The Ultimate Sanction: State High Court Affirms Liability Judgment for 'Egregious' Discovery Violations

This ruling sends a strong signal to Wisconsin litigants—and, perhaps more to the point, their counsel—that the ultimate discovery sanction is alive and well in Wisconsin's courts.

By **James E. Goldschmidt** | March 19, 2021

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When litigation counsel speak of dispositive discovery, they typically mean evidence so compelling that it will drive the merits in their favor. But a recent decision by the Supreme Court of Wisconsin gives a whole new meaning to the term.

In its February decision, Wisconsin's highest court unanimously affirmed the trial court's judgment of liability against the defendant bank as a sanction for discovery violations. That judgment formed the basis of a jury verdict exceeding $800,000, making for quite the discovery sanction against the bank.

Discovery issues aside, the litigation between Mohns and the bank was fairly run-of-the mill. Mohns was the general contractor on a condominium construction project financed by the bank. As Mohns continued to complete work and incur costs, the bank sold the loan for a loss. Two years later, the loan's new owner, MIL, foreclosed on the project. Mohns, still unpaid and precluded from proceeding against MIL, filed a complaint against the bank for breach of contract, unjust enrichment, and misrepresentation.

The discovery trouble began after the trial court denied the bank's motion to dismiss. As catalogued by the Supreme Court, the bank:

- Refused to produce *any* documents, maintaining that all relevant documents had been produced in a prior lawsuit
- Served written discovery responses that "contained more objections than answers"
- Produced a corporate witness who could not answer key questions, then violated a court order directing the bank to do better at a rescheduled corporate deposition

- Waited until the night before the aforementioned corporate deposition to produce hundreds of "newly discovered" documents

- Withheld a document that the trial judge said was "as close to a smoking gun as I have seen in a long time"

The trial court's ire culminated in summary judgment on liability against the bank on all three counts of Mohns' complaint. The court set the case for trial on damages, and the jury returned a verdict of approximately $240,000 in compensatory damages and $1 million in punitive damages. The trial court reduced the latter award to roughly $460,000 and added over $110,000 in attorney fees.

On appeal, the Supreme Court clarified a key point relating to discovery sanctions in Wisconsin. The court rejected the bank's argument that any order for default judgment as a discovery sanction must be accompanied by an express finding that the movant was prejudiced by the discovery violations. While trial courts must make a finding of "egregious conduct" or "bad faith" without a "clear and justifiable excuse" before granting the ultimate sanction, a finding of prejudice to the offended party is not required. Instead, when discovery violations rise to this level, prejudice goes beyond the parties to the administration of justice itself.

At the same time, the Supreme Court clarified Wisconsin law in another way that reduced the sting of the default judgment and should be welcome (if not entirely novel) news to Wisconsin's civil defense bar: a claim for unjust enrichment is incompatible with a claim for breach of contract. Although this principle could be gleaned from earlier decisions, the Supreme Court's decision in *Mohns* expressed the principle clearly, succinctly, and with an eminently quotable nod to quantum mechanics:

Allowing both [claims] to stand would create the legal equivalent of the Schrödinger's cate paradox. Just as a cat cannot be both dead and alive at the same time, a contract cannot both exist and not exist simultaneously. A contract either exists, or it doesn't. If a contract exists, a plaintiff may recover damages for its breach. Only if a contract does not exist may a party recover damages in equity.

The court also clarified that the related doctrine of election of remedies applies (as the name suggests) only to *remedies*, not claims for relief. For example, a defrauded party to a contract must elect between rescinding the contract or affirming the contract and seeking damages. But Wisconsin law allows plaintiffs to plead *claims* in the alternative, as Mohns could have done here. The problem arises when, as here, the plaintiff is permitted to recover on each of two claims pleaded in the alternative.

This aspect of the Supreme Court's decision had a domino effect on Mohns' recovery against the bank. First, it knocked out compensatory damages for the unjust enrichment claim. Second, with the disappearance of any tort liability supporting the punitive damages award, that award had to be vacated. This left Mohns with its judgment for breach of contract and the award of attorney fees, which the bank judiciously elected not to challenge.

Mohns sends a strong signal to Wisconsin litigants—and, perhaps more to the point, their counsel—that the ultimate discovery sanction is alive and well in Wisconsin's courts. The next time a party finds itself on the wrong end of that sanction, one gets the sense that the high court may not be as accommodating in finding ways to trim the resulting judgment.

The decision is Mohns, Inc. v. BMO Harris Bank N.A., 2021 WI 8 (Feb. 2, 2021).

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