# WISCONSIN SUPREME COURT
# CALENDAR AND CASE SYNOPSES
# OCTOBER 2020

**NOTICE:** Due to the COVID-19 pandemic, oral arguments during October will be conducted via video/audio conferencing. The Supreme Court Hearing Room will not be open to the public. The media and public may view the proceedings live on WisconsinEye or on www.wicourts.gov.

The cases listed below originated in the following counties:

Marathon
Milwaukee
Oneida
Outagamie
Waukesha

**THURSDAY, OCTOBER 1, 2020**

| | | |
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| 9:45 a.m. | 18AP71 | Mohns Inc. v. BMO Harris Bank National Association |
| 10:45 a.m. | 18AP547 | Michael Anderson v. Town of Newbold |

**MONDAY, OCTOBER 5, 2020**

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| 9:45 a.m. | 18AP1114 | Christus Lutheran Church of Appleton v. Wis. Dept. of Transp. |

**MONDAY, OCTOBER 26, 2020**

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| 9:45 a.m. | 18AP2419-CR | State v. Angel Mercado |
| 10:45 a.m. | 18AP2357-LV | State v. Anthony James Jendusa |
| 1:30 p.m. | 18AP237-D | Office of Lawyer Regulation v. Jeffery J. Drach |

***Note:*** The Supreme Court calendar may change between the time you receive these synopses 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. The synopses provided are not complete analyses of the issues.

**WISCONSIN SUPREME COURT**
**October 1, 2020**
**9:45 a.m.**

2018AP71 Mohns Inc. v. BMO Harris Bank National Association

*This is a review of a decision of the Wisconsin Court of Appeals, District II that affirmed an order of the Waukesha County Circuit Court, Judge Kathryn W. Foster, presiding, entered following a jury verdict, awarding compensatory damages, punitive damages, and attorney's fees of $113,940 to Mohns, Inc.*

Mohns Inc., a general contractor, was building a condominium project for Bouraxis Properties, a developer. BMO Harris became the developer's construction lender after a banking merger. BMO Harris then sold assets, including the developer's loan, to MIL Acquisition. After that, MIL rejected Mohns' draw requests. Mohns sued BMO Harris for breach of contract, unjust enrichment, and misrepresentation. Mohns asserted that it relied upon BMO Harris's representations that there were funds to pay Mohns for past and future work to continue working on the project. Mohns also argued that its work enhanced the project's value during the time BMO Harris was selling the developer's construction loan. BMO Harris filed a motion for summary judgement on all of Mohns' claims. The circuit court denied the motion finding that there were factual issues that required resolution.

In January 2017, Mohns moved the circuit court to compel BMO Harris to comply with discovery and to impose sanctions because BMO Harris did not provide the information requested, did not produce the documents requested, and in response to a notice of corporate deposition, did not produce a witness who could testify about the topics listed in the deposition notice. As a sanction for BMO Harris's discovery violations, the circuit court granted summary judgment against BMO Harris on liability as to all three of Mohns' claims. After that, a jury awarded Mohns damages. The circuit court reduced the jury's punitive damage award from $1 million to $478,498 and also awarded Mohns attorney's fees.

BMO Harris appealed. BMO Harris argued that the circuit court erred when the court denied its motion for summary judgment as to Mohns' claims of breach of contract, unjust enrichment, and misrepresentation. The Court of Appeals disagreed and stated that there were material fact disputes regarding the alleged contract between BMO Harris and Mohns, whether BMO Harris committed intentional misrepresentation, and whether BMO Harris was unjustly enriched by Mohns' work while BMO Harris was marketing and selling the developer's construction loan. BMO Harris next asserted that the circuit court erred in granting summary judgment to Mohns as a sanction for its discovery violations. The Court of Appeals noted that imposing sanctions is a discretionary decision for the circuit court, and discovery-related sanctions may be imposed if a party, without a justifiable excuse, fails to comply with the circuit court's discovery orders. The Court of Appeals then determined that the circuit court properly exercised its discretion in granting summary judgment to Mohns. BMO Harris also challenged the jury's verdict and award of damages. The Court of Appeals determined that the jury verdict and imposed damages were supported by credible evidence. The Court of Appeals affirmed.

BMO Harris now raises the following issues for supreme court review:

1. Does Wisconsin law prevent a court from entering the ultimate discovery sanction against a defendant – a default judgment or directed verdict – when the discovery conduct had no impact at all on the plaintiff's ability to pursue and prove its case?
2. Does Wisconsin law prevent a plaintiff from recovering damages for unjust enrichment and breach of contract simultaneously, even in the presence of a discovery sanction of liability?
3. Does Wisconsin law bar an award of punitive damages based solely on damages claims that sound in contract or quasi-contract, even in the presence of a discovery sanction of liability?

**WISCONSIN SUPREME COURT**
**October 1, 2020**
**10:45 a.m.**

2018AP547 Michael Anderson v. Town of Newbold

*This is a review of a decision of the Wisconsin Court of Appeals, District III that affirmed an order of the Oneida County Circuit Court, Judge Patrick F. O'Melia, presiding, which, in turn, affirmed the authority of the Town of Newbold to enforce a subdivision ordinance which requires a minimum 225 foot lot width at the ordinary high water mark on Lake Mildred.*

Michael Anderson owns a lot in the Town of Newbold with 358 feet of shoreland frontage on Lake Mildred. This means the property is classified as shoreland property. In 2016, Anderson submitted a certified survey map to the Town proposing to divide his current lot into two lots that would have shoreland frontage of 195 and 163 feet. The planning commission considered the proposal and voted to recommend that the request be denied because it did not comply with the Town's "On-Water Land Division Standards" which require a minimum 225 foot lot width at the ordinary high water mark of the lake. The town board adopted the recommendation a week later and denied Anderson's proposal.

Anderson sought certiorari review in circuit court. Anderson argued that the Town should not be allowed to regulate shoreland property as an exercise of subdivision authority when it would be prohibited from accomplishing the same result by means of its zoning authority. The circuit court upheld the Town's decision. The circuit court noted that the supreme court's decision in Town of Sun Prairie v. Storms, 110 Wis. 2d 58, 70-71, 327 N.W.2d 642 (1983) provides guidance and states:

> *Zoning regulations and subdivision controls are not only adopted and administered by separate agencies, but are authorized by separate enabling acts which may be unlike in their requirements for enactment of regulations and their procedure for enforcement or relief. Thus, the authority of the agency assigned to plat review may not be limited by the zoning regulations…. ch. 236, Stats., provides separate and independent enabling legislation for local governments to enact subdivision control regulations. Separate and distinct procedures are required for the adoption of such regulations as compared to zoning ordinances. As long as the regulation is authorized by and within the purposes of ch. 236, the fact that it may also fall under the zoning power does not preclude a local government from enacting the regulation pursuant to the conditions and procedures of ch. 236.*

The circuit court then determined that while the zoning enactment statute could have been broadly written to bar any and all minimum shoreland frontage requirements that are more restrictive than the standard set at the state level regardless of whether those requirements are framed as zoning or subdivision ordinances, the Legislature did not do that and the courts can only enforce the statute as written.

Anderson appealed. He argued that even if the Town lawfully enacted the Shoreland Ordinance under the authority granted to it by ch. 236, the fact that an identical frontage restriction would be unlawful if the Town attempted to enact it as a zoning ordinance creates a statutory conflict which should be reconciled by concluding that the power given to towns under § 236.45 was impliedly revoked by the enactment of § 59.692. The Court of Appeals affirmed the circuit court's decision. The Court of Appeals said the only issue presented in this case is whether the town board acted according to law, and the court determined that the circuit court applied the statute as written. The Court of Appeals further noted that there is an "undeniable tension" between the Legislature's decision to restrict towns' shoreland zoning authority while at the same time granting towns the power to enact shoreland frontage requirements under the guise of their subdivision authority, and that it is up to the Legislature to resolve the problem, if indeed the Legislature agrees there is a problem.

Anderson now raises the following issues for supreme court review:

1. Are The Town of Newbold Land Division Standards set forth in ordinance 13.13 an exercise of a subdivision authority granted under Wis. Stat. 236?
2. Is the Legislative intent in enacting 2015 WI Act 55 to set statewide shoreland standards, and to not defer to municipalities?

**WISCONSIN SUPREME COURT**
**October 5, 2020**
**9:45 a.m.**

2018AP1114 Christus Lutheran Church of Appleton v. Wis. Dept. of Transportation

*This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), that reversed an Outagamie County circuit court ruling, Judge Carrie A. Schneider, presiding, that granted summary judgment in favor of the Wisconsin Department of Transportation in an eminent domain case.*

Christus Lutheran Church of Appleton is a non-profit entity that owns and operates a church in Greenville, Wisconsin. The church abuts State Trunk Highway 15, which the Wisconsin Department of Transportation (DOT) wants to reconstruct and expand. In October 2016, a DOT representative notified Christus Lutheran that it would require 5.87 acres of the church's land for the highway project, as well as temporary easement rights over another .198 acres. In the letter, DOT sent to initiate negotiations, DOT said it valued the land to be acquired at $133,400, and it provided the church with the forms necessary to accept an offer in that amount. The initial offer letter did not identify severance damages as a line item for compensation.

Attached to DOT's initial offer letter was an appraisal prepared in August 2016 by an outside appraiser, Single Source, Inc. The appraisal indicated the land to be acquired in free should be valued at $13,500 per acre, for a total of $79,245. The appraisal valued temporary easement rights at $921, and it estimated the value of site improvements to the property at $53,100. The appraisal explicitly considered the issue of severance damages, which it defined as "the loss in value to the portion of the larger parcel remaining after the taking and construction of the public improvement" and concluded that no severance damages would result from the highway project.

After receiving DOT's initial offer, Christus Lutheran asked for an electronic copy of the appraisal, which DOT provided. The parties had a few other communications, after which the church notified DOT that it had retained an attorney to assist it in the negotiations. Although the church was advised of its statutory right to request a second appraisal at government expense, it did not seek such an appraisal. In January of 2017, the church's attorney advised DOT that the congregation would not authorize a sale and that DOT should proceed to acquire the property it needed by eminent domain.

After being notified of Christus Lutheran's decision, DOT officials reviewed the initial offer internally through its administrative review process. DOT concluded that the acquisition was more complex than originally thought and concluded that a higher offer was warranted.

In March 2017, DOT sent Christus Lutheran a revised offer of $403,200. The revised offer increased the per acre value of the land by a total of $14,675; added $75,321 for the church to remedy parking lot impacts and construct a retention pond; and awarded $159,574 as severance damages based on the proximity of the church structure to the new right of way.

After discussing the revised offer, the church again told DOT that it should proceed to acquire the property by eminent domain. The DOT responded on April 11, 2017 with a jurisdictional offer of $403,200. The DOT did not receive a response to the jurisdictional offer, and on May 9, 2017, DOT notified Christus Lutheran it was acquiring the property by eminent

domain. Enclosed with the letter was a check, a closing statement, and a copy of the award of damages. The church, represented by a new attorney, sought to reopen negotiations with DOT but was told it was too late.

On May 15, 2017, Christus Lutheran filed suit, alleging that DOT "failed to provide any appraisal that forms the basis for, or supports, the $403,200 compensation amount contained in the Jurisdictional Offer." Christus Lutheran argued that this failure violated Wis. Stat. § 32.05(2)(b) and (3)(e), as those provisions had been interpreted in Otterstatter v. City of Watertown, 2017 WI App 76, 378 Wis. 2d 697, 904 N.W.2d 396. Christus Lutheran sought a judgment declaring the jurisdictional offer void; an injunction prohibiting DOT from attempting to acquire title to, or possession of, any interest via condemnation until it had complied with § 32.05; and an order allowing Christus Lutheran to recover its costs and attorney fees.

The parties filed cross motions for summary judgment. The circuit court granted summary judgment in favor of DOT. It concluded the appraisal "can be considered a 'supporting part' of the [jurisdictional] offer" under Otterstatter because the "core line items" – the land acquisition and temporary limited easement – were similar in both. As for the additional line items included in the jurisdictional offer, the court concluded that the statute provided an opportunity for negotiation and further appraisals of which Christus Lutheran had failed to take advantage. Based on affidavits, the circuit court also concluded that DOT officials had sufficient expertise to revise the appraisal.

Christus Lutheran appealed. The Court of Appeals reversed and remanded. The Court of Appeals said the central issue in the case was whether DOT's jurisdictional offer satisfied the statutory requirements in § 32.05, "Condemnation for sewers and transportation facilities." It said statutes governing the condemnation process are in derogation of the common law and must be strictly construed, and statutory provisions that favor the owner, such as those regulating the amount of compensation to be paid, are to be afforded a liberal construction.

The Wisconsin Department of Transportation seeks review of the Court of Appeals' decision and raises these issues for review:

1. Should the Supreme Court grant review of the Court of Appeals' decision because it misconstrued Wis. Stat. § 32.05(2)(a)
2. Should the Supreme Court review the circuit court's decision on the merits and conclude that the jurisdictional offer DOT made to Christus was "based" "upon" the appraisal?

**WISCONSIN SUPREME COURT**
**October 26, 2020**
**9:45 a.m.**

2018AP219-CR State v. Angel Mercado

*This is a review of a decision of the Wisconsin Court of Appeals, District I, that reversed a judgment of conviction by the Milwaukee County Circuit Court, Judge Jeffrey A. Conen, presiding, for two counts of first-degree sexual assault of a child for having sexual contact with a child under the age of thirteen and one count of first-degree sexual assault for having sexual intercourse with a child under the age of twelve.*

This case concerns the procedure for audiovisual recordings of statements of children introduced at hearings and trials, which is outlined in Wis. Stat. § 908(8). Wis. Stat. § 908.08(2)(b) provides, in relevant part, that a hearing shall be conducted to determine the statement's admissibility and that the court shall view the statement at or before the hearing. Wis. Stat. § 908.08(5)(a) requires, in relevant part, that the child testify immediately after their videotaped statement is shown at the hearing or trial. Wis. Stat. § 908.08(3) states that prior to admitting a videotaped statement of a child, the circuit court must make these findings:

> (a) That the trial or hearing in which the recording is offered will commence:
> 1. Before the child's 12th birthday.
> . . .
> (b) That the recording is accurate and free from excision, alteration and visual or audio distortion.
> (c) That the child's statement was made upon oath or affirmation or, if the child's developmental level if inappropriate for the administration of an oath or affirmation in the usual form, upon the child's understanding that false statements are punishable and of the importance of telling the truth.
> (d) That the time, content and circumstances of the statement provide indicia of its trustworthiness.
> (e) That the admission of the statement will not unfairly surprise any party or deprive any party of a fair opportunity to meet allegations made in the statement.

Angel Mercado was charged with two counts of first-degree sexual assault of a child and one count of first-degree sexual assault. At trial, the State introduced videotaped statements made by the three involved children. At trial, two of the children were either unable to identify the difference between a truth and a lie or made contradictory statements regarding the difference between a truth and a lie before their testimony was played for the jury. Two of the children testified at the trial after their videotaped statements were played and one child testified before their statement was played. Mercado was found guilty on all counts.

Mercado then filed a postconviction motion alleging the circuit court erred when it admitted the videos of the children's videotaped interviews. He argued the court failed to

comply with the requirements for admission set forth in Wis. Stat. § 908.08. He argued the court was required to view the entire length of each video pursuant to § 908.08(2)(b) and noted that at the pretrial hearing, the court said it was "going to review the first few minutes of each of the videos" so the court could discuss them the next day. Mercado also argued that the trial court failed to make the required findings in Wis. Stat. § 908.08(5)(b) by allowing one child to testify before her video was shown to the jury. The postconviction court rejected all of Mercado's arguments.

On appeal, Mercado argued that the circuit court failed to comply with the requirements of § 908.08. Mercado argued that § 908.08(2)(b) required the trial court to view the videos in their entirety before ruling on their admissibility. The Court of Appeals determined that the circuit court did not satisfy the requirement of § 908.08(2)(b) that it "view the statement[s]" prior to admitting them into evidence. The appellate court went on to say that from its own review of the videos, it was unable to conclude that the finding in § 908.08(2)(c) could be made with regard to two of the children since neither child demonstrated a firm understanding of the difference between the truth and a lie. Accordingly, the Court of Appeals concluded that the circuit court erroneously exercised its discretion in admitting the videos. The Court of Appeals reversed and remanded.

The Supreme Court is expected to review these issues:

1. Did the Court of Appeals contravene Wis. Stat. § 901.03(1)(a) when it directly reviewed Mercado's forfeited challenges to the admission of the victims' forensic- interview videos into evidence?
2. Did the circuit court properly admit the victims' forensic-interview videos into evidence at trial? This question presents four sub-issues:
    a. Did the circuit court comply with Wis. Stat. § 908.08(2)(b) when it reviewed the relevant portions of two child victims' forensic-interview videos before playing them to the jury?
    b. Did the Court of Appeals conflict with binding case law when it rejected the State's argument that all three victims' forensic-interview videos were admissible under the residual hearsay exception?
    c. Was the youngest victim's forensic-interview video also admissible under Wis. Stat. § 908.08(3)(c) or as a prior inconsistent statement?
    d. Did the circuit court comply with Wis. Stat. § 908.08(5)(a) when it allowed the youngest victim to testify before playing her forensic-interview video for the jury?

**WISCONSIN SUPREME COURT**
**October 26, 2020**
**10:45 a.m.**

2018AP2357-LV State v. Anthony James Jendusa

*This is a review of an order of the Wisconsin Court of Appeals, District I, that denied a petition for leave to appeal an order by the Milwaukee County Circuit Court, Judge Joseph R. Wall, presiding, which requires the Department of Corrections (DOC) to provide counsel for Anthony Jendusa with "a copy of the full, un-redacted database maintained by the DOC Chapter 980 Forensic Unit."*

In December 2016, the State of Wisconsin filed a petition seeking to commit Anthony James Jendusa as a sexually violent person under ch. 980. The court determined probable cause existed to believe Jendusa would meet criteria as a sexually violent person, and the case was set for trial. On May 9, 2018, Jendusa filed a "Motion to Disclose Data for Analysis," which sought an order to disclose a database containing data on all individuals who have been evaluated for commitment under ch. 980. The database contains raw data which includes the names and static scores of at least 1,400 individuals referred for special purpose evaluations under ch. 980. In addition, Jendusa filed a request for information from the database pursuant to Executive Directive 36, which permits persons to apply to the DOC for confidential information about inmates for legitimate research purposes. The DOC's Research Review Committee approved giving Jendusa access to the data on July 27, 2018, but Jendusa has never had access to the database.

The State opposed Jendusa's motion on various grounds. It argued the raw data from this ongoing research project would not be admissible at trial because it would not make any fact of consequence more or less probable, so it would be irrelevant. The State also argued that the data was protected by HIPAA. It further asserted that Jendusa failed to show that he, or anyone he had hired, had the necessary skill or training to analyze the data.

In an order dated November 29, 2019, the circuit court granted Jendusa's "Motion to Disclose Data for Analysis." The circuit court's order allows the defense expert, who was appointed to examine Jendusa, to analyze the data in the DOC database. The order states that "identifying information for the individuals contained within the database shall be only used in so far as it is necessary to determine recidivism information. Public disclosure of any personal identifying information without prior Court authorization is prohibited." The State then filed a petition for leave to appeal the November 29, 2019 order. The Court of Appeals denied the petition for leave to appeal on July 16, 2019.

The State petitioned for Supreme Court review of the denial of the petition for leave to appeal. The Supreme Court granted the State's petition for review and asked the parties to address the following issues:

1. Did the Court of Appeals erroneously exercise its discretion in denying the State's petition for leave to appeal because the order subjects DOC and the researchers to substantial and irreparable injury and raises substantial issues of general importance in the administration of justice,

because the circuit court had no authority – pursuant to Wis. Stat. § 980.036(2)(h), § 980.036(2)(j), § 980.036(5), or Brady v. Maryland – to order DOC to disclose this data to the defense for use in Jendusa's sexually-violent person commitment trial?

2. Does release of the information in the database sought by the respondent violate either Wisconsin or federal law, see e.g., Wis. Stat. § 51.30; Wis. Stat. §§ 146.81-83; Wis. Admin. Code ch. DHS 92; 42 C.F.R. ch. 1(A)2, 2a; 42 C.F.R. Part 2; 45 C.F.R. Subt. A, Subch. A., pt. 46 (protection of human subjects); 45 C.F.R. Subt. A, Subch. C, pt. 164 (HIPPA);
3. Does an entity like the Department of Corrections fall under the umbrella of "the state" for the purposes of the Wis. Stat. Ch. 980 discovery statutes;
4. Does the circuit court have authority to order a non-investigative agency to provide a defendant with data that does not meet any of the discovery provisions in Wis. Stat. Ch. 980;
5. Does Brady v. Maryland, 373 U.S. 83 (1963) impose any duty on a prosecutor in sexually violent person commitment trials.

**WISCONSIN SUPREME COURT**
**October 26, 2020**
**1:30 p.m.**

*The Wisconsin Supreme Court is responsible for supervising the practice of law 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 acted unethically, 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 cases and makes recommendations to the Supreme Court.*

2018AP237-D Office of Lawyer Regulation v. Jeffery J. Drach

The respondent lawyer is Jeffery Drach, who has practiced law in Wisconsin since 1975. He operates Drach Elder Law Center LLC in Wausau.

This disciplinary case stems from two client matters. The first involved A.P., R.P., Sr., and their adult son, R.P., Jr. In 2011, A.P and R.P., Sr. entered into three flat fee agreements with the Drach law firm related to end-of-life planning and estate planning. In 2014, R.P., Jr., in his capacity as power of attorney, signed a fourth flat fee agreement with the Drach law firm for the preparation of a medical assistance application for his father. The OLR alleges that in his work for the P. family, Atty. Drach engaged in billing improprieties, such as double billing for certain work, failing to disclose the basis or rate of certain hourly fees, and failing to enter into a written fee agreement for certain work. The OLR further alleges that Atty. Drach engaged in various trust account improprieties, including withdrawing fees from trust before they were earned.

The second matter involved in this case concerns Atty. Drach's estate planning work on behalf of G.L. The OLR alleges that Atty. Drach did this work without a written fee agreement and without communicating in writing certain increases in hourly fees.

The parties dispute the appropriate level of discipline for Atty. Drach's misconduct. The OLR asks the court to impose a public reprimand plus the full costs of this proceeding and restitution. Atty. Drach asks the court to impose a private reprimand plus a reduced amount of costs and restitution.

The Supreme Court is expected to determine whether Drach violated the rules of conduct for attorneys, and if so, what level of discipline may be applied.