of the use of land and thus found in favor of the plaintiffs. The Town appealed to the Wisconsin Court of Appeals, which certified the appeal directly to the Wisconsin Supreme Court.

The Powers of the Town

The town of Cooks Valley adopted village powers in 2001, and thus was authorized to exercise powers of a village board under Wis. Stat. § 60.22(3). Wis. Stat. § 61.34(5) explains that villages are to enjoy the largest measure of self-government possible to implement home rule and that the statutes should be liberally construed in favor of the rights, powers and privileges to promote the general welfare, peace, good order and prosperity of the community and its residents. Village powers include planning, police powers and the power to zone under Wis. Stat. § 62.23(7); however, a town that has adopted village powers has a limit on its zoning authority. If a town is located in a county that has countywide zoning, the town may not adopt a zoning ordinance unless it is approved by the county board. The Town is situated in Chippewa County, which has enacted a countywide zoning ordinance. Thus any zoning ordinances enacted by the Town need the approval of the county board. The Town did not obtain the Chippewa County Board's approval in enacting the Ordinance, claiming that it was a non-zoning police power ordinance.

Is the Town's Nonmetallic Mining Ordinance a Zoning Ordinance?

The Wisconsin courts have not established a bright-line rule as to what constitutes a zoning ordinance as opposed to a non-zoning police power ordinance. Thus the

Court's opinion embarked upon a review of the functional characteristics of zoning ordinances and the purposes of zoning ordinances, and compared the Ordinance to those characteristics and purposes.

The Court first evaluated six traditional characteristics of a zoning ordinance:

1. Zoning ordinances usually divide an area into multiple districts or zones such as residential, commercial and industrial, and often include a map outlining the boundaries of the districts. The Ordinance did not create districts or zones.

2. Within zoning districts, some uses are permitted as of right in a traditional zoning ordinance and some uses are prohibited. The Ordinance does not approve any permitted uses as of right generally or in specified areas. Under the Ordinance, nonmetallic mining may be permitted or conditionally permitted in any part of the Town.

3. Zoning ordinances control where a use occurs, as opposed to how it occurs. The Ordinance regulates various aspects of mining activity, but does not regulate by location. There are not areas were nonmetallic mining is allowed and areas where it was prohibited under the Ordinance.

4. Zoning ordinances typically classify uses in general terms and attempt to comprehensively address all possible uses in that area. The Ordinance only addressed one activity: nonmetallic mining.

5. Zoning ordinances typically make a fixed, forward-looking determination of what uses will be permitted on a self-administering rather than a case-by-case, ad hoc basis. However, many zoning ordinances provide for conditional use permits that give local officials the ability to make decisions on an individual basis. Today, most zoning ordinances contain permitted uses and conditional uses. The Ordinance does not list permitted uses and requires a case-by-case review. Just because the Ordinance essentially provides for individual evaluations and permits that resemble a conditional use permit does not mean the ordinance is necessarily zoning. Rather it may be a means of implementing the licensing process created under the police powers. The labels used are not determinative, the Court remarked.

6. Zoning ordinances allow grandfathering of established uses despite the failure to conform to current standards. Land use that was legal prior to the adoption of the zoning ordinance may maintain that land use despite its failure to conform to the zoning ordinance. The Ordinance does grandfather existing operations. However, the Court remarked, no rule exists that a nonzoning police power ordinance cannot exempt preexisting uses. The Town apparently determined that preexisting mines were harmless enough that the owners would not be required to undergo the application process and permit process unless the activities were expanded.

Overall, after examining the similarities and differences of the Ordinance when compared to a zoning ordinance, the Court concluded it was not a zoning ordinance.

Additionally, the Court discussed and analyzed the purposes of zoning, emphasizing the following purposes as particularly instructive:

1. The separation of incompatible land uses.

2. Confinement of certain classes of buildings and uses to certain localities.

3. The comprehensive assignment of compatible land uses to districts throughout the community.

The Court concluded that the Ordinance does not attempt to separate incompatible uses or assign certain uses to particular areas – the Town's intent appeared to be to regulate a single use throughout the Town. Thus, the Court concluded the purpose of the Ordinance was not zoning.

In the end the Wisconsin Supreme Court unanimously held that the Town could regulate the frac sand and other nonmetallic mining without any county approval because the Town Ordinance was a general licensing ordinance and not a zoning ordinance.

The WRA Legal Action Program filed an amicus brief in support of the landowners in this case, asserting the Ordinance was in fact a zoning ordinance because it involved a pervasive and substantial regulation of the use of land.

REALTOR® Practice Tip: It appears that the Court in the *Zwiefelhofer* case has given a green light to unzoned towns to adopt licensing ordinances to regulate nonmetallic mining or other objectionable uses outside the traditional zoning standards where public hearings and county board approval are required. Towns may adopt zoning-like measures by enacting police power licensing ordinances instead of zoning ordinances, provided they follow the Court's guidelines.

REALTOR® Practice Tip: This is not an isolated incident. Many towns throughout Wisconsin use permitting ordinances (driveway, building, conditional use, etc.) to regulate land use. While all counties, cities and villages have the authority to adopt zoning and subdivision ordinances, towns do not. Some towns are subject to county zoning and thus do not have the authority to adopt their own independent zoning ordinances. These towns attempt to regulate land use through other means, like building and driveway regulations. These regulations are more technical (engineering standards)

and administrative in nature, and do not balance public and private interests when determining what land use restrictions are reasonable.

REALTOR® Practice Tip: For information about frac sand mining, see http://chippewa.com/news/local/article_12bb1802-bb16-11e0-b922-001cc4c002e0.html.

Abandoned Highway Reversion and Nonconforming Uses

Highway Relocation Reverts Land to Adjacent Owner and Corrects Setback

Town of Bradford v. Merriam (No. 2010AP1759, Ct. App. 2012) (www.wisbar.org/res/capp/2012/2010ap001759.htm)

David G. Merriam (Merriam) is the present owner of Shady Hill Mobile Home Court (Shady Hill), which has been located in the Town of Bradford (the Town) near Creek Road since 1956. In 1981, the centerline of Creek Road was moved as part of a road improvement project. Before the road improvement project, mobile home unit #1 in Shady Hill was located between 21.5 and 22 feet from the centerline of Creek Road. After the project, it was approximately 50 to 52 feet from the new centerline of Creek Road.

The Alleged Encroachment

In 2008, the Town brought legal action against Merriam, requiring the removal of unit #1 because it encroached upon the right-of-way of Creek Road by approximately 13 feet. The Town's position was that although the centerline of old Creek Road had been moved away from unit #1 in 1981, the road's right-of-way had not moved along with it.

Merriam denied the encroachment and counterclaimed for a declaratory judgment that Shady Hill is a valid, nonconforming use and therefore is not subject to any of the Town's zoning ordinances governing mobile home parks, which were adopted in 2005. Merriam also alleged that the replacement of mobile homes, or changes in the occupancy of existing mobile homes, does not change Shady Hill's nonconforming use.

The circuit court concluded that unit #1 does not encroach on the new Creek Road right-of-way because old Creek Road and its right-of-way were abandoned when the road was rerouted. The court confirmed that Creek Road now has a 66 foot right-of-way (33 feet on either side of the new centerline) and that unit #1 sits approximately 52 feet from the centerline of the relocated Creek Road, which means it is 19 feet outside of the roadway. As to the counterclaim, the court concluded that Shady Hill was a nonconforming use with regard to the land and its mobile home structures, and thus not subject to the 2005 mobile park ordinance. The court confirmed that a change in occupancy of a mobile home does not affect the mobile home's status as a valid nonconforming use, but that under Wis. Stat. § 62.23(7)(h), if any mobile unit is abandoned for 12 months or repaired in excess of 50 percent of its value, the mobile home's nonconforming use status is lost and the Town's zoning ordinances would then apply. The Town appealed.

Relocation of Unrecorded Town Highway

The Court of Appeals first noted that Creek Road is an unrecorded highway. Any unrecorded highway that has been worked as a public highway for 10 years or more is presumed to be 66 feet wide per Wis. Stat. §82.31(2)(a). Any encroachment upon this 66 foot right-of-way may be removed by the Town under Wis. Stat. § 86.04(1).

The first issue was whether old Creek Road and its accompanying right-of-way were discontinued upon the relocation of Creek Road. Under Wisconsin law, when a highway is discontinued, the land reverts to the adjoining landowner. *Miller v. City of Wauwatosa*, 87 Wis. 2d 676, 680, 275 N.W.2d 876 (1979); Wis. Stat. § 66.1005(1). If old Creek Road and its right-of-way were discontinued, the Creek Road right-of-way would extend only

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33 feet on either side of the centerline and unit #1 would not encroach.

The Town contends that old Creek Road was not discontinued because the formal procedures under Wis. Stat. § 66.1003 to discontinue a road were not followed. However, there are other ways a highway can be discontinued, such as under Wis. Stat. § 82.19(2)(b)2. That statute provides that "any highway that has been entirely abandoned as a route of vehicular travel, and on which no highway funds have been expended for 5 years, shall be considered discontinued." The Wisconsin Supreme Court stated in the *Miller* case that an alteration of an existing road constitutes a discontinuance of that part of the old road that is not included within the limits of the new road, even though no formal order of discontinuance is made.

The Town argued that criteria in Wis. Stat. § 82.19(2)(b)2, namely the abandonment as a route of vehicular travel and no highway funding for five years, have not been established. The Court, however, found that the Town failed to provide any convincing evidence that old Creek Road has been used for vehicular travel or that the Town spent any money maintaining old Creek Road since the relocation. Accordingly, the Court found that old Creek Road and its right-of-way were discontinued and that unit #1 is situated outside the right-of-way of the relocated road and therefore does not encroach.

Shady Hill as a Nonconforming Use

In 2005, the Town adopted an ordinance relating to mobile home parks that included setback restrictions on mobile homes located within a mobile home park (Bradford Ordinance). While the circuit court concluded that the Bradford Ordinance is a zoning ordinance and that Shady Hill is a nonconforming use per Wis. Stat. § 62.23(7)(h), the Town argued that the Bradford Ordinance is a non-zoning police power ordinance enacted for health and safety reasons and not for zoning. The Court turned to the decision in *Zwiefelhofer v. Town of Cooks Valley*, 2012 WI 7, for guidance on this issue and used a similar analysis with regard to the Bradford Ordinance. (See Pages 5-6 of this *Update*.)

The Court examined the list of characteristics that are traditionally present in a zoning ordinance discussed in the *Zwiefelhofer* case with respect to the Bradford Ordinance:

1. Like traditional zoning ordinances that create districts or zones in a town, the Bradford Ordinance applies only to mobile home parks. It does not apply to all property in the Town.

2. Like traditional zoning ordinances that list uses permitted as of right in each district or zone and prohibit other uses, the Bradford Ordinance permits as of right the location of mobile homes in approved mobile home parks in the manner specified in the ordinance.

3. Like zoning ordinances that directly control the location of activities, the Bradford Ordinance controls the location of mobile homes in mobile home parks.

4. Like traditional zoning ordinances that comprehensively address all potential land uses in a geographic area in order to separate incompatible land uses, the Bradford Ordinance specifies where mobile homes may be located in mobile home parks.

5. Like zoning ordinances that feature fixed rules, the Bradford Ordinance does not operate on a case-by-case basis. The Bradford Ordinance applies to all mobile homes.

6. Like traditional zoning ordinances that allow certain preexisting uses to remain although they do not conform to the ordinance, the Bradford Ordinance allows mobile homes in place as of Nov. 17, 2004, to remain in place even if those mobile homes did not meet the setback requirements of the Bradford Ordinance.

Accordingly, the Court found that all of the traditional characteristics of a zoning ordinance are present in the Bradford Ordinance and concluded that the Bradford Ordinance is a zoning ordinance. Thus, the nonconforming use protections of Wis. Stat. § 62.23(7)(h) apply.

It is well established in Wisconsin case law, the Court explained, that "a nonconforming use existing at the time a zoning ordinance goes into effect cannot be prohibited or restricted by statute or ordinance, where it is a lawful business or use of property and is not a public nuisance or harmful in any way to the public health, safety, morals or welfare" (quoting *Des Jardin v. Town of Greenfield*, 262 Wis. 43, 47, 53 N.W.2d 784 (1952)). Shady Hill, the Court opined, does not constitute a public nuisance, and is not harmful to public health, safety or welfare. Thus, the Court agreed with the circuit court that Shady Hill is a valid nonconforming use that cannot be prohibited or restricted by the Bradford Ordinance.

Shady Hill Mobile Homes

Merriam argues that the replacement of a mobile home within the park should not result in the loss of that mobile home's nonconforming use protection. The nonconforming use at issue is the use of the property as a mobile home community and the replacement of mobile homes within Shady Hill does not alter or enlarge that use of the property.

Wis. Stat. § 62.23(7)(h) lists three instances when nonconforming status will be lost: (1) the nonconforming use is extended; (2) total repairs costing more than 50 percent of the structure's assessed value of the nonconforming structure are made or (3) the nonconforming use is discontinued for a period of 12 months.

In *County of Columbia v. Bylewski*, 94 Wis. 2d 153, 170, 288 N.W.2d 129 (1980), the Wisconsin Supreme Court discussed if the replacement of a mobile home, which was exempt from a county zoning ordinance because it was a nonconforming use, with a new mobile home resulted in the loss of the nonconforming use protection. The Court determined that when the old mobile home was removed and substituted with a new mobile home, alterations were made in excess of 50 percent of the assessed value, which then disqualified the new mobile home as a nonconforming use. In keeping with the *Bylewski* decision, the Court agreed with the circuit court that the replacement of a mobile home located in Shady Hill alters the assessed value of the protected mobile home by more than 50 percent. The protection of the nonconforming use doctrine then is lost and the Town's zoning ordinance applies to the new mobile home.

REALTOR® Practice Tip: When a roadway is abandoned, the ownership of the land reverts to the adjoining property owners. Wis. Stat. § 66.1005(1) provides: "When any highway or public ground acquired or held for highway purposes is discontinued, the land where the highway or public ground is located shall belong to the owner or owners of the adjoining lands. If the highway or public ground is located between the lands of different owners, it shall be annexed to the lots to which it originally belonged if that can be ascertained. If the lots to which the land originally belonged cannot be ascertained, the land shall be equally divided between the owners of the lands on each side of the highway or public ground."

REALTOR® Practice Tip: A nonconforming use relates to the kind of activity conducted at the property. A nonconforming use is a use of land for a purpose not currently allowed in the zoning district where the land is situated (i.e., factory in a residential neighborhood). For example, a use that was a permitted use when that use began is no longer a permitted use if the zoning ordinance was later changed to prohibit it. A nonconforming use requires active, actual and continuing use of the land and buildings that existed before the enactment of the present zoning ordinance. The nonconforming use must continue in the same or a related manner. See Wis. Stat. § 59.69(10)(ab) [counties], § 60.61(5)(ab) [towns], § 62.23(7)(ab) [cities].

REALTOR® Practice Tip: Wis. Stat. § 62.23(7)(h) provides with regard to nonconforming uses that: "The continued lawful use of a building, premises, structure, or fixture existing at the time of the adoption or amendment of a zoning ordinance may not be prohibited although the use does not conform with the provisions of the ordinance. The nonconforming use may not be extended. The total structural repairs or alterations in such a nonconforming building, premises, structure, or fixture shall not during its life exceed 50 percent of the assessed value of the building, premises, structure, or fixture unless permanently changed to a conforming use. If the nonconforming use is discontinued for a period of 12 months, any future use of the building, premises, structure, or fixture shall conform to the ordinance."

REALTOR® Practice Tip: To read more about nonconforming uses, see "REALTORS®' Guide to Wisconsin's New Nonconforming Structures Laws" in the June 2012 *Wisconsin Real Estate Magazine* at https://www.wra.org/WREM/Jun12/NonconformingLegislation and Pages 10-12 of the August 2012 *Legal Update*, "2012 Legislative Developments," at www.wra.org/LU1208.

Highway Right of Way

Property Acquired for Highway Held to Be an Easement

Berger v. Town of New Denmark, 2012 WI App 26 (www.wisbar.org/res/capp/2012/2011ap001807.htm)

Wade and Ilona Berger (Bergers) own two abutting parcels of land in the Town of New Denmark in Brown County. Both parcels are zoned A-1 Agricultural and are bordered on the east by County Highway T. The Bergers have been seeking building permits. The applicable zoning ordinance requires a minimum area of 35 acres and lot frontage on the street of at least 500 feet.

The Bergers knew their parcels were not quite 35 acres so they acquired additional land and replatted the parcel boundaries so that each parcel contained 35.190 acres. However, when the Bergers applied to the Town Board for building permits, they were denied because the Board concluded that roads must be excluded when calculating the total acreage. Excluding land occupied by the County Highway T right-of-way, the parcels each contained approximately 34.5 acres.

The Bergers filed suit, seeking a declaration that their parcels were buildable under the ordinance. The Town filed a motion to dismiss, asserting that the lots were not buildable because Brown County, not the Bergers, owned the land on which the County Highway T right-of-way was located. The Town pointed to two deeds from the 1950s that the Town said showed that the prior owners of the parcels had conveyed full title of the land to Brown County. Each conveyance stated:

"It having been deemed necessary for the proper improvement or maintenance of a county aid highway, and so ordered, to change or relate a portion thereof through lands owned by [prior owners], and a plat showing the existing location, the proposed change

and the right of way to be acquired, having been filed with the County Clerk of said County by the County Highway Commission as required by Section 83.08, Wisconsin Statutes; … That the said owner for valuable consideration, the receipt of which is hereby acknowledged, do hereby grant and convey to Brown County, Wisconsin, for highway purposes as long as so used, the lands of said owner necessary for said relocation shown on the plat and described as follows [Legal description of property omitted]. A covenant is hereby made with the said Brown County that the said grantor holds the above described premises by good and perfect title; having good right and lawful authority to sell and convey the same; that said premises are free and clear from all liens and encumbrances whatsoever except as hereinafter set forth[.]"

The circuit court found in favor of the Town, ruling that the Bergers' parcels are of insufficient size when the property underlying the county highway abutting their land is excluded from the acreage calculation. The Bergers appealed to the Wisconsin Court of Appeals, claiming that the circuit court erroneously determined that fee title to the highway property had been conveyed to Brown County by the prior owners of the parcels.

Fee Title or Easement?

The Court of Appeals examined the language of the deeds to Brown County to determine whether an easement or fee simple title had been granted for the highway right-of-way. The Court looked at the intention of the parties as expressed in the language of the conveyances.

Each document was entitled, "Conveyance of Land for Highway Purposes," specified that the land conveyed was for highway purposes and referenced the plats that had been filed showing the location of "the right of way to be acquired." The Bergers argue that this supports their position that the prior conveyances only conveyed an easement while the County asserts that this confirms that fee title to the land was deeded.

Wis. Stat. § 83.08, the statute describing the acquisition of land and interests in land for county highway purposes, at that time (and today) permits the County to "obtain easements or title in fee simple by conveyance of the lands or interests required." Under Wisconsin case law, the courts presume that the grantor of land to be used for roadways intends to convey only an easement. In *Walker v. Green Lake Cnty.*, 269 Wis. 103, 111, 69 N.W.2d 252 (1955), a county asserted it had gained full title to land underlying a highway by virtue of adverse possession. The Wisconsin Supreme Court stated that, in the absence of a statute expressly requiring fee title or a deed wherein the owner expressly conveys the fee, the public only acquires an easement for passage over the property of the landowners.

The grantors used the phrase "right of way," which means "the right of passage over another man's ground." This, the Court maintained, strongly suggests that the County received easements. The conveyances also state that the land shall be used "for highway purposes," which also suggests that an easement was granted. Thus, the Court concluded that the prior owners of the Bergers' parcels conveyed nothing more than easements to the County.

The Bergers and the Town agreed that further proceedings were necessary because the circuit court only determined that the parcels did not meet the 35-acre requirement and did not determine whether the parcels were otherwise buildable, or whether the ordinance allows for the inclusion of a public right-of-way easement when calculating acreage. Therefore the Court reversed the circuit court's decision and remanded for further proceedings consistent with its opinion.

REALTOR® Practice Tip: This case illustrates that the language used in deeds and other conveyances is critical. It is important that the words used specifically and precisely delineate what property and what interest in that property is being transferred.

REALTOR® Practice Tip: The uses permitted in the right-of-way of state or U.S. highways are strictly regulated. See www.dot.wisconsin.gov/business/rules/property-permits.htm. For rules concerning the right-of-way for county highways, consult with the particular county or its website.

Adverse Possession

Person Not in Possession Wins Adverse Possession Claim

Engel v. Parker, 2012 WI App 18 (www.wisbar.org/res/capp/2012/2011ap000025.htm)

Ronald Engel and Sandra O'Donnell (Engel) are siblings who own a 40-acre parcel of land that has been in their family since 1954. At that time there was a barbwire fence along the entire length of the parcel. The Engels adversely possessed the strip of land on their side of the fence for 20 years, from 1954 to 1974. Rodney Chaplin has leased and farmed the property within four to five feet of the fence (as close has his farm equipment would allow) since 1977. According Chaplin, the Engel's maintained that fence until 1982.

In 2003, Steven and Judy Parker purchased the adjacent 40-acre parcel. There is a strip of land that is approximately one-quarter of a mile long and 15-20 feet wide between the Engel and Parker parcels.

When the Parkers purchased the property the fence was still present but had fallen into disrepair and no longer ran

the entire length of the property. In January 2006, the Parkers had a property survey that revealed that the old Engel fence was placed on their side of the boundary line; the Parkers had survey stakes placed at that time. The Parkers installed a new fence in the summer of 2008. The Engel's filed suit in January 2009, claiming acquisition of the property by adverse possession.

Each party moved for summary judgment. The circuit court held that the owner-in-possession exception applied and prevented the 30-year statute of limitations from blocking the claim.

The Parkers appealed, arguing that the exception cannot apply because Engel was no longer in possession of the disputed property after the survey, specifically after the Parkers placed a new fence.

Claim of Adverse Possession

Adverse possession is a legal theory whereby a person can obtain title to another's lands by occupying those lands for an extended time. This occupancy must be: (1) actual possession of the entire amount claimed; (2) sufficiently open and visible to the titleholder; (3) notorious (the activities and signs of possession are sufficiently conspicuous to let the titleholder know someone else is acting like the owner); (4) excluding all others (exclusive); (5) continuous and uninterrupted; and (6) hostile in the sense that the adverse possessor claims exclusive rights and his or her possession prevents possession by the titleholder. The adverse possession must last for the time set in one of the adverse possession statutes.

Both Wis. Stat. § 893.33(2) and (5) provide that unless the person asserting the claim or defense records a notice referring to the existence of the claim during the 30-year period, the statutes bar all claims or defenses relating to interests in real property not commenced within 30 years after the event giving rise to the claim.

Engel never recorded anything relating to the adverse possession claim. And if the owner-in-possession exception did not apply, then the statute of limitations would have barred all legal action by Engel beginning in 2004 – 30 years after the family adversely possessed the land in 1974.

Owner-in-Possession Exception

The owner-in-possession exception states that the statute of limitations "does not apply to any action commenced or any defense or counterclaim asserted, by any person who is in possession of the real estate involved as owner at the time the action is commenced." Wis. Stat. § 893.33(5).

The Parkers argue that the Engels were too late in filing their adverse possession claim because the Parkers had already placed their survey stakes and built a new fence, thus the owner-in-possession exception could not apply. The Court of Appeals disagreed.

Citing *O'Neill v. Reemer*, 2033 WI 31, 259 Wis. 2d 544, 657 N.W. 403, the Court held it was unreasoned to believe that a person making a claim of adverse possession would record such claim prior to a lawsuit prompting the need. The Court determined that the Engels adversely possessed the disputed strip of land from 1954 to 1974, the necessary time frame. The Court also relied on the holding of *Herzog v. Bujniewicz*, 32 Wis. 2d 26, 145 N.W. 2d 124 (1966), where the Court applied the owner-in-possession exception. In *Herzog*, the fence had disappeared by the time the neighbor purchased the property; however, the Court deemed the elements of adverse possession to have been met. In applying the owner-in-possession exception in *Herzog*, the Court stated, "Once title is secured by adverse possession the possessor need not keep the flag of hostility waving forever." In addition, the Court noted, when the Parkers purchased the property, there was part of a fence remaining between the two parcels.

Thus the Court found that the Engels met the requirement of Wis. Stat. § 895.33(5) and were in possession at the time the action was commenced and the owner-in-possession exception applied.

REALTOR® Practice Tip: Wis. Stat. § 893.25(2)(b) limits the amount of land subject to adverse possession, "Only to the extent that it is actually occupied." Therefore, only the portion of the parcel that was used will be subject to the claim. The entire parcel will be subject to the claim only if it was occupied in its entirety.

REALTOR® Practice Tip: When listing a property that involves a potential adverse possession claim, according to the real estate condition report, the seller may include information regarding the dispute. The licensee should refer the owners and neighbors to private legal counsel for advice on the situation.

Association Assessments for Lots

Association Covenants Control Assessments for Merged Properties

Voyager Village v. Letourneau, (No. 2011AP1097, Ct. App. 2012) (www.wisbar.org/res/capp/2012/2011ap001097.htm)

Brooks Letourneau purchased a vacant lot in Voyager Village (Voyager) in 1999. The purchase was subject to a recorded Declaration of Covenants which he received. The covenants, required the lot owners to pay annual assessments for each lot owned. In addition, the covenants did permit the owner to apply for the lots to be treated as a single lot for the purpose of the assessment if a home was constructed on contiguous lots.

Sometime around 2004 the association directors approved a plan that allowed current members to expand their ownership from a total of two contiguous lots to four. Article IV section 5 of the declaration permits the individual to apply to the association for permission to depart from the setback requirements due to the consolidation of the lots and, "If written permission for such use shall be granted, and a building built in departure of the original setback requirements, the Lots constituting the consolidated site shall be treated in other respects as a single Lot for the purpose of applying this Declaration."

In 2005, Letourneau received two documents promoting a special offer to current members to purchase adjacent lots at a discount. The first document was a letter to the association members from Brian Langdon/ Northwoods Properties explaining he was the broker and marketing agent for Voyager. His correspondence referenced the 2004 approval to allow "current members to expand their ownership to a grand total of four contiguous lots without being assessed an increase in annual dues for the larger parcel…" In addition, he mentioned that the discount expired at the end of the year and "any purchase is subject to current title restrictions and POA rules." The second was a flyer from Northwoods indicating that both the office was located within Voyager and that its real estate agents lived in Voyager as well. The flyer also stated, "Voyager Village will allow you to buy the adjoining lot, subject to restrictions, at a 40% discount through December 31, 2005 to combine up to 4 lots and pay one association dues."

Letourneau met with Northwoods agent David Anderson. Letourneau testified that Anderson on more than one occasion, including when drafting the offer to purchase, confirmed there would only be one assessment on the lots. The offer to purchase did not contain any reference to the lot assessments or the joining of the lots for that purpose but did include, "The Grantee agrees that [lots 24, 25, and 26] shall never be conveyed separately from lot 23… and that if this restriction is ever violated by the Grantee…, title to the land conveyed herein shall immediately revert to the Grantor…"

After Letourneau purchased the three additional lots he received a letter from the association declaring he would be required to pay four separate assessments, one on each of his lots. He refused to pay, and the association sued Letourneau for approximately $10,800 in dues and interest for the years 2006-2009. Letourneau counterclaimed for intentional, negligent and strict responsibility misrepresentation against the association. Anderson was not a party to the lawsuit.

The circuit court dismissed Letourneau's counterclaims and found for the association. The court held that Letourneau's tort claims were barred by the economic loss doctrine, the statutory claims failed because Anderson was an independent contractor and the contract claims failed because Letourneau could not provide parol evidence. Letourneau appealed.

Economic Loss Doctrine

The Economic Loss Doctrine (ELD) is a judicially created doctrine that encourages the parties to a contract to anticipate all of their potential legal claims relating to the contract and address them in the contract. According to the ELD, there should not be any lawsuits based on misrepresentation, fraud or negligence (referred to as tort claims) with regard to the subject of a contract because the parties should have provided the needed remedies in their contracts.

Fraud in the Inducement Exception

The Court held that the ELD bars tort claims alleging that a product is inferior, does not work for the general purposes for which it was manufactured or does not meet a contracting party's expectation. Letourneau argues that the fraud in the inducement exception applies to his circumstances.

For such an exception to apply, the misrepresentation must have induced the buyer to enter into the contract and must be "'extraneous to, rather than interwoven with, the contract'" as quoted by the circuit court from *Digicorp, Inc. v. Ameritech Corp.*, 2003 WI 54, 262 Wis. 2d 32, 662 N.W.2d 652). The Court continued that the exception does not apply, "to matters whose risk and responsibility relate to the quality or characteristics of the goods for which the parties contracted, or which otherwise involve performance of the contract."

Letourneau argued that Anderson's misrepresentation was not regarding characteristics of the lots but rather the extraneous issue concerning the amount charged for assessments. The Court was not persuaded by Letourneau. According to the Court, merging the lots into one single lot directly implicates the characteristic of the lots. Letourneau also contends that the association breached the contract by failing to join the lots for purposes of the assessments. He argued that the merger of the lots relating to assessments was a material part of the contract with the association. The Court held that if Letourneau was so concerned about his contractual rights, he could have placed a contingency in the offer to purchase stating that the sellers agree the merger of the four lots would result in a charge for a single lot assessment.

The Court further explained that the language of the offer to purchase Conveyance of Title section states that title was subject to "recorded building and use restrictions of covenants." Letourneau received a copy of the declaration addressing the merger of adjacent lots and assessments when he purchased his

first lot, which runs with the land.

The Court held that Letourneau's fraud in the inducement exception to the ELD failed.

Misrepresentation

According to the Court's analysis, Letourneau did not properly develop his arguments claiming the association's direct and vicarious liability for Anderson's misrepresentations as its agent. Letourneau cited a variety of statutory provisions including Wis. Stat. §§ 452.133, 452.134, 452.135 and 452.139(2)(a), all of which relate to a real estate broker's responsibility to clients and customers. The Court of Appeals agreed with the circuit court that because Anderson was an independent contractor, the association could not be held vicariously liable.

Letourneau also attempted to argue that the association knew or should have known of Anderson's representations because of the two promotional materials sent out to all the members and because Anderson was the president of the association board. The Court disagreed and again cited Letourneau's inability to create a developed and organized argument.

Breach of Contract

Lastly, Letourneau argued that the association's failure to combine the four vacant lots for the one assessment was a breach of contract. He cited Anderson's oral statements and the representations made in the two promotional materials. However, the Court would not allow such parol (oral) evidence to be presented.

The Court stated that the offer to purchase included an integration clause, better known as the Entire Contract provision. This section of the offer to purchase states that the contract is the complete and final agreement of the parties and therefore this section prevents the Court's consideration of the evidence provided by Letourneau.

REALTOR® Practice Tip: The circuit court did acknowledge that the ELD would not bar Letourneau's cause of action against Northwoods or Anderson, but it could not be taken up by the Court because the broker and the agent were not parties to the contract.

REALTOR® Practice Tip: AS ALWAYS, real estate brokers must fulfill their legal duties to disclose material adverse facts and information suggesting the possibility of material adverse facts, promptly and in writing, to all parties. The ELD provides no excuse for licensees failing to disclose, disclose, disclose! Review the October 2009 *Legal Update*, "Diligent Disclosure," at www.wra.org/LU0910, for disclosure duty details.

REALTOR® Practice Tip: Part of contract drafting is listening to your party's concerns and including the appropriate contingencies.

Direct Action Versus Derivative Action on Behalf of Corporation

Ewer v. Lake Arrowhead Assoc. Inc., 2012 WI App 64 (www.wisbar.org/res/capp/2012/2011ap000113.htm)

Gilbert and Linda Ewer and Wayne and Mae Gunther (collectively the Ewers) own residential lots in the town of Rome in Adams County that are subject to the Covenants for Lake Arrowhead (the Covenants). The Lake Arrowhead Association, Inc. is a Wisconsin non-stock corporation organized under Wis. Stat. ch. 181, and its bylaws incorporate the terms of the Covenants. The Covenants provide for the collection of a yearly assessment from the 1,602 lot owners who are subject to the Covenants. The amount of the assessment that the Association collects varies depending upon the type of lot a member owns. The Association charges "nonconsolidated site" owners one assessment per year, and it charges "consolidated site" owners a one and one-quarter assessment each year. A "consolidated site" is two or more contiguous residential lots that, with the Association's permission, are treated as single lots for certain purposes. The Ewers are consolidated site owners and have been charged a one and one-quarter annual assessment.

The Ewers contend that the Covenants do not authorize the Association to charge consolidated site owners a one and one-quarter assessment, so they filed legal action seeking a declaratory judgment regarding whether the Covenants authorize the Association to charge consolidated site owners a one and one-quarter annual assessment. The complaint asks for certification of a class action on behalf of all 140 consolidated site owners.

Who Can Sue?

The Association filed a motion for summary judgment, asserting that Ewers' claim is a "derivative" claim per Wis. Stat. § 181.0740 and that the Ewers had to comply with the requirements of for a "derivative proceeding." In addition, the Association argued that the Ewers had to comply with the joinder requirements of Wis. Stat. § 806.04, the Uniform Declaratory Judgments Act, and the Association also opposed the certification of a class action. The circuit court granted the Association's motion and dismissed the complaint. The court held that the proper construction of the Covenants is a matter concerning all Lake Arrowhead property owners and therefore it was a derivative claim. Because the claim must be filed as a derivative claim, the court denied the request for certification of a class. The circuit court also concluded that the complaint failed to meet the joinder requirements of the Declaratory Judgments Act, and that this failure was an additional ground for dismissal.

The Association is governed by Wis. Stat. ch. 181. Under Wis. Stat. § 181.0740, a "derivative proceeding" for a non-stock corporation is "a civil suit in the right of a corporation." A derivative proceeding may be brought in the right of a corporation by one or more members having 5 percent or more of the voting power or by 50 members, whichever is less. A corporation's right of action cannot be brought as a direct claim by an individual shareholder or member, but rather must be brought as a derivative action in accordance with the statutory procedures.

Generally, the purpose of a derivative action is to prevent injustice against the corporation by allowing shareholders to enforce corporate interests when the directors refuse to take action The derivative action statute requires that the member must first make a demand upon the corporation that it take "suitable action," and 90 days from the demand must pass before the member proceeds, unless the corporation notifies the member it has rejected the demand before the end of the 90-day period. The purpose of the derivative action statute is to allow members to bring a claim they could not otherwise bring at all because the cause of action belongs to the association and not to them.

Primary Injury Test: Whose Right Would be Enforced?

The fundamental question is: whose right would be enforced by the legal action? If the only direct injury is to the corporation, then the right to bring the action belongs solely to the corporation.

Applying this "primary injury" test, courts have concluded that the following claims belong only to the corporation and therefore must be brought as a derivative action under Wis. Stat. § 180.0740(2): a claim for breach of fiduciary duty against officers and directors who allegedly engaged in a plan to deplete the corporation of its cash reserves so that one of them could engage in a competing business; a claim for breach of fiduciary duty against a majority shareholder alleging that it had rejected the opportunity for the corporation to purchase another company and instead purchased that company itself; and misappropriation from the corporation.

On the other hand, a claim based on an individual right of a shareholder belongs to the shareholder and is properly brought by the shareholder directly. The injury must be to the individual shareholder and not to the corporation. One example of a proper direct claim by a shareholder is found in *Jorgensen v. Water Works, Inc.*, 2001 WI App 135, where the Court concluded that the minority shareholders could maintain a direct claim for breach of fiduciary duty by the directors when the directors ceased making distributions to the minority shareholders while continuing to pay distributions to themselves, the majority shareholders.

The Ewers argue that, like the distributions withheld from the minority shareholders, the Association's construction of the Covenants provision affects each consolidated site owner differently than the other lot owners. According to the Ewers, the Association suffers no injury under either interpretation of the Covenants. Fundamentally, the Association's position is that every member has an interest in the proper construction of the bylaws and is injured if the bylaws are incorrectly construed, and therefore only the Association has a right to bring this action.

The disputed provision states: "All annual assessments for corporate areas and corporate facilities which pertain to inactive owner memberships shall be one-fourth (1/4) of the amount of such assessments which would be due on such owner memberships if the same had not been declared inactive; provided that if the owner membership made inactive is one which appertains to a residential lot which is a part of a consolidated site as is described elsewhere in this Declaration, no such annual assessments shall be charged with respect thereto, *except that at least one (1) full annual assessment or one (1) one-fourth (1/4) annual assessment, as the case may be, shall be charged with respect to every consolidated site*. [Emphasis added.]" Failure to pay assessments means a residential parcel owner loses the right to attend Association meetings and vote.

The Ewers, the Court observed, have a contractual obligation to pay the assessment authorized by the Covenants and the bylaws for a consolidated site owner and a corresponding contractual right not to pay assessments greater than those authorized. The obligation to pay the correct assessment amount and the right to pay no more than that is individual to each parcel owner, the Court opined. Owners who do not timely pay assessments are penalized in a manner that also points to the individual natures of the issue: the owner cannot attend meetings and vote on Association matters. Thus, the Court concluded, the Ewers each suffer a direct injury as an individual if they pay more than the bylaws authorize and a derivative action on behalf of the Association is not required in this situation.

Declaratory Judgment Criteria

The declaratory judgment statute, Wis. Stat. § 806.04(2), provides: "Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a contract may have determined any question of construction or validity arising under the instrument [or] contract and obtain a declaration of rights, status or other legal relations thereunder." The Court concluded

that the Ewers and the Association are both "interested" within the meaning of § 806.04(2) in the interpretation of the disputed provision, and that either could therefore bring a claim for a declaratory judgment construing the disputed language.

Joining All Required Parties

The circuit court concluded that the Ewers complaint failed because it does not join all the persons who have an interest, as required by Wis. Stat. § 806.04(11). Whenever declaratory relief is sought, all persons who have any interest that would be affected by the declaration must be made parties. The Court concluded that all of the nonconsolidated site owners must be made parties under this provision. The Ewers contend that requiring that they name all 1,602 members of the Association as parties to the declaratory action is an unreasonable interpretation. The Association responds that all 1,602 members must be joined. The Court suggested another solution: that only a few of the nonconsolidated site owners need be joined if they are suitable representatives of the class of nonconsolidated site owners. Ewers may amend the complaint with leave of the court and add appropriate nonconsolidated representative parties.

The Court held that the claim asserted by the Ewers is an individual claim belonging to each of the four members because the claim is based on a direct injury to a right that is individual to each.

REALTOR® Practice Tip: The distinctions in actions involving a group of owners or members clearly may be difficult to determine because the lines between a direct injury to an individual and a derivative action when the corporation or association is the injured party are somewhat blurry and seem a bit discretionary.

REALTOR® Practice Tip: Either class actions or parties representative of a class are helpful techniques that can save a party from having to name hundreds if not thousands of parties when the lawsuit impacts an entire membership group.

Title Insurance Tragedies

Negligent Hiring, Theft and Misappropriation

Olson v. Zurich American, (No. 2010AP1207, Ct. of App. 2012) www.wisbar.org/res/capp/2012/2010ap001207.htm

The Players

Thomas Olson was to close and receive net proceeds in cash of over $175,000. David Reed was Olson's real estate agent who recommended Coulee Country Title, the local office of the title company, Ibarras-McClary Global LLC (I-M) to prepare the necessary title work and serve as the closing agent for the sale. Pamela Harris, was an I-M employee and closing agent. Commonwealth was the title insurance company for whom I-M served as underwriting agent. Prior to Commonwealth, I-M served as an agent for Stewart Title.

The closing took place May 22, 2006. Harris provided a check to Olson on May 23, 2006, for the total amount issued by I-M and signed by Harris. When Olson deposited the check he learned that it was returned because the I-M trust account did not have sufficient funds to cover the check.

Olson attempted to obtain his sale proceeds but to no avail and therefore brought action against Reed, I-M, Commonwealth, Stewart Title and their individual insurers to recover his money. Originally Harris was included in the action but was later dismissed because she was discharged in bankruptcy.

Olson's Claims

Olson alleged that Stewart Title terminated its relationship with I-M in November 2005 because of irregularities with I-M's trust account and problems with the nonpayment of premiums. However, Stewart claimed the relationship was severed because there was already another agent in the area. Olson alleged that I-M was negligent in its hiring, training and supervision of Harris and that Stewart Title colluded with I-M and Harris to conceal why it terminated its relationship with the agency and assisted in helping I-M obtain a new underwriter. Olson also claimed that Reed was negligent in recommending I-M and Harris was both negligent and committed theft for misappropriation. While a number of cross-claims were made, the only relevant one for this discussion is Commonwealth against Stewart Title for intentional misrepresentation and negligent misrepresentation.

The Jury Verdict

The jury, which was presented a number of questions, found that both Stewart Title and Commonwealth were casually negligent. Commonwealth lost its cross-claim against Stewart for intentional misrepresentation. Both Stewart Title and Commonwealth were found negligent. And the jury rejected the notion of fraudulent misrepresentation and found Commonwealth's contributory negligence to outweigh Stewart Title's negligent misrepresentation as a cause of its damages.

The Circuit Court Orders

The circuit court held a hearing and issued a number of judgments, four of which were the basis of the appeal.

1. Judgment for Olson against I-M for $113,458.11 plus taxable costs;
2. Judgment for Olson against Commonwealth for $26,383.28 plus costs;

3. Judgment against Olson dismissing Stewart for costs taxed against Olson for $5,677.22;

4. Judgment against Olson dismissing Reed and his insurance carrier, the jury unanimously found that Reed was not negligent; and

5. Denial of Olson's motions for judgment in the full amount of $134,314.19 against I-M.

The Appeal

Olson raises 12 separate issues while Commonwealth cross-claims on one. The legal arguments are numerous and this summary will attempt to focus on the primary issues.

Dismissal of Stewart Title

To establish a claim for negligence in Wisconsin, a plaintiff must show four elements: 1) a duty of care on the part of the defendant; 2) a breach of that duty; 3) a causal connection between the breach and the harm alleged and 4) actual loss or damage as a result of the harm.

However, even if all four elements are established, liability may not be imposed due to public policy. The Wisconsin Supreme Court has set forth six nonexclusive policy reasons for not imposing liability for negligence, and the Court of Appeals focused on three of them. First, the injury is too remote to form the negligence. Secondly, it is too highly extraordinary that the negligence should have brought about the harm. And thirdly, allowance of recovery would enter a field that has no sensible or just stopping point.

Olson disputed the court's dismissal of Stewart Title based upon the public policy argument. However, the Court deemed Olson's argument to lack development and upheld the circuit court's dismissal of Stewart Title.

Commonwealth's Attempt at Public Policy Argument

Commonwealth argued that public policy also prevents the imposition of liability on it because I-M and Harris were not its employees and their relationship as agents were limited to the sale of title insurance and did not include handling closings.

Olson contested this argument and said the claim against Commonwealth is for negligent hiring, training and supervision, which is established in Wisconsin for agents and employees. The interesting point in this legal argument is that Commonwealth was found by the jury to be casually negligent but it did not challenge that finding. However, Wisconsin case law provides that once negligence has been found, there is no longer a need for the court to determine if there was a duty to the one who was injured. Therefore, Commonwealth's continued focus on the fact that it had no duty to Olson is irrelevant because the issue of duty was not before the Court.

The Court could not see any public policy factor that prevents imposition of liability on Commonwealth. The Court held that the injury was foreseeable because it was precisely what would happen from mismanagement of a trust account – insufficient funds – or failure to investigate a person, such as Harris or I-M, who is in a position of trust involving money, could lead to some financial consequence.

Olson had two other issues on appeal that were not discussed in this summary. First, Olson moved the circuit court for a new trial relating to the compliance with a statute in which five-sixths of the jurors must agree upon all jury questions with respect to the same claims. This summary does not discuss this issue because it was moot once the court upheld the dismissal of Stewart Title. Secondly, Olson challenged that the circuit court should not have included Harris in the comparative negligence question because she was dismissed in the bankruptcy and is not relevant to this summary. In addition, Olson had a number of issues that the Court did not discuss due to lack of sufficiency.

Reed's Duty

The last issue Olson attempted raise on appeal was his real estate licensee's duty of care when making a referral. The Court did not address this issue because Olson's arguments were statements unsupported by authority.

For these reasons stated, the Court affirmed the circuit court.

REALTOR® Practice Tip: Clients and customers may ask REALTORS® to refer them to contractors and other service providers. Although it may be beneficial to the consumer to have such a recommendation, this practice may lead to licensee liability if the referral is not handled properly.

REALTOR® Practice Tip: Do not recommend or endorse one particular provider because a recommendation that does not present the party with options may result in liability should problems or questions of competency later arise. Instead, maintain a list with the names and contact information, such as telephone numbers and websites, of at least three professionals in each field, and include any available references from past users.

Commission Case

Buyer's Broker May Have Received Commission If Language was Clearer

Hernandez v. BNG, 2012 WI App 65 (www.wisbar.org/res/capp/2012/2011ap000362.htm)

Jason Hernandez is a real estate broker licensed in both Wisconsin and Illinois who worked for Keller Williams Realty, Inc., in Chicago. In February 2007 in Illinois, Hernandez signed a buyer agency agreement with BNG Management Limited Partnership (BNG) exclusively for the purpose of acquiring two Wisconsin properties.

Buyer Agency Agreement Terms

The buyer agency agreement stated that BNG would pay Keller Williams a commission if BNG purchased one or both of the properties. The buyer agency agreement also stated, "This agreement shall expire and become null and void on February 15, 2008 or if the property or properties become listed with a broker." The purpose of this language essentially was to keep BNG under the buyer agency agreement unless one or both of the properties were on the open market by being listed; at that time the buyer agency agreement would not be necessary for the exclusive representation of the Wisconsin properties.

Herbert Kollinger, the owner of three Wisconsin properties, including the two designated in the buyer agency agreement, entered into a listing contract in Illinois for the three properties with Cushman and Wakefield, Inc. of Illinois on June 14, 2007. BNG purchased the two properties designated in the buyer agency agreement on August 10, 2007.

Claim for Commission

Hernandez, the only individual licensed in Wisconsin, claimed that BNG owed him a commission because BNG purchased the two properties designated in the buyer agency agreement. BNG argued no commission was owed to Hernandez because the buyer agency agreement became null and void because the two properties purchased were listed with Cushman and Wakefield.

The circuit court awarded commission to Hernandez and denied BNG's motion for summary judgment and reconsideration. BNG appealed.

Engaging in Brokerage Services Without a Wisconsin License

On appeal, Hernandez argued that the null and void provision in the buyer agency agreement was not triggered by the listing of the two designated properties because Cushman and Wakefield were not real estate brokers licensed in Wisconsin. Hernandez supported this argument by referencing Wis. Stat. § 452.03, which states, "No person may engage in or follow the business or occupation of, or advertise or hold himself or herself out as, or act temporarily or otherwise as a broker or salesperson without a license."

BNG attempted to argue that Illinois law should apply because all entities and individuals were Illinois residents, including Hernandez. Although the Court did apply Wisconsin law, as requested by Hernandez, the Court did not support Hernandez's argument that he was owed a commission. The Court said that the null and void provision in the buyer agency agreement defeated Hernandez's award of commission under the buyer agency agreement.

The Court indicated there were only two penalties for violating Wis. Stat. § 452.03.

1) As stated in § 452.20, which prohibits a person within the state of Wisconsin from bringing or maintaining an action in Wisconsin courts for collection of commission or compensation – Cushman was not bringing such an action in Wisconsin.

2) The violator may be subject to the criminal penalties including a fine of not more than $1,000 or imprisonment for not more than 6 months or both (Wis. Stat. § 452.17(1)).

Court Will Not Nullify the Underlying Real Estate Transaction

Notably, the Court of Appeals stated that Wisconsin courts have never nullified an underlying real estate transaction because the licensees were not licensed in Wisconsin. Hernandez argued under these circumstances that his agreement would have been null and void if the properties were listed with a Wisconsin licensee, which they were not. The Court was not persuaded by this argument because the buyer agency agreement included the word broker and did not specify a Wisconsin broker, and while Cushman and Wakefield were not real estate brokers licensed in Wisconsin, they were licensed real estate brokers.

The Court held that the Legislature clearly protected the citizens of Wisconsin against the activities of unlicensed brokers in Wisconsin by disallowing commission lawsuits in Wisconsin courts and imposing criminal penalties. In addition, the Court refused to rewrite the language of the buyer agency agreement to read the way Hernandez wished it had been written. The Court held, "[s]imply put, 'listed with a broker' means what it says – no more, no less."

The Court of Appeals reversed the order awarding Hernandez commission and denying BNG's motion for summary judgment.

REALTOR® Practice Tip: Hernandez petitioned the Wisconsin Supreme Court to review the case in 2012, but was denied. The WRA submitted a brief supporting Hernandez's request, citing that the issue before the Court was a novel one potentially impacting the entire state of Wisconsin.

REALTOR® Practice Tip: Say what you mean. When drafting provisions or contingencies in contracts, avoid ambiguous terms and be clear when drafting the language to ensure that it is accomplishing the intent of the parties.

REALTOR® Practice Tip: Each state's laws control the real estate license activities that occur within that state. To determine exactly what is permitted requires an analysis of those laws.

Landlord-Tenant Law

Renewals, Incentives and Holdovers

Fiduciary Real Estate v. Goodavage, 2010AP3056 (Ct. of App. 2011) (www.wisbar.org/res/capp/2011/2010ap003056.htm)

Diana Goodavage entered into a 12-month lease with Fiduciary Real Estate Development, Inc. that commenced at noon on Nov. 1, 2009, and terminated at noon on Oct. 31, 2010. Goodavage was offered a renewal of her lease prior to its termination. The renewal provided that the lease would commence Nov. 1, 2010, at noon and terminate noon on the last day of October 2011. Goodavage was offered a $150 incentive by Fiduciary if she signed and returned the lease before Aug. 15, 2010. Goodadvage signed the renewal, however she modified the termination date and time from noon on the last day of October 2011 to 11:49 a.m. on the first day of November 2011. Fiduciary did not sign the modified version.

On Aug. 17, 2010, Goodavage asked the property manager about the $150 incentive. The property manager told her that Fiduciary was not prepared to renew the lease until her apartment passed the required section 8 inspection by the Dane County Housing Authority. The section 8 inspection was required in order for her participation in the program. Goodavage's apartment did not pass the inspection due to damage to the carpet from her cat(s). After the apartment was re-inspected in September, both Fiduciary and the Dane County Housing Authority were willing to renew her lease effective Nov. 1, 2010, on a month-to-month term. In addition, Goodavage was told Fiduciary would pay the incentive when she signed the month-to-month lease agreement. Goodavage did not sign the month-to-month lease agreement.

Small Claims for the Incentive and Holdover

In August 2010, Goodavage filed a small claims court claim against Fiduciary for the incentive. The case was dismissed. The day after the small claims hearing, Goodavage was provided notification by Fiduciary that if she did not sign her lease renewal she would become a holdover tenant on Nov. 1, 2010. Fiduciary also stated that Goodavage would receive the $150 incentive once Fiduciary received a signed renewal. Goodavage did not sign.

Holdover Tenant Eviction

Goodavage remained in the apartment and attempted to pay Fiduciary rent for the month of November 2010, but Fiduciary declined payment. Instead, Fiduciary filed an eviction action against Goodavage alleging she was a holdover tenant.

The court found that the two parties never entered into a valid lease together after the original 12-month lease and therefore Goodavage was a holdover tenant. Goodavage could not persuade the court that the eviction was brought forth as a retaliation against her for bringing the small claims action against Fiduciary. Goodavage appealed.

Goodavage's Changes to the Renewal Terms Equaled New Offer

Goodavage argued that the circuit court erred because it failed to see that she had a valid lease from Nov. 1, 2010 to Oct. 31, 2011. She argued her change was not substantive and therefore was not a rejection of the renewal lease. The Court of Appeals was not swayed.

The Court held that Goodavage's changes to the renewal time in the renewal provided by Fiduciary from noon on the last day of October 2011 to 11:49 a.m. on the first day of November 2011 constituted a rejection of the terms and was a counteroffer to which Fiduciary had to agree. The Court held that there was not a meeting of the minds between the two parties to create a binding contract. In order for the terms to be binding both parties had to agree to the modification and therefore a renewal of a new 12-month lease was not created.

Fiduciary Did Not Retaliate By Declining Renewal After Tenant's Small Claims Action

Goodavage argued that Fiduciary's failure to renew her lease was in direct retaliation for her filing the small claims action for the incentive. The Court did not agree.

Wis. Stat. § 704.45(1)(c) clearly states that the landlord may not refuse to renew a lease if the evidence shows that the refusal was in retaliation against the tenant for exercising legal rights relating to the residential tenancy. The circuit court noted that the day after the small claims action, Fiduciary sent Goodavage a letter, which recognizes that Fiduciary did not want her to become a holdover tenant and asked her to sign and return the attached month-to-month renewal before Nov. 1. Fiduciary also stated that once Goodavage signed, she would receive the incentive. The Court found that the eviction was the byproduct of Goodavage not signing the renewal and thus becoming a holdover tenant after her 12-month lease expired Oct. 31, 2010, not a retaliation for the small claims action.

The Court did not address in any great detail Goodavage's argument relating to the circuit court's error in disallowing her son to testify at the trial and additional issues that were either not fully developed or raised before the circuit court.

The Court of Appeals affirmed the circuit court.

REALTOR® Practice Tip: For basic information regarding small claims actions, see the *Basic Guide to Wisconsin Small Claims Actions* online at www.wicourts.gov/about/pubs/circuit/docs/smallclaims.pdf. For a description of the stages of small claims lawsuits and the resources available from the Wisconsin State Law Library, visit http://wilawlibrary.gov/topics/justice/civil/smallclaims.php.

REALTOR® Practice Tip: Any time an offer has been drafted in a manner that is ambiguous, confusing or subject to different interpretations, it is best to counter the offer to clarify the intent of the parties and reach a meeting of the minds to minimize the potential for litigation later in the transaction.

Unemployment Benefits

Part-time Real Estate Agent Who Changes Brokers Loses Unemployment Benefits

Piontek v. LIRC (No. 2011AP690, Ct. App. 2012) (www.wisbar.org/res/capp/2012/2011ap000690.htm)

Leonard Piontek (Piontek) held a full-time job with Midwest Wholesale as a salaried sales representative and also worked part-time as a real estate agent with Cooper Spransy Realty where he was paid on a commission basis. In July 2008, Piontek was laid off from his full-time job with Midwest Wholesale, so he filed for and began receiving unemployment (UE) benefits. Piontek continued working as a part-time real estate salesperson. In April 2009, Piontek left Cooper Spransy to take a similar position with another real estate brokerage because he believed he might have a better financial opportunity there. He continued to receive UE benefits with respect to his full-time job.

In July 2009, the Department of Workforce Development determined that Piontek "quit the Cooper Spransy job" which made him ineligible for UE benefits. An administrative law judge (ALJ) affirmed that determination, and Piontek petitioned the Labor and Industry Review Commission for review. The LIRC affirmed the ALJ's determination that Piontek became ineligible for UE benefits when he left the first real estate company based on the "quit statute" in Wis. Stat. § 108.04(7)(a). Piontek sought judicial review of LIRC's decision, and the circuit court affirmed. Piontek appealed to the Wisconsin Court of Appeals.

Plain Language of the "Quit Statute"

The Court evaluated the language of the "quit statute." Under Wis. Stat. § 108.04(7)(a), an employee who is otherwise eligible to receive UE benefits is rendered ineligible if the employee "terminates work." Wis. Stat. § 108.04(7)(a) states, in pertinent part: "If an employee terminates work with an employing unit, the employee is ineligible to receive benefits." Piontek contended that he is not an "employee" within the meaning of this language and thus the LIRC could not declare him ineligible for UE benefits.

There is no dispute that the real estate company Piontek worked for is an "employing unit." That term is broadly defined in Wis. Stat. § 108.02(14m) as "any person who employs one or more individuals." The LIRC maintains that the brokerage "employed" Piontek and various office personnel. It also was undisputed that Piontek met the "terminates work" requirement in Wis. Stat. § 108.04(7)(a) when he left the first real estate company. The common usage of the term "work" is very broad and the Court observed there was no reason to think the term has a narrower meaning here. Wis. Stat. § 108.02(12)(a) defines "employee" as "any individual who is or has been performing services for pay for an employing unit."

Since the brokerage is an employing unit, the only reason Piontek would not qualify as an "employee" is if he was not performing "services" for pay for the broker. "Services" is not defined in Wis. Stat. ch. 108. The LIRC argued and the Court agreed that Piontek, who was paid by the brokerage on a commission basis for listing and selling real estate thus provided services for pay. Piontek argued that "services" has a narrower meaning because it is interchangeable with the statutorily defined term "employment." Piontek's work as a real estate agent who was paid solely by commission is specifically excluded from the term "employment" per Wis. Stat. § 108.02(15)(k)7. The Court, however, was unpersuaded that the term "services" should have the same meaning as "employment" and rejected that argument. Therefore, the Court found that the plain language of Wis. Stat. § 108.04(7)(a) made Piontek ineligible to receive UE benefits because Piontek "quit his job" with the real estate company.

Absurdity Arguments

Piontek argues that this is an absurd result. If that were true, it would be a basis for rejecting the plain meaning interpretation adopted by LIRC.

Wis. Stat. § 108.04(7)(p) permits an employee to quit his or her job to take another job and still remain eligible for UE benefits if the new job has a greater average weekly wage. The new job has to either fit the ch. 108 definition of "employment" or otherwise be covered by UE insurance laws. Neither Piontek's old position at the first brokerage nor his new real estate position at the second brokerage qualify as a covered job. This, according to Piontek, results in unreasonably different treatment: If a person quits a covered job and takes a better-paying covered job of the

same type, that person does not lose eligibility; but if a person quits a non-covered job (such as real estate) and takes a better-paying non-covered job of the same type, that person loses eligibility. Piontek contends it is absurd to discourage a person from taking a better-paying job in his field and to treat these situations differently.

The Court did not concur, indicating that Piontek would need to comprehensively address the complex UE insurance scheme before it would be possible to discern whether this is absurd. The LIRC explained that it treats all workers uniformly because no one may quit to take a non-covered job and still remain eligible for UE benefits. On the other hand, if someone quits any job and takes a better-paying covered job, that person would not lose eligibility. The LIRC contended that this scheme discourages workers from quitting, except to take better-paying covered jobs, thereby increasing the overall financial viability of the UE benefits system by increasing the amount employers pay into the system.

Piontek also asserted that LIRC's application of the voluntary termination provision to him is at odds with the general policy statement in Wis. Stat. § 108.01, but the court rejected these arguments as well.

The WRA (through its Legal Action Program) filed an amicus brief before the circuit court, asserting that the application of the "quit statute" to the licensee was absurd and unfair.

REALTOR® Practice Tip: Wisconsin's unemployment law in Wis. Stat. ch. 108 is a maze of 67 pages of laws, tables and definitions. Different statutes use similar, yet different terms that have subtly different meanings that can completely change the application or meaning of a provision. These laws favor persons working in "covered employment" because their employers must pay unemployment tax on the compensation that they pay. "Employment" does not include real estate agents paid solely on commission.

REALTOR® Practice Tip: If you are a real estate licensee working for a broker and also collecting unemployment benefits due to the loss of another job, do not change real estate companies or you will lose your benefits and have to repay the UE benefits you received up to that point in time. Piontek has to repay $1,727 to the Unemployment Reserve Fund.

REALTOR® Practice Tip: The LIRC decision in this case evaluated whether Pointek was an independent contractor or an employee under the test stated in Wis. Stat. § 108.02(12)(bm). An individual has to meet seven of the 10 factors that signify independent contractor status. Pointek was found to satisfy only four of the 10 criteria. See the discussion of these factors in the LIRC decision at http://dwd.wisconsin.gov/lirc/ucdecsns/3458.htm.

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