WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
OCTOBER 2019

Below is a list of cases that will be heard by the Wisconsin Supreme Court during October. Synopses of cases scheduled for Oct. 3 and Oct. 14 are provided. Synopses of cases to be heard on Oct. 21 or Oct. 28 will be provided at a later date. Cases scheduled for Madison will be heard in the Supreme Court Hearing Room, 231 East, State Capitol. **Note: Oct. 14 oral arguments will be held at the Marquette County Courthouse, 77 W. Park St., Montello, WI 53949.**

Cases scheduled for Oct. 3 and Oct. 14 originated in the following counties:

Fond du Lac
Milwaukee
St. Croix
Waukesha

THURSDAY, OCTOBER 3, 2019 (MADISON)

9:45 a.m.	18AP53-CR	State v. Dennis Brantner
10:45 a.m.	17AP2361	Chris Hinrichs v. DOW Chemical Company

MONDAY, OCTOBER 14, 2019 (MONTELLO)

9:45 a.m.	18AP75-CR	State v. Charles L. Neill, IV
10:45 a.m.	18AP651-CR	State v. Kelly James Kloss
1:30 p.m.	18AP712-FT	Joan C. Pulkkila v. James M. Pulkkila

MONDAY, OCTOBER 21, 2019 (MADISON)

9:45 a.m.	17AP2265-CR	State v. Carrie E. Counihan
10:45 a.m.	17AP2292-CR	State v. Donavinn D. Coffee
1:30 p.m.	19AP614-LV & 19AP622	SEIU, Local 1 v. Robin Vos,

MONDAY, OCTOBER 28, 2019 (MADISON)

9:45 a.m.	18AP116	Roger Choinsky v. Germantown School District Bd. of Education
10:45 a.m.	15AP2442-D	Office of Lawyer Regulation v. Wendy Alison Nora
1:30 p.m.	18AP1681	Steven J. Piper v. Jones Dairy Farm

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 oral argument in Madison, contact media coordinator Stephanie Fryer at WISC-TV, (608) 271-4321. For cases to be heard in Montello, contact Brad Allen at the Portage Daily Register, (608) 745-3510. The synopses provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
October 3, 2019
9:45 a.m.

No. 2018AP53-CR State v. Dennis Brantner

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), that summarily affirmed a Fond du Lac County Circuit Court decision, Judge Peter L. Grimm, presiding, that found the defendant, Dennis Brantner, guilty of three felony counts of possession of narcotic drugs, one misdemeanor count of possession of a controlled substance, one misdemeanor count of possessing an illegally-obtained prescription drug, and five counts of felony bail jumping.

May the State charge someone twice for possessing different doses of the same drug at the same time, as opposed to charging a single count based on the aggregate amount? This is the question of double jeopardy law before the Supreme Court in this case. This case also presents the Supreme Court with an opportunity to clarify the analytical framework for applying the Wisconsin Constitution's requirement that criminal prosecutions take place in the county where they occurred.

On March 27, 2015, Brantner appeared in the Kenosha County circuit court. As he was leaving the courthouse, detectives from the Fond du Lac County Sheriff's Office executed an arrest warrant against him. The detectives handcuffed him, asked him if he had anything on his person about which they should know, and patted him down. Brantner did not disclose that he possessed an assortment of pills in a plastic bag that was inside his left boot. The detectives drove Brantner to the Fond du Lac County jail.

At the jail, deputies booked Brantner. As part of the booking process, Brantner was directed to remove his clothing. When Brantner removed his left boot, the booking officer discovered the pills, which included thirty-five 20mg oxycodone pills and two 5mg oxycodone pills. Brantner did not have a prescription for any of the pills. The State charged Brantner with the counts identified above. Of importance to this case is that the State charged Brantner with two separate counts relating to the oxycodone pills.

At trial, Brantner moved for a directed verdict on the ground that there was insufficient evidence to support venue in Fond du Lac County, arguing that the possession had occurred in Kenosha County prior to his arrest. Brantner also moved to dismiss one of the oxycodone possession counts on the ground that the two counts were multiplicitous (i.e., that the State was seeking to punish him twice——through two separate counts——for the same offense, in violation of the federal and state double jeopardy clauses). The circuit court denied both motions. The jury subsequently found Brantner guilty on all counts.

Brantner appealed. With respect to the venue issue, the Court of Appeals said Brantner knew at the time of his arrest that he had the pills in his boot and that the detectives were going to take him to Fond du Lac County to be booked based on the arrest warrant. The Court of Appeals reasoned that if Brantner had wanted to avoid being charged with possession in Fond du Lac County, he could have disclosed the pills to the detectives while still in Kenosha County. Since Brantner did not do so, he maintained possession of the illegal pills until they were discovered in the Fond du Lac County jail, therefore providing sufficient support to laying venue in that county.

As to Brantner's argument that the two oxycodone charges were multiplicitous, the Court of Appeals said that multiplicity occurs when a defendant is charged with more than one count for a single offense. A "single offense" must be identical in law and fact. If there are differences in law or fact between counts, then there is a presumption that the law intends separate punishments. Here, the Court of Appeals concluded that the two oxycodone counts were different in fact because the pills differed in dosage and were therefore different types of pills. The Court of Appeals presumed that Brantner would have had to obtain these different types of pills by different means, and so the offenses committed to obtain the pills were separate.

Brantner petitioned the Supreme Court for review, seeking clarification of the same issues argued on appeal: the venue issue——specifically where venue should lie where the police arrest a person in one county, transport the person to another county, and then discover concealed controlled substances; and the multiplicity issue——whether possession of two different dosages of the same illicitly-obtained drug are identical offenses or separate offenses under the law.

The Supreme Court is expected to resolve the following issues:

1. Do the United States and Wisconsin Constitutional protections against double jeopardy bar the State from punishing a criminal defendant twice for violations of Wis. Stat. § 961.41(3g)(am) for possessing pills containing different doses of the same substance at the same time?

2. When an individual is arrested in one county with controlled substances on his person and transported in police custody to a different county where the substances are removed from the individual's person during the booking process, does a trial for possession of the controlled substances in the destination county violate the individual's rights under Article I, Section VII of the Wisconsin Constitution and Wis. Stat. § 971.19?

WISCONSIN SUPREME COURT
October 3, 2019
10:45 a.m.

2017AP2361 Chris Hinrichs v. DOW Chemical Company

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), that affirmed in part, reversed in part, and remanded with directions, a Waukesha County Circuit Court judgment, Judge Kathryn W. Foster, presiding, that dismissed Chris Hinrichs and Autovation Limited's complaint against DOW Chemical Company, d/b/a Dow Automotive.

This case asks the Supreme Court to consider and clarify two rather complicated legal matters: 1) the economic loss doctrine, which is a court-created doctrine that says that a party to a contract may not pursue remedies in tort to recover economic losses that rose out of performance or non-performance of the contract; and 2) Wis. Stat. § 100.18 claims, which are false advertising claims.

The facts of the case are somewhat straightforward, even if the legal questions presented are not. Chris Hinrichs owns Autovation Limited, a company that manufactures, distributes, and installs JeeTops, an after-market skylight that can be installed on Jeep Wranglers. When installing JeeTops, Autovation used a Dow Automotive adhesive to attach the panels to the vehicles and to maintain a water-tight seal.

In 2013, Hinrichs informed Dow Automotive that some customers were experiencing cracks in their installed JeeTops. The adhesive was sent to Dow labs for testing. In October 2013, a Dow agent forwarded a report to Hinrichs that claimed tests showed that the Dow adhesive was properly functioning and that it was not responsible for the cracking that customers were experiencing. Accordingly, Hinrichs and Autovation continued to purchase and use the Dow adhesive.

By October 2014, one-third of all JeeTops installed using the Dow adhesive had failed. By late October 2014, Hinrichs had sold 585 JeeTops and believed they were all in the process of failing because the Dow adhesive deteriorated the skylight's integrity, causing them to leak and then fracture. Eventually, Hinrichs changed adhesives. By then, however, JeeTops had already received negative publicity, and sales were significantly affected.

Hinrichs and Autovation filed suit against Dow, alleging negligent misrepresentation, intentional misrepresentation, strict responsibility misrepresentation, and false advertising under Wis. Stat. § 100.18. Dow responded with a motion to dismiss.

After a hearing, the circuit court granted Dow's motion to dismiss. The circuit court determined that the economic loss doctrine barred the misrepresentation claims. It also concluded that the Wis. Stat. § 100.18 claim could not be maintained because Hinrichs and Autovation were not members of "the public" for purposes of the statute and had failed to allege that Dow made representations that were untrue, deceptive, or misleading.

Hinrichs and Autovation appealed. The Court of Appeals agreed with the circuit court that the economic loss doctrine barred the misrepresentation claims in this case, but the Court of Appeals reversed the circuit court's decision on Hinrichs' and Autovation's Wis. Stat. § 100.18 claim. The Court of Appeals said that for purposes of § 100.18, it was fairly debatable whether

Hinrich and Autovation could be considered "the public," and thus the Court of Appeals remanded the case to the circuit court for more fact-finding.

Both Hinrichs, together with Autovation, and Dow filed petitions for review with the Supreme Court. Hinrichs and Autovation want the Supreme Court to clarify the exceptions to the economic loss doctrine. Dow wants the Supreme Court to clarify "the public" element of a § 100.18 false advertising claim, and to clarify how § 100.18 and the economic loss doctrine relate to each other.

The Supreme Court is expected to resolve the following issues:

1. Wisconsin Statute Section 100.18(1) only prohibits fraudulent statements made "to the public." "The public" means more than one person. But courts deciding Wis. Stat. § 100.18 ("Section 100.18") claims do not ask whether the statement was made to more than one person. They instead apply a "particular relationship" test. That phrase is not in Section 100.18, and applying that test has yielded inconsistent and irreconcilable law, with some cases holding that a statement made to only one person constitutes a statement "to the public." Given the muddled law that the "particular relationship" test has produced, should Wisconsin abandon or modify it, and instead follow Section 100.18's plain terms?
2. Section 100.18 law is in conflict regarding whether a plaintiff in the midst of an ongoing commercial relationship is considered "the public." Kailin v. Armstrong, 2002 WI App 70, 252 Wis. 2d 676, 643 N.W.2d 132, and related cases, hold that statements made after the parties had already entered into a commercial relationship are not governed by Section 100.18. However, other cases, including the Court of Appeals' decision here, hold that statements made after the parties had entered into a commercial relationship may be governed by Section 100.18. Can a plaintiff proceed with a Section 100.18 claim when the plaintiff admits that it was in an ongoing commercial relationship with the defendant before the statement in question?
3. Wisconsin Statute Section 802.03(2) provides that "[i]n all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity." Id. (emphasis added). A Section 100.18 claim is a fraud claim. But attempting to avoid an early motion to dismiss, Plaintiffs-Appellants' Complaint adopted the commonly-used tactic of not pleading their Section 100.18 claim with particularity. For example, had they included the specific date of the misrepresentations, their Section 100.18 claim would have been time-barred. Are Section 100.18 claims subject to the same heightened pleading requirements that Wis. Stat. § 802.03(2) says "shall" apply to "all" fraud claims?
4. In a commercial setting, the same principles that support applying the Economic Loss Doctrine to misrepresentation claims likewise support applying the Economic Loss Doctrine to Section 100.18 claims. This Court has never squarely addressed whether the Economic Loss Doctrine applies to a commercial plaintiff bringing a Section 100.18

claim. Other courts have held that it does. Does the Economic Loss Doctrine apply to a business plaintiff bringing a Section 100.18 claim over the plaintiff's purchase of goods?

5. The economic loss doctrine (ELD) does not preclude common law misrepresentation claims when a product causes damage to property other than the product itself. Linden v. Cascade Stone Co., Inc., 2005 WI 113, ¶6, 283 Wis. 2d 605, 699 N.W.2d 189; Kaloti Enterprises, Inc. v. Kellogg Sales Co., 2005 WI 111, 129, 283 Wis. 2d 555, 699 N.W.2d 205. In that context, should the question of what constitutes an "integrated system" be answered by the "Product Bargained For" test?
6. Fraud in the inducement is an exception to the ELD. Kaloti Enterprises, Inc. v. Kellogg Sales Co., 2005 WI 111, 142, 283 Wis. 2d 555, 699 N.W.2d 205; in other words, when one party induces another to enter into a contract through intentional misrepresentations, the ELD will not bar an intentional misrepresentation claim. In that context, if there is no obligation to purchase another product, does each purchase of another product constitute a new contract?

WISCONSIN SUPREME COURT
October 14, 2019
9:45 a.m.
(Marquette County Courthouse)

No. 2018AP75-CR State v. Charles L. Neill, IV

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), that affirmed a Milwaukee County Circuit Court judgment of conviction, Judge Dennis R. Cimpl, presiding, that was entered upon Charles L. Neill's guilty plea to third offense OWI, with penalty enhancers for having a minor in the vehicle and having an excessive blood alcohol concentration.

This case asks the Supreme Court to clarify how fines should be calculated when multiple penalty enhancers are to be applied to the minimum base fine for a conviction of operating while intoxicated (OWI). Specifically at issue here are Wis. Stat. § 346.65(2)(f)2, which doubles the fine for an OWI conviction when a minor passenger is in the vehicle, and § 346.65(2)(g)3, which quadruples the fine for an OWI conviction when a person has a blood alcohol concentration of 0.25 or above.

In July 2016, Milwaukee County law enforcement officers received a report of a minivan driving recklessly. When stopped, a police officer observed the driver, Charles Neill, and believed that Neill was intoxicated. A second officer saw a one-year-old child in the backseat of the minivan, in a car seat.

Neill was taken to a hospital, where a blood draw revealed a blood-alcohol concentration (BAC) of 0.353. The officers checked Department of Transportation records and learned that Neill had two prior OWI offenses. Neill was charged with third offense OWI, along with penalty enhancers for having a minor in the vehicle and having an excessive BAC.

Neill pled guilty. The circuit court imposed and stayed a prison sentence and placed Neill on probation for three years, with six months in jail as a condition of probation. The court also imposed a $4,800 fine, in accordance with the state's recommendation. The court reached this total by applying the penalty enhancer for having a minor in the vehicle, thus doubling the minimum third offense OWI base fine of $600, for a new minimum base fine of $1,200. The circuit court then quadrupled the new $1,200 base fine by applying the penalty enhancer for excessive BAC, for a total minimum fine of $4,800.

Neill filed a postconviction motion challenging the amount of the fine. He argued there is nothing in the statutes to indicate that increases in the base fine for the penalty enhancers are to be multiplied by each other. He asserted that the starting point for calculating the fine for each enhancer was $600, and that, once multiplied by each enhancer separately, the fines should be added together.

The circuit court denied the motion. The Court of Appeals affirmed, with Judge Joan F. Kessler dissenting. The majority agreed with the circuit court's interpretation of the statutes, saying that there is no ambiguity as to how the State wanted the enhancers applied here. Judge Kessler concluded that there is ambiguity, that the statutes do not say the enhancers are supposed to be multiplied by each other, and that the application of multiple penalty enhancers does not change the minimum base fine.

The Supreme Court is expected to resolve the following issue: When Mr. Neill was convicted of third offense operating while intoxicated (OWI) and was subject to a doubling of the minimum fine under Wis. Stat. § 346.65(2)(f)2 for having a child in the vehicle and a quadrupling of the minimum fine under Wis. Stat. § 346.65(2)(g)3 for having a blood alcohol concentration above .25, did the statute require that the circuit court multiply Mr. Neill's minimum fine by a factor of eight?

WISCONSIN SUPREME COURT
October 14, 2019
10:45 a.m.
(Marquette County Courthouse)

No. 2018AP651-CR State v. Kelly James Kloss

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), that affirmed in part and reversed in part a St. Croix County Circuit Court decision, Judge Eugene D. Harrington, presiding, that denied Kloss's motion for postconviction relief from his convictions for solicitation of first-degree reckless injury and solicitation of first-degree recklessly endangering safety.

Does solicitation of first-degree reckless injury exist as a crime under Wisconsin law?

This is the question put before the Supreme Court in this case. The first-degree reckless injury statute provides that "[w]hoever recklessly causes great bodily harm to another human being under circumstances which show utter disregard for human life is guilty of a Class D felony." Wis. Stat. § 940.23(1)(a). The defendant, Kelly James Kloss, claims that solicitation of reckless injury cannot exist because it is not possible for a person to *intend* that another person succeed in causing great bodily harm by reckless conduct. Kloss argues that harm resulting from reckless conduct is "entirely unpredictable" and whether there will be a resulting injury is unknowable, so it is impossible to prove intent.

In November 2013, Kloss was serving jail time for operating while intoxicated (OWI) when he was released on furlough to attend a funeral. He absconded. In October 2014, he was arrested when police found him hiding in a house he shared with his wife, Cheryl.

Kloss was jailed. In the 12 days following his arrest, Kloss made approximately 52 telephone calls to Cheryl from jail. These calls were vulgar, ranting, and rambling conversations that covered a great number of topics, but included Kloss telling Cheryl to shoot a gun through the front door if any police officers returned to their house. Each call was recorded and reviewed by law enforcement.

Police got a warrant for the Kloss house based on the phone calls. They arrested Cheryl while she was at work and searched the house. They found a loaded .357 revolver tucked into a couch near the front door, a loaded shotgun, a loaded .308 caliber rifle, and notes that Cheryl had made from her conversations with Kloss.

The State charged Kloss with seven counts of solicitation, and, following a bench trial, the circuit court convicted Kloss of two charges: Soliciting First Degree Reckless Injury, Wis. Stat. § 940.23(1)(a), and Soliciting First Degree Recklessly Endangering Safety, Wis. Stat. § 941.30(1). Kloss was acquitted on the five other counts.

Kloss appealed. On appeal, he argued that that soliciting first-degree reckless injury is not a crime and that there was insufficient evidence to sustain a finding that he *intended* that Cheryl engage in reckless conduct with resulting injury. Kloss also argued that because soliciting/endangering-safety is a lesser included offense of soliciting/reckless-injury, the two solicitation convictions here were multiplicitous and that one of them warranted reversal.

The Court of Appeals disagreed with Kloss's first argument, but agreed with him on the second. The Court of Appeals found that, while it may be true that a solicitor cannot know with certainty at the time of the solicitation whether an injury will in fact result, there is "no reason

why a solicitor cannot intend, at the time he or she solicits reckless conduct from another, that great bodily harm result from the solicitee's reckless conduct." The Court of Appeals stated that "the unlikelihood that the solicitee will have the opportunity to commit the crime does not negate the intent of the solicitor." The Court of Appeals did not reach the question of whether the unlikelihood of the opportunity presenting itself is an instance of insufficient evidence.

As to the multiplictious charges, the Court of Appeals agreed with Kloss. The Court of Appeals found that the convictions were identical at law and, because solicitation of first-degree recklessly endangering safety is a lesser included offense of solicitation of first-degree reckless injury, the two convictions are multiplicitous.

Both Kloss and the state sought Supreme Court review, but for different reasons. Kloss continues to argue that solicitation of first-degree reckless injury is not a crime, and there is insufficient evidence to prove his intent.

The State seeks review of the determination that the charges are multiplictious, contending the Court should distinguish between instances where charges are multiplicitous because one is a lesser-included offense of the other, as opposed to instances where charges are multiplicitous because a defendant is charged with multiple crimes for a single act.

The Supreme Court is expected to resolve the following issues:

1. Is Solicitation of First-Degree Reckless Injury a crime under Wisconsin law?
2. Was the evidence sufficient to show the defendant "unequivocally" intended that a "felony be committed" when the solicited conduct required the element of surprise and defendant knowingly forewarned the alleged victims?
3. Is it possible to solicit a crime without also soliciting a crime that would be a lesser-included offense of a completed act when solicitation does not require a completed act, but requires only that the solicitor intend that a particular felony be committed?

WISCONSIN SUPREME COURT
October 14, 2019
1:30 p.m.
(Marquette County Courthouse)

No. 2018AP712-FT Joan C. Pulkkila v. James M. Pulkkila

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), that reversed a Waukesha County Circuit Court decision, Judge Paul Bugenhagen, Jr., presiding. The Court of Appeals imposed a constructive trust on life insurance proceeds that were disbursed upon James M. Pulkkila's death.

At issue in this case is whether a constructive trust was established correctly under the law. A constructive trust is a legal remedy that a court can use to prevent unjust enrichment. It is a power to be applied "as necessary" to meet the needs of a particular case, but is to be used only in limited circumstances, when a benefit has been obtained by fraud, duress, abuse of a relationship, mistake, or some form of unconscionable conduct. In this instance, the Court of Appeals placed the proceeds of a life insurance policy in a constructive trust for the deceased's children. The named beneficiary on the policy, the deceased's second wife, challenges that decision.

Joan and James Pulkkila were married in 1996 and had two children. They divorced in July 2009. In their marital settlement agreement (MSA), which was incorporated into their divorce judgment, they agreed that any life insurance policies would remain in the children's names, until the children were no longer minors. The MSA also provided that "[i]f either party fails for any reason to maintain any of the insurance . . . , there shall be a valid and provable lien against his or her estate in favor of the specified beneficiary . . . ."

At the time of the divorce, James had a $250,000 insurance policy with Banner Life Insurance (Banner). In 2013, James married Lynnea, and changed the beneficiary designation on the Banner policy to her. James died in November 2015. One or both of his children were still minors.

Banner paid Lynnea the proceeds of the policy. Joan filed a motion in court to join Lynnea to the divorce action, and moved to enforce the insurance provision of the divorce judgment and to impose a constructive trust over the life insurance proceeds. Lynnea objected.

The circuit court ordered briefing and conducted a hearing, then denied Joan's motion. The court concluded that as the language of the MSA was not ambiguous, Joan's only remedy for the children was a lien against James's estate.

Joan appealed and the Court of Appeals reversed, in a split decision. The Court of Appeals ruled that as a matter of law, all of the requirements of a constructive trust were satisfied, and that the creation of a constructive trust in favor of the children was necessary to accomplish the intent of the MSA.

Judge Brian K. Hagedorn dissented from the Court of Appeals' majority decision. He concluded that the MSA provided a different remedy provision – a lien against the estate – and, therefore, a constructive trust is not warranted.

The Supreme Court is expected to resolve the following issues:

- Does a marital settlement agreement expressly providing a remedy that "shall" apply if either party fails to maintain life

insurance provide an exclusive remedy such that a constructive trust is unavailable by operation of law?

- Did the Court of Appeals violate Petitioner's right to due process under the federal and state constitutions by imposing a constructive trust as a matter of law, without remand, before any court heard evidence related to the elements of constructive trust or adjudicated Petitioner's objection to Joan Pulkkila's legal standing to move for a constructive trust in the divorce proceeding?