

WISCONSIN SUPREME COURT CALENDAR AND CASE SYNOPSES OCTOBER 2021

NOTE: Cases scheduled for Oct. 15, 2021 will be heard at the Ozaukee County Administration Center (old courthouse), 121 West Main Street, Port Washington. Cases listed for Madison will be heard in the Supreme Court Hearing Room, 231 East, State Capitol. Synopses for Oct. 1 cases are attached. Synopses for other cases will be provided at a later date. The cases originated in the following counties:

Ashland
Dane
Milwaukee
Oconto
Oneida
Racine
Sheboygan
Waukesha

FRIDAY, OCTOBER 1, 2021 [MADISON]

9:45 a.m. 19AP299 / 534 Friends of the Black River Forest v. DNR
10:45 a.m. 19AP629 Jama I. Jama v. Jason C. Gonzalez

MONDAY, OCTOBER 4, 2021 [MADISON]

9:45 a.m. 19AP2205 Loren Imhoff Homebuilder, Inc. v. Lisa Taylor
10:45 a.m. 19AP1206 Daniel J. Hennessey, Jr. v. Wells Fargo Bank, N.A.

FRIDAY, OCTOBER 15, 2021 [PORT WASHINGTON]

9:45 a.m. 20AP1058-CR State v. Teresa L. Clark
11:00 a.m. 19AP1671 Cree, Inc. v. LIRC

MONDAY, OCTOBER 25, 2021 [MADISON]

9:45 a.m. 20AP520 Friendly Village Nursing and Rehab, LLC v. DWD & LIRC
10:45 a.m. 20AP878-CR State v. Avan Rondell Nimmer

WEDNESDAY, OCTOBER 27, 2021 [MADISON]

9:45 a.m. 19AP1317 State v. Daniel J. Van Linn
10:45 a.m. 19AP1479 City of Waukesha v. City of Waukesha Bd. of Review

Note: The Supreme Court calendar may change between the time you receive it and when a 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 type of camera coverage of Supreme Court oral argument, you must contact media coordinator Stephanie Fryer at WISC-TV, (608) 271-4321. The synopses provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT

October 1, 2021

9:45 a.m.

2019AP299, 2019AP534 Friends of Black River Forest v. Dept. of Natural Resources

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee) that consolidated two appeals and then reversed a decision from the Sheboygan County circuit court, the Honorable L. Edward Stengel presiding, that found the petitioners lacked standing and also reversed a decision of the Dane County circuit court, the Honorable Stephen E. Ehlke presiding, that dismissed a certiorari petition.

Kohler Company announced a plan to build a golf course and related facilities on property north of Kohler-Andrae State Park. Kohler approached the Department of Natural Resources (the Department) about a land exchange. The Department prepared a recommendation detailing a proposed land exchange in which Kohler would deed, to the Department, title to 9.5 acres located to the west of the Park in exchange for title to 4.59 acres of land inside the Park boundary, along with an easement over 1.88 acres of Park property that were "no longer needed for the State's use for conservation purposes."

The Friends of Black River Forest filed a Wis. Stat. ch. 227 petition in Sheboygan County circuit court, seeking judicial review of the land exchange, as persons who utilize the state park. The proceedings were stayed. Kohler then successfully moved to intervene and moved to lift the stay and dismiss the petition arguing that the Friends lacked standing, that the land exchange was not a "decision" subject to judicial review under ch. 227, and that the land exchange was a ministerial act that is unreviewable under ch. 227.

The Department and the Natural Resources Board filed a brief in support of Kohler's motion to dismiss standing, arguing that the Friends failed to allege a protected interest and failed to allege that any injuries they had were recognized or protected by law. The circuit court dismissed the amended ch. 227 petition solely on standing grounds.

Meanwhile, the Friends had also filed a common law certiorari action in Dane County circuit court, challenging the land swap; that claim was dismissed with the court stating, "Sheboygan County is the proper place for this case to proceed."

The Friends appealed both decisions and the cases were consolidated and venued in District I Court of Appeals. The Court of Appeals reversed both decisions. As relevant here, the court determined that the Friends alleged sufficient facts to satisfy the standing inquiry.

The Court of Appeals observed that the standing inquiry here is two-fold. "The first step under the Wisconsin rule is to ascertain whether the decision of the agency directly causes injury to the interest of the petitioner. The second step is to determine whether the interest asserted is recognized by law."

The Court of Appeals was satisfied that the Friends had alleged recreational, aesthetic, and conservational injuries resulting from the anticipated outcomes. The court further concluded that the Friends alleged injuries that are recognized by law and, therefore, satisfied the second step of the standing inquiry. The court viewed "these statutes and accompanying regulations as creating an environmental interest in the protection and regulation of Wisconsin's state parks, including the Kohler-Andrae State Park at the heart of the dispute here."

Kohler and the Department view this decision as potentially greatly expanding the scope of who has standing in agency proceedings. Kohler argues that the consensus of the Court of Appeals' decision is that "virtually any objector could exercise expansive, if not unlimited, rights to sue state agencies by mere virtue of his or her disappointment with a state agency decision." Opposing review, the Friends describe this case as "a garden variety Wis. Stat. chapter 227 standing decision" where the Court of Appeals followed settled law and applied the proper standing analysis to the specific injuries alleged by the Friends.

The following issues have been presented for review by Kohler:

1. Does a plaintiff satisfy the "injury-in-fact" prong of the standing test by alleging an injury that will not, and cannot, result from the challenged action until numerous intervening, uncertain, and unrelated events occur?
2. Does a plaintiff satisfy the "zone of interest" prong of the standing test by alleging a violation of statutes and regulations that expressly grant the Department the power to take such action?
3. Does a Plaintiff satisfy the "zone of interest" prong of the standing test merely by alleging that an injury is environmental in nature, even the statute at issue is not?

In addition, in its petition for cross-review, the Department presents this issue:

Do the Friends' alleged injuries fall outside the zone of interests of the land-disposition law, so that they lack standing to challenge the Board's land exchange with Kohler?

WISCONSIN SUPREME COURT

October 1, 2021

10:45 a.m.

2019AP629

Jama I. Jama v. Jason C. Gonzalez

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), that reversed a Dane County Circuit Court decision, Judge Valerie Bailey-Rihn, presiding, that dismissed Jama I. Jama's attempt to commence a civil malpractice action against his former trial counsel, Jason C. Gonzalez, citing the "actual innocence" rule.

The "actual innocence" rule is a legal standard that holds that a person should not be permitted to recover damages for legal malpractice from their former defense attorneys, unless they can prove to a civil jury that they are innocent of the criminal charges of which they were convicted. The standard was adopted in Wisconsin in Hicks v. Nunnery, 2002 WI App 87, 253 Wis. 2d 721, 643 N.W.2d 809. This case asks the court to consider if there is a "split innocence" exception to the "actual innocence" rule. If a defendant was found guilty of all charges against them, but claims they can prove innocence to some of the charges while admitting guilt to others, should they be permitted to pursue a malpractice claim against defense counsel?

The criminal complaint filed against Jama I. Jama alleged that H.H. was walking home from a bar, highly intoxicated. Jama helped her enter her apartment building. Once inside the apartment, the complaint alleged that H.H. was struck on the back of the head and rendered unconscious. When she awoke, she was on the floor, naked from the waist down. She reported to the police that Jama sexually assaulted her and took items from her apartment. Later, DNA from sperm found in H.H.'s underwear was determined to be a match to Jama. Items that H.H. reported stolen (a gaming system and a controller) were recovered from Jama's apartment and his brother's car. Jama was criminally charged with five counts of sexual assault, burglary, and theft.

Jama retained Attorney Jason Gonzalez to defend him. From the onset and throughout proceedings, Jama told Attorney Gonzalez that he had committed the theft but denied having committed the two sexual assault charges. The case went to a jury trial and Jama was convicted of all charges, four felonies (second-degree sexual assault, third-degree sexual assault, and two charges of burglary) and one misdemeanor (theft).

However, subsequent court proceedings confirm that Attorney Gonzalez made numerous errors at Jama's criminal trial, including not meeting with Jama until the third day of trial after both sides rested, and not asking Jama details about the case until after the trial was completed, pending sentencing.

After sentencing, Jama retained new defense counsel who filed a postconviction motion for a new trial, alleging ineffective assistance of counsel. The circuit court conducted a Machner¹ hearing, then vacated all of Jama's convictions due to Attorney Gonzalez's ineffective assistance.

The State then moved to dismiss all of the original charges against Jama except the misdemeanor theft charge. It also issued a new charge of misdemeanor resisting or obstructing an officer. Jama pleaded guilty to both these charges and was sentenced to nine months in jail, "time served." By this time, Jama had served over two and one-half years in prison.

¹ State v. Machner, 92 Wis. 2d 797, 285 N.W.2d 905 (1979).

Jama filed a civil malpractice complaint against Attorney Gonzalez. Attorney Gonzalez moved to dismiss the complaint citing the "actual innocence" rule, arguing that Jama could not prove that he was innocent of all charges under the actual innocence rule because he pled guilty to a misdemeanor theft charge. The circuit court granted Gonzalez's motion to dismiss. The circuit court agreed that Jama had to provide "proof of innocence of all charges" that were charged in the underlying criminal case. The court ruled, "because Mr. Jama pled guilty to the theft charge, even though he . . . has always claimed that he was innocent of the sexual assault charges . . . [Gonzalez has] prevailed on [his] motion to dismiss."

Jama appealed. Jama asserted that Wisconsin case law supports his argument that it is sufficient to allege that he can prove innocence only as to those charges for which he alleges that Gonzalez provided negligent representation, even if he cannot prove innocence on other charges. Attorney Gonzalez asserted that the case law supports his argument that Jama has to prove innocence as to all charges of which Jama was convicted.

The Court of Appeals found Jama's argument persuasive, stating that public policy is not served when a person did not actually commit the criminal offense that is the subject of the malpractice action. So, the Court of Appeals concluded that allowing Jama to proceed with his claims in this split innocence situation is consistent with the actual innocence rule adopted in Hicks. The Court of Appeals found that there is nothing in controlling case law to suggest that Jama cannot seek recovery for Attorney Gonzalez's negligent representation as to crimes that Jama alleges he can show he did not commit.

Attorney Gonzalez filed a petition to review the Court of Appeals' decision. The following issues are presented for Supreme Court review:

1. Is there an exception to the actual innocence rule that relieves criminal malpractice plaintiffs of establishing their innocence as to convictions on which they do not claim malpractice?
2. If criminal malpractice plaintiffs need not establish their innocence as to all convictions, must they nevertheless establish their innocence as to all convictions transactionally related to the convictions on which they claim malpractice?
3. If criminal malpractice plaintiffs need not, as a matter of law, establish their innocence as to any convictions, is the circuit court nevertheless allowed to determine, on a case-by-case basis, whether public policy considerations preclude imposing liability on the defendant, and did the circuit court correctly determine that public policy bars the claims at issue here?