WISCONSIN SUPREME COURT CALENDAR
AND CASE SYNOPSES
November 2005

This calendar contains cases that originated in the following counties:
Brown
Dane
Green Lake
Portage
Racine
Waukesha

These cases will be heard in the Wisconsin Supreme Court Hearing Room, 231 East Capitol:

TUESDAY, NOVEMBER 8, 2005

9:45 a.m.	03AP2108	Hoida, Inc. v. M&I Midstate Bank
10:45 a.m.	03AP2628	Racine Harley-Davidson, Inc. v. State of Wisconsin Division of Hearings and Appeals
1:30 p.m.	03AP3521	Earl J. Teschendorf v. State Farm Insurance Companies

WEDNESDAY, NOVEMBER 9, 2005

9:45 a.m.	03AP3353	Jim Hilton v. Dept. of Natural Resources
10:45 a.m.	04AP377	Julie M. Lassa v. Todd Rongstad
1:30 p.m.	03AP2180	State v. John R. Maloney

TUESDAY, NOVEMBER 15, 2005

9:45 a.m.	{03AP2177	Debra L. Kontowicz v. American Standard Insurance Co. of Wisconsin
	{03AP2534	Larry Buyatt v. Metropolitan Property and Casualty Insurance Company
10:45 a.m.	04AP188	AKG Real Estate, LLC v. Patrick J. Kosterman
1:30 p.m.	04AP1359	Kenneth J. Yorgan v. Thomas W. Durkin

WEDNESDAY, NOVEMBER 16, 2005

9:45 a.m.	04AP356	Glen H. Rocker v. USAA Casualty Insurance Company
10:45 a.m.	04AP64	Mary E. Fazio v. Department of Employee Trust Funds
1:30 p.m.	04AP1092-CR	State v. Germaine M. Taylor

In addition to the cases listed above, the court will consider and determine on briefs, without oral argument, the following case:

03AP587-D Office of Lawyer Regulation v. Robert L. Taylor *(no summary; Taylor is a Milwaukee attorney)*

The Supreme Court's decision in this case will be posted on the court system Web site, www.wicourts.gov, on the morning of its release.

WISCONSIN SUPREME COURT
TUESDAY, NOVEMBER 8, 2005
9:45 a.m.

03AP2108 Hoida, Inc. v. M&I Midstate Bank

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

This case arises from a construction project involving four eight-unit apartment buildings. The project landed in the court system after one of the developers was indicted and the bank foreclosed. The court proceedings have yielded a question that the Supreme Court now is expected to address: Is giving lenders and title companies immunity from subcontractor negligence claims good public policy?

Here is the background: In October 1996, a Brookfield-based developer called The Villager at Nashotah borrowed $1.32 million from M&I Bank to build four apartment buildings in Plover, a small community south of Stevens Point. The loan agreement specified that M&I "shall not be responsible for any aspect of the construction … or the procurement of lien waivers."

The Villager hired Packard Construction as the general contractor and Packer hired Hoida, Inc., a lumber company, as a subcontractor to provide prefabricated wall sections and roof trusses.

During the course of the project, M&I and McDonald Title approved requests from The Villager to draw from the loan. Contrary to accepted practice, these draws were permitted without obtaining lien waivers. Eventually, when promised lien waivers did not materialize and progress on the project slowed, the bank and title company cut The Villager off, indicating that no money would be disbursed until the lien waivers were received. Shortly after, it came to light that Packard and Michael Imperl, a principal of The Villager, had misappropriated or diverted between $600,000 and $700,000 of the money they had received. Imperl was subsequently indicted on multiple counts of bank fraud.

In July 1997, Hoida filed a construction lien against the project. M&I foreclosed on the property and eventually obtained a judgment that allowed it to recover its losses. Hoida also obtained a judgment but remains unpaid. Wisconsin law provides priority status to lenders over subcontractors in situations such as this. Hoida estimates that it is owed just under $550,000.

In May 2001, Hoida sued M&I and McDonald Title, alleging that the defendants were negligent in disbursing the money without obtaining lien waivers. The circuit court concluded that the bank and the title company owed no duty to the subcontractor and dismissed the claim.

Hoida appealed, and the Court of Appeals affirmed the lower court but disagreed with the finding that the defendants did not have a duty to Hoida. The Court of Appeals said that the defendants had, in fact, been negligent, but declined to enter a judgment against them for public policy reasons.

Whether a plaintiff who has proven his/her case will be permitted to collect is a public policy decision that the courts must weigh. A court may decline to issue a judgment in favor of a plaintiff if the injury is too remote from the negligence, if the injury is out of proportion to the defendant's culpability, if allowing recovery would open the door to fraudulent claims, and so on.

Now, Hoida has come to the Supreme Court where it alleges that the Court of Appeals action in this case represents the first time in Wisconsin and in the nation that public policy factors have been applied to insulate lenders and disbursing agents from subcontractor negligence claims.

The bank and the title company, on the other hand, argue that permitting Hoida to recover would place an unreasonable burden on construction lenders and would force disbursing agents to guarantee payment to each and every subcontractor and materials supplier involved in every construction project.

The Supreme Court will decide if giving lenders and title companies immunity from subcontractor negligence claims is good public policy.

WISCONSIN SUPREME COURT
TUESDAY, NOVEMBER 8, 2005
10:45 a.m.

03AP2628 Racine Harley-Davidson, Inc. v. State of Wisconsin Division of Hearings and Appeals

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which reversed a ruling of the Racine County Circuit Court, Judge Charles H. Constantine presiding. The circuit court had reversed a decision of the state Division of Hearings and Appeals.

This case, which the Wisconsin Automobile and Truck Dealers Association notes will affect every car and truck dealer in the state, began with a decision by Harley-Davidson Motor Company to redraw the boundaries of one of its dealer territories, sparking a legal battle. The Supreme Court is expected to clarify the standard of review that the courts use to review an agency's interpretation of a statute and to decide what is encompassed by the phrase "motor vehicle dealer agreement" in the state statutes.

Here is the background: In 1992, Harley-Davidson Motor Company (Harley) and Racine Harley-Davidson Inc. (Racine Harley) entered into a dealer agreement. Initially, Racine Harley's territory was defined to include all of Racine County, but in 1994 Harley began using ZIP codes to assign territories and Racine Harley signed a modified agreement reflecting that change. While the contract referenced dealership territories, the actual ZIP code list was a separate document.

In 2001, Harley notified Racine Harley that it was transferring the Burlington ZIP code from the dealer's assigned territory and to a dealer in Kenosha County. Racine filed a complaint with the Division of Hearings and Appeals (DHA) alleging that the change violated the dealer agreement. Harley moved for summary judgment, asking DHA to dismiss the complaint, and DHA granted Harley's motion.

Racine Harley sought review by the Racine County Circuit Court, which reversed the DHA, determining that the ZIP code list was, in fact, part of the motor vehicle dealer agreement. The judge said:

> It is disingenuous to argue the list is not part of the dealership agreement. The dealership agreement only makes sense if there is a reference to the agreement. The assigned territory is a significant and substantial aspect of the relationship between the parties….

Harley appealed and the Court of Appeals reversed the circuit court after concluding that it must give great weight deference to the DHA decision. The appellate court explained that judicial review of legal conclusions made by a state agency begins with a decision about what, if any, deference the agency decision is due. The highest deference, great weight deference, is given where the Legislature has assigned to the agency the duty of administering the statute and the agency has specialized knowledge. The middle level, due weight deference, is given when the agency has some experience in an area but has not developed expertise that places it in a better position than a court to make judgments about the interpretation of a statute. The final level is no deference at all: the court conducts a *de novo* hearing either because the issue has not arisen in the past or the agency has no special expertise.

Now in the Supreme Court, Racine Harley argues that the Court of Appeals decision will result in every DHA ruling in every dispute between a manufacturer and a dealer in Wisconsin receiving great weight deference. Racine Harley notes that, following this same reasoning, all decisions by the Tax Commission on questions related to the sales tax and all decisions of the Personnel Commission related to the Wisconsin Fair Employment Act might also be accorded great weight deference by the courts.

For its part, Harley argues that no matter the standard used in review, its contract with Racine Harley permitted it to change the dealer's territory and the DHA conclusion was correct.

WISCONSIN SUPREME COURT
TUESDAY, NOVEMBER 8, 2005
1:30 p.m.

03AP3521 Earl J. Teschendorf v. State Farm Insurance Companies

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed an order of the Milwaukee County Circuit Court, Judge Jeffrey A. Kremers presiding.

This case involves a fatal car crash that took place in the course of the victims' employment. An insurance dispute brought the case into the courts, and the Supreme Court now is expected to decide whether the insurers acted lawfully when they reduced their payments to the family by the amount of worker's compensation that was paid into the state treasury.

Here is the background: Scott Shira was 33 when he died in a car crash in Woodbury, Minn., while in the course of his employment for Layne Christensen Co., an outfit that drills wells. The crash was caused by an uninsured motorist (UM). Shira was unmarried and had no children. His parents, Bernard and Maria Shira, brought this case. The other plaintiffs are Earl and Linda Teschendorf. Earl was Shira's passenger and was injured in the accident.

Under Wisconsin's worker's compensation law[1], when a person dies in the course of his/her employment and does not have dependents, worker's compensation benefits are paid to the State of Wisconsin Work Injury Supplemental Benefit Fund. Shira's benefits amounted to about $160,000 and were mostly paid to the state treasury.

Another state law[2] permits insurance companies to reduce their UM coverage limits by the amount paid under the worker's compensation law. The insurance policy that covered Shira had a UM limit of $150,000. When American Family Insurance Co. applied the reducing clause, Shira's parents received nothing.

The Shiras sued, arguing that the reduction was unlawful because the worker's compensation went into the state treasury rather than to the family. The circuit court ruled in favor of American Family and the Shiras appealed.

The Court of Appeals reversed in a split decision. The majority concluded that the Legislature's intent in authorizing reducing clauses was to permit insurers to reduce UM payments by the amounts that the insured/heirs/estate actually have received. The dissent, however, argued that the language of the statute is not ambiguous and that the question of whether the family or the state treasury has received the worker's compensation payout is immaterial.

Now in the Supreme Court, American Family argues that there is no logical reason that the Shiras, who were not dependent upon their son for support, should be able to circumvent the law that limits recovery. The Shiras, on the other hand, argue that there is no logical reason that coverage limits should be reduced when those seeking UM benefits have not collected anything.

The Supreme Court will decide whether and how insurance reducing clauses are to apply in cases where the worker's compensation money is paid not to the family but to the state treasury.

---

[1] Wis. Stat. 102.49
[2] Wis. Stat. 632.32(5)(i)2

The Supreme Court's decision in this case will be posted on the court system Web site, www.wicourts.gov, on the morning of its release.

WISCONSIN SUPREME COURT
WEDNESDAY, NOVEMBER 9, 2005
9:45 a.m.

03AP3353 Jim Hilton v. Dept. of Natural Resources

This is a review of summary decision by the Wisconsin Court of Appeals, which reversed a decision of the Green Lake County Circuit Court, Judge W.M. McMonigal presiding. The circuit court had modified the order of an administrative law judge.

This case involves a homeowners' association that owns a 77-foot stretch of lakeshore property with a pier where association members keep their boats. Acting on a complaint, the state Department of Natural Resources (DNR) ordered the association to shorten the pier and remove most of the boat slips. The matter landed in court. The Supreme Court is expected to decide if the administrative law judge (ALJ) correctly balanced the interests of the homeowners against the interests of the public, and whether the removal of boat slips constituted an illegal "taking" without due process.

Here is the background: Nelson Page owned land on Green Lake that included a stretch of lakeshore. He subdivided the land several times over the years beginning in 1958, selling off lots to people to build cottages on the back lot and selling shares in the common pier off the riparian (lakefront) property. Over time, the number of boat slips along the pier grew. In 1966, there were six; in the mid-1970s, there were 11; and, by 1990, there were 22.

Under DNR guidelines, a lot with 77 feet of shoreline would be permitted just two or three boat slips. Although the DNR knew about the pier, it took – in the words of the ALJ who initially handled this case – a "wink and nod approach" to the matter until it received a complaint. After the complaint, the DNR took action to reduce the size of the pier substantially, ordering the association to get rid of all but six of the 22 boat slips. The association sought a hearing and the ALJ concluded that the historic use of the pier was for 11 slips because the pier had 11 slips in 1976 when it had been in use for 10 years. The methodology underlying this conclusion is largely the subject of this appeal.

After the ALJ issued his decision, the homeowners' association sought review in the circuit court. The circuit court concluded that the ALJ's 11-slip ruling was "arbitrary and not based on sufficient evidence in the record." The court ruled that 17 slips would be allowed to remain, because that was the number on the pier in 1993 when the municipality where the property is located passed an ordinance that barred the future proliferation of multi-slip piers but allowed piers currently in use to continue at their 1993 capacities.

The DNR appealed the circuit court decision to the Court of Appeals, which reversed the lower court and reinstated the ALJ's determination. The Court of Appeals concluded that the ALJ's choice of 1976 as a benchmark for determining the historic use of the pier was appropriate and reasonable.

Now the association has brought the matter to the Supreme Court, which will clarify how decisions on historic use of a property are to be made, determine if the circuit court gave proper deference to the ALJ's finding, and decide whether this reduction in the size of the pier amounts to an illegal taking of private land by the government.

WISCONSIN SUPREME COURT
WEDNESDAY, NOVEMBER 9, 2005
10:45 a.m.

04AP377 Julie M. Lassa v. Todd Rongstad

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. The case began in Dane County Circuit Court, Judge Maryann Sumi presiding.

This case originated as a defamation action filed by a public official against the publishers of an 'attack ad' that appeared shortly before an election. The Supreme Court is expected to clarify when the identity of anonymous speakers must be disclosed in a defamation proceeding.

Here is the background: Julie M. Lassa, who is now a state senator, served in the state Assembly from 1998-2002 and was elected in an April 2003 special election to the state Senate. Shortly before that election, a flier produced by an organization called The Alliance for Working Wisconsin – a tax exempt group that says its mission is to educate the public via direct communications on public policy issues related to business, taxes, and families – was mailed to voters in the district. The flier criticized Lassa for her supposed connections to Chuck Chvala, former Senate majority leader.

Lassa sued Todd Rongstad, whose company had worked on the mailer. During the discovery phase of the case, Lassa attempted to learn the identities of the people behind The Alliance but Rongstad refused to divulge them. The circuit court ordered Rongstad to supply this information but Rongstad did not comply. The court sanctioned Rongstad and entered an order for default judgment against him, but before final judgment was entered Ronstad and Lassa reached a stipulated settlement that dismissed the defamation claim, set the amount of sanctions to be levied against Rongstad, and reserved Rongstad's right to appeal the imposition of the sanctions.

This case is Rongstad's appeal. He first went to the Court of Appeals, which noted that the case raises an issue that has not previously been decided in Wisconsin: when the identities of anonymous speakers must be disclosed in the context of a defamation action by a public official. The Court of Appeals certified the case to the Supreme Court.

In the Supreme Court, Rongstad argues that the First Amendment protects the identities of the members of the Association. He cites federal cases that establish that groups engaged in political expression need not reveal the names of their members to the government as such disclosure might serve to restrain the freedom of association.

Lassa, on the other hand, argues that the constitutional privilege against disclosure is not absolute. She says that group members cannot be permitted to hide behind the privilege when they have acted wrongfully.

The Supreme Court will clarify the circumstances under which an anonymous speaker may be required to identify him/herself in a defamation action.

WISCONSIN SUPREME COURT
WEDNESDAY, NOVEMBER 9, 2005
1:30 p.m.

03AP2180 State v. John R. Maloney

This is the second time this case has come before the Wisconsin Supreme Court. This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which affirmed an order of the Brown County Circuit Court, Judge Peter Naze presiding.

This case stems from the February 1998 death of Sandra Maloney and the subsequent murder conviction of her estranged husband, Green Bay Police Officer John R. Maloney. The Supreme Court is expected to decide if Maloney will receive a new trial.

The Supreme Court first heard this case last April. Its review focused on the actions of the man who prosecuted the case, former Winnebago County District Attorney Joe Paulus, who was convicted of taking bribes in 22 cases between 1998 and 2000 and sent to federal prison. The Court was expected to decide whether Paulus violated the lawyers' code of ethics in his investigation and, if so, whether the evidence obtained as a result of that violation should have been suppressed. The Court also examined Maloney's allegation that his defense team, Attorneys Gerald Boyle and Bridget Boyle-Saxton, were ineffective at his trial.

After the oral argument, the Court concluded that it had additional questions that would require further briefing by the attorneys and another oral argument. The questions, which are expected to be the focus of today's oral argument, are:

1. Whether the Supreme Court has the authority to remand this case to the circuit court for consideration of a motion for postconviction relief in the interest of justice; and

2. If so, whether the Supreme Court should act upon that authority and send the case back to the circuit court.

Here is the background: On Feb. 11, 1998, Sandra Maloney's mother entered Sandra's home and discovered her badly burned body. Fire investigators initially concluded that she had died as a result of the fire, and that the fire had been accidental; the autopsy, however, revealed signs of strangulation, and John Maloney became the prime suspect.

During the investigation, Maloney's girlfriend, Tracy Hellenbrand, a former criminal investigator, agreed to wear a wire that allowed for the secret video- and audio-taping of her conversations with Maloney. At Maloney's trial, Paulus – who served as a special prosecutor because the Brown County District Attorney's Office had worked with Maloney in Maloney's role as a police officer – showed the jury several hours of videotape and called Hellenbrand to the witness stand to testify that Maloney had confessed the murder to her. Boyle built Maloney's defense around the theory that Hellenbrand had killed Sandra Maloney. The jury convicted Maloney and he appealed.

In the Court of Appeals, Maloney argued that Boyle had provided an inadequate defense by failing to object to the videotapes on the grounds that Paulus, in directing Hellenbrand's participation in the secret videotaping, violated the Rules of Professional Conduct for Attorneys, which state, in part:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so.

The Court of Appeals concluded that there had been no ethics violation and that, even if there had, suppression of evidence would not be the remedy for this type of violation. The Court of Appeals further found that Boyle's defense of Maloney, while ultimately unsuccessful, was not ineffective.

In the first round of arguments in the Supreme Court, Maloney renewed his argument that Paulus "egregiously violated his ethical constraints in obtaining evidence" and that the videotapes should be suppressed. He further argued that Boyle, in repeatedly asking the State's lead investigator at trial whether he thought Maloney was lying, and repeatedly receiving affirmative responses, did him undue harm.

The Supreme Court will decide whether to order a new trial in the interest of justice.

WISCONSIN SUPREME COURT
TUESDAY, NOVEMBER 15, 2005
9:45 a.m.

{#03AP2177 Debra L. Kontowicz v. American Standard Insurance Co. of Wisconsin
{#03AP2534 Larry Buyatt v. Metropolitan Property and Casualty Insurance Company

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which reversed an order of the Waukesha County Circuit Court, Judge Mark A. Gempeler presiding.

These cases involve people who were injured in car crashes. They have been consolidated because both raise the issue of how the interest penalty for third-party personal injury claims is to be applied.

Here is the background: On June 21, 1999, Larry Buyatt sustained significant injuries in an automobile collision caused by Jason Schoessow. While the circumstances of the crash are not set out in detail in the record, Buyatt suffered neck injuries that resulted in lost wages and substantial medical bills.

Schoessow's insurer was Metropolitan Property and Casualty Insurance Company. Buyatt sought payment of his claims and eventually sued Metropolitan and won. After receiving a jury verdict of $24,081, Buyatt filed a motion for payment of interest penalties and the court ordered Metropolitan to pay Buyatt about $5,000 in interest.

The other case, Kontowicz, began on Aug. 30, 2000, when Debra L. Kontowicz was driving her van on Center Road in the Town of Waukesha. Daniel Jeffers, a then-16-year-old driver who was driving a sports car at a high rate of speed, hit Kontowicz's vehicle from behind. The impact pushed the van off the road and it struck a utility pole. Kontowicz's spinal cord was severed and she was rendered a quadriplegic.

Jeffers's insurer was American Standard Insurance Company. Kontowicz sued Jeffers and American Standard and settled with Jeffers for $78,000 and with the insurer for the policy limit of $500,000. As in the Buyatt case, American Standard was ordered to pay about $50,000 in interest.

In both cases, the circuit court determined that the insurance companies failed to pay the claims promptly and therefore were subject to interest penalties. The insurance companies, however, disagree that interest penalties are to be applied in cases such as these (third-party personal injury claims). The law that establishes interest penalties reads, in pertinent part:

> Wis. Stat. § 628.46
> **Timely payment of claims. (1)** Unless otherwise provided by law, an insurer shall promptly pay every insurance claim. A claim shall be overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of the loss…. All overdue payments shall bear simple interest at the rate of 12% per year.

Another subsection of this law indicates that the section reprinted above only applies to the classes of claims listed in Wis. Stat. § 646.31(2) of the statutes. The list in § 646.31(2) includes the following: "A claim under a liability or workers' compensation insurance policy, if either the insured or the 3rd party claimant was a resident of this state at the time of the insured event."

Kontowicz and Buyatt argue that this language means that third-party claims such as theirs are subject to the interest penalty; the insurers disagree, and they appealed to the Court of Appeals, which reversed the circuit court decisions although it acknowledged that there are "two incompatible, yet reasonable" interpretations of these statutes.

The Supreme Court will clarify whether insurers are subject to interest penalties in personal injury cases involving third-party claimants.

WISCONSIN SUPREME COURT
TUESDAY, NOVEMBER 15, 2005
10:45 a.m.

04AP188 AKG Real Estate, LLC v. Patrick J. Kosterman

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 ruling of the Racine County Circuit Court, Judge Charles H. Constantine presiding.

This case involves a homeowner with an easement over land that now belongs to a developer and is platted for a subdivision. The homeowner does not want to give up the easement; the developer argues that the new subdivision roads will make it unnecessary. The Supreme Court will decide whether an easement may continue to exist if the circumstances that required the easement no longer are present.

Here is the background: Louis and Angeline Chvilicek bought 80 acres of land on Highway 31 in the Town of Caledonia. In 1960, they gave four acres of that property to their son Edward and his wife Audrey. The parcel was landlocked and the deed included an easement across the main property. The following year, the elder Chviliceks granted a second easement (of 66 feet) that expanded the first.

Louis passed away in 1961 and Angeline divided the remaining land between Edward and his sister. In 1998, the Chvilicek children and their spouses sold this acreage to AKG Real Estate for a subdivision. The original easement between the four-acre homestead and the highway was retained in the deed. In 2000, the Chviliceks sold their original four-acre homestead to Patrick and Susan Kosterman.

As AKG planned the new Quarry Springs subdivision, concerns arose about the easement. The Town approved AKG's plan on the condition that the Kostermans terminate the easement.

The Kostermans objected for reasons that were both monetary and aesthetic. They indicated that AKG's plan would force them to reconfigure their driveway and that the cul-de-sac layout would result in a ring of houses whose sides and backs faced their home.

AKG went to court seeking an order that would permit the developer to terminate the Kostermans' private-road easement. The court extinguished the 1998 easement but declined to get rid of the 1961 easement – which had the effect of leaving the Kostermans' private road intact.

AKG appealed and the Court of Appeals reversed the circuit court, concluding that an easement ceases to exist when the purpose for which it is granted no longer exists. As soon as the Kostermans could access Highway 31 from their home via the subdivision planned Louis Court, the court ruled, the easement would be extinguished:

> There is no longer any danger that the homestead property will remain perpetually landlocked without the private easement…. The privilege of dictating how to arrange improvements on [AKG's] property was not among the benefits the defendants paid for when they bought the homestead and its accompanying easements. They are playing the holdout game but not to preserve any substantial benefit.

Now the Kostermans have come to the Supreme Court, where they argue that this was an easement of "express grant," meaning that it was written into the deed, rather than an easement of necessity, and that an express grant easement cannot be extinguished simply because there is an alternative means of meeting the easement-holder's needs. They argue that the Court of Appeals decision violates their constitutional rights and amounts to an illegal taking. AKG, on the other hand, argues that easements are not meant to be permanently in force without regard to changed conditions.

The Court will decide whether the Kostermans' easement was appropriately extinguished.

The Supreme Court's decision in this case will be posted on the court system Web site, www.wicourts.gov, on the morning of its release.

WISCONSIN SUPREME COURT
TUESDAY, NOVEMBER 15, 2005
1:30 p.m.

04AP1359 Kenneth J. Yorgan v. Thomas W. Durkin

This a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which reversed a judgment of the Racine County Circuit Court, Judge Charles H. Constantine presiding.

This is a small claims case brought by a chiropractor against an attorney who represented one of the chiropractor's patients. The Supreme Court is expected to determine if lawyers are obligated, either under the law or by their code of ethics, to pay chiropractors' fees out of settlement money they receive on their clients' behalf.

Here is the background: Sol Hernandez was involved in an automobile accident and retained Atty. Thomas W. Durkin to represent her. She also sought care from chiropractor Kenneth J. Yorgan. Because she could not afford to pay Yorgan up front, she signed a document giving him a share in any settlement she might receive.

Durkin settled Hernandez's claim and paid the proceeds to her without first paying Yorgan's $2,104 bill. Yorgan tried without success to collect the money from Hernandez – who cannot be located – and then sued Durkin.

Yorgan won in the trial court after the judge concluded that Durkin had had actual notice of Yorgan's lien on the settlement because it was part of the medical record that Yorgan supplied to Durkin.

Durkin appealed and the Court of Appeals reversed on the basis that Durkin had not signed the "Authorization and Doctor's Lien" that Yorgan had supplied and therefore he had no obligation to pay the chiropractor's fees from the settlement proceeds. Hernandez did sign the authorization.

Now, the chiropractor has come to the Supreme Court where he argues that the trial court judgment ought to be reinstated. He believes that the attorney had both a legal and ethical obligation to pay him regardless of whether the lawyer signed the document. The lawyer, on the other hand, argues that he never agreed to undertake the obligation to ensure that Hernandez paid Yorgan's bill, and that the Court of Appeals correctly declined to hold him responsible for that bill.

The Supreme Court will decide if the law or the code of ethics for attorneys obligates an attorney to ensure follow-through by a client who has agreed to pay a health care provider's bills out of a settlement.

WISCONSIN SUPREME COURT
WEDNESDAY, NOVEMBER 16, 2005
9:45 a.m.

04AP356 Glen H. Rocker v. USAA Casualty Insurance Company

This is a certification from the Wisconsin Court of Appeals, District I (headquartered in Milwaukee). 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. The case began in Milwaukee County Circuit Court, Judge Clare L. Fiorenza presiding.

This case began when an employee of Octopus Car Wash mistakenly stepped on a car's accelerator, striking and seriously injuring a fellow employee. A dispute arose over insurance coverage, resulting in the following question that the Supreme Court is expected to answer: do full-service car washes fall within the definition of "motor vehicle handler" under the state statutes?

Here is the background: On Feb. 3, 1999, Andrew Paretti brought his car to Octopus Car Wash. The car proceeded along the conveyor belt until it reached the end and employee Cornell Cousins got behind the wheel to drive the vehicle to the drying area. He stepped on the accelerator rather than the brake and hit a co-worker, Glen H. Rocker. Rocker was seriously injured and brought suit against the car wash's insurer (General Casualty Company), Paretti's insurer (USAA Casualty Company) and Cousins.

The car wash's insurance policy specified that employees were insured for acts within the scope of their employment but excluded coverage for bodily injury caused by an employee or an auto. However, another part of the policy indicated that this exclusion did not apply to any customer's auto in any of the following businesses: auto repair shop, car wash, gas station, tire dealer, quick lube stations.

Paretti's insurance policy excluded coverage for any person "…employed or otherwise engaged in the auto business," which it defined to include: altering, customizing, leasing, parking, repairing, road testing, delivering, selling, servicing, or storing vehicles. The policy said that this exclusion did not apply to maintenance of a covered auto by any person "if there is no other valid and collectible insurance…."

Octopus's insurer, General Casualty, sought and received a judgment from the circuit court that it was not liable for Rocker's injuries. The judge found that the language of the insurance policy was unambiguous as to coverage limitations in accidents involving co-workers.

Paretti's insurer, USAA, also went to court. It sought a judgment limiting its liability to $25,000. Its rationale was that the car wash was a "motor vehicle handler," which is defined[3] as a motor vehicle dealer, lessor, rental company, repair shop, service station, storage garage or public parking place. If a car wash fits this definition, then another section of the statute limits the insurer's liability. The trial court agreed that a car wash qualifies as service station under the "motor vehicle handler" statute.

Rocker appealed, and the Court of Appeals certified this case to the Supreme Court, noting that if the trial court's conclusion that a car wash is a service station is permitted to stand, then Octopus's insurer is again on the hook because the law contains a provision prohibiting insurers from excluding employees of motor vehicle handlers from coverage.

In the Supreme Court, General Casualty – Octopus's insurer – argues that a car wash is no more a service station than is Radio Shack, which installs car stereo systems. The Supreme Court will determine whether full-service car washes are service stations for purposes of insurance coverage.

---

[3] Under Wis. Stat. § 632.32(2)(b)

The Supreme Court's decision in this case will be posted on the court system Web site, www.wicourts.gov, on the morning of its release.

WISCONSIN SUPREME COURT
WEDNESDAY, NOVEMBER 16, 2005
10:45 a.m.

04AP64 Mary E. Fazio v. Department of Employee Trust Funds

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed a ruling of the Dane County Circuit Court, Judge Patrick J. Fiedler presiding.

This case involves a question of how death benefits are paid to beneficiaries in the Wisconsin Retirement System.

The WRS provides benefits to participating public employees and retirees and, in some cases, to their survivors or beneficiaries. State law[4] provides that a named beneficiary may request a lump-sum payment of a death benefit or an annual payment. The law sets out how those payments are calculated.

Here is the background: Mary Fazio is the wife of a UW professor who died on Jan. 2, 1999, while actively employed by the university. In November 2000, Fazio submitted an application to the state Department of Employee Trust Funds (ETF) for a death benefit, attached a copy of the death certificate, and elected to receive a lump-sum payment. The department determined that Fazio was entitled to receive $507,395, which it paid to her on Dec. 1, 2000 – one month after she applied, but nearly two years after her husband's death.

In the two years between the time Fazio's husband died and when she received the money, the $507,395 was on deposit in the WRS and increased in value by $182,494. She asked for those earnings, as well, and was denied. She sued ETF, arguing that, by keeping the interest on her husband's money, WRS had engaged in an unlawful taking in violation of the Wisconsin Constitution. She brought the case as a class action whose plaintiffs consisted of herself and all other "persons having an interest as a beneficiary in a lump sum death benefit paid or payable out of the funds of the Employee Trust Funds…from and after January 11, 1995."

The circuit court ruled in Fazio's favor and established a formula for calculating fair compensation. The judgment resulted in a total award of more than $1.5 million to Fazio and the others in the class.

ETF appealed and the Court of Appeals reversed the circuit court after concluding that the death benefit payment is not the property of the survivor until the survivor applies for the benefit. The Court of Appeals drew a distinction between the participant (the state employee) and the beneficiary, deciding that the participant in the WRS clearly has a property interest in his/her fund but the beneficiary does not have an interest that is on equal footing.

In a ruling that could have an effect on many participants in the WRS, the Supreme Court will decide if beneficiaries and survivors are entitled to the earnings that accrue between the date of the participant's death and the date when the payment is made.

[4] Wis. Stat. § 40.71(2)

The Supreme Court's decision in this case will be posted on the court system Web site, www.wicourts.gov, on the morning of its release.

WISCONSIN SUPREME COURT
WEDNESDAY, NOVEMBER 16, 2005
1:30 p.m.

04AP1092-CR State v. Germaine M. Taylor

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a conviction in Racine County Circuit Court, Judge Allan B. Torhorst presiding.

This case involves an 18-year-old man who was convicted of sexual assault after having non-forced sexual relations with a 15-year-old girl. The Supreme Court will determine whether the sentence he received was excessive. The Court also will clarify the extent to which a trial judge must explain his/her decision to deviate from a sentencing recommendation.

Here is the background: S.R., then 15, had non-forced intercourse with Germaine M. Taylor, then 18, and became pregnant. At the time, Taylor was on probation for a similar offense that occurred when he was 16. He pleaded guilty to second-degree sexual assault in the case involving S.R. and the judge ordered a pre-sentence investigation. Pre-sentence investigations are conducted by probation agents who gather information about the offender – family life, drug/alcohol abuse, history of offenses, academics, employment and so on, and conclude with a sentencing recommendation that is not binding on the judge.

In this case, the pre-sentence recommended six years of confinement followed by six years of extended supervision. In a hearing that was marked by Taylor arguing and using obscenities, the judge opted to impose 12 years behind bars followed by six years of extended supervision. This meant that Taylor would first become eligible for release at age 33.

Taylor appealed the sentence arguing that it was unduly harsh and excessive. The Court of Appeals affirmed the trial court, writing as follows:

> Taylor contends that his sentence … was excessive…. We cannot agree. We acknowledge the accuracy of many of Taylor's contentions on appeal: Had the sexual assault occurred two months later, it would not have been a crime. Some, if not many, teenagers undoubtedly have intercourse and get pregnant. The age difference between Taylor and his victims is not great. While all of these assertions are accurate, they do not bear upon the serial nature of Taylor's behavior, which plainly motivated the court to impose the sentence that it did. The court made clear that the underage girls whom Taylor preys upon are in need of protection…. Considering that Taylor had impregnated two young women while on probation for sexual assault of a third, and considering his demeanor at sentencing, we cannot say that the court erred in imposing the sentence that it did.

Now in the Supreme Court, Taylor renews his arguments that the sentence was unduly harsh and suggests that the trial court had a responsibility to explain more fully how its sentence met sentencing objectives and why it deviated substantially from the pre-sentence recommendation.

The Supreme Court will review this matter and determine whether Taylor deserves to be re-sentenced.