

WISCONSIN SUPREME COURT CALENDAR AND CASE SYNOPSES September 2008

Please note, cases listed below will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol.

This calendar includes one case that originated in U.S. District Court for the Eastern District of Wisconsin, which is on appeal in the U.S. Court of Appeals for the 7th Circuit, and in the following counties:

Dane
Milwaukee
Rock

TUESDAY, SEPTEMBER 9, 2008

2:00 p.m. 08AP333-CQ Plastics Engineering Co. v. Liberty Mutual Ins. Co.

WEDNESDAY, SEPTEMBER 10, 2008

9:45 a.m. 07AP46 D.L. Anderson's Lakeside Leisure v. Donald Anderson
10:45 a.m. 06AP2670 Ruben Baez Godoy v. E.I. du Pont de Nemours and Co.
1:30 p.m. 06AP2695 County of Dane v. Labor and Industry Review Comm.

FRIDAY, SEPTEMBER 12, 2008

9:45 a.m. 06AP1811-CR State v. Patrick C. Carter
10:45 a.m. 07AP617 Star Direct, Inc. v. Eugene Dal Pra
1:30 p.m. 07AP1114-CR/ State v. Elandis D. Johnson
1115-CR

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, SEPTEMBER 9, 2008
2:00 p.m.**

This is a certification from the U.S. Court of Appeals for the 7th Circuit. The certification procedure is governed by sec. 821.01, Stats., which says "Power to answer. The supreme court may answer questions of law certified to it by the supreme court of the United States, a court of appeals of the United States or the highest appellate court of any other state when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court and the court of appeals of this state."

2008AP333-CQ Plastics Engineering Co. (Plenco) v. Liberty Mutual

The U.S. Court of Appeals for the 7th Circuit has certified three questions to the Wisconsin Supreme Court in this case, which involves insurance coverage for asbestos-related lawsuits. As the 7th Circuit points out, there does not appear to be any Wisconsin precedent addressing the three specific issues:

- 1) What constitutes an "occurrence" in an insurance contract when exposure injuries are sustained by numerous individuals at varying geographical locations over many years;
- 2) Whether Wisconsin Wis. Stat. § 631.43 (1) applies to successive insurance policies; and
- 3) Whether Wisconsin courts would adopt an "all sums" or pro rata allocation approach to determining liability when an injury spans multiple successive insurance policies.

Some background: Plenco, which began manufacturing molding compounds in 1934, has been a defendant in hundreds of lawsuits for claims arising from individuals' exposure to asbestos-containing products it manufactured from 1950 to 1983. Liberty Mutual Insurance Co. provided primary general liability policies to Plenco beginning in 1957 and umbrella policies for most of the years since May 1970.

In 2004, Plenco filed a complaint in U.S. District Court for the Eastern District of Wisconsin against Liberty Mutual. Plenco sought a declaratory judgment that Liberty Mutual was obligated to fully defend Plenco in all of its pending and future asbestos-related lawsuits. Liberty Mutual sought an opposing declaration that it was not obligated to pay certain defense and indemnification expenses and was entitled to a refund for some expenses.

The parties stipulated to a joint statement of facts and subsequently filed motions for summary judgment in the 7th Circuit. On Oct. 2, 2006, the 7th Circuit Court issued a decision and order granting in part and denying in part each party's motion for summary

judgment. The court subsequently entered a final declaratory judgment to which both parties consented.

The judgment laid out an understanding on how coverage will be handled, depending on the timing and definition of “occurrences.” Both side appealed.

The 7th Circuit says there are two sub-issues within the “all sums” allocation debate that are laden with policy considerations and it believes the Wisconsin Supreme Court is best suited to address.

The first concerns the insurer’s defense obligations when an insured faces a claim that triggers one insurance policy, and the second relates to the insurer’s indemnification obligations arising from adverse judgments and settlements against the insured.

A decision by the Supreme Court could clarify Wisconsin law, resolve questions likely to recur and possibly control the outcome of the appeal in the 7th Circuit.

WISCONSIN SUPREME COURT
WEDNESDAY, SEPTEMBER 10, 2008
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed in part, reversed in part and remanded a judgment entered on a jury's verdict in Dane County Circuit Court decision, Judge Shelly J. Gaylord, presiding.

2007AP46

[D.L. Anderson's Lakeside Leisure Co. v. Anderson Marine](#)

This case involves claims that a non-compete clause was violated and that a common law trade-name infringement occurred after the execution of an asset purchase agreement involving businesses in the Waunakee area.

D.L. Anderson's Lakeside Leisure Co., Inc., M. Scott Statz and Steven Statz seek review of a decision affirming in part, reversing in part, and remanding a judgment entered on a jury's verdict against Donald Anderson and Anderson Marine, LLC for compensatory and punitive damages, and an order for injunctive relief, attorneys fees and extending the duration of the non-compete clause.

Some background: In October 2000, the Statzes purchased D.L. Anderson Marine Contractors, which also operated under the name D.L. Anderson Co. The agreement included a non-compete clause, stating that for seven years within a 120-mile radius of Waunakee, Donald Anderson would not permit his name to be used by any competing business.

Around January 2002, Anderson began working as a dealer representative for a pier manufacturer and boat-lift distributor in Wisconsin and four other states. In the fall of 2003, Anderson formed another business, Anderson Marine, LLC, which operated under the name "The Sailboat House at Anderson Marine," which sold boats and marine accessories about a mile away from the Statzes' business.

The Statzes sued, and, after a three-day trial, a jury found Anderson breached the non-compete clause and awarded \$15,000 in compensatory damages. The jury also found Anderson had infringed on the D.L. Anderson Co. trade name and awarded \$75,000 in compensatory damages on this claim, \$160,000 in punitive damages against Anderson Marine, LLC. The court extended the duration of the non-compete clause and awarded \$118,435 in attorney fees for both claims in accordance with the contract.

Anderson appealed. The Court of Appeals found sufficient evidence supporting the jury's finding of breach of the non-compete clause and the \$15,000 in compensatory damages. Second, it concluded sufficient evidence supported the finding of trade name infringement, but that the \$75,000 compensatory damage award was unsupported. Therefore, it reversed both the compensatory and punitive damage award on the trade name infringement. Third, it ruled that with one geographical modification, the injunctive relief extending the duration of the non-compete provision was proper. Finally, it held that based on the contract language, the attorney fee award must be reduced and remanded for that purpose.

Both sides have asked the Supreme Court to review. The Statzes challenge the reversal of the compensatory and punitive damages awarded for trade name infringement, as well as the reduction in attorney fees.

In a cross-petition, the Andersons ask the Supreme Court to consider, among other things, if lost profits should have been considered in the award of damages on the non-complete claim and if a non-compete claim can be upheld in this case, given the nature of the businesses.

A decision by the Supreme Court could develop the area of law involving trademark infringement, damages and non-compete clauses.

WISCONSIN SUPREME COURT
WEDNESDAY, SEPTEMBER 10, 2008
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a Milwaukee County Circuit Court decision, Judge Francis T. Wasielewski, presiding.

2006AP2670

[Godoy v. E.I. du Pont](#)

This is a product liability case involving lead paint and pigment manufacturers. A decision by the Supreme Court could affect more than 30 similar cases pending in Milwaukee County Circuit Court and how the Supreme Court's 2005 decision in Thomas ex rel. Gramling v. Mallett may be applied in other cases.

Some background: According to the complaint, Ruben Baez Godoy, now 10 years old, was poisoned when he was one year old after ingesting white lead carbonate derived from painted surfaces, paint chips, paint flakes and dust while living in a Milwaukee apartment with his family in 1998.

The complaint alleges that the defendants, including E.I. du Pont, the Sherwin-Williams Company and American Cyanamid Co., knew that the white lead carbonate was dangerous when used in paint. The companies allegedly lied by failing to disclose the hazardous nature of white lead carbonate and by representing their products as safe.

Attorneys for Godoy have asked the Supreme Court to determine if the white lead carbonate pigment was defectively designed where the injury-causing lead is a prominent ingredient in the paint pigment.

The circuit court dismissed Godoy's strict liability and negligence defective-design claims, concluding that lead is inherent in the product white lead carbonate and that white lead carbonate could not be designed without using lead.

The Court of Appeals affirmed, saying the issue presented is whether a product can be considered defectively designed when the design is inherent in the nature of the product.

The parties are at odds as to whether Godoy's claim complies with the Supreme Court's decision in Thomas, which expressly recognized the right of a lead-poisoned child to sue the former manufacturers of lead pigment for personal injury damages under both negligence and strict liability.

Godoy contends his complaint conforms with Thomas, and the theory that there is no alternative design is predicated on the incorrect assumption that the product in question here is leaded pigments. He says the product in question is paint pigment, and the appropriate question is whether paint can be made without lead.

Godoy argues the Court of Appeals erred by essentially adopting a theory of products liability law that requires a plaintiff prove a reasonable alternative design to the product in question. Godoy further contends the Wisconsin Supreme Court has explicitly rejected such a theory in two previous decisions.

DuPont argues that the Court of Appeals' decision is entirely consistent with existing Wisconsin law, as well as all circuit courts that have addressed the issue. The

issues presented here do not bear on the “risk contribution” doctrine, and the Supreme Court’s decision in Thomas does not apply because Thomas did not appeal design defect claims.

DuPont asserts that as part of a design defect claim under Wisconsin law, a plaintiff must allege facts to support a claim of a design decision on the part of the manufacturer. DuPont contends the defective design argument is “akin to alleging that a manufacturer of knives should have made spoons instead,” and that the issue of paint pigment was not brought up until appeal.

Another of Godoy’s claims – “failure to warn” – was not dismissed by Milwaukee County Circuit Court, and that portion of the case is still pending in the circuit court during leave for this appeal.

Without a decision by the Wisconsin Supreme Court in this case, many similar additional cases could work their way through appellate courts individually.

WISCONSIN SUPREME COURT
WEDNESDAY, SEPTEMBER 10, 2008
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed a decision of the Labor and Industry Review Commission.

2006AP2695

[County of Dane v. LIRC and Gloria N. Graham](#)

This case, involving a disability claim, examines whether a state agency is entitled to judicial deference when the agency reverses its long-standing interpretation of a statute and implements a new one, even though the statute did not change.

Further, Dane County asks the Supreme Court to consider if the Labor and Industry Review Commission (LIRC) abandoned a reasonable interpretation of “disfigurement” as the term has been used in Wis. Stat. § 102.56, and adopted an unreasonable interpretation.

Some background: Gloria N. Graham slipped and fell while working in food service for Dane County. Graham was awarded 25-percent permanent partial disability. The dispute here is whether Graham's limp that resulted from the fall should qualify for an additional award for disfigurement under the Workers Compensation Act, Wis. Stat. § 102.56 (1), even though there is no amputation, scarring or burns.

The Court of Appeals rejected the county's claim that its interpretation of disfigurement being limited to amputations, scarring or burns was more reasonable than the LIRC's conclusion that Graham's limp constituted a disfigurement. The Court of Appeals also determined that the LIRC's current interpretation was a reasonable one, and that the LIRC's prior interpretation in another case, which had been in line with Dane County's current position, had not been more reasonable.

The county argues that review is necessary because the LIRC's about-face on this issue will have a profound effect on the number of disfigurement awards that will be given to claimants and could potentially be extended for the first time to other alterations in the body's movements.

The County also argues that since the LIRC serves a quasi-judicial role in workers' compensation cases, legislative inaction that follows an interpretation of a statute by the LIRC should be viewed as legislative approval of that interpretation.

The County argues that it would be unreasonable, after 80 years since the Workers' Compensation Act has been in existence, to now add limping to the definition of disfigurement.

Graham contends that the county's petition to the Supreme Court ignores a previous decision that recognized a limp and the use of a brace as elements of disfigurement.

A decision by the Supreme Court could affect a number of disability cases involving limps and clarify the level of deference given to a state agency's decision.

WISCONSIN SUPREME COURT
FRIDAY, SEPTEMBER 12, 2008
9:45 a.m.

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

2006AP1811-CR

[State v. Patrick C. Carter](#)

In this criminal case, the state asks the Wisconsin Supreme Court to review how sentence credits may apply in relation to a portion of time a defendant spent in custody in Illinois.

The state's petition for review sets forth a single issue: "Is a defendant who is arrested in a foreign state on both a violation of the foreign state's criminal law and a fugitive warrant based on pending criminal charges entitled to sentence credit on a concurrent sentence for the time spent in custody in the foreign state after arrest and before sentencing on the foreign state's conviction?"

Some background: On July 23, 2003, a criminal complaint charging Patrick C. Carter with first-degree recklessly endangering safety was filed in the Milwaukee County Circuit Court. A felony arrest warrant, which authorized Carter's extradition from any state, was then issued.

On Dec. 14, 2003, Carter was arrested in the Chicago area in connection with an armed robbery and a charge of driving under the influence (DUI). The Illinois authorities also placed a hold on Carter because of a Wisconsin "fugitive warrant." Two days later, Carter was "charged" with the Wisconsin warrant. Carter remained in Cook County Jail nearly a year, during which time he was sentenced to a seven-day jail term for the DUI charge. He was also convicted of the armed robbery charge and was given a 14-year sentence for that offense.

On March 14, 2004, while in Cook County Jail, Carter was served with a Wisconsin governor's warrant. After being sentenced on the Illinois armed robbery conviction, Carter was extradited to Wisconsin. On Aug. 30, 2005, Carter entered a guilty plea to the Wisconsin charge of first-degree recklessly endangering safety. He was sentenced to seven and a half years of initial confinement and five years of extended supervision. The court stated the sentence was to run concurrently to the existing Illinois sentence. Pursuant to an agreement between defense counsel and the prosecutor, Carter was given 91 days of sentence credit for the period between his initial appearance in Wisconsin on June 1, 2005, and the Wisconsin sentencing date.

The circuit court denied Carter's post-conviction motion seeking a sentence credit for 324 days for the time he had been incarcerated in Illinois prior to the beginning of his Illinois armed robbery sentence, concluding Carter had not been in custody "in connection with the course of conduct for which (the Wisconsin) sentence was imposed" under Wis. Stat. § 973.155 until he had been placed under the control of Wisconsin authorities.

The Court of Appeals reversed, granting Carter credit for 227 additional days of incarceration, in part because some of the time served in custody in Illinois was attributable to the Wisconsin fugitive charge.

A decision by the Supreme Court could clarify how the rulings in prior cases fit together when interpreting the sentence credit statute in Carter's situation.

WISCONSIN SUPREME COURT
FRIDAY, SEPTEMBER 12, 2008
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed a Rock County Circuit Court decision, Judge Daniel T. Dillon, presiding.

2007AP617

[Star Direct, Inc. v. Eugene Dal Pra](#)

This case, resulting from a business dispute, examines the divisibility of clauses in a non-compete agreement between a product distributor and a sales representative.

Some background: In 2006, Eugene Dal Pra voluntarily left his employment with Star Direct, a distributor of products to about 800 retail outlets, including convenience stores, service stations, truck stops and travel centers in Wisconsin and other Midwestern states.

After leaving Star, Dal Pra began his own business distributing general merchandise under the name “Distributing Plus.”

Dal Pra’s employment contract with Star included two provisions, which have become the focus of this petition for review. The Court of Appeals refers to these two clauses as “the customer clause” and “the business clause.”

The circuit court held that both clauses were vague, overbroad, not reasonably necessary to protect Star, and that the clauses were indivisible. The Court of Appeals affirmed and concluded that the entire agreement was unenforceable because the clauses were indivisible under Mutual Service Casualty Insurance Co. v. Brass, 2001 WI App 92, 242 Wis. 2d 733, 625 N.W.2d 648.

Star contends the customer clause is reasonable and was written narrowly enough to preclude Dal Pra from soliciting only current customers, or those customers he had dealt with on behalf of Star within the last year. In addition, the company argues each clause is separate and divisible.

Dal Pra argues the restrictive covenants in the agreement were not necessary for Star’s protection, and that the restrictive covenants are divisible. Many products sold in convenience stores are not sold by Star, and by prohibiting him from working in a substantially similar business, he would be restricted from selling items that do not compete with Star, Dal Pra contends.

A decision by the Supreme Court could help determine if the Brass case properly sets out the law governing divisibility of clauses in non-compete agreements under Wis. Stat. § 103.465.

WISCONSIN SUPREME COURT
FRIDAY, SEPTEMBER 12, 2008
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (District IV judges), which affirmed a Milwaukee County Circuit Court decision, Judge Timothy M. Witkowiak, presiding. District I Court of Appeals is headquartered in Milwaukee; District IV is headquartered in Madison.

2007AP1114/1115 – CR

[State v. Johnson](#)

These consolidated criminal cases examine sentencing credits as applied to concurrent sentences. The Supreme Court has been asked to review how a statute and case law apply when a circuit court imposes two concurrent sentences at the same time.

More specifically in this case, the Court could decide if the circuit court must apply the same credit toward both sentences in order to ensure that credit on one sentence is not negated by the lack of credit on the concurrent sentence.

Some background: In 2004, Elandis D. Johnson entered a guilty plea on a drug offense and was released on bail pending sentencing. In 2005, while awaiting sentencing, he was arrested on a new drug offense. After the second arrest, he remained held on his 2004 case, spending 50 days in custody before being released on bail in his 2005 case. Johnson later pled guilty in his 2005 case.

At a joint sentencing hearing on both cases, Johnson received 50 days credit against one of his two concurrent sentences – the 2005 case. He claims that he is entitled to sentence credit against both sentences to ensure that credit awarded on one sentence is not negated by the lack of credit on the concurrent sentence.

The Court of Appeals rejected Johnson’s argument, holding that a defendant is entitled to credit on concurrent sentences imposed at the same time only when the custody was “in connection with” both offenses.

“There is nothing in the statute suggesting an exception to the ‘in connection with’ requirement when credit is due against a concurrent sentence imposed at the same time,” the Court of Appeals concluded.

Johnson’s petition argues the Court of Appeals misinterprets a decision in State v. Ward, 153 Wis. 2d 743, 746, 452 N.W.2d 158. Johnson argues Ward held that time in custody due as credit against one sentence must be credited against all other concurrent sentences imposed at the same time, regardless whether the custody was “in connection with” all of the concurrent sentences imposed. Johnson also contends the Court of Appeals’ decision raises constitutional questions related to the equal protection clause.

A decision by the Supreme Court could help resolve an apparent conflict in appellate court decisions and address a situation that is likely to recur.