WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
OCTOBER 21 and OCTOBER 28, 2019

The cases listed below will be heard by the Wisconsin Supreme Court on Oct. 21 and Oct. 28 in the Supreme Court Hearing Room, 231 East, State Capitol. The cases originated in the following counties:

Dane
Door
Jefferson
Milwaukee
Washington

MONDAY, OCTOBER 21, 2019

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

9:45 a.m.	18AP116	Roger Choinsky v. Germantown School District Bd. of Ed.
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 type of camera coverage of Supreme Court oral argument, you must contact media coordinator Stephanie Fryer at WISC-TV, (608) 271-4321. The synopses provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
October 21, 2019
9:45 a.m.

No. 2017AP2265-CR State v. Carrie E. Counihan

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), that affirmed a Door County Circuit Court judgment, Judge David L. Weber, presiding, that convicted Carrie E. Counihan of misdemeanor theft and sentenced her, among other things, to nine months in jail.

This case is on the Supreme Court's calendar on the same day as State v. Coffee, No. 2017AP2292-CR, because both cases involve the same issue: whether the introduction of information at the time of sentencing, without the chance for rebuttal, is a violation of a defendant's constitutional right to due process.

In this case, Carrie Counihan was charged with theft in a business setting of an amount greater than $10,000, along with 11 counts of unauthorized use of an entity's identifying information. The State and Counihan reached a plea agreement and the State amended the charges to one count of theft in a business setting over $10,000, five counts of misdemeanor theft in a business setting, and six counts of unauthorized use of an entity's identifying information. The plea agreement called for Counihan to plead no contest to the five misdemeanor theft charges, to make an advance payment of restitution and fines, to pay fines on each count, and to write a letter of apology. In exchange, the State would dismiss the felony counts and recommend three years probation and 60 days jail time to be stayed, provided that Counihan complied with all probation conditions.

Counihan pled no contest to the five misdemeanor theft charges pursuant to the plea agreement. Also consistent with the plea agreement, the State and the defense both recommended three years probation with 60 days of stayed jail time.

However, the sentencing court, without prior notice to the parties, advised that it had independently undertaken review of several other "similar" cases in Door County. The court compared and contrasted those cases to Counihan's, and, citing those cases as its guide, rejected the joint probation recommendation. The court sentenced Counihan to nine months in jail. Counihan's defense counsel did not object.

Counihan filed a motion for post-conviction relief, arguing that she received ineffective assistance of counsel at the sentencing hearing because her counsel failed to object to the court's reliance on other cases without prior notice to Counihan. The circuit court denied Counihan's postconviction motion. Counihan appealed. She argued that her right to due process was violated when the circuit court placed significant reliance on information at sentencing that she had no opportunity to review or rebut. Alternatively, Counihan argued that her attorney was ineffective for failing to object to the court's reference to the "similar" cases.

The Court of Appeals affirmed, concluding that Counihan failed to establish that her sentence would have been different if she had been made aware of the information in advance. Counihan petitioned the Supreme Court for review, reaffirming her argument that her constitutional right to due process was violated.

The Supreme Court is expected to address the following issues:

1. Whether one's right to due process at sentencing is violated when the circuit court conducts an independent investigation of "similar" cases and

relies on these cases as the "most significant" of all information at sentencing but failed to give the parties advance notice of such to allow the defense to review and rebut this information?

2. Whether one forfeits her due process claim when during the court's pronouncement of sentence, the court first reveals that it conducted its own investigation and relied on information it discovered in determining a sentence but counsel did not interrupt to object?
3. Whether a defendant, in establishing the prejudice prong of an ineffective assistance of counsel at sentencing claim, must show that the outcome of the proceeding——the sentence——would have been different? Also, whether Counihan was denied the effective assistance of counsel?

WISCONSIN SUPREME COURT
October 21, 2019
10:45 a.m.

No. 2017AP2292-CR State v. Donavinn D. Coffee

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, Judge Frederick C. Rosa, presiding, that convicted Donavinn Coffee of armed robbery, attempted armed robbery, and first-degree recklessly endangering safety, all as a party to the crimes. The Court of Appeals also affirmed the order that denied Coffee's post-conviction motion.

This case is on the Supreme Court's calendar on the same day as State v. Counihan, No. 2017AP2265-CR, because both cases involve the same issue: whether the introduction of information——or misinformation, as in this instance——at the time of sentencing, allegedly without the chance for rebuttal, is a violation of a defendant's constitutional right to due process.

In November 2015, Donavinn Coffee was charged with armed robbery as party to a crime, attempted armed robbery as party to a crime, and first-degree recklessly endangering safety as party to a crime. Coffee entered a guilty plea to the three counts.

At the sentencing hearing, the State recited Coffee's criminal record, which consisted of two misdemeanor convictions. The State also told the court that Coffee had been arrested for an armed robbery in December 2011, adding that while the matter was never formally prosecuted, a prior arrest for similar conduct was "alarming." Coffee's counsel made no objection to this statement.

In rendering sentence, the circuit court mentioned the State's reference to an earlier armed robbery arrest and commented on Coffee's apparent "pattern" of criminal conduct. The court then ordered Coffee to serve 13 years of initial confinement and nine years of extended supervision.

Coffee filed a postconviction motion arguing that the State's assertions regarding the 2011 robbery arrest were incorrect, misleading, and thus violated his due process right to a fair sentencing hearing. Specifically, Coffee asserted that he was not in fact previously arrested for an armed robbery. The circuit court ordered briefing. The State's reply brief disclosed there had been a mix-up: After an assault in 2011, Coffee was stopped because he fit the description of the assailant; however, the victim and a witness confirmed that Coffee was not who committed the assault. Coffee was immediately released and was never charged.

The postconviction court agreed that the State had presented inaccurate information and further agreed that the court had relied upon this information during the sentencing hearing. However, the court denied Coffee's motion because it had concluded that "this error was harmless because it did not materially affect the court's sentencing decision in this case."

Coffee appealed. The Court of Appeals affirmed, ruling that where trial counsel does not object to the information provided by the State or to the trial court's findings, the defendant has forfeited his right to review other than in the context of an ineffective assistance of counsel claim**.** The Court of Appeals then said that because Coffee did not argue that his trial counsel was ineffective, he could not obtain appellate review of this issue. Coffee appealed to the Supreme Court, arguing that his constitutional right to due process has been violated.

The Supreme Court is expected to address these issues:

1. Does a defendant forfeit his constitutional due process right to be sentenced based only upon accurate information by failing to make a contemporaneous

objection at the time of sentencing when the nature of the inaccuracy could not have been reasonably determined by effective counsel at the time the misinformation is presented to the court at the sentencing hearing?

2. Was Mr. Coffee sentenced in violation of his constitutional due process right be sentenced based only upon accurate information?

WISCONSIN SUPREME COURT
October 21, 2019
1:30 p.m.

2019AP614-LV Service Employees International Union (SEIU), Local 1 v. Robin Vos
2019AP622

These two appeals come before the Supreme Court out of one Dane County Circuit Court case, Dane County Case No. 2019CV302, Judge Frank Remington presiding. In February 2019, SEIU, Local 1, a labor union, and a number of private individuals (collectively, "the plaintiffs") challenged the constitutionality of certain statutory provisions that were included in 2017 Wis. Act 369 and 2017 Wis. Act 370, which were passed during the December 2018 extraordinary legislative session.

The plaintiffs' complaint asserted three claims against the various challenged statutory provisions: (1) violations of the separation of powers doctrine under Art. V of the Wisconsin Constitution (the Governor's power and duty to "take care that the laws be faithfully executed"); (2) violations of the separation of powers doctrine under Art. IV and Art. V of the Wisconsin Constitution (impermissible legislative veto); and (3) violations of Art. IV of the Wisconsin Constitution (legislative action without a quorum). The plaintiffs sought a declaratory judgment pursuant to Wis. Stat. § 806.04 that the challenged provisions were unconstitutional under one or more of these three claims, and therefore were invalid and unenforceable. The plaintiffs additionally sought a temporary injunction pursuant to Wis. Stat. § 813.02, that would prohibit any state official from attempting to apply, implement, or enforce any of the identified unconstitutional provisions of the Acts while the lawsuit was pending.

The complaint named four legislative leaders and two state officers as defendants. The four legislative leaders were Robin Vos (Assembly Speaker), Roger Roth (Senate President), Jim Steineke, (Assembly Majority Leader), and Scott Fitzgerald (Senate Majority Leader) (collectively, the "Legislative Defendants"). The two state officers were Governor Tony Evers and Attorney General Josh Kaul.

The Legislative Defendants moved to dismiss the complaint and opposed the request for a temporary injunction. They asked the circuit court to stay any temporary injunction it might issue pending an appeal. Governor Evers and Attorney General Kaul took positions generally in agreement with the plaintiffs.

The circuit court denied the Legislative Defendants' motion to dismiss the plaintiffs' complaint. After holding an evidentiary hearing, it granted in part and denied in part the plaintiffs' motion for a temporary injunction. Specifically, the circuit court issued a decision and order that temporarily enjoined the defendants from enforcing sections 26 and 30 of Act 369, which generally require the Attorney General to obtain approval from a legislative house or joint committee before dismissing or compromising certain types of lawsuits. The court also temporarily enjoined a number of sections of Act 369 relating to the use and promulgation of "guidance documents" by administrative agencies. Finally, the court temporarily enjoined section 64 of Act 369, which authorizes a joint legislative committee to suspend an agency rule or regulation multiple times before the legislature must pass a bill that would modify or reverse the rule or regulation. The circuit court's decision also denied the Legislative Defendants' motion for a stay of the temporary injunction pending appeal.

The Legislative Defendants filed an appeal as of right from the circuit court's order granting a temporary injunction (No. 2019AP622). They also filed a petition for permission to appeal the circuit court's non-final decision denying their motion to dismiss (No. 2019AP614-LV). The Supreme Court ultimately assumed jurisdiction over the appeals and granted the request for permission to appeal the denial of the motion to dismiss. After assuming jurisdiction, it granted the motion of the Legislative Defendants to stay the circuit court's temporary injunction while the appeals are in process. The Supreme Court consolidated the two appeals for purposes of briefing and oral argument. Consequently, the oral argument on Oct. 21, 2019, will address both appeals.

The issues that the Legislative Defendants are asking the Supreme Court to decide in the consolidated appeals are as follows:

1. Whether the Legislature may enact statutes that give it a seat at the table with the Attorney General, in a particular category of litigation;
2. Whether joint committees of the Legislature may review certain actions taken by administrative agencies;
3. Whether the Legislature may impose certain requirements on agencies' issuance of guidance documents and make certain other related changes in Wisconsin law; and
4. Whether the circuit court abused its discretion in issuing its temporary injunction.

WISCONSIN SUPREME COURT
October 28, 2019
9:45 a.m.

2018AP116 Roger Choinsky v. Germantown School District Bd. of Education

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), that affirmed a Washington County Circuit Court decision, Judge Todd K. Martens presiding, that denied the Germantown School District and the Germantown School District Board of Education's post-verdict motion seeking attorney's fees from the District's liability insurers.

This case brings questions about a liability insurer's duty to defend an insured, whether an insurer breached its duty, and whether an insured is entitled to attorney's fees in securing a defense and establishing coverage. Wisconsin courts apply the "four-corners rule," and determine an insurer's duty to defend by comparing the four corners of the underlying complaint to the terms of the entire insurance policy. The court looks to the nature of the claim, rather than its merits, and assumes without deciding that the allegations are true. If the policy covers at least one of the claims, the insurer has a duty to defend against all of the claims. The duty to indemnify, in contrast, arises when a claim is shown to be covered and the insured is liable.

In this case, the insured is the Germantown School District and the Germantown School District Board of Education (the "District"). The insurers are Employers Insurance Company of Wausau and Wausau Business Insurance Company (the "insurers"). The underlying complaint was filed in 2013, when a group of retired teachers and former employees of the Germantown School District (the "plaintiffs") sued the District, asserting breach of contract, breach of implied contract, breach of duty of good faith and fair dealing, and promissory estoppel. The allegations arose out of the District's 2012 discontinuation of a group long-term care (LTC) insurance policy for active District teaching and professional staff employees.

To defend against the claims, the District retained the services of a law firm. The District tendered the defense of the lawsuit to the insurers. Based on their review of the complaint and policies, the insurers determined there was no coverage——essentially stating that the District's decision to terminate the LTC policy was a deliberate act, not a coverable negligent act. The insurers advised the District of their no-coverage determination, explained the reasons for that determination, and indicated their intent to intervene in the lawsuit and seek declaratory judgment with respect to their obligation to defend or indemnify the District. The District advised the insurers of its disagreement with the insurers' coverage determination. The District also moved to dismiss the plaintiffs' action.

The insurers moved to intervene, to bifurcate the merits from coverage, and to stay the merits until coverage was resolved. The District had no objection to the insurers' motions. The trial court granted the insurers' motions to intervene and bifurcate, but denied the motion to stay the merits.

The two cases proceeded in parallel——the merits case sought to determine the plaintiffs' claims against the District; the coverage case sought to determine the insurers' responsibility to pay for the District's legal fees in the merits case.

The insurers moved for summary judgment in the coverage case, contending they owed no duties to defend and indemnify the District. In their brief, the insurers stated that, as a consequence of the denied request for a stay, they had "agreed to provide a defense [in the merits case] under a reservation of rights until the coverage issues are decided." In a January 14, 2014 letter to the District, the insurers reiterated that they "will provide [the District] with a full defense against the claims alleged in the lawsuit" subject to a reservation of rights, including their "right to seek reimbursement of defense costs paid in this action in whole or in part to the extent permitted by applicable law."

The trial court denied the insurers' summary judgment motion. Noting that the suit was "procedurally . . . still at its beginning stages," the court concluded that there were disputes of material fact regarding what led to the termination of the LTC coverage that could not be resolved "at least at this stage of the litigation."

The coverage issue went to a jury trial in April 2016. The jury found that the District's conduct resulting in the termination of the LTC policy was a negligent act——and thus, coverable.

The District moved for a judgment on the verdict that the insurers must indemnify the District in the event it was found liable in the merits case, and also moved to recover $50,000 in unreimbursed merits fees. The trial court granted the District's motion in part and denied it in part. The trial court upheld the jury's finding and concluded the insurers would have to indemnify the District if found liable. However, the trial court rejected the District's argument that the insurers had breached their duty to defend. Because the insurers followed a court-approved procedure to resolve the coverage dispute, the District was not entitled to the fees it incurred relating to coverage, the court held.

The merits case went to a jury trial in June 2017. The District won. Thus, there is no issue as to indemnity for the claims against the District. Nor is there a dispute about the insurers' payment of the District's defense fees for services rendered after April 2014.

The District appealed from the trial court's denial of its motion for $50,000 in unreimbursed merits fees and for the fees it incurred relating to coverage. The Court of Appeals affirmed, over a dissent by Judge Paul Reilly. The District filed a petition for review with the Supreme Court, presenting the following issues:

1. If an insurer refuses to provide an initial defense to its insured, can it nevertheless avoid application of the four-corners rule applied by this Court (see, e.g., Olson v. Farrar, 2012 WI 3, ¶32, 338 Wis. 2d 215, 809 N.W.2d 1) in determining whether the insurer breached its duty to defend?
2. If an insurer refuses to provide a defense and coverage to its insured, but begins paying for the defense almost a year later, can the insurer nevertheless invoke the protections of Mowry v. Badger State Mut. Cas. Co., 129 Wis. 2d 496, 385 N.W.2d 171 (1986), to avoid fee liability and other equitable relief under Elliott v. Donahue, 169 Wis. 2d 310, 485 N.W.2d 403 (1992) and/or fee liability under Newhouse v. Citizens Security Mut. Ins. Co., 176 Wis. 2d 824, 836, 501 N.W.2d 1 (1993)?

WISCONSIN SUPREME COURT
October 28, 2019
10:45 a.m.

2015AP2442-D Office of Lawyer Regulation v. Wendy Alison Nora

The Wisconsin Supreme Court is responsible for supervising the practice of law by lawyers licensed in the state and protecting the public from misconduct by lawyers. Lawyers must follow a code of ethics developed by the Court. When there is an allegation that a lawyer has violated an ethical rule, the Supreme Court's Office of Lawyer Regulation (OLR) investigates, and, if warranted, prosecutes the attorney. A referee——a court-appointed attorney or reserve judge——hears the discipline case and makes recommendations to the Supreme Court. The lawyer involved in this case most recently operated a law practice in Minneapolis, Minnesota.

The Supreme Court has adopted Supreme Court Rules (SCRs) governing a number of areas related to the conduct of the judicial system and the regulation of the practice of law. One chapter of the SCRs (ch. 20) contains the Rules of Professional Conduct for Attorneys (the ethics rules). As part of its responsibility to regulate the practice of law in Wisconsin, the Supreme Court presides over disciplinary cases in which attorneys are alleged to have violated the ethics rules.

In this disciplinary case, Attorney Wendy Alison Nora has appealed the referee's orders and his report, in which the referee concluded that Attorney Nora had committed three counts of professional misconduct and recommended that Attorney Nora's license to practice law in Wisconsin be suspended for a period of two years. The OLR has also filed a cross-appeal from the referee's conclusion that two counts of its second amended complaint should be dismissed.

Attorney Nora has been licensed to practice law in Wisconsin since 1975. She has been the subject of professional discipline in this state on two prior occasions. In 1993 her license was suspended for 30 days as discipline reciprocal to a suspension imposed by the Supreme Court of Minnesota, where Attorney Nora has also held a law license. In re Disciplinary Proceedings Against Nora, 173 Wis. 2d 660, 495 N.W.2d 95 (1993). Her Wisconsin license was reinstated in May 1993. (Her Minnesota license was not reinstated until January 2007.) In March 2018, the Supreme Court suspended Attorney Nora's license for a period of one year, effective April 30, 2018. In re Disciplinary Proceedings Against Nora, 2018 WI 23, 380 Wis. 2d 311, 909 N.W.2d 155. Her Wisconsin license has not been reinstated from that disciplinary suspension.

The misconduct allegations in this disciplinary proceeding arise out of two client matters in which Attorney Nora represented clients in foreclosure-related cases. In one matter (the Spencer matter), she represented a homeowner who was a defendant in a foreclosure action. In the other matter (the Rinaldi matter), she represented homeowners who had been defendants in a foreclosure action in their subsequent civil action against a lender and their subsequent bankruptcy proceedings.

In the Spencer matter, the referee concluded that the OLR had proven that Attorney Nora had engaged in two counts of misconduct: (1) Count 2——a violation of SCR 20:3.2 due to her filing of a frivolous appeal on behalf of both her client and herself personally when she was not a party to the litigation and due to her pattern of conduct intended to harass other parties and judicial officers and to delay the proceedings; and (2) Count 3——a violation of SCR 20:8.4(g) by engaging in a pattern of conduct designed to harass other parties and judicial officers and to

delay the resolution of a civil action. The Referee further concluded, with respect to Count 1 of the second amended complaint, that while the OLR had proven violations of all three subsections of SCR 20:3.1(a) by clear, satisfactory, and convincing evidence, due to Attorney Nora having removed a case to federal court without any colorable basis for federal jurisdiction and having filed a frivolous motion for reconsideration of the federal court order remanding the case back to state court, Count 1 should be dismissed because the second amended complaint had not specified which subsection(s) of SCR 20:3.1(a) Attorney Nora had violated.

In the Rinaldi matter, the referee concluded that the OLR had proven that Attorney Nora had engaged in one count of professional misconduct: Count 5——a violation of SCR 20:3.2 due to her filing of a frivolous motion to intervene personally and her filing of a frivolous motion for relief from the federal district court's prior orders, after that court had warned her that any further frivolous submissions would result in sanctions being imposed on her. As with the Spencer matter, although the referee concluded, with respect to Count 4, that the OLR had proven that Attorney Nora had violated subsections 1 and 3 of SCR 20:3.1(a) by filing the frivolous motions, he recommended that the Supreme Court dismiss Count 4 because the second amended complaint had not specified which subsection(s) of SCR 20:3.1(a) Attorney Nora had violated, thereby infringing on Attorney Nora's due process rights.

On the basis of the three counts of misconduct that the referee found, he recommended that the Supreme Court impose discipline of a two-year suspension of Attorney Nora's license to practice law in Wisconsin. He also recommended that the Supreme Court require Attorney Nora to pay the costs of the disciplinary proceeding.

Attorney Nora has appealed the referee's determination that she engaged in professional misconduct as alleged in Counts 2, 3, and 5. Attorney Nora's appellate brief lists 18 separate issues that she wants the Supreme Court to address with respect to the referee's conduct of the disciplinary proceeding and his conclusion of three counts of misconduct. The OLR has cross-appealed the referee's conclusion that Counts 1 and 4 should be dismissed due to the failure of the second amended complaint to specify the subsection(s) of SCR 20:3.1(a) that Attorney Nora violated in those counts.

The Supreme Court will review the referee's findings of fact and conclusions of law to determine if those findings are supported by the evidence in this case and to analyze whether the facts support the legal conclusions that Attorney Nora violated the Rules of Professional Conduct for Attorneys. It will also review whether Counts 1 and 4 in the second amended complaint should be dismissed on due process grounds. If the Supreme Court concludes that Attorney Nora did violate the ethics rules, it will also independently decide what the appropriate level of discipline should be.

WISCONSIN SUPREME COURT
October 28, 2019
1:30 p.m.

2018AP1681 Steven J. Piper v. Jones Dairy Farm

This case, taken on a petition to bypass the Court of Appeals, asks the Supreme Court to determine whether Wisconsin law requires employers to compensate employees for donning/doffing and walking time if the issue was negotiated as part of the creation of a collective bargaining agreement. This case concerns a Jefferson County Circuit Court decision, Judge William F. Hue presiding, that denied Jones Dairy Farm's motion for summary judgment on employees' claims for payment for donning/doffing/walking activities.

This case asks the Supreme Court to clarify if there is a collective bargaining exception to the enforcement of wage statutes and regulations under Wisconsin law. A 2016 Supreme Court case that resulted in no majority opinion considered a similar issue about the compensability of donning/doffing time, with four justices indicating in separate concurring and dissenting writings that there was such an exception, but the court not explicitly ruling that such an exception existed. See United Food and Comm. Workers Union, Local 1473 v. Hormel Foods Corp., 2016 WI 13, 367 Wis. 2d 131, 876 N.W.2d 99. The circuit court in this case concluded that no such exception existed under Wisconsin law. Jones Dairy Farm, a Fort Atkinson food production facility, asks the Supreme Court to clarify whether it recognized such an exception in the separate writings in Hormel.

For decades, the employees at Jones Dairy Farm have been represented by United Food and Commercial Workers International Union, Local 538 (the Union). According to Jones Dairy Farm, at one point in time, the collective bargaining agreement (CBA) between Jones Dairy Farm and the Union provided that each employee would receive a daily credit of 12 minutes of paid time for donning and doffing work clothes. In the 1982 CBA, the parties agreed to reduce the amount of credited donning and doffing time to 6 minutes, in return for an increase in employee base hourly wage. In subsequent CBAs, according to Jones Dairy Farm, the parties followed the same pattern with respect to the donning and doffing provision: the Union consistently put forth proposals seeking extra pay for donning and doffing time, and the parties would ultimately agree to eliminate the donning and doffing provision completely in exchange for Jones Dairy Farm agreeing to other proposals that increased the employees' base hourly wage. Thus, from 1985 to 2013,[1] Jones Dairy Farm's employees did not receive compensation for the time spent donning and doffing work clothes and walking to and from their work stations.

In 2010, Union member Steven J. Piper and a number of other Jones Dairy Farm employees filed a class action lawsuit in the Jefferson County circuit court, alleging that Jones Dairy Farm's failure to pay employees for their donning/doffing and walking time violated Wisconsin law.

[1] In November 2013, Jones Dairy Farm changed its time-clock procedures so that the donning/doffing and walking time is considered part of the work day for which its employees are compensated.

Jones Dairy Farm filed a motion for summary judgment. The circuit court denied the motion. It ruled that under Hormel and Weissman v. Tyson Prepared Foods, Inc., 2013 WI App 109, 350 Wis. 2d 380, 838 N.W.2d 502, the donning/doffing and walking activities were "integral and indispensable" to the principal activity of the employer, and therefore were compensable under Wis. Admin. Code § DWD 272.12(1)(a)1. The circuit court rejected Jones Dairy Farm's argument that it should not be required to compensate the plaintiffs for these activities because the Union had agreed in collective bargaining to waive such claims in exchange for other economic benefits. The circuit court concluded that there was no collective bargaining exception under Wisconsin law. It also rejected Jones Dairy Farm's argument that the donning and doffing times were too trivial to merit consideration, concluding that $675 per year per employee was significant to each individual employee. Finally, the circuit court rejected Jones Dairy Farm's reliance on equitable defenses (equitable estoppel, laches, waiver, and unjust enrichment) because it concluded that the legislature had banned contracts that failed to include compensation for donning/doffing and walking time, which policy would be thwarted by a court's resort to equitable defenses.

Jones Dairy Farm appealed and asked the Supreme Court to consider its appeal immediately, which the Supreme Court agreed to do. It asks in its appeal for the Supreme Court to clarify whether there is a collective bargaining exception to the requirement under Wisconsin law to pay employees for donning and doffing time that is integral to the principal activity of the employer. Specifically, Jones Dairy Farm's petition for bypass lists the following issues for Supreme Court review:

1. Are the Plaintiffs' state law claims for compensation for donning and doffing activities subject to the Parties' historical negotiations and enforcement of their collective bargaining agreements, thus rendering those activities non-compensable?
2. Are the Plaintiffs' state law claims for compensation for donning and doffing activities subject to the doctrines of equitable estoppel, laches, wavier, and/or unjust enrichment, in light of the many successive collective bargaining agreements Plaintiffs agreed to and benefited from, and thus rendering those activities non-compensable?
3. Are the Plaintiffs' state law claims for compensation for donning and doffing activities subject to the doctrine of *de minimis non curat lex,* thus rendering those activities non-compensable?