

**FARM-TO-CONSUMER LEGAL DEFENSE FUND,
GRASSWAY ORGANICS FARM STORE LLC,
GRASSWAY ORGANICS ASSOCIATION, and
KAY and WAYNE CRAIG d/b/a GRASSWAY FARM,**

Plaintiffs,

DECISION AND ORDER

vs.

**WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION,**

Case No. 09-CV-6313

Defendant.

**FARM-TO-CONSUMER LEGAL DEFENSE FUND,
MARK and PETRA ZINNIKER, NOURISHED BY
NATURE LLC, PHILLIP BURNS, GAYLE
LOISELLE, and ROBERT KARP,**

Plaintiffs,

DECISION AND ORDER

vs.

**WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION,**

Case No. 10-CV-3884

Defendant.

DECISION AND ORDER ON ZINNIKER PLAINTIFFS' CLARIFICATION MOTION

The Zinniker Plaintiffs seek clarification regarding the court's decision and order dated August 12, 2011, which denied their motion for summary judgment. While the court believes that its holding was clear, it will restate its analysis in hopes that a second discussion will clarify any confusion.

The Zinniker Plaintiffs seek clarification on the following portion of the court's decision

and order:

Plaintiffs argue that the DATCP's interpretation of Wis. Stat. § 97.24(2) is unreasonable because it fails under a strict scrutiny analysis and is unconstitutional as applied to them. Plaintiffs argue that they have a fundamental right to possess, use and enjoy their property and therefore have a fundamental right to own a cow, or a heard of cows, and to use their cow(s) in a manner that does not cause harm to third parties. They argue that they have a fundamental right to privacy to consume the food of their choice for themselves and their families and therefore have a fundamental right to consume unpasteurized milk from their cows. Plaintiffs contend that they have a fundamental right to contract to board their cows with a farmer. Finally, Plaintiffs argue that they have a fundamental right to associate in order to promote and support their beliefs, which includes consuming unpasteurized milk. Plaintiffs argue because DATCP's interpretation of Wis. Stat. § 97.24(2) violates the above-mentioned fundamental rights it must be subject to strict scrutiny in order to be reasonable. Plaintiffs contend that the DATCP's interpretation of Wis. Stat. § 97.24(2) is not reasonable because it does not pass the strict scrutiny test.

Plaintiffs' arguments are wholly without merit. The DATCP's interpretation of Wis. Stat. § 97.24(2) does not affect or interfere with a fundamental right and therefore is not subject to strict scrutiny. While the Plaintiffs have recited a plethora of cases involving a variety of constitutional rights, no case cited stands for the propositions that the Plaintiffs have asserted herein. Arguments unsupported by references to legal authority will not be considered. *Post v. Schwall*, 157 Wis. 2d 652, 657, 460 N.W.2d 794 (Ct. App. 1990). Plaintiffs' arguments are nothing more than an attempt to misconstrue the issues in this case. They do not simply own a cow that they board at a farm. Instead, Plaintiffs operate a dairy farm. If Plaintiffs want to continue to operate their dairy farm then they must do so in a way that complies with the laws of Wisconsin.

(Decision and Order 21-23).

The court stands by its decision and order and continues to believe that the Plaintiffs' constitutional claims are "wholly without merit" because they are extremely underdeveloped. To be clear, one example of how the Plaintiffs' arguments are underdeveloped is their reasoning behind why the court should declare that there is a fundamental right to consume the food of one's choice. Specifically, Plaintiffs argue that "[g]uidance on this issue [of whether there is a

fundamental right to consume the food of one's choice] can be gleaned from other United States Supreme Court cases that have dealt with the issues of liberty, right to privacy, and substantive due process." (Zinniker Supp. Br. 16). They then cite to cases that stand for a menagerie of rights such as: the right to possess or view pornography in the privacy of one's own home (*see Stanley v. Georgia*, 394 U.S. 557 (1969)); a woman's right to have an abortion (*see Roe v. Wade*, 410 U.S. 113 (1973)); the right to refuse medical treatment (*see Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990)); and the right to engage in consensual sexual conduct (*see Lawrence v. Texas*, 539 U.S. 558 (2003) (*Id.* at 16-17)). Plaintiffs then ask this court to declare that they have a fundamental right to consume the foods of their choice because "[w]hat good are all the fundamental rights mentioned above if a person cannot consume the food of his/her own choice?" (*Id.* at 17).

While it is true that the cited cases do in fact stand for the propositions of law they argued, the Plaintiffs have failed to adequately explain why those propositions support their argument that there is a fundamental right to consume the food of one's choice. For example, the Plaintiffs do not explain why a woman's right to have an abortion translates to a right to consume unpasteurized milk. Moreover, they do not detail how a person's right, for example, to refuse medical treatment will not be "good" even if a person cannot consume the food of his/her own choice. This court is unwilling to declare that there is a fundamental right to consume the food of one's choice without first being presented with significantly more developed arguments on both sides of the issue.

The other constitutional claims Plaintiffs put forward in their brief are similarly underdeveloped. As a result, the court denied Plaintiffs' motion for summary judgment, which means the following:

- (1) no, Plaintiffs do not have a fundamental right to own and use a dairy cow or a dairy herd;
- (2) no, Plaintiffs do not have a fundamental right to consume the milk from their own cow;
- (3) no, Plaintiffs do not have a fundamental right to board their cow at the farm of a farmer;
- (4) no, the Zinniker Plaintiffs' private contract does not fall outside the scope of the State's police power;
- (5) no, Plaintiffs do not have a fundamental right to produce and consume the foods of their choice; and
- (6) no, the DATCP did not act in an ultra vires manner because it had jurisdiction to regulate the Zinniker Plaintiffs' conduct.

For further clarification, the court notes that because it found that the DATCP's interpretation of Wis. Stat. § 97.24(2) does not involve a fundamental right, it accorded the Agency's statutory construction a presumption a validity. *See Heller v. Doe by Doe*, 509 U.S. 312, 209 (1993). Furthermore, the court found that the government has a legitimate interest in regulating the sale and/or distribution and consumption of unpasteurized milk through Wis. Stat. § 97.24(2) and other provisions because it can result in serious illness. In fact, according to the detailed findings in the Consent Judgment and Order issued against the Zinniker Plaintiffs in Walworth County Circuit Court Case No. 09-CX-11, consuming unpasteurized milk *did result* in serious illness. (Emphasis added.) As a result, the court upheld the DATCP's interpretation because it rationally furthers the legislature's purpose found in Wis. Stat. § 97.24(4):

Regulation of the production, processing and distribution of milk and fluid milk products under minimum sanitary requirements which are uniform throughout this state and the United States is essential for the protection of consumers and the economic well-being of the dairy industry, and is therefore a matter of statewide concern.

See State v. Annala, 168 Wis. 2d 453, 468, 484 N.W 2d 138 (1992).

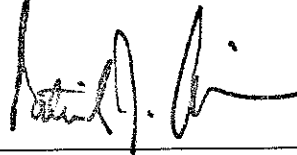
Finally, it is clear from their motion to clarify that the Plaintiffs still fail to recognize that they are not merely attempting to enforce their “right” to own a cow and board it at a farm. Instead, *Plaintiffs operate a dairy farm*. (Emphasis added). As this court already said in its decision and order, if Plaintiffs want to continue to operate their dairy farm then they must do so in a way that complies with the laws of Wisconsin.

AAG Hunter is directed to prepare the appropriate final judgment and order of dismissal.

THIS IS A FINAL ORDER FOR PURPOSES OF APPEAL.

Dated this 9th day of September, 2011.

By the Court:



Judge Patrick J. Fiedler
Circuit Court Judge – Branch 8

cc: Atty. David G. Cox and Atty. Elizabeth Gamsky Rich (*attorneys for Plaintiffs*)
Assistant Attorney General Robert M. Hunter (*attorney for Defendant DATCP*)