WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
SEPTEMBER 2018

The cases listed below will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol. This calendar includes cases that originated in the following counties:

Ashland
Douglas
Dunn
Ozaukee
Monroe
Milwaukee
Racine
Vernon
Waukesha

WEDNESDAY, SEPTEMBER 5, 2018

9:45 a.m.	15AP1083-CR	State v. Gary Lee Wayerski
10:45 a.m.	16AP299	SECURA Insurance v. Ray Duerr Logging LLC
1:30 p.m.	08AP85-D	Office of Lawyer Regulation v. Brian P. Mularski

FRIDAY, SEPTEMBER 7, 2018

9:45 a.m.	16AP1609-CR	State v. Faith N. Reed
10:45 a.m.	16AP636	Koss Corporation v. Park Bank
1:30 p.m.	17AP208-CR	State v. Johnny K. Pinder

MONDAY, SEPTEMBER 24, 2018

9:45 a.m.	17AP1413/1414	State v. C. L. K.
10:45 a.m.	16AP801	Michael Engelhardt v. City of New Berlin
1:30 p.m.	16AP1525	Milwaukee District Council 48 v. Milwaukee County

TUESDAY, SEPTEMBER 25, 2018

9:45 a.m.	16AP1765	Melvin DeWitt v. Earl G. Ferries
10:45 a.m.	16AP1517	Philip Myers v. Wisconsin DNR
1:30 p.m.	16AP1541-CR	State v. Shawn T. Wiskerchen

Note: The Supreme Court calendar may change between the time you receive these synopses and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at (608) 266-1880. If your news organization is interested in providing any camera coverage of Supreme Court argument in Madison, contact media coordinator Hannah McClung at WISC-TV, (608) 271-4321. Synopses provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
SEPTEMBER 5, 2018
9:45 a.m.

2015AP1083-CR State v. Gary Lee Wayerski

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), that affirmed a Dunn County Circuit Court judgment of conviction and order denying a postconviction motion, Judges William C. Stewart and Maureen D. Boyle, presiding.

This appeal involves (1) whether the State must disclose to a criminal defendant the existence of pending criminal charges against a witness whom the State intends to call to testify at the defendant's trial, and (2) whether the lower courts properly analyzed the prejudice prong of a claim of ineffective assistance of counsel.

Gary Wayerski was the police chief for the Village of Wheeler and a police officer for the Village of Boyceville. In his role as the police chief, he came into contact with two teenage boys, J.P. and J.H. The following facts are drawn primarily from their testimony at trial.

At different times in early 2011, Wayerski volunteered to mentor and supervise the two boys, with the approval of their parents. Wayerski began to take the boys separately on "ride-alongs" while he was on duty. Wayerski also invited the boys to come to his apartment. Both boys testified that between March and July 2011 they visited Wayerski's apartment multiple times, either separately or together. They each asserted that during the first or second such visit Wayerski persuaded them to engage in physical fitness activities. The "workouts" concluded with Wayerski instructing the boys to strip naked and rubbing their genitals. The boys alleged that during subsequent visits, they would often watch pornography with Wayerski and he would rub their genitals. Ultimately, the boys told one of their fathers about what had been occurring during their visits to Wayerski's apartment. The state charged Wayerski with sixteen crimes, including eight counts of sexual assault by a person who works or volunteers with children.

In his trial testimony Wayerski denied all of the boys' allegations of sexual contact. Wayerski also called four witnesses, each of whom generally testified that after Wayerski had been arrested, J.P. had made statements that the claims in the criminal complaint were untrue or that the boys had "set up" Wayerski to be charged.

In rebuttal, the State called John Clark, who had occupied a jail cell near Wayerski for several weeks. Clark testified that Wayerski had admitted to him that he and the boys had watched pornography on his computer, that he had given them alcohol, and that he had rubbed their genitals.

Defense counsel called Wayerski to testify in surrebuttal in response to Clark's testimony, but counsel never asked Wayerski whether Clark's claim that Wayerski had admitted sexually assaulting the boys had been true.

A few days prior to the trial, the prosecutor conducted a search of the Wisconsin Circuit Court Access (WCCA) website and discovered that there were pending charges against Clark in another county. The prosecutor did not advise Wayerski's counsel of the pending charges, and neither the prosecutor nor Clark mentioned them during Clark's testimony. Defense counsel was not aware of the charges at the time of trial.

On appeal following his conviction on all sixteen counts, Wayerski argued that his trial attorney had been constitutionally ineffective for not asking him on surrebuttal whether he had essentially confessed to Clark in the jail. The Court of Appeals concluded that Wayerski's ineffective assistance claim did not require a new trial because Wayerski could not show prejudice from the failure to question him about his alleged confession to Clark because the other evidence against him had been overwhelming. In the Supreme Court, Wayerski is challenging whether the lower courts' prejudice analysis conflicts with prior appellate decisions.

Wayerski also argued on appeal that the prosecutor's failure to disclose the pending charges against Clark had violated the State's obligation to turn over material, exculpatory evidence, pursuant to Brady v. Maryland, 373 U.S. 83 (1963), and subsequent cases. In State v. Randall, the Court of Appeals had held that it was a clear violation of Brady for the State to fail to disclose pending charges against one of the State's witnesses because it would place an "intolerable burden" on defense counsel "to continually comb the public records." In the present case, the Court of Appeals held that the State no longer has such an obligation to disclose pending charges against its witnesses because that information was no longer in the exclusive possession of the State due to the development of the WCCA website, which now provides easy online access to that information. Moreover, the Court of Appeals concluded that even if the State had improperly failed to disclose the charges pending against Clark, that violation was harmless, again due to the overwhelming evidence of guilt.

Wayerski is asking the Supreme Court to reverse this decision by the Court of Appeals because it is in conflict with prior decisions.

The following issues are presented for review:

1. Whether Wayerski was denied his right to effective assistance of counsel under the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution.

2. Whether the prosecution's Brady, Giglio, and Kyles violation warrants a new trial.

WISCONSIN SUPREME COURT
SEPTEMBER 5, 2018
1:30 p.m.

2016AP299 SECURA Insurance v. Ray Duerr Logging, LLC

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), that affirmed a Douglas County Circuit Court decision, Judge Kelly J. Thimm, presiding, declaring the amount of insurance coverage.

This case arises out of a fire that became known as the "German Road Fire" in Douglas County in May 2013. The fire started in the cutting head of a machine used by Ray Duerr Logging, LLC (Duerr) while cutting timber on the property of Lyme St. Croix Forest Company, LLC. Although the Duerr employee saw grass burning under the cutting head and stopped the machine, the fire quickly spread across the grass, into a pile of felled trees, and then into the surrounding standing timber. The fire burned for three days and covered more than 7,400 acres, damaging or destroying many buildings and items of personal property.

At the time of the fire, Duerr was covered by a commercial general liability (CGL) policy issued by SECURA Insurance (SECURA). The CGL policy contained an "Each Occurrence Limit" of $500,000 for bodily injuries and property damage arising out of "each occurrence" resulting from logging and lumbering operations. The CGL policy defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The policy also contained a "General Aggregate Limit" that capped SECURA's total liability at $2 million regardless of the number of occurrences.

Two lawsuits regarding the fire were filed and consolidated in the Douglas County Circuit Court. SECURA filed a motion seeking a declaration that if Duerr was found liable for damages arising out of the German Road Fire, the $500,000 per-occurrence limitation in the CGL policy applied to its obligation to pay damages caused by Duerr (i.e., that its total liability connected to the fire would be no more than $500,000). The circuit court ruled against SECURA, concluding that although there had been only one fire, there had been a separate occurrence for insurance purposes each time the fire had crossed over another claimant's property line. Thus, it ruled that SECURA's liability was capped only by the $2 million aggregate limit in the CGL policy.

The Court of Appeals granted review of the circuit court's decision on an interlocutory basis because the decision was not a final decision in the case. The Court of Appeals acknowledged that in Olsen v. Moore, 56 Wis. 2d 340, 202 N.W.2d 236 (1974), the Supreme Court had adopted the "cause theory," which states that "a single, uninterrupted cause which results in a number of injuries or separate instances of property damage is yet one 'accident' or 'occurrence.'" It concluded, however, that two subsequent cases, Plastics Eng'g Co. v. Liberty Mut. Ins. Co., 2009 WI 13, 315 Wis. 2d 556, 759 N.W.2d 613 (each person's exposure to asbestos constituted separate occurrence), and Wilson Mut. Ins. Co. v. Falk, 2014 WI 136, 360 Wis. 2d 67, 857 N.W.2d 156, had clarified or modified the "cause theory" to support the conclusion in this case that there had been "an 'occurrence' each time the fire—fueled and

expanded by the consumption of new materials—spread to a new piece of real property and caused damage." It therefore affirmed the circuit court's decision.

The following issue is presented for review:

> Are all property damages from the May 2013 German Road Fire the result of a single, uninterrupted cause, and therefore a single occurrence for purposes of liability coverage under a commercial policy issued by SECURA Insurance, A Mutual Company?

WISCONSIN SUPREME COURT
SEPTEMBER 5, 2018
1:30 p.m.

2008AP85-D Office of Lawyer Regulation (OLR) v. Brian P. Mularski

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers.

Brian P. Mularski was admitted to practice law in Wisconsin in 2000. In 2010, the Supreme Court granted his petition for consensual license revocation and revoked his Wisconsin law license. The misconduct giving rise to the Court's decision involved 13 counts of professional misconduct in three client matters, as well as eight pending grievance investigations. In its decision the Supreme Court stated that:

> [a]s a condition of any future petition for reinstatement, Attorney Mularski shall provide an accounting and demonstrate he has made full restitution to those individuals aggrieved by his misconduct as alleged in the OLR complaint and the pending investigations.

In 2012, after his law license was revoked, Mularski was convicted of one count of felony theft based on allegations that he had embezzled hundreds of thousands of dollars from the trust account of his former law firm. As part of his criminal sentence, the court ordered Mularski to pay restitution to the firm's trust account.

On February 17, 2017, Mularski filed a petition seeking reinstatement of his license to practice law. A referee was appointed and conducted an evidentiary hearing on the reinstatement petition. On December 14, 2017, the referee issued a written report recommending that this Court deny Mularski's petition for several reasons, but primarily on the grounds that Mularski has failed to prepare an accounting and demonstrate he has made full restitution to those individuals aggrieved by his misconduct, as required by the Court's 2010 order and by SCR 22.29(4)(4m).

Mularski appeals. He argues that it is not within his power to complete the required accounting. As such, he argues that his failure to complete this task should not preclude his reinstatement. Mularski says that "the practice of law is the only viable employment option which would provide the financial means to resolve [his] outstanding restitution obligations." He says that conditions of his probation, such as a no-contact order with his former law firm, prevented him from acquiring the records and other information he needs to assemble an accounting. He also charges that the OLR should do more to help him compile the information he needs. In short, Mularski says he has done what he can to satisfy the requirement of an accounting and restitution.

The OLR disagrees, arguing that Mularski is impermissibly trying to shift the responsibility for this task to the OLR. OLR argues there was more Mularski could have done to complete this requirement.

The Supreme Court is expected to decide whether Mularski has met the requirements for reinstatement of his license to practice law in Wisconsin.

The following issues are presented for review:

1. Has the Respondent-Appellant proven that he has the moral character to practice law in Wisconsin?

2. Has the Respondent-Appellant proven that his resumption of the practice of law will not be detrimental to the administration of justice?

3. Has the Respondent-Appellant provided a complete accounting and proof that he has made full restitution to or settled all claims of persons harmed by his misconduct?

4. Has the Respondent-Appellant proven that his conduct since revocation has been exemplary and above reproach?

WISCONSIN SUPREME COURT
SEPTEMBER 7, 2018
9:45 a.m.

2016AP1609-CR State v. Faith N. Reed

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), that affirmed a judgment of conviction against Faith N. Reed for misdemeanor possession of a controlled substance and misdemeanor bail jumping. The judgment was entered by the Monroe County Circuit Court, Judge J. David Rice, presiding.

This case examines how an individual may demonstrate consent for police to enter his or her home, and what type of action is sufficient to withdraw that consent.

Reed's conviction arises from the following facts. Responding to a report of a street fight between two men, an officer encountered two men on the street —— neither of whom had been involved in the fight. One of the men (Kirk Sullivan) lived in a nearby apartment. The men told the officer that one of the men involved in the fight, named Jerome, may have gone to Sullivan's apartment. The officer said to Sullivan: "All right, let's go, ah, let's go look over——see if [Jerome's] over here. If anything, we could just talk to him." Without verbally responding, Sullivan led the officer through a parking lot, the unlocked exterior door to a multi-unit apartment building, a set of stairs, and an unlocked hallway. Sullivan briefly knocked on the door to an apartment unit, and then opened the door. The door was inward-opening, with the door knob on the right side as Sullivan approached. Sullivan opened the door only wide enough to allow himself to walk into the apartment, while gently pushing the door toward a closed position behind him. The officer used one hand to apply enough pressure to the door to keep it from closing, and pushed the door open wide enough for him to enter the apartment. The officer saw Jerome and Reed near what appeared to be a controlled substance. The officer arrested Reed and transported her to the jail, where a controlled substance was found in her sock.

The following issues are presented for review:

1. Did Sullivan initially consent to [the officer's] entry into the apartment?

2. If Sullivan initially consented to the entry, did he take sufficient action to withdraw that consent?

3. If Sullivan consented to the entry, was his consent freely and voluntarily given?

WISCONSIN SUPREME COURT
SEPTEMBER 7, 2018
9:45 a.m.

2016AP636 Koss Corporation v. Park Bank

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), that affirmed a Milwaukee County Circuit Court decision, Judge David L. Borowski, presiding, granting summary judgment in favor of Park Bank.

This case examines the legal standard for assessing "bad faith" under Wisconsin's Uniform Fiduciaries Act (UFA), Wis. Stat. § 112.01, *et seq*. Sujata Sachdeva embezzled $34 million from her employer, Koss Corporation, over 12 years.[1] Koss sued Park Bank, the financial institution through which Sachdeva obtained most of the embezzled funds. Koss alleges that Park Bank violated Wisconsin's version of the UFA.

Park Bank argues that it was not liable on the theory that there is no evidence it acted in bad faith regarding Sachdeva's transactions. The circuit court agreed. The Court of Appeals affirmed, ruling that the undisputed facts did not demonstrate that Park Bank acted in bad faith.

According to the Court of Appeals, bad faith under the UFA requires proof of: (1) circumstances suspicious enough to place a bank on notice of improper conduct by the fiduciary; and (2) a deliberate failure to investigate the suspicious circumstances because of a belief or fear that such inquiry would disclose a defect in the transaction at issue. The Court of Appeals held that a bank's mere negligence in failing to prevent or detect a fiduciary's misconduct is insufficient to support a finding of bad faith under the UFA.

Koss argues that the Court of Appeals' decision established a new —— and incorrect —— two-part test for bad faith. Koss also asserts that the Court of Appeals "improperly assumed the role of trier of fact" by resolving all inferences in favor of Park Bank. The Supreme Court is expected to provide guidance regarding what is required to establish bad faith under the UFA.

The following issues are presented for review:

1. Did the Court of Appeals err by creating a new two-part test regarding what is required for plaintiffs to prove "bad faith" within the meaning of the Wisconsin Uniform Fiduciaries Act, Wis. Stat. § 112.01 *et seq.*, ("UFA"), which differs from the legal standard established by courts in other jurisdictions that have adopted the UFA?

[1] In 2010, Sachdeva pled guilty to six counts of wire fraud in federal court. She was sentenced to 11 years in prison and ordered to pay Koss $34 million in restitution.

2. Did the circuit court and Court of Appeals improperly resolve factual disputes and competing inferences drawn from the evidence in granting summary judgment when they decided that the evidence proffered by Koss Corporation merely demonstrated that Park Bank was at most negligent and not liable for bad faith?

3. Did Koss Corporation proffer sufficient evidence to create a genuine issue of material fact as to whether Park Bank's acts and omissions amounted to "bad faith" in violation of the Wisconsin UFA?

WISCONSIN SUPREME COURT
SEPTEMBER 7, 2018
1:30 p.m.

2017AP208-CR State v. Johnny K. Pinder

This is an appeal, taken on certification of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), by Johnny K. Pinder. Pinder was convicted after a jury trial in Ozaukee County Circuit Court, Judge Paul V. Malloy, presiding, of burglary as a party to the crime and possession of burglarious tools.

Pinder's conviction arises from the following facts. Based on surveillance footage and an informant, police determined that Pinder was probably the individual behind a rash of commercial burglaries in Mequon. Police obtained a warrant to install a GPS tracking device on Pinder's car, to be removed "as soon as practicable after the objectives of the surveillance are accomplished or not later than 60 days" after issuance. Ten days after obtaining the warrant, police installed the device on Pinder's car. A few days later, police tracked Pinder's car to an office building. After the car left, police went to the building and saw that a break-in had occurred. Surveillance footage showed that a silver vehicle had been parked outside the building; the GPS data confirmed that this was Pinder's car. Police stopped and searched Pinder's car and found stolen property and burglary tools.

Although Wis. Stat. § 968.15(1) requires a search warrant to be executed within five days after the date of issuance, here, the police didn't put the GPS on Pinder's car until ten days after the date of issuance. The parties dispute whether this fact requires the suppression of the evidence seized during the search.

The court of appeals has certified the following issue:

> If a search warrant issued under Wis. Stat. § 968.12 for the placement and use of a GPS tracking device on a motor vehicle is not executed within five days after the date of issuance per Wis. Stat. § 968.15(1), is the warrant void under § 968.15(2), even if the search was otherwise reasonably conducted?

WISCONSIN SUPREME COURT
SEPTEMBER 24, 2018
9:45 a.m.

2017AP1413 &
2017AP1414 State v. C.L.K.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), that affirmed orders of the Milwaukee County Circuit Court, Judge Christopher R. Foley, presiding, terminating C.L.K.'s parental rights to his children, S.M.H. and J.E.H.

The circuit court's orders resulted from the State's petitions to terminate C.L.K.'s parental rights to S.M.H. and J.E.H. on the statutory grounds of abandonment under Wis. Stat. § 48.415(1)(a)2., and failure to assume parental responsibility under Wis. Stat. § 48.415(6).

The circuit court held a trial to determine whether these grounds existed. The circuit court directed a verdict for the State at the close of the State's case without allowing C.L.K. an opportunity to present evidence.

On appeal, the State conceded that the circuit court erred in granting a directed verdict at the close of the State's case. This case examines whether that error can (and, if so, should) be considered harmless.

The following issues are presented for review:

1. Where, during the grounds phase of a [termination of parental rights] trial, the circuit court errs by directing a verdict in favor of the State without giving the respondent an opportunity to present evidence, has the court committed structural error, or is the error subject to the harmless error analysis?

2. In this case, if the error is not structural, was the error harmless?

WISCONSIN SUPREME COURT
SEPTEMBER 24, 2018
9:45 a.m.

2016AP801 Michael Engelhardt v. City of New Berlin

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), that granted leave to appeal and reversed a Waukesha County Circuit Court decision, Judge J. Mac Davis, presiding, denying the City of New Berlin's motion for summary judgment.

This "governmental immunity" case arises from the tragic death of a child at a swimming pool during a summer camp outing with the City of New Berlin Parks and Recreation Department ("New Berlin").

The child's parents sued New Berlin. New Berlin moved for summary judgment, asserting that it is immune from suit under Wis. Stat. § 893.80(4), the governmental immunity statute. The parents respond that one or more of the exceptions to governmental immunity apply here, such that New Berlin can be sued. For example, there is no immunity against liability associated with performance of "ministerial duties" imposed by law.[2] The parents argue that certain documents (a camp information packet, staff guidelines, and a staff handbook that contained written policies for camp staff members) created "ministerial duties" that New Berlin violated, resulting in the child's death, such that immunity should not apply.

Another exception to governmental immunity arises when there is a "known and compelling" danger sufficient to give rise to a ministerial duty on the part of a municipality or its officers. The parents argue that here, there was a "known and compelling" danger such that immunity should not apply.

The circuit court denied New Berlin's motion for summary judgment on the question of immunity, ruling that there were disputed issues of material fact. The Court of Appeals granted New Berlin's request for leave to appeal and reversed, ruling that under the facts presented, New Berlin is immune from suit.

The Supreme Court's decision may provide guidance on the nature and content of documents sufficient to create a "ministerial duty" under Wis. Stat. § 893.80(4) and provide guidance regarding the "known danger" exception.

[2] A ministerial duty is more than just a generalized duty to act. Rather, it is a duty that "is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion."

The following issues are presented for review:

A government entity or employee has no immunity for liability associated with the performance of ministerial duties imposed by law. Brown v. Acuity, 2013 WI 60, ¶42, 348 Wis. 2d 603, 833 N.W.2d 96. Where a written law or policy defining a duty exists, courts "look to the language of the writing to evaluate whether the duty and its parameters are expressed so clearly and precisely, so as to eliminate the official's exercise of discretion." Pries v. McMillon, 2010 WI 63, ¶26, 326 Wis. 2d 37, 784 N.W.2d 648. This case raises multiple issues regarding the type of writing which establishes such a duty:

a. In Lodl v. Progressive N. Ins. Co., 2002 WI 71, ¶24, 253 Wis. 2d 323, 646 N.W.2d 314, the Wisconsin Supreme Court indicated that the title of a document is not dispositive as to whether it creates a ministerial duty. Does a question of fact exist regarding whether a ministerial duty is imposed by law by a governmental entity's writing, titled a "guideline," where a governmental employee or representative identifies it as stating "the policy" governing the program?

b. In Meyers v. Schultz, 2004 WI App 234, ¶19, 277 Wis. 2d 845, 690 N.W.2d 873, the Court of Appeals declared that "[l]aw' in this context means, at a minimum, an act of government." Can a document mailed to its citizens by a governmental entity create ministerial duties for the defendant governmental entity, particularly where representatives identify it as stating the policies of the entity's program?

c. The Wisconsin Supreme Court has held that "a duty need not dictate each precise undertaking that the government actor must implement in order to be ministerial." Pries, 326 Wis. 2d 37, ¶131. Do a governmental entity's rules, requiring employees to (inter alia) "supervise the kids at all times," create a ministerial duty?

d. Do material issues of fact bar summary judgment in this case where there is evidence that New Berlin violated its rules and procedures for supervision of its summer day camp participants?

e. Cords v. Anderson, 80 Wis. 2d 525, 542, 259 N.W.2d 672 (1977), held that, when the government actor is aware of a "known danger" and chooses not to act, immunity does not apply. Application of this exception applies when there is a showing of "imminent danger [that] is known by the employee or officer to be present and is a danger of such force as to leave nothing to the discretion of the officer." C.L. v. Olson, 143 Wis. 2d 701, 723, 422 N.W.2d 614 (1988). Do material issues of fact bar summary judgment where, after two incidents at Wiberg pool requiring rescue by life guards, New Berlin, despite knowing that the child could not

swim and promising her mother that she would be safe, failed to do anything to fulfill that promise, resulting in the child's death?

WISCONSIN SUPREME COURT
SEPTEMBER 24, 2018
1:30 p.m.

2016AP1525 Milwaukee District Council 48 v. Milwaukee County

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), that affirmed a Milwaukee County Circuit Court decision, Judge Stephanie Rothstein, presiding, granting summary judgment in favor of Milwaukee District Council 48.

The issue in this case is whether certain Milwaukee County employees, represented by District Council 48, were covered by a collective bargaining agreement at the time Milwaukee County General Ordinance § 201.24(4.1) took effect, thereby making those employees eligible for retirement benefits under a policy referred to as the "Rule of 75."

For many years, Milwaukee County provided retirement benefits to its employees pursuant to ordinance. Those employees are considered members of the County's employee retirement system. In 1993, Milwaukee County adopted the ordinance commonly referred to as the "Rule of 75." Under the terms of this rule, an "employee not covered by the terms of a collective bargaining agreement at the time his employment is terminated and who retires on or after September 1, 1993," received a full pension if the employee's age, added to his or her years of service, equaled 75.

The County Board agreed to a collective bargaining agreement with District Council 48 in 1993 in which the Rule of 75 was extended to employees represented by the union who had become retirement system members prior to January 1, 1994. In 2005, the County amended the ordinance to end the Rule of 75 for employee retirement system members who were not covered by a collective bargaining agreement if they first entered the retirement system after January 1, 2006. Those employees covered by District Council 48 continued to receive Rule of 75 benefits only if they had been hired before January 1, 1994. The last collective bargaining agreement between District Council 48 and the County expired on December 31, 2008. By agreement, the collective bargaining agreement was extended to March 31, 2009. No successor collective bargaining agreement between District Council 48 and the County was ever reached after that date.

In 2011, the Wisconsin Legislature adopted Act 10, which took effect on June 29, 2011. Act 10 dramatically curtailed collective bargaining by prohibiting municipal employees represented by unions from negotiating pension provisions. On September 29, 2011, the Milwaukee County Board adopted an amendment to Milwaukee County General Ordinance § 201.24(4.1) for the purpose of extending the Rule of 75 to additional employees not covered by a collective bargaining agreement on that date. Continued eligibility for the Rule of 75 depended on when the employee became a member of the County retirement system.

Pursuant to other changes made by Act 10, District Council 48's certification as a representative of county general employees was revoked by the Wisconsin Employment Relations Commission, effective January 30, 2012. After the decertification, the County moved

for summary judgment on the grounds that the Rule of 75 benefit was not applicable to employees represented by District Council 48 on September 29, 2011, if those employees entered the retirement system between January 1, 1994 and December 31, 2005. The County argued that those employees were covered by a collective bargaining agreement on September 29, 2011 because District Council 48 had not yet been decertified. District Council 48 also moved for summary judgment.

The circuit court granted summary judgment in favor of District Council 48, concluding that the employees were not covered by a collective bargaining agreement on September 29, 2011. The Court of Appeals affirmed.

The following issue is presented for review:

> Whether an ordinance amendment which designated County employees "covered by the terms of a collective bargaining agreement" was applicable to those employees after their collective bargaining agreement (which included provisions for wages) had expired and 2011 Wis. Act 10 was enacted, but before their union was decertified.

WISCONSIN SUPREME COURT
SEPTEMBER 25, 2018
9:45 a.m.

2016AP1765 Melvin DeWitt v. Earl G. Ferries

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), that reversed a Vernon County Circuit Court decision, Judge Michael J. Rosborough, presiding, confirming transfer of property and denying petition for writ of mandamus.

This case involves a dispute over a one-acre parcel of land located within a 204-acre farm that has been owned by the Ferries family for generations. The petitioners believe that the parcel is an unmaintained pioneer cemetery dating from the 1800s. The parcel is adjacent to a state park, but there is no public vehicular access to the site. Several local residents (the petitioners) believe their ancestors are buried there.

In March 2014, the petitioners successfully petitioned the circuit court to transfer the parcel to the Town of Forest in Vernon County pursuant to Wis. Stat. § 157.115(1)(c), a statute that authorizes transfer of abandoned or neglected cemeteries to a town for care and upkeep, subject to certain requirements. In February 2016, the petitioners filed a writ petition seeking a court order to require the Town to "provide proper, timely, and permanent care and maintenance" of the parcel. The Town moved to quash the writ and the Ferries intervened. In July 2016, the circuit court issued an order confirming the transfer of the parcel under the statute, but denying the writ, essentially concluding that it could not force the Town to maintain this parcel.

The Ferries and the Town appealed, challenging the transfer of the parcel on a number of grounds. The Court of Appeals reversed, ruling that the transfer was void because the petitioners had failed to prove —— and the circuit court failed to make conclusions necessary to satisfy —— the statutory requirement in § 157.115(1)(c) that "there exists no association or group with authority to transfer ownership and operation of the cemetery to the town."

The Supreme Court's decision may provide guidance on the quantum of evidence required to effectuate a transfer under Wis. Stat. § 157.115(1)(c), may address ownership of the parcel, whether the parcel is a "cemetery" or a "burial site," and whether the doctrine of adverse possession applies.

The Supreme Court directed the parties to brief the following issues:

1. Does the evidence presented support the circuit court conclusion that the parcel was and is used as a cemetery and, therefore, the parcel cannot be subject to a claim of adverse possession by the Ferries?

2. Does the evidence presented support the petitioners' and circuit court's conclusion that there exists no association or group with authority to transfer ownership and operation of the one (1) acre cemetery to the Town of Forest?

3. Whether the parcel at issue is a "cemetery."

4. Whether a "cemetery" may be adversely possessed by a private citizen.

5. Whether it is necessary to resolve the question of the parcel's ownership to effect a transfer under Wis. Stat. § 157.115.

6. What does Wis. Stat. § 157.115 require to demonstrate that, "by reason of the removal or death of the persons interested in its upkeep there exists no association or group with authority to transfer ownership and operation of the cemetery to the town."

WISCONSIN SUPREME COURT
SEPTEMBER 25, 2018
9:45 a.m.

2016AP1517 Philip Myers v. Wisconsin Department of Natural Resources

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), that affirmed an Ashland County Circuit Court decision, Judge Robert E. Eaton, presiding, affirming in part a pier permit issued by the Wisconsin Department of Natural Resources (DNR) and remanding for additional fact-finding.

This case examines the process by which the Department of Natural Resources (DNR) may or may not amend a construction permit for a previously permitted pier.

In December 1999 the Myerses applied under Wis. Stat. § 30.12 to build a new pier on the bed of Lake Superior on Madeline Island next to the remnants of a 1930s pier that had deteriorated. The Myerses' application sought to construct a series of rock-filled cribs that would form the base of the pier. The DNR received several objections that the pier as proposed would erode parts of the beach and block the wave action that produces littoral drift (the process of sediment, primarily sand, moving along the shoreline due to wave action). In response, the Myerses made some changes in their application.

Ultimately, after holding a contested case hearing, an administrative law judge (ALJ) granted the Myerses their requested permit, but required a 12' opening between the two cribs underneath the main length of the pier to allow water and sediment to flow through from one side of the pier to the other. The ALJ, however, also included the following language in the permit: "The authority herein granted can be amended or rescinded if the structure becomes a material obstruction to navigation or becomes detrimental to the public interest."

The Myerses' pier was constructed pursuant to the design parameters of the permit in 2001.

In 2012 and 2013, the DNR received complaints from two neighbors who claimed that they had suffered erosion and "loss of riparian property" due to the Myerses' pier. The DNR sent the Myerses a letter regarding those complaints in March 2013. It demanded an inspection of the pier. A professional coastal engineer from the University of Wisconsin Sea Grant Institute inspected the pier and the neighboring properties. The DNR also consulted historical aerial photographs.

In July 2013, the DNR sent another letter to the Myerses, which purported to modify the 2001 permit and demanded that they remove a crib remnant from the 1930s pier and that they also remove the two 24-foot cribs that the Myerses had placed on the sea bed to support the main length of the pier.

The Myerses objected and petitioned for an administrative review. The DNR denied the request for a formal administrative review. Instead, it published a notice of a pending

amendment to the permit and then held a public informational hearing (not a contested case hearing). After the hearing, the DNR issued an amendment to the permit requiring the removal of the two cribs.

The Myerses sought judicial review in the Bayfield County Circuit Court. The circuit court rejected the Myerses' claim that the DNR had lacked authority to amend the 2001 permit, but it remanded the matter to the agency for additional factual development as to whether the Myerses' pier was exempt from any amendment either under a grandfather clause (Wis. Stat. § 30.12(1k)(b)) or a prohibition on enforcement actions against piers that are in compliance with an original permit. The circuit court stated that it needed additional facts to resolve those issues.

The Myerses appealed the circuit court's order to the Court of Appeals. The DNR cross-appealed the circuit court's remand of the matter to the agency for additional fact-finding.

The Court of Appeals affirmed the circuit court's order. It concluded, among other things, that the DNR did not have to follow the modification procedure set forth in the statutes because it had reserved the power to modify in the original permit. The Court of Appeals said the grandfather clause did not apply because it believed that the DNR had implicitly found in its amendment decision that the Myerses' pier "was not in compliance with the original permit's terms."

The following issues are presented for review:

1. May the DNR require removal and replacement of a 16-year old permitted pier by unilateral amendment of its permit without a trial or a contested case hearing, rather than following the procedures set forth in Wis. Stat. § 30.03 and Wis. Admin. Code § NR 326.06-.08?

2. Is the DNR's unilateral permit amendment subject to the Grandfather Exemption and the Enforcement Exemptions to Wis. Stat. § 30.12 which, with limited exceptions, prohibit DNR from regulating or removing piers placed prior to April 17, 2012?

3. To the extent that factual issues relating to Exemption exceptions were relevant, were the Myerses entitled to a trial or contested case hearing on the allegations that their pier interfered with the riparian rights of others or was detrimental to the public interest, or could an appellate court substitute implicit findings made at an informational public hearing for actual factual findings made after notice and a hearing?

Following the filing of the petition for review, the DNR advised the Supreme Court that the Myerses' pier had been damaged by a storm. The Supreme Court may consider some of these issues in light of that alleged damage.

WISCONSIN SUPREME COURT
SEPTEMBER 25, 2018
1:30 p.m.

2016AP1541-CR State v. Shawn T. Wiskerchen

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), that affirmed the portion of a Racine County Circuit Court judgement of conviction, Judge Faye M. Flancher, presiding, ordering payment of restitution.

This appeal examines the scope of restitution that a circuit court may impose as part of a criminal sentence.

This case arises out of a May 8, 2015 burglary by Shawn Wiskerchen of a neighbor's home. The owner of the home, N.D., arrived home and found Wiskerchen in one of the upstairs rooms. He threw her down the stairs and fled, but the police subsequently found him hiding in a neighbor's yard and arrested him. Ultimately, Wiskerchen agreed to enter a no-contest plea to one count of burglary.

The circuit court held a restitution hearing to consider N.D.'s request for restitution for items that she believed Wiskerchen had stolen. At the hearing, N.D. testified that Wiskerchen's mother had told her that Wiskerchen had been in N.D.'s home "numerous times" and that she had found N.D.'s medication in her home.[3] N.D., however, admitted that she had "no idea" which items had been stolen by Wiskerchen on May 8, 2015, and which items had been stolen on other occasions. Wiskerchen disputed how many items had been stolen from N.D.'s home.

The circuit court found as fact that N.D.'s house had been burglarized on prior occasions by Wiskerchen and determined that it could consider the thefts of property in those prior burglaries as related to the May 8, 2015 burglary. It therefore ordered Wiskerchen to pay restitution to N.D. in the amount of $8487.41, which was the difference between all of N.D.'s claimed losses (as depreciated) and the amount the insurance company had paid N.D. for those items.

The sole issue on appeal was the correctness of the circuit court's restitution award. Specifically, Wiskerchen argued that the circuit court had erred in granting restitution because N.D. had not met her burden of showing that the loss of her items had been related to a crime considered at sentencing, namely the May 8, 2015 burglary. He relied on Wis. Stat. § 973.20 (2015-16), which provides that a sentencing court "shall order the defendant to make full or partial restitution under this section to any victim of a crime considered at sentencing . . . ." A "crime considered at sentencing" is defined in Wis. Stat. § 973.20(1g)(a) as "any crime for which the defendant was convicted and any read-in crime."

[3] Apparently, Wiskerchen lived with his mother in the house next door to N.D.'s home.

The Court of Appeals affirmed the circuit court's restitution award. It relied on its holding in State v. Queever, 2016 WI App 87, 372 Wis. 2d 388, 887 N.W.2d 912, that when an alleged victim of the defendant seeks the recovery of costs as restitution, "they are recoverable if a causal nexus is established between the costs and the entire course of the defendant's criminal conduct considered at sentencing." In the present case, although Wiskerchen had not been charged with any prior burglaries of N.D.'s home nor were those burglaries read-in offenses, the Court of Appeals read Queever to authorize it to "consider Wiskerchen's entire course of criminal conduct, including 'all facts and reasonable inferences,' as it relates to the crime of conviction." It concluded that there was a sufficient "causal nexus" between the prior burglaries of N.D.'s home and the May 8, 2015 burglary to which Wiskerchen had pled no contest. Thus, the Court of Appeals ruled that the circuit court had properly awarded restitution for all of the items N.D. claimed as stolen.

The following issue are raised for review:

> Must [State v. Queever, 2016 WI App 87, 372 Wis. 2d 388, 887 N.W.2d 912] be overturned because it is impossible for a crime committed on a certain date to cause losses on an earlier date? If not, what are the limits of Queever and of the definition of "a crime considered at sentencing" for restitution purposes? Can the definition include alleged prior-committed crimes?