WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
SEPTEMBER 2022

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

Dane
Kenosha
Milwaukee
Portage
Racine
Sauk
Walworth
Washington
Waupaca

TUESDAY, SEPTEMBER 6, 2022

9:45 a.m.	20AP2003	Wisconsin Justice Initiative, Inc. v. Wisconsin Elections Commission
10:45 a.m.	19AP664-CR	State v. Alan S. Johnson
1:30 a.m.	19AP2184-CR	State v. Jeffrey L. Moeser

FRIDAY, SEPTEMBER 9, 2022

9:45 a.m.	19AP1728/2063	Marilyn Casanova v. Michael S. Polsky, Esq.
10:45 a.m.	20AP128	Robert L. Slamka v. General Heating and Air Conditioning
1:30 p.m.	20AP225	Louis Pagoudis v. Marcus Keidl

MONDAY, SEPTEMBER 12, 2022

9:45 a.m.	20AP1014-CR	State v. Christopher D. Wilson
10:45 a.m.	20AP1124	Matthew W. Murphy v. Columbus McKinnon Corporation
1:30 p.m.	19AP1085 / 1086	5 Walworth, LLC v. Engerman Contracting, Inc.

WEDNESDAY, SEPTEMBER 28, 2022

9:45 a.m.	20AP32-CR	State v. Oscar C. Thomas
10:45 a.m.	19AP1987	Lowe's Home Centers, LLC v. City of Delavan

FRIDAY, SEPTEMBER 30, 2022

9:45 a.m.	20AP2119-CR	State v. Larry L. Jackson
10:45 a.m.	20AP189	ACUITY v. Estate of Michael Shimeta

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
September 6, 2022
9:45 a.m.

2020AP2003 Wis. Justice Initiative, Inc. v. Wis. Elections Commission

This is a review of a decision of the Circuit Court for Dane County, Judge Frank D. Remington, presiding, granting Wisconsin Justice Initiative declaratory judgment. The circuit court ruled that the 2020 amendment to Article I, Section 9m of the Wisconsin Constitution ("Marsy's Law"), which provided more detailed and expanded rights to crime victims, did not satisfy the requirements for amendments under Wis. Const. art. XII, Section 1, and Wis. Stat. § 5.64(2)(am). Pursuant to Wis. Stat. § 809.61, the Court of Appeals, District III (headquartered in Wausau) certified this case to this court.

Marsy's Law was approved in both houses during the 2017 session and during the 2019 session, both houses of the Legislature again considered and approved the proposed amendment in 2019 Enrolled Joint Resolution 3, which specified that the amendment would be submitted to a vote of the citizens of this state at the April 2020 election. The submission of the amendment by the Legislature triggered certain duties for both the Wisconsin Elections Commission ("WEC") and municipal-clerks. The WEC was required to certify the referendum question. Following that, municipal clerks were required to prepare and publish three types of notices to inform voters about the proposed amendment.

On December 18, 2019, Wisconsin Justice Initiative, Inc. ("WJI") brought this action against the Wisconsin Elections Commission ("WEC") challenging the ballot question's sufficiency. WJI requested declaratory judgment and injunctive relief. On February 11, 2020, the circuit court denied WJI's motion for a preliminary injunction.

Municipalities timely published Type A notices, which contained the referendum question and information on where to find the text of the proposed amendment. Type B and C notices were published by April 6, 2020. Type B notices contained a sample ballot and voting instructions. Type C notices explained the effects of "yes" and "no" votes, and they contained the text of the proposed amendment.

On April 7, 2020, the Legislature submitted the ballot question to the voters of this state during the presidential preference primary and spring election. The ballot question was worded as follows:

> *Additional rights of crime victims. Shall section 9m of article I of the constitution, which gives certain rights to crime victims, be amended to give crime victims additional rights, to require that the rights of crime victims be protected with equal force to the protections afforded the accused while leaving the federal constitutional rights of the accused intact, and to allow crime victims to enforce their rights in court?*

The Amendment passed by a 3 to 1 margin, the election results were certified on May 4, 2020, and the amendment became effective that day.

On November 3, 2020 the circuit court ruled that the Amendment's passage violated Article XII, Section 1 of the Wisconsin Constitution. WEC filed an appeal to the Court of Appeals. The Court of Appeals certified this case to the Supreme Court.

The issues before the court are:

1. Whether Article XII, Section 1 of the Wisconsin Constitution requires that a ballot question state "every essential" purpose of the proposed amendment?
2. Whether the ballot question was misleading—either by containing misinformation or by failing to "mention[] [its subject] in accord with the fact"?
3. Whether, under the "separate amendment" rule, the amendment was required to have been submitted as more than one ballot question because it encompassed more than one subject matter and one purpose?

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

2019AP664-CR State v. Alan S. Johnson

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison) that reversed the Waupaca County Circuit Court order, Judge Raymond Huber presiding, concluding that, under Wis. Stat. § 950.105, the alleged victim, T.A.J., did not have standing to oppose Johnson's motion for an in camera review by the circuit court of T.A.J.'s health care records.

In April of 2017, the defendant, Alan S. Johnson, was charged with one count of sexual assault of a child under 16 years of age, five counts of incest, one count of child enticement, two counts of sexual assault of a child under age 13, and one count of causing a child under the age of 13 to view/listen to sexual activity. In March 2018, Johnson filed a motion for *in camera* inspection[1] of one of the alleged victim's (T.A.J.), counseling records. Johnson's motion is commonly referred to as a Shiffra-Green motion.[2] T.A.J. opposed this request. On March 13, 2019, the circuit court held a hearing on T.A.J.'s objection to the motion for *in camera* review and concluded that, under Wis. Stat. § 950.105, T.A.J. did not have standing to oppose Johnson's request.

T.A.J. filed an interlocutory appeal with the Court of Appeals challenging Judge Huber's non-final order. The Court of Appeals granted the interlocutory appeal. After briefing was completed in the Court of Appeals, a majority of Wisconsin voters during the April 2020 election voted in favor of a constitutional amendment sometimes referred to as "Marsy's Law," which provided more detailed and expanded rights to crime victims. See Wis. Const. art. 1, § 9m. The Court of Appeals ordered additional briefing on the effect, if any, of "Marsy's Law" in this case. T.A.J. maintained he has standing pursuant to Wis. Stat. § 950.105, separate and apart from "Marsy's Law." The Court of Appeals reversed the decision of the circuit court, concluding that, under the "Marsy's Law" amendment, T.A.J. had standing to oppose Johnson's motion.

The Wisconsin Supreme Court granted Johnson's petition to review the Court of Appeals' decision. On September 29, 2021, this court held oral argument, after which it ordered supplemental briefing on the following issue: Should the court overrule State v. Shiffra, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993)?

After this court received and reviewed the supplemental briefing, the court ordered that a second oral argument be held in this case.

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[1] An *in camera* inspection happens when a judge reviews evidence (medical records, documents, photos, etc.) to determine whether it should be provided to other parties.

[2] State v. Shiffra, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993), and State v. Green, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298, established a judicial process by which a criminal defendant may request *in camera* review by the circuit court of an alleged victim's health care records in order for the court to determine whether any records should be released to the parties for potential use at trial.

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

19AP2184-CR State v. Jeffrey L. Moeser

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), that affirmed a Portage County Circuit Court order, Judge Robert J. Shannon presiding, convicting Jeffrey Moeser of operating while intoxicated (OWI), sixth offense.

Jeffrey Moeser was arrested for operating while intoxicated (OWI), sixth offense, in October 2017. Moeser was transported to a hospital where he refused to comply with a blood draw, causing the police officer to seek a search warrant. An affidavit in support of the search warrant was notarized by a notary public in the officer's presence and presented to the on-call court commissioner. The commissioner authorized the warrant and Moeser's blood was drawn resulting in a blood alcohol concentration test result of 0.220 g/100mL. The State charged Moeser with OWI, sixth offense, and operating with prohibited alcohol concentration, sixth offense.

Moeser filed a motion to suppress the blood test results, arguing that the warrant did not satisfy constitutional requirements because the officer was not placed under oath regarding his statements made in his affidavit. When the affidavit was signed and notarized, the officer wrote his name on a blank space preceding the phrase "being first duly sworn on oath, deposes, and says…." In the affidavit's second paragraph, the officer stated, "I have personal knowledge that the contents of this affidavit are true and that any observations or conclusions of fellow officers referenced in this affidavit are truthful and reliable." The officer also signed and dated the affidavit and wrote that it was made while at the hospital. His signature appears immediately above a line that reads "subscribed and sworn to before me." The notary dated and signed the certification and notarized the warrant. It is not disputed that the officer was never orally placed under oath before signing the affidavit.

The circuit court denied Moeser's motion to suppress concluding that the language of the affidavit indicated that the police officer swore to the truth of the information provided. Moeser pleaded guilty to sixth offense OWI and was placed on probation for three years with various conditions.

Moeser appealed and argued that the affidavit was defective because it was not "sworn to" by the police officer because the officer was never "placed under oath nor did he orally swear that the contents were true to the best of his knowledge". The Court of Appeals disagreed and confirmed the circuit court.

Moeser filed a petition for Supreme Court review raising the following issue: Whether the 'Oath' requirement under the Fourth Amendment of the United States Constitution and Article 1, Section 11 of the Wisconsin Constitution require a police officer to swear an oath to the truthfulness of an affidavit used to obtain a search warrant to conduct an evidentiary blood draw in a criminal OWI matter?

WISCONSIN SUPREME COURT
September 9, 2022
9:45 a.m.

2019AP1728/2019AP2063 Marilyn Casanova v. Michael S. Polsky Esq.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha) that reversed decisions of the Racine County Circuit Court, Judges David W. Paulson Michael J. Piontek, presiding, holding that building residents' claims to entry fees and security deposits took priority over bondholders' claims in receivership and holding that residents properly appealed from a final order.

The Atrium, a senior housing facility, entered into a finance agreement with the Elderly Housing Authority of the City of Racine (the Authority). The Authority contracted with the Atrium so that the Authority would issue revenue bonds to finance the project, and the Atrium would pay the debt service on the bonds.

In purchasing the bonds, Bondholders received a first mortgage on the Atrium's property, "subject only to Permitted Encumbrances." The Project Contract between the Authority and the City stated that "[t]he Obligor agrees that it will not create or suffer to be created or exist any Lien upon its Property . . . other than Permitted Liens whenever created, all of which Permitted Liens may be superior." The Official Statement and Project Contract stated that such "Permitted Liens" include "refundable resident deposits." The Official Statement also stated that "the entrance fees held by the Corporation may not be available to pay the Series 2002 Bonds in the event of a foreclosure."

On May 25, 2017, the Atrium defaulted on its bond payments and voluntarily entered receivership under Wis. Stat. ch. 128. As of then, current residents paid $7,574,820 in entrance fees and $47,149 in security deposits (referred to collectively as "entrance fees"). Entrance fees varied between $40,000 and $238,000. All agreements specified that some portion of the entrance fee would be returned upon terminating occupancy. Some agreements required residents to pay security deposits between $608 and $1,800 that would also be returned upon terminating occupancy. The resident agreements did not require the Atrium to hold these fees in separate funds. There was no separate accounting for those fees. The Atrium did keep a resident trust account that only contained $3,000.

At the same time, the Atrium owed over $6.2 million to approximately 800 Bondholders, represented in this case by the Bank of New York Mellon Trust Co. On May 26, 2017, Racine County Circuit Court entered an order appointing a receiver, petitioner Michael S. Polsky, and enjoining creditors from proceeding against the Atrium. On July 17, 2017, the circuit court granted Polsky permission to hire a broker to sell Atrium's assets. Polsky also submitted a motion for the circuit court to allow the use of cash collateral to continue operating and maintaining the Atrium, fund the receivership, and market and sell the property. The circuit court granted Polsky's motion. In August of 2017, some residents filed objections to the order permitting Polsky to use cash collateral. On September 29, 2017, the circuit court granted a resident's request to establish a creditor's committee to represent all residents ("Resident Committee").

Polsky then moved the circuit court to declare that the Bondholders' interest in the secured bonds was superior to the Resident Committee's claims for entrance fees and the residents objected. On January 26, 2018, the residents filed a motion seeking summary judgment that the their claims for entrance fees were superior to the Bondholders' interest in the secured bonds, and moved the circuit court to impose a constructive trust on the amount of those entrance fees. The Resident Committee also objected to Polsky taking a position on priority as a violation of his fiduciary duty. On February 28, 2018, the circuit court

held a hearing on the motions to determine priority. On April 4, 2018, the circuit court declared priority for the Bondholders' claims and on April 23, 2018, issued a written order incorporating its April 4 decision.

Polsky proceeded to sell the Atrium's assets (the buyer did not assume any of the Atrium's liabilities relating to entrance fees). Resident Committee objected to disbursement of any sale proceeds to the Bondholders and stated an intention to appeal the circuit court's priority determination. Polsky and the Bondholders argued the Resident Committee forfeited its opportunity to appeal. The circuit court then approved a stipulation to allow the sale to proceed but held the net sale proceeds in trust pending these proceedings and granted Polsky permission to sell the Atrium's assets.

On August 8, 2019, the asset sale closed. Net sale proceeds constituted over $4.7 million. Resident Committee filed a notice of appeal of the order approving the sale. On October 17, 2019, the circuit court issued an order restating its April 23, 2018 priority findings, its July 31, 2018 order permitting the sale, and the August 8, 2018 sale. The circuit court noted that its order was final for purposes of appeal. Resident Committee filed a second appeal from the October 17, 2019 order.

On July 30, 2021, the Court of Appeals issued an opinion reversing the circuit court's priority determination and finding that the court had jurisdiction to hear the case because the Resident Committee did not forfeit appeal of that issue. Polsky and the Trustee filed a petition with this court seeking review of the Court of Appeals' rulings on priority and jurisdiction, and this court granted review.

The issues before the court are:

1. Whether the Bondholders agreed to subordinate their claims to repayment of Resident Committee's entrance fees.
2. Whether, in chapter 128 proceedings, Resident Committee's unsecured claims for repayment of unsegregated entrance fees may take priority over a mortgage.
3. Whether the circuit court's priority determination was a final ruling for purposes of appeal.
4. Whether Polsky breached his fiduciary duty to the Resident Committee by favoring some creditor's claims over others.

WISCONSIN SUPREME COURT
September 9, 2022
10:45 a.m.

2020AP128 Robert L. Slamka v. General Heating & Air Conditioning

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 William E. Hanrahan presiding, affirming the Wisconsin Employment Relations Commission's decision dismissing Slamka's complaint and finding that the National Labor Relations Board has exclusive jurisdiction over Slamka's complaint.

In June of 2018 Slamka responded to a job posting by General Heating and Air Conditioning, Inc. ("GHAC") which limited consideration to members of the Sheet Metal Workers Union. Slamka was not a union member. After GHAC rejected his application, Slamka filed an unfair labor practices complaint with the Wisconsin Employment Relations Commission ("WERC") alleging that GHAC violated Wisconsin's Right to Work Act, Wis. Stat. § 111.04(3)(a), by denying Slamka employment based on his lack of union membership. Slamka filed a similar complaint against GHAC with the National Labor Relations Board ("NLRB").

On October 26, 2018, the NLRB dismissed Slamka's complaint; Slamka appealed this decision. In the meantime, on December 18, 2018, WERC held an evidentiary hearing on Slamka's claims. On January 17, 2019, the NLRB denied Slamka's appeal determining that no remedy was required for the advertisement because GHAC had since changed it, and there was insufficient evidence that Slamka's application was rejected because of his non-union status. On March 4, 2019, WERC held a hearing on whether it had jurisdiction to hear Slamka's complaint. Slamka argued that Wisconsin's right to work law is constitutional and that Wisconsin courts have authority to enforce validly enacted state laws. Additionally, he argued that the NLRB does not enforce state laws. The WERC hearing examiner determined that the NLRB had exclusive jurisdiction over Slamka's claims.

Slamka filed a petition for review in the Dane County Circuit Court, and the circuit court affirmed WERC's decision that the NLRB had exclusive jurisdiction over Slamka's claims. Slamka appealed to the Wisconsin Court of Appeals and the Court of Appeals affirmed the circuit court's decision, finding that WERC properly dismissed Slamka's complaint on preemption grounds, and that Slamka failed to establish that WERC erred by dismissing his complaint on presumption grounds.

Slamka filed a petition with this court for review of the Court of Appeals' decision, arguing that his case should not have been dismissed on preemption grounds. He continues to argue that Wisconsin's Right to Work Act would be meaningless if he were not allowed to purse his claim in a state tribunal.

The issues before this court are:

1. Is Wisconsin's Right to Work Act pre-empted by federal law WERC of jurisdiction to hear and determine cases under the Right to Work Act § 111.06(1) (a) and § 111.04(3)(a) Wis. Stats.?
2. Does Article I, Section 9 of the Wisconsin Constitution provide a remedy before WERC under the Right to Work Act?

WISCONSIN SUPREME COURT
September 9, 2022
1:30 p.m.

2020AP225 Louis Pagoudis v. Marcus Keidl

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), reversing the Washington County Circuit Court order, Judge Todd K. Martens presiding, that dismissed an amended complaint filed by the plaintiffs which raised claims for breach of contract based on express warranty; false advertising, and misrepresentation arising out of alleged undisclosed defects in property that Keidl sold to the plaintiffs.

Louis and Hanna Pagoudis contracted to purchase property from Amy and Marcus Keidl. The offer to purchase stated it was between the Keidls and Louis or "assigns." In signing the offer, Louis relied on a real estate condition report signed by Amy Keidl. The property was purchased from the Keidls by Sead, an LLC owned and operated by Pagoudis, using Pagoudis's funds. A few months later, Sead transferred the title of the property to Kearns LLC, another related LLC which is owned by Pagoudis that was purportedly formed as a part of a reorganization of entities he owned. Kearns still owns the property.

After the original purchase by Sead, Pagoudis discovered undisclosed defects in the property, which prompted Pagoudis to sue. The alleged defects are far ranging and include failure to disclose things like black mold growth, foundation leaks, significant amounts of debris scattered over the property, rodent infestation, and other issues. The Keidls moved to dismiss, arguing that none of the parties had standing to sue since Pagoudis and Sead no longer owned the property and Kearns did not have standing because it was not a party to the original transaction in which the alleged fraud occurred.

The circuit court agreed, finding that Sead, as Pagoudis's assignee, might have had standing to bring the fraud claims based on the real estate condition report, but that those representations did not follow the property to the now-owner Kearns. Pagoudis appealed and the Court of Appeals reversed and remanded the case to the circuit court.

The Keidls filed a petition for Supreme Court review raising the following issues:

1. Whether a seller of residential real estate can be held liable in perpetuity to a subsequent third-party purchaser or transferee for alleged misrepresentations in a Real Estate Condition Report issued on as part of an earlier home sale.
2. Whether an owner of residential real estate who transfers the property to a third party can recover for damages not incurred by the owner before transfer.
3. Whether Limited Liability Companies (LLCs) are treated as separate legal entities even if they are owned by the same person.

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

2020AP1014-CR State v. Christopher D. Wilson

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee) that affirmed the Milwaukee County Circuit Court decision, Judge David L. Borowski, presiding, denied Christopher D. Wilson's motion to suppress evidence.

Officers were dispatched to investigate a reckless driver complaint from a 911 caller. The 911 caller stated that the car was "all over the roadway . . . changing speeds, just driving very erratically." The caller observed the car pull over, climbed onto and reached over a fence, opened it, and entered the backyard. The caller also described the driver as a white male wearing bright orange shoes.

Upon arrival to the location, the officers saw an unoccupied vehicle that matched the caller's description and ran the license plate. They found that the vehicle was not registered to any nearby address. The car was running and its trunk was open. The officers entered the fenced backyard and walked to the side door of the garage. The officers knocked on the door, and Christopher Wilson, a white male matching the 911 caller's description, opened the door. The officers asked Wilson about his driving, if he was under the influence, and if he lived in the house. One of the officers noted that Wilson had slurred speech and stumbled on leveled ground.

Wilson and the officers returned to the car so that Wilson could get his identification. One of the officers observed a handgun inside the car and then patted Wilson down for weapons. During the pat down, the officer found a pill bottle in Wilson's pocket. The officers discovered that Wilson's driver's license was revoked and arrested him. A later blood test came back positive for methadone and alprazolam.

Wilson filed a motion to suppress all of the evidence the police obtained because it came from an "unlawful seizure" of Wilson in the backyard. The circuit court held a motion hearing and ultimately denied Wilson's motion to suppress. The circuit court denied Wilson's motion on the ground that the officers had probable cause to believe that Wilson was committing a jailable offense of OWI, burglary, or criminal trespass.

Wilson pleaded guilty to OWI as a second offense and endangering safety by use of a dangerous weapon while under the influence of an intoxicant. Wilson was sentenced to a total of four months in jail.

Wilson filed an appeal with the Court of Appeals. The Court of Appeals affirmed the circuit court's decision, but did not address whether probable cause and exigent circumstances justified entry into the backyard. Instead, the court concluded that the officers had "implicit license" to enter Wilson's backyard. Wilson petitioned this court for review.

The issue before this court is whether the officers violated Wilson's Fourth Amendment rights by entering Wilson's backyard through the gated fence in order to conduct a "knock and talk" investigation.

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

2020AP1124 Matthew W. Murphy v. Columbus McKinnon Corporation

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), affirming in part and reversing in part the Sauk County Circuit Court order, Judge Michael P. Screnock presiding, that granted summary judgment to Columbus McKinnon Corporation and dismissed Matthew Murphy's complaint.

Matthew Murphy was employed by a utility company as a line technician and was injured while trying to load a wooden pole from the ground onto the bed of a trailer. He lifted the pole by using a set of metal tongs attached to the end of the winch line of a truck-mounted boom that he operated by remote control. The pole fell and struck him on the front of his head and shoulder causing serious injury. Although Murphy was accompanied by a coworker at the time of the accident, he alone attempted to lift the pole from the ground onto the trailer. The metal tongs he used had a so-called Dixie design, that resembled tongs used to carry ice blocks. Columbus McKinnon Corporation (CMC) is the parent company of the business that designed and manufactured the tongs.

Murphy sued CMC in its product design role as the manufacturer of the tongs. He alleged claims for strict product liability based on an alleged design defect under Wis. Stat. § 895.047 and for negligence based on a theory of design defect. CMC moved for summary judgment dismissing the claims. As to the strict liability claim, CMC argued that Murphy could not prove a safer alternative design or that the Dixie tongs were unreasonably dangerous as required by § 895.047. Murphy responded that an unreasonable risk of failure created by the Dixie tongs could have been reduced or avoided if CMC used a different design or incorporated a chain, cable, or strap used as a lifting device. As to the negligent design claim, CMC argued that Murphy disregarded his training and experience by not properly attaching the tongs and then positioning himself beneath, rendering Murphy's alleged negligence a greater contributor to the accident than CMC's alleged negligence. Murphy argued that evidence that includes proof of an alleged safer design could allow a reasonable jury to rule in his favor.

While CMC's summary judgment motion was pending, CMC filed a motion in limine to exclude the opinions of Murphy's liability expert on the ground that they were inadmissible under Wis. Stat. § 907.02 because the opinions were contradictory, speculative, and not reliable. The circuit court initially denied CMC's summary judgment motion, but later reversed its course and granted summary judgment dismissing Murphy's complaint in its entirety. Murphy appealed.

The Court of Appeals affirmed in part and reversed in part, with respect to the proposed jaw-style alternative design. The Court of Appeals concluded that although CMC had made a case for summary judgment, Murphy has nevertheless raised a genuine issue of material fact as to whether this design satisfies his burden under Wis. Stat. § 895.047. The Court of Appeals also concluded that CMC failed to show that Murphy's negligence exceeded its own.

CMC has raised the following issues for Supreme Court review:

1. Did the Legislature eliminate application of the consumer-contemplation standard for design defect claims when it enacted Wis. Stat. § 895.047?
2. If the Legislature did not eliminate application of the consumer-contemplation test, can a product, as a matter of law, be "unreasonably dangerous" where the risk was undisputedly obvious and foreseeable?

3. In a products liability design defect case, can a factfinder reasonably base on verdict on expert testimony that is not based on testing despite the ability to test, or reliant on the circular inference that the accident itself is evidence of a design defect?

WISCONSIN SUPREME COURT
September 12, 2022
1:30 p.m.

2019AP1085 5 Walworth, LLC v. Engerman Contracting, Inc.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), reversing the Walworth County Circuit Court order, Judge Daniel Steven Johnson presiding, denying coverage to Engerman Contracting, Inc. and Otto Jacobs Company, LLC, and remanding the case to the circuit court for further proceedings.

In 2012, 5 Walworth hired Engerman Contracting, Inc. as a general contractor to build a pool complex. Engerman subcontracted the project to Downes Swimming Pool Co. Downes purchased shotcrete, a sprayed concrete, from Otto Jacobs Company to be used in the pools' walls and base. The pool complex was completed around August 2012. The project included a main pool and an adjacent children's pool.

5 Walworth alleges that the pool began leaking almost immediately. On several occasions, Downes tried unsuccessfully to fix the problem. In 2015, 5 Walworth hired an engineering firm to investigate the leaks. The firm issued a report concluding that the shotcrete material had not been installed correctly which contributed to the cracking in the pool walls, and that the steel reinforcing bars were not sufficient to prevent cracks. The report did not explicitly identify one cause of the cracking but did not rule out suboptimal shotcrete mix or construction defects.

5 Walworth alleges that due to the extensive damage as a result of the leakage, it was forced to demolish the pool complex and construct a new one. It sued Engerman and its insurers, General Casualty Company and West Bend, and Downes to recover the costs of removing and replacing the pool complex. 5 Walworth's lawsuit alleged breach of contract, breach of implied warranty, and violation of Wisconsin's Deceptive Trade Practices Act (Wis. Stat. § 100.18) against Engerman. 5 Walworth also alleged separate counts of negligence against Engerman and Downes. Downes brought a third-party complaint against Otto Jacobs Company and its insurer Acuity.

Each insurer filed a motion for summary and declaratory judgment, alleging there was no coverage and therefore no duty to indemnify. These claims were based on there not being "property damage" caused by an "occurrence" under the policies, which all used the same relevant language. West Bend also argued that coverage for Engerman was precluded because the property damage occurred prior to the policy period. Acuity argued that coverage for Otto Jacobs was precluded under its policy's business risk exclusion.

The circuit court issued an oral ruling granting the insurers summary judgment and denying coverage to Engerman and Otto Jacobs. The court also found there was no duty to defend or indemnify the § 100.18 claim because it alleged volitional conduct. The court found that there was no "property damage" caused by an "occurrence," so it did not address West Bend's and Acuity's claims based on their respective policies. Otto Jacobs and Engerman filed separate notices of appeal with the Court of Appeals. The Court of Appeals consolidated the two cases and reversed the circuit court's ruling. General Casualty Company, West Bend Mutual Insurance, and Acuity all filed separate petitions with this court to review the Court of Appeals' decision.

The issues before the Supreme Court are:

1. Whether there must be damage to third-party property for there to be "property damage" caused by an "occurrence" under a standard Commercial General Liability insurance policy.
2. Whether the integrated-systems test analysis applies to insurance coverage disputes to aid in the determination of whether there was "property damage" caused by an occurrence."
3. Is an insurer entitled to summary judgment declaring it has no coverage obligations when its policy commenced roughly a year after a contractor had received notices of damages, had attempted to repair damages, and was aware of claims of ongoing damages at a pool complex, when its policy does not extend to losses which have occurred, or which have begun to occur, prior to its term?
4. Do the policy's business risk exclusions, specifically the "your product" exclusion, eliminate coverage under the Acuity policy?

Note: The first two issues are as stated in the petition for review filed by General Casualty Company. The third issue was in West Bend Mutual Insurance Company's petition for review and relates only to West Bend. The fourth issue was in Acuity's petition for review and relates only to Acuity.

WISCONSIN SUPREME COURT
September 28, 2022
9:45 a.m.

2020AP32-CR State v. Oscar C. Thomas

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), affirming the Kenosha County Circuit Court judgment, Judge Bruce E. Schroeder presiding, convicting Oscar C. Thomas of first-degree intentional homicide, first-degree sexual assault, and false imprisonment.

In 2007, a jury convicted Oscar C. Thomas of first-degree intentional homicide, first-degree sexual assault, and false imprisonment. The victim was his wife, Joyce. An autopsy showed that Joyce died from "strangulation due to physical assault."

During the investigation of Joyce's death, Thomas gave formal statements to police. First, Thomas told police he and a friend had been smoking crack in the basement and Joyce had been complaining about ear and chest pain, so he would periodically check on her. With respect to the sexual assault charge, Thomas told police he and Joyce engaged in consensual sex when he checked on her, and they fell out of the bed together; Joyce did not complain of any injuries except that her chest still hurt. Thomas said he went back to the basement, left the apartment for a while, and when he came back he found Joyce on the floor next to the bed, and he called 911.

In another statement to police, he again said he and a friend had been smoking crack in the basement and he kept going upstairs so that Joyce would not become suspicious. He said he left to purchase more drugs, returned home and took the drugs, along with some prescription medication. He again said he initiated consensual sex with Joyce, and they fell out of bed but Joyce was not injured. Thomas said Joyce got up, used the bathroom, and then laid down on the bed. Thomas left with his friend and when he returned he found Joyce on the floor. He called 911 and began chest compressions until an officer arrived. Thomas stated he believed he was accidentally responsible for Joyce's death. A sexual assault kit was conducted during the autopsy but no physical evidence of sexual intercourse was found, including no DNA evidence and no injuries.

Thomas appealed his conviction, and in 2011 the Court of Appeals affirmed the conviction. This court denied Thomas's petition for review in 2012.

In 2015, Thomas pursued federal habeas corpus relief in the United States Court of Appeals for the Seventh Circuit and was granted a new trial. Thomas's second trial commenced in January of 2018. Thomas was again convicted of all charges and sentenced to life in prison without the possibility of parole. Thomas filed post-conviction motions seeking dismissal of the sexual assault charge and a new trial on the remaining charges. The circuit court denied the motions in December, 2019.

Thomas filed an appeal with the Court of Appeals, arguing that the evidence presented at the 2018 trial was insufficient to convict him of first-degree sexual assault because the State failed to satisfy the corroboration rule, which is a common law standard meant to "ensure that a conviction does not stand when there is an absence of any evidence independent of the defendant's confession that the crime in fact occurred." The corroboration rule requires the State to present

evidence corroborating "any significant fact" in the defendant's confession. Thomas argued that nothing in the evidence, apart from his own statements, corroborated the sexual assault conviction. The Court of Appeals was not persuaded by Thomas's arguments, and affirmed the conviction.

Thomas presents the following issues for this court's review:

1. Whether the Court of Appeals applied the wrong standard in determining that admission of DNA evidence in violation of his right of confrontation was harmless.
2. Whether the Court of Appeals erred in determining that Thomas's confession to a sexual assault was corroborated by a significant fact.

WISCONSIN SUPREME COURT
September 28, 2022
10:45 a.m.

2019AP1987 Lowe's Home Centers, LLC v. City of Delavan

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha) that affirmed the Walworth County Circuit Court order, Judge Daniel Steven Johnson presiding, which denied Lowe's Home Centers request for refund of excessive property taxes.

Lowe's Home Centers (Lowe's) filed a lawsuit in Walworth County Circuit Court contesting 2016 and 2017 assessments of its occupied and operating property (subject property) located in a retail area known as Delavan Crossing in Delavan, Wisconsin. Lowes also sought to obtain a refund for its alleged excessive taxes paid on the subject property that were based on the assessments. The contested assessments were conducted by the City of Delavan's assessor, who calculated that the subject property was valued at $8,992,300 (approximately $66.82 per square foot). Lowe's hired its own expert assessor, who calculated the subject property to be valued at $4,600,000 (approximately $34.18 per square foot).

Lowe's argues that based on a fee simple valuation, the City of Delavan's assessment contradicted Wis. Stat. § 70.32 (Wisconsin's Real estate valuation statute), and therefore the assessment should not have the statutorily prescribed assumption of correctness. Additionally, Lowe's asserts that its expert's assessment is accurate and that vacant properties should be allowed in its comparable property valuation. The City of Delavan argues that Lowe's comparison was flawed because it included "dark," "distressed," and otherwise incomparable properties. The City of Delavan also argues that the precedent Lowe's cited is inapplicable in this case and that the City's assessment meets the statutory standards for receiving an assumption of correctness.

The circuit court held a three-day bench trial in April, 2019 trial. The circuit court issued an order dismissing Lowe's complaint because Lowe's did not overcome the presumption f correctness. The court found that the analysis conducted by the city assessor and the valuation arrived at was appropriate and complied with the Wisconsin Property Assessment Manual. The circuit court also found that the evidence that Lowe's presented at trial was "significantly less credible" than the evidence presented by the City. Lowe's appealed the circuit court ruling.

The Court of Appeals affirmed the circuit court concluding that the City's assessment was entitled to the statutory presumption of correctness because Lowe's failed to demonstrate that the assessment violated the Manual. Additionally, the Court of Appeals concluded that the circuit court did not err by concluding that the Lowe's expert's analysis did not constitute significant contrary evidence that the 2016 and 2017 assessments were excessive. Finally, the Court of Appeals concluded that circuit court's factual findings were supported by the record and were not clearly erroneous.

Lowe's filed a petition with this court to review the Court of Appeals' decision.

The issues before this court:

1. Whether vacancy is a proper consideration in an assessment?
2. Whether the assessment complied with Wisconsin law and the Property Assessment Manual such that the presumption of correctness applies?
3. Whether leased fee sales are comparable sales for assessing owner-occupied property?

WISCONSIN SUPREME COURT
September 30, 2022
9:45 a.m.

2020AP2119-CR State v. Larry L. Jackson

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), that affirmed the Milwaukee County Circuit Court order, Judge Jeffrey A. Wagner, presiding, denying Larry Jackson's motion for post-conviction relief which alleged his trial counsel was ineffective.

Larry L. Jackson was convicted in a shooting death apparently linked to a dispute among neighbors. In October 2015, City of Milwaukee police responded to a call reporting a shooting in front of a duplex. They found the victim with gunshot wounds to his left flank and right chest area; the victim died from his injuries. The State charged Jackson with first-degree intentional homicide as party to a crime, and while using a dangerous weapon, and felon in possession of a firearm. The complaint stated that the victim had been arguing with his neighbor who also lived in the duplex. The neighbor's wife called Jackson, who was a friend of his. When Jackson arrived, the complaint states that Jackson pulled out a black and silver semi-automatic handgun and shot the victim multiple times. Another witness identified Jackson as the shooter from a photo array. Jackson filed a notice of alibi stating that at the time of the shooting he was at his home with his mother, sister, and then-girlfriend.

At the October 2016 jury trial, witnesses for the State testified consistently with their statements to police, also found in the complaint. The defense called Jackson's mother who testified she knew Jackson was at her house and had not left the night of the shooting because her alarm system was not triggered. However, on cross-examination, she also confirmed that she told a detective over the phone that she did not know where Jackson was at the time of the shooting.

The jury found Jackson guilty of all charges and the circuit court sentenced him to life imprisonment with eligibility for extended supervision in 2051. Jackson filed a post-conviction motion arguing he received ineffective assistance of counsel at trial because he claims his attorney did not properly present his alibi defense. The circuit court denied Jackson's motion without holding a hearing.

Jackson filed an appeal and the Court of Appeals affirmed the circuit court's denial of his post-conviction motion. The Court of Appeals concluded the circuit court did not err in denying the motion without a hearing. The Court of Appeals further concluded Jackson's allegation that his trial counsel did not prepare alibi witnesses was not persuasive; the court agreed with the State that the record did not establish that Jackson's attorney failed to investigate the witnesses.

Jackson filed a petition with the Supreme Court to review the Court of Appeals decision.

The issue before this court is: Did Jackson's post-conviction motion, claiming ineffective assistance of his trial counsel, allege sufficient facts to warrant an evidentiary hearing?

WISCONSIN SUPREME COURT
September 30, 2022
10:45 a.m.

2020AP189 Acuity v. Estate of Michael Shimeta

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 Conen, presiding, granting Acuity's motion for declaratory judgment and denying a motion for judgment on the pleadings filed by the Estate of Michael Shimeta.

On November 22, 2018, Douglas Curley lost control of his pickup truck, crossed the median, became airborne, and landed on top of a vehicle driven by Michael Shimeta. Shimeta was killed, and his passenger was badly injured. Farmers Insurance Company insured Curley, the tortfeasor. Farmers paid its policy limits of $250,000 of liability "per person" and $500,000 limit of liability "per accident." Shimeta's estate and his passenger each received $250,000 from Farmers. However, the combined damages sustained by Shimeta's estate and the passenger equal or exceed $1 million in total value.

Shimeta had insurance coverage with Acuity. The limits of liability for his underinsured motorist coverage are listed as $500,000 for "Each Person" and $500,000 for "Each Accident." The "Limits of Liability" section in the policy contains a reducing clause which states that Acuity's limit of liability shall be reduced by all sums paid because of the bodily injury by or on behalf of persons who may be legally responsible for the accident.

Acuity filed a declaratory judgment action with the Milwaukee County Circuit Court seeking a declaration that it had no duty to pay underinsured motorist benefits. Acuity alleged that there is no remaining underinsured motorist coverage under its policy because such benefits must be reduced by "all sums" paid by the tortfeasor's insurer ($500,000) with respect to the accident. Shimeta's estate and the passenger argued that each is separately owed $250,000 in additional UIM coverage under Acuity's policy.

The circuit court granted Acuity's motion, concluding the language in the policy is clear: "Regardless of the number of injured persons, the maximum limit of UIM coverage remains the same ($500,000)." In addition, the circuit court concluded that the reducing clause in the policy makes clear that Acuity will not make payments that duplicate payments made by or on behalf of those parties legally responsible for the accident.

Shimeta's estate filed an appeal and the Court of Appeals reversed the decision of the circuit court. The Court of Appeals concluded that the language of the reducing clause applies to first reduce the per person limit of liability in Shimeta's policy with Acuity, and the UIM coverage operates on an individual basis such that Acuity cannot aggregate the payments made to Shimeta's estate and the passenger to eliminate UIM coverage.

Acuity filed a petition with the Supreme Court to review the Court of Appeals decision.

The issues before this court:

1. Whether an insurer providing underinsured motorist ("UIM") coverage in a "predetermined, fixed sum," which does nothing more than put those insured under the UIM policy in the same position they would have occupied had the tortfeasor's liability limits been the same as the UIM limits purchased, may reduce the benefits payable to those afforded coverage under the same UIM policy by all sums paid on behalf of any person that may be legally responsible for a motor vehicle accident.
2. Whether Wis. Stat. § 632.32(5)(i) permits an insurer issuing a UIM policy to reduce its per accident limit by any amounts paid on behalf of any person that may be legally liable for a motor vehicle accident to those insured under the same UIM policy to achieve the "predetermined, fixed sum" purchased.