

# **WISCONSIN SUPREME COURT CALENDAR AND CASE SYNOPSES November 2007**

This calendar includes cases that originated in the following counties:

Columbia  
Dane  
Dodge  
Fond du Lac  
Rock  
Walworth

To be heard in the Wisconsin Supreme Court Hearing Room, 231 East Capitol:

## **TUESDAY, NOVEMBER 6, 2007**

9:45 a.m.	06AP662	State v. Beaver Dam Area Development Corporation, et al.
10:45 a.m.	05AP2257	Walter J. Olson v. Town of Cottage Grove

## **WEDNESDAY, NOVEMBER 28, 2007**

9:45 a.m.	05AP1527	Berner Cheese Corp. v. Lyle A. Krug, et al.
10:45 a.m.	05AP2607	Estate of James H. Matteson v. Robert Matteson, et al.
1:30 p.m.	06AP364	Shannon Nichols, et al. v. Progressive Nrthrn Ins., et al.

## **THURSDAY, NOVEMBER 29, 2007**

9:45 a.m.	06AP405	Gregory A. Liebovich v. Minnesota Insurance Co., et al.
10:45 a.m.	04AP3239	Wisconsin Department of Revenue v. Menasha Corp.
1:30 p.m.	06AP2761	Wisconsin Realtors Assoc., et al. v. Town of West Point

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. Summaries provided are not complete analyses of the issues presented.

**WISCONSIN SUPREME COURT**  
**TUESDAY, NOVEMBER 6, 2007**  
**9:45 a.m.**

*This is a certification from the Wisconsin Court of Appeals, District IV (headquartered in Madison). The Court of Appeals may certify cases that it believes cannot be resolved by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications. This case began in Dodge County Circuit Court, Judge Richard O. Wright, presiding.*

2006AP662

[State v. Beaver Dam Area Development Corp.](#)

The District IV Court of Appeals asks the Supreme Court to establish an analytical framework for determining whether an entity is a quasi-government corporation as it relates to Wisconsin's open meetings and public records law, and then to apply the framework to the facts of this case.

Some background: The state sought a judgment, declaring that the Beaver Dam Area Development Corporation (BDADC) is subject to the open meetings and public records laws and an order for the corporation to comply with the laws.

The circuit court held that the corporation is not subject to the open meetings and open records law because it does not meet the definition of a "quasi-governmental corporation" within the meaning of these statutes. The state appealed.

The state emphasizes that two city officials, serve on the corporation's board by virtue of their positions as city officials; that the corporation originally had only one employee, who had previously worked for the city as the economic development director; and that the corporation was originally housed at city hall. The BDADC receives about 80 percent of its funding from the city.

The corporation, on the other hand, emphasizes its independent creation and freedom from city control and the role of private individuals on the corporation's board of directors. The two city officials are non-voting members, and voting members are private citizens. The BDADC has cooperation agreements with the city, although it has no authority to obligate the city to do anything.

In stating their cases, both sides refer to a 1991 attorney general opinion in which then-Attorney General Jim Doyle concluded that for purposes of the open meetings law "quasi-governmental corporations" are not limited to non-stock body politic corporations.

In that case, the attorney general concluded that the Milwaukee Economic Development Corporation was subject to the open meetings and public records laws. He did not, however, develop a general list of factors that are significant in determining the status of corporations as "quasi-governmental" or private.

The Court of Appeals notes the potential significance of a decision by the Supreme Court: "... the more narrow the definition of 'quasi-governmental corporation,' the greater the ability of governments to delegate public functions to entities that are shielded from public scrutiny... On the other hand, genuinely private corporations presumably should be allowed to conduct their affairs, including some degree of interaction with government bodies or public issues, without themselves becoming entirely subject to the open meetings and public records laws..."

**WISCONSIN SUPREME COURT**  
**TUESDAY, NOVEMBER 6, 2007**  
**10:45 a.m.**

*This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed a Dane County Circuit Court decision, Judge Angela B. Bartell, presiding.*

2005AP2257      [Olson v. Town of Cottage Grove](#)

In this case, the Supreme Court could clarify the proper standard of review in cases where the circuit court resolves a declaratory judgment action by means of summary judgment and the Court determine the point at which a controversy is “ripe.”

Some background: Under the Town of Cottage Grove’s Smart Growth ordinance, which was approved in July 2002, some land use districts are categorized as “sending areas,” while others are categorized as “receiving areas” in relation to “transfer of development rights,” or TDRs. “Sending areas” include land designated as part of the agricultural district, while receiving areas include residential districts.

On December 27, 2001, prior to town approval of the Smart Growth ordinance, Walter Olson, a real estate developer, submitted a petition to the County to rezone about 70 acres of property known as the Klosterman Farm. Olson asked zoning be changed from A-1 EX classification to R-1 Residential in order to subdivide part of his property into fifteen residential lots.

On October 28, 2002, subsequent to approval of the Smart Growth ordinance, Olson filed a second, separate petition to rezone his property, requesting an increase to 58 lots. The Dane County Board of Supervisors conditionally approved Olson’s second zoning application and gave him an extended period of time to record the plat, but Olson concedes he did not do so.

Olson claims that meeting the TDR requirement would require him to purchase 350 acres of farmland at a cost of approximately \$750,000. Olson sought a declaratory judgment challenging the ordinance on constitutional and other grounds.

The circuit court granted the town’s motion for summary judgment, concluding that Olson failed to demonstrate there were any genuine issues of material fact that entitled him to a trial. The circuit court also concluded that the facts presented by the town required the legal conclusion that Olson’s controversy was not ripe.

The Court of Appeals reversed and remanded.

The town argued the controversy was not ripe because even if the ordinance were declared void, Olson’s ability to develop his property was not a certainty, so any declaration by the court would be advisory. In order for Olson to meet the ripeness requirements, Olson would first have to reapply for rezoning from the county and for plat approval from the town, the town argued.

A decision by the Supreme Court could clarify the law on when a controversy is ripe and the proper standard of review to be applied by an appellate court when summary judgment is rendered in a declaratory judgment action.

**WISCONSIN SUPREME COURT**  
**WEDNESDAY, NOVEMBER 28, 2007**  
**9:45 a.m.**

*This is a review of a decision of the Wisconsin Court of Appeals, District IV (District III judges presiding), which affirmed a Rock County Circuit Court decision, Judge James E. Welker, presiding. District IV Court of Appeals is headquartered in Madison; District III is headquartered in Wausau.*

2005AP1527 [Berner Cheese Corp. v. Lyle A. Krug, et al.](#)

This complex case began as a dispute between Berner Cheese Corporation and its vice president of sales and marketing, who, after resigning his post, was subject to a zealous effort by Berner to recover proprietary information on customers and cheese formulas. The effort included a raid on the offices of Dairy Source, Inc. (DSI), one of Berner's suppliers, where the ex-employee kept an office. DSI sued, and Berner ultimately paid DSI \$1.35 million to settle the claim.

After the settlement, additional disputes were aired. Berner sued its corporate counsel, Lyle Krug, for legal malpractice, and Berner's defense counsel, the law firm of Brennan, Steil, Basting, and MacDougall, S.C., sued Berner for unpaid legal bills.

The trial court's dismissal of two of Berner's claims against Krug, the corporate counsel, is the basis for this appeal. The dismissed claims were for breach of fiduciary duty and punitive damages. The Court of Appeals affirmed the dismissal of these claims.

The Supreme Court is expected to explore the bounds of an attorney's duties to a client, and to clarify the circumstances under which a client can mount a claim for punitive damages against an attorney whose advice is not sound.

**WISCONSIN SUPREME COURT**  
**WEDNESDAY, NOVEMBER 28, 2007**  
**10:45 a.m.**

*This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed in part, and reversed in part, a Fond du Lac County Circuit Court decision, Judge Robert J. Wirtz, presiding.*

2005AP2607     [Estate of James Matteson v. Robert Matteson](#)

This case, resulting from a dispute over the dissolution of a business partnership, examines the detailed calculations used to determine an outgoing partner's profit share and the continuing partner's compensation. The partners here were Robert R. and James M. Matteson, two halfbrothers, and the partnership was Matteson Communications, a radio sales and service business.

In 2001, James left the partnership, causing its dissolution. Robert continued the business as an LLC, but the two were unable to agree as to what Robert should pay James for his share of the company. James died shortly after his retirement, and his estate sued. After more than three years of litigation and three days of trial, the circuit court awarded James' estate a share of the value of the business at the date of dissolution and a share of the profits earned between the date of dissolution and the date of trial.

The circuit court concluded that as of the date of dissolution, James' 55 percent share of the business was worth \$68,641, and that Robert had continued the business. The circuit court also concluded that the profits from the date of dissolution to the trial date were \$282,886.80, and that the estate was entitled to 55 percent of that amount. The circuit court then deducted \$91,230 from the estate's share of the profits in order to compensate Robert for the time he and his wife and son had put into concluding the partnership's affairs, along with various other expenses.

Both parties appealed, each alleging a multitude of errors in the court's calculation.

The Court of Appeals affirmed in large part, but reversed that portion of the circuit court's decision compensating Robert only for his work to wind up the partnership. The Court of Appeals directed, on remand, that the circuit court modify its judgment to award Robert compensation for his reasonable labor and management services between the date of dissolution and the date of trial.

The Court of Appeals noted that because the partners had no written agreement to the contrary, the end of the partnership was controlled by ch. 178, Stats., the Uniform Partnership Act. It noted that dissolution does not end a partnership, and instead, the partnership continues to exist until its affairs are concluded.

The petition for review asks the Supreme Court to determine if the Court of Appeals and the trial court correctly interpreted the Uniform Partnership Act and correctly determined that interest continued to accrue on the judgment even after judgment monies were deposited.

**WISCONSIN SUPREME COURT**  
**WEDNESDAY, NOVEMBER 28, 2007**  
**1:30 p.m.**

*This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed a Columbia County Circuit Court decision, Judge Richard Rehm, presiding.*

2006AP364      [Nichols v. Progressive](#)

This case, involving an underage drunken driver and a car accident, presents questions about the scope of “social host” liability in Wisconsin. Social host liability is based on the concept that, under certain circumstances, a party host serving alcohol should be responsible for the acts of guests committed under the influence of alcohol. Most states, including Wisconsin, have laws imposing liability on social hosts where alcohol is served to a minor.

In this case, the hosts are not accused of serving alcohol to the underage guest later involved in an accident, but the hosts were allegedly aware that minors on their property were consuming alcohol during a party they hosted.

Some background: On the evening of June 4, 2004, Edward and Julie Niesen allowed a large group of high-school students to hold a party on their property. One of the underage guests, Beth Carr, drove away from the party under the influence of alcohol. A vehicle driven by the guest collided with another vehicle, injuring its occupants, all members of the Nichols family. The Nichols sued Carr, her automobile insurance company, Progressive Northern Insurance Co., the Niesens, and their homeowners insurance company. Progressive settled for its policy limit.

The trial court concluded that the Nichols failed to state a claim for common law negligence against the Niesens, in part because the defendants did not actually provide or serve alcohol to the underage driver. The Court of Appeals reversed part of the decision, concluding that the family had established a claim for common law negligence.

The Court of Appeals deemed it a “reasonable inference” – knowing high school students were drinking alcohol on their property – that some of those underage students would drive away from their property after consuming alcohol.

The Court of Appeals’ decision, which appears to expand social host liability, would permit the case to go to trial.

The Supreme Court will consider whether a common law negligence claim may be used to impose liability in this situation and have broader implications for social liability law.

**WISCONSIN SUPREME COURT**  
**THURSDAY, NOVEMBER 29, 2007**  
**9:45 a.m.**

*This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Madison), which reversed a Walworth County Circuit Court decision, Judge Michael S. Gibbs, presiding.*

2006AP405      [Liebovich v. Minnesota Insurance Co.](#)

This case involves the question of whether a lakefront homeowner's insurance policy provided coverage for liability arising out of his allegedly willful construction of a house in violation of a deeded 125-foot setback covenant.

Some background: Gregory A. Liebovich was sued by two contiguous neighbors on Geneva Lake who claimed he built his house in violation of the setback restriction. Liebovich's insurance companies refused to defend, telling him that the policy did not cover the liability claimed in the suit.

Liebovich hired his own attorney to defend the suit, which resulted in an award of damages against Liebovich, in the sum of \$10,000, plus costs and disbursements. Liebovich then sued the insurance company to recover the attorney fees he incurred in his own defense.

AIG argues, among other things, that the neighbors' complaint failed to adequately state a personal injury claim that would be covered under the policy, and that its intentional acts exclusion applies.

The circuit court granted summary judgment to the insurance company, but the Court of Appeals reversed. The Court of Appeals concluded that because coverage was "fairly debatable," Minnesota Insurance Company and American International Insurance Company (AIG) had a duty to defend Liebovich. The Court of Appeals sent the case back to the circuit court to calculate the cost of Liebovich's defense.

The Supreme Court is expected to decide if coverage is "fairly debatable," resulting in a duty on the part of the insurer to defend Liebovich. A decision could clarify the meaning of various policy terms and have implications statewide in situations that seem likely to recur.

**WISCONSIN SUPREME COURT**  
**THURSDAY, NOVEMBER 29, 2007**  
**10:45 a.m.**

*This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed a Dane County Circuit Court decision, Judge Steven D. Ebert, presiding.*

2004AP3239     [Wis. Dept. of Revenue v. Menasha Corp.](#)

This case examines whether a computer software package purchased by Menasha Corp. is a custom computer program, and therefore exempt from state sales tax, or whether it is a pre-written program subject to taxation.

Some background: In 1995, Menasha Corp., a large corporation with business locations in 20 states and eight foreign countries, entered an agreement with SAP, a German firm, to license software to help run its enterprise.

The system included more than 70 separate software modules, but was not usable without modifications to meet specific business needs. More than 3,000 modifications were made over a period of nearly a year to create an end product useable by Menasha Corp. The cost of licensing and implementing the program exceeded \$23 million, including \$5.2 million for licensing the core system. The balance was used for planning, customization and implementation. Menasha continues to pay about \$975,000 per year for technical assistance, new releases, upgrades and patches.

After a Wisconsin Department of Revenue (DOR) audit of SAP's American subsidiary, the department and SAP agreed that the software was "off-the-shelf" standardized software subject to the state sales and use tax. SAP agreed to remit more than \$1.9 million in sales taxes for past sales and to collect taxes in future transactions. SAP's payment did not include sales taxes for Menasha's project because Menasha advised SAP that it would pay the tax itself.

Menasha paid the sales tax, but then filed a refund claim for \$342,614, a portion of which related to the maintenance fees paid to SAP. The DOR denied Menasha's refund claim. The Tax Appeals Commission reversed, granting Menasha's summary judgment motion. The circuit court reversed that decision, concluding that Menasha was required to prove there had been significant modification of the program by the vendor.

The Court of Appeals, in turn, reversed the circuit court's order and affirmed the Commission's decision.

DOR has asked the Supreme Court if judicial deference to the Commission's legal interpretation of DOR rules is appropriate in cases where the Commission does not address the Department's prior construction of its rules. Even if deference is appropriate, DOR also asks the Supreme Court to review whether the Commission's decision was reasonable.

**WISCONSIN SUPREME COURT**  
**THURSDAY, NOVEMBER 29, 2007**  
**1:30 p.m.**

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2006AP2761

[WRA, Inc. v. Town of West Point](#)

This certification from the District IV Court of Appeals could affect the state's Smart Growth statute and examines whether towns in Wisconsin have the authority to place moratoriums on new development of land while updating land-use plans.

Some Background: The Smart Growth statute, Wis. Stat. § 66.1101, requires Wisconsin municipalities to develop comprehensive land-use plans by 2010.

After the statute was enacted, the town of West Point, in conjunction with Columbia County, began updating its comprehensive land use plan. In September, 2005, the town imposed by ordinance an 18-month moratorium on the acceptance, review, or approval of land division or subdivision plans. The ordinance was intended to eliminate development pressure, which otherwise might increase because land owners and developers sought to rush their projects to beat the planning process.

The Wisconsin Realtors Association, Inc. and the Wisconsin Builders Association sought a declaration that the town lacked the authority to enact the ordinance. The circuit court granted summary judgment in the town's favor, concluding reasonable moratoria on subdivision of land applications were permitted by Wis. Stat. § 236.45.

The Realtors Association appealed, challenging the town's legal authority to enact a moratorium. The association contends that municipalities in Wisconsin have no inherent powers, rather only authority expressly conferred on them by statute or necessarily implied from powers given. The association also noted that the town did not have authority to enact zoning ordinances in the absence of a county zoning ordinance because Columbia County had its own zoning ordinance.

The town says it is not asserting inherent authority or any zoning authority delegated from the county. The ability to adopt a temporary moratorium is an "ordinance governing the subdivision of land or other division of land" as expressed in Wis. Stat. § 235.45 (1), and/or the broad grant of general police powers under Wis. Stat. § 61.34, the town argues.

The Court of Appeals concluded that this case presents an issue of pressing statewide importance and asked the Supreme Court to take it directly. The Supreme Court is expected to decide whether a town has the authority to enact an ordinance that places a moratorium on new development.