WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
OCTOBER 2022

IMPORTANT NOTICE: October 10, 2022 oral arguments will be held at the Waupaca County Courthouse, 811 Harding Street, Waupaca, WI 54981. Cases listed on other dates will be heard in the Supreme Court Hearing Room, 231 East, State Capitol. The cases listed below originated in the following counties:

Barron
Dane
Dodge
Douglas
Dunn
Kenosha
Marathon
Milwaukee
Vernon

MONDAY, OCTOBER 3, 2022 [MADISON]

9:45 a.m.	18AP2005-CR	State v. Garland Dean Barnes

THURSDAY, OCTOBER 6, 2022 [MADISON]

9:45 a.m.	21AP142-CR	State v. Charles W. Richey
10:45 a.m.	20AP1696	Saint John's Communities, Inc. v. City of Milwaukee
1:30 p.m.	20AP1943	Lindsey Dostal v. Curtis Strand

MONDAY, OCTOBER 10, 2022 [WAUPACA]

9:45 a.m.	21AP21-CR	State v. Robert K. Nietzold, Sr.
11:00 a.m.	20AP877	Slabey v. Dunn County, Wisconsin

WEDNESDAY, OCTOBER 12, 2022 [MADISON]

9:45 a.m.	20AP1213-CR	State v. Corey T. Rector
10:45 a.m.	19AP1319	Milwaukee Police Supervisors Organization v. City of Milwaukee

MONDAY, OCTOBER 17, 2022 [MADISON]

9:45 a.m.	20AP806	Allsop Venture Partners III v. Murphy Desmond SC
10:45 a.m.	20AP1683	Citation Partners, LLC v. Wisconsin Department of Revenue

Note: The Supreme Court calendar may change between the time you receive it and when a case is heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at (608) 266-1880. If your news organization is interested in providing any type of camera coverage of Supreme Court oral argument, you must contact media coordinator Logan Rude at WISC-TV, (608) 271-4321. The synopses provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
October 3, 2022
9:45 a.m.

2018AP2005-CR State v. Garland Dean Barnes

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau) that affirmed the Douglas County Circuit Court judgment, Judge Kelly J. Thimm, presiding, convicting Garland Dean Barnes of delivering more than 50 grams of methamphetamine, and an order denying post-conviction relief.

In 2013 Barnes was charged with delivering greater than 50 grams of methamphetamine. The crime occurred during a controlled drug transaction using a confidential informant, Charles Marciniak, who was a former drug user and admitted criminal. Barnes does not dispute that a drug deal occurred. His defense is that he was the buyer, not the seller.

It is the State's position that Marciniak called Barnes on several occasions to set up the transaction. The calls were recorded and police provided Marciniak with $7,200 to purchase four ounces of methamphetamine from Barnes. Marciniak also wore a wire. Marciniak testified (in exchange for a plea agreement) that he and Barnes parked their vehicles so that their driver's side doors were facing one another. Marciniak and Barnes exchanged bags by throwing them into each other's vehicle. The two then drove separate ways.

Officers on standby arrived at the location just as the transaction took place. After a brief chase, officers pulled over Barnes' car and apprehended both Barnes and his girlfriend, Bobbi Reed. Officers found several grams of methamphetamine and several heroin pills in Reed's possession. They also found the bag of with the buy money in the car. On April 23, 2013, the State filed a criminal complaint charging Barnes with one count of delivery of methamphetamine in an amount more than 50 gm.

A two-day jury trial was scheduled for July 7 and 8, 2015. Shortly before trial began, Barnes moved to exclude testimony of the officer who was present for Barnes' arrest, because the State failed to disclose that officer's reports without explanation (the officer claimed in his reports that he personally observed the drug transaction take place). The report was provided to defense counsel a few days later. Shortly thereafter, Barnes moved to exclude Marciniak's testimony because the State did not disclose Marciniak's work as an informant. The circuit court ordered disclosure, but did not exclude Marciniak's testimony. Immediately before the trial began, Barnes moved to exclude any recorded phone calls due to nondisclosure. The State said the audio recordings contained only background noise and no voices, so Barnes retracted his objection.

On the first day of trial, the circuit court granted Barnes' motion to exclude the officer's testimony because the State committed an "egregious" discovery violation by failing to provide the officer's reports until just before trial began.

As for the audio recording, an officer testified that there were "no voices" and "no spoken words." However, another officer testified that "[t]here were words on the recording," and you "can hear Mr. Marciniak talking." The court ordered the State to disclose the audio recording to

the defense. Barnes moved for dismissal due to the State's several discovery violations. The circuit court denied dismissal and instead elected for other sanctions, such as precluding testimony.

The jury found Barnes guilty of possessing more than 50 grams of methamphetamine. Barnes filed a motion for a new trial. The circuit court denied the motion for a new trial, and sentenced Barnes to 30 years, consisting of 15 years' initial confinement and 15 years' extended supervision. Barnes filed a motion for post-conviction relief and the circuit court denied the motion. Barnes filed a notice of appeal with the Court of Appeals.

The Court of Appeals affirmed, and Barnes' petitioned this court for review. In a nutshell, Barnes argues that a combination of evidentiary errors and egregious discovery violations rendered this case unfair.

The issues before the Wisconsin Supreme Court:

1. Can a defendant "open the door" to testimonial hearsay violating his confrontation rights, and which was excluded based on an "egregious" discovery violation, by challenging the quality of the police investigation?
2. Can the claim that a non-testifying officer witnessed the defendant commit the crime be admitted over hearsay objections under the theory that it is admissible to show the course of investigation, not for the truth of the matter asserted?

WISCONSIN SUPREME COURT
October 6, 2022
9:45 a.m.

2021AP142-CR State v. Charles W. Richey

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau) affirming the Marathon County Circuit Court order, Judge Gregory J. Strasser, presiding, that denied Charles W. Richey's motion to suppress evidence obtained during a traffic stop.

Shortly after hearing a report from a sheriff's deputy to be on the lookout for a Harley Davidson motorcycle that was driving erratically and at a high rate of speed, a police officer noticed a motorcycle within a half mile of where the speeding motorcycle was last seen. The officer followed the motorcycle for approximately two blocks, noticed that it was a Harley Davidson, and initiated a traffic stop, based on the belief that the driver had been the same speeding motorcyclist.

Upon stopping Charles Richey and obtaining his identification, the officer determined that Richey was not operating the motorcycle which the sheriff's deputy had encountered. The officer approached Richey and detected signs of intoxication. The officer arrested Richey for OWI. Richey was subsequently charged with his eighth offense of OWI.

In the circuit court, Richey filed a motion to suppress the OWI evidence that was gathered during and after the traffic stop. Richey argued that the arresting officer initiated a stop without reasonable suspicion that Richey recently committed a crime or traffic offense.

The circuit court denied Richey's suppression motion, concluding that the facts within the officer's knowledge at the time of the traffic stop created a reasonable suspicion that Richey could have been driving the motorcycle reported by the sheriff's deputy. Richey then entered a plea of no contest to his eighth OWI and the court sentenced him to nine years of imprisonment.

Richey filed an appeal with the Court of Appeals on the sole issue of whether the circuit court properly denied his motion to suppress. The Court of Appeals affirmed the circuit court's denial of the motion to suppress.

Richey petitioned this court to review the Court of Appeals' decision. Essentially, Richey contends that his mere presence in the area of a suspected crime or traffic offense involving a Harley Davidson motorcycle while himself driving a Harley Davidson motorcycle was insufficient to establish reasonable suspicion for a traffic stop.

The Wisconsin Supreme Court must decide the following issue:

> Whether, at the time of the investigatory traffic stop, the officer had a reasonable suspicion to believe that Richey had been driving his motorcycle erratically and at excessive speeds.

WISCONSIN SUPREME COURT
October 6, 2022
10:45 a.m.

2020AP1696 Saint John's Communities Inc. v. City of Milwaukee

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee) that reversed the Milwaukee County Circuit Court order, Judge Jeffrey A. Conen, presiding, denying the City of Milwaukee's motion to dismiss and granting Saint John's Communities' motion for summary judgment.

Saint John's owns a 5.02 acre parcel of land in Milwaukee, where it operates a continuing care retirement community. In 2018, Saint John's began constructing a 21-story residential apartment tower. In October 2019, the City determined the part of Saint John's parcel containing the new tower was taxable for the 2019 tax year, so the City issued Saint John's an assessment.

On December 5, 2019, Saint John's filed a Wis. Stat. § 74.35 "recovery of unlawful tax" claim against the City of Milwaukee. Section 74.35 states, "A person aggrieved by the levy and collection of an unlawful tax assessed against his or her property may file a claim to recover the unlawful tax against the taxation district which collected the tax." The City advised Saint John's its recovery claim was deficient because although by December 5, 2019, the City levied the tax against Saint John's, section 74.35 still required a taxpayer to be aggrieved by the collection of an unlawful tax in order to file a claim. Because Saint John's had not yet paid any disputed tax, there was nothing for Saint John's to recover and it could not file a recovery claim against the City. Saint John's refused to withdraw its December 5, 2019 claim, and refile after paying the tax. The City denied Saint John's claim on January 21, 2020. On January 22, 2020, Saint John's paid its first disputed tax installment and filed a lawsuit in Milwaukee County circuit court seeking a refund.

In the circuit court, the City filed a motion to dismiss Saint John's claim because it was procedurally deficient. The circuit court denied the City's motion to dismiss. Saint John's filed a motion for summary judgment, and the circuit court granted Saint John's motion. The circuit court found the use of the property had not changed and because the property had previously been exempt, a new application was unnecessary. Therefore, the property was fully exempt from property taxation for 2019 and Saint John's 2019 tax payments were refundable with interest.

The City appealed to the Court of Appeals, and the Court of Appeals reversed the circuit court's order and remanded to Milwaukee County circuit court with direction to dismiss Saint John's claim in its entirety. The Court of Appeals concluded that Wis. Stat. § 74.35(2)(a) first requires a taxpayer be aggrieved with the levy and collection of an unlawful tax by the taxation district. Then, after collection of the disputed tax or installment tax payment, the taxpayer must file a recovery of unlawful tax claim against the collecting taxation district.

Saint John's filed a petition for review with the Supreme Court. The Supreme Court is deciding the following issue:

> In order to pursue an action under Wis. Stat. § 74.35, must a tax payer pay the disputed real estate taxes before filing a claim against the municipality?

WISCONSIN SUPREME COURT
October 6, 2022
1:30 p.m.

2020AP1943 Lindsey Dostal v. Curtis Strand

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau) that affirmed the Barron County Circuit Court order, Judge James C. Babler, presiding, granting summary judgment to Curtis Strand.

Curtis Strand was the non-custodial parent of his infant daughter, Haeven Dostal. During an overnight stay with Strand, Haeven was injured. Paramedics responded to a 911 call at Strand's house, where they began treating Haeven. Haeven was taken to the hospital; she was diagnosed with a significant skull fracture and associated brain injury. Haevan died from these injuries two days later.

Strand told officers differing versions of the incident:

- While feeding and burping Haevan, she slid off Strand's knee and hit the floor. Strand didn't know if Haevan hit her head on the nearby coffee table. Haevan cried, but once she calmed down he put her back to bed; and
- After Haeven slipped off his knee, Strand took her downstairs to the kitchen to give her a bottle. As he was warming up her bottle, Strand turned around, hit the kitchen island, and dropped Haeven on the floor. Haeven started crying, but once she calmed down, Strand put her back to bed.

Strand was arrested and charged with first-degree reckless homicide and obstructing an officer. During his criminal trial, expert witnesses testified that Haeven's injuries were inconsistent with being dropped from kitchen counter height. The jury did not make any findings of fact as to how Haevan sustained injuries. Ultimately, Strand was convicted of second-degree reckless homicide and obstructing an officer.

After the criminal case concluded, Haevan's mother, Lindsey Dostal, filed a civil lawsuit against Strand and his homeowners insurance provider, State Farm Fire and Casualty Company ("State Farm"), alleging Haeven's injuries were caused due to Strand's negligence. Dostal also alleged a claim for wrongful death.

State Farm filed a motion for summary judgment, seeking a declaration that there was no coverage under its policy. State Farm's policy provided for coverage when "a suit is brought against an insured for damages because of bodily injury . . . caused by an occurrence." The policy defined "occurrence" as an "accident, including exposure to conditions, which result in bodily injury . . . during the policy period."

State Farm argued that even if there was coverage under the personal liability insuring clause, Dostal's claims were excluded (1) by the policy's intentional acts exclusion, which excluded coverage for "bodily injury . . . which is either expected or intended by the insured," and

(2) by its resident relative exclusion, which excludes coverage for bodily injury to any insured, including "any other person under the age of 21 who is in the care of [an insured] "if the person is a "resident[] of [the insured's] household."

The circuit court granted State Farm's motion for summary judgment, concluding that the homeowners policy did not provide coverage for Haeven's bodily injures and death as they did not result from an occurrence under the policy. Dostal filed an appeal with the Court of Appeals.

The Court of Appeals affirmed the circuit court's order granting summary judgment to State Farm, concluding that no accident occurs when a jury finds an individual's conduct to be criminally reckless. Therefore, State Farm's policy did not provide coverage for Haeven's injuries and death because they were not the result of an accident.

Dostal filed a petition with the Wisconsin Supreme Court to review the Court of Appeals' decision.

The issues to be decided by this Court are:

1. Whether issue preclusion stemming from a criminal conviction bars civil suit claims of a victim who was not a party to the criminal proceedings; and
2. Whether Strand's conviction of second-degree reckless homicide precludes the finding of an "occurrence" under the policy as a matter of law.

WISCONSIN SUPREME COURT
October 10, 2022
9:45 a.m.
[WAUPACA COUNTY COURTHOUSE]

2021AP21-CR State v. Robert K. Nietzold, Sr.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison) that reversed and remanded a sentencing decision of the Vernon County Circuit Court, Judge Darcy Jo Rood, presiding. The circuit court entered judgment of conviction and sentenced Robert K. Nietzold on charges of repeated sexual assault of a child, and the circuit court denied Nietzold's post-conviction motion for resentencing.

On September 21, 2018, the State filed a criminal complaint charging Nietzold with five counts of second-degree sexual assault of a child, contrary to Wis. Stat. § 948.02(2). The State and Nietzold entered a plea agreement whereby Nietzold would plead guilty to repeated sexual assault of the same child, contrary to Wis. Stat. § 948.025(1)(e). Under the terms of the agreement, the State could request imprisonment but would not argue for a specific term of imprisonment.

On May 6, 2019, Nietzold pled guilty and the circuit court accepted the plea. The circuit court ordered a presentence investigation report (PSI) from the Department of Corrections. The PSI recommended a sentence of 22 years, consisting of 12 years of initial confinement and 10 years of extended supervision. The maximum sentence by statute was 40 years, consisting of 25 years of initial confinement and 15 years of extended supervision. At the plea hearing, the State asked the court to consider keeping Nietzold on extended supervision for a 15-year period rather than the 10 being requested in the PSI. In other words, the State asked the court to consider a 27-year sentence, with 12 years of initial confinement and 15 years of extended supervision.

Defense counsel pointed out that the State had agreed not to make a specific recommendation, and the State confirmed that was accurate.

When imposing the sentence, the circuit court remarked that "the State" recommended 12 years. The prosecutor reminded the court that he wasn't making a recommendation. The court responded that it meant to refer to the Department of Corrections, not the State.

The circuit court then imposed a sentence of 25 years, 15 years of confinement and 10 of extended supervision. This sentence did not match the PSI's recommendation nor the prosecutor's statement.

Nietzold filed a post-conviction motion seeking resentencing. He argued that the State materially and substantially breached the plea agreement by recommending a specific length of imprisonment. In the alternative, he argued that, in the event the State claimed the issue of the breach was forfeited due to an untimely objection, then Nietzold's trial counsel was ineffective. The circuit court denied the post-conviction motion, without a hearing. Nietzold filed an appeal with the Court of Appeals.

The Court of Appeals reversed and remanded with directions that Nietzold be sentenced by a different judge. The Court of Appeals concluded that a defendant has a due process right to have a prosecutor uphold the terms of a plea agreement, and that a breach that is material and substantial (not just technical) will vacate a plea or result in resentencing. In this case, the Court of Appeals said, the prosecutor made a sentencing recommendation contrary to the agreement, thus making it a material breach. The Court of Appeals further concluded that even though the prosecutor retracted, the material and substantial breach already occurred and therefore the defendant was denied the benefit of the agreement.

The State filed a petition for review with the Wisconsin Supreme Court. The issue to be decided by the Court is:

> Whether the Court of Appeals erred in deciding the defendant is entitled to resentencing by a different judge. (See State v. Smith, 207 Wis. 2d 258, 558 N.W.2d 379 (1997), State v. Bowers, 2005 WI App 72, 280 Wis. 2d 534, 696 N.W.2d 255, and State v. Knox, 213 Wis. 2d 318, 570 N.W.2d 599 (Ct. App. 1997)).

WISCONSIN SUPREME COURT
October 10, 2022
11:00 a.m.
[WAUPACA COUNTY COURTHOUSE]

2020AP877 Slabey v. Dunn County, Wisconsin

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau) that affirmed the Dunn County Circuit Court order, Judge Maureen D. Boyle, presiding, granting summary judgment in favor of Dunn County and a number of county officials.

Some background: Ryan Boigenzahn was employed as a correctional officer in Dunn County between April 2011 and May 2016. On May 15, 2017, he was found guilty by a jury on one count of second-degree sexual assault by correctional staff for an incident that occurred with an inmate at the Dunn County Jail in March 2016. The victim did not immediately report the sexual assault.

Boigenzahn was terminated from his employment in May of 2016, after receiving a romantic note from another inmate without disclosing that he had received it. When the sexual assault victim learned of Boigenzahn's termination, the victim reported the assault, leading to the criminal charge against Boigenzahn.

In November 2017, the civil lawsuit now before the Wisconsin Supreme Court, was filed in circuit court against Dunn County, the sheriff, and other county employees, alleging the victim's civil rights, pursuant to 42 U.S.C. § 1983, were violated. The lawsuit contends the conditions of confinement had exposed the victim to a substantial risk of harm; the lack of appropriate correctional policies and training amounted to deliberate indifference to civil rights; and the failure to protect the victim from unreasonable harm constituted a substantive due process violation. The lawsuit sought monetary damages and training and policy changes.

The County defendants moved for summary judgment. The circuit court granted their motion. The circuit court said it was undisputed that Boigenzahn had received training about sexual misconduct and had been disciplined before for violating the jail's fraternization policy in 2015. However, the court concluded that no reasonable fact finder could conclude that the County defendants should have inferred that the prior violations would escalate to sexual assault or that they demonstrated deliberate indifference to the risk that Boigenzahn would commit sexual assault. The court also found that there was no evidence the County's training practices were constitutionally deficient and that the County was aware of, and failed to abate, the deficiency. The court also found that there was no evidence demonstrating that the individual defendants were personally involved in the assault. The decision was appealed.

The Court of Appeals affirmed the circuit court's order granting summary judgment to the County defendants. The Court of Appeals concluded that the circuit court correctly found there was insufficient evidence that the County defendants demonstrated deliberate indifference to the risk that Boigenzahn would commit sexual assault. The Court of Appeals pointed out that it was

undisputed that Boigenzahn was punished for his fraternization violations and after the suspension there were no further instances of misconduct observed by, or reported to, jail officials.

Now on appeal before the Wisconsin Supreme Court, the questions raised in the petition for review include:

1. Are Dunn County and the County defendants liable, under 42 U.S.C. § 1983, for failing to address credible allegations that Boigenzahn was likely to cross a line sexually or romantically with female inmates?
2. Are Dunn County and the County defendants liable, under 42 U.S.C. § 1983, for failing to protect the victim from a single sexual assault in light of the obvious constitutional risk of being sexually assaulted, particularly in light of credible allegations that Boigenzahn was likely to engage in inappropriate sexual conduct?

WISCONSIN SUPREME COURT
October 12, 2022
9:45 a.m.

2020AP1213-CR State v. Corey T. Rector

The Wisconsin Court of Appeals, District II (headquartered in Waukesha) certified a question to this court regarding the meaning of the sex-offender-registration statute, Wis. Stat. § 301.45(5)(b)1., which requires lifetime sex offender registration for a person who "has, on 2 or more separate occasions, been convicted" of a sex offense. This case originated in Kenosha County Circuit Court, Judge Jason A. Rossell, presiding.

On August 2, 2018, law enforcement executed a search warrant at the home of Corey Rector after connecting electronic devices in his home to a report from the National Center for Missing and Exploited Children that 715 suspected child pornography video files were associated with a Dropbox account associated with one of Rector's email addresses.

The State charged Rector with 10 counts of possession of child pornography, and he accepted the State's offer to plead guilty to five counts in exchange for dismissing the other five counts. Each of the ten counts in the Complaint and Information lists "on or about Thursday, August 2, 2018" as the date Rector possessed the child pornography. At the plea hearing on January 17, 2019, when asking Rector for his plea to each count individually, the circuit court tied each of the counts to "August 2nd, 2018."

On May 30, 2019, the circuit court sentenced Rector to eight years of initial confinement and 10 years of extended supervision on each of the five counts, to be served concurrently. The court then asked whether sex-offender registration was required. The prosecutor did not know if it was, so the court looked to the presentence investigation report, which recommended sex-offender registration for 15 years. The circuit court ordered sex-offender registration for 15 years. A single judgment was entered reflecting Rector's convictions on the five counts to which he pled, listing the date committed for each as August 2, 2018, and the date convicted for each as January 17, 2019.

Shortly after sentencing, the Department of Corrections (DOC) sought clarification from the circuit court on the duration of Rector's sex-offender-registration requirement, and requested that the court's judgment of conviction be amended to require lifetime sex-offender registration for Rector instead of 15 years. It was the DOC's opinion that because Rector was convicted of more than two sex offenses, Wis. Stat. § 301.45(5) (b)1 mandated lifetime registration.

The circuit court held a hearing on DOC's request for clarification. The court found that DOC relied on an Attorney General opinion regarding a different, albeit related, statute. The circuit court also discounted the Attorney General opinion cited by DOC because it relied heavily on this court's precedent which determined the phrase "separate occasions" in Wis. Stat. § 939.62(2) (the repeater statute) ambiguous and deciding the phrase meant each separate conviction—even when multiple convictions occurred in the same proceeding, at the same time, and on the same occasion.

The circuit court found the phrase "separate occasions" in Wis. Stat. § 301.45 to be ambiguous. It then concluded that "separate occasions" in this statute means "the number of times that it had previously occurred" and that it means two separate occasions, rather than two separate convictions. The circuit court found, therefore, that the statute required Rector to register as a sex offender for only the 15 years already ordered. The circuit court subsequently entered an order denying DOC's request for lifetime sex offender registration.

After the circuit court's decision, Rector filed an appeal on a sentencing issue and the State cross-appealed, arguing the circuit court should have ordered lifetime sex-offender registration. Having considered Rector's and the State's arguments, the Court of Appeals decided that this case requires resolution by the Wisconsin Supreme Court.

The Court of Appeals certified this case to the Court on the following issue:

> Whether the plain meaning of "separate occasions" in the sex offender-registration statute means that the two convictions must have occurred at different times in two separate proceedings so that the qualifying convictions occurred sometime before a defendant is convicted in the current case. Stated otherwise, can the qualifying convictions occur simultaneously, as they did in this case?

WISCONSIN SUPREME COURT
October 12, 2022
10:45 a.m.

2019AP1319 Milwaukee Police Supervisors Organization v. City of Milwaukee

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee) that reversed the Milwaukee County Circuit Court order, Judge Jeffrey A. Conen, presiding, granting summary judgment to the Milwaukee Professional Firefighters' Association Local 215.

The Milwaukee Employees' Retirement System (MERS) administers the City of Milwaukee's retirement system for eligible members, including most employees and some elected officials. Members in active service for the Milwaukee Police Department and Milwaukee Fire Department are generally eligible to accrue retirement benefits through MERS, subject to the terms of their employment and any applicable collective bargaining agreement (CBA). Upon reaching a specified minimum age, an employee in active service is eligible for a pension retirement benefit based on their years of creditable service. Rates of pay, hours of work, and conditions of employment for the members represented by the Milwaukee' Police Supervisors Organization and the members represented by Milwaukee Professional Firefighters' Association Local 215 are contained in their respective CBAs. MERS also administers Duty Disability Retirement (DDR) benefits for eligible members.

Under the terms of both the 2013-16 Milwaukee Police Supervisors CBA and the 2013-16 Local 215 CBA, members who were hired before October 3, 2011, were required to contribute 7% of their compensation toward the member contribution for their pension. Both CBAs also provided that members hired before October 3, 2011, would receive a 5.8% wage increase which was labeled a "pension offset" in the CBAs. The CBAs did not define "pension offset." When the police supervisors' CBA took effect in December of 2016, all police supervisors DDR beneficiaries received a 5.8% wage increase in their DDR benefit payments based on their current annual salary as calculated by MERS using the base salary grids. In March of 2017, police supervisors organization DDR beneficiaries hired prior to October 3, 2011, were notified that their benefits would be reduced by the removal of the 5.8% wage increase from their current annual salaries. MERS also took steps to recoup the portion of DDR benefits already paid to police supervisors organization DDR beneficiaries attributable to the 5.8% wage increase.

Affected members of the police supervisors organization who were receiving DDR benefits and the organization itself filed suit against the City and MERS seeking a declaratory judgment and injunctive relief. Since the City and MERS took the position that DDR beneficiaries were not entitled to the 5.8% wage increase, MERS did not calculate a wage increase for DDR beneficiaries belonging to other public safety unions. Thus, Local 215 members hired prior to October 3, 2011, who received DDR benefits were never given the 5.8% wage increase. Eligible Milwaukee Fire Department members and Local 215 brought an action against the City and MERS alleging breach

of contract and violation of the ordinance. They also sought a declaratory judgment and injunctive relief. The two cases were consolidated.

The police supervisors, Local 215, and the City all moved for summary judgment. The circuit court granted the police supervisors' and Local 215's motions for summary judgment, concluding that the 5.8% wage increase was not predicated on the payment of the 7% pension contribution in either CBA. The City appealed. The Court of Appeals affirmed the entry of summary judgment in favor of the police supervisors. It reversed the grant of summary judgment in favor of Local 215 and remanded with directions that summary judgment be entered in favor of the City on Local 215's claims.

The issues before this Court:

1. Does the 2013-2016 CBA between the Milwaukee Professional Firefighters' Local 215 and the City of Milwaukee, the City of Milwaukee's Charter, and the parties' past practice require the City of Milwaukee Employees' Retirement System to include the 5.8% wage increase in its calculation of duty disability retirement ("DDR") benefits?
2. Does the 2013-2016 CBA between the Milwaukee Police Supervisors Organization and the City of Milwaukee, the City of Milwaukee's Charter, and the parties' past practice require the City of Milwaukee Employees' Retirement System to include the 5.8% wage increase in its calculation of DDR benefits?
3. Does the Court of Appeals' decision comply with precedent regarding the interpretation of pension laws, in this case Milwaukee City Charter § 36?

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

2020AP806 Allsop Venture Partners III v. Murphy Desmond SC

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison) that affirmed the Dane County Circuit Court order, Judge Richard G. Niess, presiding, that granted judgment on a jury verdict to Murphy Desmond SC.

In 1985, Terry and Sandy Shockley formed Shockley Communications Corporation, which came to own a number of radio and television stations. The corporation was always closely held. Investors were brought in to fund its expansion.

Acting in consultation with tax advisors and attorneys, large shareholders of the corporation executed what amounted to a sale of the corporation. In an attempt to avoid taxes on that transaction, they used a so-called "midco transaction," in which an intermediary or "middle company" facilitated the sale of the corporation's stock and the (purportedly separate) transfer of a substantial portion of its assets to a third-party purchaser. Attorney Pasch of Murphy Desmond undertook various activities on behalf of the corporation's shareholders related to the midco transaction. One was to negotiate the terms of the stock sale portion of the transaction among interested persons and entities. In addition, after consultation with Terry Shockley and others, Pasch contacted the law firm Curtis Mallet to provide an opinion letter about the potential tax consequences of the midco transaction. Curtis Mallet provided a written opinion stating that key elements of the transaction should be recognized for federal income tax purposes as a stock sale and not an asset sale, with favorable tax consequences for the shareholders.

However, the Internal Revenue Service took the position, later upheld by the federal courts, that this was not a stock sale separate from an asset sale but, instead, a single transaction: the direct sale of the corporate assets involving a sale of stock. As a result, large shareholders in the corporation, including corporation founders Terry Shockley and Sandy Shockley, were assessed significant tax liabilities as transferees under federal and state law.

In the wake of the imposition of these significant tax liabilities, investors in the corporation brought this action in Dane County Circuit Court. At issue is the allocation of responsibility for causing the tax liabilities among the Shockleys, accountants, lawyers, and others. The Shockleys joined the action as intervening plaintiffs. Various parties settled out of the case, pursuant to a Pierringer release.[1]

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[1] A Pierringer release is named after this court's decision in Pierringer v. Hoger, 21 Wis. 2d 182, 184-85, 124 N.W.2d 106 (1963). A Pierringer release operates as a satisfaction of that portion of a plaintiff's cause of action for which the settling joint tortfeasor is responsible, while at the same time reserving the balance of the plaintiff's cause of action against a nonsettling joint tortfeasor, in this case, Murphy Desmond.

By the time of the jury trial in the case, the remaining plaintiffs were the Shockleys and the remaining defendants were the law firm Murphy Desmond, an attorney of that firm, and the firm's malpractice insurer. The jury returned verdicts resolving a range of issues regarding alleged negligence and intentional misrepresentations by various individuals and entities. This included jury findings that Terry Shockley and Murphy Desmond were negligent, but also that the defendants who had entered into pretrial settlements with the plaintiffs had committed intentional torts. The circuit court considered post-trial arguments and entered a decision and order granting Murphy Desmond's motion for a judgment on the verdict. This was based in part on the court's conclusion that the causal negligence that the jury attributed to Murphy Desmond was fully satisfied through indemnity by operation of the Shockleys' pretrial Pierringer-release settlements with settling defendants, because the settling defendants were intentional tortfeasors.

The Shockleys filed a petition with the Wisconsin Supreme Court.

The issues to be decided by the court are:

1. When is evidence of a settlement between plaintiff and co-defendant joint tortfeasors admissible under Wis. Stat. § 904.08?
2. Are allegations in a prior, unverified and superseded complaint admissible as admissions of a party opponent if the prior allegations are not inconsistent with the operative complaint?
3. Is a negligent tortfeasor entitled to indemnity from an intentional tortfeasor without proof of any connection between the intentional wrongdoing and subsequent negligence?
4. Does defense counsel's closing argument that settlement payments showed who were "the true culprits here, of course" and were an "acknowledgment" that settling defendants' intentional wrongdoing "had been proven" require a new trial?

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

2020AP1683 Citation Partners, LLC v. Wisconsin Department of Revenue

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee) that reversed a Dodge County Circuit Court order, Judge Martin J. DeVries, presiding, reversing a decision by the Tax Appeals Commission (Commission) which held that portions of a lease payment for aircraft maintenance and engine maintenance were not exempt from sales tax.

Citation Partners leases a Cessna Citation aircraft to lessees through an Aircraft Dry Lease. Pursuant to that lease agreement, Citation Partners is required to schedule and pay for all repairs and maintenance on the plane, and the lessees are required to "reimburse" Citation Partners for their share of those costs. Lessees notify Citation Partners when an aircraft needs to be serviced; Citation Partners schedules the appointment with an aircraft servicer for maintenance and repair.

Wisconsin's sale tax law is set forth in Chapter 77 of the Wisconsin Statutes. On July 1, 2014, 2013 Wisconsin Act 185 took effect. Act 185 amended portions of Chapter 77. One such amendment exempted from sales tax various "types of services," including the repair, service, and maintenance of any aircraft or aircraft parts, and "the sale of" parts used to modify or repair aircraft. Prior to the enactment of Act 185, Citation Partners had collected sales tax on the entire lease price of the aircraft, including aircraft maintenance and engine maintenance costs. After Act 185 took effect, Citation Partners ceased collecting sales tax from lessees for the costs of maintenance and repair.

The Department of Revenue (DOR) conducted a field audit of Citation Partners, after which it issued Citation Partners a tax assessment. The assessment included, but was not limited to, sales tax that had not been collected for aircraft maintenance and engine maintenance costs from July 1, 2014, to December 31, 2015.

Citation Partners filed a petition for redetermination of the assessment; the DOR denied that petition. Citation Partners then sought administrative review by the Tax Appeals Commission (Commission). The Commission affirmed the DOR's decision.

The Commission concluded that the full amount charged and paid to Citation Partners by its lessees is subject to sales tax. The Commission said while Act 185 may apply to Citation Partners' purchase of aircraft maintenance services and repair parts, "it does not apply to any portion of the subsequent lease payments" to Citation Partners.

Citation Partners filed a petition for judicial review with the circuit court. On August 20, 2020, the circuit court reversed the Commission, finding that the "reimbursements" for engine maintenance and aircraft maintenance paid to Citation Partners by the lessees between July 1, 2014, and December 31, 2015, were exempt from sales tax. The circuit court found that Citation Partners was an "agent" for its lessees when it purchased repairs, maintenance, and parts for the

aircraft and thus was entitled to a sales tax exemption. DOR appealed the circuit court's decision to the Court of Appeals.

The Court of Appeals reversed the circuit court and remanded with directions to affirm the Commission's decision. The Court of Appeals concluded that, based on the plain language of Wis. Stat. § 77.52(1)(a), the five percent sales tax applies to the total amount of consideration for which a property is leased, and there is no deduction from the sales price for the "cost of materials used, labor or service cost, . . . and any other expense of the seller." Therefore, under the facts of this case, the Court of Appeals concluded the portions of the lease payment for engine maintenance and aircraft maintenance are not exempt from sales tax.

Citation Partners filed a petition with the Wisconsin Supreme Court to review the Court of Appeals' decision. The issue before this court is:

> Are reimbursement payments from lessees to Citation Partners for the lessees' proportional share of airplane parts and maintenance and repair services exempt from sales tax pursuant to the provisions of 2013 Wisconsin Act 185 and the common law of agency?