WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
FEBRUARY 2022

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

Columbia
Dane
Sauk
Shawano
Waukesha

MONDAY, FEBRUARY 14, 2022

9:45 a.m.	20AP2081-AC/ 20AP2103-AC	Wisconsin Manufacturers and Commerce v. Tony Evers
10:45 a.m.	20AP202	Estate of Anne Oros v. Divine Savior Healthcare Inc.

THURSDAY, FEBRUARY 17, 2022

9:45 a.m.	19AP1850-CR	State v. Scott W. Forrett
10:45 a.m.	18AP2205	State v. C. G.

MONDAY, FEBRUARY 28, 2022

9:45 a.m.	21AP1321-LV/ 21AP1325	County of Dane v. Public Service Commission of Wisconsin
10:45 a.m.	19AP1033	Sauk County v. S. A. M.

In addition to the cases listed above, the following case is assigned for decision by the Court on the last date of oral argument based upon the submission of briefs without oral argument:

20AP1616-D	Office of Lawyer Regulation v. Nathan E. DeLadurantey

Note: The Supreme Court calendar may change between the time you receive it 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. If your news organization is interested in providing any type of camera coverage of Supreme Court oral argument, you must contact media coordinator Logan Rude at WISC-TV, (608) 271-4321. The synopses provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
February 14, 2022
9:45 a.m.

20AP2081-AC/ 20AP2103-AC — Wisconsin Manufacturers and Commerce v. Tony Evers

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), that reversed the Waukesha County Circuit Court order, Judge Lloyd V. Carter presiding, denying the State's and Milwaukee Journal Sentinel's motions to dismiss the complaint filed by Wisconsin Manufacturers and Commerce, Muskego Area Chamber of Commerce, and New Berlin Chamber of Commerce and Visitors Bureau regarding the release of a list of businesses with more than 25 employees who had close contact or positive cases of COVID-19.

On Sept. 30, 2020, the Wisconsin Manufacturers and Commerce (WMC) was informed by the Secretary of the Wisconsin Department of Administration that on Oct. 2, 2020, the State planned to release a list of "the names of all Wisconsin businesses with over 25 employees that have had at least two employees test positive for COVID-19 or that have had close case contacts that were investigated by contact tracers" and the numbers of such employees at each business in response to public records requests.

WMC, the Muskego Area Chamber of Commerce, and the New Berlin Chamber of Commerce (collectively, the Associations) filed a complaint in Waukesha County circuit court seeking declaratory relief under Wis. Stat. §§ 146.84, 806.04, and 813.01, in the form of an injunction barring planned release of the requested list. The Associations argued that some of the information in the list that the State plans to release comes from "protected, confidential health care information that cannot be released without the informed consent of each individual" employee patient under Wis. Stat. § 142.82. The Associations also argued that revealing the list would permit identification of the employee patients as well as violate the businesses' employee's right to privacy and the businesses' reputations.

The circuit court issued a temporary restraining order enjoining the planned release as to all businesses named on the list regardless of whether a named business is a member of any of the Associations. The Associations moved for a temporary injunction, and the State and Milwaukee Journal Sentinel moved to dismiss the complaint. The circuit court denied the motions to dismiss and granted the Associations' motion for a temporary injunction. The Journal Sentinel and the State filed petitions for leave to appeal the circuit court's order. The Court of Appeals granted the petitions and consolidated the appeals.

The Court of Appeals reversed and directed the circuit court on remand to dismiss the Associations' complaint with prejudice and to vacate the temporary injunction order. (Note: the temporary injunction order remains in effect during the pendency of proceedings in this court).

The Associations filed a petition for review raising two issues:

1. Whether the Associations sufficiently alleged a justiciable controversy under the Uniform Declaratory Judgments Act.

2. Whether the right to challenge a records release under the Uniform Declaratory Judgments Act survived the enactment of Wis. Stat. § 19.356, which states that "[e]xcept as . . . otherwise provided by statute . . . no person is entitled to judicial review of the decision of an authority to provide a requester with access to a record."

WISCONSIN SUPREME COURT
February 14, 2022
10:45 a.m.

20AP202 Estate of Anne Oros v. Divine Savior Healthcare Inc.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), reversing a Columbia County Circuit Court order, Judge Andrew Voigt presiding, that dismissed a wrongful death claim made by Kim Andruss regarding the death of her mother, Anne Oros, who died while in the care of Divine Savior Healthcare Inc.

Divine Savior Healthcare Inc. ("Divine Savior") is a Wisconsin corporation operating a general acute hospital in Portage as well as operating a skilled care nursing home and an assisted living community-based residential facility, both operating under the name of "Tivoli at Divine Savior Healthcare." Anne Oros was under the care of Divine Savior at both the nursing home and assisted living facility in 2015 and 2016 when she fell and suffered bodily injury. It is alleged that the 2016 fall at the assisted living facility specifically led to Oros's death.

Kim Andruss, Oros's daughter and the personal representative of her mother's estate, filed a complaint against Divine Savior alleging that Divine Savior had been negligent because it "failed to appropriately change or implement a new care plan to account for Oros's increased risk of falling." The complaint alleged two claims: (1) a wrongful death claim by Andruss in her own personal capacity to recover for the damages she personally suffered due to Oros's death; and (2) a survival action on behalf of the estate to recover any damages that Oros herself may have suffered. The second claim is not at issue in this appeal, and remains pending in the circuit court.

Divine Savior filed a motion seeking an order dismissing the wrongful death claim. Divine Savior argued that Wis. Stat. ch. 655 applied, and therefore, a wrongful death claim cannot be filed by a deceased's adult child. Chapter 655 governs health care liability for certain medical providers, establishes the Injured Patients and Families Compensation Fund (the Fund) to provide compensation for medical malpractice claims and requires mandatory participation by hospitals and certain other health care facilities. In exchange, the chapter provides indemnity for the health care facilities which it covers.

The circuit court ruled in favor of Divine Savior stating that although the assisted living facility was not a ch. 655 health care provider on its own, the wrongful death claim still had to be dismissed because the nursing home was a ch. 655 health care provider under Wis. Stat. § 655.002(j). The circuit court permitted Andruss to file an amended complaint removing the allegations involving the actions of the nursing home. Andruss filed the amended complaint and also filed a motion for reconsideration of the court's prior ruling arguing that the wrongful death claim in the amended complaint was not covered by ch. 655. The circuit court denied Andruss's motion for reconsideration and ordered that the wrongful death claim be dismissed.

Andruss appealed the circuit court's orders to the Court of Appeals. Divine Savior argued on appeal that it was a "conglomerate entity" that included the hospital, nursing home, and assisted living facility, and therefore, it qualified as a ch. 655 health care provider. The Court

of Appeals rejected this argument stating that ch. 655 does not recognize anything resembling a "conglomerate" in any of its definitions of health care providers. The Court of Appeals reversed the circuit court's orders.

Divine Savior filed a petition for review raising two issues:

1. Is a lawsuit against Divine Savior, a defined Chapter 655 provider, and its affiliate healthcare providers subject to Chapter 655?
2. Is the Tivoli assisted living facility an affiliate entity of Divine Savior, "whose operations are combined as a single entity with a hospital" pursuant to Chapter 655.002, such that the Divine Savior is entitled to the protections of Wisconsin Chapter 655?

WISCONSIN SUPREME COURT
February 17, 2022
9:45 a.m.

19AP1850-CR State v. Scott W. Forrett

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), that reversed the Waukesha County Circuit Court, Judges Michael J. Aprahamian and Brad Schimel presiding, and remanded for further sentencing proceedings, regarding Scott W. Forrett's conviction for seventh offense operating a motor vehicle while intoxicated (OWI).

In April of 2017, Scott W. Forrett was arrested for OWI and refused an officer's request for a blood sample. The officer obtained a search warrant for the sample and Forrett's blood was drawn at a hospital with an analysis showing a blood alcohol concentration of 0.266-percent. Forrett had six prior OWI-related offenses, so he was charged with OWI and operating a motor vehicle with a prohibited alcohol concentration above 0.02-percent, both as seventh offenses. He was also charged with operating a motor vehicle after revocation, failure to install an ignition interlock device, possession of THC, and possession of drug paraphernalia.

Forrett pled guilty to OWI and did not contest his refusal to submit a blood sample. The charges for operating after revocation, failure to install an ignition interlock device, and possession of THC and drug paraphernalia were dismissed but read in at sentencing. The charge for prohibited alcohol concentration was dismissed outright.

At sentencing, the circuit court noted that Forrett had been convicted of six prior OWI-related offenses. Forrett's attorney told the court that one of the prior offenses, which occurred in 1996, was for refusal to submit to a blood draw but that there was no accompanying OWI conviction for that offense as the OWI charge had been dismissed and read into a felony eluding charge. The circuit court imposed a sentence for a seventh offense OWI.

Forrett filed a post-conviction motion seeking a new sentencing hearing or commutation of his sentence to the maximum allowed for a sixth offense OWI arguing that Wisconsin's statutes that provide that a refusal may be used to enhance the sentence for an OWI related offense are unconstitutional because they provide increased criminal penalties. Forrett also argued that his trial counsel was ineffective for not raising the constitutionality issue. The circuit court denied the motion and stated that although the State cannot directly punish a person criminally for refusing to provide a blood sample, a prior refusal may increase the criminal penalty for a subsequent OWI offense.

Forrett appealed. The Court of Appeals reversed and remanded the circuit court's decision. The Court of Appeals concluded that imposing an increased criminal penalty based on the refusal of a warrantless blood test from a previous OWI-related incident is a violation of the Fourth Amendment because the result of the refusal is an increased penalty, albeit delayed. The Court of Appeals relied on the United States Supreme Court's decision in Birchfield v. North Dakota, 136 S. Ct. 2160 (2016), and the Wisconsin Supreme Court's decision in State v. Dalton, 2018 WI 85, to support its conclusion.

The State filed a petition for Supreme Court review raising two issues:

1. Is Wisconsin's accelerated penalty structure for OWI-related offenses unconstitutional under Birchfield v. North Dakota and State v. Dalton?
2. Is an increased penalty for an offense because the person is a repeater an increased penalty for the prior offense?

WISCONSIN SUPREME COURT
February 17, 2022
10:45 a.m.

18AP2205 State v. C.G.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), affirming the holding of the Shawano County Circuit Court, Judge William F. Kusssel, presiding, denying a motion to stay a juvenile sex offender registration.

The petitioner, Ella (a pseudonym), is a transgender female who, as a juvenile, was ordered to register as a sex offender following a plea of no contest to a sexual assault charge.

The sex offender registry statute prohibits an offender from legally changing his or her name. Accordingly, Ella may not formally change her legal, male-sounding name. In the lower courts, Ella argued, unsuccessfully, that this name-change ban unconstitutionally restrains her freedom of expression, and additionally violates her constitutional right to be free from cruel and unusual punishment.

Ella's petition for review presents the following two issues:

1. Does Wis. Stat. § 301.45, the statute governing juvenile sex offender registration, unconstitutionally infringe on Ella's First Amendment right to freedom of speech by preventing her from legally changing her name to reflect her gender identity?
2. Does requiring Ella to register under Wis. Stat. § 301.45 amount to cruel and unusual punishment in violation of the Eighth Amendment?

WISCONSIN SUPREME COURT
February 28, 2022
9:45 a.m.

2021AP1321-LV & 2021AP1325 Dane County v. Public Service Commission

This is a review of District III & District IV Wisconsin Court of Appeals' (headquartered in Wausau and Madison, respectively) orders dismissing appeals filed by Michael Huebsch. Huebsch, who is not a party in the underlying case, appealed the Dane County Circuit Court's oral ruling and orders, Judge Jacob Frost, presiding, that denied Huebsch's motion to quash non-party subpoenas that were issued to him.

This appeal relates to subpoenas that were issued to Michael Huebsch, a non-party to these actions. From 2015 until 2020, Huebsch served on the Public Service Commission (PSC). He also was a member of an advisory board to Midcontinent Independent System Operators (Midcontinent), a regional transmission organization under the supervision of the Federal Energy Regulatory Commission that manages the power grid across 15 states, including Wisconsin.

In September 2019, the PSC unanimously approved a new high-voltage transmission line. The Driftless Area Land Conservancy and Wisconsin Wildlife Federation (collectively, Opponents) opposed the PSC's decision to approve the line and asked the PSC to recuse Huebsch and another PSC commissioner on the ground that their conduct had created an unconstitutional "appearance of bias and lack of impartiality." The Opponents also argued that Huebsch must have engaged in improper ex parte communications while participating on Midcontinent's advisory board. The PSC denied the recusal requests for Huebsch and the other PSC member.

Huebsch resigned from the PSC in February 2020 to start a private consulting group. Shortly thereafter, Huebsch applied to be chief executive officer of Dairyland Power Cooperative, a company which had appeared before him while he served on the PSC. His employment application was rejected.

The Opponents filed a petition for judicial review of the September 2019 PSC decision to approve the new high-voltage transmission line under Chapter 227 of the Wisconsin Statutes with the Dane County Circuit Court. In October 2020, the Opponents filed a motion asking that the circuit court accept non-record evidence in support of their ongoing effort to vacate the PSC's decision approving the new high-voltage transmission line. Among other things, the Opponents sought information about Huebsch's employment application to Dairyland. In January 2021, the circuit court held oral argument on the Opponents' motion and concluded that the Opponents had made a prima facie showing of an appearance of bias sufficient to permit discovery on Huebsch and his close associations.

On July 12, 2021, the Opponents issued a subpoena duces tecum demanding that Huebsch turn over his personal smartphone and any other phone he had used since April 2018 for copying and inspection. Huebsch moved to quash the subpoena. The Opponents proposed a compromise whereby Huebsch would turn over his phone to a third party, which would extract

data and produce a report. The circuit court denied Huebsch's motion to quash and ordered Huebsch to turn his phones over for inspection and appear for a deposition three business days later.

Huebsch sought review of the circuit court's ruling in the Court of Appeals. He filed both a petition for leave to appeal the circuit court order denying his motion to quash the non-party deposition subpoena and a notice of appeal of right from the same order, along with an alternative supervisory writ of mandamus seeking to compel the Court of Appeals to grant his motion to quash the subpoena. The leave petition was filed in District III Court of Appeals. District III granted a temporary stay of the circuit court's order pending resolution of the appeal on the merits. The appeal of right and alternative writ petition were filed in District IV Court of Appeals. The Opponents then requested the circuit court enter an order requiring Huebsch to deliver his phone to a third party for a forensic extraction of data. The circuit court signed that order.

On Aug. 12, 2021, the Opponents withdrew all subpoenas issued to Huebsch and filed a motion to dismiss the appeals and dissolve the stay on mootness grounds. On August 20, 2021, both Court of Appeals Districts III and IV dismissed the pending appeals and writ petition as moot, over Huebsch's objection. Both Court of Appeals' orders noted that Huebsch's position was that the possibility he would be served with a trial subpoena prevented the pending cases from being moot; both Court of Appeals' orders disagreed, saying the validity of a trial subpoena would present different issues.

On Aug. 24, 2021, the Opponents issued a subpoena ad testificandum commanding Huebsch to appear in Dane County Circuit Court on Sept. 29, 2021, "to give evidence" at a hearing in the underlying case.

Huebsch then filed with this court (1) a petition for expedited review of the Court of Appeals' Aug. 20 orders dismissing his appeal, mandamus petition, and petition for leave to appeal as moot; (2) an emergency petition for supervisory writ or exercise of superintending authority; and (3) an emergency motion for administrative stay and stay pending appeal.

On Sept. 21, 2021, this court denied Huebsch's emergency petition for supervisory writ, granted his petition for review, and granted a stay of enforcement of the Aug. 24, 2021 subpoena and any other discovery or trial-related demands directed to Huebsch.

The petition for review raises these issues:

1. Whether a party who withdraws a subpoena for testimony, after the Court of Appeals stays that subpoena pending appeal, may moot the appeal notwithstanding that the party states that it will imminently issue, and does issue, another subpoena for testimony after the stay is lifted and appeal dismissed; and if yes, do any mootness exceptions apply?

2. Whether a circuit court commits a per se abuse of discretion on the "likelihood of success" prong when denying a stay motion by simply cross-referencing its merits decision?

3. Whether conduct by an adjudicator that creates a mere "appearance of bias" violates the due Process Clause.

4. Whether an adjudicator's personal connections to individuals linked to parties appearing before the adjudicator, whether those individuals are close friends or mere professional acquaintances, give rise to a "serious risk of actual bias" under the Due Process Clause, notwithstanding the presumptions of regularity, integrity, honesty, and impartiality that attach to the adjudicator's decisions.

5. Whether the practice of applying for employment, after leaving public office, with an entity that had previously appeared before the adjudicator creates a "serious risk" that the adjudicator, when the entity appeared before him, had been actually biased.

WISCONSIN SUPREME COURT
February 28, 2022
10:45 a.m.

2019AP1033 Sauk County v. S.A.M.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), that dismissed as moot a Sauk County Circuit Court order, Judge Patrick J. Taggart presiding, that extended S.A.M.'s involuntary commitment.

In February 2018, S.A.M., who has bipolar disorder, was committed to mental health treatment pursuant to Wis. Stat. ch. 51 for a period of six months. In June 2018, Sauk County filed a petition to extend S.A.M.'s involuntary commitment for 12 months. S.A.M. contested the petition, and the circuit court held a recommitment hearing.

Following the hearing, the circuit court issued an order extending S.A.M.'s commitment for six months, rather than the 12 months requested by the County. The six-month recommitment order expired in February 2019.

In June 2019, approximately four months after the recommitment order had expired, appointed counsel for S.A.M. filed a notice of appeal from the recommitment order. (Counsel's delay in filing the notice of appeal was due in part to an extension granted by the Court of Appeals as a result of an unexpected death in counsel's immediate family.) The appeal raised sufficiency of the evidence and due process challenges to the recommitment order.

Because S.A.M.'s recommitment had ended, the Court of Appeals ordered the parties to brief mootness. S.A.M. argued that his appeal was not moot because his recommitment carried collateral consequences, including: (1) a firearm restriction; (2) the stigma associated with being committed; and (3) possible liability for the costs of his care.

The Court of Appeals was not persuaded. It held that firearm restriction did not eliminate mootness concerns because S.A.M. did not prove that the restriction was the result of his recommitment, rather than his initial commitment. The Court of Appeals also held that S.A.M. failed to prove he suffered other collateral consequences from his recommitment, such as being stigmatized or required to pay the costs of his recommitment. The Court of Appeals therefore dismissed S.A.M.'s challenge to the recommitment order as moot.

S.A.M. filed a petition for review, asking the Wisconsin Supreme Court to address the following issues:

1. Whether S.A.M.'s appeal of his recommitment was moot because the commitment expired before S.A.M. filed his notice of appeal;
2. Whether Sauk County failed to meet its burden to prove by clear and convincing evidence that S.A.M. was dangerous;
3. Whether S.A.M. was denied procedural due process because he did not receive particularized notice of the basis for his recommitment, including which of the standards of dangerousness was being alleged.
4. Whether this court has the authority, through its "superintending and administrative authority over all courts" (Wis. Const. art. VII, § 3(1))

and/or its authority to "regulate pleading, practice, and procedure in judicial proceedings in all courts" (Wis. Stat. § 751.12(1)), to require the Court of Appeals to expedite the disposition of appeals under Wis. Stat. ch. 51, or in some other manner to ensure that appellants under Wis. Stat. ch. 51 receive an appeal that addresses the merits of the appellants' contentions.