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FOR IMMEDIATE RELEASE

Wisconsin Supreme Court accepts 11 new cases

Madison, Wis. (Nov. 3, 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. 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.

2015AP1858 Voters with Facts v. City of Eau Claire

Supreme Court case type: Petition for Review
Court of Appeals: District III
Circuit Court: Eau Claire County, Paul J. Lenz, affirmed in part; reversed in part and cause remanded with directions
Long caption: Voters with Facts, Pure Savage Enterprises, LLC, Wisconsin Three, LLC, 215 Farwell LLC, Dewloc, LLC, Leah Anderson, J. Peter Bartl, Cynthia Burton, Corinne Charlson, Maryjo Cohen, Jo Ann Hoeppner Cruz, Rachel Mantik, Judy Olson, Janeway Riley, Christine Webster, Dorothy Westermann, Janice Wnukowski, David Wood and Paul Zank, Plaintiffs-Appellants-Petitioners, v. City of Eau Claire and City of Eau Claire Joint Review Board, Defendants-Respondents-Respondents.

Issues presented: This case examines Wisconsin's Tax Incremental Financing (TIF) law, Wis. Stat. § 66.1105 (2013-14), as it relates to what has become known as the Confluence Project – a large riverfront development in Eau Claire that is planned to include a new performing arts center and residential construction, among other development.

The Supreme Court reviews issues presented by a group known as Voters with Facts,[1] four limited liability companies, and fourteen individual plaintiffs (collectively, "Voters"):

- Do taxpayers have standing to challenge the legality of a Tax Incremental District ("TID")?

1 According to the complaint, Voters with Facts is an "unincorporated association of grassroots citizen volunteers and [local] taxpayers who question the propriety" of the developments related to the tax incremental districts at issue in this case.

- Must the legal requisites for a formation of TID actually exist, such that their presence or absence can be challenged in a declaratory judgment action?
- Does the payment of a cash subsidy to a property owner for private improvements violate the Uniformity Clause or the Public Purpose Doctrine?
- Did Voters sufficiently plead a claim that Eau Claire is using TID funds to reimburse the owner/developer for the destruction of historic buildings in violation of Wis. Stat. § 66.1105(2)(f)1.a.?

Some background: The statutory TIF process, which involves the creation of specific taxing districts, allows municipalities to finance development in blighted or underdeveloped areas, using the increased tax revenue generated by the resulting increased property value within the TID to repay the costs of the improvements.

In this case, after public hearings, the City of Eau Claire Joint Review Board passed resolutions approving the creation of one new TID ("TID No. 10") and the amendment of another TID ("TID No. 8") for portions of the Confluence Project.

On Nov. 10, 2014, Voters sent a notice of claim to the city clerk objecting to the amended and created TIDs. The next day, the city council voted to adopt a resolution approving the city's 2015-19 Capital Improvement Plan, which included appropriations of several million dollars to be spent on the TIDs. At the same meeting, the city council also adopted a resolution authorizing the issuance of bonds, the repayment of which was to be funded by the incremental tax revenue generated by the TIDs. The city did not respond to Voters' notice of claim and it was disallowed by inaction pursuant to Wis. Stat. § 893.80(1g).

Voters filed the underlying action here in March 2015. Voters had sought a declaratory judgment invalidating the pertinent resolutions because:

- Eau Claire allegedly failed to follow the statutory requirements when amending TID No. 8 (Count 1);
- Eau Claire allegedly failed to follow the statutory requirements when creating TID No. 10 (Count 2);
- TID funds allegedly could be used unlawfully to reimburse the developer for the cost of demolishing historic structures, contrary to Wis. Stat. § 66.1105(2)(f)1.a. (Count 3); and
- the TIDs allegedly operated in violation of the Wisconsin Constitution's Uniformity Clause, Wis. Const. art. VIII, § 1, because the cash payments to the developer functioned as a tax rebate or credit (Count 4).

Voters' final assertion was that, if declaratory judgment was an improper mechanism for judicial review of Eau Claire's actions related to the TIDs, review was alternatively available by certiorari, and Eau Claire's actions were "arbitrary, capricious, and outside the scope of [its] lawful authority" (Count 5).

The City of Eau Claire and the city's Joint Review Board moved to dismiss Voters' complaint. The trial court granted the motion and dismissed Voters' complaint in its entirety.

The motion advanced nine bases for dismissal, among them: that Voters lacked standing to prosecute its declaratory judgment and certiorari claims; that Voters' constitutional challenge was in fact a facial challenge to legislation that had already been upheld against constitutional attack; and that Voters' historic building allegations in Count 3 failed to state a claim.

The Court of Appeals ruled that Voters lacked standing to challenge the TIDs through a declaratory judgment action, but had standing to challenge the TIDs through certiorari review.

The Court of Appeals remanded the case to the trial court for further proceedings on Voters' claim for certiorari review, which encompasses allegations that Eau Claire lacked substantial evidence to make the determinations necessary to create/amend the TIDs at issue, and that those actions were done arbitrarily.

Voters appealed to the Wisconsin Supreme Court.

2015AP1258 Golden Sands Dairy LLC v. Town of Saratoga

Supreme Court case type: Petition for Review
Court of Appeals: District IV
Circuit Court: Wood County, Judge Thomas B. Eagon, reversed and cause remanded with directions
Long caption: Golden Sands Dairy LLC, Plaintiff-Respondent-Petitioner, Ellis Industries Saratoga, LLC, Plaintiff, v. Town of Saratoga, Terry A. Rickaby, Douglas Passineau, Patty Heeg, John Frank and Dan Forbes, Defendants-Appellants, Rural Mutual Insurance Company, Intervenor

Issue presented: This case arises out of a dispute between the Town of Saratoga and Golden Sands Dairy LLC, regarding the dairy's efforts to develop and operate an "integrated dairy farm" on approximately 6,388 acres of land in the township. The Supreme Court reviews the issue as presented by Golden Sands: When a permit applicant secures vested rights by filing a valid building permit application for a project (Wisconsin's "Building Permit Rule"), does the law protect the applicant's right to both construct buildings and to use the project land in the lawful manner described in the building permit application?

Some background: This is the second case between these parties to reach the Court of Appeals. In the first case, Golden Sands Dairy, LLC v. Fuehrer, No. 2013AP1468 (Wis. Ct. App. July 24, 2014)(Golden Sands I), the Court of Appeals concluded that Golden Sands had met all requisite criteria to obtain a vested right to a building permit issued for the construction of seven farm buildings. The Court of Appeals ordered the town to issue a building permit to Golden Sands.

In its July 17, 2012 commercial building permit application, Golden Sands identified the "area involved" as "100 acres of site and 6388 acres total." The circuit court issued a writ of mandamus ordering the town to issue the building permit, and the Court of Appeals affirmed. The town did not file a petition for review.

The central issue at this point involves the acreage outside of the area where the buildings are to be constructed. At the time Golden Sands filed its building permit application, the disputed acres were zoned for unrestricted use. Under that zoning, the land could be used "for any purpose whatsoever, not in conflict with the law."

Accordingly, in July 2012 when Golden Sands submitted its building permit application to construct the farm buildings, the unrestricted use zoning ordinance would have allowed the 6,388 acres to be used for agricultural purposes.

On Nov. 13, 2012, four months after Golden Sands had submitted its building permit application, the town rezoned the area, including the 6,388 acres, in a way that prohibited Golden Sands' planned agricultural use of the land.

While the Golden Sands I litigation was pending in circuit court, Golden Sands filed this lawsuit against the town seeking a declaration that it had a vested right to use the 6,388 acres of land for its dairy operation. The circuit court granted summary judgment on Golden Sands' claim that it had acquired vested rights to agricultural use of the property identified in the building permit application prior to the town enacting its new zoning ordinance.

In its remarks from the bench, the circuit court said, "Golden Sands reasonably and substantially relied on existing zoning regulations when it invested in the development of its proposed farm and filed its building permit application." The circuit court also said, "The use of the acreage that is described [in the building permit application] is integral to the farm operation that was described and, therefore, Golden Sands has a vested use in what was allowed at the time the building was applied for, which was agricultural use."

The Court of Appeals reversed, finding that the use of any land associated with a reference in a building permit application poses additional and different issues than the use of a building site for purposes of constructing a building. It said in order to obtain a building permit an applicant must show that the proposed building comports with then-existing zoning and building code regulations, but land use questions are more complex and do not easily lend themselves to regulation by the mere issuance of a building permit.

While the Court of Appeals said that Golden Sands no doubt needs land to grow crops and spread manure to fully use the multiple large dairy buildings it has acquired the right to construct, the court questioned how many of the 6,388 acres are actually needed. The court queried what would happen if a factual inquiry showed that Golden Sands needs substantially fewer than 6,388 acres to fully utilize its proposed farm buildings. In that event, the court asked why all 6,388 acres should obtain nonconforming use status.

The Court of Appeals said as far as it could tell, Golden Sands was advocating for a rule that turned on whether the land was merely identified in a building application, regardless of the applicant's relationship to the land.

Golden Sands argues that the Court of Appeals' decision, which was issued the day after the Wisconsin Supreme Court released its decision in McKee Family I, 374 Wis. 2d 487, is inconsistent with that decision. McKee Family I reaffirmed the bright-line building permit rule which holds that a valid building permit application triggers vested rights in the use of property under the zoning laws in place at the time of the application.

Golden Sands argues that its farm is an integrated agricultural operation of crop and milk production but despite that fact, the Court of Appeals' analysis divided the farm property into two components: the construction of seven agricultural buildings and the agricultural use of the farm property. Golden Sands says this is an artificial distinction not contemplated in any previous application of Wisconsin's bright-line rule.

The town argues that Golden Sands has not cited any case in which lands apart from a building site have been given vested rights. The town argues that the Court of Appeals' decision is consistent with this court's decision in McKee Family I, in which this court noted the broad discretion that municipalities have to enact zoning ordinances and the statutory directive that such ordinances are to be liberally construed in favor of the municipality.

The town argues it is Golden Sands' position that would eviscerate the bright-line approach by allowing a building permit to extend vested rights to land outside of the specific building permit parcel without any apparent limitation. The town also argues that Golden Sands ignores the fact that in 2013 the legislature enacted § 66.10015, which it says will govern the application of vested rights in future projects.

2015AP2627 Mark McNally v. Capital Cartage, Inc.

Supreme Court case type: Petition for Review
Court of Appeals: District IV
Circuit Court: Dane County, Judge Juan B. Colas, affirmed
Long caption: Mark McNally, Plaintiff-Respondent, v. Capital Cartage, Inc. d/b/a Capital Cartage Moving & Storage, Defendant-Appellant-Petitioner, Mary R. Hermanson, Defendant.

Issues presented:

- May the seller of a business and real estate reject an offer, and be relieved of the obligation to pay the listing broker's commission, if the offer matches the listing price but includes additional terms not explicit in the listing contract, such as a requirement that the seller work full time without pay for an undetermined amount of time, among other terms?
- Is this Court's ruling in [Libowitz v. Lake Nursing Home, Inc., 35 Wis. 2d 74, 150 N.W.2d 439 (1967)] (stating that offer terms may constitute a "substantial variance" only if they directly conflict with express terms specified in the listing contract) inconsistent with this Court's interpretation of "substantial variance" in [Kleven v. Cities Serv. Oil Co., 22 Wis. 2d 437, 126 N.W.2d 64 (1964)] and [Peter M. Chalik & Assocs. v. Hermes, 56 Wis. 2d 151, 201 N.W.2d 514 (1972)], which do not limit substantial variances to express terms in the listing contract?
- As a matter of public policy, should state-approved real estate forms intended for use by consumers without attorneys be construed according to their plain meaning?

Some background: Mary and Rolyn Hermanson have owned Capital Cartage, Inc., a moving and storage company for more than 40 years. Mary is the company's president. Mary and Rolyn are the sole shareholders. Mary entered into a listing contract with McNally, a real estate broker, to sell the company. The price in the listing contract was $1.2 million. McNally procured an offer to purchase at the $1.2 million listing price. The prospective buyer's offer included three additional terms:

- Lender charges, including the cost of an appraisal, estimated at $7,500, would be split between the buyer and Capital Cartage, with Capital Cartage recovering its half if the sale went through.
- Mary and Rolyn Hermanson would enter into a covenant not to compete.
- Mary Hermanson would stay on full time without pay for a period "outlined" in a referenced document.

None of these terms conflict with any express terms in the listing contract. The record indicates that these terms were discussed with the Hermansons before the buyer submitted the offer to purchase. After the offer was delivered, Mary and Rolyn met to discuss it. They ended up rejecting the offer by letter, stating "Capital Cartage has decided not to sell its business at this time." The letter provided no other reason for rejecting the offer, and the letter did not mention the three additional terms.

McNally sued Capital Cartage, alleging he was owed a $72,000 commission pursuant to the listing contract. McNally argued he procured an offer in compliance with the conditions in the contract and that the offer he procured was "at the price and on substantially the terms set forth" in this listing.

After filing an answer, Capital Cartage moved for judgment on the pleadings arguing that it did not, as a matter of law, owe McNally the commission because the three terms were substantial variances from the listing contract.

The circuit court denied the motion and the matter proceeded to trial. Over the objection of Capital Cartage, the circuit court concluded as a matter of law that the three terms were not substantial variances from the listing contract because they did not conflict with any demand made by the seller in the contract.

Therefore, the circuit court informed the jury, "The court has determined that as a matter of law that the [three terms] in the offer to purchase . . . are not substantial variances." The jury resolved other disputes in favor of McNally, with the result being that Capital Cartage was required to pay McNally the commission. The Court of Appeals affirmed.

The appellate court noted that Capital Cartage claimed it was unfair to put it in the position of having to either accept the offer with the additional conditions or be penalized by having to pay McNally the $72,000 commission without a sale. The Court of Appeals said those were not Capital Cartage's only options. It said Capital Cartage could have pointed to the three terms when rejecting the offer, thereby preserving its right to rely on those terms as justifiable reasons for rejecting the offer.

McNally says the Court of Appeals properly applied longstanding precedent dictating when a commercial broker is entitled to a commission for the sale of a business. McNally says in refusing to accept the offer, Capital Cartage, a sophisticated business entity represented by counsel, pointed to no specific issues with the terms of the offer but instead simply said it was no longer interested in selling its business. McNally says the three offer terms were discussed in detail between the buyer and Mary Hermanson before the offer was submitted and Hermanson never objected to any of the terms.

Capital Cartage argues that Libowitz is inconsistent with two other Supreme Court cases [Kleven v. Cities Serv. Oil Co., 22 Wis. 2d 437, 126 N.W.2d 64 (1964)] and [Peter M. Chalik & Assocs. v. Hermes, 56 Wis. 2d 151, 201 N.W.2d 514 (1972)], discussing the meaning of 'substantial variance' and the well-established principle that that contract language must be interpreted according to its plain and ordinary meaning. McNally says Capital Cartage is now arguing for the first time that the Supreme Court ought to ignore the Libowitz decision and instead enforce the listing contract according to its plain language.

Capital Cartage argues that as Libowitz has been interpreted, it stands for the proposition that a prospective buyer can add any term, requirement, or contingency in the universe into an offer to purchase and the added term, as a matter of law, will not constitute a "substantial variance" unless the seller or broker had the forethought to address it explicitly in the listing agreement.

2016AP355 Wisconsin Bell, Inc. v. LIRC

Supreme Court case type: Petition for Review
Court of Appeals: District I
Circuit Court: Milwaukee County, Judge Richard J. Sankovitz, reversed and cause remanded with instructions
Long caption: Wisconsin Bell, Inc., Petitioner-Appellant, v. Labor and Industry Review Commission (LIRC) and Charles E. Carlson, Respondents-Respondents

Issues presented: This employment case examines the “inference method” of causation as it relates to the Wisconsin Fair Employment Act (WFEA). More specifically here, whether the evidence of record was sufficient to support the LIRC’s findings and decision about the firing of an employee with a disability. The Court of Appeals concluded it was.

The Supreme Court reviews the following issues as presented by Wisconsin Bell, Inc.:

- Is LIRC’s “inference method” of proof, as grounds for liability under the “because of disability” prong of the WFEA, based on a reasonable interpretation of the statute and consistent with public policy underlying the statute?

- If the "inference method" of proof is a valid means of proving intentional discrimination, what evidence of causation between the employee's conduct and the employee's disability is required, and should the employer have knowledge of that evidence?
- Was there sufficient evidence of causation and employer knowledge in this case and was it reasonable for Wisconsin Bell not to excuse Carlson's conduct?
- 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?

Some background: Charles Carlson was a long-time Wisconsin Bell employee, hired in 1986. He worked in a number of different areas of the company, most recently as a customer service representative in a call center. He provided technical support to Wisconsin Bell's customers and technicians for AT&T U-verse services by answering incoming phone calls and responding to electronic messages.

In 1997 Carlson began treatment for what was eventually diagnosed as bipolar I disorder. This illness is characterized by having at least one episode of mania, combined with episodes of depression. These extreme mood swings can come on quickly, and a relatively minor frustration can trigger an episode. Carlson's condition is treated by medication and therapy.

In 2006, before moving to the call center involved here, Carlson disclosed his condition to his supervisor at the time. The supervisor had the discretion to allow temporary accommodations for limited periods of time when Carlson's symptoms arose at work. When Carlson could not get his symptoms under control and had to leave work, he sometimes requested that the time off be covered under the Family and Medical Leave Act (FMLA).

Carlson took medical leaves from Wisconsin Bell, using FMLA, on several occasions in 2008 and 2009. These requests were made to a separate entity, the AT&T Integrated Disability Service Center (IDSC). Any health information received by the IDSC about employees remains confidential.

Carlson informed his next supervisor about his condition, but she had already been informed by his previous supervisor. When Carlson moved to his most recent position in 2007, he did not inform his new supervisor about his condition because he thought this information had been passed on by management.

In 2010, Carlson was issued a suspension pending termination after he was observed violating company policy by disconnecting eight consecutive calls over a period of nine minutes, without explanation.

At a review board hearing, Carlson presented letters from his psychiatrist and psychotherapist describing his illness and symptoms. The supervisor at the time of the suspension had not been informed about Carlson's condition before this time, but found that the letters from Carlson's treatment providers had no impact on the proceeding because the conduct for which Carlson was being disciplined would never be allowed under any circumstances.

Wisconsin Bell imposed a 50-day suspension and required Carlson to enter into a "Back to Work Agreement." The agreement which permits an employee to return to work with the understanding that at any time during a one-year time period, Wisconsin Bell would have just cause to terminate the employee for infractions relating to customer care, or for a breach of integrity.

Ten days before the expiration of the Back to Work Agreement, on April 20, 2011, Carlson left work just before lunch due to illness. Around 11 a.m. he had activated a "health

code" which takes the employee temporarily offline and keeps him from receiving any incoming customer calls.

When asked about the comparatively lengthy 38-minute duration of health code by an operations manager through a computer screen messaging system, Carlson apparently sent a personal message intended for someone else in the call center to the manager. The manager became suspicious that Carlson was chatting about personal matters during a health code.

On April 21, 2011, Carlson received a notice of suspension pending termination. The hearing on this incident was held on May 26, 2011. Carlson obtained another letter from his psychiatrist about his bipolar disorder, which noted that Carlson's medication had been increased recently as a result of an increase in his depression.

In a June 7, 2011 letter, Wisconsin Bell described what it determined were breaches of the provisions of the Back to Work Agreement, namely mistreatment of customers by chatting with other employees while having activated a health code for an excessive amount of time and also a breach of integrity in leaving work early because Wisconsin Bell did not believe that Carlson was really ill.

Carlson filed two complaints with the Wisconsin Department of Workforce Development – Equal Rights Division (ERD), the first in June 2010 when he received the 50-day suspension, and the second in February 2012, after his termination.

In an April 24, 2014 decision, the Administrative Law Judge (ALJ) concluded that Carlson's conduct was caused by his condition, and thus actions taken by Wisconsin Bell against Carlson were "because of" Carlson's disability. The ALJ concluded Wisconsin Bell violated the WFEA with regard to both the suspension and termination. The ALJ ruled that Carlson was to be reinstated at Wisconsin Bell, with back pay, and with Wisconsin Bell making reasonable accommodations for his disability. The ALJ also held that Wisconsin Bell was to pay Carlson's attorney's fees and costs.

Wisconsin Bell appealed to the Labor Industry Review Council (LIRC).

On February 19, 2015, LIRC reversed the ALJ's ruling regarding the suspension. It found that although Carlson's conduct in February 2010 was caused by his bipolar disorder, his supervisor and managers at the time did not have knowledge of his disability. LIRC affirmed the ALJ's conclusion that Wisconsin Bell had terminated Carlson because of his disability. It found Carlson's conduct in April 2011 was caused by his bipolar disorder, and it found that at that time Carlson's supervisor and managers had been informed of the condition and the types of symptoms which could arise at work. LIRC found that Wisconsin Bell had violated the WFEA and affirmed the ALJ's conclusion that Carlson should be reinstated with back pay and that Wisconsin Bell should pay his attorney's fees and costs.

Wisconsin Bell petitioned for judicial review by the Milwaukee County Circuit Court. The circuit court found that the "inference theory" of causation used by LIRC in finding Wisconsin Bell liable was reasonable. However, the circuit court remanded the matter to LIRC, finding LIRC's analysis of the issues and facts to be incomplete, especially with regard to LIRC's findings relating to whether Wisconsin Bell had known that Carlson's conduct was caused by his condition at the time of his termination.

Wisconsin Bell appealed, arguing that the inference method of establishing causation was not a reasonable interpretation of the WFEA. The Court of Appeals concluded that the "inference method" of causation utilized by LIRC was a reasonable interpretation of the Wisconsin Fair Employment Act (WFEA) and that the evidence of record was sufficient to support LIRC's findings and decision.

The Court of Appeals said the appeal focused on whether LIRC's interpretation of the WFEA was reasonable, specifically with regard to the language in § 111.322(1), Stats., with respect to whether the termination was "because of" Carlson's disability. The Court of Appeals

concluded that Wisconsin Bell failed to show that LIRC's interpretation was unreasonable. It said the theory behind the inference method of causation was a reasonable interpretation of the WFEA as a means of imposing liability on an employer.

The Court of Appeals said Wisconsin Bell simply chose not to believe Carlson, without giving any consideration to the information from his health care providers and without obtaining an expert of its own to provide a basis to contradict Carlson's experts. The Court of Appeals concluded Wisconsin Bell failed to act in good faith in terminating Carlson under those circumstances.

Wisconsin Bell argues that the Court of Appeals' decision "was not only incorrect, but exemplifies LIRC's inconsistent interpretation and application of the 'because of disability' standard." Wisconsin Bell argues that LIRC's inference method of causation is not based on a reasonable interpretation of the WFEA and conflicts with the WFEA's reasonable accommodation scheme.

2016AP2017-CR State v. Andre L. Scott

Supreme Court case type: Bypass
Court of Appeals: District I
Circuit Court: Milwaukee County, Judge Jeffrey A. Kremers
Long caption: State of Wisconsin, Plaintiff-Respondent, v. Andre L. Scott, Defendant-Appellant

Issue(s) presented:

- Whether, despite [State v. Debra A.E., 188 Wis. 2d 111, 523 N.W.2d 727 (1994),] a circuit court may use § 971.14(4)(b) to require a nondangerous defendant to be treated to competency against his will, and if so, whether § 971.14(4)(b) is unconstitutional on its face because it does not comport with [Sell v. United States, 539 U.S. 166 (2003)].
- Whether an order requiring an inmate to be involuntarily treated to competency is a nonfinal order that should be challenged by a Wis. Stat. § 809.50 petition for interlocutory appeal or a final order of a special proceeding that is appealable as a matter of right via Wis. Stat. § 808.03(1).
- Whether the court of appeals exercises its discretion erroneously when it denied a motion for relief pending appeal without explaining its reasoning: that it applied the proper legal standard to the facts of record and used a rational process to reach a reasonable decision.

Some background: In 2009, a jury found Andre L. Scott guilty of battery, disorderly conduct, and kidnapping. He was sentenced to 13 years and three months of initial confinement and ten years of extended supervision. After Scott filed a timely notice of intent to pursue postconviction relief, his attorney abandoned him.

In 2015, the Court of Appeals reinstated Scott's postconviction/appellate deadlines, and the State Public Defender appointed new counsel to represent him.

Newly appointed counsel had concerns about Scott's ability to assist with postconviction proceedings and make decisions so counsel asked for a competency evaluation. As a result of the evaluation, Scott was diagnosed with schizoaffective disorder. The evaluator, Dr. Robert Rawski concluded that Scott demonstrated a lack of substantial capacity to coherently explain his understanding of legal proceedings and was substantially incapable of assisting in his defense.

Doctors and staff at the Wisconsin Resource Center who previously evaluated Scott did not find him to be dangerous, and he had not previously been medicated against his will. Dr. Rawski opined, "Even though he has not been treated for the last nine years, it is more likely

than not that Mr. Scott's competency to proceed can be restored with institution of appropriate psychotropic treatment."

In August 2016, the circuit court held a hearing where Scott considered himself "competent to proceed." Dr. Rawski testified and confirmed that Scott has either schizophrenia or schizoaffective disorder; his symptoms are treatable; but Scott has declined medication because he lacks insight into his illness and the need for treatment. Dr. Rawski said he did not regard Scott as dangerous or threatening.

The circuit court held that Scott was not competent to proceed and not competent to refuse medication and treatment. The court ordered involuntary treatment. Defense counsel said Scott did not want an involuntary medication order and likely would not have pursued an appeal if a medication order were required. Postconviction counsel also pointed out Scott had never been found to be dangerous to himself or anyone else. The circuit court ordered that Scott be involuntarily medicated, staying its involuntary medication order for 30 days so Scott could seek appellate relief.

Scott filed a petition for leave to appeal. The court of appeals extended the stay of the medication order until Oct. 14, 2016. On Oct. 7, 2016, the appellate court denied leave to appeal and lifted the stay. On October 11, 2016, Scott appealed the involuntary medication order as a matter of right and filed an emergency motion to stay the medication order pending appeal. On Oct. 14, 2016, the court of appeals denied the stay but allowed the direct appeal to proceed. As a result, the Department of Health Services began medicating Scott.

On May 8, 2017, the circuit court found Scott competent to proceed in postconviction proceedings and reinstated his appeal.

Scott acknowledges that the government has an essential state interest to subject an inmate to involuntary treatment where the inmate is dangerous to himself or others and the medication is in the inmate's medical interest. See Riggins v. Nebraska, 504 U.S. 127, 135 (1992). Scott also agrees that in some circumstances, rendering a defendant competent to stand trial may also qualify as an essential or overriding state interest, but the U.S. Supreme Court has said those instances may be rare. See Sell, 539 U.S. at 180.

Scott asks the Supreme Court to determine whether, under Debra A.E., a postconviction court may use § 971.14(4)(b) to order that a nondangerous defendant be involuntarily treated to competency and, if so, whether the statute is facially unconstitutional.

Scott argues that the circuit court violated Debra A.E. and his right to substantive due process when it required him to be involuntarily medicated. He says the state had the burden to prove he was incompetent to participate in postconviction proceedings, but it only asked Dr. Rawski if Scott was capable of understanding the advantages, disadvantages, and alternatives to treatment and the state never asked, nor did the doctor's report opine, whether Scott failed the standard prescribed by Debra A.E. Scott says the circuit court's conclusion that once Scott invoked his right to appeal the court had the right to protect the appellate process by forcibly medicating him was a clear violation of Debra A.E.

Scott says the state incorrectly argues that Scott forfeited or waived his right to argue that the circuit court order violated Sell, but Scott says a facial challenge to the constitutionality of a statute is a matter of subject matter jurisdiction which cannot be waived.

A decision by the Supreme Court is expected to establish the appellate procedure for challenging a circuit court order requiring a defendant to be treated to competency against his will.

2015AP2525-CR State v. Tydis Trinard Odom

Supreme Court case type: Certification

Court of Appeals: District I (District II judges)
Circuit Court: Milwaukee County, Judge Timothy G. Dugan and Judge Ellen R. Brostrom
Long caption: State of Wisconsin, Plaintiff-Respondent, v. Tydis Trinard Odom, Defendant-Appellant.

Issue(s) presented: The certification by the Court of Appeals asked the Supreme Court to examine whether a defendant must be advised of and understand the imposition of mandatory DNA surcharges for each felony and misdemeanor conviction prior to the entry of the defendant's plea under the following specific issues:

- In determining whether the imposition of multiple DNA surcharges constitutes "potential punishment" under Wis. Stat. § 971.08(1)(a) so that a court must advise a defendant about the surcharges before a valid plea may be taken, is the "intent-effects" test, as applied in State v. Radaj, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758, and State v. Scruggs, 2017 WI 15, 373 Wis. 2d 312, 891 N.W.2d 786, to ex post facto claims, the same analysis that was applied in State v. Bollig, 2000 WI 6, ¶16, 232 Wis. 2d 561, 605 N.W.2d 199, to a plea withdrawal claim?
- If the analysis is the same, should Radaj be overruled in light of the Supreme Court's recent decision in Scruggs.

Because the Supreme Court accepted jurisdiction of the entire case, it may also review another issue raised by Odom in his brief to the Court of Appeals:

- Is Tydis Trinard Odom entitled to plea withdrawal because the circuit court misadvised him about his eligibility for the Substance Abuse and Challenge Incarceration Programs right before he decided to plead?

Some background: Odom was charged with kidnapping, and substantial battery, and two counts of second-degree sexual assault, based on allegations that, on March 11, 2014, he had beaten a woman, driven her to his uncle's house, and then had sexual contact with her without her consent. Odom initially rejected a plea offer and then accepted a different one when the woman did not appear for trial.

Before agreeing to enter a plea, however, Odom asked the circuit court what the potential penalties would be. The court did not mention the mandatory per-count DNA surcharges. Odom also asked about his eligibility for the Substance Abuse Program (SAP) or the Challenge Incarceration Program (CIP), which might have reduced his initial confinement. The court advised Odom that it could, in its discretion, find him eligible for both programs, although it would have to look at all of the relevant factors and specifically would have to find a substance abuse treatment need. In reality, Odom was statutorily ineligible for either program because of the nature of the crimes with which he was charged, even under the amended plea offer. Odom ultimately entered a plea, which the circuit court accepted.

Odom did not object at sentencing to the imposition of the mandatory DNA surcharges. He subsequently filed post-conviction motions in which he alleged that his plea had not been knowing, intelligent and voluntary because he had not been informed of the punishment of the DNA surcharges and that he had been misled by the court about his eligibility for the CIP or the SAP. The circuit court denied the motions, and Odom appealed.

The Supreme Court previously declined to accept certification of this case on the issue of whether multiple DNA surcharges constituted "potential punishment" under WIS. STAT. § 971.08(1)(a), such that a court's failure to advise a defendant about them before taking his or her plea establishes a prima facie showing that the defendant's plea was unknowing, involuntary, and unintelligent.

The Court of Appeals certified the appeal again because it believes that the Supreme Court's decision in Scruggs suggests that the ex post facto analysis of the Court of Appeals' decision in Radaj, holding that multiple DNR surcharges are "punishment," was incorrect. In Scruggs, the Supreme Court decided that the Legislature's intent in enacting mandatory DNA surcharges was non-punitive and that the imposition of a single, $250 surcharge for one count of conviction was not so punitive as to transform a civil remedy into a criminal penalty.

In Radaj, the defendant challenged the imposition of a $1,000 DNA surcharge – $250 for each of his four felony convictions – as a violation of the constitutional prohibition against ex post facto laws because he had committed the crimes that led to his conviction prior to when the new law took effect. Radaj, 363 Wis. 2d 633, ¶¶3, 11, 12 ("[A]n ex post facto violation occurs if a law 'inflicts a greater punishment than the law annexed to the crime at the time it was committed.").

In its certification memorandum, the Court of Appeals listed a number of cases from Wisconsin and elsewhere that address some issues related to DNA surcharges and what may constitute a penalty. The Court of Appeals said it is not entirely clear what is the proper analysis for the issue of whether multiple, mandatory surcharges constitute punishment in the plea context and whether that analysis is the same as the analysis for determining whether a surcharge constitutes punishment for ex post facto purposes.

A decision by the Supreme Court could clarify if the analyses are different for ex post facto claims and plea withdrawal claims, and if so, how that difference may affect whether multiple, mandatory DNA surcharges are punishment such that a defendant must be informed of such surcharges prior to entering a plea. It may also review whether the circuit court's statements about the SAP and CIP were misleading and whether that affected Odom's decision to enter a plea. *Chief Justice Patience Drake Roggensack did not participate.*

2016AP1496 Federal National Mortgage Association v. Cory Thompson

Supreme Court case type: Certification
Court of Appeals: District IV
Circuit Court: Dane County, Judge Amy C. Smith
Long caption: Federal National Mortgage Association, Plaintiff-Respondent, v. Cory Thompson, Defendant-Appellant, Unknown Spouse of Cory Thompson, Defendant.

Issue presented: The Supreme Court has accepted a certification from the Court of Appeals to resolve the following issue: Where a foreclosure action brought on a borrower's default on a note has been previously dismissed, is the lender barred by the doctrine of claim preclusion from bringing a second foreclosure action on the borrower's continuing default on the same note?

Some background: In 2010 BAC Home Loans Service, LP (BAC) (f/k/a Countrywide Home Loans Servicing, LP) filed a foreclosure action against Cory Thompson based on his default on a 2004 note. The complaint alleged that Thompson had failed to make monthly payments on the note as of April 2009 and that, as a result, BAC had accelerated the debt, making immediately due a principal balance of $153,202.53.

After a bench trial, the circuit court concluded that BAC had failed to present evidence of the original notice of intent to accelerate the debt, had failed to present the original note, and had failed to present evidence that BAC was in possession of the original note. The court dismissed the foreclosure action "with prejudice." The trial court refused to admit into evidence copies of the note and the notice of intent to accelerate the debt.

BAC objected to the dismissal with prejudice in a reconsideration motion in the circuit court. In BAC's subsequent appeal, the Court of Appeals acknowledged that BAC had a meritorious argument that the circuit court had an erroneous reason for making the dismissal with prejudice (that it had confused the concept of prejudice in criminal and civil cases), it refused to consider the argument on the ground that BAC had forfeited the argument by failing to make it in the circuit court. Thus, the Court of Appeals affirmed the dismissal with prejudice. See BAC Home Loans Servicing LP v. Thompson, No. 2013AP210 (Wis. Ct. App. Dec. 19, 2013).

In 2011 Bank of America, N.A. (BANA) took over servicing Thompson's loan. BANA filed a second foreclosure complaint in December 2014. While the complaint in the first action alleged nonpayment and default in April 2009, the complaint in the second action alleged a failure to make payments as of September 2009. The second complaint again alleged that BANA had accelerated the debt, which made the principal balance of $152,355.98 immediately payable in full.

Thompson moved to dismiss the complaint, alleging in part that the second complaint was barred by claim preclusion arising from the dismissal of the first foreclosure action. The circuit court held that the portion of the claimed default alleged to have occurred prior to the trial in the first action was barred, but any default claim relating to a period after the conclusion of the first trial (August 16, 2012) was not barred. BANA therefore filed an amended complaint that alleged that Thompson had failed to make payments as of September 2012. After the filing of the amended complaint, Federal National Mortgage Association (Fannie Mae) was substituted as plaintiff.

A second bench trial occurred in May 2016. Before calling any witnesses, counsel for Fannie Mae moved to admit several exhibits, including a copy of the note. After Thompson's counsel said that Thompson did not recognize the exhibit as the original note, or even as the note that he had signed, Fannie Mae's counsel produced what he represented to the court was the original note. The circuit court visually inspected and compared the exhibit and the original note, and ultimately admitted the exhibit copy of the note into evidence.

After hearing testimony from foreclosure specialists from both the current loan servicer and BANA about the business records relating to the loan account, the circuit court granted a foreclosure judgment in favor of Fannie Mae and against Thompson.

On appeal, Thompson again argued that the second foreclosure complaint now pursued by Fannie Mae is barred by the doctrine of claim preclusion.

Under the doctrine of claim preclusion, a subsequent claim is barred where: (1) there is an identity between the parties or their privies in the two actions, (2) there is an identity between the causes of action in the two lawsuits, and (3) in the first action there was a final judgment on the merits in a court of competent jurisdiction. Northern States Power Co. v. Bugher, 189 Wis. 2d 541, 551, 525 N.W.2d 732 (1995).

In its certification memorandum, the Court of Appeals stated that the key legal issue here centers on the second element, regarding an identity between the causes of actions in the two lawsuits. It acknowledges that certain rules of law have been developed concerning this element. First, "[u]nder this analysis, all claims arising out of one transaction or factual situation are treated as being part of a single cause of action and they are required to be litigated together." Parks v. City of Madison, 171 Wis. 2d 730, 735, 492 N.W.2d 365 (Ct. App. 1992). Second, the Wisconsin Supreme Court has defined a transaction generally as a "common nucleus of operative facts," which is to be assessed on a pragmatic basis. Kruckenberg v. Harvey, 2005 WI 43, ¶¶26-27, 279 Wis. 2d 520, 694 N.W.2d 879.

The Court of Appeals noted, however, that neither it nor the Supreme Court has answered the question as to whether a default on a note and a subsequent acceleration of the debt

constitutes a common nucleus of fact with all subsequent defaults and accelerations. In other words, are all defaults by one borrower to be considered one continuing default when the lender has accelerated the note such that they all constitute one common nucleus of operative fact or are the defaults different transactions or nuclei of operative facts because they occur in different time periods? The Supreme Court has accepted the certification from the Court of Appeals to resolve this legal issue.

2014AP2561 State v. David McAlister, Sr.

Supreme Court case type: Petition for Review
Court of Appeals: District II
Circuit Court: Racine County, Judge Emily S. Mueller, affirmed
Long caption: State of Wisconsin, Plaintiff-Respondent, v. David McAlister, Sr., Defendant-Appellant-Petitioner.

Issue(s) presented:

- Is newly discovered evidence from three separate witnesses swearing that the state's witnesses admitted prior to trial that they intended to falsely accuse McAlister "cumulative" and "merely tend to impeach the credibility of witnesses" such that it could not support a newly discovered evidence claim?
- Whether the allegations of McAlister's § 974.06 motion were sufficient to require a new trial and therefore an evidentiary hearing on his claim.

Some background: David McAlister, Sr. stands convicted after a jury trial of attempted armed robbery (threat of force), possession of a firearm by a felon, and armed robbery (threat of force). In a September 2009 decision affirming his conviction, the Court of Appeals rejected McAlister's challenges to the trial testimony of his alleged accomplices, Alphonso Waters and Nathan Jefferson.

McAlister argued that Waters perjured himself at trial. McAlister also argued that both Waters and Jefferson were offered concessions for their testimony against him, which were not fully disclosed by the state. The Court of Appeals was unpersuaded by these arguments.

In a 2014 pro se motion, McAlister sought a new trial on the grounds of newly discovered evidence. He offered the affidavits of three individuals: (1) Wendell McPherson; (2) Corey Prince; and (3) Antonio Shannon. Generally speaking, each of these affiants swore that Waters and Jefferson lied when they testified about McAlister's involvement in the charged crimes.

The trial court denied McAlister's post-conviction motion without an evidentiary hearing. The trial court found that the three affiants had "limited credibility"; that there was "no circumstantial guarantee of trustworthiness" in their statements; and that McAlister failed to show a "feasible motive" for the initial false statements. The trial court also found that the credibility of Waters and Jefferson was challenged at trial given that the jury learned about the concessions that they were offered for their testimony against McAlister. Ultimately, the trial court determined that McAlister did not meet his burden to show that there would be a reasonable probability of a different result had the evidence offered in the three affidavits been available to the jury.

Representing himself, McAlister appealed, unsuccessfully, again arguing that the McPherson, Prince, and Shannon affidavits constituted newly discovered evidence that justified a new trial.

The Court of Appeals concluded that the three affidavits McAlister submitted in support of his post-conviction motion were merely an attempt to retry the credibility of Waters and Jefferson, whose credibility was well-aired at trial. The court held that evidence does not warrant a new trial when it would merely tend to impeach the credibility of witnesses.

After receiving this decision, McAlister obtained representation, who filed a motion for reconsideration on McAlister's behalf. The motion was denied, and McAlister, still represented by counsel, seeks review by the Supreme Court.

2015AP304-CR State v. Gerald P. Mitchell

Supreme Court case type: Certification
Court of Appeals: District II
Circuit Court: Shebogan County, Judge Terence T. Bourke
Long caption: State of Wisconsin, Plaintiff-Respondent, v. Gerald P. Mitchell, Defendant-Appellant.
Issue(s) presented: This case examines the constitutionality of the implied consent law and revisits an issue raised, but not clearly decided, in State v. Howes, 2014AP1870-CR. The Court of Appeals certifies the issue here: "whether the warrantless blood draw of an unconscious motorist pursuant to Wisconsin's implied consent law, where no exigent circumstances exist or have been argued, violates the Fourth Amendment."

In Howes, the issue was whether the "implied consent," deemed to have occurred before a defendant is a suspect, is voluntary consent for purposes of the consent exception to the Fourth Amendment's warrant requirement.

Some background: After a jury trial, Mitchell was convicted of operating a motor vehicle while intoxicated (OWI), and operating with a prohibited alcohol concentration (PAC). Mitchell had six previous OWI convictions, which subjected him to enhanced penalties. See Wis. Stat. § 346.65(2)(am)6. (2015-16). He was sentenced to three years of initial confinement and three years of extended supervision on each count to be served concurrently.

At around 3:15 p.m. on a May afternoon in 2013, police received a call from a man who knew Gerald Mitchell. The caller reported that Mitchell was drunk and driving his minivan. About a half hour later, an officer located Mitchell walking down a street. His van was parked nearby. Mitchell was shirtless, wet, and covered in sand. He was slurring his words, had great difficulty maintaining balance, and nearly fell over several times, requiring the officer to help him keep upright.

Initially, Mitchell stated that he had been drinking in his apartment. He later altered his story and told the officer that he was drinking down at the beach, and had parked his vehicle because he felt he was too drunk to drive. Due to Mitchell's condition, the officer deemed it unsafe to administer the standard field sobriety tests. The officer administered a preliminary breath test, which indicated an alcohol concentration of 0.24 percent. Based on his observations, the officer arrested Mitchell for OWI at approximately 4:26 p.m.

Mitchell eventually became completely incapacitated and had to be taken to the hospital . The officer read the "Informing the Accused" form verbatim to the inert Mitchell. Mitchell did not respond, and the officer concluded that it would be impossible to get affirmative verbal consent due to Mitchell's high level of intoxication. The officer admitted on cross-examination that he could have applied for a warrant, but he did not do so. Accordingly, at 5:59 p.m., a blood sample was taken, which revealed a blood alcohol concentration of .222g/100mL.

Mitchell moved the trial court to suppress the results of the blood test taken while he was unconscious.

The State said that Mitchell had consented to the blood draw via the "implied consent" provided for in Wis. Stat. § 343.305, and under § 343.305(3)(b), unconscious persons are presumed not to have withdrawn their consent. Therefore, the unconscious Mitchell impliedly consented to the warrantless blood draw. The State expressly disclaimed that it was relying on exigent circumstances to justify the draw, explaining that "[t]here is nothing to suggest that this is a blood draw on [an] exigent circumstances situation when there has been a concern for exigency."

The trial court sided with the State and denied Mitchell's motion, reasoning that Wis. Stat. § 343.305(3)(b) "makes clear that an unconscious operator . . . cannot withdraw their consent to a blood sample."

Mitchell appealed, resulting in this certification to the Supreme Court.

2015AP2665 State v. Anthony Jones

Supreme Court case type: Petition for Review
Court of Appeals: District IV
Circuit Court: Dane County, Judge Rhonda L. Lanford, affirmed
Long caption: In re the commitment of Anthony Jones: State of Wisconsin, Petitioner-Respondent, v. Anthony Jones, Respondent-Appellant-Petitioner.

Issue(s) presented: This case involves the involuntary commitment of Anthony Jones as a sexually violent person pursuant to Wis. Stat. § 980.02(1)(a). The Supreme Court reviews whether the circuit court adequately scrutinized two actuarial instruments to determine if they were reliable under the Daubert standard [Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)].

Some background: Prior to 2011, Wis. Stat. § 907.02 made expert testimony admissible if the witness was qualified to testify and the testimony would help the trier of fact understand the evidence or determine a fact at issue. State v. Giese, 2014 WI App 92, ¶17, 356 Wis. 2d 796, 854 N.W.2d 687. In 2011, the legislature amended § 907.02 to adopt the Daubert reliability standard embodied in Federal Rule of Evidence 702. Section 907.02(1) now states:

> *If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case. (Emphasis added; underlined language added in 2011).*

In 1993, Anthony Jones was convicted of three sexually violent offenses. Prior to his release from prison, the State filed a petition alleging that Jones was a sexually violent person within the meaning of Wis. Stat. § 980.01(7) and, therefore, eligible for commitment under Wis. Stat. § 980.05(5). Prior to trial, Jones filed a motion pursuant to Wis. Stat. § 907.02(1) to bar any and all expert testimony pertaining to the actuarial risk instruments: the Minnesota Sex Offender Screening Tool-Revised (MnSOST-R) and the Rapid Risk Assessment Sex Offender Recidivism (RRASOR).

Jones was committed under Wis. Stat. ch. 980 after a trial at which the state presented expert testimony relying in part on the two actuarial instruments.

Jones had moved pretrial to exclude these instruments as unreliable under Daubert, claiming that they are decades old and were constructed using questionable means. Jones questions whether these actuarial instruments are admissible under Wis. Stat. §907.02(1), which the legislature revised in 2011 to adopt the test for the admissibility of expert testimony set forth in Daubert.

The circuit court held a Daubert hearing and permitted the introduction of the actuarial instruments.

On appeal, Jones argued that the MnSOST-R instrument is "unreliable" because its design "virtually guarantees a high false positive rate overestimating the probability of recidivism" and "fails to account for the decline in recidivism rates as offenders pass through the middle decades of life." Jones also argued that the norms used in the MnSOST-R instrument are "outdated" and do not account for the "observed decline in recidivism in recent decades."

Jones further argued on appeal that the RRASOR was "unreliable" because it does not account for the decline in recidivism after age 25. Jones also objected to the method used to determine the ten-year risk estimate. Jones also claimed that the studies that have validated the instrument are undated so that it cannot be determined whether the instrument reflects the decline in recidivism.

The Court of Appeals noted that in denying Jones's motion, the trial court considered the Daubert factors. In particular, the trial court found that the state's expert witnesses testified that the instruments "were the product of sufficient facts or data and the product of reliable principals [sic] and methods." *See* Daubert, 509 U.S. at 593 (whether a theory or technique has been tested). The trial court found that the instruments have been the "subject of extensive review." *See* ***id.*** at 593 ("submission to the scrutiny of the scientific community is a component of 'good science'").

A previous decision discussing the 2011 changes to Wis. Stat. § 907.02, Seifert v. Balink, 2017 WI 2, 372 Wis. 2d 525, 888 N.W.2d 816, did not produce a majority opinion. A decision in this case could clarify the Daubert-Wis. Stat. § 907.02 standard.

2016AP983 Robert H. Shugarts, II v. Dennis M. Mohr

Supreme Court case type: Petition for Review
Court of Appeals: District III
Circuit Court: Eau Claire County, Judge Michael A. Schumacher, affirmed
Long caption: Robert H. Shugarts, II and Judith Lynn Shugarts (Shugarts), Plaintiffs-Appellants-Petitioners, v. Dennis M. Mohr, Progressive Casualty Insurance Company/Artisan and Truckers Casualty Company and Wisconsin Municipal Mutual Insurance Company, Defendants, Allstate Property and Casualty Insurance Company, Defendant-Respondent.

Issues presented: This case involves a dispute over underinsured motorist (UIM) coverage. The Supreme Court examines what constitutes proper notice of a claim, and more specifically here, whether the Shugarts properly provided notice to Allstate, their primary insurer, of their underinsured motorist claim. The Court of Appeals found that the Shugarts failed to provide proper notice and denied a motion for reconsideration. The Shugarts raise the following issues:

- Can a Duty to Submit a Proof of Claim Arise before the Claim Exists?
- Under Wis. Stat. § 631.81 can a Party be Required to Submit a "Proof of Loss" with respect to a Claim which has not yet Accrued?

- Can the Court of Appeals Ignore Provisions of an Insurance Contract when Interpreting that Contract?
- Can the Court of Appeals Decide an Appeal based on a Misreading of Decisions Rendered by the Supreme Court?
- Can the Court of Appeals find Prejudice to an Insurer Despite Case Law which is Clearly to the Contrary?
- Can the Court of Appeals Rely on Case Law which it has Raised Sua Sponte without Providing the Parties an Opportunity to Address that Case Law?

Some background: Robert H. Shugarts, II was a deputy sheriff in Eau Claire County, when on Oct. 11, 2010, he was injured while on duty when his county-owned squad car was struck by a vehicle driven by Dennis Mohr. Mohr's vehicle was insured by Progressive Insurance.

Shugarts' squad car was insured under a policy issued by Wisconsin Municipal Mutual Insurance Company (WMMIC), which included UIM coverage. Shugarts and his wife, Judith Shugarts, also a plaintiff here, had a personal automobile insurance policy through Allstate, which also included UIM coverage.

In November 2011, Shugarts retained an attorney and sent a notice of retainer to Progressive. Progressive denied coverage in January 2012, asserting its policy excluded coverage for Shugarts' claim because Mohr intentionally struck Shugarts' vehicle.

In April 2013, through new counsel, Shugarts wrote to Progressive and offered to settle the case for $600,000. In response, Progressive continued to assert that its policy excluded coverage for Shugarts' claim.

In June 2013, Shugarts filed a lawsuit against Mohr and Progressive. Although Progressive continued to deny coverage, in August 2013, it offered Shugarts $10,000 to settle the case. Progressive also provided a declarations page stating that Mohr's policy had a bodily injury liability limit of $50,000 per person.

In July 2014, Shugarts filed a second amended summons and third amended complaint, naming WMMIC as a defendant. Shugarts alleged WMMIC was "liable for . . . underinsured motorist coverage arising out of the operation of" Shugarts' squad car. WMMIC moved to dismiss, and later moved for summary judgment, arguing Shugarts was not an insured under its policy for purposes of UIM coverage. The trial court eventually granted summary judgment in favor of WMMIC, and Shugarts does not challenge that ruling on appeal.

Progressive eventually changed its coverage position, and on Oct. 13, 2014, it offered to settle Shugarts' claim for its full bodily injury liability limit of $50,000.

On October 28, 2014, Shugarts' attorney's firm sent a notice of retainer to Allstate, advising it that Shugarts had retained counsel to represent him "with regard to injuries he sustained in an automobile accident which occurred on October 11, 2010."

During the ensuing months, staff from Shugarts' attorney's firm continued to correspond with Allstate regarding Shugarts' UIM claim. On February 9, 2015, Shugarts' attorney sent Allstate a notice, pursuant to Vogt v. Schroeder, 129 Wis. 2d 3, 383 N.W.2d 876 (1986), that Progressive had offered to settle Shugarts' claim for its $50,000 bodily injury liability limit.

In March 2015, Shugarts filed a third amended summons and fourth amended complaint, naming Allstate as a defendant and asserting it was required to provide him with UIM coverage.

In April 2015, Allstate answered the Shugarts' complaint. Allstate asserted as an affirmative defense that "[t]here is no coverage available to the plaintiffs under the Allstate policy given the failure of the plaintiffs to provide timely notice of their intention to make a claim as a result of the subject accident as required under the Allstate policy." Allstate subsequently and successfully moved for summary judgment on the same ground.

The trial court granted Allstate's motion, concluding that Shugarts failed to provide timely notice to Allstate of the accident and to rebut the presumption that Allstate was prejudiced by the untimely notice.

Shugarts appealed, unsuccessfully. Shugarts insisted that Vogt and Ranes v. American Family Mutual Insurance Co., 219 Wis. 2d 49, 580 N.W.2d 197 (1998) demonstrates that a settlement offer, not the underlying accident, is the trigger for a UIM carrier's subrogation rights.

The Court of Appeals held that Shugarts could have provided Allstate with proof of his UIM claim as early as January 2012, when Progressive denied coverage for his claim against Mohr, or when he learned that Progressive's policy limit was only $50,000 – hundreds of thousands of dollars short of his claimed damages and his settlement offer to Progressive.

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:

Barron

2016AP1378-1380 Barron Cty. DHHS v. C.K.

2016AP1381-1383 Barron Cty. DHHS v. M.B.-T.

Brown

2015AP1894 MillerCoors LLC v. Millis Transfer Inc.

2015AP2265-CR State v. Hopson

2015AP2418-CR State v. Phillips

2016AP361-CR State v. Thompson-Jones

2016AP1343 Country World Media Group v. Erie Ins. Co.

Calumet

2016AP1669-CR State v. Neuens

Columbia

2015AP1187 Zabler v. Weber

Dane

2015AP273 HSBC Bank USA v. Lisse

Justice Shirley S. Abrahamson and Justice Ann Walsh Bradley dissent.

2015AP2367 Fun Srvs. of Kansas City v. Nat'l Cas. Co.

2016AP1814 Vill. of DeForest v. Strelchenko

2016AP2414-CR State v. Forgue

Dodge
2016AP78 State v. Campbell

Douglas
2016AP1027-1029-CR State v. Andrews

Fond du Lac
2015AP2056-CR State v. Anderson

2015AP2488-CR State v. Clark

Green Lake
2016AP748 The Stimac Family Trust v. Wis. Power & Light Co.
Justice Daniel Kelly did not participate.

Iron
2015AP2499-CR State v. Marquardt
Justice Shirley S. Abrahamson dissents.

Jackson
2015AP2629-CR State v. Thill

Jefferson
2016AP876 McBride v. City of Watertown

2016AP2387-CR State v. Sanders

Kenosha
2016AP803-CR State v. Bennett

2016AP1411-CR State v. Scott

Manitowoc
2016AP931-CRNM State v. Mills

Marquette
2017AP5 Marquette Cty. v. T.F.W.

Milwaukee
2012AP449-W James v. Meisner

2014AP2181-CRNM State v. Boynton

2014AP2781 JP Morgan Chase v. Bach
Justice Annette Kingsland Ziegler did not participate.

2015AP1265 State v. Hubanks

2015AP1903 Kastner v. Kastner

2015AP2125-CR State v. Riley

2015AP2357 Bank Mutual v. Sherman

2015AP2412 Casper v. Am. Int'l S. Inc. Co.
Justice Rebecca Grassl Bradley did not participate.

2016AP172-W Tate v. Foster

2016AP230 State v. Hubanks

2016AP477-CR State v. Taylor

2016AP633-CR State v. McNeal

2016AP730 State v. Harris

2016AP782-CR State v. Dyson

2016AP1008 State v. Reed

2016AP1197 State v. M.G.
Justice Rebecca Grassl Bradley did not participate.

2016AP1616-CR State v. Taylor

2016AP1827 State v. D.W.
Justice Shirley S. Abrahamson and Justice Daniel Kelly dissent.

2016AP1919-CR State v. Mitchell
Justice Shirley S. Abrahamson and Justice Ann Walsh Bradley dissent.

2016AP2037 State v. D.P.V.

2017AP194-CR State v. Barbosa

2017AP197 State v. J.L.C.

2017AP902-W Jackson v. Kemper

2017AP1215-W Coleman v. Ct. App., Dist. I

Oconto
2016AP1423 First Nat. Bank v. Trewin

Outagamie
2016AP816-CR State v. Mitchell

Ozaukee
2015AP2296-CR State v. Yanko

Racine
2016AP457/458-CR State v. Higgenbottom

2017AP1238-W Walton v. Cir. Ct. for Racine Cty.

Rock
2016AP843-CR State v. Wilson

2016AP1474-CR State v. Millard

St. Croix
2016AP534-CR State v. Drexler

Sauk
2015AP2263-CR State v. Baehni

2016AP487-CR State v. Gavin

Sawyer
2015AP1753-CR State v. Sanchez

Sheboygan
2015AP2185 Hoefler v. Doherty

2016AP864-CR State v. Green

Taylor
2015AP2244 State v. Zittlow

Trempealeau
2015AP1051 Breslin v. Wis. Health Care Liability Ins. Plan

2016AP1414/1415-CR State v. Sanders

Walworth
2016AP462 ALCO Capital Group, LLC v. Whitehead

Washington
2016AP712-CR State v. Bonlender

2016AP715 /1242 State v. Gabelbauer
Justice Annette Kingsland Ziegler did not participate.

Waukesha
2015AP1729 State v. Schroeder

2016AP1485-CR State v. Wagester

2016AP1727-FT Bach v. Waukesha City Police Dep't

Waupaca

2016AP2364 State v. Verkuylen

Winnebago

2015AP866 Victory Valley Ch. v. Purported Victory Valley Ch.

2017AP325 Dowling Invs. Atlas LLC v. Parc Corp. USA