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FOR IMMEDIATE RELEASE

Wisconsin Supreme Court accepts 10 new cases

Madison, Wis. (July 26, 2017) – The Wisconsin Supreme Court has voted to accept 10 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.

2015AP2375 Milwaukee Police Association v. City of Milwaukee

Supreme Court case type: Petition for Review
Court of Appeals: District I [District IV judges]
Circuit Court: Milwaukee County, Judge Timothy G. Dugan, affirmed
Long caption: Milwaukee Police Association and Michael Crivello, Plaintiffs-Appellants-Petitioners, Milwaukee Professional Fire Fighters Association, Local 215 and David R. Seager, Jr., Intervenors-Plaintiffs-Co-Appellants-Petitioners, v. City of Milwaukee, Defendant-Respondent-Respondent

Issues presented: This case challenges an amendment to the city charter ordinance affecting the Annuity and Pension Board of the City of Milwaukee Employes' Retirement System. The Court of Appeals agreed with the circuit court that the city was entitled to amend the size, composition, and manner of election of the pension board on a prospective basis and that in doing so the city did not violate the rights of retirement system members.

The Milwaukee Police Association and the Milwaukee Professional Fire Fighters Association have each filed a petition for review of a Court of Appeals' decision affirming a circuit court order granting summary judgment in favor of the City of Milwaukee.

The Firefighters Association raises one issue: Whether a municipality may ignore the legislature's specific mandates regarding the size and composition of the pension board simply by passing its own ordinance.

Milwaukee Police Association and Michael Crivello raise the following issues:

- Whether a municipality may lawfully disregard specific requirements the Legislature has placed on the municipality, by simply passing an ordinance at odds with the law.
- Whether home rule allows the city of Milwaukee to avoid the mandates identified by the legislature in the Session Laws of 1937 and 1947.

- Whether the Session Laws of 1937 and 1947 vested the Employee's Retirement System (ERS) members with the right to vote for and seat ERS board members.
- Whether the decision of the Court of Appeals is in conflict with the decisions of the Supreme Court in Van Gilder v. City of Madison, 222 Wis. 58, 267 N.W. 25 (1936) and Johnston v. City of Sheboygan, 30 Wis. 2d 179, 140 N.W.2d 247 (1966)?

Additionally, the Milwaukee Fire Fighters Association, Local 215 and Seager ask whether a municipality may ignore the Legislature's specific mandates regarding the size and composition of the Pension Board simply by passing its own ordinance.

Some background: In the Laws of 1937, the legislature assigned responsibility for the operation of the Milwaukee Employes' Retirement System to the pension board. That law detailed the membership of the board and how members were to be elected. When the law was enacted, Milwaukee police officers and firefighters were not covered by the retirement system and were not subject to the jurisdiction of the pension board.

The Laws of 1947 granted all first-class cities, such as the city of Milwaukee, the authority to amend the 1937 law as long as the cities did not modify the "annuities, benefits or other rights" of any persons who were members of the retirement system. The 1947 law gave employees "a vested right" to the "annuities and other benefits" offered by the retirement system that "shall not be diminished or impaired by subsequent legislation or by any other means" without members' consent. The 1947 law provided that city police and firefighters hired on or after July 30, 1947, become members of the retirement system.

The city codified the pertinent part of the 1947 law in its home rule charter ordinance. In 2013, the city amended the charter ordinance to change the size and composition of the pension board and the manner of election of its active employee-members. Among other things, the 2013 amendment added three mayoral appointments and provided that only active firefighters can vote for the person to fill the fire department's seat and only active police officers can vote for the person to fill the police department's seat.

The Police Association filed suit, seeking a declaratory judgment and an injunction. The Police Association alleged that the 2013 amendment violated the vested rights of retirement system members in the size and composition of the pension board and their vested rights to elect members to the board without being limited to voting only for members in their same employment classification. The Firefighters Association was allowed to intervene.

The circuit court granted summary judgment in favor of the city, concluding that the pertinent session laws and charter do not provide members of the retirement system with a specific right to the makeup of the pension board. The circuit court also concluded that the 2013 amendment modifying the makeup of the board did not affect any of the rights of the members.

The Court of Appeals affirmed, relying heavily on the Supreme Court decision in Stoker v. Milwaukee County, 2014 WI 130, 359 Wis. 2d 347, 857 N.W.2d 102

It noted that in Stoker, the Wisconsin Supreme Court reviewed a county ordinance in light of Wisconsin session laws that established the county retirement system and corresponding benefit funds, and that gave the county the power to make changes to benefit funds as long as the changes did not operate to diminish or impair the annuities, benefits, or other rights of any person who is a member of the benefit fund prior to the effective date of any such change.

The Court of Appeals rejected the unions' argument that retirement system members have a vested right in the size, composition, and manner of election of the pension board as it existed before the 2013 amendment.

The Firefighters Association argues the home rule amendment recognizes the legislature's ability to supplant municipal ordinances. The Firefighters Association argues the city's ordinance modifies not only the size and composition of the board but also the voting rights of members which, it argues, conflicts with the mandates of the session laws of 1937 and 1947.

The Police Association argues that the ordinance directly conflicts with Wisconsin public sector pension law because it modifies not only the number of members of the pension board but also the voting rights of city employees, by limiting them to voting for only a board member who is within the employee's same employment classification.

The city says the case involves only questions of interpretation of state enabling laws and charter provisions affecting only members of the Milwaukee retirement system. The city argues this is entirely a local dispute, given that all public employees in Wisconsin other than those who work in Milwaukee are all members of the Wisconsin Retirement System, which is governed by an entirely different set of statutes.

2016AP1365 Wisconsin DWD v. Wisconsin LIRC

Supreme Court case type: Petition for Review
Court of Appeals: District II
Circuit Court: Ozaukee County, Sandy A. Williams, reversed
Long caption: Wisconsin Department of Workforce Development (DWD), Plaintiff-Respondent-Petitioner, v. Wisconsin Labor and Industry Review Commission (LIRC), Defendant-Appellant-Respondent, Valarie Beres and Mequon Jewish Campus, Inc., Defendants

Issues presented: This case involves a dispute over whether Valarie Beres, a registered nurse, is entitled to unemployment benefits. Beres was fired from an assisted-living center after she missed one day of work during her 90-day probationary period due to an illness, without notifying her employer in advance that she would be absent. The Supreme Court reviews the following issues:

- Did LIRC err in refusing to apply the absence standard specified by the employer solely because that standard is "stricter" than the statutory disqualification standard that applies when the employer has no policy?
- 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: Section 108.04(5) sets forth a general standard for misconduct and sets forth seven specific circumstances that, by definition, qualify as misconduct. The only one of these circumstances relevant here is absenteeism, which is addressed in § 108.04(5)(e).

This standard, which the Legislature enacted in 2013 and which applies to this case, is significantly different from the previous absenteeism standard, which made a discharged employee ineligible for unemployment benefits "if an employee is absent for 5 or more

scheduled workdays in the twelve-month period preceding the date of the discharge without providing adequate notice to his or her employer." Wis. Stat. § 108.04(5g)(c) (2011-12).

If an employee was not discharged for misconduct, either under the general standard in Wis. Stat. § 108.04(5) or under one of the seven circumstances specified in § 108.04(5)(a) through (g), the employee still may be ineligible for unemployment benefits if the employee was discharged for "substantial fault" under Wis. Stat. § 108.04(5g).

Beres was within her 90-day probationary period when she did not call or show up for her scheduled shift on Feb. 23, 2015, due to illness. Beres had signed her employer's written attendance policy, which provided that employees in their probationary period may have their employment terminated for one instance of "no call no show."

The employer's policy required that an employee "call in 2 hours ahead of time" if they are unable to work. Beres was terminated because she did not comply with this policy on the day she took ill.

Beres filed for unemployment benefits. DWD denied benefits due to Beres's "misconduct" in violating her employer's "no call no show" attendance policy.

Beres appealed to LIRC, which concluded that: (1) the "more than 2 absences in 120 days" standard is the default standard; and (2) while employers may have a more generous standard (i.e., utilize the previous statutory standard of five or more absences without notice in a 12-month period), an employer may not be more restrictive than the "more than 2 absences in 120 days" standard.

LIRC concluded, therefore, that Beres's single absence without notice was not a form of misconduct under Wis. Stat. § 108.04(5)(e).

DWD appealed LIRC's decision to the trial court, which reversed LIRC's decision.

LIRC appealed to the Court of Appeals, which affirmed LIRC's decision after holding that, under a due weight deference standard, LIRC correctly applied § 108.04(5)(e) and allowed benefits.

Judge Mark D. Gundrum dissented, writing that: (1) in his view, the court owed no deference to LIRC's interpretation of Wis. Stat. § 108.04(5)(e) because the applicable statutory language is new and the issue at hand is one of first impression; and (2) LIRC misread the statute.

DWD challenges the Court of Appeals' decision on a variety of fronts, including a challenge to whether any deference should have been given to LIRC's interpretation of Wis. Stat. § 108.04(5)(e).

2015AP2506-CR State v. Bartelt

Supreme Court case type: Petition for Review
Court of Appeals: District II
Circuit Court: Washington County, Judge Todd K. Martens, affirmed
Long caption: State of Wisconsin, Plaintiff-Respondent, v. Daniel J.H. Bartelt, Defendant-Appellant-Petitioner.

Issues presented: The central question in this case is whether Daniel J.H. Bartelt's incriminating statements to police officers, and the physical evidence that police found as a result of these statements, should have been suppressed. The Supreme Court reviews the following issues:

- After confessing to an attempted homicide or other serious crime, would a reasonable person feel free to terminate a police interview and leave an interrogation room, such that the person is not "in custody" for Miranda v. Arizona, 384 U.S. 436 (1966) purposes?
- After his confession, did Bartelt clearly and unequivocally invoke his right to counsel?

Some background: Bartelt was convicted after a jury trial of first-degree intentional homicide for killing Jessie Blodgett, a 19-year-old woman he strangled in her bedroom at her parents' home. Bartelt also stands convicted, upon his guilty plea, of first-degree recklessly endangering safety for a knife attack on a different woman in a park several days before Blodgett's murder. Bartelt was friends with, and had briefly dated Blodgett; the woman in the park was a stranger. Bartelt was 19 years old at the time of his crimes.

After gathering information from the knife-attack victim in the park, Washington County Sheriff's detectives interviewed Bartelt about that incident in an interview room at the village of Slinger police station inside the village's municipal building. The interview room doors were left ajar, and the building was not locked to someone attempting to exit the building.

At the beginning of the interview, detective Joel Clausing advised Bartelt that he was "not in trouble" and that he was "not under arrest." Bartelt responded, "[T]hat's good." Clausing repeated that Bartelt was not under arrest and also advised him that he could "get up and walk out of here any time [he] want[ed]." The detectives did not search or frisk Bartelt.

After initially denying he was at the park and making apparently untrue statements to detectives about his employment status and the cause of an injury to his hand, Bartelt admitted being at the park with a knife and knocking the woman down.

Bartelt asked what would happen after he gave a written statement, and Clausing answered that he was unsure, but probably he would have more questions for Bartelt. The following exchange then occurred:

Bartelt: "Should I or can I speak to a lawyer or anything?"
Det. Clausing: "Sure, yes. That is your option."
Bartelt: "Okay. I think I'd prefer that."
Det. Clausing: "All right."

Shortly thereafter, Bartelt was placed under arrest, handcuffed and searched. He was not given a Miranda warning.

The day after Bartelt was arrested, at about 2:30 p.m., city of Hartford Police Det. Richard Thickens, the lead investigator into Blodgett's death, met Bartelt, along with another detective, at the Washington County Sheriff's Department. After informing Bartelt about the nature of the interview, Thickens read Bartelt the Miranda Warning. Bartelt waived his Miranda rights and agreed to speak with Thickens without an attorney present. At the time of this interview, Thickens knew that Bartelt had previously asked about an attorney.

Bartelt spoke with Thickens for about 90 minutes, during which he said that on the morning of Blodgett's murder, he was at Woodlawn Union Park. The interview ended when Bartelt asked for an attorney. After the interview, Thickens went to Woodlawn Union Park to investigate, and he discovered physical evidence in a trash can that was connected to Blodgett's murder (e.g., duct tape, ropes, a homemade gag ball, a bloody towel) and that contained both her and Bartelt's DNA.

Ultimately, the trial court denied Bartelt's motion to suppress his statements to police and the evidence that resulted from those statements, concluding that Bartelt was not in custody at the time he asked about counsel during the first interview.

As for the second interview, the trial court held that the fact that Bartelt had asked about counsel while not in custody did not prohibit Thickens from speaking with him without an attorney present. When Thickens interviewed Bartelt, he was clearly in custody, but Bartelt was given Miranda warnings, and he waived his rights freely, knowingly, and voluntarily. It was not until 90 minutes later that Bartelt invoked his right to counsel, at which point the questioning ceased.

Bartelt appealed, unsuccessfully. He argued on appeal that, upon admitting to attacking the woman in the park, and given the other circumstances present at the time, a reasonable person in his situation would not have felt free to terminate the interview and leave. When, shortly thereafter, he invoked his right to counsel, all further interrogation had to cease, Bartelt claimed. When the detectives approached him the next day to question him about Blodgett's murder without counsel present, and without him ever having validly waived his asserted right to counsel, he contends his right to counsel was violated.

The Court of Appeals held that the fact Bartelt made incriminating admissions did not render him in custody, when considered among all the other circumstances.

The Court of Appeals went on to say that if it adopted Bartelt's argument, then at the moment of a suspect's first incriminating statement, the police would have to stop questioning the subject and administer Miranda warnings. This result has no basis in Miranda jurisprudence, the Court of Appeals said.

Bartelt asks the court to decide whether a person who has confessed to a serious crime in the presence of police, but who has not yet been formally placed under arrest, is in custody for Miranda purposes. Bartelt also argues that this case presents a second significant question of constitutional law: whether Bartelt unequivocally invoked his right to counsel, given his statement that "I think I'd prefer that [a lawyer]."

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

2016AP2196-CR State v. Delap

Supreme Court case type: Petition for Review
Court of Appeals: District IV
Circuit Court: Dane County, Judge Steven G. Bauer, affirmed
Long caption: State of Wisconsin, Plaintiff-Respondent, v. Steven T. Delap, Defendant-Appellant-Petitioner

Issue presented: This case examines whether the doctrine of "hot pursuit" always justifies a forcible warrantless entry into the residence of one suspected of minor criminal activity. Specifically, the Supreme Court reviews whether the arrest made here is subject to a separate Fourth Amendment reasonableness analysis even if the prerequisites for the "hot pursuit" exception to the warrant requirement are present. The Court considers this issue in light of Welsh v. Wisconsin, 466 U.S. 740 (1984) and State v. Weber, 2016 WI 96, 372 Wis. 2d 202, 887 N.W.2d 554.

Some background: Two Dodge County Sheriff's deputies planned to execute two arrest warrants on Steven T. Delap in Neosho. The deputies were apparently unaware of the specific underlying offenses related to the warrant and did not have a photo of Delap. However, they knew that he was a white male between 25 and 30 years old, that he had a history of resisting and assaulting law enforcement officers, and that he had recently fled from two traffic stops.

The officers parked a block away from the residence where they believed Delap to be residing and approached the home on foot. As they approached, they saw a man in the street and another man walking down the driveway from Delap's residence. When the man in the driveway saw the officers, he turned and began to walk back toward the house.

One of the officers believed that the man in the driveway was Delap, which turned out to be correct. The officer pointed his flashlight at Delap and shouted, "Stop, police." Delap then began to run toward the residence. The officer ran after Delap. Delap entered the rear door of the house and tried to close the door, but the officer stopped the door before it latched. The other officer arrived, and the two of them forced the door open. They entered the house and arrested Delap.

The state charged Delap with obstructing an officer and possession of drug paraphernalia, as a repeat offender. Both of the charged offenses were misdemeanors. Delap represented himself in the circuit court and filed a motion to suppress, arguing that the warrantless arrest in his home was unlawful. The circuit court denied the motion, concluding that the officers had probable cause to believe that Delap had obstructed an officer by fleeing, which was a jailable offense, and that they were justified in following him into his home to arrest him because they were in hot pursuit.

After losing his suppression motion, Delap pled no contest to the two charges and filed a notice of appeal. Delap argued that the exigent circumstance of hot pursuit was not present because he was not being continuously pursued from a crime scene. The Court of Appeals rejected this argument, stating that the crime scene was the area in the driveway from which Delap had fled –where he had obstructed the officer's investigation into his identity – and that the officers had continuously chased Delap into his house.

Delap also argued that even if the officers had probable cause and were engaged in hot pursuit of a fleeing suspect, the warrantless, forced entry into his home to arrest him was unlawful because it was unreasonable under the Fourth Amendment for a minor offense – forcibly continuing into his house when an officer had told him to stop.

Delap asserts that the Court of Appeals' decision upholding the officer's forcible entry into his home is inconsistent with both the reasoning of Welsh and statements in the lead opinion in Weber.

2016AP2214 Madison Teachers, Inc. v. Scott

Supreme Court case type: Bypass
Court of Appeals: District IV
Circuit Court: Dane County, Judge Peter C. Anderson
Long caption: Madison Teachers, Inc. (MTI), Plaintiff-Respondent, v. James R. Scott, Chairman and Records Custodian, Wisconsin Employment Relations Commission (WERC), Defendant-Appellant.

Issues presented: The central issue in this public records case is whether the public policy against voter intimidation in union certification elections is sufficient to outweigh the public policy and presumption in favor of disclosing public records. The Supreme Court reviews:

- whether WERC Chair and records custodian James R. Scott properly relied on a policy against voter intimidation or coercion under these facts to deny public records requests by MTI that sought records disclosing which employees had voted up to certain times during annual union certification elections;
- if Scott violated the Public Records Act, whether MTI is entitled to recover its attorneys' fees and costs because MTI's mandamus action was reasonably necessary to obtain the requested records and MTI's action was the substantial reason Scott ultimately released the requested records.

Some background: Scott petitioned for bypass of the Court of Appeals following the circuit court's judgment granting statutory damages, attorneys' fees, and costs to MTI for Scott's alleged violation of the Wisconsin Public Records Act.

Under 2011 Wisconsin Act 10, in order for a public sector union to retain its position as the exclusive collective bargaining representative for a bargaining unit, the union must receive 51 percent of the total votes in the bargaining unit in annual certification elections. Scott says these elections are to be conducted by "secret ballot" and that "a non-vote is the same as a 'no' vote in these elections."

WERC contracted with the American Arbitration Association (AAA) to provide the technological services necessary to run the fall 2015 certification elections. Voting could occur via telephone and via the internet. The AAA provided a secure automated telephone voting system that used an interactive voice response system and a database to record, process, and tabulate votes.

Annual certification elections for five bargaining units that had been represented by MTI were scheduled to occur from Nov. 4 to Nov. 24, 2015. On Oct. 26, 2015, then MTI Executive Director John Matthews sent a letter to Scott advising him that MTI would be submitting three public record requests during the 20-day election period, which would seek production of a list of the employees who had voted prior to a specified time. The letter also stated that if WERC did not maintain such a list of employees in each bargaining unit, MTI would request the ability to inspect and copy each ballot that had been received by the specified time. MTI's letter also stated that it did not intend to engage in voter coercion or any other illegal election practice.

On Nov. 10, 2015, MTI hand-delivered its first public record request during the election. It requested records showing the names of employees who had voted in the election up to that point, by bargaining unit. It sought production of the records as soon as possible, but no later than 5:00 p.m. on Nov. 16, 2015.

Scott denied the request via letter dated Nov. 16, 2015. He gave three reasons for the denial, including that the balancing test under the Public Records Act weighed in favor of not disclosing the requested information due to the "potential for voter coercion while the ballot is ongoing."

MTI delivered a second request letter to Scott on Nov. 17, 2015. Scott did not produce any records in response to the MTI's second request nor did he provide a written response by MTI's requested deadline.

The election ended at noon on Nov. 24, 2015. At 3:26 p.m. on that day, MTI delivered a third request to Scott. This request sought records containing a list of all employees in each

bargaining unit who had voted in the election. The following day WERC staff provided to MTI spreadsheets containing the information requested in MTI's third request.

On Nov. 30, 2015, Scott formally denied MTI's second (Nov. 17, 2015) request.

On that same day, MTI filed a mandamus action in the Dane County circuit court. In addition to an order compelling Scott to turn over the records requested in its first two requests, MTI also sought an award of punitive damages and payment of its attorneys' fees and costs.

During the course of discovery Scott did turn over documents showing the information sought in MTI's first two requests (specifically, the names of employees, by bargaining unit, who had voted in the elections as of Nov. 10 and Nov. 17, 2015).

Both parties moved for summary judgment. Ultimately, the circuit court granted MTI's motion for summary judgment. It stated that it was granting a declaratory judgment that Scott had violated the open records law by not producing the documents in response to MTI's request. After another hearing on remedies, the court denied MTI's request for punitive damages, but it awarded MTI statutory damages of $100, as well as its attorneys' fees and costs.

MTI then filed a motion for contempt and supplemental relief based on the fact Scott had denied new MTI requests that were similar to the requests litigated in this action. Ultimately, after issuing a series of orders, the court denied MTI's motion and stated that its prior order that specified the relief granted to MTI would be the final order for purposes of appeal.

Scott filed an appeal. Following the submission of Scott's opening brief and MTI's response brief, Scott filed the petition for bypass.

Scott contends denial of a public records request is proper when the policy of disclosure is outweighed by another public policy. He says each public records balancing test is a fact intensive process performed on a case-by-case basis. Here, Scott believed that employees who had not voted could be intimidated into voting against their will if their names were disclosed, and determined that this outweighed the policy of disclosure while the certification elections were ongoing.

MTI argues that Scott and WERC were required to produce the requested records while the elections were ongoing, as it requested. It disputes Scott's reliance on a policy against voter intimidation or coercion, especially given the presumption in favor of disclosure of public records.

2015AP2328-CR State v. Sanders

Supreme Court case type: Petition for Review
Court of Appeals: District II
Circuit Court: Waukesha County, Judge Lee S. Dreyfus, Jr. and Judge Jennifer R. Dorow, affirmed
Long caption: State of Wisconsin, Plaintiff-Respondent-Respondent, v. Shaun M. Sanders, Defendant-Appellant-Petitioner

Issue presented: Can a person be criminally responsible for acts allegedly committed before the age of original juvenile court jurisdiction (which, as germane to this case, was 10 years of age)?

Some background: Shaun M. Sanders was charged with four felony counts related to sexual activity he allegedly engaged in over a number of years with a girl who was several years younger. Count one charged him with committing repeated sexual assaults between 2003 and

2006, when the girl was seven to nine years old and Sanders was nine to 12 years old. The other three counts charged Sanders with committing repeated sexual assault, incest, and child enticement between 2008 and 2012, when the girl was 12 to 15 years old and Sanders was 14 to 18 years old.

A jury found Sanders not guilty on count one, involving the sexual activity that allegedly occurred when he was nine to 12 years old. It found him guilty of the other three counts. Sanders filed a post-conviction motion, arguing that his trial counsel performed deficiently. The circuit court denied the motion. The Court of Appeals affirmed.

On appeal, Sanders argued he was improperly prosecuted on count one (the count on which he was acquitted) because that count included time during which he was under 10 years old. He argued the circuit court lacked subject matter jurisdiction and the competency to exercise that jurisdiction to prosecute him for acts committed prior to age 10.

In addition, he argued his trial counsel was deficient in failing to challenge count one on those grounds before trial. Even though the jury acquitted Sanders on that count, he argued that because the count was not dismissed prior to trial, evidence was admitted at trial specifically related to that count which prejudiced him with regard to the other counts.

The Court of Appeals noted that challenges to the circuit court's competency are forfeited if they are not raised in the circuit court. The court said because Sanders did not raise the issue in the circuit court, it must be addressed on appeal in the context of an ineffective assistance of counsel claim.

The Court of Appeals said by the time Sanders allegedly committed the acts charged in count one, the Legislature had reduced the age at which a person could be treated as a delinquent from 12 years old to 10 years old. The appellate court said it is a defendant's age on the date legal action is initiated, not his age on the date he committed the wrongful acts, that controls. Because the alleged acts did not come to the attention of authorities until Sanders was an adult, the Court of Appeals said they were properly addressed in adult criminal court.

Sanders asks the Supreme Court to determine whether there is a minimum age for criminal prosecution in Wisconsin. He says Wisconsin effectively has no minimum age for criminal responsibility and a person can later be prosecuted for crimes allegedly dating as far back as infancy.

The state says it is well established in Wisconsin that courts' competency to adjudicate a criminal count is based on the offender's age at the time charges are brought, not at the time the offense allegedly occurred. The state says the question of whether there should be a bright line minimum age for criminal culpability is a policy decision that should be left to the Legislature.

2015AP1970 & 2016AP2528 Thoma v. Village of Slinger

Supreme Court case type: Petition for Review/Petition for Bypass
Court of Appeals: District II
Circuit Court: Washington County, Judge Andrew T. Gonring, affirmed
Long caption: Donald J. Thoma and Polk Properties LLC, Petitioners-Appellants-Petitoners, v. Village of Slinger, Respondent-Respondent-Respondent

Issues presented: This case involves appeals of property tax assessments by real estate developer Donald J. Thoma and his business, Polk Properties, LLC. Thoma challenges the Village of Slinger's decision to classify one of his development properties as residential

property, when he argues it should remain classified as agricultural land – a classification that would result in lower taxes than residential.

The central issue is which competing legal claim has priority: The requirement that classifications are to be based solely on the actual use of the property as stated in the Wisconsin Property Assessment Manual; or an injunction obtained by the Village based on a restrictive covenant that prohibited Thoma from using the land for anything other than a residential use. More pointedly, the Supreme Court considers the question: Does an injunction trump "use?"

Petition for Review: In Case No. 2015AP1970, the Court of Appeals affirmed the village Board of Review's decision, which in turn, had upheld the village assessor's reassessment of the property as agricultural.

Thoma notes that the Wisconsin Property Assessment Manual, promulgated by the Wisconsin Department of Revenue (DOR), states that classification as agricultural use "is based *solely* on whether *use* of the parcel is agricultural in nature." Thoma also points to DOR guidance on this rule that is published in a frequently-asked-questions section of its website, which says that a municipality may not override the "use trumps" rule by means of ordinance, easement or contract.

Petition to Bypass: Thoma also filed with the Clerk of Supreme Court what he labeled a "Motion for Consolidation" of Case No. 2015AP1970 with Case No. 2016AP2528 on a related issue. This case reaches the Supreme Court as a bypass of the Court of Appeals. Thoma asks here whether an assessor's inaccurate or false testimony regarding DOR guidance constitutes a valid reason for relief under Wis. Stat. § 806.07(1)(h).

Some background: Thoma had purchased vacant land in the town of Polk that had been part of the Melius Farm. He planned to develop the land into a residential subdivision that would be known as Pleasant Farm Estates.

By 2007 Thoma had executed development agreements and restrictive covenants with the village of Slinger. The development agreements called for Pleasant Farm Estates to be developed in three consecutive stages, each with its own set of progress requirements. Following the execution of the development agreements and restrictive covenants, the village annexed the entire parcel that was to become Pleasant Farm Estates and rezoned it as residential.

The village put a provision into the development agreement or the restrictive covenants that Thoma could not use the land for agriculture. Despite the restrictive covenant, Thoma continued to maintain alfalfa and grass on most of the property, which he apparently regularly cut and baled. In a small area of the property, Thoma continued to plant (or allowed someone else to plant) row crops. Initially, the village allowed Thoma's ongoing use of the property, and it continued to classify the property as agricultural land for assessment purposes.

Over the next several years Thoma had very little success in selling residential lots, some of which were partially developed with utilities and other improvements.

In 2011, the Village filed a civil action (Washington County Case No. 2011CR1224) against Thoma seeking an injunction against any agricultural use of the property based on the restrictive covenant. Although Thoma argued that another restrictive covenant allowed him to continue the agricultural use until the lots were sold to residential end users, the circuit court granted summary judgment to the village and entered an injunction prohibiting the land from being used for agricultural purposes.

Following the injunction, Thoma removed the remaining row crops but maintained alfalfa and grass. The village's assessor, Michael Grota, continued to assess the entire property as agricultural for the 2013 tax year.

For the 2014 tax year, Grota changed the classification of the property to residential and reassessed the property, which substantially raised the property's valuation and tax bill. As part of his assessment process, Grota apparently had a telephone conference with the regional supervisor for the DOR.

What the supervisor told Assessor Grota and whether the assessor accurately relayed that guidance to the Board of Review is subject to dispute. Indeed, Thoma filed a motion for relief from the summary judgment and injunction under Wis. Stat. § 806.07(h) based on the DOR supervisor's subsequent deposition testimony that contradicted Grota's statements to the Board.

Grota acknowledged that the use of the land (maintaining ground cover that was cut and baled) had met the burdens of establishing an agricultural use in order to be classified as agricultural land. He also acknowledged that ordinarily use trumps all else in classifying land. He concluded, based on what he believed was the DOR's guidance, that the court order directing Thoma not to use the land for agricultural purposes changed the way the land had to be classified for assessment purposes. The Board of Review upheld the classification and the new assessment.

Thoma filed for certiorari review in the circuit court, which upheld the board's decision.

The Court of Appeals also affirmed the board's decision to accept the assessor's classification of the property as residential property. The Court of Appeals said that Thoma made only a conclusory argument that maintaining ground cover on the property was an agricultural use and that he failed to develop that argument either before the board or on appeal. To the extent that Thoma argued that the classification should have remained as in prior years, the Court of Appeals said that its "sole inquiry [was] whether the board erred in accepting the assessor's classification for the 2014 tax year."

Thoma contends that the Court of Appeals' decision violates the state's constitutional requirement of uniformity because other similarly used land continues to be taxed at the agricultural rate. The village argues that this case is really about the factual question of whether Thoma presented evidence at the board hearing that the lots in Pleasant Farm Estates were primarily devoted to agricultural use.

Justice Daniel Kelly did not participate.

2015AP2457 Cintas Corp. No. 2 v. Becker Property

Supreme Court case type: Petition for Review
Court of Appeals: District I
Circuit Court: Milwaukee County, Judge John J. DiMotto, reversed and cause remanded for further proceedings
Long caption: American Family Mutual Insurance Company, State Auto Insurance Company of Wisconsin, Property and Casualty Insurance Company of Hartford, Fay Walters and Farmers Insurance Exchange, Plaintiffs, H.O.L.I.E. of Greenfield Avenue, Inc., Dennis Kleinhans, Dorothy Grabowski, Virginia Werner, Mernlyn Goodrich, Theodore Kolodzyk, Judith Gorski, Linda Sutton, as the personal representative of the Estate of Mary Sutton and Alice Carey, Involuntary Plaintiffs, v. Cintas Corporation No. 2, Defendant-Third-Party Plaintiff-Appellant-Cross-Respondent, The Travelers Indemnity Company of Connecticut (Travelers), Defendant-

Third-Party Plaintiff-Co-Appellant, v. Becker Property Services LLC, Third-Party Defendant-Respondent-Cross-Appellant-Petitioner.

Issues presented: This indemnification case arose after extensive water damage occurred at the Valentino Square Apartments in West Allis. The issues at trial were whether a contract between Cintas Corporation No. 2 (a fire protection company) and Becker Property Services LLC (the property management company that managed the apartments) obligates Becker to defend and indemnify Cintas for Cintas' alleged negligent acts and breach of implied warranty.

The Supreme Court reviews the enforceability of the contract's choice of law provision, which designates that disputes would be settled under Ohio law, and how that provision may interact with established policy in Wisconsin law.

The trial court ruled by summary judgment in favor of Becker; the Court of Appeals reversed. Becker presents the issues as such:

- Whether an indemnification clause can be interpreted from the perspective of a technocrat or lawyer, as opposed to a reasonable consumer, to provide indemnification for an indemnitee's own negligence when the indemnification clause does not expressly state so; and
- whether the Contract's choice of law provision, which designated Ohio law, is enforceable.

Some background: On or about Jan. 6, 2013, a pipe connected to Valentino Square's fire suppression system burst. There was extensive damage. The plaintiffs (owners, tenants, and insurers) sued, alleging that Cintas had failed to properly inspect and maintain the system and that, as a result, the system "catastrophically failed."

Cintas denied liability and filed a third-party complaint against Becker, alleging that Becker breached its contract with Cintas to defend and indemnify Cintas pursuant to the contract. Travelers also filed a third-party complaint against Becker, seeking indemnification for any amount it is required to pay on behalf of its insured, Cintas.

The contract between Becker and Cintas was signed in March 2012. The first page of the contract, entitled "Service Scope of Work and Price," contains the following language in the "Term" provision: "This quotation is subject to the Terms and Conditions of Sale – Fire Equipment Goods and Services."

The following language also appears at the bottom of the first page: "All work performed will be according to NFPA, State and City Fire Department requirements and is guaranteed, insured and done by licensed personnel."

Terms and conditions in the contract address a variety of other subject areas, including an "Acceptance and Modification" provision, which indicates that no other terms or conditions that are not specifically agreed upon by the seller shall be binding upon seller. Among other topics addressed by language in the contract in the contract: inspection, limited warranty, claims, indemnity, insurance, governing law and disputes.

The indemnity section included a provision that states, in part, that the *"Purchaser, at its own expense, shall defend, indemnify and hold harmless Seller from any claim, charge, liability, or damage arising out of any goods or services provided by Seller hereunder, including any failure of the goods or services to function as intended[.] …"*

The provision on governing law contained the language: *"The rights and obligations of the parties contained herein shall be governed by the laws of the State of Ohio, excluding any choice of law rules which may direct the application of the laws of another jurisdiction."*

In the trial court, Cintas and Becker filed cross motions for summary judgment. Cintas sought an order requiring Becker to defend and indemnify Cintas in this lawsuit. Becker filed its own motion for summary judgment, seeking an order dismissing Cintas' complaint. The trial court acknowledged the contract provision specified Ohio law, but said that established public policy dictated that Wisconsin law should be applied, and, applying Wisconsin law concluded that "Cintas is not … entitled to defense or coverage."

Cintas appealed, and the Court of Appeals reversed. The Court of Appeals ruled that even under Wisconsin law, the contract language required Becker to defend and indemnify Cintas.

The Court of Appeals concluded that the contract "clearly states that Cintas is to be indemnified by Becker for losses occasioned by Cintas' own negligent acts and that it is clear that the purpose and unmistakable intent of the parties in entering into the contract was for no reason other than to cover losses occasioned by the indemnitee's own negligence."

Becker contends that only an overly technical reading could yield this result.

The Court of Appeals did not decide whether the choice of law provision is applicable (such that Ohio law applies to this case), or whether Wisconsin's practice of strictly interpreting indemnification clauses that indemnify the indemnitee from its own negligence should override the choice of law clause.

The Wisconsin Supreme Court is expected to rule on whether the contract requires Becker to defend and indemnify Cintas and may provide guidance on whether public policy permits the choice of law provision included by the parties.

2016AP866-CR State v. Arberry

Supreme Court case type: Petition for Review
Court of Appeals: District II
Circuit Court: Fond du Lac County, Judge Peter L. Grimm, affirmed
Long caption: State of Wisconsin, Plaintiff-Respondent, v. Diamond J. Arberry, Defendant-Appellant-Petitioner

Issues presented:
This case examines whether State v. Matasek, 2014 WI 27, 353 Wis. 2d 601, 846 N.W.2d 811 precludes a post-conviction court from considering expungement. More specifically:

- When a defendant is eligible for expungement, but it is not addressed at her sentencing hearing, can the defendant raise this issue in a post-conviction motion?
- Did the circuit court err in its exercise of discretion when it denied expungement eligibility but gave reasons for doing so that could apply to any case?

Some background: In August 2015, Diamond J. Arberry pled no contest to two counts of retail theft and her case proceeded directly to sentencing. She was convicted of a Class I felony and a Class A misdemeanor, both offenses that carry a maximum penalty of less than six years of imprisonment and she was under 25 at the time of the offense.

No one, neither the lawyers nor the judge, raised the issue of her eligibility for expungement although there is no dispute that Arberry met the other statutory requirements for

expungement. Accordingly, Arberry filed a post-conviction motion for sentence modification seeking eligibility for expungement.

At the post-conviction hearing, the circuit court ruled that it could not grant Arberry eligibility for expungement because the case law interpreting the expungement statute requires "the matter to be granted at the time of sentencing." The court also noted, in passing, that, anyway, it would have denied expungement if the parties had requested it.

Arberry appealed, arguing a post-conviction court may consider eligibility for expungement when it was "overlooked" at sentencing. The state said by failing to request it at that time, Arberry waived her right to request expungement postsentencing.

The Court of Appeals cited Matasek, in which the Supreme Court unanimously held that § 973.015 requires that "if a circuit court is going to exercise its discretion to expunge a record, *the discretion must be exercised at the sentencing proceeding*." Matasek, 353 Wis. 2d 601, ¶45.

The Court of Appeals concluded, in a published decision, that it may not, citing Cook v. Cook, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997), to signal that it considered itself bound by Supreme Court precedent.

The Court of Appeals pointed out that Arberry was sentenced well after Matasek was decided and noted that at the post-conviction hearing, the circuit court stated that it would have considered, and denied, expungement if the parties had requested it.

The Court of Appeals said the circuit court's conclusion that it could not consider expungement after Arberry's sentencing hearing was proper under Matasek. In so holding, the court noted that "[n]either we nor the circuit court may overrule a holding of our supreme court. *See* Cook v. Cook, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) ('The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case.')."

Arberry contends that permitting a post-conviction court to consider eligibility for expungement in a motion for sentence modification does not conflict with Matasek. She says that "even issues that are required to be resolved at sentencing are still subject to motions for sentence modification." Arberry says she is not attempting to revisit an expungement decision after having completed her sentence nor is she asking the court to delay its decision until she has done so (as was proposed in Matasek).

Arberry would like the court to find that the circuit court did not exercise proper discretion when it said that it would not have deemed her eligible for expungement.

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

2015AP2356 Talley v. Mustafa

Supreme Court case type: Petition for Review
Court of Appeals: District I (District II judges)
Circuit Court: Milwaukee County, Judge Daniel A. Noonan, reversed and cause remanded
Long caption: Archie A. Talley, Plaintiff-Appellant-Respondent, v. Mustafa Mustafa, d/b/a Burleigh Liquor, a/k/a Burleigh Food Market and Adams Foods, LLC, Defendants, Auto Owners Insurance Company, Defendant-Respondent-Petitioner.

Issues presented:
This dispute over insurance coverage stems from an incident in which a convenience store customer was punched in the face. The Supreme Court reviews the following issues:

- Can negligent supervision alone constitute an occurrence?
- Does a negligent supervision claim extend to wrongful acts committed by people with only a "special relationship" to the employer as opposed to an actual employee?
- When both the insurance company and the policyholder agree that an insurance policy does not provide coverage for allegations in a lawsuit, should that agreement be respected as the intent of the contracting parties?

Some background: Keith Scott regularly helped out in various capacities at a convenience store owned by Mustafa Mustafa. One day in July 2009, Scott allegedly became angry with a customer, Archie Talley, for taking too long to close the door to the convenience store when the air conditioning was on. The two men had words, and then Scott punched Talley twice, fracturing Talley's jaw.

Talley sued Mustafa and his liability insurer, Auto Owners Insurance Company, alleging that Mustafa was negligent with regard to his "duty to properly train and supervise" Scott, and that Mustafa's breach of this duty resulted in Talley's injuries.

Auto Owners moved for summary and declaratory judgment. It claimed that it had no duty to provide coverage to Mustafa because Scott's punching of Talley was an intentional act – not an "accident" – and thus was not an "occurrence" covered under Auto Owners' policy. Auto Owners also argued that it owed no coverage to Mustafa because Mustafa maintains that Scott was not his employee; as such, Mustafa agrees with Auto Owners' position that Scott's actions were not those of an "agent, employee, or representative" of Mustafa that would trigger coverage.

The trial court agreed with Auto Owners' argument that because the injury to Talley was caused by Scott's intentional act, there is no coverage under Mustafa's Auto Owners insurance policy.

The Court of Appeals reversed, ruling that Auto Owners and the trial court incorrectly focused on Scott's conduct, when they should have focused on Mustafa's conduct. While Talley alleged that Scott punched him, he also alleged that Mustafa, the insured, had a duty to properly train and supervise Scott and that Mustafa's negligence was a substantial factor in causing his injuries. The Court of Appeals held that a reasonable business owner in Mustafa's position would expect that if a customer sued him on the ground that he caused injury to the customer because of his negligence – including negligent supervision—the insurance policy would provide coverage for that claim.

The Court of Appeals held that, rather than granting Auto Owner's motion for summary and declaratory judgment and dismissing it from this action, the trial court should have denied the motion and allowed a jury to determine:

- whether Scott was an employee of Mustafa or otherwise had a special relationship with him that created an obligation for Mustafa to train and/or supervise Scott with due care;
- if so, whether Talley's injuries were caused by wrongful conduct of Scott;
- if so, whether Mustafa was negligent in training or supervising Scott; and
- if so, whether such negligence was a substantial factor in causing Scott's injury-causing conduct.

In a dissent, Court of Appeals Judge Paul F. Reilly agreed with the trial court's reasoning that – regardless of whether Scott was an employee, agent, or customer of Mustafa – Scott's

actions could not have qualified as an "occurrence" under Auto Owners' policy because Scott's punching of Talley was an intentional act, not an accident that would trigger coverage.

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

2015AP2554-CR	State v. Clardy
2015AP592	State v. Donley
2017AP926-W	Greybuffalo v. Ct. App., Dist. III

Buffalo

2015AP1762	Earney v. Buffalo Co. Bd. of Adjustment

Dane

2015AP2364	State v. Moore
2016AP937-CR	State v. Mitchell
2016AP2422	Dane Co. DHS v. J.B.
2017AP514-W	Griffin v. Ehlke
2014AP2497	Johnson v. City of Madison Zoning Bd.
2015AP383	Midland Funding v. Witten
2015AP1960-CR	State v. Castillo-Dominguez
2016AP76	Wilson v. Wall
2016AP88-CR	State v. Nichols
2016AP447	State v. Robinson
2017AP1172-OA	Wright v. Ct. App.,Dist. IV

Dodge

2016AP989-CR	State v. Biese
2016AP990-CR	State v. Jedrzejewski

Fond du Lac

2015AP2002/2003-CR State v. Martinez

2016AP147 Manowske v. Wisconsin Central Ltd.

2016AP1225-CR State v. Hyatt

Grant

2016AP187-CR State v. Marsh

Green Lake

2016AP1455 State v. Petroski

Jefferson

2016AP754-CR State v. Parker

Kenosha

2015AP1745 State v. Murry

2016AP1237-CR State v. Navigato

2016AP1112 118th Street Kenosha v. DOT

2017AP95-NM Kenosha Co. DHS v. M.L.

Langlade

2016AP1079 Selenske v. Selenske

Manitowoc

2016AP932-CRNM State v. Mills

Marathon

2016AP1427-CR State v. Perkins

Milwaukee

2013AP1880-CRNM State v. Bryant

2015AP249-CR State v. Amaya

2015AP1876 Clear Channel Outdoor v. City of Milwaukee

2015AP2014-CR State v. Brown

2015AP2021-CR State v. Robinson

2015AP2092-93-CR	State v. Singh
2015AP2443-CR	State v. Mantie
2015AP2572-CR	State v. Gilmore
2016AP120	State v. Thomas
2016AP180-W	Jones v. Richardson
2016AP232-CR	State v. Freeman
2016AP245	State v. Choice
2016AP319-CR	State v. King
2016AP573-CR	State v. Hamilton
2016AP695-CR	State v. Pender
2016AP1322-CR	State v. Brewer
2013AP2100-CR	State v. Coleman
2015AP1890-CRNM	State v. Berry
2015AP2154/2155-CR	State v. Nicholson
2015AP2410-CR	State v. Adames
2015AP2605-CR	State v. Johnson
2016AP5	State v. Jaworski
2016AP231-CR	State v. Augoki
2016AP369-CR	State v. Brown
2016AP814-CRNM	State v. Panfil
2016AP1751-W	Eppenger v. Foster
2017AP32	State v. K.C.
2017AP823/824-W	Ramage v. Malone

Outagamie
2015AP2355-CR State v. Cannon

2016AP326 Dudas v. Dudas

Polk
2015AP2248-CR State v. McNew

Portage
2016AP1038-39-CR State v. Worzalla

Racine
2016AP159 State v. Henderson

2015AP280-CR State v. Cobbs

2015AP1598-CR State v. Scheidell

2016AP1052-CR State v. Burns

Rock
2016AP1441-CR State v. Kimpel

2017AP981-W Seaverson v. Rock Co. Cir. Ct.
Justice Shirley S. Abrahamson and Justice Rebecca Grassl Bradley dissent.

Rusk
2015AP1521-CR State v. Swanson

St. Croix
2014AP1093 Slocum v. Star Prairie Township

2015AP1006 Slocum v. Star Prairie Township

2016AP41 Slocum v. Star Prairie Township

2016AP280 Slocum v. Star Prairie Township

2016AP281 Town of Star Prairie v. Slocum

Sauk
2015AP2582-CR State v. Brar

Washington
2016AP1407 Kearns v. Kearns

Waukesha

2015AP1720 Schroeder v. Hayes

2015AP2338-CRNM State v. Howard

2016AP40 Craig v. Village of Big Bend
Justice Daniel Kelly did not participate.

2016AP668 State v. C.G.B.

2016AP1036 State v. Wold

2017AP369-W Prouty v. Cir. Ct. for Waukesha Cty.

2017AP569-W Prouty v. Cir. Ct. for Waukesha Cty.

Waupaca

2015AP1808-CR State v. Triolo

Winnebago

2015AP2295 State v. Wallace

2016AP259-CR State v. Nap