WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
APRIL 2018

The cases listed below will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol. This calendar includes cases that originated in the following counties:

Bayfield
Dane
Milwaukee
Sheboygan
Washington
Waukesha

WEDNESDAY, APRIL 11, 2018

9:45 a.m.	15AP304-CR	State v. Gerald P. Mitchell
10:45 a.m.	16AP2455-CR	State v. Christopher John Kerr

TUESDAY, APRIL 17, 2018

9:45 a.m.	16AP1409-CR	State v. Joseph T. Langlois
10:45 a.m.	14AP2498	Wingra Redi-Mix, Inc. v. Burial Sites Preservation Board
1:30 p.m.	15AP1632/	Wingra Redi-Mix, Inc. v. State Historical Society of Wis.
	15AP1844	Wingra Redi-Mix, Inc. v. State Historical Society of Wis.

THURSDAY, APRIL 19, 2018

9:45 a.m.	16AP1599	E. Glenn Porter, III v. State of Wisconsin
10:45 a.m.	14AP2812	Ascaris Mayo v. Wisconsin Injured Patients and Families Compensation Fund
1:30 p.m.	17AP1240	John McAdams v. Marquette University

Note: The Supreme Court calendar may change between the time you receive these synopses 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. If your news organization is interested in providing any camera coverage of Supreme Court argument in Madison, contact media coordinator Hannah McClung at (608) 271-4321. Synopses provided are not complete analyses of the issues presented.

Wisconsin Supreme Court
Wednesday, April 11, 2018
9:45 a.m.

2015AP304-CR State v. Gerald P. Mitchell

Supreme Court case type: Certification
Court of Appeals: District II
Circuit Court: Sheboygan County, Judge Terence T. Bourke
Long caption: State of Wisconsin, Plaintiff-Respondent, v. Gerald P. Mitchell, Defendant-Appellant.

Issue(s) presented: This case examines the constitutionality of the implied consent law and revisits an issue raised, but not clearly decided, in State v. Howes, 2014AP1870-CR. The Court of Appeals certifies the issue here: "whether the warrantless blood draw of an unconscious motorist pursuant to Wisconsin's implied consent law, where no exigent circumstances exist or have been argued, violates the Fourth Amendment."

In Howes, the issue was whether the "implied consent," deemed to have occurred before a defendant is a suspect, is voluntary consent for purposes of the consent exception to the Fourth Amendment's warrant requirement.

Some background: After a jury trial, Mitchell was convicted of operating a motor vehicle while intoxicated (OWI), and operating with a prohibited alcohol concentration (PAC). Mitchell had six previous OWI convictions, which subjected him to enhanced penalties. See Wis. Stat. § 346.65(2)(am)6. (2015-16). He was sentenced to three years of initial confinement and three years of extended supervision on each count to be served concurrently.

At around 3:15 p.m. on a May afternoon in 2013, police received a call from a man who knew Gerald Mitchell. The caller reported that Mitchell was drunk and driving his minivan. About a half hour later, an officer located Mitchell walking down a street. His van was parked nearby. Mitchell was shirtless, wet, and covered in sand. He was slurring his words, had great difficulty maintaining balance, and nearly fell over several times, requiring the officer to help him keep upright.

Initially, Mitchell stated that he had been drinking in his apartment. He later altered his story and told the officer that he was drinking down at the beach, and had parked his vehicle because he felt he was too drunk to drive. Due to Mitchell's condition, the officer deemed it unsafe to administer the standard field sobriety tests. The officer administered a preliminary breath test, which indicated an alcohol concentration of 0.24 percent. Based on his observations, the officer arrested Mitchell for OWI at approximately 4:26 p.m.

Mitchell eventually became completely incapacitated and had to be taken to the hospital. The officer read the "Informing the Accused" form verbatim to the inert Mitchell. Mitchell did not respond, and the officer concluded that it would be impossible to get affirmative verbal consent due to Mitchell's high level of intoxication. The officer admitted on cross-examination that he could have applied for a warrant, but he did not do so. Accordingly, at 5:59 p.m., a blood sample was taken, which revealed a blood alcohol concentration of .222g/100mL.

Mitchell moved the trial court to suppress the results of the blood test taken while he was unconscious.

The State said that Mitchell had consented to the blood draw via the "implied consent" provided for in Wis. Stat. § 343.305, and under § 343.305(3)(b), unconscious persons are presumed not to have withdrawn their consent. Therefore, the unconscious Mitchell impliedly consented to the warrantless blood draw. The State expressly disclaimed that it was relying on exigent circumstances to justify the draw, explaining that "[t]here is nothing to suggest that this is a blood draw on [an] exigent circumstances situation when there has been a concern for exigency."

The trial court sided with the State and denied Mitchell's motion, reasoning that Wis. Stat. § 343.305(3)(b) "makes clear that an unconscious operator . . . cannot withdraw their consent to a blood sample."

Mitchell appealed, resulting in this certification to the Supreme Court.

Wisconsin Supreme Court
Wednesday, April 11, 2018
10:45 a.m.

2016AP2455-CR State v. Christopher John Kerr

Supreme Court case type: Bypass
Court of Appeals: District III
Circuit Court: Bayfield County, Judge John P. Anderson
Long caption: State of Wisconsin, Plaintiff-Appellant, v. Christopher John Kerr, Defendant-Respondent.

Issues presented: In this bypass of the Court of Appeals, the Supreme Court is asked to resolve two questions arising from a dispute over an arrest and drug possession charges:

- Was the Ashland County commitment order for the nonpayment of a city ordinance fine void *ab initio* (null from the beginning)?
- Does the good-faith exception to the exclusionary rule apply when there is no misconduct by an officer in arresting an individual on an active commitment order that is later revealed to be void *ab initio*?

Some background: Police were dispatched to Christopher John Kerr's home in Bayfield County in response to a 911 call that turned out not to be an emergency. During the 911 call, the dispatcher could hear a female yelling, and then the line went dead. The dispatcher called the number back; a man answered and said, "shut the fuck up." The dispatcher asked to whom he was talking, and the man said he was talking to his cat. The man denied that there was a female with him; said there was no problem; and said that the call was placed by accident.

While in route, the dispatcher notified the officers that Ashland County had an outstanding warrant for Kerr. The officers were not provided with any further details about the warrant.

When police arrived it was determined the 911 call was indeed made by mistake. Nevertheless, the officer told Kerr that there was an outstanding warrant for his arrest. The officer asked Kerr to step outside the residence, and placed him under arrest. During a pat-down, police found a rock-type substance Kerr's pants pocket. Kerr was charged with one count of possession of methamphetamine contrary to Wis. Stat. § 961.41(3g)(g).

Kerr moved the Bayfield County trial court to suppress the evidence, arguing that his arrest was unlawful because the arrest warrant from Ashland County was issued in violation of his due process rights.

The "arrest warrant" from Ashland County turned out to be a commitment order for an unpaid fine. On June 15, 2015, Kerr had been issued a citation for violating a City of Ashland ordinance prohibiting disorderly conduct. Kerr failed to appear for his court date, so the trial court issued a default judgment and gave Kerr 60 days to pay the civil forfeiture of $263.50, which he did not accomplish on time.

On Sept. 22, 2015, the Ashland County Clerk of Court certified the unpaid forfeiture to the Wisconsin Department of Revenue, and the trial court issued a "Commitment Order for Non-Payment of Fine/Forfeiture," which ordered "any law enforcement officer [to] arrest and detain

[Kerr] in custody for 90 [d]ays or until $298.50 is paid, or until the person is discharged by due course of law."

The Bayfield County trial court ruled that the Ashland County commitment order was not valid because: (1) it was unclear whether Kerr received notice of the default judgment; and (2) the Ashland County trial court failed to offer an indigency hearing or determine Kerr's ability to pay.

The Bayfield County trial court held that the Ashland County commitment order "circumvented the notice and right to hearing provisions necessary before issuing a commitment order," including Wis. Stat. § 800.095(1)(b)2 (providing, generally, that no defendant may be imprisoned for failing to pay a monetary judgment ordered by the court unless the defendant has an opportunity to be heard on the issue of the ability to pay).

The Bayfield County trial court additionally noted that there was "no legal authority" for the Ashland County trial court "to summarily issue commitment orders as it did in this case."

At the same time, however, the Bayfield County trial court noted that "neither the defendant nor the state alleges even the slightest hint of misconduct or wrongdoing by law enforcement in this matter."

The Bayfield County trial court indicated that, based on previous court decisions, there was some confusion about the state of the law as it relates to good-faith exception to the exclusionary rule.

The trial court wrote that if the analysis stopped at State v. Hess, 2010 WI 82, 327 Wis. 2d 524, 785 N.W.2d 568, the answer to the question in the case at bar would be relatively easy – the evidence from the search incident to the arrest, predicated upon a warrant that did not comply with statutory requirements, should be suppressed.

The trial court said that clearly State v. Scull, 2015 WI 22, 361 Wis. 2d 288, 862 N.W.2d 562 calls into question the Hess court's decision, but it is unclear if Hess has been overruled.

The trial court determined that Hess represents the law in Wisconsin, and as such, Kerr's suppression motion should be granted.

The state, which submitted the bypass petition, urges the Supreme Court to overrule Hess and hold that exclusion is not appropriate if there is no police misconduct to deter – even if the police are acting upon a void warrant.

Kerr argues that Hess stands for the proposition that evidence must be excluded if it flows from a warrant that was invalid when issued, regardless of whether the police relied on the warrant in good faith.

A decision by the Supreme Court is expected to clarify the law in this area.

Wisconsin Supreme Court
Tuesday, April 17, 2018
9:45 a.m.

2016AP1409-CR State v. Joseph T. Langlois

Supreme Court case type: Petition for Review
Court of Appeals: District II
Circuit Court: Washington County, Judge James K. Muehlbauer, affirmed
Long caption: State of Wisconsin, Plaintiff-Respondent, v. Joseph T. Langlois, Defendant-Appellant

Issues presented: This homicide case examines whether the jury was given proper instructions before convicting Joseph T. Langlois of homicide by negligent handling of a dangerous weapon, and whether Langlois' counsel was ineffective for not objecting to the jury instructions as delivered.

Some background: Langlois fatally stabbed his brother Jacob during an altercation in Jacob's room as Jacob was packing to leave for the National Guard. The two were arguing over items that belonged to their father and what items Langlois may have been taking with him.

The knife used in the stabbing was a fillet knife that had belonged to their father. Their mother had set the knife, still in its sheath, on a nightstand in Jacob's room before the physical altercation.

Jacob pushed Langlois out of the room and held the door against him. Langlois pushed through the door and went over to Jacob's bed, asking, "What else do you have in here?" The men started wrestling. Jacob placed Langlois in a headlock. Langlois said he couldn't breathe. Jacob released Langlois.

Langlois said he was confused, angry, and furious. He took the knife from the nightstand, removed it from its sheath, and "held it up threateningly" against his right shoulder with the sharp end pointed out. Jacob did not have a weapon.

Langlois yelled at Jacob, saying he "never liked him" and "always hated him." Jacob kicked Langlois on his right side. Langlois told police that he reacted by stabbing Jacob in the chest once, using an extended stabbing motion.

Langlois was charged with first-degree reckless homicide. At the close of the evidence at trial, the state asked that Langlois be charged with lesser included offenses of second-degree reckless homicide and homicide by negligent handling of a dangerous weapon. Langlois requested instructions on the defenses of self-defense and accident. The state then asked for an instruction on retreat. The circuit court granted all requests. Defense counsel made no objection to the instructions.

The circuit court gave complete jury instructions on self-defense for the first- and second-degree reckless homicide counts but on the negligent homicide count – on which the jury ultimately found Langlois guilty – the court did not specifically reinstruct the jury that the state had the burden of proving beyond a reasonable doubt that Langlois did not act lawfully in self-defense.

The jury returned a verdict acquitting Langlois of the first- and second-degree reckless homicide counts, but convicting him of homicide by negligent handling of a dangerous weapon. Sentence was withheld, and Langlois was placed on five years probation with conditions.

Langlois filed a motion for judgment notwithstanding the verdict, arguing there was insufficient evidence to convict him because a normally prudent person would not have reasonably foreseen that his conduct exposed another to an unreasonable risk and high probability of bodily harm. He also argued that the trial court's instruction on accident violated his due process rights because the instruction referred to risk without qualifying that the risk had to be unreasonable and substantial. The motion was denied.

Langlois then moved for a judgment of acquittal, again arguing that the evidence was insufficient to support the verdict. In the alternative, he asked for a new trial in the interest of justice on the ground that trial counsel's failure to object to the instructions on self-defense and accident deprived him of the effective assistance of counsel. The motion was denied without an evidentiary hearing.

The Court of Appeals, with Judge Paul F. Reilly dissenting, affirmed. The Court of Appeals said Langlois viewed the jury instructions in isolation rather than considering them as a whole. With respect to the self-defense instructions, Langlois faulted his attorney for not objecting with the trial court failed to repeat the instruction given in conjunction with first-degree reckless homicide when it instructed the jury on homicide by negligent handling of a dangerous weapon.

The Court of Appeals said the trial court did instruct the jury on self-defense as it related to the count charging homicide by negligent handling of a dangerous weapon, although the court did not repeat the portion of the instruction telling the jury that it was the state's burden to prove beyond a reasonable doubt to show that Langlois did not act in self-defense.

Judge Reilly said the trial court, by omission, instructed the jury that self-defense for homicide by negligent handling of a dangerous weapon does not require the state to prove beyond a reasonable doubt that Langlois did not act lawfully in self-defense. Reilly says this omission, by inference, removed from the state its burden to disprove self-defense and erroneously put the burden to prove self-defense on Langlois.

The state says contrary to Langlois's position, the circuit court did not need to completely reinstruct the jury on the requirements of self-defense as they pertain to the negligent homicide charge when the court had previously given the jury a complete instruction on self-defense on the greater charges.

A decision by the Supreme Court is expected to clarify what constitutes proper jury instructions in the common situation where multiple lesser included offenses are at play.

Wisconsin Supreme Court
Tuesday, April 17, 2018
10:45 a.m.

2014AP2498 Wingra Redi-Mix, Inc. v. Burial Sites Preservation Board

Supreme Court case type: Petition for Review
Court of Appeals: District IV
Circuit Court: Dane County, Judge Ellen K. Berz, affirmed
Long caption: Wingra Redi-Mix, Inc. d/b/a Wingra Stone Company, Petitioner-Appellant-Petitioner, v. Burial Sites Preservation Board, Respondent-Respondent, Ho-Chunk Nation, Other Party-Respondent.

Issues presented: This is one of two companion Supreme Court cases involving a dispute between a gravel pit operator and the Burial Sites Preservation Board. [1] The Supreme Court reviews lower court decisions upholding an order of the board that denied Wingra Redi-Mix, Inc.'s petition to remove effigy mounds on its property from the catalog of human burial sites.

Some background: In 1914, Native American effigy mounds referred to as the Ward Mound Group were identified and mapped on property now belonging to Wingra in Dane County. At the time, the group consisted of seven mounds. In 1989 and 1990, the Dane County Indian Mounds Identification Project investigated the site and found that a bird effigy and a portion of a tailed mammal effigy still exist. The other mounds had been destroyed over time. The property at issue was catalogued as a protected burial site in 1991. Wingra, which has operated the site as a gravel pit since 1961 and has owned it since 1982, did not challenge the finding at the time.

In September of 2010, Wingra sent the director a letter requesting that the mounds be removed from the burial sites catalog because "[t]here is no definitive evidence that human remains have been buried in any of the mounds."

In January 2011, Wingra submitted a petition to the director seeking removal of the mounds from the catalog of burial sites. The petition alleged that the mounds were cataloged in 1991 with no evidence of human remains and the director did not offer Wingra an opportunity to appeal the decision to catalog the mounds, in violation of Wingra's right to due process. The petition also alleged that effigy mounds are understood to have functioned as ceremonial locations and only sometimes as burial sites. The petition further alleged that a 1998 investigation on behalf of the Ho-Chunk Nation using ground penetrating radar identified only "one or more anomalies within the portions of one of the mound remnants," which were "not dispositive of the presence of human remains."

The Ho-Chunk Nation was permitted to join the proceedings as an interested party. It opposed Wingra's removal petition. The director of the Historical Society denied the petition. Wingra appealed to the Burial Sites Preservation Board. The Board received briefs, held a contested hearing, and ultimately affirmed the director's final decision and adopted it as its own. The Board concluded that Wingra's challenges to the validity and scope of the original

[1] The second case is Wingra Redi-Mix, Inc. v. State Historical Society of Wisconsin, Nos. 2015AP1632 & 2015AP1844 (scheduled to be heard at 1:30 p.m. on April 17, 2018). The issue presented in that case is whether the Historical Society erred in denying Wingra's petition for permission to disturb the burial mounds.

cataloging decision were time barred. The board went on to say even if they were not time barred, Wingra's arguments that the director should not have cataloged the site and that the director cataloged too much land were inconsistent with the purpose of § 157.70.

The board held Wingra failed to establish grounds for removing the site from the catalog, and it denied Wingra's petition. The circuit court affirmed, as did the Court of Appeals.

In reviewing the board's decision, the Court of Appeals reviewed somewhat conflicting testimony from a geologist and an archeologist about whether it seems likely or not that human remains are located at the site.

The Court of Appeals concluded there was substantial evidence to support the Board's conclusion that Wingra failed to provide sufficient evidence that the mounds do not contain human remains.

The Court of Appeals said Wis. Admin Code § HS 2.03(6)(a), (b) imposes on Wingra the burden of presenting "sufficient evidence to indicate that a cataloged site does not contain any burials" or "human remains." The appellate court said the board simply applied the standard that is found in the code.

The Court of Appeals went on to note that the board reviewed historical literature relied on by Wingra and pointed out that the authors cited by Wingra clearly stated that most effigy mounds contained human burials.

Wingra argues that there is no site specific factual support that the effigy mounds on its property contain human remains and complains it is being prohibited from mining a three-acre parcel.

"This case exemplifies the harm caused to private property owners by an unaccountable administrative agency driven by an agenda of its own making, regardless whether that agenda comports with the dictates set forth by the legislature," Wingra contends.

Wingra also says, if in fact, a party must conclusively establish that no human remains exist, then Wingra suffered a violation of its due process rights because it was deprived of a meaningful opportunity to challenge the initial cataloging. The company adds that conclusive proof of the absence of human remains cannot be achieved without invasive surveying, which the Historical Society has also rejected.

Wisconsin Supreme Court
Tuesday, April 17, 2018
1:30 p.m.

2015AP1632/2015AP1844 Wingra Redi-Mix, Inc. v. State Hist. Society. of Wis.

Supreme Court case type: Petition for Review
Court of Appeals: Dist. IV
Circuit Court: Dane County, Judge John C. Albert, reversed

Long caption: Wingra Redi-Mix, Inc. d/b/a Wingra Stone Company, Petitioner-Respondent-Cross-Appellant-Petitioner, v. State Historical Society of Wisconsin, Respondent-Appellant-Cross-Respondent, Ho-Chunk Nation, Intervenor-Co-Appellant-Cross-Respondent

Issues presented: This consolidated case is the second of two companion Supreme Court cases involving a dispute between Wingra Redi-Mix, a gravel pit operator, and the Burial Sites Preservation Board or the State Historical Society of Wisconsin.

While the companion case, 2014AP2498 (scheduled to be heard at 10:45 a.m. on April 17, 2018), dealt with Wingra's petition to remove the effigy mounds at issue from the State Historical Society's catalog of burial sites, this case deals with Wingra's petition to disturb two Native American effigy mounds that are part of the Ward Mound Group, located in Dane County. The Ho-Chunk Nation has intervened on behalf of the Historical Society.

Some Background: In 1914, Native American effigy mounds referred to as the Ward Mound Group were identified and mapped on property now belonging to Wingra. The property at issue was catalogued as a protected burial site in 1991.

Wingra has operated the site as a gravel pit since 1961 and has owned it since 1982. The cataloged burial site at issue consists of about three acres, located within a 57-acre sand and gravel pit.

Over the years, Wingra has conducted its mining and quarrying activities around the mound group, which the company says has resulted in a 50-foot tall mesa in the middle of its quarry. On Sept. 17, 2010, Wingra applied for a permit that would allow the company to disturb three "anomalies" found at the site to confirm, consistent with its expert's report, that those anomalies were not human remains.

The State Historical Society denied the petition, as did the state Division of Hearings and Appeals (DHA). DHA determined that evidence of whether human remains exist in the mounds is not material under the statute controlling the process for handling a permit to disturb.

The circuit court reversed the DHA, and the circuit court was reversed by the Court of Appeals. The Court of Appeals rejected all of Wingra's arguments challenging the denial of the permit, and affirmed the decision denying the petition to disturb.

The Court of Appeals said it is required to affirm an agency's decision unless it finds a ground for setting aside, modifying, remanding, or ordering agency action. In addition, it noted it will uphold an agency's factual findings if they are reasonable under § 157.70(5)(c)2.

The DHA concluded the Ho-Chunk Nation has a legitimate tribal and religious affiliation with the mounds and an interest in preserving the site. The Court of Appeals said it was satisfied that decision was based on substantial evidence.

In taking the case to the Supreme Court, Wingra argues that review by the Supreme Court is necessary "to rein in the administrative state by insuring that it acts within the bounds set by the legislature and protect the rights of private parties that are targeted by administrative agencies."

Wingra accuses the Court of Appeals of ignoring questions of law and applying a highly deferential "substantial evidence" test, which ends up expanding the DHA, and the Historical Society's authority in excess of what the legislature intended. Wingra argues that the Court of Appeals erroneously reframed Wingra's issues as factual disputes and in doing so confused, rather than clarified, the appropriate interpretation of the Burial Sites Preservation statute.

The Historical Society said the near universal policy of deep respect for sites where the dead are buried was codified in Wisconsin law by the enactment of the Burial Sites Preservation Law. It says the statute sought to "assure that all human burials be accorded equal treatment and respect for human dignity without reference to ethnic origins, cultural backgrounds, or religious affiliations." 1985 Wis. Act 316, § 1(2)(a).

The Historical Society also noted that the Burial Sites Preservation law is expressly intended to "balance the interests of scientists, landowners, developers and others with an interest in a burial site, including those with a kinship interest and those with a general cultural, tribal, or religious affiliation with the burial site."

Wisconsin Supreme Court
Thursday, April 19, 2018
9:45 a.m.

2016AP1599 E. Glenn Porter, III v. State of Wisconsin

Supreme Court case type: Petition for Review
Court of Appeals: Dist. II [Dist. III judges]
Circuit Court: Waukesha County, Judge Patrick C. Haughney, affirmed
Long caption: E. Glenn Porter, III and Highland Memorial Park, Inc., Plaintiffs-Appellants, v. State of Wisconsin, Dave Ross and Wisconsin Funeral Directors Examining Board, Defendants-Respondents

Issues presented: This case examines the scope and application of "rational basis review." The Supreme Court reviews two issues presented by E. Glenn Porter, III and Highland Memorial Park, Inc.

- Must statutes that restrict the ability of Wisconsin citizens to engage in otherwise lawful business activities bear a real and substantial relationship to some legitimate exercise of the state's police power in order to be constitutional?
- If there must be a real and substantial relationship between a challenged law and a legitimate exercise of the police power, does the presumption of constitutionality permit courts to ignore disputed issues of material facts when considering a motion for summary judgment?

Some background: It has been unlawful in Wisconsin to own both a funeral home and a cemetery since 1939, due to what are referred to as "anti-combination laws." Wisconsin Statute § 445.12(6) prohibits funeral directors (or their agents) from receiving any compensation from any cemetery, mausoleum or crematory (or their agents or employees) "in connection with the sale or transfer of any cemetery lot, outer burial container, burial privilege or cremation." That subsection also prohibits funeral directors from operating a funeral establishment "located in" or financially connected with a cemetery, or from acting "as a broker or jobber of any cemetery property or interest therein."

A parallel provision, applicable to "cemetery authorities," imposes prohibitions reciprocal to those imposed on funeral directors. See § 157.067(2). The cemetery provision prohibits cemetery authorities from allowing funeral homes to locate in the cemetery, and also prohibits cemetery authorities from holding any financial interest in funeral establishments. § 157.067(2).

In this case, the state maintains, and the lower courts have agreed, that the anti-combination laws are constitutional because they are rationally related to the legitimate government interest of protecting consumers in particularly vulnerable circumstances.

E. Glenn Porter, III the president and one of the principal owners of Highland Memorial Park, a cemetery located in New Berlin (collectively, "Porter") disagree. Porter wants to expand his business by operating a funeral establishment in conjunction with his existing cemetery operations.

Porter filed the underlying lawsuit, seeking: (1) a declaratory judgment that the anti-combination laws violate equal protection and substantive due process; (2) an order permanently

enjoining the state from enforcing the anti-combination laws; and (3) reasonable costs and attorney fees.

The state moved for summary judgment. During summary judgment briefing, the parties submitted competing expert reports. In support of its summary motion, the State submitted (among other things) a report authored by economics professor Jeffrey Sundberg, who opined to a reasonable degree of professional certainty that the anti-combination laws serve the state's claimed government interests.

In response, Porter relied primarily on a report and affidavit authored by economics professor David Harrington, who opined to a reasonable degree of professional certainty that the anti-combination laws do not actually advance the state's claimed interests. Porter argued that any dispute as to that issue created a material question of fact requiring a trial.

The trial court granted summary judgment in favor of the state, concluding that the anti-combination laws are constitutional because they are rationally related to a number of legitimate government interests; namely, "preserving competition, avoiding commingling of funds, preserving consumer choices, avoiding higher prices, fostering personal service, [and] avoiding undue pressure on consumers." The trial court explained it was "satisfied . . . that if there are arguments over whether some of this works or some of that doesn't work, it stands as proof then that there is a basis for the law."

The court emphasized that it was "not supposed to decide whether or not one type of law is better than the other, but only whether or not there's a rational basis for it." Given the trial court's determination that there was a rational basis for the anti-combination laws, it concluded it did not "need to go beyond summary judgment and to have a trial on the matter, because . . . there's enough information before the court that the court finds the law is constitutional."

Porter appealed, unsuccessfully. The Court of Appeals held that regardless of the standard of review employed – traditional rational basis review or rational basis with bite – the anti-combination laws are not unconstitutional on substantive due process or equal protection grounds.

Porter argues that the anti-combination laws must be examined under a "rational basis with bite" standard, a more stringent form of rational basis scrutiny that requires the state to produce evidence showing that the laws actually, not just conceivably, advance a legitimate government interest. See generally Ferdon v. Wisconsin Patients Comp. Fund, 2005 WI 125, 284 Wis. 2d 573, 701 N.W.2d 440.

Wisconsin Supreme Court
Thursday, April 19, 2018
10:45 a.m.

2014AP2812 Mayo v. Wis. Injured Patients and Families Compensation Fund

Supreme Court case type: Petition for Review
Court of Appeals: District I
Circuit Court: Milwaukee County, Judge Jeffrey A. Conen, affirmed
Long caption: Ascaris Mayo and Antonio Mayo, Plaintiffs-Respondents-Cross-Appellants, United Healthcare Insurance Company and Wisconsin State Department of Health Services, Involuntary-Plaintiffs, v. Wisconsin Injured Patients and Families Compensation Fund, Defendant-Appellant-Cross-Respondent-Petitioner, Proassurance Wisconsin Insurance Company, Wyatt Jaffe, MD, Donald C. Gibson, Infinity Healthcare, Inc. and Medical College of Wisconsin Affiliated Hospitals, Inc., Defendants

Issues presented: In this medical malpractice case, the Wisconsin Injured Patients and Families Compensation Fund (the Fund) challenges a Court of Appeals decision finding a $750,000 cap on noneconomic damages in medical malpractice actions, as stated in § 893.55, Stats. (2015-16), is unconstitutional on its face. The Fund also asks the Supreme Court to decide whether the cap is constitutional as applied here to the plaintiffs, Ascaris Mayo and Antonio Mayo.

The Supreme Court reviews the issues in light of Ferdon v. Wisconsin Patients Compensation Fund, 2005 WI 125, 284 Wis. 2d 573, 701 N.W.2d 440. According to the Court of Appeals, Ferdon held that there was no rational relationship between the stated legislative objectives of the fund and amount of the cap, which at that time Ferdon was decided was $350,000.

Some background: In May 2011, 50-year-old Ascaris Mayo was seen in the emergency room of Columbia St. Mary's Hospital in Milwaukee for abdominal pain and high fever. Mayo was seen by Dr. Wyatt Jaffe and a physician's assistant, Donald Gibson. Gibson included infection in his differential diagnosis, and he admitted at trial that Mayo met the criteria for Systemic Inflammatory Response Syndrome. However, neither medical professional informed Mayo about that diagnosis or the available treatment, which was antibiotics.

Instead, Mayo was treated for uterine fibroids because she had a history of that condition. She was told to follow up with her personal gynecologist. Mayo's condition worsened the next day, prompting her to visit a different emergency room, where she was diagnosed with a septic infection caused by the untreated infection. The infection resulted in what physician called a "medical tsunami," which caused nearly every organ to fail and caused dry gangrene in all four of Mayo's extremities. All four extremities eventually had to be amputated.

The Mayos filed suit, alleging medical malpractice and failure to provide proper informed consent. Prior to trial, the Fund filed a motion to consider constitutional issues. The circuit court held the cap was not facially unconstitutional, but it allowed the Mayos to raise an "as applied" challenge after trial.

A jury found that neither Jaffe nor Gibson was medically negligent, but it found that both medical professionals failed to provide Mayo with the proper informed consent about her

diagnosis and treatment options. The jury awarded Ascaris Mayo $15 million in noneconomic damages, and it awarded $1.5 million to Antonio Mayo for loss of society and companionship.

In seeking entry of judgment on the verdict, the Mayo's renewed their facial challenges to the cap on damages and argued that the cap was unconstitutional as applied. The circuit court concluded the cap was not facially unconstitutional but that it was unconstitutional as applied to the Mayos' jury award because it violated the Mayos' rights to equal protection and due process.

The circuit court, relying in part on principles set forth in Ferdon, found that an application of the cap would reduce the Mayos' jury award on noneconomic damages by 95.46 percent. The circuit court also found that there was no rational basis for depriving Ascaris Mayo of the award the jury deemed appropriate to compensate her for her injuries; that reducing the Mayos' jury award would not further the cap's purpose of promoting affordable health care to Wisconsin residents while also ensuring adequate compensation to medical malpractice victims; that the Fund is financially fully capable of honoring the jury's award; and that applying the cap would not advance the legislative purpose of policing high or unpredictable damage awards.

The Court of Appeals affirmed. It concluded that the statutory cap on noneconomic damages is unconstitutional on its face because it violates the same principles articulated by the Wisconsin Supreme Court in Ferdon by imposing an unfair and illogical burden only on catastrophically injured patients, thereby denying them the equal protection of the law and creating a class of fully compensated victims and partially compensated victims. The Court of Appeals found, as in Ferdon, that the cap on non-economic damages is not rationally tied to the legislative objectives of keeping doctors in the state, preventing defensive medicine, controlling the cost of health care and premiums.

The Court of Appeals did not reach the question of whether the statute was unconstitutional as applied to the Mayos.

The Fund says the Court of Appeals decision jeopardizes longstanding precedent that recognizes that the legislature sets the policy for the state and should be afforded substantial deference in doing so. The Fund argues that the Court of Appeals employed an exacting level of scrutiny that cannot be reconciled with proper "rational basis" review. It also argues the appellate court ignored legislative fact-finding and investigation, took no steps to independently construct a rationale for the cap, and searched out its own sources to contradict the legislature's findings.

The Fund also says that because the Court of Appeals left undisturbed the circuit court's decision that declared the cap unconstitutional as applied to the Mayos, this leaves open the possibility that the cap, even if ultimately deemed facially constitutional in all respects, can still be undone one "as applied" challenge at a time.

The Fund also asks the Supreme Court to clarify whether uniform application of a law can violate equal protection simply by producing harsh results. It says the cap has been applied to the Mayos exactly the same as it is to all other individuals receiving an award in excess of $750,000.

In addition to addressing constitutional questions raised by the Mayos, a decision by the Supreme Court is expected to clarify the proper scope of rational basis review following Ferdon, and the level of scrutiny a court must undertake when analyzing economic legislation applicable to medical malpractice cases.

Wisconsin Supreme Court
Thursday, April 19, 2018
1:30 p.m.

2017AP1240 McAdams v. Marquette University

Supreme Court case type: Bypass
Court of Appeals: District I
Circuit Court: Milwaukee County, Judge David A. Hansher
Long caption: John McAdams, Plaintiff-Appellant, v. Marquette University, Defendant-Respondent

Issues presented:

- Was the statement made by Professor John McAdams in a Nov. 9, 2014 post of his Marquette Warrior blog protected under the doctrines of academic freedom and freedom of expression?
- Did the Circuit Court improperly deny McAdams a trial on the merits by deferring to the findings of fact and conclusions of law made by Marquette's internal Faculty Hearing Committee?

Some background: On Nov. 9, 2014, John McAdams, a tenured professor at Marquette University, published a blog post on his personal blog, Marquette Warrior, criticizing Cheryl Abbate, a graduate student and philosophy instructor. The blog post discussed Abbate's conversation with a student in her philosophy class.

The blog post said that Abbate had listed some issues on the board, including "gay rights." According to the blog post, Abbate "then airily said that 'everybody agrees on this, and there is no need to discuss it.'"

The blog post went on to say that the student, who disagrees with some of the notions of gay rights, such as gay marriage, approached Abbate after class and told her he thought the issue deserved to be discussed.

The blog post indicated that Abbate told the student "some opinions are not appropriate, such as racist opinions, sexist opinions." The blog post indicated Abbate told the student "you don't have a right in this class to make homophobic comments" and that she would "take offense" if the student said that women can't serve in particular roles and that somebody who is homosexual would experience similar offense if somebody opposed gay marriage in class.

The blog post indicated that Abbate said, "In this class, homophobic comments, racist comments, will not be tolerated," and she invited the student to drop the class. In addition to naming Abbate, the blog post included a clickable link to her contact information and personal website. Abbate immediately started receiving strongly negative emails, and several of the communications expressed violent thoughts about her.

On Dec. 16, 2014, Dean Richard Holz advised McAdams that until further notice he was relieved of all teaching duties and faculty activities and that he would still receive his salary and benefits. On Jan. 2, 2015, Holz affirmed that McAdams was banned from campus. On Jan. 30, 2015, Holz advised McAdams that his "conduct clearly and substantially fails to meet the standards of personal and professional excellence that generally characterizes university

faculties," and that Marquette was initiating the process to revoke his tenure and terminate his employment.

A Faculty Hearing Committee (FHC) comprised of seven tenured faculty members and chaired by a law professor held a hearing. Both parties were represented by counsel, and multiple witnesses were examined and cross-examined during a four-day hearing that occurred in September 2015.

Following the hearing, the FHC met and deliberated seven times and ultimately issued a 123-page report containing over 300 findings of fact. The FHC concluded that the university demonstrated by clear and convincing evidence that McAdams' conduct was seriously irresponsible and his demonstrated failure to recognize his essential obligations to follow members of the Marquette community, and to conform his behavior accordingly will substantially impair his fitness to fulfill his responsibilities as a professor.

In accordance with McAdams' employment contract, Marquette's president reviewed and adopted the FHC findings and conclusions. Because the FHC had emphasized McAdams' refusal to acknowledge or accept his professional duties and thus was likely to repeat his misconduct, the president added a condition that McAdams be sent a private letter with the criteria for reinstatement that: required McAdams privately to acknowledge and accept the unanimous judgment of his peers; affirm his commitment that his future actions would adhere to the standards of higher education; acknowledge that the blog post was reckless and incompatible with the mission and values of Marquette University; and express regret for the harm caused to the graduate student. McAdams refused to accept these conditions. After eight months of discovery and 178 pages of briefing, the circuit court granted Marquette summary judgment. McAdams appealed.

McAdams says the circuit court's decision in favor of the University will have, and may already have had, a chilling effect on free expression by the faculty of other universities around the state, including professors at the University of Wisconsin. He contends there is a split of authority in the law on whether deference should be given to universities with respect to the administration of employment contracts.

Marquette says while McAdams is entitled to seek appellate review, reviewing the record of the proceedings to ensure that Marquette followed the contractual standards is the type of error correcting analysis typically performed by the Court of Appeals, not this court. Marquette argues that contrary to McAdams' assertions, he was not disciplined because of any controversial opinion that he holds or that he expressed. Rather, Marquette says the conduct that led to McAdams' suspension was his decision to put Abbate's name and her personal contact information on the internet, knowing that this could lead to negative communications.