WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
SEPTEMBER 2017

Note: Cases scheduled for Sept. 20 will be heard at the JEFFERSON COUNTY COURTHOUSE, 311 S. Center Ave., Jefferson, Wisconsin. Other cases listed will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol. This calendar includes cases that originated in the following counties:

Columbia
Dane
Eau Claire
Manitowoc
Marathon
Milwaukee
Price

TUESDAY, SEPTEMBER 5, 2017 (MADISON)

9:45 a.m.	15AP756-CR	State v. Frederick S. Smith
10:45 a.m.	15AP1530	The Manitowoc Company, Inc. v. John M. Lanning
1:30 p.m.	15AP2041-CR	State v. Jose Alberto Reyes Fuerte

TUESDAY, SEPTEMBER 12, 2017 (MADISON)

9:45 a.m.	14AP2420	Estate of Stanley G. Miller v. Diane Storey
10:45 a.m.	15AP1904	Mark Halbman v. Mitchell J. Barrock
1:30 p.m.	12AP2377/	Debra K. Sands v. John R. Menard, Jr.
	15AP870	Debra K. Sands v. John R. Menard, Jr.

FRIDAY, SEPTEMBER 15, 2017 (MADISON)

9:45 a.m.	16AP1980-W	Dept. of Natural Resources v. Wis. Court of Appeals, District IV
10:45 a.m.	16AP21	Metropolitan Associates v. City of Milwaukee

WEDNESDAY, SEPTEMBER 20, 2017 (JEFFERSON)

9:30 a.m.	15AP1610-CR	State v. Ginger M. Breitzman
11:00 a.m.	15AP583	Jerome Movrich v. David J. Lobermeier
2:00 p.m.	16AP173-CR	State v. Brian Grandberry

Note: The Supreme Court calendar may change between the time you receive these synopses and when a particular case is 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, (608) 271-4321 or hmcclung@wisctv.com. If your news organization is interested in camera coverage of the Sept. 20 oral argument in Jefferson, contact media coordinator Tom Schultz at the Watertown Daily Times, (920) 261-4949 or toms@wdtimes.com.
Summaries provided are not complete analyses of the issues presented.

Wisconsin Supreme Court
9:45 a.m.
Tuesday, Sept. 5, 2017

2015A756-CR State v. Smith

Supreme Court case type: Petition for Review
Court of Appeals: District IV
Circuit Court: Dane County, Judge Stephen E. Ehlke, reversed and cause remanded with directions
Long caption: State of Wisconsin, Plaintiff-Respondent-Petitioner, v. Frederick S. Smith, Defendant-Appellant

Issues presented:

- When a police officer performs a lawful traffic stop, is it reasonable for the officer to make contact with the driver to ask for the driver's name and identification and to explain the basis for the stop, even if the reasonable suspicion supporting the stop has dispelled by the time the officer does so?
- When an officer is unable to request a driver's name and identification and explain the basis for a traffic stop because, as in this case, the driver indicates that the driver's side window and door are both broken, is the officer then permitted to open the passenger's side door to achieve that goal?

Some background: This case arose when an officer pulled over the car Frederick S. Smith was driving because a check showed that the driver's license of the vehicle's owner was suspended. However, on approaching the vehicle, the officer noted that Smith was a man; the vehicle's owner was a woman.

Although the officer realized it could not be the owner driving, the officer continued to approach the car and asked the driver to open the window, and then the door. The driver, communicating through the vehicle window, explained that they were broken and didn't open.

The officer then went around to the passenger side and, according to a circuit court finding, opened that door. The officer then noticed that the driver appeared intoxicated.

Smith was charged with his seventh drunk driving offense and operating a motor vehicle while revoked. Smith filed a motion to suppress evidence, including the arresting officer's observations of him during the traffic stop, arguing that the officer improperly failed to terminate the stop immediately when he saw that the driver was not the registered owner.

The circuit court disagreed, leading to a conviction on one count of operating while intoxicated. The Court of Appeals reversed and vacated the conviction.

On appeal, Smith presented several arguments and cited case law in support of his claim that the officer improperly extended the duration of the seizure after reasonable suspicion dissipated.

The state asserted on appeal that the essential inquiry is whether the officer's actions were "reasonable" under all the facts and circumstances present, citing State v. Williams**,** 2002 WI App 306, ¶12, 258 Wis. 2d 395, 655 N.W.2d 462 (citation omitted). In Williams, the Court of Appeals held that when an officer has reasonable suspicion to make a traffic stop, the officer is permitted to ask for the driver's name and identification even if the officer realizes that the driver is not the party that the officer is looking for.

The Court of Appeals "assumed without deciding" that the officer in this case was permitted to make contact with Smith notwithstanding the officer's realization that he was not the owner.

Smith questions the state's reliance on Williams, noting that it was based on State v. Ellenbecker, 159 Wis. 2d 91, 464 N.W.2d 427 (1990). Smith contends that "Ellenbecker and similar cases have been criticized as 'questionable authority,'" citing Wayne R. La Fave, Search and Seizure: A treatise on the Fourth Amendment § 9.3(c), at 511 n.162 (5th ed. 2012). Indeed, Smith says, Ellenbecker and Williams should be overruled, because under Delaware v. Prouse, 440 U.S. 648 (1979), suspicionless detentions for license checks are in fact unconstitutional.

Smith next argued on appeal that the officer was also not permitted to go around to the other side of the vehicle and open the passenger door without consent or without probable cause. On direct appeal, Smith argued that the investigative methods used during a seizure must be, quoting case law, "the least intrusive means reasonably available to verify or dispel the officer's suspicion." Florida v. Royer, 460 U.S. 491, 500 (1983). Here, Smith argues that opening the passenger door did not comply with that requirement.

The state now says the officer was permitted to open the door to speak with Smith and ask for his license because officers have the legal authority to order occupants out of a validly-detained vehicle under Pennsylvania v. Mimms, 434 U.S. 106 (1977), and because case law from other jurisdictions indicates that an officer may open the door to achieve that purpose.

A decision by the Supreme Court is expected to clarify what constitutes reasonable action of an officer in extending the duration of a seizure after reasonable suspicion has dissipated.

Wisconsin Supreme Court
10:45 a.m.
Tuesday, September 5, 2017

2015AP1530 The Manitowoc Company, Inc. v. Lanning

Supreme Court case type: Petition for Review
Court of Appeals: District II
Circuit Court: Manitowoc County, Judge Gary L. Bendix, reversed and remanded with directions
Long caption: The Manitowoc Company, Inc., Plaintiff-Respondent-Petitioner, v. John M. Lanning, Defendant-Appellant-Respondent

Issues presented: This case examines whether Wis. Stat. § 103.465, relating to restrictive covenants, governs non-solicitation of employees (NSE) clauses, and if so, whether the particular NSE clause at issue here is unenforceable.

Some background: The Manitowoc Company is a manufacturer with a food service equipment division and a crane division. The defendant, John Lanning, began his career with Manitowoc in 1985, in the crane division, where he worked as an engineer for over 25 years. Lanning was a senior-level employee who was held in high esteem. He had significant knowledge of Manitowoc's products and intellectual property, and of Manitowoc's employee base.

In 2008, Lanning signed a confidentiality/non-solicitation agreement that stated, in part, that he would not either directly or indirectly solicit, induce, or encourage any employee(s) to terminate their employment with Manitowoc or to accept employment with any competitor, supplier or customer of Manitowoc.

In 2010, Lanning left Manitowoc and accepted employment with a foreign competitor in the crane business, SANY. Manitowoc asserts that Lanning engaged in a number of recruiting actions over the next two years that violated the NSE provision and led to three Manitowoc employees leaving to work for SANY.

Manitowoc filed suit against Lanning in March 2011. Lanning filed an unsuccessful motion to dismiss for failure to state a claim. In April 2013, the parties filed cross-motions for summary judgment.

In September 2013, after extensive briefing, the circuit court granted Manitowoc's motion for summary judgment and denied Lanning's motion. The court entered judgment in favor of Manitowoc on the merits on Oct. 14, 2013.

In July 2014, the parties tried the issue of damages. In December 2014, the court awarded Manitowoc $97,844.78. Subsequently, the court awarded Manitowoc $1,000,000 in attorneys' fees and $37,246.82 in costs. Lanning appealed and the Court of Appeals reversed.

As stated by the Court of Appeals, if the text of the NSE provision restrains trade impermissibly, it is unenforceable even if the acts complained of in this action could have been proscribed by a more narrowly written and permissible restrictive covenant.

The Court of Appeals concluded that the NSE provision "must comply with Wis. Stat. § 103.465," citing Tatge v. Chambers & Owen, Inc., 219 Wis. 2d 99, 112, 579 N.W.2d 217 (1998) (holding that a nondisclosure provision is subject to § 103.465) for the proposition that it

"would be an exercise in semantics to overlook []§ 103.465 merely because … the agreement is not labeled a 'covenant not to compete.'"

Manitowoc maintains that the statute only applies to traditional non-compete provisions envisioned when the statute was approved. Manitowoc emphasizes that its provision is in "stark contrast" to an NSE provision, that "merely restricts an individual from enticing others to leave his/her former company, which plainly does not fall within the legislature's intended purview for § 103.465."

Lanning says that numerous types of restrictive covenants have been interpreted and enforced (or not enforced) by Wisconsin courts in accordance with § 103.465 and that many of these are not "traditional" non-compete restrictions.

Lanning argues that Wisconsin courts have broadly interpreted § 103.465 to apply to <u>any</u> restrictive covenant that seeks to restrain competition or trade.

Manitowoc says that the intent of the NSE clause is merely to prevent a key employee like Lanning from raiding Manitowoc employees and siphoning them to a competitor, supplier, or customer where he is capable of utilizing insider knowledge not akin to that which any other employee at the competitor/supplier/customer would have regarding Manitowoc's talent base.

The Supreme Court is expected to decide whether NSE provisions are subject to § 103.465 and what analysis applies to determine enforceability.

Wisconsin Supreme Court
1:30 p.m.
Tuesday, September 5, 2017

2015AP2041-CR State v. Reyes Fuerte

Supreme Court case type: Petition for Review
Court of Appeals: IV
Circuit Court: Columbia County, Judge Alan J. White, reversed
Long caption: State of Wisconsin, Plaintiff-Respondent, v. Jose Alberto Reyes Fuerte, Defendant-Appellant-Petitioner

Issues presented: This case examines notification requirements about the potential immigration consequences faced by defendants who enter plea agreements. The Supreme Court reviews this case in light of Wis. Stat. § 971.08(1) (c) and decisions in Padilla v. Kentucky, 559 U.S. 356 (2010) and State v. Douangmala, 2002 WI 62, 253 Wis. 2d 173, 646 N.W.2d 1.

Some background: In February 2014, Jose Alberto Reyes Fuerte was charged with attempting to flee or elude an officer (a felony) and to operating a motor vehicle with a controlled substance in his blood, second offense (a misdemeanor). He pled guilty.

After his conviction and sentencing, Reyes Fuerte filed a postconviction motion to withdraw his pleas, relying on Wis. Stat. § 971.08 and State v. Douangmala, 2002 WI 62, 253 Wis. 2d 173, 646 N.W.2d 1.

Wisconsin Stat. § 971.08(1)(c) provides specific language that circuit courts are required to use when advising defendants of the deportation and other immigration consequences of a guilty or no contest plea before accepting a plea. If a court fails to advise a defendant as required by sub. (1)(c) and a defendant later shows that the plea is likely to result in the defendant's deportation, exclusion from admission to this country or denial of naturalization, the court on the defendant's motion shall vacate any applicable judgment against the defendant and permit the defendant to withdraw the plea and enter another plea. Wis. Stat. § 971.08(2).

Reyes Fuerte contends that the circuit court failed to sufficiently comply with both § 971.08 and this court's interpretation of that statute in Douangmala.

Douangmala had the effect of lifting a harmless error rule that prohibited a defendant who was aware of the potential immigration consequences of a plea from being able to withdraw the plea just because the circuit court failed to give a statutory immigration warning that complied with Wis. Stat. § 971.08(1)(c).

The circuit court did not permit Reyes Fuerte to present evidence regarding the likelihood that his pleas would result in deportation.

Reyes Fuerte appealed. The Court of Appeals agreed that the circuit court did not comply with the statute, stating that the circuit court "deviated in significant ways from that statutorily specified language."

Wisconsin Supreme Court
9:45 a.m.
Tuesday, September 12, 2017

2014AP2420 Estate of Stanley G. Miller v. Storey

Supreme Court case type: Petition for Review
Court of Appeals: District III
Circuit Court: Marathon County, Judge Jill N. Falstad, reversed and cause remanded with directions
Long caption: Estate of Stanley G. Miller c/o Genevieve Miller, Personal Representative, Plaintiff-Respondent-Petitioner, v. Diane Storey, Defendant-Appellant

Issues presented:

- Whether statutory claims are considered tort claims for purposes of Wis. Stat. § 799.01(1).
- Whether Wis. Stat. § 895.446(3) allows for recovery of attorney's fees to a prevailing plaintiff.
- Whether the Court of Appeals abused its discretion by taking up arguments improperly placed before the Court of Appeals in Diane Storey's appellate brief.
- Whether the Court of Appeals abused its discretion by denying the Estate of Stanley G. Miller's motion for reconsideration.

Some background: The Estate of Stanley G. Miller filed a small claims action against Diane Storey, seeking money damages of $10,000. The estate alleged that Storey misappropriated funds through checking account transactions. After Storey prevailed at a small claims trial to the court commissioner, the estate filed a demand for a de novo jury trial.

During the ensuing two-day jury trial, testimony showed that Stanley Miller was 86-years-old in May 2010 when Storey, his niece, began serving as his caretaker. Storey cared for Stanley Miller through May 2011. During that time, Storey helped Stanley by doing his shopping, cooking meals, doing laundry, taking him to appointments, getting his mail, and other necessary tasks. Storey also helped Stanley with his checkbook and paying bills. At Stanley's request, Storey wrote out checks for him, which he then signed. While Storey wrote check entries in Stanley's checkbook ledger, she never balanced his checkbook.

After Stanely died, his estate determined that funds from Stanley's bank accounts had been withdrawn in large amounts over the course of the year Storey stayed with Stanley. Storey's property taxes in Horicon, Wisconsin, were paid from Stanley's checking account, and personal checks were made payable to "Cash," among other questionable transactions.

After trial and post-trial motions, the circuit court awarded the estate restitution of $10,000 in actual damages, $20,000 in exemplary damages, $20,000 in attorney fees, and over $1,600 in double statutory costs.

The Court of Appeals reversed, ruling in pertinent part as follows:

- The circuit court judge improperly awarded exemplary damages without a jury determination.

- The circuit court should have limited the estate's judgment for compensatory damages to $5,000, rather than the $10,000 awarded, because the estate asserted a tort claim (misappropriation of funds), and tort claims seeking more than $5,000 exceed the small claims limit.
- The circuit court should not have awarded double statutory costs because the estate was only entitled to $5,000 in compensable damages in small claims court, which is less than the $7,500 statutory settlement offer made by the estate.
- The circuit court should not have awarded attorney fees because the applicable statute, Wis. Stat. § 895.446 ("Property damage or loss caused by crime") does not allow attorney fees.
- The circuit court should not have ordered that the judgment be deemed the same as restitution because there was no basis for it to be labelled restitution.

In its petition for review, the estate argues, among other points, that § 895.446, like § 895.80 before it, is intended to allow victims of criminal conduct to act as their own "private attorney generals" in seeking vindication and restitution for their damages, including their own attorneys fees. The estate says § 895.446 permits an attorney fee award, given that the plaintiff under this statute "has been tasked with seeking justice after the intentional commission of a crime."

The estate says the Court of Appeals erred in deeming Storey's argument that the estate's civil theft claim under § 895.446(3)(c) an action in tort. The estate says it was pursuing a statutory claim, not a tort claim, and Storey's arguments to the contrary were so unsupported as to justify being ignored, rather than being deemed admitted by the Court of Appeals.

Storey contends, among other things, that the Court of Appeals correctly determined that § 895.446(3)(b) does not permit an award of attorney fees by applying the well-established rules of statutory construction. Storey says subsection (3)(b) does not specifically state that attorney fees are available, whereas subsection (3m)(b) does specifically state that attorney fees may be awarded under that particular subsection; that distinction has significant meaning under the rules of statutory construction, Storey says.

Wisconsin Supreme Court
10:45 a.m.
Tuesday, September 12, 2017

2015AP1904 Halbman v. Barrock

Supreme Court case type: Petition for Review
Court of Appeals: District I [Dist. II judges]
Circuit Court: Milwaukee County, Judge Dennis P. Moroney, affirmed
Long caption: Mark Halbman, Plaintiff-Appellant-Petitioner, v. Mitchell J. Barrock D/B/A Barrock & Barrock, Defendant-Respondent

Issues presented: This case examines the burden of proof a plaintiff must meet when establishing damages sustained as a result of an attorney's malpractice. The Supreme Court reviews:

- Whether the Court of Appeals erred in affirming the circuit court's grant of the defendant's motion to dismiss on the basis that the plaintiff had failed to establish a prima facie case as to damages?
- Whether the circuit court erred in ruling that the value of the plaintiff's underlying case was conclusively established at the second trial and therefore, precluding the plaintiff from introducing evidence of the first jury verdict of $182,250.00?

Some background: In August of 2000, Mark Halbman retained Atty. Mitchell J. Barrock to represent him in a lawsuit related to a motor vehicle accident. A jury trial held in 2004 resulted in a verdict in Halbman's favor in the amount of $182,250 plus court costs. Pursuant to a post-verdict motion, the circuit court declared a mistrial and ordered a new trial, due in part to improper comments Barrock had made during closing argument. Halbman appealed. The Court of Appeals affirmed.

A new trial was held in 2006. According to Halbman's testimony at the legal malpractice trial that underlies this action, the jury in the second trial returned a verdict in his favor in the amount of $36,000, which ultimately resulted in a check for $29,653.14 made out to Halbman and Barrock. The check was sent to Barrock from the insurer of the defendant in the motor vehicle case. Halbman testified in the legal malpractice suit that Barrock deposited the check without Halbman's approval and that Halbman did not receive any money from the verdict.

In 2011, Halbman filed a legal malpractice action against Barrock, based on the improper comments Barrock had made during closing arguments in the first jury trial. At the trial in the legal malpractice suit, Halbman presented evidence that included his retainer contract with Barrock, which provided, in part:

"… [t]he Attorneys' fee shall be a sum equal to . . . Thirty three and one third percent of the total valued amount recovered . . . [and] the Attorneys shall be entitled to recover their costs and expenses, and any judgment costs, regardless of the outcome of the legal action as a cost to be paid prior to the payment of any other costs or disbursement."

After Halbman rested, Barrock moved for dismissal of the suit on the basis that Halbman had failed to present a prima facie case as to damages. The circuit court granted the motion, saying, "I never saw any figures up here about" costs and expenses incurred, "I can't guess at that. It's your duty to prove that; that's your burden."

The Court of Appeals affirmed, finding that a circuit court is "clearly wrong" when it grants a motion to dismiss despite the existence of any credible evidence to support a claim. It also noted that a circuit court must consider the evidence in the light most favorable to the plaintiff. See Haase v. Badger Mining Corp., 2004 WI 97, ¶15, 274 Wis. 2d 143, 682 N.W.2d 389.

The Court of Appeals said Halbman failed to account for the "costs and expenses" that were required to be paid pursuant to the retainer agreement and he cited to no trial evidence as to the amount of costs and expenses the jury would have to deduct under the retainer agreement in order to render a lawful verdict.

Wisconsin Supreme Court
1:30 p.m.
Tuesday, Sept. 12, 2017

2012AP2377 /2015AP870 Debra K. Sands v. John R. Menard Jr.

Supreme Court case type: Petition for Review/Petition for Cross Review
Court of Appeals: District III
Circuit Court: Eau Claire County, Judge Paul J. Lenz, affirmed
Long caption: Debra K. Sands, Plaintiff-Appellant-Petitioner, v. John R. Menard, Jr., Menard, Inc., Menard Thoroughbreds, Inc., Webster Hart as Trustee of the John R. Menard, Jr. 2002 Trust and Related Trusts, Angela L. Bowe as Trustee of the John R. Menard, Jr. 2002 Trust and Related Trusts and Alphons Pitterle as Trustee of the John R. Menard, Jr. 2002 Trust and Related Trusts, Defendants-Respondents-Respondents
Midwest Manufacturing Co., Wood Ecology Inc., Countertops Inc., Team Menard Inc., Menard Engine Group, Menard Competition Technologies LTD, MC Technologies Inc., Menard Engineering LTD, UltraMotive LTD and Merchant Capital LLC, Defendants

Issue presented: This somewhat complicated case examines how Supreme Court rules on the professional conduct of attorneys, specifically SCR 20:1.7(b) and SCR 20:1.8(a), may or may not be invoked in civil actions involving attorneys.

The Supreme Court reviews whether a lawyer's noncompliance with SCR 20:1.8(a) may be used as a legal basis for denying the lawyer's civil claim for unjust enrichment arising out of a joint enterprise created during a romantic cohabitation, and whether a lawyer, who may have violated SCR 20:1.7(b) by failing to disclose conflicts of interest to a client, may invoke the discovery rule under the applicable statute of limitations to bar a client's claim for breach of fiduciary duty.

Some background: The original defendants include John R. Menard, Jr., a prominent Wisconsin business owner, and Menard, Inc., the large chain of lumber and home improvement stores that is primarily owned by Menard.[1] The plaintiff is Debra K. Sands, who is Menard's former fiancé. Sands graduated from a Minnesota law school in 1993 and was licensed to practice law in that state. She was never licensed to practice law in Wisconsin.

Menard and Sands began dating in November 1997, about 40 years after Menard established his business in Eau Claire. The couple was engaged in 1998 and remained so until April 2006, when they broke up.

It is not disputed that during their relationship Sands performed a substantial number of roles both for Menard personally and for his various companies, including Menard, Inc. She was allegedly involved in Menard, Inc.'s product offerings, marketing and sales activities, and governmental relations. She states that she was also involved in helping Menard to find new

[1] In this summary, when John Menard, Jr., Menard, Inc., and Menard Thoroughbreds, Inc. are referred to collectively as defendants, they are the "Menard Defendants." John Menard, Jr. is referred to individually as "Menard;" Menard, Inc. alone is referred to by that name; and the trustees of a 2002 trust established by Menard are referred to collectively as the "Menard Trustees."

investment opportunities and to acquire and manage several new companies. She also oversaw work at his residences, assisted with his health care, and made social appearances.

Sands claims Menard repeatedly promised her during the relationship that in return for her work on his behalf and that of his companies, he would give her an ownership interest in his various business ventures to which she contributed. Menard denies ever making any such promises.

Sands filed her complaint against the Menard Defendants on Nov. 3, 2008. She filed a second amended complaint in May 2011, in which she alleged that, unbeknownst to her, Menard had transferred the vast majority of his non-voting stock in Menard, Inc. to the John R. Menard, Jr. 2002 Trust and added the trustees as defendants.

Sands' amended complaint made claims against Menard personally for unjust enrichment, breach of contract, and promissory estoppel (quasi-contract). She also made unjust enrichment claims against the other Menard Defendants and the Menard Trustees. Sands' claims against these other defendants sought "judgment in an amount equal to the fair and reasonable value of the substantial benefits" she had provided to them.

Menard Defendants and the Menard Trustees filed a motion to dismiss and an answer to the second-amended complaint. In addition, Menard, Inc. filed a counterclaim against Sands for breach of fiduciary duty in connection with a transaction that created a private equity fund managed by a long-time business associate of Menard and funded by one of Menard's business entities. Menard, Inc.'s counterclaim alleged that Sands had failed to disclose, among other things, that the fund manager had secretly paid her a "bonus" and had hired her as general counsel for the fund while she was allegedly retained as a lawyer to represent the interests of Menard, Inc.

The Menard Defendants sought partial summary judgment and dismissal of "all of [Sands'] claims by which she [sought] a portion of [Menard's] net worth or assets, ownership interest in the Menard companies, or any part of the increase in value of the Menard companies."

The motion alleged that Sands was barred from obtaining any such portion of Menard's assets or ownership interests because she had failed to comply with Supreme Court Rule 20:1.8(a). That rule addresses potential conflicts of interest and makes it an ethical violation for a lawyer to enter into a business transaction with a client, or to obtain an ownership or pecuniary interest that is adverse to a client, unless a number of conditions are satisfied.

The circuit court found that Rule 1.8(a) prohibited Sands, because she was a lawyer, from obtaining any part of Menard's assets because she did not satisfy the conditions of SCR 20:1.8(a). However, the court indicated that the rule did not apply to any transaction, where the attorney and client had a pre-existing romantic relationship prior to the beginning of a lawyer-client relationship. The circuit court concluded that Sands could not dispute that she had acted as legal counsel for Menard or Menard, Inc. in connection with a Department of Natural Resources (DNR) investigation prior to the start of her romantic relationship with Menard. Sands alleged that she had not acted as a lawyer in the DNR investigation, that the payment by Menard, Inc. was intended merely to pay off her outstanding student loan, and that Menard had instructed her to send a bill for legal services in the amount of the loan to Menard, Inc. so that it could write off the payment as a business expense. The circuit court concluded that Sands' allegations in this regard gave her unclean hands because she would have participated in a scheme designed to hide Menard, Inc. income from taxation.

Because the court viewed Sands as "seek[ing] relief from the rule prohibiting lawyers from obtaining a client's assets without a written agreement," the circuit court refused to allow

her to avoid the prohibition of Rule 1.8(a). It rejected all of Sands' claims, whether legal or equitable, to the extent they sought a portion of the assets of Menard or his companies. It also granted summary judgment to the Menard Trustees, reasoning that if Sands could not prevail against the principal (i.e., Menard), then she could not obtain any recovery against the trust or its trustees.

However, the circuit court also granted summary judgment to Sands on Menard, Inc.'s counterclaim for breach of fiduciary duty. It ruled that the claim was barred by the applicable two-year statute of limitations because Menard, Inc. had sufficient grounds to investigate a breach of fiduciary duty claim more than two years before Sands had filed her complaint.

Ultimately, the circuit court ruled that neither side was a prevailing party for purposes of obtaining an award of fees and costs from the other side.

Sands appealed the dismissal of her claims, and Menard, Inc. appealed the dismissal of its counterclaim. The Court of Appeals affirmed the circuit court's orders in their entirety.

The Court of Appeals rejected Sands' argument that her alleged violation of Rule 1.8(a) cannot be a categorical bar to recovery against Menard and the corporations he owns on her claim for unjust enrichment under Watts v. Watts, 137 Wis. 2d 506, 405 N.W.2d 303 (Wis. 1987). Sands relied primarily on both the preamble to the Rules of Professional Conduct for Attorneys and this court's decision in Foley-Ciccantelli v. Bishop's Grove Condominium Assn., 2011 WI 36, ¶2, 333 Wis. 2d 402, 797 N.W.2d 789, where the court stated that violations of the Code of Professional Conduct are determined only by means of disciplinary action.

On the other hand, the Court of Appeals rejected Menard, Inc.'s argument that Sands' failure to comply with her ethical duty to disclose a conflict of interest relieved it of its duty to exercise reasonable diligence in discovering her breach of fiduciary duty.

A decision by the Supreme Court could determine how the Rules of Professional Conduct for Attorneys may or may not be used as a basis for making or defending claims in civil litigation in which an attorney is a party.

Wisconsin Supreme Court
9:45 a.m.
Friday, September 15, 2017

2016AP1980-W Wis. DNR v. Wis. Court of Appeals (District IV)

Supreme Court case type: Petition for Supervisory Writ
Court of Appeals: District IV
Circuit Court: Dane County, Judge John W. Markson
Long caption: State of Wisconsin ex rel. Department of Natural Resources, Petitioner, v. Wisconsin Court of Appeals, District IV, Clean Wisconsin, Inc., Lynda A. Cochart, Amy Cochart, Roger D. DeJardin, Sandra Winnemueller, Chad Cochart and Kinnard Farms, Inc., Respondents.

Issues presented: This is a dispute about the process for selecting an appellate venue in the Wisconsin court system. The Supreme Court examines the interplay of three statutes: Wis. Stat. §§ 227.53 (pertaining to review of an administrative decision), 801.50(3) (venue in civil actions), and 752.21 (venue in Court of Appeals).

Some background: In 2011, the Wisconsin Legislature amended two venue statutes addressing venue in the Court of Appeals. Changes resulting from 2011 Wisconsin Act 61, among others, include:

> **Wis. Stat. 752.21**
> (1) Except as provided in sub. (2), a judgment or order appealed to the Court of Appeals shall be heard in the Court of Appeals district which contains the court from which the judgment or order is appealed.
> (2) A judgment or order appealed from an action venued in a county designated by the plaintiff to the action as provided under s. 801.50 (3) (a) shall be heard in a Court of Appeals district selected by the appellant but the Court of Appeals district may not be the Court of Appeals district that contains the court from which the judgment or order is appealed.

The underlying case involved here began taking shape in March 2012, when Kinnard Farms, Inc., a dairy farm in Kewaunee County, asked the state Department of Natural Resources (DNR) to reissue its Pollutant Discharge Elimination System permit. The DNR granted the request. Five individuals (the Cochart petitioners) then challenged the DNR's decision. An Administrative Law Judge (ALJ) concluded that the DNR could reissue Kinnard Farm's permit only if two other conditions were included in the permit related to groundwater monitoring and maximum animal units.

Kinnard Farms petitioned the DNR to review the ALJ's decision. Initially, the DNR declined. Then, after consultation with the Department of Justice, the DNR reconsidered its denial and determined that the two permit conditions added by the ALJ were unlawful under 2011 Wisconsin Act 21.

On Oct. 12, 2015, Clean Wisconsin and the Cochart petitioners separately petitioned for judicial review of the DNR's decision under Wis. Stat. § 227.52. Clean Wisconsin filed in Dane County Circuit Court. A few hours later, the Cochart petitioners filed in Kewaunee County Circuit Court. All parties then submitted briefs in Dane County on the question of venue.

Both Clean Wisconsin and the Cochart petitioners argued that Dane County was the appropriate venue if the cases were to be consolidated. The Dane County Circuit Court consolidated the cases and placed the case on its docket.

On July 14, 2016, the Dane County Circuit Court ruled in favor of Clean Wisconsin and the Cochart petitioners on the merits, concluding that the DNR was required to enforce the ALJ's two extra conditions on Kinnard Farms' reissued permit.

The DNR appealed. In its notice of appeal, it selected the Court of Appeals for District II, headquartered in Waukesha, as the appellate venue, citing § 752.21(2).

The Court of Appeals for District IV, headquartered in Madison, issued a brief order on Aug. 31, 2016, ruling that § 752.21(2) did not apply. The District IV court removed the case from District II's docket, and placed it on its own docket. The DNR's motion for reconsideration was denied Sept. 29, 2016.

District IV held that Clean Wisconsin/Cocharts had not "designated" the venue under Wis. Stat. § 801.50(3)(a) because venue in this case was governed by Wis. Stat. § 227.53(l)(a)3, which restricts venue in an appeal of an ALJ's decision to a petitioner's county of residence.

The Court of Appeals interpreted § 801.50(3)(a) as applying only when "venue [is] designated unilaterally by the plaintiff."

> **Wis. Stat. 801.50(3)** (Venue in civil actions or special proceedings).
> 801.50(3)(a)(a) Except as provided in pars. (b) and (c), all actions in which the sole defendant is the state, any state board or commission, or any state officer, employee, or agent in an official capacity shall be venued in the county designated by the plaintiff unless another venue is specifically authorized by law.

The District IV Court of Appeals ruled that since "venue was not designated by the plaintiffs under s. 801.50(3)(a) . . . the provision of Wis. Stat. 752.21(2) that allows an appellant to select an appellate district does not apply."

The DNR filed a petition for supervisory writ on Oct. 13, 2016, asking the Supreme Court to decide the question of venue before the case proceeds on merit. The DNR says Clean Wisconsin designated Dane County as the venue under Subsection 801.50(3)(a), and that as the appellant, it has the right to "select" the Court of Appeals under § 752.21(2).

The District IV Court of Appeals says Clean Wisconsin and the Cochart petitioners had no "choice" of venue – they were required to file in Dane County and Kewaunee County, respectively, because § 227.53(l)(a)3 "specifically authorized" venue only in petitioner's county of residence.

District IV says that in 2013, District II denied a state agency's attempted venue selection under § 752.21(2) in another Chapter 227 judicial review case. Lamar Cent. Outdoor, LLC v. State of Wisconsin, No. 2013AP1188 (Wis. App., Dist. II, June 20, 2013).

The Court of Appeals says that under the DNR's view, any appellant, including the state, is entitled to select a different appellate district in essentially *every* case, unless the action is ultimately venued somewhere different from where a complaint was filed.

The DNR maintains that a Subsection 801.50(3)(a) "designation" occurs whenever a plaintiff, in a case in which the state is the sole defendant, indicates the venue in its pleadings, regardless of whether any venue limitations outside of Subsection 801.50(3)(a) also apply.
A decision by the Supreme Court would provide the parties, bench and bar with an opinion as to the applicability of § 752.21(2) to the DNR's appeal.

Wisconsin Supreme Court
10:45 a.m.
Friday, September 15, 2017

2016AP21 Metropolitan Associates v. City of Milwaukee

Supreme Court case type: Petition for Review
Court of Appeals: District I (District IV judges)
Circuit Court: Milwaukee County, Judge Jeffrey A. Conen and Judge Dennis P. Moroney, affirmed
Long caption: Metropolitan Associates, plaintiff-appellant-petitioner, v. City of Milwaukee, defendant-respondent

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

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

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

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

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

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

The circuit court upheld the city's assessment process, and the Court of Appeals affirmed. The Court of Appeals observed that Metropolitan's argument "omits two critical directions" in the statutory language – namely, that assessors are to value property "in the

manner specified in the Wisconsin property assessment manual" and they are to do so based on "the best information that the assessor can practicably obtain." See § 70.32(1).

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

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

Metropolitan maintains that an assessor is *required* to utilize actual income and expenses when valuing an income-producing property, as the best information available pursuant to § 70.32(1) and case law. Metropolitan then describes the city's "failure" to utilize this information as "intentional" and claims that this is a direct violation of § 70.32(1).

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

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

Wisconsin Supreme Court
9:30 a.m., Jefferson County Courthouse
(311 S. Center Ave., Jefferson, Wisconsin)
Wednesday, September 20, 2017

2015AP1610-CR State v. Breitzman

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

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

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

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

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

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

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

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

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

Wisconsin Supreme Court
11 a.m., Jefferson County Courthouse
(311 S. Center Ave., Jefferson, Wisconsin)
Wednesday, September 20, 2017

2015AP583 Movrich v. Lobermeier

Supreme Court case type: Petition for Review
Court of Appeals: District III (District I judges)
Circuit Court: Price County, Judge Patrick J. Madden, affirmed
Long caption: Jerome Movrich and Gail Movrich, Plaintiffs-Respondents, v. David J. Lobermeier and Diane Lobermeier, Defendants-Appellants-Petitioners

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

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

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

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

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

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

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

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

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

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

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

Wisconsin Supreme Court
2 p.m., Jefferson County Courthouse
(311 S. Center Ave., Jefferson, Wisconsin)
Wednesday, September 20, 2017

2016AP173-CR State v. Grandberry

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

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

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

Some background: Brian Grandberry was stopped by police while driving a car in Milwaukee on Nov. 9, 2014. One of the officers asked Grandberry if he had any firearms in the car. Grandberry replied that he had a gun in the glove compartment. The officer asked if Grandberry had a valid CCW permit. Grandberry said he did. The officers checked their database and discovered Grandberry did not in fact have a valid permit. An officer opened the glove compartment and found a loaded .45-caliber semi-automatic pistol. While being conveyed to the police station, Grandberry said he owned the gun and that he had taken a CCW class but never actually got a permit. Police also determined that Grandberry was not a peace officer.

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

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

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

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

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

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

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

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

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

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

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

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