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. 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 Machner[1] 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

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

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.

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?

WISCONSIN SUPREME COURT
October 4, 2021
9:45 a.m.

2019AP2205 Loren Imhoff Homebuilder, Inc. v. Lisa Taylor

The petitioners seek review of a Court of Appeals, District IV (headquartered in Madison) order that reversed and remanded a Dane County Circuit Court order, Judge Frank D. Remington presiding, that vacated an arbitration award by an allegedly sleeping arbitrator, and ordered a hearing before a new arbitrator.

This case turns on whether an arbitrator was sleeping during portions of the arbitration proceeding and whether the parties who claimed he was sleeping forfeited their claim that they were entitled to have the arbitration award vacated because they failed to ask the arbitrator to resolve any problems caused by his alleged sleeping during the proceeding.

The homeowners entered into a construction contract with Loren Imhoff Homebuilder, Inc. for a remodeling project. The construction contract included provisions that addressed dispute resolution, including eventual recourse to binding arbitration. When a variety of disputes arose, Imhoff filed a petition to compel arbitration. The circuit court granted the petition and ordered the parties to arbitrate. The arbitrator made unsuccessful mediation attempts on two days and conducted a five-day evidentiary arbitration hearing before issuing a decision.

After the arbitration hearing had concluded and after post-hearing briefs had been filed, the homeowners submitted a pro se motion requesting the arbitrator's recusal. This document objected to him rendering a decision in the matter and included allegations that the arbitrator was dozing or sleeping at times during the hearings and that the arbitrator exhibited "substantial bias" making him "sufficiently impartial to render an unbiased decision" during the process by pressuring the Homeowners to accept less than the reasoned decision they requested.

Imhoff opposed the recusal demand, disputed the allegations and said the motion was untimely. The arbitrator denied the recusal demand. The homeowners submitted a pro se letter requesting reconsideration of the order. The arbitrator issued his Decision and Order which included a setoff for attorney's fees and a sanction against the builder for a missed home inspection.

Imhoff moved to confirm the arbitration award. Following a hearing, the circuit court issued its decision concluding that the homeowners did not forfeit the sleeping arbitrator issue. The court said, "Although failing to raise issues before the close of evidence generally results in forfeiture, arbitration is an informal process where the rigid rules of courtroom proceedings do not apply . . . Here the couple raised the issue of the arbitrator's sleepiness *before* the arbitrator issued a final decision," stating that "the lack of an explicit denial by Imhoff's counsel, as well as the weight and credibility of the witnesses during the hearing, led the court to find that it was more likely than not that the arbitrator slept through major portions of the arbitration hearing."

The circuit court remanded the matter for a new arbitration hearing in front of a different arbitrator. Imhoff appealed.

The court of appeals reversed the circuit court order denying confirmation of the arbitrator's decision and award, reversed the order vacating the decision and award, and remanded to the circuit court with instructions that it confirm the award and enter judgment against the homeowners concluding that the homeowners forfeited drowsiness or sleeping by the

arbitrator as a basis to vacate the award further saying that it is true that both the appellate rule of forfeiture and the administrative law rule of forfeiture are rules of administration rather than mandatory rules of decision, and the reviewing court has the discretionary authority to take up an issue despite the fact that it was not raised in the circuit court or before the administrative agency.

The Supreme Court is expected to resolve these issues:

- Did Petitioners sufficiently assert an objection to the arbitrator on a single arbitrator panel sleeping though major portions of the arbitration hearing by objecting to such sleeping multiple times between the close of evidence and the issuance of the arbitration decision and award?
- In addition to the issue raised in the petition for review, the parties are directed to address whether the doctrine of forfeiture applies in arbitration proceedings and, if so, whether it should be applied in this case.

WISCONSIN SUPREME COURT
October 4, 2021
10:45 a.m.

2019AP1206 Daniel J. Hennessy, Jr. v. Wells Fargo Bank, N.A.

This is a review of a decision of the Court of Appeals, District I (headquartered in Milwaukee) that affirmed a Milwaukee County Circuit Court decision, Judge William S. Pocan, presiding, finding that a Mexican court judgment is valid under Mexican law, and permitting Wells Fargo to domesticate the Mexican judgment in Milwaukee County Circuit Court.

In June 2008, the Hennessys borrowed $7,500,000 to build a condominium in Mexico. A set of construction loan documents set forth the parties' obligations. The Hennessys defaulted on their loan. In 2010, Wells Fargo[2] initiated an extra-judicial foreclosure in Mexico, an option contemplated in the event of default under the construction loan documents. The Hennessys filed a lawsuit in Mexico court, unsuccessfully seeking to nullify the assignment of the loan documents from M&I to Wells Fargo, which delayed the sale of the condominium.

Wells Fargo then filed an action in Mexico City federal court seeking foreclosure of the condominium and personal liability against the Hennessys. In 2014, the Mexican federal court entered judgment in favor of Wells Fargo for the $7,500,000 principal plus ordinary interest. Both parties appealed. In October, 2014, the appellate court issued a modified judgment in favor of Wells Fargo.

In November 2016, the Hennessys filed a lawsuit in Milwaukee County circuit court seeking a declaration that Wells Fargo's 2010 attempt at an extrajudicial sale of the property triggered the running of a six-year statute of limitations such that "Wells Fargo is barred from asserting any action or claim against the Hennessys to enforce any obligation under the construction loan documents." Wells Fargo counterclaimed for domestication of the Mexican court judgment.

The circuit court ruled in favor of the Hennessys on the statute of limitations, but expressly stated that its order did not encompass Wells Fargo's counterclaim. The circuit court then considered whether the Mexican court entered a valid judgment against the Hennessys under Mexican law. The parties disputed the scope of the judgment but agreed that the determination of Mexican law was a fact question. The circuit court conducted an evidentiary hearing, heard expert testimony and considered stipulated exhibits regarding whether the Mexican judgment gave Wells Fargo authority to pursue both foreclosure and a deficiency against the Hennessys (as Wells Fargo argued) or effectively left foreclosure as the only remedy (as the Hennessys argued). The circuit court concluded that the Mexican judgement is a valid and enforceable personal judgment against the Hennessys that permitted Wells Fargo to pursue both foreclosure and a deficiency against the Hennessys. Next, relying on the Restatement (Third) of Foreign Relations Law, the court entered an order ruling that Wells Fargo could domesticate the Mexican judgment in Wisconsin under principles of comity.

The Court of Appeals affirmed.

The Hennessys filed a petition for review, which the Supreme Court granted. The Hennessys' petition presents the following issues for review:

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[2] Wells Fargo succeeded in interest to all rights of M&I under the construction loan agreements.

1. Should Wisconsin modernize its antiquated, illogical approach to interpreting foreign countries' laws by adopting the federal and other states' commonsense approach of allowing judges to consult whatever resources they deem helpful and treating legal interpretation as a question of law?
2. Did the circuit court correctly extend comity to the Mexican Proceeding by entering a monetary judgment for no specific amount of money in the absence of a judgment for a definite sum of money by the Mexican court?
3. Where it is undisputed that the Wisconsin Contracts were governed by Wisconsin law and that the Mexican courts did not consider Wisconsin law, did the circuit court err in concluding that the Mexican Judgment intended, sub silentio, to find liability under the Wisconsin Contracts?

WISCONSIN SUPREME COURT
October 15, 2021
9:45 a.m.
[Port Washington]

2020AP1058-CR State v. Teresa L. Clark

This is a review, pursuant to an order granting the State of Wisconsin's petition for bypass of the court of appeals, of an interlocutory order of the Ashland County circuit court, Honorable John P. Anderson presiding, granting Teresa Clark's motion challenging two of her prior OWI convictions for the purposes of determining the nature of the pending OWI and PAC charges.

In Wisconsin a charge of operating a motor vehicle while intoxicated (OWI) or operating a motor vehicle with a prohibited alcohol concentration is designated as having a specific number based on the number of applicable prior convictions for similar offenses. For example, a defendant who has two prior applicable convictions for OWI would be charged with OWI-3rd offense for another instance of operating while intoxicated. The number of the current offense impacts the level of misdemeanor or felony of the current offense, and therefore the maximum penalty that can be imposed upon conviction.

This case involves the procedure that should be followed when a person charged with a second or greater OWI or PAC offense challenges a prior conviction due to an allegedly defective waiver of counsel in the prior case, and there is no transcript of plea hearing in the prior proceeding.

Clark was involved in vehicle accident, when the truck she was driving collided with a car, injuring the other driver. A blood test from Clark showed a blood alcohol concentration (BAC) of 0.194. Clark's driving record showed three prior OWI convictions: in 1994, 1995, and 2002. Consequently, the state charged Clark with OWI-Fourth and PAC-Fourth. It also charged her with OWI causing injury and PAC causing injury, both as second or subsequent offenses.

Clark filed a motion collaterally attacking the 1995 and 2002 OWI convictions. In Clark's supporting affidavit, she alleged that she had been unrepresented in the 1995 and 2002 cases; during those proceedings the circuit court had not conducted a colloquy with her regarding the difficulties and dangers of proceeding pro se, the seriousness of the charges against her, and the range of possible penalties; that she was unaware of those matters; and that she had not knowingly, intentionally, and voluntarily waived her right to counsel. In defense counsel's affidavit, he stated that the file for the 1995 case had been destroyed because 20 years had passed (SCR 72.01(18)) and that the transcript for the 2002 case could not be prepared because the reporter's notes of the plea hearing were no longer available.

The state acknowledged that Clark's averments were sufficient to entitle her to an evidentiary hearing. It argued, however, that because Clark had not pointed to evidence demonstrating that the circuit courts had not given her the required information to support a knowing, intelligent, and voluntary waiver of counsel, the burden of persuasion (that she had not knowingly, intelligently, and voluntarily waived her right to counsel) should remain with Clark. Although it could not produce transcripts from either case, the state submitted the complaint, a bond sheet, the minute sheet from the plea hearing, and the minute sheet from the sentencing

hearing from the 2002 case, some of which indicated that Clark had been advised of her constitutional rights, including her right to be represented by counsel.

At the hearing on her motion to exclude the convictions in the 1995 and 2002 cases, Clark acknowledged signing the 2002 bond sheet, but said that she had not known what she was signing. She stated that she did not know if she had read the 2002 complaint. She admitted that the information on the minutes sheets in that case was correct, but said that the judges had not advised her of her constitutional rights.

The circuit court concluded that because there was nothing in the record to refute Clark's testimony, it was obligated to grant Clark's motion to disregard the convictions in the 1995 and 2002 cases. Because those two convictions could not be counted as prior convictions for the current case, the 1994 conviction also could not be counted because the 1994 conviction was now the last countable offense and the violation date for that conviction was more than 10 years old. See Wis. Stat. § 346.65. The ultimate result was that the original charges for OWI-4th and PAC-4th had to be reduced to OWI-1st and PAC-1st.

The state filed a petition for leave to file an interlocutory appeal from the circuit court's order, which the Court of Appeals granted. The state then filed a petition with the Supreme Court to bypass the Court of Appeals, which was granted.

The problem that the state asks the Supreme Court to address arises when the transcript of the waiver of counsel in the prior case is no longer available, either because the record of the prior OWI/PAC case is no longer in existence or because no transcript of the prior plea hearing was prepared and the court reporter's notes are no longer available. In this case, as the entire case file for the 1995 conviction had been destroyed, and the transcript for the waiver of counsel in the 2002 case could not be prepared because the court reporter's notes were no longer available. The circuit court shifted the burden to the state to prove a valid waiver of counsel in the prior cases, but the state had no evidence available to satisfy its burden.

The state's bypass petition asks the Supreme Court to decide the following two issues:

1. Does the burden shift to the State when a defendant collaterally attacking a prior conviction does not point to evidence that *shows* that the circuit court failed to inform her of the right to counsel but merely *alleges* that the court failed to do so?
2. Did Clark prove that her right to counsel was violated in her prior cases?

WISCONSIN SUPREME COURT
October 15, 2021
11:00 a.m.
[Port Washington]

2019AP1671 Cree, Inc. v. Labor Industry Review Commission

This is a review of a Court of Appeals, District II (headquartered in Waukesha) published decision reversing an order of the Racine County Circuit Court, Judge Michael J. Piontek, presiding, which reversed a decision made by the LIRC, which reversed a previous decision of an Administrative Law Judge, determining whether Cree, Inc. unlawfully discriminated against Derrick S. Palmer when it rescinded a job offer upon learning of his conviction record.

Palmer applied for a job with Cree, Inc. in June 2015, and Cree invited him to interview. Cree asked him to complete an online questionnaire asking if the applicant had ever been convicted of a felony, and if so, to explain. Palmer checked the box "yes" and wrote, "domestic related charges." The form also asked if the applicant had been convicted of a misdemeanor in the past seven years, and if so, to explain. Palmer checked the box "yes" and again wrote, "domestic related charges."

In July 2015, Cree offered Palmer a Lighting Schematic Layout Applications Specialist position contingent on a drug screen and background check. Cree later rescinded the offer because the background check showed that Palmer had been convicted in 2012 of strangulation/suffocation, fourth-degree sexual assault, battery, and criminal damage to property.

Palmer filed a discrimination complaint with the Wisconsin Department of Workforce Development alleging that Cree unlawfully discriminated against him when it rescinded his job offer based upon his conviction record. An Equal Rights Officer issued an Initial Determination concluding there was probable cause to believe Cree "may have violated the Wisconsin Fair Employment Law" by "refusing to hire or employ [Palmer] because of [his] conviction record."

After an evidentiary hearing, an ALJ determined that Cree had not unlawfully discriminated against Palmer.

Palmer then appealed, and LIRC determined otherwise, reversing the ALJ. LIRC found that Cree rescinded Palmer's job offer based solely on his conviction record. LIRC further determined that no substantial relationship existed between Palmer's conviction record and Cree's Applications Specialist position. Ultimately, then, LIRC concluded that Cree had unlawfully discriminated against Palmer.

Cree appealed LIRC's decision to the trial court, and the court reversed.

Palmer and LIRC successfully appealed. The Court of Appeals wrote that the question before the court was whether Cree met its burden to show that Palmer's past domestic abuse is substantially related to the circumstances of the Applications Specialist job Palmer applied for. The Court of Appeals noted that Wisconsin law prohibits an employer from refusing to hire a prospective employee on the basis of his or her conviction record. Wis. Stat. §§ 111.321, 111.322. The employer may, however, so, discriminate if "the circumstances of [any felony, misdemeanor, or other offense] substantially relate to the circumstances of the particular job" for which the employee is being considered. Wis. Stat. § 111.335(3)(a)1. Based upon the facts presented, the Court of Appeals agreed with LIRC and Palmer that Cree failed to establish a

substantial relationship between the circumstances of Palmer's prior convictions and the circumstances of the Applications Specialist job.

Cree presented the following issues for Supreme Court review:

1. Whether the LIRC and the Court of Appeals erred in their interpretation and application of the Wisconsin Fair Employment Act's substantial relationship test when they found that there was not a substantial relationship between Derrick Palmer's multiple convictions for assaulting and battering women and the employment he sought at Cree, through which he would have regular, unsupervised interaction with women.
2. Whether LIRC and the Court of Appeals erred in disregarding the uncontested testimony of Cree's fact and expert witnesses concerning the nature of the position to which Palmer applied and the substantial relationship between his numerous domestic violence convictions and the potential for violence against those with whom he would interact if employed at Cree.

WISCONSIN SUPREME COURT
October 25, 2021
9:45 a.m.

2020AP520 Friendly Village Nursing and Rehab, LLC v. DWD and LIRC

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), that affirmed an order of the Oneida County Circuit Court, Judge Michael H. Bloom, presiding, that affirmed a decision of the Labor and Industry Review Commission (LIRC).

In Wisconsin, when a business is transferred, the successor may retain the unemployment insurance "account experience," which includes the transferor's positive or negative unemployment insurance reserve fund balance; unemployment benefit liability based on the transferor's employment; the transferor's reported payrolls for the purposes of meeting the taxable wage base in the transfer year; and all other aspects of the transferor's account. A business with a positive account experience will generally pay unemployment contributions at a lower rate than a business with negative work experience.

In order to qualify as a successor under Wis. Stat. § 108.16(8)(b), a transferee must, among other things, submit a written application to the Department of Workforce Development "requesting that it be deemed a successor." Wis. Stat. § 108.16(8)(b)4. The Department must receive the application "on or before the contribution payment due date for the first full quarter following the date of transfer," unless the transferee "satisfies the department that the application was late as a result of excusable neglect." Id. In any event, the Department "shall not accept a late application. . . more than 90 days after its due date." Id.

Eden Senior Care did not meet this deadline. Eden purchases and rehabilitates distressed nursing homes. On September 1, 2017, Eden purchased its first two nursing homes in Wisconsin: Friendly Village, and Northpoint Nursing and Rehab. Eden directed their new business analyst to complete online employer registration for Friendly Village and Northpoint with the Department of Workforce Development. Eden's business analyst did not correctly indicate on Friendly Village's and Northpoint's employer registration reports that Eden had acquired those activities from previous employers, which, ultimately resulted in Eden failing to meet the deadline mentioned above, and therefore failing to acquire its predecessor's unemployment insurance account experience.

Upon being made aware that a transferee may acquire the unemployment insurance account experience of its predecessor, Eden applied to acquire the account experience for the Northpoint facility, but neglected to do the same for the Friendly Village facility. The Department determined that Eden's late filing for Northpoint was the result of excusable neglect and allowed it to succeed to the previous owner's unemployment insurance account experience for Northpoint.

Shortly thereafter, when Eden applied to succeed to the unemployment insurance account experience for Friendly Village, the request was not handled by the same Department employee. This employee determined that Eden's tardiness was not the result of excusable neglect and, as a result, the Department would not allow it to succeed to the unemployment insurance account experience for Friendly Village.

Friendly Village appealed the Department's decision. An Administrative Law Judge determined Friendly Village's failure to meet the applicable deadline was the result of excusable

neglect, and therefore "is the successor to the Wisconsin unemployment reserve account of [the previous owner]."

The Department then sought Commission review of the ALJ's decision, and the Commission reversed.

Friendly Village next sought judicial review of the Commission's decision. In the trial court proceedings, Friendly Village argued that the Commission had erred by failing to consider the interests of justice in its excusable neglect analysis. The trial court rejected that argument, affirming the Commission's decision.

Friendly Village appealed, unsuccessfully. The Court of Appeals held that the Commission properly determined that Friendly Village failed to establish excusable neglect, and that, contrary to Friendly Village's argument, the Department need not consider the interests of justice when determining whether to accept a late successorship application.

Eden now asks the Supreme Court to review the following issues:

1. Whether the Labor and Industry Review Commission erred in finding that there was no excusable neglect as a matter of law while failing to consider the interests-of-justice factors;
2. Whether the Commission acted in excess of its powers by failing to consider the interests of justice factors when analyzing whether Friendly Village's late filing of its successorship application was due to excusable neglect;
3. Whether this Court's decision in Casper v. American International, 2011 WI 81, 336 Wis. 2d 267 (2011) requires a decision maker to consider the interests of justice factors in its excusable neglect analysis, specifically, whether the Commission should have considered various interests of justice factors when analyzing the issue of excusable neglect, including:

   > (1) "the party seeking an enlargement of time has acted in good faith; (2) the opposing party has been prejudiced by the delay; (3) the party promptly sought to remedy the situation caused by the failure to file timely; (4) the failure to file timely was the result of a conscientious, deliberate, and well-informed choice; (5) the party seeking enlargement received the effective assistance of counsel; (6) . . . there was a consideration of the merits; [and] (7) . . . the claim has merit, but for the failure to timely file."

   In essence, the question is whether when determining the existence of "excusable neglect" is the application of the interests of justice factors limited to a litigation-focus in courts and Wis. Stat. § 801.15(2), or are the interests of justice factors also to be applied to acts before administrative agencies and/or administrative proceedings when determining "excusable neglect," as in Wis. Stat. § 108.16(8)(b)?
4. Whether there has been a demonstration of excusable neglect pursuant to Wis. Stat. § 108.16(8)(b), after applying the interest of justice factors as required by this Court's decision in Casper v. American International, 2011 WI 81, 336 Wis. 2d 267 (2011).

WISCONSIN SUPREME COURT
October 25, 2021
10:45 a.m.

2020AP878-CR State v. Avan Rondell Nimmer

The state seeks review of a Court of Appeals, District I (headquartered in Milwaukee) decision that reversed a Milwaukee County circuit court judgment of conviction for possession of a firearm, Judge Glenn H. Yamahiro, presiding, and remanding the matter for an entry of an order granting Nimmer's motion to suppress.

Officers from the Milwaukee Police Department were on patrol when they received a ShotSpotter alert that four gunshots had been fired nearby. The officers drove the short distance to the area and observed Nimmer about 100 feet from the location of the ShotSpotter alert, with his hand in his right pocket. The officers said that when Nimmer saw the squad car, he looked away and began to walk faster.

The officers approached Nimmer, who reached for his left side and "bladed" his left side away from the officers. When one of the officers patted him down, Nimmer said, "the gun's on my waistline bro." A handgun was found concealed in his waistband, under his t-shirt. Nimmer was charged with possession of a firearm by a felon.

Nimmer filed a motion to suppress the evidence of the handgun, on the ground that the investigative stop was not supported by reasonable suspicion or probable cause that he was engaged in criminal activity. The trial court denied Nimmer's suppression motion, finding that the timing was the "key" that "solidifie[d] reasonable suspicion," because "anyone that [police] encountered within a minute or two of receiving the alert should have been investigated if they were within a couple of blocks of the alleged shots being fired."

The trial court accepted Nimmer's plea and sentenced him to two years of initial confinement and two years of extended supervision. Nimmer appealed, challenging the denial of his suppression motion. The Court of Appeals reversed the trial court's order denying his suppression motion and remanded with instructions to enter an order granting the motion. It concluded that the articulable facts available to the officers did not support a finding that they had reasonable suspicion to stop and frisk Nimmer.

The Court of Appeals noted that the Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect people from unreasonable searches and seizures, and a stop by police is included in those constitutional protections. For an investigatory stop to pass constitutional muster, police must have a reasonable suspicion that a crime has been committed, is being committed, or is about to be committed, and the question of what constitutes "reasonable suspicion" is under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience.

The Supreme Court is expected to resolve this issue:

> Does law enforcement, within a minute of receiving a ShotSpotter report of shots fired at a residential address, have reasonable suspicion to stop the only person outside the address where the person reacts to the police by grabbing at his waistband, angling one side of his body away from police, and speeding his pace away from the officers?

WISCONSIN SUPREME COURT
October 27, 2021
9:45 a.m.

2019AP1317 State v. Daniel J. Van Linn

Van Linn seeks review of a Wisconsin Court of Appeals, District III (headquartered in Wausau) decision that affirmed his conviction for operating a motor vehicle while intoxicated, fifth-offense, in Oconto County Circuit Court, the Honorable Michael T. Judge, presiding.

The petitioner contends that this case presents a novel question about the scope of the exclusionary rule of the Fourth Amendment and its interplay with the independent source doctrine, questioning whether, after an unlawful blood test has revealed incriminating information, the State may use a subpoena to a hospital to obtain that same information.

Van Linn was involved a single-vehicle car crash. He was located by police some distance from his vehicle, injured, smelling of alcohol, and admitted consuming some beer. The police learned that
Van Linn had four prior OWI offenses so he was subject to a .02 blood alcohol limit. Van Linn was transported to the hospital where, suspecting that he was intoxicated, a deputy sheriff informed him that he was under arrest and asked him to consent to a blood draw. Van Linn refused. The deputy, believing the circumstances presented an exigent circumstance, directed that Van Linn's blood be drawn without seeking a warrant.

Van Linn was charged with operating while intoxicated and operating with a prohibited alcohol concentration. He moved to suppress the results of the blood test. The State argued the search was justified by exigent circumstances. The circuit court disagreed because some two hours had elapsed since the accident and police had not attempted to obtain a warrant. The court suppressed the results of the warrantless blood draw.

About three months later, the State moved the court, citing Wis. Stat. § 968.135, to issue a subpoena to the hospital where Van Linn was treated, seeking the results of his blood tests. The court signed the subpoena, which referenced the results of the warrantless blood draw. Van Linn's counsel intended to challenge the subpoena but the hospital provided the records before the challenge was heard; the court deemed the defendant's motion to quash the subpoena moot. The hospital records revealed that hospital personnel had taken blood samples from Van Linn and had performed a blood panel for diagnostic purposes; these results included his blood alcohol concentration, which showed a prohibited blood alcohol content.

In circuit court, Van Linn argued that the result of the hospital's blood draw was privileged under Wis. Stat. § 905.04 (providing for physician-patient privilege). He also argued that the court's prior suppression of the same information should prevent the State from accessing it via different means. The court ruled that the hospital's blood test results were admissible. Van Linn entered a no contest plea and appealed.

On appeal, Van Linn argued that the evidence from the diagnostic blood test should be inadmissible, invoking the well-established principle that all evidence derived from an illegal search is the "fruit of the poisonous tree" and must be suppressed. See Nardone v. United States, 308 U.S. 338, 341 (1939). The court of appeals disagreed and affirmed, holding that the subpoena to the hospital satisfied the "independent source" exception to the exclusionary rule.

The exclusionary rule requires courts to suppress evidence obtained through the exploitation of an illegal search or seizure. The rule applies not only to primary evidence seized during an unlawful search, but also to derivative evidence acquired as a result of the illegal search, unless the State shows sufficient attenuation from the original unlawful search to dissipate that taint.

To determine whether the evidence was obtained from an independent source, courts look to two factors: (1) whether, absent the unlawful seizure, police would still have applied for the search warrant; and (2) whether the unlawful seizure influenced the court's decision to grant the search warrant.

The court of appeals rejected Van Linn's argument that by disclosing the impermissibly derived blood alcohol content in the subpoena application, the State rendered the diagnostic blood test evidence the "fruit" of the earlier unlawful law enforcement blood sample. The court reasoned that the diagnostic blood test evidence sought by the State was created completely independently of the impermissible law enforcement blood sample. It reasoned that the purpose of the hospital blood draw was not to obtain evidence of a crime but, rather, to diagnose and treat Van Linn.

Van Linn asked this court to address the interplay between the "fruit of the poisonous tree" doctrine and the "independent source doctrine." Van Linn argues that the State should not be permitted to take advantage of its earlier impermissible warrantless blood draw as a way to obtain a subpoena to acquire and use the blood draw evidence obtained from hospital records. This Court granted review.

Van Linn has presented the following issue for review:

> After Daniel Van Linn was arrested on suspicion of drunk driving, a sheriff's deputy ordered his blood drawn for testing. This draw was illegal, and the circuit court excluded its fruit. After the suppression decision, the prosecutor applied for a subpoena to the hospital where Mr. Van Linn had been treated; the application included the results of the first, suppressed blood test. The court issued the subpoena and the hospital turned over evidence including the results of the blood alcohol test it had conducted. Was the State's decision to seek this subpoena the fruit of its earlier, unlawful search, such that its results should have been suppressed?

WISCONSIN SUPREME COURT
October 27, 2021
10:45 a.m.

2019AP1479 City of Waukesha v. City of Waukesha Board of Review

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 order, Judge Michael O. Bohren presiding, that granted a writ of certiorari in favor of the City of Waukesha to review the City's challenge to a tax assessment determination[i] made by the City of Waukesha Board of Review.

This case, while it may seem complex, boils down to a rather simple question: May a municipality petition a court to review a decision of the municipality's Board of Review? The Waukesha County Circuit Court said yes, a municipality can petition the court, via a writ of certiorari, to review the decisions of a Board of Review. The District II Court of Appeals, however, said that state statutes do not provide a municipality with authority to challenge a Board of Review decision; only a *taxpayer* has such right. The Supreme Court is asked now to review.

In 2017, the City of Waukesha assessed property owned by the Salem United Methodist church at $51,900. In 2018, the City's assessor increased the amount of the assessment to $642,200, in part because the Church had received and accepted an offer to sell the property for approximately $1,000,000. The assessor notified the church of the change, informed it that the open book session would be held the following week, and explained that a Board of Review hearing would be held. The Church filed an objection, saying the correct valuation for the property was $108,655. After a hearing, at which the assessor and the Church offered testimony and evidence, the Board ruled in favor of the church and assessed the property at $108,700.

The City petitioned the circuit court under Wis. Stat. § 70.47(13)[ii] to issue a writ of certiorari, asserting that the Board failed to afford the assessor's valuation the required presumption of correctness; the Church failed to overcome the presumption with sufficient evidence; and the Board's decision was arbitrary and unreasonable.

The circuit court issued the writ. The court rejected the Board's argument that the City lacked authority to challenge an assessment. The circuit court went on to find that the Board of Review did not overcome the presumption that its initial valuation of the property, $642,000, was correct. The court said the evidence presented was such that it would not permit the Board to reasonably make the decision and order it did and in doing so the Board went outside of its jurisdiction and did not act according to law. On that basis, the circuit court granted the writ of certiorari and remanded the issue of the assessment back to the Board of Review.

The Board of Review appealed. The Court of Appeals reversed and remanded, concluding that Wis. Stat. § 70.47(13) is clear and does not authorize the City to pursue a certiorari appeal of the Board's determination and noting that the taxpayer is the only person or entity to receive notice of the Board's decision.

The City petitioned the Supreme Court for review of the following issue:
May a municipality seek certiorari review of a decision of its Board of Review?

[i] **Wisconsin's tax assessment process.** Each municipality is designed as a taxation district, which must have a tax assessor. The assessor values all taxable property and must notify, in writing, an owner of a changed assessment at least fifteen days before the board meeting of the assessment amount, time and place of the meeting, and information about how to object. Once the assessor has completed the assessment rolls, the municipal clerk publishes a notice to the public of the open book session, at which time the rolls are made available for examination.

Owners who wish to dispute an assessment may file an objection with the board of review. At the hearing, the board takes, under oath, testimony of any person relative to the assessment; the board may examine any person it believes has knowledge of the value of the property; the hearing shall be recorded; and the assessor shall provide specific information to the board supporting the assessor's valuation. Wisconsin Stat. § 70.48(11) provides that "in all proceedings before the board the taxation district shall be a party in interest to secure or sustain an equitable assessment of all the property in the taxation district."

The board then makes a determination as to whether the assessment is correct. The board shall presume that the assessor's valuation is correct, and the presumption is only rebutted "by a sufficient showing by the objector" that it is incorrect.

[ii] Wisconsin Stat. § 70.47(13) states, in part:

> [A]ppeal from the determination of the board of review shall be by an action for certiorari commenced within 90 days after the taxpayer receives the notice under sub. (12). . . . If the court on the appeal finds any error in the proceedings of the board which renders the assessment or the proceedings void, it shall remand the assessment to the board for further proceedings in accordance with the court's determination and retain jurisdiction of the matter until the board has determined an assessment in accordance with the court's order.