WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
NOVEMBER 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:

Chippewa
Door
Eau Claire
Milwaukee
Waukesha

MONDAY, NOVEMBER 5, 2018

9:45 a.m.	16AP880	State v. A. L.
10:45 a.m.	17AP140	The Yacht Club at Sister Bay Condo. Assn., Inc. v. Village of Sister Bay
1:30 p.m.	17AP516	The Peter Ogden Fam. Trust of 2008 v. Bd. of Rev. for Town of Delafield

WEDNESDAY, NOVEMBER 7, 2018

9:45 a.m.	17AP1142	Cacie M. Michels v. Keaton L. Lyons
10: 45 a.m.	17AP146	Daniel Marx v. Richard L. Morris
1:30 p.m.	17AP170	J. Steven Tikalsky v. Susan Friedman

In addition to the cases listed above, the following cases are assigned for decision by the court on the last date of oral argument based upon the submission of briefs without oral argument:

16AP85-D Office of Lawyer Regulation v. Daniel Parks

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
NOVEMBER 5, 2018
9:45 a.m.

2016AP880 State v. A.L.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), that reversed a circuit court order entered by the Milwaukee County Circuit Court (Judge T. Christopher Dee, presiding) that had denied the State's request for a reevaluation of a juvenile's competency in a suspended delinquency matter.

Stated generally, this case examines the following issue: If a juvenile has been found incompetent to stand trial and unlikely to regain competency, may the State later resume the proceedings and revisit the ruling on the juvenile's competency?

In 2012, the State filed a delinquency petition against A.L., charging him with second-degree reckless homicide. A.L.'s lawyer challenged A.L.'s competency to proceed. The juvenile court determined that A.L. was not competent and was not likely to regain competency within the statutory time frame established by Wis. Stat. § 938.30(5)(e) ("within 12 months or within the time period of the maximum sentence that may be imposed on an adult for the most serious delinquent act with which the juvenile is charged, whichever is less"). The juvenile court suspended the delinquency proceedings against A.L. and entered a juvenile in need of protective services ("JIPS") order, which ultimately expired in 2015.

After A.L. turned 17 years old, the State charged him as an adult with three crimes, based on new conduct. The circuit court found him not competent to proceed but likely to regain competency. He was treated and found competent. He pled guilty to two of the charges, with the third dismissed and read in. He was sentenced in August 2015.

In December 2015, the State filed a motion to recall the juvenile delinquency petition relating to the charge of second-degree reckless homicide for purposes of reevaluating A.L.'s competency. The juvenile court decided that it had no authority to grant the motion. More specifically, the juvenile court held that when a juvenile is found not competent and not likely to regain competency——as was the case here——the relevant statute, Wis. Stat. § 938.30(5), is silent as to a procedure for reinstating the suspended proceedings. As a result, the juvenile court held, this case must remain suspended.

The State filed a petition for leave to appeal the juvenile court's nonfinal order denying the State's request for reevaluation of A.L. The Court of Appeals granted the State's petition. It ultimately ruled that, guided by the legislative history of § 938.30(5) and by the provisions of the statute relating to adult competency in criminal proceedings (§ 971.14), § 938.30(5) may be read to give the circuit court authority to reinitiate a suspended delinquency proceeding and order a competency re-evaluation for a juvenile previously found not competent and not likely to become competent.

The following issues are presented for review:

1. Whether a circuit court may reinitiate competency proceedings in a delinquency case for a juvenile who is found not competent and not likely to regain competency during the statutory time limits.
2. Does the circuit court retain competency over a juvenile delinquency petition that has been suspended due to the

juvenile's incompetence and subsequently converted to a juvenile in need of protection and services (JIPS) order after that JIPS order has expired?

WISCONSIN SUPREME COURT
NOVEMBER 5, 2018
10:45 a.m.

2017AP140 The Yacht Club at Sister Bay Condo. Assn., Inc. v. Vill. of Sister Bay

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), that affirmed a Door County Circuit Court decision (Judge D.Todd Ehlers presiding) dismissing the case.

This case presents the question whether the Yacht Club at Sister Bay Condominium Association (Association), seeking to assert a noise nuisance claim against the Village of Sister Bay, properly complied with statutory notice requirements and whether this court's decision in E–Z Roll Off, LLC v. County of Oneida, 2011 WI 71, 335 Wis. 2d 720, 800 N.W.2d 421, precludes the Association from arguing that each nuisance-causing event is a new "event" for purposes of the notice statute.

In 2013, the Village of Sister Bay built a performance pavilion with a band shell in a public park. The park is adjacent to a condominium complex and the pavilion faces the condominiums. In August of 2014, public performances commenced, including live music concerts that often ran until well after official park hours, occasionally as late as midnight. The residents of the condominium complex say that the noise from these concerts is loud enough to shake the windows and can be heard by all residents. Eventually, the Association filed a lawsuit alleging, among other things, that the concert noise is a public and private nuisance. The Association seeks damages and an injunction to "abate" the nuisance.

Wisconsin statutes impose certain notice requirements on a party who seeks to sue a Town, which includes the Village of Sister Bay. Wisconsin Stat. § 893.80(1d)(a) provides that no action may be maintained against a Town unless the Town is served "written notice of the circumstances of the claim . . . [w]ithin 120 days after the happening of the event giving rise to the claim."

The statute provides an alternative under § 893.80(1d)(a), whereby failure to give the requisite notice shall not bar the lawsuit if: (1) the defendant had actual notice of the claim, and (2) the claimant shows that the delay or failure to give the requisite notice was not prejudicial. The statute also requires the claimant to present "an itemized statement of the relief sought." Wis. Stat. § 893.80(1d)(b).

The Village says the Association failed to serve a written notice of injury on the Village within the requisite 120-day period. The Village argued, and the circuit court agreed, that the concerts started in August 2014 but the Association did not provide notice until March 2016, some nineteen months later. The circuit court considered whether the Association's claims could proceed under the alternative procedure and ruled that it could not, concluding that even if the Village had "actual notice" of the Association's claims, the Association had failed to show that there was no prejudice to the Village as a result of the delay. The circuit court dismissed the Association's claim.

On appeal, the Association maintained that the ongoing use of the pavilion constitutes a "continuing nuisance" such that its notice was timely, because notice was provided within 120 days of the most recent concert.

The Court of Appeals ruled that the Supreme Court's decision in E–Z Roll Off, LLC v. County of Oneida, 2011 WI 71, 335 Wis. 2d 720, 800 N.W.2d 421, forecloses the Association's

argument that each nuisance-causing use of the pavilion (i.e. every concert) constitutes a new "event" for purposes of Wis. Stat. § 893.80(1d)(a). The Court of Appeals reasoned that if each act gave a claimant a new opportunity to file a notice of injury, it would be "much more difficult for governmental entities to budget for potential litigation." The Court of Appeals remanded for further proceedings relating to the alternative statutory notice provision. The Association petitioned for Supreme Court review.

The Association says that E–Z Roll Off does not apply because E–Z Roll Off was an antitrust case, not a nuisance case. The Association reasons that a different rule should apply for nuisance claims filed against municipalities because they have a duty to abate nuisances and every continuance of a nuisance truly does constitute a new nuisance. It warns that if E-Z Roll Off is interpreted to cover not just repetitive commercial conduct but on-going nuisances in the municipal context, the courts have effectively granted limitless immunity to the government against nuisance claims.

The Supreme Court is expected to provide guidance on what constitutes proper notice under the governing statutes and whether the ruling in E-Z Roll Off applies in the context of a nuisance claim against a municipality.

The following issues is presented for review:

> Does Wisconsin law prohibit a party from asserting a claim against a municipality for a noise nuisance from a concert that occurs in 2015, 2016, 2017 or beyond simply because it failed to complain within 120 days about a noise nuisance from a different concert the municipality sponsored in 2014?

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

2017AP516 The Peter Ogden Family Trust of 2008 v. Bd. of Rev. for the Town of Delafield

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), that (1) reversed the decision of the Town of Delafield Board of Review (the Board) changing the classification of certain real property from agricultural to residential and (2) remanded the matter back to the Board to assess the property anew.

This case is about the proper classification and assessment of a piece of real property located in the Town of Delafield that is currently owned by two family trusts established by Peter Ogden and Theresa Mahoney-Ogden. (This summary will refer to the Ogdens and their family trusts simply as the Ogdens.)

When the Ogdens purchased the property in 2003, it was classified residential for property tax purposes. As a result of the Ogdens planting pine trees, apple trees and hay on the property, in 2012 the assessor reclassified the property as agricultural and agricultural forest.

In 2016 the assessor questioned whether the property really was being used for agricultural purposes, which he viewed as requiring the marketing of products grown on the property. Apparently unsatisfied with the Ogdens' supporting documents for such marketing, he changed the classification back to residential. That change in classification changed the assessed value from $17,000 (agricultural/forest) to $886,000 (residential).

The Ogdens objected to the reclassification and new assessment. After holding an evidentiary hearing, the Board split 2-2, which resulted in the assessor's reclassification and new assessment being upheld.

The Ogdens brought a certiorari action to review the Board's decision in the Waukesha County Circuit Court. The Circuit Court upheld the Board's decision.

The Court of Appeals, which reviewed the Board's decision (not the Circuit Court's), concluded that the assessor and the Board had relied on an improper view of the applicable law regarding what constitutes "agricultural use" for tax classification purposes. The Court of Appeals stated that the statutory definition of "agricultural land" requires that the property be "devoted primarily to agricultural use." Wis. Stat. § 70.32(2)(c)1g. When that definition is satisfied, the land "must be classified as agricultural." Fee v. Board of Review of Florence, 2003 WI App 17, ¶12, 259 Wis. 2d 868, 657 N.W.2d 112. The statutes further provide that the term "agricultural use" is to be defined by a rule promulgated by the Department of Revenue (DOR). The DOR's rule, in turn, incorporates a subsection of a federal government publication, the North American Industry Classification System (NAICS). The Court of Appeals pointed out that the statute, the DOR rule, and the NAICS all refer to "growing" certain crops, including three crops that Peter Ogden testified at the Board hearing are being grown on the property—— Christmas trees, apples, and hay. The Court of Appeals further noted that the statute, the rule, and the NAICS did not include in their definitions any requirement that such crops be marketed or sold for a profit.

The Court of Appeals concluded, however, that the assessor and the Board had added to the definition the requirement that the growing of crops be done for the purpose of marketing them. Because the Court of Appeals determined that adding this element constituted an

erroneous interpretation of the applicable statute and rule, it reversed the circuit court's order and remanded the matter to the circuit court to, in turn, remand the matter to the Board for further proceedings consistent with the Court of Appeals' opinion.

The Board presents the following issue for review:

> Did the Court of Appeals consider and properly apply all required statutory and regulatory provisions when it determined that to qualify for agricultural classification all that needs to be shown is that there are "growing qualifying crops" on the land?

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

2017AP1142 Cacie M. Michels v. Keaton L. Lyons

This is an appeal, taken on certification from the Wisconsin Court of Appeals, District III (headquartered in Wausau). Cacie Michaels and Keaton Lyons, the parents of A.L., challenged an order of the Chippewa County Circuit Court (Judge James M. Isaacson, presiding) that granted visitation rights to Jill Kelsey, A.L.'s grandmother. Ms. Kelsey is Keaton Lyons's mother.

Ms. Kelsey filed a petition in circuit court to compel her son, Lyons, and Michels to provide Ms. Kelsey with additional visitation time with A.L., including a one week Florida vacation. The circuit court granted Ms. Kelsey visitation one Sunday each month and for a seven day period each summer, with no restriction on where she could take the child.

Wis. Stat. § 767.43(3) provides that a court may grant reasonable visitation rights to a grandparent if: (1) the grandparent has maintained a relationship with the child or has attempted to maintain a relationship with the child but has been prevented fromm doing so by a parent who has legal custody of the child; (2) the grandparent is not likely to act in a manner that is contrary to decisions that are made by a parent who has legal custody of the child and that are related to the child's physical, emotional, educational or spiritual welfare; and (3) the visitation is in the best interests of the child.

Lyons and Michels appealed, arguing that the visitation order violates the Fourteenth Amendment to the U.S. Constitution and Article I, § 1 of the Wisconsin Constitution. They argue that a court should only be able to order visitation under § 767.43(3) if there is a showing that failure to do so would harm the child. In the alternative, Lyons and Michel argue that, at an absolute minimum, the Supreme Court should find that a circuit court can order visitation only upon a showing, by clear and convincing evidence, that the parents' visitation decision was wrong.

The following issues are presented for review:

1. Did the visitation order entered by the circuit court violate the Fourteenth Amendment to the United States Constitution and Art. I, Sec. 1 of the Wisconsin Constitution?
2. If not, did the circuit court nevertheless erroneously exercise its discretion by granting Ms. Kelsey grandparent visitation rights?

WISCONSIN SUPREME COURT
NOVEMBER 7, 2018
10:45 a.m.

2017AP146 Daniel Marx v. Richard L. Morris

This is an appeal, taken on a certification from the Wisconsin Court of Appeals, District III (headquartered in Wausau). The Court of Appeals agreed to review the Eau Claire County Circuit Court's nonfinal order (Judge William M. Gabler, Sr., presiding), denying a summary judgment motion by one member of a limited liability company (LLC), called North Star Sand, against other members of North Star Sand.

Daniel Marx, Michael Murray, and Richard Morris are members of North Star Sand, LLC. Marx and Murray claim that Morris engaged in self-dealing in a transaction in which one of North Star's subsidiaries was sold to an entity partially owned by Morris. Marx and Murray filed a lawsuit against Morris, asserting claims only on behalf of themselves and their own LLCs; they did not assert any claims on North Star's behalf. Specifically, Marx and Murray claimed: (1) that Morris violated Wis. Stat. § 183.0402 by "willfully fail[ing] to deal fairly" with them and "deriv[ing] an improper personal profit"; (2) that Morris breached common law fiduciary duties he owed them as a member of North Star; (3) that Morris engaged in unjust enrichment; and (4) that Morris breached the implied covenant of good faith and fair dealing.

Morris moved for summary judgment on several grounds, including: (1) that Marx and Murray's claims "belong[ed] to North Star" and therefore could not "be asserted directly by its individual members"; and (2) that Wis. Stat. ch. 183 preempted Marx and Murray's common law claims for breach of fiduciary duty, unjust enrichment, and breach of the implied covenant of good faith and fair dealing.

The circuit court denied Morris's summary judgment motion. It rejected Morris's argument that Marx and Murray's claims actually belonged to North Star, as well as Morris's argument that Wis. Stat. ch. 183 preempted Marx and Murray's common law claims.

Morris petitioned the Court of Appeals for leave to appeal the circuit court's nonfinal order denying his summary judgment motion. The Court of Appeals granted the petition, and subsequently certified the issues for Supreme Court review.

The following issues are presented for review:

1. Does a member of a limited liability company (LLC) have standing to assert a claim against another member of the same LLC based on an injury suffered primarily by the LLC, rather than the individual member asserting the claim?
2. Does the Wisconsin Limited Liability Company Law, Wis. Stat. ch. 183, preempt common law claims by one member of an LLC against another member based on the second member's alleged self-dealing?

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

2017AP170 J. Steven Tikalsky v. Susan Friedman

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), that reversed a Waukesha County Circuit Court decision (Judge Maria S. Lazar, presiding), granting summary judgment in favor of defendants.

This case examines what a plaintiff must include in a complaint when seeking a "constructive trust" from the court, and how that pertains to a defendant who is not alleged to have engaged in the wrongdoing that gives rise to the need for a constructive trust.

Simply stated, the court may create a "constructive trust" to remedy a situation when estate property has been given to someone who, in fairness, should not have received the property. It directs that the property be transferred to the appropriate beneficiary. See Wilharms v. Wilharms, 93 Wis. 2d 671, 678, 287 N.W.2d 779 (1980). A constructive trust is imposed only when legal ownership is held by someone who, in equity and good conscience, should not be entitled to beneficial enjoyment, and when ownership was obtained by means of fraud, duress, abuse of a confidential relationship, mistake, commission of a wrong or by any form of unconscionable conduct. Id. at 678-79, 287 N.W.2d 779.

The plaintiff, Steven, is one of four children. Steven became estranged from his parents and was excluded from any inheritance. Following his parents' deaths, Steven filed a lawsuit against his siblings seeking to recover a share of the inheritance. He contends that two of his three siblings exerted undue influence and intentionally interfered with his expected inheritance. He does not allege that his third sibling, Terry, was part of this interference, but contends that she was unjustly enriched; she received a larger inheritance because he inherited nothing. He sought a constructive trust.

As the case progressed, Steven voluntarily dropped some of his claims, including the claim for unjust enrichment. His siblings moved for summary judgment. The circuit court granted summary judgment in favor of the siblings on Steven's undue influence claim, but denied the sibling's motion as to Steven's claim for intentional interference with expected inheritance. The circuit court also granted summary judgment to the siblings on the claim for a constructive trust, ruling that because Steven had voluntarily dismissed his unjust enrichment claim, this deprived him of a legal basis on which to seek a constructive trust. The circuit court then dismissed Steven's sister, Terry, from the case because no claims against her remained.

Steven appealed, arguing that he had presented enough evidence to survive summary judgment on his claim for a constructive trust. The Court of Appeals ruled that the evidence offered in support of his intentional interference claim potentially established a basis for a constructive trust. The Court of Appeals rejected Terry's argument, on appeal, that she cannot be subjected to a constructive trust because she was not alleged to have participated in any unconscionable conduct giving rise to the need for a constructive trust.

The Supreme Court is expected to provide guidance on the nature of a constructive trust, how it should be presented in a complaint, and how a party against whom a constructive trust is sought should be designated where no cause of action for liability is asserted against that party.

The following issues are presented for review:

1. Is a constructive trust a cause of action or a remedy and, if a remedy, how is the remedy to be pled by a plaintiff?
2. Can a constructive trust be imposed against a wholly innocent party against whom no cause of action for liability is pled?