WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
NOVEMBER 2021

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

Brown
Dane
Kenosha
Racine
Walworth

MONDAY, NOVEMBER 1, 2021

9:45 a.m.	19AP1618	Nudo Holdings, LLC v. Bd. of Review for the City of Kenosha
10:45 a.m.	21AP802	Andrew Waity v. Devin Lemahieu

TUESDAY, NOVEMBER 16, 2021

9:45 a.m.	20AP940	Brown County v. Brown County Taxpayers Association
10:45 a.m.	19AP2090	Claudia B. Bauer v. Wisconsin Energy Corporation

MONDAY, NOVEMBER 22, 2021

9:45 a.m.	20AP1271-AC	James Sewell v. Racine Unified School Dist. Bd. of Canvassers

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 the media coordinator at WISC-TV, (608) 271-4321. The synopses provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
November 1, 2021
9:45 a.m.

2019AP1618 Nudo Holdings. LLC v. Board of Review for the City of Kenosha

Nudo Holdings, LLC, seeks review of a Court of Appeals, District II, decision affirming an order of the Kenosha County Circuit Court, the Honorable Anthony G. Milisauskas, presiding, regarding the City Assessor's classification of undeveloped property.

Nudo Holdings purchased a parcel of land located in the City of Kenosha. At the time of purchase the property was classified as tax exempt, with zero value for assessment purposes. In 2018 the property was re-assessed as residential. Nudo objected, arguing that the property should be classified as agricultural. The Board of Review for the City of Kenosha held firm that the property was correctly classified as residential, rather than agricultural.

Initially the trial court reversed and remanded the Board's decision, concluding that the Board had incorrectly required the parcel to have a "business purpose" in order to qualify as agricultural land (land does not need to be farmed for a "business purpose" in order to be classified as "agricultural land" for property tax purposes, State ex rel. Peter Ogden Family Trust of 2008 v. Bd. of Review, 2019 WI 23, ¶32, 385 Wis. 2d 676, 923 N.W.2d 837).

The trial court remanded to the Board to reconsider Nudo Holdings' appeal. On remand, the Board took into account testimony and other evidence.

Mr. Nudo (the individual who organized Nudo Holdings) testified to the Board that Nudo Holdings purchased the property to eventually develop it into subdivided residential lots, but at the time of assessment, the parcel remained in an "unimproved" state, with no habitable structures or improvements, such as sewer or water. Mr. Nudo explained that even though the long-term goal was residential development, the property's current use was agricultural. He stated that the property contained a significant walnut grove that was there when he purchased the property, and that Christmas trees were growing scattered at the site.

The City Assessor acknowledged that Nudo Holdings' property was located in an A-2 Agricultural Land Holding District, but explained that the key determination for classification is use of the property, not location, zoning, or other factors. Nudo Holdings' property, in fact, was located within the St. Peters Neighborhood Plan, and the city had slated the location for single-family residential development, in line with Nudo Holdings' goals. Therefore, the City Assessor classified the property as "residential," based on its likely future use.

The City Assessor next explained why he determined the land was not devoted primarily to agricultural use. He pointed out that land classified as agricultural "shall typically bear physical evidence of agricultural use, such as furrows, crops, fencing or livestock," see Wis. Admin. Code § Tax 18.06(1) (July 2018), and that he did not see any such "physical evidence," or any other indication that the land was being farmed.

The City Assessor further testified that despite being asked to provide it, Nudo Holdings did not provide any additional information that might indicate agricultural use, such as: a profit and loss statement and/or tax records documenting agricultural activities; documentation of the harvesting of trees and nuts at the parcel; evidence of keeping livestock on the parcel; evidence of furrows, crops, or fencing; and evidence of agronomic practices defined in the Property Assessment Manual.

After considering all of the evidence, the Board sustained the assessment.

On certiorari review, the trial court affirmed the Board's decision, concluding that the Board "had sufficient basis to affirm the assessor's valuation based on the evidence presented."

Nudo Holdings appealed from the trial court order affirming the Board's decision. The Court of Appeals affirmed the trial court order, in a published decision.

Nudo Holdings, LLC asks the Supreme Court to resolve the following issues:

1. Was the [Board's] decision in affirming the property tax assessment for [Nudo Holdings'] land, classifying it as residential land instead of agricultural land, according to the law?
2. Was the Board's decision supported by sufficient evidence?

WISCONSIN SUPREME COURT
November 1, 2021
10:45 a.m.

2021AP802 Waity v. LeMahieu

Pursuant to an order granting the petition of defendants-appellants, Senate Majority Leader Devin LeMahieu and Assembly Speaker Robin Vos, for bypass of the Court of Appeals, this is a review of an order of the Dane County circuit court, Judge Stephen E. Ehlke presiding, granting summary judgment to the plaintiffs-respondents, Andrew Waity et al., declaring two contracts for legal services void, and permanently enjoining the defendants-appellants from making any further payments on those two contracts.

Essentially, this case is about whether the Wisconsin Legislature, through two of its leaders, may lawfully enter into contracts with "outside" (i.e., non-governmental) lawyers for legal services in the absence of existing litigation. Specifically, the case asks whether the Senate Majority Leader and the Assembly Speaker could lawfully retain outside lawyers to represent the Senate and Assembly in connection with redistricting following the 2020 census prior to the time that redistricting lawsuits were filed.

In December 2020 the Assembly (by Speaker Robin Vos) and the Senate (by Majority Leader-elect Devin LeMahieu) entered into an "Engagement Agreement" with the law firm of Consovoy McCarthy PLLC in association with Attorney Adam Mortara (collectively "Consovoy"). (Pet. App. 94-98) That Engagement Agreement stated that Consovoy would represent the Assembly and Senate "in possible litigation related to decennial redistricting (the 'Litigation')."

On January 4, 2021, at the beginning of the Legislature's 2021-22 term, Senator LeMahieu became the Senate Majority Leader for the first time. Representative Vos continued as Speaker of the Assembly for the 2021-22 term.

On January 5, 2021, Senator LeMahieu sent a memorandum to the members of the Committee on Senate Organization memorializing the committee's 3-2 vote adopting the following motion:

> It is moved that this committee authorizes the senate or the senate in conjunction with the assembly, to retain and hire legal counsel to represent the senate or the legislature in any matter or action affecting the senate or the legislature; the validity, construction, application, or constitutionality of a statute; the legality of a senate or legislative action; redistricting; or any administrative proceeding. This authorization shall be in force the entire 2021-2022 legislative session, unless revoked by this committee. Senator Devin LeMahieu shall approve all financial costs and terms of representation.

On January 6, 2021, Senator LeMahieu and Representative Vos entered into an engagement agreement with the law firm of Bell Giftos St. John (BGSJ). That engagement agreement stated that "[s]ervices within the scope include all services in furtherance of this attorney-client relationship relating to redistricting," including providing legal advice relating to

constitutional and statutory requirements for redistricting, as well as appearing for the Legislature in litigation and administrative proceedings related to redistricting, but not including drawing redistricting maps.

On March 2 and 3, 2021, Senator LeMahieu and Representative Vos entered into a "Revised Engagement Agreement" with Consovoy.

On March 24, 2021, Representative Vos sent a memorandum to the members of the Committee on Assembly Organization memorializing that the committee had passed the following motion:

> It is moved that the authorization granted to Speaker Robin Vos on February 2, 2017, to "hire the law firms of Kirkland & Ellis LP and Bell Giftos St. John LLC and any other law firms, entities or counsel necessary for services related to the matter of Whitford v. Gill and legislative redistricting and all ancillary matters" authorizes, and has always authorized, Speaker Robin Vos to hire any law firms, entities or counsel he deems necessary for the legislative redistricting beginning as of January 1, 2021, including—but not limited to—Consovoy McCarthy PLLC, Bell Giftos St. John LLC, and Adam Mortara.

On March 10, 2021, after the Revised Engagement Agreement with Consovoy had been signed, the plaintiffs, four individuals, filed an action in the Dane County circuit court. The plaintiffs contended that Senator LeMahieu and Representative Vos were without legal authority to enter into the two legal engagement agreements, that those agreements provided only for pre-litigation and litigation representation regarding redistricting, and that there was no redistricting action pending at the time the legal engagement agreements were executed that could justify those agreements. The plaintiffs sought a declaratory judgment that the legal engagement agreements were void ab initio, as well as accompanying injunctive relief (both temporary and permanent injunctions).

On March 24, 2021, the defendants filed a motion to dismiss the plaintiffs' complaint and a brief in opposition to the plaintiffs' motion for a temporary injunction.

The circuit court converted the defendants' motion to dismiss into a motion for summary judgment. On April 29, 2021, the circuit court issued a written decision and order on the summary judgment motion.

It considered whether the two legal engagement agreements were authorized under the Legislature's constitutionally granted powers. The circuit court concluded they were not.

It also considered whether the legal engagement agreements were authorized under Wis. Stat. § 13.124, which provides that the Majority Leader or Speaker may obtain legal counsel (other than the Department of Justice (DOJ)) "in any action in which the assembly [or the senate] is a party or in which the interests of the assembly [or the senate] are affected." The circuit court interpreted this statute to mean that because counsel can be retained "in any action," there must be a pending action in order for this statute to apply. Because there was no redistricting "action" pending when the defendant legislators entered into the engagement agreements at issue, the circuit court concluded that this statute did not authorize the engagement agreements.

The circuit court further concluded that the legal engagement agreements were not authorized under Wis. Stat. § 16.74, which states that "[a]ll supplies, materials, equipment, permanent personal property and contractual services within the legislative branch shall be

purchased by the joint committee on legislative organization" or by the appropriate service agency. The circuit court construed the term "contractual services" in this statute to refer only to the list of items that precedes that term. In other words, the circuit court read this statute as authorizing the Legislature to obtain contractual services only when those services are connected to a purchase of supplies, materials, equipment, or permanent personal property.

Finally, the circuit court rejected the defendants' arguments that the legal engagement agreements were authorized by Wis. Stat. § 20.765, which provides that the Legislature shall have a "sum sufficient" appropriation to carry out its functions. The circuit court read this statute as not providing any authority for action by the Legislature. It said that the provision only guaranteed that there would be money for the Legislature to carry out its functions, but that the authority to perform any function must come from the constitution or other statutory source. The circuit court indicated that the Legislature's function is to pass laws, not to become involved in litigation (except in limited circumstances) because that would violate the rule that this state's constitutional structure does not contemplate unilateral rule by any one branch of government.

Because the circuit court concluded that the legal engagement agreements were not authorized by either the state constitution or statutes, its decision declared those legal engagement agreements to be void ab initio. It also permanently enjoined the defendants from making any further payments for legal services provided pursuant to either of the two engagement agreements.

The circuit court denied the defendants' motion to stay its decision pending their appeal.

The defendants filed an appeal in the Court of Appeals, but they then filed a petition to bypass the Court of Appeals and to have the Supreme Court consider their appeal immediately. In addition, they asked the Supreme Court to stay the circuit court's decision and injunction pending appeal.

The Supreme Court granted the bypass petition. It also issued an order staying the circuit court's permanent injunction temporarily while the appeal is pending in the Supreme Court.

The defendants-appellants' bypass petition, as supplemented, asks the Supreme Court to decide the following issues:

1. Whether Wis. Stat. § 16.74 gives the Legislature—acting through its leadership—the authority to enter into those "contract[s]" for legal "services" that the Legislature determines to be "required within the legislative branch." Wis. Stat. § 16.74(1), (2)(a)-(b).
2. Whether the Wisconsin Constitution gives the Legislature—acting through its leadership—the authority to enter into those contracts for legal services that the Legislature determines to be necessary for the discharge of its constitutional duties.
3. Whether Wis. Stat. § 20.765 gives the Legislature—acting through its leadership-- the authority to enter into those contracts for legal services that the Legislature determines to be necessary for carrying out its "functions." Wis. Stat. § 20.765(1)(a)-(b).
4. Whether Wis. Stat. § 13.124 gives the Legislature—acting through its leadership—the authority to obtain legal advice for impending, but not yet filed, litigation.
5. Whether the Circuit Court erroneously exercised its discretion in failing to stay its summary judgment Order pending appeal.

WISCONSIN SUPREME COURT
November 16, 2021
9:45 a.m.

2020AP940 Brown County v. Brown County Taxpayers Association

This case comes to the Court on a certification request by the Court of Appeals, District III (headquartered in Wausau) regarding a decision of the Brown County Circuit Court, the Honorable John Zakowski, presiding, which upheld Brown County's interpretation of Wis. Stat. § 77.70.

This certification request concerns a dispute over the legality of a half-percent sales tax that the Brown County Board of Supervisors instituted, by ordinance, at the start of 2018, to be collected for no more than 72 months. The ordinance stated that the tax would be "utilized only to reduce the property tax levy by funding" $147 million in capital projects and facility improvements; e.g., road and bridge improvements, improvements at the county jail, library, museum, expo center, fairground, parks, etc.

The statutory provision at issue in this case, Wis. Stat. § 77.70, reads as follows:

> Any county desiring to impose county sales and use taxes under this subchapter may do so by the adoption of an ordinance, stating its purpose and referring to this subchapter. The rate of the tax imposed under this section is 0.5 percent of the sales price or purchase price. Except as provided in s. 66.0621 (3m), **the county sales and use taxes may be imposed only for the purpose of directly reducing the property tax levy** and only in their entirety as provided in this subchapter. *(Emphasis added).*

Highly summarized, this case asks whether the Brown County ordinance is "only" "directly reducing" the property tax levy in the county in compliance with Wis. Stat. § 77.70. Frank Bennett and Brown County Taxpayers Association (the "Association") say "no": § 77.70 requires a dollar-for-dollar reduction of the property tax levy with sales and use tax revenue generated by the ordinance. Thus, the Association argues, the ordinance would only comply with the statute if all of the sales and use taxes it generated were used to pay existing expenses, which is not the case; the sales and use taxes are designated to fund new capital projects.

The County disagrees with the Association's reading of Wis. Stat. § 77.70, arguing that paying a county's existing expenses is only one avenue to directly reduce the property tax levy. Another way to directly reduce the property tax levy, the County argues, is to use sales and use tax revenue to pay for new projects that would otherwise inevitably raise the levy. And, the County claims, an Attorney General opinion from 1998 directly supports its argument. See Wis. Op. Att'y Gen. OAG 1-98.

The trial court sided with the County's arguments. In its certification request, the Court of Appeals asks this court to examine the following issue:

> Does the sales and use tax Brown County enacted in 2017 and implemented as part of its 2018 budget process "directly reduce the property tax levy," as required by Wis. Stat. § 77.70 (2015-16), if the proceeds are designated to fund

new capital projects that collectively would otherwise exceed the levy limits established by Wis. Stat. § 66.0602, but the County could otherwise fund the projects by borrowing?

WISCONSIN SUPREME COURT
November 16, 2021
10:45 a.m.

2019AP2090 Claudia B. Bauer v. Wisconsin Energy Corp.

This case arises from a Court of Appeals District II (headquartered in Waukesha) order affirming a Walworth County Circuit Court order, Judge Steven Johnson, presiding, dismissing on summary judgment Claudia Bauer's lawsuit concerning whether Wisconsin Energy Corporation has a prescriptive easement to access a long buried gas line on Bauer's property.

This case involves questions about how a utility company may acquire a "prescriptive easement" over private property, that is, a right to access the property.

In 1996, the Bauers (hereafter "Bauer") purchased lakefront property in Lake Geneva not knowing that 25 years earlier, in 1980, a prior owner had given the predecessor of Wisconsin Energy Corporation ("We") permission to install a single half-inch underground gas line across the property solely to provide gas service to a neighbor's property. In 2014, Bauer's neighbor began an extensive remodeling project. We requested Bauer's permission to install a larger gas line for the neighbor, across Bauer's property. Bauer, shocked learn of the existence of the gas line under the property, refused.

Bauer sued to have the underground gas line removed. We moved for summary judgment, arguing that it had a prescriptive right to access Bauer's property based on its continued use of the property for more than ten years, citing Wis. Stat. § 893.28 (2).

Historically, Wisconsin common law governed prescriptive rights using a four-element test. In 1979, the Wisconsin Legislative codified the law on prescriptive easements. Wis. Stat. § 893.28 (1) applies to private citizens and requires "continuous adverse use of rights in real estate of another for at least 20 years" to establish a prescriptive easement.[1] Wis. Stat. § 893.28 (2) applies to utility companies and requires "continuous use of rights in real estate of another for at least 10 years." It does not contain "adverse use" language.[2]

The circuit court agreed with We. Bauer sought reconsideration, arguing that the lack of notice to Bauer resulted in an unconstitutional taking in violation of Wis. Const. Art. I, § 9. She also alleged new evidence/disputed issues of fact. Bauer had learned that in 1984, and again in 1989, repairs were made to the gas line. An 84-foot section of new pipe was spliced

[1] Wis. Stat. § 893.28 (1) provides: "Continuous adverse use of rights in real estate of another for at least 20 years, except as provided in s. 893.29 establishes the prescriptive right to continue the use. Any person who in connection with his or her predecessor in interest has made continuous adverse use of rights in the land of another for 20 years, except as provided by s. 893.29, may commence an action to establish prescriptive rights under ch. 843."

[2] Wis. Stat. § 893.28 (2) provides: "Continuous use of rights in real estate of another for at least 10 years by a domestic corporation organized to furnish telegraph or telecommunications service or transmit heat, power or electric current to the public or for public purposes, by a cooperative association organized under ch. 185 or 193 to furnish telegraph or telecommunications service, or by a cooperative organized under ch. 185 to transmit heat, power or electric current to its members, establishes the prescriptive right to continue the use, except as provided by s. 893.29. A person who has established a prescriptive right under this subsection may commence an action to establish prescriptive rights under ch. 843."

into the existing pipe. Bauer argued that "the only gas line approved by [the former owner] no longer exists" so We's use was not "continuous" as required by statute.

The circuit court was not persuaded, reasoning that the modified gas line "not an additional pipe or an additional grant of permission per se, it's more a continuation of the old permission that was clearly granted." The circuit court ruled that each and every time a utility company touches a line for service or maintenance does not restart the time for acquiring a prescriptive easement. The court also concluded that Bauer lacked standing to challenge the constitutionality of the alleged taking; that right would have rested with the former property owner.

The Court of Appeals affirmed, agreeing that We was granted the "use of rights" in the Bauer property back in 1980, and has continued that use for 36 years such that a prescriptive easement exists on Bauer's property. The court rejected Bauer's lack of notice argument, ruling that no affirmative notice was necessary by operation of law because Wis. Stat. § 893.28 (2) requires only "continuous use" of the property, citing Williams v. American Transmission Co., 2007 WI App 246, 306 Wis. 2d 181, 742 N.W.2d 882. The Williams court had concluded that the legislature made an intentional policy decision when it omitted the "adverse use" element of common law prescriptive easements for public utilities. The Williams court recognized "that our interpretation of Wis. Stat. § 893.28(2) has the effect in some circumstances of negating the ability of a landowner to revoke a permissive use of his or her property. It would appear, however, that this is precisely what the legislature intended." Id. ¶9.

Bauer urges the court to reexamine the law on prescriptive easements as it relates to utility companies. Bauer asserts that common law elements of prescriptive easements remain viable when it comes to determining whether a prescriptive easement exists under Wis. Stat. § 893.28 and that the Court of Appeals was wrong to hold otherwise. Bauer argues that the Court of Appeals' conclusion that Wis. Stat. § 893.28(2) eliminates the "notice" requirement raises serious constitutional concerns for property owners. She also maintains that Wisconsin law requires that the "continuous use" for a prescriptive easement be "uninterrupted" and says that in her case, that requirement was not met because of the extensive repairs. We responds that the common law notice requirement was eliminated by the enactment of § 893.28 (2) and that the bright line rule Bauer seeks (i.e. that any work on existing utility facilities interrupts the "continuous use" element of Wis. Stat. §893.28(2)) would lead to absurd results, because a utility is statutorily required to maintain its facilities.

Bauer presents the following issues for review:

1. Has Wisconsin law on prescriptive easements eliminated entirely the longstanding common law requirement that a property owner have notice of a utility company's use of their land, in order for the utility company to lawfully acquire a prescriptive easement?
2. Can the continuous use requirement of Wis. Stat. § 893.28(2) be satisfied as a matter of law when a public utility substantially modifies its initial use of another's property?
3. Are the constitutional rights of a private landowner violated if a public utility company can exercise its prescriptive easement rights without providing any notice whatsoever to the property owner, and in doing so, avoid having to use its condemnation powers?

WISCONSIN SUPREME COURT
November 22, 2021
9:45 a.m.

2020AP1271 James Sewell v. Racine Unified School Dist. Bd. of Canvassers

The petitioners seek review of a Court of Appeals, District II (headquartered in Waukesha), decision affirming an order of the Racine County Circuit Court, Judge Michael J. Piontek, presiding, upholding the results of an election recount.

> This case involves Wis. Stat. § 7.54, "Contested elections," which provides:
> In all contested election cases, the contesting parties have the right to have the ballots opened and to have all errors of the inspectors, either in counting or refusing to count any ballot, corrected by the board of canvassers or court deciding the contest. The ballots and related materials may be opened only in open session of the board of canvassers or in open court and in the presence of the official having custody of them.

In April 2020, voters in the Racine Unified School District voted on a referendum allowing additional spending on public schools for the next 30 years. The measure passed by only five votes in an election that had 33,491 total votes.

The petitioners requested a recount pursuant to the recount statute, Wis. Stat. § 9.01, and the Racine Unified School District Board of Canvassers completed the recount, opening and recounting all of the ballots in public and under the observation of the petitioners. The recount confirmed the original result.

The petitioners appealed to the circuit court asserting the right to "examine the ballots" and "have those votes recounted in their presence in open court." The circuit court upheld the result of the board of canvasser's recount, finding that "the procedure utilized by the [board of canvassers] in this recount was proper and provided an accurate result."

Petitioners next presented their case to the Court of Appeals, where they renewed their request to examine the ballots in open court so that another recount can occur, claiming they had a right to do so under Wis. Stat. § 7.54 and State ex rel. Graves v. Wiegand, 212 Wis. 286, 249 N.W. 537 (1933).

The Court of Appeals affirmed the circuit court holding that neither authority cited by the petitioners supported their argument. The court held that while the relevant statute authorizes the opening of ballots in court, it does not require that a court do so. In this case the Court of Appeals found that opening the ballots in court was unnecessary because: (1) the ballots had already been opened by the board of canvassers during its recount; and (2) the circuit court found that "the procedure utilized by the board of canvassers in this recount was proper and provided an accurate result," and the petitioners did not demonstrate that the circuit court's finding was erroneous.

> The petitioners ask the Supreme Court to review the following issue:
> Does Wis. Stat. § 7.54 vest in challenging parties the right to review in open court ballots they assert were miscounted such that an incorrect election

outcome will be sustained unless the errors alleged by the challengers are corrected by the circuit [court]?