WISCONSIN SUPREME COURT CALENDAR
AND CASE SYNOPSES
October 2004

This calendar contains cases that originated in the following counties:
Barron
Dane
Grant
Milwaukee
Walworth

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

TUESDAY, OCTOBER 5, 2004

9:45 a.m.	03-0750	Badger State Bank v. Roger A. Taylor, et al.
10:45 a.m.	03-1850	Joan Solie, et al. v. Employee Trust Funds Board, et al.

WEDNESDAY, OCTOBER 6, 2004

9:45 a.m.	02-3041	Julie A. Kenyon v. Ralph C. Kenyon
10:45 a.m.	02-0931-D	Office of Lawyer Regulation v. Bruce B. Jacobson
1:30 p.m.	01-1914-D	Office of Lawyer Regulation f/k/a Board of Attorneys Professional Responsibility v. Ronald A. Arthur

TUESDAY, OCTOBER 26, 2004

9:45 a.m.	02-3163	Wisconsin Bell, Inc., v. Public Service Commission of Wisconsin
10:45 a.m.	02-3394	Christina Pitts, et al. v. Revocable Trust of Dorothy Knueppel
1:30 p.m.	03-2487-FT	Benjamin Atkins v. Swimwest Family Fitness Center, et al.

THURSDAY, OCTOBER 28, 2004

9:45 a.m.	02-1056	State v. Shawn D. Schulpius
10:45 a.m.	03-2527	LeRoy M. Strenke, et al. v. Levi Hogner, et al.
1:30 p.m.	01-0724/ 01-1031/ 01-2486	Patricia Wischer, et al. v. Mitsubishi Heavy Industries America, Inc., et al.

The Supreme Court will issue its opinion in this case by June 30, 2005. Find the opinion on the Web at www.wicourts.gov.

WISCONSIN SUPREME COURT
TUESDAY, OCTOBER 5, 2004
9:45 a.m.

03-0750 Badger State Bank v. Roger A. Taylor, et al.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed a judgment of the Grant County Circuit Court, Judge Robert P. VanDeHey presiding.

In this case, the Wisconsin Supreme Court will review a ruling that the Court of Appeals acknowledged "may seem harsh" to determine whether the ruling is, as the Court of Appeals concluded, unavoidable under the law. The Court of Appeals' ruling required a small business to pay a bank more than $12,500 even though the business did nothing wrong.

Here is the background: Rodney and Roger Taylor own the Economy Feed Mill. The mill did business with two companies owned by Al Vogt. One of Vogt's companies, Ag-Tech, sold supplies to the Taylors; the other, AT & T Livestock, bought the Taylors' feed. The Taylors owed Ag-Tech money and AT & T Livestock owed the Taylors money. So, Vogt and the Taylors reached an agreement to cancel each other's debts.

Unbeknownst to the Taylors, Ag-Tech was insolvent. Its major creditor, Badger State Bank, wanted repayment of its loans. When the bank learned of the deal between the Taylors and Vogt, it sued, arguing that that its claims against Ag-Tech should have been settled before the Taylors' claims, and that the deal was fraudulent because Ag-Tech did not receive something of reasonably equivalent value in exchange for the cancellation of the Taylors' debt. "Reasonably equivalent in value" is required under the law for businesses that engage in these sorts of transfers when they are insolvent.[1]

In the trial court, the Taylors argued that they had, in fact, given something of equivalent value to Vogt: the cancellation of the AT & T Livestock debt. The bank, however, was only concerned with Ag-Tech. The trial court ruled in favor of the Taylors, dismissing the bank's claim. The Court of Appeals, however, reversed, and the result was that the Taylors must pay the bank what they owed to Ag-Tech in spite of the deal they reached with Vogt.

In the Supreme Court, the Taylors argue that they entered into the agreement in good faith, and did not realize that Vogt could not speak for Ag-Tech. The Supreme Court will decide whether the Taylors will have to pay Badger State Bank.

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[1] Wis. Stats. § 242.05 (1)

The Supreme Court will issue its opinion in this case by June 30, 2005. Find the opinion on the Web at www.wicourts.gov.

WISCONSIN SUPREME COURT
TUESDAY, OCTOBER 5, 2004
10:45 a.m.

03-1850 Joan Solie, et al. v. Employee Trust Funds Board, et al.

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 Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case began in Dane County Circuit Court, Judge Paul B. Higginbotham (now a Court of Appeals judge) presiding.

This case involves a question of how to calculate teachers' retirement benefits. The Supreme Court will decide whether two schoolteachers are eligible for credit in the Wisconsin Retirement System (WRS) for teaching before 1971, when they were members of the State Teachers Retirement System, a predecessor to the WRS.

Here is the background: Joan Solie and Ann Baxter taught in the public school system and accumulated retirement money in the "Combined Group" plan of the State Teachers Retirement System. They quit, and took separation benefits from the retirement fund, which amounted to their contributions to the fund plus interest.

Both returned to the public schools. A new basic annuity plan, the "Formula Group," had been created. The benefit available under this plan is determined in part by multiplying the time of "creditable service" by a percentage of the employee's final average compensation. The Department of Employee Trust Funds (ETF) deemed Solie and Baxter to be new members of the retirement system and automatically enrolled them in the Formula Group.

Solie and Baxter challenged the ETF in court, arguing that they had been wrongly placed in the Formula Group and denied credit for their earlier years of service only because they had taken their separation benefits and signed a waiver. The trial court ruled in their favor, concluding that the teachers gave up neither their membership in the Combined Group nor their years of creditable service when they withdrew their money. The court ruled that they had the right to choose whether to re-join the Combined Group of join the Formula Group when they were re-hired.

The ETF board appealed, arguing that the only thing in the retirement deposit fund in money, and that when a person opts to withdraw his/her money from the fund, that effectively removes the person from membership in the fund. The Court of Appeals certified this case to the Supreme Court, noting that the ETF has indicated there are other, similar cases in the pipeline and that more are likely to come.

On the "creditable service" issue, the Wisconsin Supreme Court has said that a teacher's years of service do not disappear when s/he quits the retirement system and then re-joins.[2] On the other issue – whether membership in the Combined Group continues – there is no caselaw.

The Supreme Court will decide whether the creditable years of service that the teachers retain when they pull their money from the retirement fund is enough to continue their membership in the Combined Group.

[2] Schmidt v. Wisconsin Employe Trust Funds Board, 153 Wis. 2d 35, 449 N.W.2d 268 (1990)

WISCONSIN SUPREME COURT
WEDNESDAY, OCTOBER 6, 2004
9:45 a.m.

02-3041 Julie A. Kenyon v. Ralph C. Kenyon

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

The case involves a divorce and a subsequent dispute about how much one spouse must pay the other in maintenance. Specifically, the Supreme Court will decide whether a judge may reduce a maintenance payment that has been previously set even though the financial circumstances of both individuals have not changed.

Here is the background: Julie and Ralph Kenyon were married in 1977 and divorced in 1993. At the time of the divorce, Julie was unemployed and wheelchair-bound, and the court record indicates her physical disabilities hindered her ability to find work. She was enrolled at Madison Area Technical College and anticipated earning a degree in graphic design in 1995. Ralph was a lineman for a utility company and grossed about $2,700 per month.

The judge divided the couple's property as evenly as possible but awarded the house to Ralph. The judge awarded Julie maintenance payments of an indefinite duration, setting an initial amount of $866 and scheduling the parties to come back for a review in September 1995 when, the judge anticipated, Julie would have finished school and found a job.

At the 1995 review hearing, it was learned that Julie had not finished the degree but she did have a part-time job. The judge decided to reduce Ralph's maintenance payment by $500 – offsetting the income she was bringing in and leaving him with a monthly payment of $366.

By 2002, Julie had lost her job and her health had worsened, due to unsuccessful back surgery. She made a motion to increase her ex-husband's maintenance payments back to the original $866 (he, by contrast, made a motion to terminate the maintenance entirely). The judge, while acknowledging Julie's health problems and the fact that she was living on very little money, urged her to make an effort to find a job and declined to restore the payments. The judge noted that it "…never was my intention to put Mr. Kenyon on the hook for being a primary source of income or life support for Ms. Kenyon."

Julie went to the Court of Appeals, which affirmed the circuit court.

In the Supreme Court, Julie argues that a trial court should be required to hold to the original level of maintenance that is established at the time of the divorce unless there is a change in the parties' financial status. The Court will decide whether Julie's maintenance payments should be increased to the level she was awarded in 1993.

The Supreme Court will issue its opinion in this case by June 30, 2005. Find the opinion on the Web at www.wicourts.gov.

WISCONSIN SUPREME COURT
WEDNESDAY, OCTOBER 6, 2004
10:45 a.m.

02-0931-D Office of Lawyer Regulation v. Bruce B. Jacobson

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers. Lawyers must follow a code of ethics developed by the Court. When there is an allegation that a lawyer has acted unethically, the Supreme Court's Office of Lawyer Regulation (OLR) investigates and, if warranted, prosecutes the attorney. A referee – a court-appointed attorney or reserve judge – hears the discipline cases and makes recommendations to the Supreme Court.

In this case, the Wisconsin Supreme Court will decide whether to suspend the law license of Bruce B. Jacobson, a Milwaukee attorney who faces 12 counts of misconduct, and is appealing eight of them.

The allegations at issue now involve his representation of several people in cases involving personal injury, child support, worker's compensation, and contractual disputes. The clients all allege that Jacobson did not handle their money properly and/or did not provide detailed accounting statements and then failed to respond when they expressed concerns. For example:

- Jacobson was hired to represent a man who was charged with the crime of failure to pay child support. The man gave Jacobson money to hold in a trust account and Jacobson used the money to cover his legal fees, but allegedly failed to give the client an accounting of how the money was spent.

- Another man hired Jacobson to represent him in a personal injury lawsuit. The case settled for $8,000, and Jacobson gave the client the portion that the client had been promised and then paid himself but allegedly did not follow through on a promise to pay medical bills out of the $8,000.

- Another man hired Jacobson, providing a $3,500 retainer that was deposited in Jacobson's trust account. Jacobson suffered a heart attack shortly thereafter and did not end up representing the man. He paid back the money, but the account was short $500.

The OLR asked the Court to suspend Jacobson's license for two years, while Jacobson asked for a reprimand. The referee recommended, after evaluating evidence relating to Jacobson's mental health, a 90-day suspension with requirements for close supervision after reinstatement of the license. The Supreme Court will decide what type of discipline is appropriate in this case.

The Supreme Court will issue its opinion in this case by June 30, 2005. Find the opinion on the Web at www.wicourts.gov.

WISCONSIN SUPREME COURT
WEDNESDAY, OCTOBER 6, 2004
1:30 p.m.

01-1914-D Office of Lawyer Regulation f/k/a Board of Attorneys Professional Responsibility v. Ronald A. Arthur

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers. Lawyers must follow a code of ethics developed by the Court. When there is an allegation that a lawyer has acted unethically, the Supreme Court's Office of Lawyer Regulation (OLR) investigates and, if warranted, prosecutes the attorney. A referee – a court-appointed attorney or reserve judge – hears the discipline cases and makes recommendations to the Supreme Court.

In this case, the Supreme Court will decide whether to disbar Atty. Ronald Arthur, a Lake Geneva lawyer. Arthur is asking the Court to dismiss the allegations against him and to accept his voluntary resignation from the bar.

Here is the background: Arthur served as attorney and business advisor to William and Randy Keefe, a father and son. The Keefes entered into a business venture with Arthur that ultimately failed, and a number of the misconduct charges contained in the 43-page report and recommendation from the referee arise from this venture.

Also part of the case is a series of lawsuits addressing damage done to property in Juneau County. In connection with the Juneau County case, a default judgment was entered against Arthur in 1997. He contests the judgment and argues that the OLR and the referee improperly used this judgment in the disciplinary matter.

Arthur is accused of conducting prohibited transactions with clients; engaging in conduct designed to maliciously injure others; needlessly increasing the length and cost of court proceedings; encouraging a witness to testify falsely; and generally conducting himself in a dishonest manner.

Arthur argues that the disciplinary proceeding has been needlessly long and complicated and that he should not be held responsible for the cost of it, which is nearing $140,000. He also argues that the case against him is based upon false information.

The Supreme Court will decide whether to revoke Arthur's law license.

The Supreme Court will issue its opinion in this case by June 30, 2005. Find the opinion on the Web at www.wicourts.gov.

WISCONSIN SUPREME COURT
TUESDAY, OCTOBER 26, 2004
9:45 a.m.

02-3163 Wisconsin Bell, Inc., v. Public Service Commission of Wisconsin

This is a review of a split 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, Chief Judge Michael P. Sullivan presiding.

This case involves a dispute over whether an Ameritech (Wisconsin Bell, Inc.) charge to long-distance service providers using its network was legal, and whether the state Public Service Commission (PSC) had the authority, if the charge was *not* legal, to order refunds.

The facts of this case are so complicated that Judge Charles Schudson, who wrote the lead opinion for the Court of Appeals, began the opinion by writing: "To say that the factual background can seem complicated is like saying that pasta can be filling."

Several long-distance carriers – MCI, AT&T, Excel, Sprint – filed a complaint with the PSC alleging that one of Ameritech's charges violated a Wisconsin law[3] that regulates the prices to be charged for in-state telephone service. Specifically, this law makes "intrastate carrier common line charges" or any similar, substitute charge, illegal.

The carrier common line charge emerged as a result of the break-up of the AT&T monopoly in the 1980s. When AT&T controlled all local and long-distance calling services, consumers who made long-distance calls were charged certain access fees for completing these calls through the local network. Thus, the long-distance users were actually subsidizing the local loop. That was considered to be good public policy, as long-distance callers were presumed to be wealthier and therefore in a position to subsidize the local network.

When AT&T was broken up, numerous long-distance carriers came on the scene. They did not have local networks and therefore did not have to find a way to subsidize them. But regulators knew that permitting AT&T to lift the access fees and do away with the subsidy would mean a hefty increase in local users' rates. To prevent this, it was decided that access charges would be assessed on both customers *and* long-distance providers. And so, the per-minute, carrier common line charge was established.

In the 1990s, the Federal Communications Commission ordered a phase-out of the carrier common line charge, and the Wisconsin Legislature passed the law making these charges illegal.

After the complaint by MCI, Sprint, and the others, the PSC held a hearing and, by a 2-1 vote, ruled that Ameritech's PICC amounted to an illegal substitute for the "carrier common line charge" and ordered Ameritech to refund the $18 million it had collected through this charge.

Ameritech appealed the PSC ruling to the Milwaukee County Circuit Court, arguing that it had properly filed the rate with the PSC and that the PSC had no authority to decide after the fact that the charge was illegal and order retroactive refunds. The court found that the PSC had correctly concluded that the PICC was an illegal charge; however, the court ruled that the PSC did not have the authority to order Ameritech to refund the money.

The telephone companies and the PSC appealed this ruling, and the Court of Appeals' majority concluded that the PSC did, in fact, have the authority to order the refunds.

Ameritech appealed that ruling to the Supreme Court, which will determine whether the PSC has the power to order refunds when it determines that a properly filed rate is illegal.

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[3] Wis. Stat. § 196.196(2) (b)3:

WISCONSIN SUPREME COURT
TUESDAY, OCTOBER 26, 2004
10:45 a.m.

02-3394 Christina Pitts, et al. v. Revocable Trust of Dorothy Knueppel

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 Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case began in Milwaukee County Circuit Court, Judge Thomas P. Donegan presiding.

The Wisconsin Supreme Court regularly handles cases that arise from automobile insurance policies providing coverage for accidents involving underinsured and uninsured motorists (UIM). This is one such case. The Supreme Court will decide whether an insurance company providing UIM coverage has an obligation to either consent to, or substitute its own funds for, a proposed settlement between its client and the tortfeasor (the person who caused the accident).

In deciding this case, the Supreme Court may review a 1986 case[4] in which it held that a UIM insurer must either consent or substitute when a tortfeasor's insurer offers a settlement.

Here is the background: Dorothy Knueppel caused a car accident that left Christina Pitts with a broken leg. Knueppel's insurer, American Family, offered to settle with Pitts for the policy limit of $100,000; instead, Pitts' insurer, Sentry Insurance, paid Pitts that amount in order to preserve its right to seek subrogation from Knueppel in the event that Pitts filed a claim for UIM coverage, for which the policy limit was $250,000. Subrogation occurs when an insurer pays its client to cover his/her injuries, and then sues the party responsible for the injuries.

Knueppel passed away during the course of this case. Her trust fund has offered Pitts an additional $40,000 to settle the matter. Pitts has refused to accept the $100,000 from Sentry (the money is sitting in a circuit court trust account) and wants to take the $40,000 from Knueppel's trust, but this would require Sentry either to waive its subrogation rights against Knueppel's trust, which it does not want to do because there might be a UIM claim, or to pay Pitts the $40,000 on its own – just as it did the $100,000 – to preserve its subrogation rights. Sentry has refused to do either.

The Supreme Court will decide whether Sentry must either consent to the $40,000 settlement – giving up its subrogation right – or pay Pitts that money itself.

[4] Vogt v. Schroeder, 129 Wis. 2d 3, 383 N.W.2d 876 (1986)

WISCONSIN SUPREME COURT
TUESDAY, OCTOBER 26, 2004
1:30 p.m.

03-2487-FT Benjamin Atkins v. Swimwest Family Fitness Center, et al.

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 Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case began in Dane County Circuit Court, Chief Judge Michael N. Nowakowski presiding.

This case involves a fitness center's broadly worded release form. The question before the Supreme Court is how to establish a uniform, clear test for determining when such releases are enforceable.

Here is the background: Charis Wilson, a physician, was engaged in a physical therapy program that included swimming. One day, she chose to swim at Swimwest Family Fitness Center in Madison. She was not a member. Before entering the pool area, she signed a red, five-by-five card that asked for her name and address, inquired about how she heard about Swimwest, and presented the following waiver:

> I agree to assume all liability for myself without regard to fault, while at Swimwest Family Fitness Center. I further agree to hold harmless Swimwest Fitness Center, or any of its employees for any conditions or injury that may result to myself while at the Swimwest Fitness Center. I have read the foregoing and understand its contents.

Wilson took her time signing the form, according to the testimony of the desk clerk, and chatted with the clerk but did not ask questions about the release. Wilson then entered the pool and tragically drowned. Her son, Benjamin Atkins, through his guardian *ad litem*, sued Swimwest. The trial court concluded that the waiver released the organization from liability and dismissed the case. Atkins appealed, and the Court of Appeals asked the Supreme Court to take the case directly.

The Court of Appeals noted that many Wisconsin appellate decisions address the enforceability of so-called exculpatory clauses. Over the years, the courts have struck down releases because of a lack of clarity and specificity. While these opinions have touched upon the question of whether it's good public policy to allow very broad releases that exclude all liability for any injury to be enforced, they have not answered the question directly.

The Supreme Court will clarify whether a very broad exculpatory clause is enforceable.

WISCONSIN SUPREME COURT
THURSDAY, OCTOBER 28, 2004
9:45 a.m.

02-1056 State v. Shawn D. Schulpius

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed an order of the Milwaukee County Circuit Court, Judge John J. DiMotto presiding.

This case, which has been before the Wisconsin Supreme Court twice before, involves a convicted child molester who has remained incarcerated in violation of court orders because no suitable community-based facility can be found for him.

Here is the background: Shawn Schulpius was one week shy of 18 when, in December 1991, he pleaded guilty to, and was convicted of, first-degree sexual assault of a four-year-old boy for whom he had been babysitting. In October 1995, just before his scheduled release, Schulpius was transferred to the Wisconsin Resource Center. After a June 1996 hearing that included testimony on many other molestations by Schulpius, a judge found that Schulpius was a pedophile and committed him to the custody of the Department of Health and Family Services (DHFS).

The following month, Milwaukee County Circuit Court Judge John Franke ordered Schulpius committed to a secure mental facility unless there was an appropriate community facility. He directed DHFS to report back to him on possible facilities anywhere in Wisconsin. DHFS reported that there were none and Schulpius remained in the locked facility.

In October 1997, after conducting one of the annual reviews that are required under the sexual predator law, Franke ordered the State to find a residential treatment facility for Schulpius. The State failed to find one. Then, in November 2000, Franke considered new information about Schulpius' progress and rescinded his release order. By then, however, Schulpius already had petitioned the Court of Appeals. A majority of that court ultimately rejected Schulpius' claim that the delay in finding housing for him violated his constitutional right to due process.

Writing for the majority, Judge Ralph Adam Fine concluded that the State had acted in good faith in trying to locate a home for Schulpius and noted that releasing Schulpius into the community because the government failed to follow Franke's order to find him suitable housing did not make sense.

The dissent, written by Judge Charles Schudson, called the supervised release of sexually violent offenders "a charade" because of the lack of suitable housing. "Where government's unconscionable conduct denies due process of law," Schudson wrote, "courts must fashion appropriate remedies."

Schulpius' case was among the first of a number of high-profile cases involving sex offenders who are committed for mental treatment after they have served their prison time and are found suitable for supervised, community-based treatment. Judges order such treatment, but finding communities that are willing to take these offenders has been all but impossible, according to the State. The result is that the offenders remain in locked facilities in violation of court orders. Now Schulpius has come to the Supreme Court, which will decide whether the more than four years of confinement in violation of court orders violated his constitutional rights and, if so, what the remedy will be.

WISCONSIN SUPREME COURT
THURSDAY, OCTOBER 28, 2004
10:45 a.m.

03-2527 LeRoy M. Strenke, et al. v. Levi Hogner, et al.

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

This case, like the one the Supreme Court will hear this afternoon, involves punitive damages (that is, damages that are awarded to punish a wrongdoer) in a personal injury action.

Here is the background: On Oct. 16, 1998, Levi Hogner, who weighed about 400 pounds, drank an estimated 16-18 12-ounce beers within five hours and then got behind the wheel. He caused an accident that injured LeRoy Strenke. Hogner's blood-alcohol content was found to be .269 percent at the time of the crash.

Hogner pleaded no contest to fifth-offense drunk driving. Strenke and his wife then sued Hogner for negligence, seeking both compensatory and punitive damages. The case went to trial, and the jury awarded the Strenkes $2,000 in compensatory damages. The Strenkes asked for $25,000 in punitive damages but the jury awarded them $225,000.

Hogner appealed, pointing out that the punitive damages statute[5] requires a showing that the defendant acted maliciously or intentionally disregarded the victim's rights, and arguing that he did not maliciously attack Strenke. Hogner also had raised this issue at trial, but the judge permitted Strenke to pursue this claim, concluding that the jury could find that Hogner's act of drinking heavily and then driving while intoxicated showed disregard for Strenke's rights as a motorist.

As noted, the Court of Appeals did not issue its own opinion in this case, but rather asked the Supreme Court to take it directly. The appellate court noted that past case rulings[6] have set the bar high for plaintiffs seeking to show that their rights were intentionally disregarded; the Court of Appeals in the ruling that is being challenged in this afternoon's case interpreted the punitive damages statute as meaning that the act must be "practically certain" to result in injury. The federal district court in Wisconsin has said that "practical certainty" means something approaching inevitable, and that the defendant's conduct must have been knowingly targeted at the plaintiff who is seeking punitive damages.

The Supreme Court will determine whether a motorist who is injured by a drunk driver may sue for punitive damages. The Court also is expected to analyze whether punitive damages are unconstitutionally excessive when they are disproportionate to compensatory damages. In this case, the Strenkes were awarded more than $112 in punitive damages for every dollar they received in compensation for actual injuries.

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[5] Wis. Stats. § 893.85(3)
[6] Patricia Wischer, et al. v. Mitsubishi, et al., 2003 WI App 202
Boomsma v. Star Transport, Inc., 2002 F. Supp. 2nd 869 (Eastern District Wisconsin 2002)

WISCONSIN SUPREME COURT
THURSDAY, OCTOBER 28, 2004
01:30 p.m.

01-0724/01-1031/01-2486 Patricia Wischer, et al. v. Mitsubishi Heavy Industries America, Inc., et al.

This is a review of a split decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed an award given by a Milwaukee County jury in a case where Judge Dominic S. Amato presided.

In this case, the Supreme Court will decide whether a $94 million award of punitive damages (that is, damages that are meant to punish a wrongdoer) was unconstitutionally excessive. The Court also will determine if the law requires a plaintiff who is seeking to recover punitive damages to prove that the defendant intended to cause the injury.

Here is the background: this case is actually three cases that have been consolidated. This is the so-called Big Blue case, involving the July 14, 1999 collapse of a 45-storey crane during the construction of Milwaukee's Miller Park Stadium. The crane, dubbed Big Blue, was to lift a large piece of the retractable roof into place so that workers could bolt it down. Tragically, the crane broke and its boom struck another crane holding three ironworkers, all of whom were thrown to the ground and killed instantly.

The parties have disagreed about the cause of the collapse. The plaintiffs, who are the wives of the men who were killed – Patricia Wischer, Marjorie De Grave, and Ramona Dulde-Starr – maintain that Mitsubishi Heavy Industries America Inc., a contractor hired to build the stadium roof, ordered the lift in spite of winds that were too strong. Mitsubishi argues that the winds were within the posted Big Blue limit.

A month after the accident, the three spouses filed suit in Milwaukee County Circuit Court. The jury ultimately awarded $5.25 million in compensatory damages and $94 million in punitive damages.

Wisconsin law requires a plaintiff to demonstrate that a defendant acted maliciously or with intentional disregard for the plaintiff's rights in order to collect punitive damages.[7] Arguing that the plaintiffs did not demonstrate this, Mitsubishi appealed the punitive damage award as excessive and not warranted under the law. The company noted that there was no showing that it had maliciously intended to harm the men.

A divided Court of Appeals agreed, reversing the jury's punitive damage award. The Court of Appeals, however, did not address the issue of whether the award was excessive; it resolved the case solely on the basis of interpretation of the statute.

In the Supreme Court, the spouses argue that punitive damages are appropriate because their husbands' rights to a safe workplace were intentionally disregarded in order to meet a construction deadline. Mitsubishi, on the other hand, maintains that the plaintiffs are developing creative arguments to avoid what Mitsubishi sees as the statute's clear requirement that the plaintiffs must prove that the company intended to injure their husbands.

One factor the Court also will analyze, as it did in a case this morning, is the proportion of punitive damages to compensatory damages. In this case, the plaintiffs received about $18 million in punitive damages for every $1 million in compensatory damages.

[7] Wis. Stats. § 893.85(3)