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FOR IMMEDIATE RELEASE

Wisconsin Supreme Court accepts 11 new cases

Madison, Wis. (May 15, 2017) – The Wisconsin Supreme Court has voted to accept 11 new cases and acted to deny review in a number of other cases. The case numbers, issues, and counties of origin of granted cases are listed below. Hyperlinks to Court of Appeals' decisions are provided where available. The synopses provided are not complete analyses of the issues. More information about any particular case before the Supreme Court or Court of Appeals can be found on the Supreme Court and Court of Appeals Access website.

2015AP1331 In Re: Partnership Health Plan v. OCI

Supreme Court case type: Petition for Review
Court of Appeals: District IV
Circuit Court: Dane County, Judge William D. Johnston, affirmed
Long caption: In Re: Partnership Health Plan, Inc., Petitioner, Michael S. Polsky, Esq. as Chapter 128 Receiver of Community Health Partnership, Inc., interested party-appellant-petitioner v. Office of the Commissioner of Insurance, interested party-respondent

Issues presented: This case examines issues related to Wis. Stats. ch. 645, which regulates rehabilitation and liquidation proceedings involving insurers. The Supreme Court reviews lower court decision on how the statute may apply to the facts of this case, including the authority of the Commissioner of Insurance (Commissioner), the subject matter jurisdiction of a circuit court, and actions by taken by a non-profit's board of directors regarding surplus funds remaining after all liabilities have been paid through liquidation proceedings.

Some background: This case concerns the disposition of $4 million to $5 million of surplus funds that will remain after all liabilities of Partnership Health Plan, Inc. (PHP) have been paid in PHP's Wis. Stats. ch. 645 liquidation proceeding. The receiver for Community Health Partnership, Inc. (CHP), Atty. Michael S. Polsky, asserts that CHP is entitled to those surplus funds. Both the circuit court and the Court of Appeals disagreed, leading Polsky to appeal to the Supreme Court.

CHP was incorporated as a nonstock charitable corporation. CHP, in turn, incorporated PHP as a nonstock charitable service insurance corporation. As such, PHP does not have shareholders and CHP is its only member.

PHP was operated as a health maintenance organization, which had no employees or operating assets. All administrative services were provided by CHP. The premises occupied by PHP were leased and occupied by CHP. As of Dec. 31, 2012, CHP and PHP ceased normal operations. CHP entered into an insolvency proceeding under Wis. Stat. ch. 128 in which Polsky was appointed as receiver. PHP entered into liquidation proceedings under Wis. Stat. ch. 645.

On Dec. 17, 2012, before PHP ceased its normal operations and entered into liquidation, the PHP board of directors adopted a consent resolution authorizing the payment of any assets it might have following liquidation to CHP's receivership estate. The validity of this consent resolution is at issue.

In the PHP liquidation proceeding, CHP's receiver (Polsky) filed a claim with the Commissioner for "all surplus funds." The proof of claim states that CHP is "*the sole owner of PHP*" and as such is entitled to all excess funds under Wis. Stat. § 645.68(11).

The Commissioner denied CHP's claim. CHP filed a motion for declaratory relief with the circuit court, seeking an order that CHP is entitled to any surplus funds following PHP's liquidation. The circuit court denied the receiver's motion. The receiver appealed. The Court of Appeals affirmed, concluding, among other things, that CHP, the sole member of PHP, is not an "owner" of PHP in the context of the relevant statutory provisions.

The Court of Appeals determined that policyholders are entitled to make a claim – not because they are members of a nonstock corporation – but because they are owners. The court explains that it does not necessarily follow that because one type of owner (a policyholder in a mutual insurance company) is a member of a nonstock corporation, that all members of a nonstock corporation are therefore owners.

The Court of Appeals also agreed with the Commissioner that CHP is not entitled to the surplus funds because: (1) the resolution is void because it exceeds the authority of PHP's board of directors under PHP's articles of incorporation; and (2) the resolution is invalid under Wis. Stat. § 617.21 and Wis. Admin. Code § Ins. 40.04 because the resolution was not timely disclosed to the Commissioner.

Polsky contends that because the resolution does not take effect until PHP is liquidated, and it concerns only PHP's surplus funds, "the disposition of the surplus funds will have no effect on PHP … [and] cannot be deemed material to PHP." As such, under the circumstances of this case, the reporting requirements of § 617.21 and § Ins. 40.04 do not even apply to the disposition of the surplus funds, according to Polsky.

Polsky also contends that Wis. Stat. § 645.71(2) only gives the court authority to "approve, disapprove or modify any report on claims by the liquidator." The approval of payment of surplus funds to a charitable organization selected by the Commissioner is not a payment of a "claim" and therefore is outside of the authority provided by this statute, according to Polsky.

A decision by the Supreme Court is expected to clarify how provisions of Wis. Stats. ch. 645 apply to circumstances such as those presented here.

2016AP21 Metropolitan Associates v. City of Milwaukee

Supreme Court case type: Petition for Review
Court of Appeals: District I (District IV judges)
Circuit Court: Milwaukee County, Judge Jeffrey A. Conen and Judge Dennis P. Moroney, affirmed

Long caption: Metropolitan Associates, plaintiff-appellant-petitioner, v. City of Milwaukee, defendant-respondent

Issues presented: This case examines statutes and case law related to property tax assessments. The Supreme Court reviews two issues:

- Whether the lower courts erred in determining that the City of Milwaukee complied with Wisconsin property assessment law, including the mandate of Wis. Stat. § 70.32(1) that the assessor utilize the best information available, in valuing the subject property for tax years 2008-2011 and holding that the city's assessments were valid and proper.
- Whether the lower courts erred in holding that Metropolitan Associates failed to overcome the initial presumption of correctness contained in Wis. Stat. § 70.49.

Some background: Property owner Metropolitan Associates (Metropolitan) contends that the city's initial 2008-2011 assessments of its properties were invalid as a matter of law because the assessor used the mass-appraisal technique and not the three-tier approach. Metropolitan says that this is contrary to the terms of § 70.32(1) and to case law interpreting that statute.

Metropolitan argues that the assessor should have conducted the initial assessments using tier 2 (sales comparison) with the "best information available." The three-tier approach provides:

- First-Tier: An assessor must base the assessment of the subject property on a recent arm's length sale of the subject property, which was not available on the subject properties because they had not sold recently.
- Second-Tier: If the subject property was not recently sold, an assessor must base the assessment of the subject property on the sales of reasonably comparable properties.
- Third-Tier: Only if sales of reasonably comparable properties are not available, may an assessor base the assessment of the subject property on other valuation methodologies, such as the cost approach.

Metropolitan argues that the city should have initially assessed the property using an individual, single-property appraisal. The city responds that § 70.32(1) requires assessors to value property "in the manner specified in the Wisconsin property assessment manual" and "from the best information that the assessor can practicably obtain" – not, as Metropolitan has quoted, the "best information available."

The circuit court upheld the city's assessment process, and the Court of Appeals affirmed. The Court of Appeals observed that Metropolitan's argument "omits two critical directions" in the statutory language – namely, that assessors are to value property "in the manner specified in the Wisconsin property assessment manual" and they are to do so based on "the best information that the assessor can practicably obtain." See § 70.32(1).

The city emphasizes that the manual explicitly encourages assessors to use mass appraisal for the initial valuations of large numbers of properties, stating that "[m]ass appraisal is the underlying principle that Wisconsin assessors should be using to value properties in their respective jurisdictions."

The city says under the manual, it is only after a taxpayer challenges a valuation calculated using the mass appraisal technique that assessors are to conduct a single-property assessment under the three-tiered approach, in order to "defend" the valuations.

Metropolitan maintains that an assessor is *required* to utilize actual income and expenses when valuing an income-producing property, as the best information available pursuant to §

70.32(1) and case law. Metropolitan then describes the city's "failure" to utilize this information as "intentional" and claims that this is a direct violation of § 70.32(1).

The parties also ask the Supreme Court to consider this case in light of decisions in Regency West Apartments LLC v. City of Racine, 2014AP2947 and Walgreen Co. v. City of Madison, 2008 WI 80, ¶20 n.7, 311 Wis. 2d 158, 752 N.W.2d 687, among other cases.

A decision by the Supreme Court could clarify the property tax assessment process under the type of circumstance presented in this case.

2015AP583 Movrich v. Lobermeier

Supreme Court case type: Petition for Review
Court of Appeals: District III (District I judges)
Circuit Court: Price County, Judge Patrick J. Madden, affirmed
Long caption: Jerome Movrich and Gail Movrich, plaintiffs-respondents, v. David J. Lobermeier and Diane Lobermeier, defendants-appellants-petitioners

Issues presented: This case, involving a dispute among siblings and neighbors over the installation of a pier, examines the state's Public Trust Doctrine. The Supreme Court reviews three issues:

- Does the doctrine allow the respondent upland lot owners (Movriches) to install a dock onto or over a portion of the Sailor Creek Flowage bed, the record title to which bed is privately owned in fee by the petitioners (Lobermeiers), not by the state of Wisconsin in trust, as in instances of a natural lake?
- Does the doctrine allow the respondent upland lot owners (Movriches) to directly access the water of the Sailor Creek Flowage from their upland lot where the record title to the flowage bed is privately owned in fee by petitioners (Lobermeiers), not by the state of Wisconsin in trust, as in instances of a natural lake?
- Does the doctrine, in addition to bestowing the *public* with various recreational rights to and uses of navigable water, also effect the transfer of *private* property interests in instances of privately owned flowage bed?

Some background: David Lobermeier and Gail Movrich are brother and sister. In 2006, the Movriches purchased waterfront property abutting the Sailor Creek flowage in Price County. A dock extending from the property into the flowage was present at that time. The Lobermeiers also own property on the flowage, but their property is an area of submerged land under the flowage's waters. The Lobermeiers own only a small portion of the flowage water bed, and part of their submerged property abuts the Movriches' upland waterfront property.

Gail Movrich testified at trial that when they acquired the property she and her husband made use of the flowage in various ways, including fishing, mooring their boat to a dock, wading in the water, and kayaking. She said they also allowed Lobermeier and his friends and family to use the dock for fishing and other purposes, including mooring a boat.

The record indicates that in 2011 or 2012, the Movriches and Lobermeiers had a falling out that was unrelated to the flowage. At that time the Lobermeiers began to assert that they alone had exclusive rights to the water bed and demanded that the Movriches and other neighboring property owners remove their docks and stop using the water bed.

The Movriches ultimately filed a lawsuit against the Lobermeiers seeking a declaration of their riparian rights incident to their property ownership and their ability to access the flowage and install a pier or dock.

The circuit court consolidated the Movriches' suit with a previously pending lawsuit Lobermeier had filed against other flowage upland property owners. Following a court trial, the trial court issued a decision and order explaining that the public trust doctrine allows the Movriches to access the flowage and install a pier or a dock.

The Court of Appeals affirmed, noting that Article 9, § 1 of the Wisconsin Constitution provides that the state holds the navigable waters in trust for the public.

The Court of Appeals said because the Movriches are members of the public who also happen to be riparian property owners, the public trust doctrine gives them the right to access the flowage directly from their property and gives them the right to erect, maintain, and use a pier or dock extending from their property into the flowage. The Movriches say the Court of Appeals' decision merely applies this court's prior decisions to the specific facts of this case.

The Lobermeiers contend the Court of Appeals' decision broadens the applicability of the public trust doctrine into the domain of property rights between a flowage bed owner and an upland lot owner. They argue there is no prior case law that would require a private property owner with record title to a flowage bed to tolerate what otherwise would be a trespass on the flowage bed owner's property by placement of a dock by an adjacent, abutting landowner.

A decision in this case is expected to have statewide impact in all other situations where the boundary line between upland lot owners and flowage bed owners is the shoreline of a given flowage or similar body of water.

2016AP173-CR State v. Grandberry

Supreme Court case type: Petition for Review
Court of Appeals: District I
Circuit Court: Milwaukee County, Judge Janet C. Protasiewicz, affirmed
Long caption: State of Wisconsin, plaintiff-respondent, v. Brian Grandberry, defendant-appellant-petitioner

Issues presented: This case examines laws related to the concealed carry and transport of weapons. The Supreme Court reviews:

- As a matter of law, is there sufficient evidence to convict a person for carrying a concealed weapon (CCW), contrary to Wis. Stat. § 941.23, if the firearm is being transported in a vehicle in full compliance with the safe transport statute, Wis. Stat. § 167.31?
- Is the CCW statute void for vagueness as applied to a person like Brian Grandberry who transports a firearm in a vehicle in full compliance with the safe transport statute?

Some background: Brian Grandberry was stopped by police while driving a car in Milwaukee on Nov. 9, 2014. One of the officers asked Grandberry if he had any firearms in the car. Grandberry replied that he had a gun in the glove compartment. The officer asked if Grandberry had a valid CCW permit. Grandberry said he did. The officers checked their database and discovered Grandberry did not in fact have a valid permit. An officer opened the glove compartment and found a loaded 45 caliber semi-automatic pistol. While being conveyed to the

police station, Grandberry said he owned the gun and that he had taken a CCW class but never actually got a permit. Police also determined that Grandberry was not a peace officer.

In February 2015, Grandberry filed a motion to dismiss on the grounds that the CCW statute, as applied to him, was void for vagueness. The circuit court denied the motion. The circuit court found Grandberry guilty of carrying a concealed weapon. The court imposed and stayed a sentence of three months in the House of Corrections and placed Grandberry on probation for one year. The Court of Appeals affirmed.

The Court of Appeals noted that CCW, as defined in § 941.23, is committed by any person who carries a concealed and dangerous weapon. The Court of Appeals said the stipulated facts in this case supported all three elements of the crime of CCW:

1. The defendant carried a dangerous weapon. 'Carried' means went armed with.
2. The defendant was aware of the presence of the weapon.
3. The weapon was concealed.

Grandberry maintains the evidence was insufficient to convict him because he was in compliance with the safe transport statute found in § 167.31, Stats. Grandberry's argument was that he did not "carry" a concealed weapon because he was following the dictates of § 167.31(2)(b).

Grandberry argued that language in a footnote in a Court of Appeals' decision from 1994 supported his position. In State v. Walls, 190 Wis. 2d 65, 526 N.W.2d 765 (Ct. App. 1994), the appellate court said:

> We are mindful "that there is a long tradition of widespread lawful gun ownership by private individuals in this country." Thus, our conclusion in this case in no way limits the lawful placement, possession, or transportation of, unloaded (or unstrung) and encased, firearms, bows, or crossbows in vehicles as permitted by § 167.31(2)(b), . . . which provides in part:
>
> > (b) Except as provided in sub. (4), no person may place, possess or transport a firearm, bow or crossbow in or on a vehicle, unless the firearm is unloaded and encased or unless the bow or crossbow is unstrung or is enclosed in a carrying case. Walls, 190 Wis. 2d at 69 n.2

In deciding Grandberry's case, the Court of Appeals noted that the current version of § 167.31(2)(b) was created in November 2011 to account for changes that had to be made after the Legislature created the right of Wisconsin citizens to obtain licenses to carry concealed weapons. It said without the change, a person licensed to carry a loaded concealed weapon would not have been able to carry it in a vehicle even after obtaining a CCW permit.

The Court of Appeals said § 167.31(2)(b) only applies to those persons who have passed the rigorous conditions for obtaining a CCW permit. Since it is undisputed that Grandberry did not have a CCW permit, the court said the statute regulating the transport of firearms does not apply to him.

The Court of Appeals went on to reject Grandberry's claim that the CCW statute was void for vagueness because it conflicts with the safe transport statute. He argued he did not have fair notice of the CCW statute's prohibitions.

The Court of Appeals noted that there is a presumption that statutes are constitutional, and the party raising a constitutional claim must prove that the challenged statute is unconstitutional beyond a reasonable doubt.

The Court of Appeals said circumstantial evidence can support a criminal conviction and may be as strong or stronger than direct evidence.

The court reasoned Grandberry's actions and admissions strongly suggested he was aware he needed a CCW permit to lawfully keep a loaded pistol in his glove compartment. The court said if Grandberry had truly believe that the safe transport law allowed him to carry a loaded gun in his glove compartment, he would have had no reason to lie about having a CCW permit.

2015AP1586 Nationstar Mortgage v. Stafsholt

Supreme Court case type: Petition for Review
Court of Appeals: District III
Circuit Court: St. Croix County, Judge Scott R. Needham, affirmed in part; reversed in part and cause remanded for further proceedings
Long caption: Nationstar Mortgage LLC n/k/a Bank of America, NA, as successor by merger to BAC Home Loans, plaintiff-appellant-cross-respondent v. Robert R. Stafsholt, defendant-respondent-cross-appellant-petitioner, Colleen Stafsholt f/k/a Coleen McNamara, unknown spouse of Robert R. Stafsholt, unknown spouse of Colleen Stafsholt, f/k/a Colleen McNamara, Richmond Prairie Condominiums Phase I, Association and The First Bank of Baldwin, defendants.

Issues presented: This case involves a dispute over attorney fees arising from a home loan foreclosure. The Supreme Court reviews issues related to the awarding of attorney fees, the method by which attorney fees may be recovered, and the decision-making processes of lower courts in this case.

Some background: Robert R. Stafsholt and his former wife owned property in New Richmond. In October 2002, Colleen Stafsholt executed a note in the amount of $208,000 in favor of RBMG, Inc. The note was secured by a mortgage on the New Richmond property, which both Stafsholts granted to Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for RBMG.

The note came into the possession of Ocwen Loan Servicing, LLC after being serviced at times between 2008 and 2011 by Countrywide Home Loans, BAC Home Loans, and BOA.

BAC Home Loans filed a foreclosure action against the Stafsholts and other parties in February of 2011. The complaint alleged that the Stafsholts had defaulted on the terms of the note and mortgage by failing to pay past due payments as required.

On May 31, 2012, BOA, successor by merger to BAC Home Loans, assigned the mortgage to Homeward Residential, Inc., f/k/a American Home Mortgage Servicing, Inc. Homeward Residential assigned the mortgage to Ocwen. Ocwen was substituted as the plaintiff in the action in December of 2013.

Stafsholt asserted counterclaims for breach of contract, breach of the implied covenant of good faith and fair dealing, equitable estoppel, declaratory judgment, and assignment of mortgage under § 846.02, Stats.

The circuit court issued an order on April 8, 2015, finding that BOA had improperly charged the Stafsholts for lender placed insurance (LPI); that BOA "caused the Stafsholts to default on the Mortgage and Note"; and that Stafsholt "acted in good faith and reliance on the misrepresentations of the BOA agent." The circuit court concluded, among other improper actions, that BOA had breached the implied covenant of good faith and fair dealing and that Stafsholt had established the affirmative defense of equitable estoppel.

The circuit court dismissed the foreclosure action and reinstated the Stafsholts' mortgage. It concluded Ocwen was entitled to be paid the principal balance of the loan, some $172,000. However, the court held that Ocwen could not recover any other "fees or costs, including late fees, mortgage fees, bankruptcy fees or interest."

The circuit court rejected Stafsholt's request for attorney fees, stating there was no basis to award them. The court also declined to award Stafsholt attorney fees and costs as a sanction against Ocwen under § 802.05, Stats.

Stafsholt moved for reconsideration and asked the circuit court to declare that the principal balance of the mortgage was $10,167.38. He arrived at that figure by subtracting from the $172,000 mortgage balance some $71,000 in attorney fees and costs he had incurred during the foreclosure proceedings and a $90,000 payment he made on April 17, 2015.

On June 16, 2015, the circuit court entered a written order granting Stafsholt's motion for reconsideration in part. It concluded Stafsholt was entitled to recover a portion of his claimed attorney fees and costs. Using the "Lodestar Method," the court determined a 10-percent reduction in Stafsholt's claimed attorney fees and costs was warranted. After all of its calculations, the court concluded that the remaining balance on the loan was some $57,000. The court ordered that if Stafsholt paid that amount by Aug. 1, 2015, Ocwen would be required to assign the mortgage to Stafsholt and terminate the underlying note.

Ocwen transferred the servicing of the mortgage to Nationstar as of March 1, 2015. Nationstar was substituted for Ocwen as plaintiff. Nationstar appealed from the portion of the circuit court order dismissing the foreclosure action and from the order granting in part Stafsholt's motion for reconsideration. Stafsholt cross-appealed, arguing that the circuit court erred in reducing his requested attorney fees and costs.

The Court of Appeals' upheld many of the trial court determinations. However, it reversed a circuit court order which granted Stafsholt an offset against the principal balance due on his mortgage with Nationstar Mortgage LLC, n/k/a Bank of American, NA, for his attorney fees and costs. The Court of Appeals concluded that the lower court lacked authority to award Stafsholt attorney fees and costs on that basis.

Nationstar says that the longstanding American Rule that prohibits an award of attorney fees to the prevailing party except where limited exceptions, not present here, apply.

Nationstar goes on to say the Court of Appeals correctly declined to address Stafsholt's claim that the trial court had the inherent authority to grant attorney fees. It says even if the Court of Appeals had reached the merits of that issue, Stafsholt's argument does not support his claim for attorney fees.

2015AP1039 Westmas v. Selective Insurance Company of South Carolina

Supreme Court case type: Petition for Review
Court of Appeals: District II
Circuit Court: Walworth County, Judge Phillip A. Koss, reversed and cause remanded

Long caption: John Y. Westmas, Individually and as Special Administrator of the Estate of Jane L. Westmas and Jason Westmas, plaintiffs-appellants, v. Selective Insurance Company of South Carolina, Creekside Tree Service, Inc. and ABC Insurance Company, defendants-respondent-petitioner

Issues presented: This case examines the terms "agent" and "occupant" under Wis. Stat. § 895.52, the state's recreational immunity statute. The Supreme Court reviews whether Creekside Tree Service, as the entity in charge of trimming trees on recreational land, is entitled to immunity either as an "agent" of the owner of the land or as an "occupant."

Some background: On a May afternoon in 2012, Jane Westmas and her adult son went for a walk on a portion of a shoreline path that wraps around Geneva Lake. She was struck and killed by a tree limb felled by Creekside.

The shoreline path is a public right of way, and property owners are responsible for maintaining the path. Conference Point is one such property owner and had hired Creekside to finish some tree work not completed by another company that had bid on tree work on the property. Creekside had also submitted a bid for the project but was not initially selected.

The proposal, which Creekside submitted to Conference Point months before the accident, stated Creekside would "provide labor, material, equipment and incidentals required for the completion" of the specific tree-trimming services detailed in the proposal.

Creekside's sales/consultant foreman, certified arborist Jonathan Moore, formulated Creekside's proposal for the tree project after meeting with Brian Gaasrud, vice chairperson of Conference Point's board of trustees. Moore apparently thought that Conference Point would be taking some noticeable steps to redirect pedestrians on the path or alert them to danger. Upon his arrival for the first day of work, however, Moore realized Conference Point had not taken any such steps.

Creekside set up cones along the path and utilized its employees as spotters who, verbally or with hand gestures, would either turn back pedestrians, temporarily halt them if tree work was in progress, or halt the tree work until pedestrians had passed. It was Moore's understanding that while Creekside did its tree-trimming, it did not have authority to simply close down the path to all pedestrian traffic or detour pedestrians through other areas of the Conference Point property.

Three Creekside employees, but not Moore, were working at Conference Point on the day of the accident. While Creekside was performing its work at the Conference Point property, Gaasrud had no conversations with Creekside regarding anything Creekside was doing with regard to pedestrian traffic on the path; indeed, Gaasrud was not even aware Creekside would be working on the day of the accident. No one from Conference Point was assigned to check on Creekside's work or provide Creekside with equipment or assistance.

After the accident, Jane's husband (individually and as special administrator of her estate) and her son (collectively "the Westmases") sued Creekside, and its insurer, Selective Insurance Company of South Carolina ("Selective"). (Conference Point and its insurer were previously dismissed from the case, and are not party to this appeal).

Creekside successfully moved for summary judgment on recreational immunity grounds. The Court of Appeals reversed.

The Court of Appeals noted that Wis. Stat. § 895.52(2)(b) provides in relevant part that "no owner and no officer, employee or agent of an owner is liable for the death of, any injury to, or any death or injury caused by, a person engaging in a recreational activity on the owner's

property." "Owner" is defined to include "[a] person . . . that owns, leases or occupies property." Sec. 895.52(1)(d)1. The Court of Appeals held that Creekside was not Conference Point's agent for purposes of § 895.52, nor was it an "occupier" of the Conference Point property such that it statutorily was an "owner" of the property.

More specifically, the Court of Appeals ruled that under Showers Appraisals, LLC v. Musson Bros., 2013 WI 79, 350 Wis. 2d 509, 835 N.W.2d 226, Creekside did not qualify as an agent of Conference Point, as there was no evidence that Conference Point either controlled the details of Creekside's work or formulated any "reasonably precise specifications" for that work. Creekside argues that the Showers case, which discussed whether a governmental contractor should be immune from liability as an agent of a governmental entity under Wis. Stat. § 893.80(4), is not helpful precedent to determine whether Creekside was an agent of Conference Point for recreational immunity purposes.

Creekside also argues that it should have been considered an owner for purposes of the recreational immunity statute.

The Westmases say the Court of Appeals' decision is consistent with the purpose and text of the recreational immunity statute. They say the appellate decision declares only that "independent contractors who do not qualify as 'agents' and who are not 'occupying' the property are not entitled to §895.52 immunity. It does not declare that independent contractors can never qualify as 'agents' or 'occupants;' it states only that Creekside does not."

2015AP1610-CR State v. Breitzman

Supreme Court case type: Petition for Review
Court of Appeals: District I
Circuit Court: Milwaukee County, Judge Rebecca F. Dallet, affirmed
Long caption: State of Wisconsin, plaintiff-respondent, v. Ginger M. Breitzman, defendant-appellant-petitioner

Issues presented: This case examines whether the First Amendment precludes a disorderly conduct charge for profane statements from one family member to another within the home and whether the circumstances presented here would support a claim of ineffective assistance of counsel for not making such an argument at trial court.

Some background: A jury found Ginger M. Breitzman guilty on several counts arising from incidents at her home involving a 14-year-old boy:

- two counts of child abuse, which Breitzman does not challenge;
- one count of child neglect, for locking her son out of the house for about five hours during the winter;
- one count of disorderly conduct for berating the boy with profanities, telling the boy to get his stuff out of his room, and threatening to call police after he burned popcorn in the microwave. (The boy was on the phone with a friend during the popcorn incident and hid the phone in his pocket, allowing his friend to hear his mother's statements.)

Breitzman filed a post-conviction motion, arguing, as relevant to her petition for review, that her counsel was ineffective for failing to move to dismiss the disorderly conduct charge on grounds that the charge violated her right to free speech. The trial court disagreed, noting that if

trial counsel had moved to dismiss the charge on First Amendment grounds, the trial court would have denied the motion.

The Court of Appeals ruled that trial counsel could not have been ineffective for failing to move to dismiss the disorderly conduct charge on First Amendment grounds because the trial court said that it would have denied such a motion. Because the motion would have been unsuccessful, there can be no prejudice and the claim of ineffective assistance of counsel fails, the Court of Appeals held.

Breitzman argues that her counsel should have argued that she is being criminally prosecuted for protected speech. Breitzman says that in calling her son a "retard," a "fuck face," and a "piece of shit," she was not engaging in unprotected speech: fighting words, incitement, obscenity, libel and defamatory speech, and true threats. *See* R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 382-83 (1992). Rather, Breitzman argues, she engaged in offensive and distasteful speech, which is constitutionally protected. *See* In re Douglas D., 2001 WI 47, 243 Wis. 2d 204, 626 N.W.2d 725 ("[F]eelings of offense and distaste do not allow [the Court] to set aside the Constitution.")

Breitzman also argues that her statements to the boy do not amount to disorderly conduct. That is, Breitzman insists that there wasn't a real possibility that her statements would cause a disturbance that would spill over and disrupt the peace, order, or safety of the surrounding community. "Conduct is not punishable under the [disorderly conduct] statute when it tends to cause only personal annoyance to a person," Breitzman points out, citing State v. Schwebke, 2002 WI 55, ¶30, 253 Wis. 2d 1, 644 N.W.2d 666.

In the Court of Appeals, the state wrote that the issue of whether Breitzman's profane language constituted protected speech "rested on an unsettled area of the law." Because the issue is legally unsettled, the state argued, Breitzman's counsel could not have been ineffective in failing to argue it. State v. McMahon, 186 Wis. 2d 68, 84, 519 N.W.2d 621 (Ct. App. 1994) (holding that a criminal defense attorney "is not required to object and argue a point of law that is unsettled.")

2015AP648-CR State v. Dorsey

Supreme Court case type: Petition for Review
Court of Appeals: District III
Circuit Court: Eau Claire County, Judge Paul J. Lenz, affirmed
Long caption: State of Wisconsin, plaintiff-respondent v. Anton R. Dorsey, defendant-appellant-petitioner

Issues presented: This case examines "other acts" evidence in Wis. Stat. § 904.04(2)(b)1., and how that statute may apply to domestic abuse cases. The Supreme Court reviews:

- Whether evidence of other criminal acts committed against a person other than the victim are admissible in cases of alleged domestic abuse for the purpose of showing a generalized motive or purpose on the part of the defendant to control persons with whom he or she is in a domestic relationship.
- Whether the other acts testimony presented in this case was relevant to the purpose of proving intent on the part of the defendant to cause bodily harm to the victim.

Some background: Anton R. Dorsey was convicted on one count of misdemeanor battery, one count of disorderly conduct, and one count of aggravated battery, with the latter two counts having been charged as acts of domestic abuse against his girlfriend at the time. The jury acquitted Dorsey of a charge of strangulation and suffocation. Dorsey's sole challenge in this case relates to the trial court's admission of certain other acts evidence.

Before trial, the state moved to admit evidence that Dorsey committed acts of domestic violence against a previous girlfriend to establish Dorsey's "intent and motive to cause bodily harm to his victim and to control her within the context of a domestic relationship."

In admitting the other-acts evidence, the trial court applied the "greater latitude rule" in the context of addressing Wis. Stat. § 904.04(2)(b)1. and the Sullivan factors. *See* State v. Sullivan, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30 (1998). The "greater latitude rule," as that phrase is commonly used, refers to a court-created doctrine that applies in sex crimes cases, particularly those involving child victims, to facilitate the admissibility of other acts evidence.

The Court of Appeals initially issued a decision in August 2016, which it withdrew and re-issued in December 2016. In affirming, the Court of Appeals focused on whether the reference to "greater latitude" in § 904.04(2)(b)1. is a codification of the court-created "greater latitude" rule used in sex crime cases.

The Court of Appeals ultimately ruled that § 904.04(2)(b)1. does not make the greater latitude rule applicable to domestic abuses cases, but even without the benefit of the greater latitude rule, the other acts evidence was properly admitted here.

Wis. Stat. § 904.04(2)(b)1. provides:

> "(b) Greater latitude. 1. In a criminal proceeding alleging a violation of s. 940.302(2) or of ch. 948, alleging the commission of a serious sex offense, as defined in s. 939.615(1)(b), or of domestic abuse, as defined in s. 968.075(1)(a), or alleging an offense that, following a conviction, is subject to the surcharge in s. 973.055, evidence of any similar acts by the accused is admissible, and is admissible without regard to whether the victim of the crime that is the subject of the proceeding is the same as the victim of the similar act."

Dorsey claims that the other acts evidence was inadmissible because there was "no specific linkage" between the alleged other acts evidence from a previous case and the crimes alleged here. It was not enough, Dorsey says, for the State to argue that the other acts evidence showed "some generalized motive on the part of [Dorsey] to control the women with whom he is in a domestic relationship"

The state, which also asked the Supreme Court to take the case, says that § 904.04(2)(b)1. is ambiguous because, while that paragraph states that "evidence of any similar acts by the accused is admissible," par. (b)1. is not excepted from the general rule excluding propensity evidence in § 904.04(2)(a). The state says the Court of Appeals did not answer the question of what par. (b)1. means when it says that "evidence of any similar acts by the accused is admissible."

2015AP2019 Tetra Tech EC, Inc., v. Wis. Dept. of Revenue

Supreme Court case type: Petition for Review
Court of Appeals: District III
Circuit Court: Brown County, Judge Marc A. Hammer, affirmed

Long caption: Tetra Tech EC, Inc., and Lower Fox River Remediation LLC, Petitioners-Appellants-PETITIONERS, v. Wisconsin Department of Revenue (DOR), Respondent-Respondent-RESPONDENT.

Issues presented: This case relates to an EPA-ordered cleanup of environmental damage caused by certain paper companies' release of polychlorinated biphenyls (PCBs) into the Fox River. The primary question is whether the services of one of the subcontractors on the clean-up project, Stuyvesant Dredging, Inc. (SDI), constituted "processing" of tangible personal property, such that the services are subject to Wisconsin sales and use tax under § 77.52(2)(a)11.

Some background: The paper companies created a limited liability company, Lower Fox River Remediation, LLC (Fox River Remediation), to oversee and implement the PCB cleanup work. Fox River Remediation hired a contractor, Tetra Tech EC, Inc. (Tetra Tech), which in turn engaged subcontractors to perform certain tasks. One of those subcontractors was SDI, which was tasked with separating the sand from the polluted sediment dredged from the Fox River, and then extracting the water from the remaining polluted sediment. The remaining material, consisting of a dewatered, PCB-polluted sludge, was then disposed of by Tetra Tech.

In 2010, the Wisconsin Department of Revenue (DOR) determined that: (1) Tetra Tech owed sales tax on the portion of its sale of remediation services to Fox River Remediation that represented SDI's activities; and (2) Fox River Remediation owed use tax on the portion of its purchase of remediation services from Tetra Tech that represented SDI's activities.

In 2011, Fox River Remediation and Tetra Tech filed petitions for redetermination with the Department, which the Department denied in pertinent part, again concluding that SDI's activities were taxable.

Fox River Remediation and Tetra Tech petitioned the Tax Appeals Commission (Commission) to review the Department's determinations. The Commission decided that SDI's activities were taxable. Fox River Remediation and Tetra Tech petitioned the trial court to review the Commission's decision. The trial court affirmed the Commission's order.

Fox River Remediation and Tetra Tech appealed unsuccessfully, and then brought the case before this court.

Section 77.52(2)(a)11. imposes sales and use tax on the "processing . . . of tangible personal property for a consideration for consumers who furnish directly or indirectly the materials used in the . . . processing." Among other things, Fox River Remediation and Tetra Tech argued on appeal that SDI did not engage in "processing"; rather, it "separated" the dredged material into its constituent parts, and since § 77.52(2)(a) does not list "separation" as a taxable service, SDI's activities were not taxable.

The Court of Appeals rejected this and other arguments. The Court of Appeals held that, applying great weight deference, the Commission's decision was reasonable and therefore sustainable.

Fox River Remediation and Tetra Tech argue to this court that the Commission relied on an overly broad dictionary definition of "processing." They also argue that the Commission's interpretation of § 77.52(2)(a)11. should not be afforded great weight deference because this is a matter of first impression and the issues are not straightforward.

Note that the court has directed the parties to brief the following additional issue: Does the practice of deferring to agency interpretations of statutes comport with Article VII, Section 2 of the Wisconsin Constitution, which vests the judicial power in the unified court system?

2016AP238-CR State v. Washington

Supreme Court case type: Petition for Review
Court of Appeals: District II
Circuit Court: Racine County, Judges Wayne J. Marik, Allan B. Torhorst, and David W. Paulson, affirmed
Long caption: State of Wisconsin, plaintiff-respondent v. Michael L. Washington, defendant-appellant-petitioner

Issue presented: Whether a defendant, by voluntary absence or other conduct, may waive the statutory right to be present at trial before the trial has begun.

Some background: The state initially charged Michael L. Washington with three crimes: (1) burglary of a building or dwelling, (2) resisting or obstructing an officer, and (3) burglary of a dwelling with a person present. The third count was subsequently dismissed.

The first two lawyers appointed to represent Washington both moved to withdraw from doing so. They cited a breakdown in their relationship with Washington, an inability to prepare a defense, and Washington's "[refusal] to acknowledge the evidence against him."

When Washington's third appointed counsel also sought to withdraw, the circuit court ultimately denied the request due to Washington's speedy trial demand. On the eve of trial, counsel again moved for permission to withdraw. The court again denied the request, repeating concerns made previously that Washington was attempting to manipulate the court process.

After the jury had been chosen, but before the jurors had been sworn, defense counsel advised the court that she had learned of some new, potentially exculpatory information. The court ultimately dismissed the jury before it had been sworn so that counsel could investigate the new information. The third appointed counsel again moved to withdraw from representing Washington, and the court again refused.

On the morning of the day on which the second trial was to commence, defense counsel again explained that Washington had refused to speak to her about the case and had told her that she was not his attorney. The court and Washington discussed Washington's refusal to accept appointed representation and repeated delays in the case. Washington refused to be represented by the appointed counsel and ultimately left the courtroom. The circuit court commented that Washington "semi was removed and semi left on his own."

Based on State v. Divanovic, 200 Wis. 2d 210, 546 N.W.2d 501 (Ct. App. 1996), the court gave Washington some time to cool off and then asked if he wished to come back to the courtroom. Washington refused. The court then proceeded with selecting and swearing a jury and with the trial, having counsel speak with Washington intermittently and giving him several more opportunities to return. Washington continued to refuse and never set foot in the courtroom at any point during the trial, including for the reading of the verdict. Washington did appear at the sentencing hearing, when the circuit court imposed five years of initial confinement and five years of extended supervision.

Because he was not present during any portion of the trial, Washington contends that his conviction was invalid and must be vacated under Wis. Stat. § 971.04. He relied on the Court of Appeals' decision in State v. Dwyer, which held that a defendant must be present at the trial unless he or she voluntarily does not appear 'during the progress of the trial' *provided* that he or

she was 'present at the beginning of the trial.' Section 971.04(1)(b) & (3), Stats." State v. Dwyer, 181 Wis. 2d 836, 836, 512 N.W.2d 233 (Ct. App. 1994).

The Court of Appeals rejected Washington's argument that a defendant may not waive his or her statutory right under Wis. Stat. § 971.04 to be present at trial prior to the commencement of the trial.

The Court of Appeals pointed out that in United States v. Benabe, 654 F.3d 753 (7th Cir. 2011), the Seventh Circuit had emphasized that the defendants at issue there had been repeatedly warned that the trial would not go forward unless they promised to behave and that they had made a "knowing and voluntary choice" not to appear in the courtroom for the trial. Citing two Second Circuit decisions (Cuoco v. United States, 208 F.3d 27, 31-31 (2d Cir. 2000); Smith v. Mann, 173 F.3d 73, 76 (2d Cir. 1999)), the Court of Appeals said that the Seventh Circuit had reasoned that "the purpose of Rule 43 certainly was served." Benabe, 654 F.3d at 773.

The Court of Appeals did note that the circuit court had given Washington multiple opportunities to reclaim his right to be present, but he had continued to waive that right. The Court of Appeals asserted that Washington's waiver had been made with knowledge of his rights.

The Court of Appeals rejected Washington's reliance on Dwyer for his argument that Wis. Stat. § 971.04(3) requires a defendant's presence at the beginning of a trial before a waiver of the right to be present can be effective. In Dwyer, the defendant had been present for the first day of jury selection. According to the Court of Appeals, the language of Wis. Stat. 971.04(3) has no application when the defendant waives his or her right to be present. Washington asserts that while the Court of Appeals purported to be distinguishing Dwyer, its decision really results in Dwyer being overruled.

Washington also challenges the Court of Appeals' reliance on a purported distinction between waiver and forfeiture of the statutory right to be present. He contends that several cases cited by the Court of Appeals do not apply to his situation.

2015AP2667-68-CR State v. Bell

Supreme Court case type: Petition for Review
Court of Appeals: District IV
Circuit Court: Monroe County, Judge Michael J. Rosborough, affirmed
Long caption: State of Wisconsin, plaintiff-respondent, v. Gerrod R. Bell, defendant-appellant-petitioner

Issues presented: This sexual assault case examines whether a prosecutor may argue that, in order to find a defendant not guilty, a jury must believe that certain witnesses lied, and the defendant must provide evidence of their motive to lie.

Some background: Gerrod R. Bell was convicted of three counts of second-degree sexual assault, with the threat or use of force, one count of second-degree sexual assault of a child, and one count of misdemeanor bail jumping. Bell did not testify at trial.

On separate occasions during 2001, Bell allegedly sexually assaulted two girls, who were 14 years old and 17 years old, respectively, at that time. The younger girl told police that in the early morning hours after a birthday party at her mother's house, she went outside and sat down by a bonfire. When she tried to get up from the ground, Bell grabbed her wrist and pulled her

back down to the ground. He then engaged in forced sexual intercourse. The girl repeated these statements in her trial testimony.

For this incident, the state charged Bell with second-degree sexual assault, with the threat or use of force, and with second-degree sexual assault of a child.

After the younger girl reported the alleged sexual assault, police spoke with the older girl, who initially told police that she had not been assaulted by Bell. She later told police that on a date near the time of the birthday party Bell had touched her breast, that on another occasion he had attempted to get her to go downstairs with him, and that on the night of the party he had "made a pass" at her. Five months later, the older girl reported that in early July 2001, Bell had raped her in the bathroom of her mother's home.

With respect to the older girl, the state charged Bell with two counts of second-degree sexual assault, with the threat or use of force. One count related to the breast-touching incident and the other related to the alleged forced intercourse.

During voir dire, the prosecutor began to develop his theme by asking prospective jurors whether a teenager would lie about something as important as a sexual assault and whether, if someone had lied, the jurors would expect to hear evidence concerning a reason why the person would lie.

The prosecutor asked whether the jurors would speculate about reasons for lying if no evidence of a motive for lying was presented or whether the jurors would "follow the instructions and not speculate and base your decision based on the evidence or lack of evidence in this case."

Also, throughout his closing argument, the prosecutor repeated time and again that in order to acquit Bell of the charges, the jury "must believe" that the two girls were lying and that they could find the girls were lying only if Bell had provided specific evidence of a motive to lie.

In his closing argument defense counsel did argue that the alleged sexual assaults had never happened and that the two young women were lying. He argued that the girls had lied because they were part of a family where lying had become a way of survival.

In rebuttal, the prosecutor repeated the themes that there was no evidence of any motive for the two young women to have lied. He asserted that defense counsel was engaging in pure speculation and was asking the jurors to do the same.

The jury found Bell guilty on all four of the sexual assault counts.

Bell appealed, unsuccessfully.

The Court of Appeals said that, given the context of the closing argument and the trial as a whole, it would construe the prosecutor's "must believe" statements as simply presenting the jury with a choice between "two starkly contrasting factual alternatives."

Although Bell never testified and presented his alternative, the Court of Appeals concluded that the only alternative to the victims telling the truth was that they were lying. It reasoned that the defense never tried to develop evidence of possible mistaken identity or that Bell's actions were innocent and misinterpreted as sexual assaults. It also pointed to the fact that defense counsel's opening statement indicated that the evidence would either show that the two young women had told the truth about the alleged assaults or that those events had not occurred.

The Court of Appeals acknowledged that other courts, such as the Seventh Circuit, have indeed held as a general rule that it is improper for a prosecutor to argue that a defendant could be found not guilty only if the jurors believed witnesses, such as government agents, to be lying. See, e.g., United States v. Cornett, 232 F.3d 570, 574 (7th Cir. 2000); United States v. Vargas, 583 F.2d 380, 386-87 (7th Cir. 1978).

However, the Court of Appeals said that it believed the circumstances Bell's case were closer to United States v. Amerson, 185 F.3d 676, 680 (7th Cir. 1999) (not improper for prosecutor to comment that jurors simply could not believe both the defendant and the police officers).

The Court of Appeals also rejected Bell's "burden-to-prove-motive" argument and Bell's argument that his trial counsel had been ineffective for failing to seek redaction of certain exhibits before they had been sent back to the jury room.

Bell disagrees, contending that in Amerson, the prosecutor merely told the jury that the testimony of the defendant and the police officers was inconsistent and the jury could not believe both at the same time. Thus, in Amerson, unlike in Vargas, the prosecutor had not told the jury that it had to believe a certain person was lying in order to acquit. The prosecutor merely told the jury it had to weigh the credibility of the witnesses and make a choice. Further, unlike in Amerson, Bell had not testified during the trial.

The state argues that the Court of Appeals was correct. The state also argues that the prosecutor's comments were a proper response to the defense's assertion in closing argument that the assault had not happened and this was essentially a witch trial.

Review denied: The Supreme Court denied review in the following cases. As the state's law-developing court, the Supreme Court exercises its discretion to select for review only those cases that fit certain statutory criteria (see Wis. Stat. § 809.62). Except where indicated, these cases came to the Court via petition for review by the party who lost in the lower court:

Brown

2015AP1221 Bach v. St. Vincent
2015AP1931-33-CR State v. Taylor

2016AP107 State v. Diaz

2016AP185 State v. Kutska
Justice Ann Walsh Bradley did not participate.
Justice Shirley S. Abrahamson dissents.

Chippewa

2015AP2122 Maxberry v. LIRC

Columbia

2017AP132-W Sturdevant v. Hermans

Dane

2015AP2363-CR State v. Thomas

2015AP2564 Burke v. Burke

2015AP2266 Cibrario v. Wall

2016AP490-CR State v. Myer

2016AP724-CR State v. Drake

2017AP73-W Peters v. Percy

Dodge
2015AP2270-CR State v. Boyd

2016AP613 Dodge County v. J.T.

Douglas
2015AP14-CRMN State v. Androsky
2015AP1346 Enbridge Energy v. Engelking

Iron
2015AP1648-CR State v. Burchette
Justice Shirley S. Abrahamson dissents.

Jefferson
2015AP2587 LSREF2 Cobalt (WI) LLC v. Karma, Inc.

Kenosha
2016AP80-CR State v. Braithwaite
Justice Shirley S. Abrahamson dissents.

2015AP752-CR State v. Turner

2015AP1658-CR State v. Wright

2015AP1792-CR State v. Humes

2016AP285-CR State v. Scott

2016AP381 State v. Garcia

Langlade
2015AP2584-CR State v. Havenga

Marathon
2016AP1731-W Shebelske v. Jaeger
2016AP96-CR State v. Manteuffel
Justice Shirley S. Abrahamson dissents.

Marquette
2016AP167-CRNM State v. Saldivar

Milwaukee

2015AP1281 U.S. Bank National Assoc. v. Bohringer

2015AP1357-CR State v. Hayes

2015AP1400-CR State v. Dodd

2015AP1651-52-CR State v. Turney
Justices Shirley S. Abrahamson and Ann Walsh Bradley dissent.

2015AP1706 State v. Amonoo

2015AP1777 State v. Farrow

2015AP1798 Zielinski v. LIRC

2015AP1901 State v. Farr

2015AP2046 DJK 59 LLC v. City of Milwaukee

2015AP2097-W Clytus v. Foster

2015AP2133-CR State v. Chapman

2015AP2210-CR State v. Jackson

2015AP2300-CR State v. Helmbrecht

2015AP2569-CR State v. Ortiz

2016AP410-CRNM State v. Williams

2016AP497 State v. F.B.

2016AP896-CR State v. Brayson
Chief Justice Patience Drake Roggensack did not participate.

2016AP1413 State v. T.R.D.

2014AP702-CR State v. Muniz-Munoz

2014AP2609-W Sillas v. Pollard

2015AP311 State v. Dye

2015AP1977-CR State v. Lee

2015AP2029-CR State v. Brown

2015AP2196 E.C. v. Krueger

2015AP2536 State v. Flores

2016AP56-NM State v. Rogers

2016AP121-25 State v. A.W.

2016AP596 Milwaukee Co. v. M.G.-H.

2016AP892-93 State v. B.H.

2016AP917 State v. L.H.-H.

2016AP928-W Minnis v. Foster

2016AP1904-NM State v. C.L.L.

Outagamie
2016AP2088-NM N.L.D. v. M.D.P.

Ozaukee
2016AP838-CR State v. Dowling

Portage
2015AP2436 Check-Moe v. Worzalla

Polk
2014AP945-46-CRNM State v. Youngmark

Racine
2015AP922 State v. Shannon

2015AP2229 State v. Parks

Rock
2014AP2970-CR State v. Cooper

Sauk
2014AP2466-CR State v. Heath
Justice Shirley S. Abrahamson dissents.

Shawano
2016AP225-CR State v. Webster
Justice Ann Walsh Bradley dissents.

Sheboygan
2015AP1328-CR State v. Gahagan

2015AP2212-CR State v. Candler

St. Croix
2016AP188-CR State v. Apfel

Vernon
2015AP1997-CR State v. Nordrum

Walworth
2015AP1813-CR State v. Reigle

2015AP2381-CR State v. White

2016AP236 Payne v. Sentry Ins.

2016AP1487 City of Lake Geneva v. Hoeller

2014AP2653-CR State v. Smith
Justice Shirley S. Abrahamson and Justice Ann Walsh Bradley dissent.

Washburn
2015AP2558-CR State v. Vice

Washington
2016AP1069 State v. Long

Waukesha
2015AP1068 Leventi Trust v. Waltersdorf

2015AP1981-CR State v. Stephens

2015AP2163-CR State v. Adams

Winnebago
2015AP2633-CR State v. Jackson

Wood
2015AP2262 Briggs v. Romanski