

WISCONSIN SUPREME COURT CALENDAR AND CASE SYNOPSES February 2006

This calendar contains cases that originated in the following counties:

Green Lake
Jackson
Jefferson
Milwaukee
Washington
Waushara

TUESDAY, FEBRUARY 21, 2006

9:45 a.m.	03AP2457	Wisconsin Auto Title Loans v. Kenneth M. Jones
10:45 a.m.	04AP2746	Affordable Erecting, Inc. v. Neosho Trompler, Inc.
1:30 p.m.	03AP1534	Royster-Clark, Inc. v. Olsen's Mill, Inc.

WEDNESDAY, FEBRUARY 22, 2006

9:45 a.m.	04AP2820-CR	State v. Roger S. Walker
10:45 a.m.	04AP352	1325 North Van Buren, LLC v. T-3 Group, Ltd.
01:30 p.m.	04AP1029-CR	State v. Tomas R. Payano-Roman

THURSDAY, FEBRUARY 23, 2006

9:45 a.m.	04AP276	David Zastrow v. Journal Communications, Inc.
10:45 a.m.	04AP1435-CR	State v. Tyrone Booker
1:30 p.m.	04AP2989-CR	State v. Scott K. Fisher

The Supreme Court calendar may change between the time you receive this synopsis 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. That office will also have the names of the attorneys who will be arguing the cases.

Radio and TV, and print media wanting to take photographs, must make media requests 72 hours in advance by calling Supreme Court Media Coordinator Rick Blum at 608-271-4321. These summaries are not complete analyses of the many issues that each case presents. They are a service of the Director of State Courts Office/Amanda Todd, Court Information Officer 608-264-6256.

WISCONSIN SUPREME COURT
TUESDAY, FEBRUARY 21, 2006
9:45 a.m.

03AP2457

Wisconsin Auto Title Loans v. Kenneth M. Jones

This is a review of a decision of the Wisconsin Court of Appeals, District I (District IV judges presiding), which affirmed a ruling of the Milwaukee County Circuit Court, Judge Michael Guolee presiding.

This case involves a man who took out an auto title loan that required repayment at a high rate of interest. The Supreme Court is expected to analyze his claims that these loans violate the Wisconsin Consumer Act (WCA).

Here is the background: Kenneth M. Jones was unemployed and living on government assistance. He borrowed \$800 from Wisconsin Auto Title Loans to pay some bills. The pre-printed, standard loan agreement imposed the following terms:

1. Repayment of the loan within one month, at a rate of 300 percent interest (which added up to about \$1,200);
2. Relinquishment of a key to his car and guarantee of the car's title; and
3. Mandatory arbitration on all claims arising out of the loan agreement

Jones defaulted on the loan and Wisconsin Auto began an action to take possession of his car. Jones responded with a counterclaim that Wisconsin Auto's loan and collection practices violated the WCA. Wisconsin Auto then tried to compel Jones to participate in arbitration, as the contract required, and Jones refused.

The circuit court held a hearing to determine whether to enforce the contract's arbitration requirement. Jones argued that the clause was unconscionable, a word that means, under Wisconsin law, "the absence of a meaningful choice on the part of one party, together with contract terms that are unreasonably favorable to the other party."

The trial court invalidated the contract after concluding that it violated the WCA. The judge noted that "some people are very desperate" and that the imbalance of power between the lender and the recipient makes these loans unconscionable. Wisconsin Auto appealed, and the Court of Appeals affirmed the trial court.

Now, Wisconsin Auto has come to the Supreme Court, where it argues that the lower courts erred in numerous ways in their handling of this case. Wisconsin Auto also maintains that the Federal Arbitration Act (FAA), in which Congress declared a national policy favoring arbitration, trumps the Wisconsin Consumer Act and mandates enforcement of any arbitration agreement involving commerce.

Jones, on the other hand, argues that the lower courts got it right, and agrees with the Court of Appeals' bottom line that an arbitration clause "could contain a provision that would create a more balanced playing field but the one here does not."

The Supreme Court is expected to determine whether the arbitration clause in the auto loan contract is viable, and to clarify how the Federal Arbitration Act interacts with the Wisconsin Consumer Act.

**WISCONSIN SUPREME COURT
TUESDAY, FEBRUARY 21, 2006
10:45 a.m.**

04AP2746

Affordable Erecting, Inc. v. Neosho Trompler, Inc.

This is a review of a split decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a judgment of the Washington County Circuit Court, Judge Annette K. Ziegler presiding.

This case involves a dispute between two companies over an unpaid bill and a damaged piece of equipment. The Supreme Court is expected to decide whether an unsigned, mediated settlement agreement is sufficient to bar one of the companies from pursuing a legal claim against the other.

Here is the background: Neosho Trompler, Inc., contracted with Affordable Erecting, Inc., to relocate Neosho's equipment from the Dodge County community of Hustisford to Hartland, in Waukesha County. During the move, Affordable – a machinery installer based in Germantown – allegedly damaged a lathe. Citing the damage, Neosho refused to pay Affordable. Affordable took Neosho to court, seeking about \$18,000, and Neosho filed a counterclaim. Soon, two insurance companies – Acuity, representing Affordable, and General Casualty, representing Neosho – intervened in the case.

The circuit court ordered the parties to try mediating their dispute. In mediation, they reached an agreement that Acuity would pay \$12,500, to be divided as follows: \$5,000 to Neosho, \$4000 to General Casualty (General Casualty had paid out \$10,000 on Neosho's insurance claim for damage to the lathe), and \$3,500 to Affordable.

Although all the parties agreed that this would end the dispute, and although attorneys for the parties signed the mediated agreement, there was a final step. Affordable's attorney had made a written notation that the agreement hinged on the acceptance of Affordable's owner, Tracy Haferkorn. Haferkorn never signed the agreement and did not cash Acuity's check. Instead, Affordable filed a complaint against Neosho in the circuit court for Waukesha County, renewing the claims that originally were made in Washington County.

The case was moved into Washington County and Neosho filed a motion to dismiss Affordable's claims and to enforce the original agreement. The circuit court granted the motion on the ground of equitable estoppel. Equitable estoppel stops a party from going back on a previous agreement in the interest of fairness to others who relied upon that agreement. Affordable appealed, and the Court of Appeals affirmed.

Now, Affordable has come to the Supreme Court, where it points out that it never approved the agreement and that the circuit court erred in barring its contract claim. Neosho, on the other hand, argues that Affordable never outright rejected the settlement, but rather remained silent, leaving the others to believe that it did not object. The result of this inaction, Neosho argues, was that Neosho gave up its right to pursue a lawsuit against Affordable while Affordable apparently kept its options open.

The Supreme Court will decide if Affordable's claim against Neosho is barred by equitable estoppel.

**WISCONSIN SUPREME COURT
TUESDAY, FEBRUARY 21, 2006
1:30 p.m.**

03AP1534

Royster-Clark, Inc. v. Olsen's Mill, Inc.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed a ruling of the Waushara County Circuit Court, Judge Lewis Murach presiding.

This case involves a dispute between a fertilizer supplier and distributor that began when an unusually wet spring kept farmers from planting.

Here is the background: Olsen's Mill, Inc., entered into two contracts with Royster-Clark, Inc. The first was a written contract for 2000 tons of nitrogen fertilizer at \$192 per ton, or \$384,000, prepaid. This type of fertilizer is used primarily on corn, and generally applied before July 1. The contract called for delivery no later than June 30.

The second contract was for a special-order fertilizer called Super Rainbow, which is used on potato crops. This was a verbal agreement. According to Olsen, Royster agreed to purchase a full batch of Super Rainbow, sell what it could in 2001, and store the remainder for sale the following year. Payment was to be made at the end of the year, when it could be determined how much had been sold.

The weather was disagreeable. The planting season was thrown off by an excessively rainy spring and, according to court filings in this case, many farmers decided not to plant. As a result, demand for fertilizer diminished and prices plummeted.

Olsen, like many other Royster customers, sought to terminate its contract for 2000 tons of nitrogen fertilizer. Royster resisted. Eventually a bargain was struck and Olsen took the remaining product and re-sold it to clients at a loss.

The substance of this bargain – struck orally between Royster's sales agent, Roger Ralston, and Olsen – is the subject of this dispute. Royster asked for full payment for the Super Rainbow and Olsen claimed the oral agreement under which Olsen agreed to deal with the excess corn fertilizer gave Olsen a credit that should cover the amount owed for the potato fertilizer. Royster disagreed and sued Olsen; Olsen filed a counter claim.

The matter proceeded to trial and the trial court ruled in favor of Olsen, finding that the original written contract for the nitrogen fertilizer had been modified by the oral agreement between Olsen and Ralston.

Royster appealed, and the Court of Appeals reversed, concluding that the written contract could only be modified in writing.

Now, Olsen has come to the Supreme Court, where it argues that the circuit court was in the best position to determine the credibility of the various witnesses and that the Court of Appeals erred in substituting its judgment for that of the trial court.

Royster, on the other hand, argues that the Court of Appeals correctly determined that a conversation between a sales agent and Olsen could not be considered to have amended the original sales contract.

The Supreme Court will decide whether the supplier or the distributor will prevail in this case.

WISCONSIN SUPREME COURT
WEDNESDAY, FEBRUARY 22, 2006
9:45 a.m.

04AP2820-CR State v. Roger S. Walker

This is a review of an order of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which dismissed an appeal of a sentence imposed in Green Lake County Circuit Court, Judge William M. McMonigal presiding.

This case involves a man convicted of first-degree sexual assault of a child. The Supreme Court is expected to clarify the procedure that must be followed by a criminal defendant who is appealing after s/he has been re-sentenced in the trial court.

Here is the background: On Nov. 30, 1999, Roger S. Walker was charged in Green Lake County Circuit Court with one count of first-degree sexual assault of a child that occurred in February 1991. Walker entered an Alford plea, which allows a person charged with a crime to maintain his/her innocence while acknowledging that sufficient evidence exists for a conviction.

The judge convicted Walker and accepted the joint recommendation of the defense and prosecution that he impose and stay a prison sentence and place Walker on 20 years of probation. The probation was to follow a 20-year prison sentence that Walker already was serving in a case from Fond du Lac County (that involved similar charges and the same victim).

A few months after he was sentenced in Green Lake County, Walker had his Fond du Lac conviction overturned. The Fond du Lac County prison sentence was vacated and the case sent back to Fond du Lac Circuit Court for a new trial. He was released from prison and began serving the probation sentence imposed by the Green Lake court. Six months later, his probation was revoked and he was sent to jail. The Green Lake court then lifted the stay on the prison sentence it had imposed and sentenced Walker to 12 years' imprisonment.

Walker filed a motion asking the circuit court to reconsider the sentence and arguing that some of the medical information presented by the State at sentencing had been false. The circuit court held a new sentencing hearing and re-sentenced Walker to the same amount of time: 12 years. Walker appealed to the Court of Appeals.

The Court of Appeals dismissed Walker's appeal because Walker had not first sought reconsideration of the new sentence in the trial court. The Court of Appeals concluded that this step is required under state law before an appeal may be filed.¹

In the Supreme Court, Walker argues that this law applies only in cases where the defendant is challenging a trial court's original sentence. In this case, he was challenging the result of the re-sentencing, and he argues that it would have been wasteful of time and resources for him to return to the circuit court after having been re-sentenced.

The Supreme Court will clarify the steps a defendant must follow in seeking appellate review after having been re-sentenced in the circuit court.

¹ Wis. Stat. § 809.30

**WISCONSIN SUPREME COURT
WEDNESDAY, FEBRUARY 22, 2006
10:45 a.m.**

04AP352

1325 North Van Buren, LLC v. T-3 Group, Ltd.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which a judgment of the Milwaukee County Circuit Court, Judge Mel Flanagan presiding.

This case involves a troubled construction project to turn a downtown Milwaukee warehouse into condominiums. The Supreme Court will decide if the developer's claims against the construction manager are barred by the economic loss doctrine.

The economic loss doctrine requires parties who enter into a contract and then suffer economic losses as a result (for example, a business purchases a copier that does not work properly), to pursue remedies available under the contract (for example, a breach of warranty claim) rather than commence a tort claim. Tort claims are reserved for acts and omissions that result in personal injury or other damage that is not purely economic.

Here is the background: In March 2001, 1325 North Van Buren, LLC, hired T-3 Group, Ltd., to manage a construction project to turn a warehouse into a 42-unit condominium building. The job did not go well. There were numerous accidents, setbacks, and delays. Court filings discuss a concrete slab smashing into a ceiling, ruining already finished construction work, and demolition that left holes in floors. 1325 fired T-3 and filed a lawsuit alleging both tort and contract-related claims.

The circuit court dismissed all of 1325's tort claims, concluding that they were barred by the economic loss doctrine.

1325 appealed. The Court of Appeals reversed on the basis that the contract was for services (T-3 disputes this, maintaining that only about \$176,000 of the \$6 million contract was for services and that the rest was money flowed through to subcontractors for construction). Because the court concluded that this was a services contract, it held that the outcome was controlled by a 2004 case² in which the Supreme Court held that contracts for professional services are not subject to the economic loss doctrine.

Now, T-3 and its insurers have come to the Supreme Court, where they argue that the Court of Appeals wrongly applied the caselaw from Cease when the controlling case is Van Lare v. Vogt, Inc.,³ in which the Wisconsin Supreme Court held that the economic loss doctrine *does* bar tort claims arising from commercial real estate transactions. T-3 points out that Cease involved an informal, oral contract and should not be applied to commercial contracts such as this where parties knowledgeable in the law have drawn up comprehensive written agreements.

The Supreme Court will clarify whether the economic loss doctrine bars 1325's tort claims against T-3.

² Ins. Co. of North America v. Cease Electric, 2004 WI 139, 276 Wis. 2d 361, 688 N.W.2d 462

³ 2004 WI 110, 274 Wis. 2d 631, 683 N.W.2d 46

WISCONSIN SUPREME COURT
WEDNESDAY, FEBRUARY 22, 2006
1:30 p.m.

04AP1029-CR State v. Tomas R. Payano-Roman

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed a decision of the Milwaukee County Circuit Court, Judge Russell W. Stamper presiding.

This case involves a suspected drug dealer who was administered laxatives to move a plastic bag of heroin through his system. The Supreme Court is expected to decide if the use of laxatives and compelling the man to defecate in the presence of police officers constitutes an unreasonable search.

Here is the background: On April 12, 2002, two Milwaukee police officers were conducting surveillance. They had received a tip that a person named Mingo was trafficking cocaine and possibly heroin out of a blue Toyota Tercel.

At about 11:30 a.m., they saw a man later identified as Payano-Roman walk up to a blue Tercel and crouch into the driver's side of the car. When one of the officers was about six feet away, he observed Payano-Roman place a plastic baggie containing a white powdery substance into his mouth. The baggie was approximately the size of half of the top joint of the officer's pinky finger. Payano-Roman swallowed the object.

The officers arrested Payano-Roman for possession of a controlled substance. He was taken to the hospital. The officers advised hospital personnel that they wanted to examine Payano-Roman's stool. The hospital provided a portable toilet at his bedside and officers told Payano-Roman that he must use the portable toilet for defecation. He was handcuffed to the bed in a private room and a nurse who spoke Spanish instructed him to drink a liquid laxative every 20-30 minutes. Payano-Roman drank the laxative, sometimes with the nurse administering the drug and sometimes with one of the officers administering it. At about 4 a.m., the baggie came through Payano-Roman's stool. The contents were tested and determined to be heroin.

Payano-Roman filed a motion seeking to suppress the evidence based on a violation of the Fourth Amendment. He argued that the forced administration of laxatives constituted an unreasonable search. The trial court ruled that Payano-Roman's Fourth Amendment rights were not violated because the officers were not involved in determining the need for the administration of medical treatment. The trial court determined that the medical personnel administered the laxatives solely out of concern for Payano-Roman's health—that the plastic bag could break, causing a drug overdose.

Payano-Roman appealed, and the Court of Appeals concluded that the record did not support the trial court's conclusion that laxative was administered solely for medical reasons. The Court of Appeals sent the case back to the trial court with instructions to suppress the baggie of heroin from evidence.

Now, the State has come to the Supreme Court, which is expected to determine whether the use of laxatives in this situation amounted to an illegal search.

WISCONSIN SUPREME COURT
THURSDAY, FEBRUARY 23, 2006
9:45 a.m.

04AP276

David Zastrow v. Journal Communications, Inc.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed a judgment of the Jefferson County Circuit Court, Judge John Ullsvik presiding.

This is a class-action lawsuit by former employees of Perry Printing, a subsidiary of Journal Communications, Inc., who claim that they were not informed that they could hold onto their shares of Journal Communications stock by retiring when the printing plant was sold. This lack of information, the plaintiffs claim, meant that they were forced to sell their stock earlier and for less money than they otherwise could have earned. The Supreme Court is expected to decide whether the former employees are barred by a statute of limitation from bringing this claim against the company.

Here is the background: Perry Printing was sold in May 1995 to Milhaus Group. Employees of Perry who chose to retire before the sale were able to sell back their shares of stock in Journal Communications over a 10-year period. Those who chose immediate employment with Milhaus were given between one and five years to sell the stock. The 10-year sell-back period provided a couple of significant advantages. It gave more time for the stock to gain value and more time over which to spread out taxable capital gains.

A group of employees who chose to stay on with Milhaus sued on behalf of all former Perry employees who had been employed on the date of the sale and who had sold their units of stock. They alleged that Journal Communications had not adequately informed them that the 10-year sell-back option was available if they retired.

The circuit court dismissed most of the employees' claims. The court permitted 16 of the employees to proceed to trial on one theory: that the trustees breached the fiduciary duties of loyalty and impartiality by requiring employees to sell their units within five years rather than 10. The defendants then moved for dismissal of the remaining claims on the ground that they were barred by the two-year statute of limitations. The plaintiffs, on the other hand, argued that a six-year statute of limitation applied. The circuit court agreed and permitted the claim to move forward.

The case went to trial and damages ultimately were awarded to four of the 16 plaintiffs. The court concluded that (1) these people had not known about the 10-year sell-back and (2) had they been informed of the option, they would have retired from Perry to secure the benefit and then applied for employment with Milhaus. The other plaintiffs, the court found, knew or should have known that the benefit was available.

Journal Communications appealed, and the Court of Appeals reversed based upon the statute of limitations issue. The Court of Appeals concluded that the defendants were right that the two-year statute of limitations applies to breach of fiduciary duty claims.

Now the employees have come to the Supreme Court, where they argue that the six-year statute of limitations is the correct one to apply. The Supreme Court will decide if the plaintiffs' claims against the corporation are viable by determining whether they qualify as negligence claims (which are subject to the six-year limitation) or intentional torts (which are subject to the two-year limitation).

WISCONSIN SUPREME COURT
THURSDAY, FEBRUARY 23, 2006
10:45 a.m.

04AP1435-CR State v. Tyrone Booker

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed in part and reversed in part a decision of the Milwaukee County Circuit Court, Judge Jeffrey A. Conen presiding.

This case involves a sexual assault conviction that raised questions about whether a jury must actually view allegedly pornographic material before finding that it meets the statutory definition of pornography.

Here is the background: On Dec. 17, 2001, three Milwaukee girls – S.M.R., then 14, and her two friends, then 13 and 12 – skipped school and went to the home of the 13-year-old’s boyfriend. The boy and his mother were not home, but Tyrone Booker, the mother’s boyfriend, invited the girls in. Booker asked if the girls wanted to watch a video, and popped in a tape labeled “Robert” that contained images of adult men and women engaged in various sex acts. Then – allegedly by threatening to expose the girls for cutting school – Booker convinced S.M.R. to remove her clothes and he fondled her.

The girls left the apartment and ultimately police were called. DNA tests performed on S.M.R.’s underpants revealed the presence of semen from two unidentified men. Booker was eliminated as a possible source.

Booker was charged with two counts of second-degree sexual assault of a child and two counts of exposing a child to harmful materials. He maintained that S.M.R. was lying about the assault, but the jury convicted him on all four counts. He was sentenced to a total of 10 years’ confinement and seven years’ extended supervision. Booker appealed, arguing that his right to effective cross-examination was violated when the trial court refused to permit him to introduce the evidence of the semen from the two other men.

The Court of Appeals affirmed the trial court’s ruling that the DNA evidence was barred by the rape shield law,⁴ which, it explained, “was enacted in part to counteract outdated beliefs” that a victim’s sexual past might shed light on the truthfulness of current allegations. The DNA issue is not before the Supreme Court. The court then turned to Booker’s convictions on the harmful-materials counts, which it reversed after concluding that “no reasonable jury” could convict someone without viewing the materials firsthand or hearing expert testimony about them. In this case, testimony from the girls and from a police detective was the only evidence that the jury heard about the contents of the tape.

Both Booker and the State appealed. Booker argues that the lower courts violated his constitutional rights by invoking the rape shield law; the State argues that the Court of Appeals’ decision on the harmful materials went beyond the requirements of the statute.

The Supreme Court will clarify what evidence a prosecutor must present to prove that a defendant has exposed a minor to harmful materials.

⁴ Wis. Stat. § 972.11(2)

**WISCONSIN SUPREME COURT
THURSDAY, FEBRUARY 23, 2006
1:30 p.m.**

04AP2989-CR State v. Scott K. Fisher

This is a certification from the Wisconsin Court of Appeals, District IV (headquartered in Madison). The Court of Appeals may certify cases that cannot be decided by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case originated in Jackson County Circuit Court, Judge John A. Damon presiding.

This is a ‘concealed carry’ case. The Supreme Court will decide if the law⁵ that prohibits carrying concealed weapons may be enforced against a business owner who kept a loaded gun in the console of his vehicle for security while making night deposits.

This is the third time in recent years that the state Supreme Court has weighed the constitutionality of applying the law that prohibits carrying concealed weapons in light of the 1998 state constitutional amendment that guarantees the people's right to bear arms.

In State v. Cole,⁶ the Court concluded that a man who was discovered with two guns in a car during a routine traffic stop could be convicted of violating the concealed carry law because his generalized assertion of feeling unsafe in a neighborhood where he had been brutally beaten was not sufficient to warrant carrying a gun for personal safety.

In State v. Hamdan,⁷ the Court concluded that a grocery store owner, who was carrying a gun in his pocket while in the store, could not be prosecuted for carrying a concealed weapon because he had a legitimate security interest at his place of business. The Court emphasized that a person’s expectation of personal security is greatest on his or her own property.

This current case presents the court with elements from both previous cases: a business owner carrying a loaded gun in his vehicle. Scott Fisher owned and operated the Cozy Corner Tavern in Black River Falls. At bar time, he would transport the night’s receipts – a substantial amount of cash – to the bank or to his home. He testified that this required travel through a high-crime neighborhood.

That Fisher packed a loaded pistol in the center console of his truck came to light after the truck was stolen and he notified police that the pistol was in it. Soon after the theft, the truck thief was killed in a knife fight and the truck and loaded pistol were returned to Fisher. After Fisher had a subsequent encounter with a law enforcement officer and disclosed that he still had the loaded gun in his truck, he was charged with carrying a concealed weapon.

The circuit court dismissed the complaint after Fisher argued that his constitutional right to protect himself outweighed the State’s interest in enforcing the statute. The Court of Appeals certified the State’s appeal to the Supreme Court, which will decide whether Fisher can be prosecuted for violating the concealed carry statute.

⁵ Wis. Stat. § 941.23

⁶ 2003 WI 112, 264 Wis. 2d 520, 665 N.W.2d 328

⁷ 2003 WI 113, 264 Wis. 2d 433, 665 N.W.2d 785