

**WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
SEPTEMBER 29, 2020**

NOTICE: Due to the COVID-19 pandemic, oral arguments during September will be conducted via video/audio conferencing. The Supreme Court Hearing Room will not be open to the public. The media and public may view the proceedings live on [WisconsinEye](#) or on www.wicourts.gov. Synopses of other cases heard during September were provided in a [previous release](#).

The cases listed below originated in the following counties:

Dane
Ozaukee

TUESDAY, SEPTEMBER 29, 2020

9:45 a.m.	19AP2397/ 20AP112	Timothy Zignego v. Wisconsin Elections Commission
10:45 a.m.	20AP557-OA	Mark Jefferson v. Dane County

Note: The Supreme Court calendar may change between the time you receive these synopses and when a case is 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. The synopses provided are not complete analyses of the issues.

WISCONSIN SUPREME COURT
September 29, 2020
9:45 a.m.

2019AP2397 & 2020AP112 Zignego v. Wis. Elections Commission

This is a review of a decision of the Wisconsin Court of Appeals, District IV, that reversed decisions by the Ozaukee County Circuit Court, Judge Paul V. Malloy presiding, granting a writ of mandamus against the Wisconsin Elections Commission and some of its members and holding the Commission and some of its members in contempt.

Three Wisconsin taxpayers and registered voters (the Plaintiffs) filed a mandamus action in the Ozaukee County circuit court against the Wisconsin Elections Commission (the Commission) and five of its six commissioners. The Plaintiffs alleged that the Commission had failed to change the registration status from eligible to ineligible¹ for certain electors [i.e. someone eligible to vote] who were sent notices because the Commission had information that the elector had moved and who had failed to respond to the notice within 30 days. The Plaintiffs alleged that the Commission was obligated to change the eligibility status of those electors immediately following the expiration of 30 days after the mailing of the notice pursuant to Wis. Stat. § 6.50(3) (2017-18 statutes).

Wisconsin Statute § 5.05(1) states that the Commission “shall have the responsibility for the administration of chs. 5 to 10 and 12 and other laws relating to elections and election campaigns, other than laws relating to campaign financing.” Section 6.36(1) provides that the Commission “shall compile and maintain electronically an official registration list.” Section 6.50(3), which has been in effect for multiple decades, states that “[u]pon receipt of reliable information that a registered elector has changed his or her residence to a location outside of the municipality, the municipal clerk or board of election commissioners shall notify the elector by mailing a notice by 1st class mail to the elector’s registration address stating the source of the information.” The statute further provides that “[i]f the elector no longer resides in the municipality or fails to apply for continuation of registration within 30 days of the date the notice is mailed, the clerk or board of election commissioners shall change the elector’s registration from eligible to ineligible.”

In 2016 the Legislature passed a law directing the Commission’s administrator to enter into a membership agreement with the Electronic Registration Information Center, Inc. (ERIC), a non-profit consortium of now 30 states that was formed to improve the accuracy of voter registration data and to assist voters in registering to vote. ERIC provides a number of lists and reports to its member states. One such list is a “movers” list, which lists individuals who may have moved based on data gathered from various public sources, including state divisions of motor vehicles and the United States Postal Service.

In 2017 the Commission received a “movers” list from ERIC. After completing an internal vetting process, the Commission sent a notice to more than 341,000 electors indicating that it had received information that they might have changed their residence and advising them

¹ The parties and the lower courts have also used the term “deactivate” to refer to the process of changing an elector’s status from eligible to ineligible.

that if they did not respond to the notice within 30 days, their registration status would be changed from eligible to ineligible. Ultimately, as a result of this notice, the registration status of nearly 336,000 electors was changed to ineligible at the conclusion of the 30-day period.

In 2019, the Commission received another “movers” list from ERIC. The Commission again sent a notice/letter to more than 234,000 electors that remained on the 2019 “movers” list after completion of the Commission’s internal vetting process. Although the Commission sent out the notice, the name of the applicable municipal clerk appeared at the top of the notice. The Commission’s name, address, phone number, and website appeared in the lower portion of the notice. This 2019 notice, however, did not state that the elector’s registration status would be changed to ineligible if the elector did not respond within 30 days. The notice told the recipient that he/she had several options either to register to vote at his/her new address if he/she had moved or to confirm that he/she remained at the same address. The notice stated that the elector could confirm continued residence at the same address by going to a website maintained by the Commission, by voting at the next election, or by signing and returning the postcard attached to the bottom of the notice (which was addressed to the applicable municipal clerk). The Commission adopted its staff’s recommendation that no status changes would occur until after the 2021 spring general election for the electors who received the 2019 “movers” notice and failed to respond to it.

The Plaintiffs filed their mandamus action in November 2019. They asked the circuit court to issue a writ of mandamus ordering the Commission to change the registration status for those electors who had received the October 2019 “movers” notice and who had not responded to the notice within 30 days. After a hearing on December 13, 2020, the circuit court orally granted the requested writ of mandamus. It issued a written mandamus writ on December 17, 2020, which directed the Commission to “comply with the provision of § 6.50(3) and deactivate the registrations of those electors who have failed to apply for continuation of their registration within 30 days of the date the notice was mailed under that provision.” The Commission moved the circuit court to stay its writ of mandamus pending appeal, which the circuit court denied. Subsequently, when the Commission failed to change the registration status of the relevant electors, the circuit court held the Commission and three of its commissioners in contempt for failing to comply with the circuit court’s writ.

After the Supreme Court denied a petition for bypass, the Court of Appeals issued a stay pending appeal of the circuit court’s writ of mandamus and its contempt order. The Court of Appeals ultimately issued a final decision reversing the writ of mandamus and the contempt order, and remanding the case to the circuit court with directions to dismiss the Plaintiffs’ complaint. The Court of Appeals concluded that because Wis. Stat. § 6.50(3) references municipal clerks and boards of election commissioners,² but not the Commission, the Commission had no authority or obligation under the statute to change the registration status of any elector who had not responded to its October 2019 notice. Thus, the circuit court could not order the Commission to do so, nor could it hold the Commission and three of its commissioners in contempt for failing to comply with its order to do so.

The Plaintiffs filed a petition for review, which the Supreme Court granted. The Plaintiffs’ petition asks the Supreme Court to decide the following issues:

1. Does Wis. Stat. § 6.50(3) apply to the [Commission]?

² The Court of Appeals concluded that this term in the statute referenced local boards of election commissioners, not the Commission.

2. Was it proper to order [the Commission] to comply with Wis. Stat. § 6.50(3) and, as is required by that law, to deactivate the voter registration of voters within 30 days of sending them a notice and receiving no response?
3. Was it proper to find [the Commission] and certain of its commissioners in contempt for failing to comply with the Writ of Mandamus for 32 days after the Circuit Court grant the Writ, and for twice voting not to comply with the Writ?

WISCONSIN SUPREME COURT

September 29, 2020

10:45 a.m.

2020AP557

Jefferson v. Dane County

The Supreme Court accepted jurisdiction over the original action petition filed by Mark Jefferson and the Republican Party of Wisconsin, which challenged statements made by Scott McDonell, the Dane County Clerk, prior to the 2020 spring general election concerning the ability of electors to request absentee ballots without providing a photo ID by claiming that they were “indefinitely confined” due to the COVID-19 pandemic and the then-existing “Safer at Home” order.

In general, a Wisconsin elector (i.e., someone eligible to vote) is required by statute to provide proof of identification (e.g., a “photo ID”) when the elector submits an application to receive an absentee ballot. Wisconsin Statute § 6.86(2) (2017-18) provides an exception to the identification requirement. Specifically, that statute provides that “[a]n elector who is indefinitely confined because of age, physical illness or infirmity or is disabled for an indefinite period may by signing a statement to that effect require that an absentee ballot be sent to the elector automatically for every election.”

Absentee ballots for the April 7, 2020 spring general election were sent out to electors who requested them starting in late February 2020. During the time when absentee ballots were being requested, sent, and returned, the COVID-19 pandemic reached Wisconsin. On March 24, 2020, the Department of Health Services (DHS) issued Emergency Order #12, known as the “Safer at Home” order. That order, inter alia, directed that individuals present within the state must stay at their home or place of residence, although there were many exceptions to the directive. (On May 13, 2020, the “Safer at Home” order was declared invalid by the Supreme Court. Wisconsin Legislature v. Palm, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900.)

On March 25, 2020, while the “Safer at Home” order was still in place, Scott McDonell, the Dane County Clerk, posted a statement on his Facebook page, which included the following excerpts:

I have informed Dane County Municipal Clerks that during this emergency and based on the Governor’s Stay at Home order I am declaring all Dane County voters may indicate as needed that they are indefinitely confined due to illness. This declaration will make it easier for Dane County voters to participate in this election by mail in these difficult times. I urge all voters who request an absentee ballot and have trouble presenting [a] valid ID to indicate that they are indefinitely confined.

* * *

Voters are confined due to the COVID-19 illness. When the Stay at Home order by the Governor is lifted, the voter can change their designation back by contacting their clerk or updating their information in myvote.wi.gov. Voters who are able to provide a copy of their ID should do so and not indicate that they are indefinitely confined.

On March 27, 2020, the petitioners, Mark Jefferson and the Republican Party of Wisconsin, filed a petition for leave to commence an original action and a motion for temporary

injunctive relief. They contended that McDonell’s statement had purported to issue a binding interpretation of Wis. Stat. § 6.86(2) for Dane County, which conflicted with the plain language of the statute and created the potential for the spring general election to occur under differing rules for different counties.

In an order dated March 31, 2020, the Supreme Court granted the petitioners’ motion for temporary injunctive relief. The court stated that McDonell’s March 25, 2020 posting was “legally incorrect.” It said that guidance issued by the Wisconsin Elections Commission (WEC) on March 29, 2020 “provides the clarification on the purpose and proper use of the indefinitely confined status that is required at this time.” That guidance instructed electors not to use the indefinitely confined status simply as a means to avoid the state’s photo ID requirement. The WEC further stated that it was up to the individual elector to determine, based on his/her current circumstances, whether the elector was indefinitely confined because of age, physical illness or infirmity or was disabled for an indefinite period.

On April 1, 2020, the Supreme Court granted the petition for leave to commence an original action. That petition listed the following questions to be resolved by the Supreme Court:

1. Whether the Dane County Clerk has the authority to issue an interpretation of Wisconsin’s election laws allowing all voters in Dane County to request and cast an absentee ballot without providing a photo ID; and
2. Whether all Wisconsin voters may forego State requirements to provide a photo ID when requesting an absentee ballot on grounds that Emergency Order #12 makes them “indefinitely confined because of age, physical illness or infirmity.”