



# Supreme Court of Wisconsin

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**FOR IMMEDIATE RELEASE**

## Wisconsin Supreme Court accepts five new cases

**Madison, Wis.** (June 17, 2019) – The Wisconsin Supreme Court has voted to accept five new cases, and the Court acted to deny review in a number of other cases. The case numbers, counties of origin, and the issues presented in granted cases are listed below. More detailed synopses will be released at a later date. More information about pending appellate cases can be found on the Wisconsin Supreme Court and Court of Appeals Access [website](#). Published Court of Appeals opinions can be found [here](#), and the status of cases pending in the Supreme Court can be found [here](#).

2018AP75-CR

State v. Charles L. Neill, IV

**Supreme Court case type:** Petition for Review

**Court of Appeals:** District I

**Circuit Court:** Milwaukee County, Judge Dennis R. Cimpl, affirmed

**Long caption:** State of Wisconsin Plaintiff-Respondent, v. Charles L. Neill, IV, Defendant-Appellant-Petitioner

**Issue presented:** When Mr. Neill was convicted of third offense operating while intoxicated (OWI) and was subject to a doubling of the minimum fine under Wis. Stat. § 346.65(2)(f)2 for having a child in the vehicle and a quadrupling of the minimum fine under Wis. Stat. § 346.65(2)(g)3 for having a blood-alcohol concentration above .25, did the statute require that the circuit court multiply Mr. Neill's minimum fine by a factor of eight?

2018AP651-CR

State v. Kelly James Kloss

**Supreme Court case type:** Petition for Review

**Court of Appeals:** District III [District IV judges]

**Circuit Court:** St. Croix County, Judge Eugene D. Harrington, affirmed in part; reversed in part and cause remanded with directions

**Long caption:** State of Wisconsin, Plaintiff-Respondent-Cross Petitioner, v. Kelly James Kloss, Defendant-Appellant-Petitioner

**Issues presented:**

1. Is Solicitation of First-Degree Reckless Injury a crime under Wisconsin law?

2. Was the evidence sufficient to show the defendant “unequivocally” intended that a “felony be committed” when the solicited conduct required the element of surprise and defendant knowingly forewarned the alleged victims?

2018AP712-FT

Joan C. Pulkkila v. James M. Pulkkila

**Supreme Court case type:** Petition for Review

**Court of Appeals:** District II

**Circuit Court:** Waukesha County, Judge Paul Bugenhagen Jr., reversed and cause remanded

**Long caption:** Joan C. Pulkkila, Petitioner-Appellant, v. James M. Pulkkila, Respondent, Lynnea Landsee-Pulkkila, Other Party-Respondent-Petitioner

**Issues presented:**

1. Does a marital settlement agreement expressly providing a remedy that “shall” apply if either party fails to maintain life insurance provide an exclusive remedy such that a constructive trust is unavailable by operation of law?
2. Did the Court of Appeals violate Petitioner’s right to due process under the federal and state constitutions by imposing a constructive trust as a matter of law, without remand, before any court heard evidence related to the elements of constructive trust or adjudicated Petitioner’s objection to Joan Pulkkila’s legal standing to move for a constructive trust in the divorce proceeding?

*Justice Rebecca Frank Dallet did not participate.*

2017AP2361

Chris Hinrichs v. DOW Chemical Company

**Supreme Court case type:** Petition for Review

**Court of Appeals:** District II

**Circuit Court:** Waukesha County, Judge Kathryn W. Foster, affirmed in part; reversed in part and cause remanded with directions

**Long caption:** Chris Hinrichs and Autovation Limited, Plaintiffs-Appellants-Petitioners, v. The DOW Chemical Company d/b/a Dow Automotive, Defendant-Respondent-Petitioner

**Issues presented:**

Dow raises the following issues in its petition:

1. Wisconsin Statute Section 100.18(1) only prohibits fraudulent statements made “to the public.” “The public” means more than one person. But courts deciding Wis. Stat. § 100.18 (“Section 100.18”) claims do not ask whether the statement was made to more than one person. They instead apply a “particular relationship” test. That phrase is not in Section 100.18, and applying that test has yielded inconsistent and irreconcilable law, with some cases holding that a statement made to only one person constitutes a statement “to the public.” Given the muddled law that the “particular relationship” test has produced, should Wisconsin abandon or modify it, and instead follow Section 100.18’s plain terms?
2. Section 100.18 law is in conflict regarding whether a plaintiff in the midst of an ongoing commercial relationship is considered “the public.” *Kailin v. Armstrong*, 2002 WI App 70, 252 Wis. 2d 676, 643 N.W.2d 132, and related cases, hold that statements made after

the parties had already entered into a commercial relationship are not governed by Section 100.18. However, other cases, including the Court of Appeals' decision here, hold that statements made after the parties had entered into a commercial relationship may be governed by Section 100.18. Can a plaintiff proceed with a Section 100.18 claim when the plaintiff admits that it was in an ongoing commercial relationship with the defendant before the statement in question?

3. Wisconsin Statute Section 802.03(2) provides that “[i]n all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity.” *Id.* (emphasis added). A Section 100.18 claim is a fraud claim. But attempting to avoid an early motion to dismiss, Plaintiffs-Appellants' Complaint adopted the commonly-used tactic of not pleading their Section 100.18 claim with particularity. For example, had they included the specific date of the misrepresentations, their Section 100.18 claim would have been time-barred. Are Section 100.18 claims subject to the same heightened pleading requirements that Wis. Stat. § 802.03(2) says “shall” apply to “all” fraud claims?
4. In a commercial setting, the same principles that support applying the Economic Loss Doctrine to misrepresentation claims likewise support applying the Economic Loss Doctrine to Section 100.18 claims. This Court has never squarely addressed whether the Economic Loss Doctrine applies to a commercial plaintiff bringing a Section 100.18 claim. Other courts have held that it does. Does the Economic Loss Doctrine apply to a business plaintiff bringing a Section 100.18 claim over the plaintiff's purchase of goods?

Hinrichs and Autovation raise the following issues in their petition:

1. The economic loss doctrine (ELD) does not preclude common law misrepresentation claims when a product causes damage to property other than the product itself. *Linden v. Cascade Stone Co., Inc.*, 2005 WI 113, ¶6, 283 Wis. 2d 605, 699 N.W.2d 189; *Kaloti Enterprises, Inc. v. Kellogg Sales Co.*, 2005 WI 111, 129, 283 Wis. 2d 555, 699 N.W.2d 205. In that context, should the question of what constitutes an “integrated system” be answered by the “Product Bargained For” test?
2. Fraud in the inducement is an exception to the ELD. *Kaloti Enterprises, Inc. v. Kellogg Sales Co.*, 2005 WI 111, 142, 283 Wis. 2d 555, 699 N.W.2d 205; in other words, when one party induces another to enter into a contract through intentional misrepresentations, the ELD will not bar an intentional misrepresentation claim. In that context, if there is no obligation to purchase another product, does each purchase of another product constitute a new contract?

*Justice Daniel Kelly did not participate.*

2018AP116 Roger Choinsky v. Germantown School District Board of Education

**Supreme Court case type:** Petition for Review

**Court of Appeals:** District II

**Circuit Court:** Washington County, Judge Todd K. Martens, affirmed

**Long caption:** Roger Choinsky, Gary Finn, William Gay, David Kliss, Carol Rudebeck and Janice Weinhold, Plaintiffs, v. Germantown School District Board of Education and Germantown School District, Defendants-Appellants-Petitioners, Employers Insurance Company of Wausau and Wausau Business Insurance Company, Intervenor-Respondents

**Issues presented:**

1. If an insurer refuses to provide an initial defense to its insured, can it nevertheless avoid application of the four-corners rule applied by this Court (see, e.g., *Olson v. Farrar*, 2012 WI 3, ¶32, 338 Wis. 2d 215, 809 N.W.2d 1) in determining whether the insurer breached its duty to defend?
2. If an insurer refuses to provide a defense and coverage to its insured, but begins paying for the defense almost a year later, can the insurer nevertheless invoke the protections of *Mowry v. Badger State Mut. Cas. Co.*, 129 Wis. 2d 496, 385 N.W.2d 171 (1986), to avoid fee liability and other equitable relief under *Elliott v. Donahue*, 169 Wis. 2d 310, 485 N.W.2d 403 (1992) and/or fee liability under *Newhouse v. Citizens Security Mut. Ins. Co.*, 176 Wis. 2d 824, 836, 501 N.W.2d 1 (1993)?

**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:

**Crawford**

18AP876-CR

State v. Hampton**Dane**

17AP1598

Manthe v. Wisconsin DOT

17AP1883

TMS Investments v. PSC*Chief Justice Patience Drake Roggensack dissents.*

18AP240-CR

State v. Evans

19AP697-OA

Blank v. Walker**Dodge**

17AP2054

Tesch v. Hager*Justice Ann Walsh Bradley and Justice Rebecca Frank Dallet dissent.***Dunn**

18AP229-CR

State v. Moreno**Fond du Lac**

18AP439-440-CRNM

State v. Posey**Juneau**

18AP161

Tyler v. Kneepkens**Lincoln**

19AP156-W

Guite v. Foster**Marathon**

17AP2220

Marathon County v. C.M.L.

18AP44-CR State v. Mueller

**Milwaukee**

17AP304 State v. Laster

17AP2224-CR State v. McGinnis

17AP2249-CR State v. Watson

17AP2388 Z Fish Shanty v. Koch

18AP55-57-CR State v. Addison

*Chief Justice Patience Drake Roggensack and Justice Rebecca Frank Dallet did not participate.*

18AP159-CR State v. Lopez

18AP382-CR State v. Woodley

18AP519-CR State v. Rhodes

18AP595-CR State v. Johnson

18AP871-CR State v. Thornton

18AP905-W Williams v. Winkleski

18AP1115-CR State v. Tenner

18AP1363-CR State v. Cabagua

*Justice Rebecca Frank Dallet did not participate.*

18AP1480-CR State v. Woods

*Justice Rebecca Frank Dallet did not participate.*

19AP125-W Washington v. Pollard

19AP515-W Coleman v. Kemper

19AP424-W Payne v. Kemper

19AP563-W Castellano v. Johnson

**Oneida**

17AP1889-CR State v. Martinson

17AP2460-CR State v. Spietz

**Ozaukee**

18AP1317 Ozaukee County v. R.T.H.

**Racine**

16AP2055

State v. Shannon

18AP569-570-CR

State v. Roach

18AP2065

Racine County HSD v. L.R.H.-J.

**St. Croix**

18AP367

Town of Forest v. PSC

**Walworth**

18AP826-827-CR

State v. Jeninga

18AP1329-CR

State v. Salzman

18AP1588-CR

State v. Mitchell

**Washington**

18AP1066-CR

State v. Gravelle

*Justice Annette Kingsland Ziegler did not participate.*

**Waukesha**

18AP993

Village of Menomonee Falls v. Smithers

**Winnebago**

17AP1806-CR

State v. Bahr