

SUPREME COURT OF WISCONSIN

CASE NO.:	2015AP207
COMPLETE TITLE:	Scott Smith, Plaintiff-Respondent-Cross-Appellant, Alpha Cargo Technology, LLC, Plaintiff, v. Greg Kleynerman, Defendant-Appellant-Cross-Respondent- Petitioner, Red Flag Cargo Security Systems, LLC, Defendant.

REVIEW OF A DECISION OF THE COURT OF APPEALS

OPINION FILED:	March 21, 2017
SUBMITTED ON BRIEFS:	
ORAL ARGUMENT:	January 19, 2017

SOURCE OF APPEAL:

COURT:

COUNTY:

JUDGE:

JUSTICES:

CONCURRED: ABRAHAMSON, J. concurs (Opinion filed).

DISSENTED:

NOT PARTICIPATING: KELLY, J. did not participate.

ATTORNEYS:

For the Defendant-Appellant-Cross-Respondent-Petitioner, Greg Kleynerman, there were briefs filed by *Thomas L. Shriner, Jr.*, *Max B. Chester* and *Philip C. Babler*, *Foley & Lardner LLP*, Milwaukee, and oral argument by *Thomas L. Shriner*.

For the Plaintiff-Respondent-Cross-Appellant, Scott Smith, there was a brief filed by *Timothy M. Hansen*, *Andrew J. Kramer*, *Danielle M. Nardick* and *Hansen Reynolds LLC*, Milwaukee, and oral argument by *Andrew J. Kramer*.

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 2015AP207
(L.C. No. 2011CV18551)

STATE OF WISCONSIN : IN SUPREME COURT

Scott Smith,

Plaintiff-Respondent-Cross-Appellant,

Alpha Cargo Technology, LLC,

Plaintiff,

v.

Greg Kleynerman,

Defendant-Appellant-Cross-Respondent-
Petitioner,

Red Flag Cargo Security Systems, LLC,

Defendant.

FILED

MAR 21, 2017

Diane M. Fremgen
Clerk of Supreme Court

¶1 PER CURIAM. The judgment is affirmed by an equally divided Court.

¶2 DANIEL KELLY, J., did not participate.

¶3 SHIRLEY S. ABRAHAMSON, J. (*concurring*). I write separately to preserve institutional and historical memory. This is the first case since 1979 resulting in a tie vote in which the court does not state the names of the participating justices and each of the justices' votes in the case.

¶4 A total of 115 cases from 1885 through 2016 present the names and votes of each participating justice. See Attachment A.

¶5 A total of 26 cases from 1849 through 1979 do not present the names and votes of each participating justice. See Attachment B.

¶6 These attachments demonstrate, even if my internet search might have missed some cases, that the court is changing its recent and historically dominant practice with this per curiam. The court gives no explanation for this change.

¶7 From my perspective, consistency is important. If a court is not consistent in its practice about reporting tie votes, then I believe the court should explain why the voting information is revealed in a particular case and in another it is not.

¶8 High courts in other states differ in their practice about setting forth the names of the justices and the votes cast in tie vote cases. The United States Supreme Court does not set forth the line-up of the justices when a tie vote exists.

ATTACHMENT A

Equally Divided Court:

Cases Naming Justices

1. Zwickey v. Haney, 63 Wis. 464, 23 N.W. 577 (1885) (on appeal).
2. Church of the Good Shepherd v. Racine Water Co., 116 Wis. 11, 92 N.W. 436 (1902) (on appeal).
3. Morey v. Lake Superior Terminal & Transfer Ry. Co., 118 Wis. 148, 93 N.W. 1135 (1903) (on appeal).
4. Gibbs v. Seibt, 118 Wis. 145, 93 N.W. 1097 (1903) (on appeal).
5. Jacobs v. Queen Ins. Co. of Am., 123 Wis. 608, 101 N.W. 1090 (1905) (on appeal).
6. Cook v. Minneapolis, St. P. & S.S.M. Ry. Co., 125 Wis. 528, 103 N.W. 1097 (1905) (on appeal).
7. Zohrlaut v. Mengelberg, 148 Wis. 592, 134 N.W. 1135 (1912) (on appeal).
8. Nelson v. Fairchild & N.E. R. Co., 163 Wis. 300, 156 N.W. 942 (1916) (on appeal).
9. Wis. Chair Co. v. Industrial Comm'n of Wis., 163 Wis. 25, 157 N.W. 1103 (1916) (on appeal).
10. Faust Lumber Co. v. Industrial Comm'n of Wis., 163 Wis. 365, 157 N.W. 1103 (1916) (on appeal).
11. In re Carter's Estate, 167 Wis. 89, 166 N.W. 657 (1918) (on appeal).
12. Rathenberger v. Jacob, 167 Wis. 273, 167 N.W. 271 (1918) (on appeal).

13. Johnston v. City of West Allis, 173 Wis. 463, 180 N.W. 121 (1920) (on appeal).
14. Racine Auto Tire Co. v. Indus. Comm'n of Wis., 173 Wis. 118, 180 N.W. 124 (1920) (on appeal).
15. Gruhl Sash & Door Co. v. Chicago, M. & St. P. Ry. Co., 173 Wis. 215, 180 N.W. 845 (1921) (on appeal).
16. In re Saveland's Will, 173 Wis. 328, 181 N.W. 209 (1921) (on appeal).
17. South Side Malleable Co. v. Four Wheel Drive Auto Co., 174 Wis. 93, 181 N.W. 749 (1921) (on appeal).
18. Kahn v. Melaney, 174 Wis. 95, 181 N.W. 737 (1921) (on appeal).
19. Kroner v. Order of United Commercial Travelers of Am., 176 Wis. 151, 184 N.W. 1037 (1921) (on appeal).
20. Griffin v. Milwaukee Elec. Ry. & Light Co., 176 Wis. 179, 185 N.W. 639 (1921) (on appeal).
21. State ex rel. Klefisch v. Wis. Telephone Co., 181 Wis. 519, 195 N.W. 544 (1923) (on appeal).
22. Fox River Paper Co. v. Railroad Comm'n, 189 Wis. 626, 208 N.W. 266 (1926) (on appeal).
23. Schafer & Olson v. Varney, 191 Wis. 186, 210 N.W. 359 (1926) (on appeal).
24. Morse v. State, 193 Wis. 495, 215 N.W. 216 (1927) (on appeal).
25. Boehlke v. Wallschlaeger, 196 Wis. 570, 219 N.W. 270 (1928) (on appeal).

26. Barteck v. Rotter, 197 Wis. 303, 222 N.W. 221 (1928) (on appeal).
27. In re Ott's Will, 198 Wis. 55, 223 N.W. 452 (1929) (on appeal).
28. Estate of Byrne, 201 Wis. 76, 228 N.W. 436 (1930) (on appeal).
29. Olson v. Cunningham, 200 Wis. 610, 228 N.W. 895 (1930) (on appeal).
30. Spring Creek Threshing Co. v. Amundson, 202 Wis. 150, 231 N.W. 628 (1930) (on appeal).
31. Bender v. Bain, 227 Wis. 454, 278 N.W. 864 (1938) (on appeal).
32. Carpenter Baking Co. v. Bakery Sales Drivers Local Union, 238 Wis. 367, 299 N.W. 30 (1941) (on appeal).
33. In re Gerlach's Will, 239 Wis. 353, 300 N.W. 476 (1941) (on appeal).
34. Banking Comm'n of Wis. v. Rothe, 239 Wis. 529, 2 N.W.2d 220 (1942) (on appeal).
35. Radtke Bros. & Kortsch Co. v. Indus. Comm'n, 240 Wis. 410, 3 N.W.2d 679 (1942) (on appeal).
36. Int'l Harvester Co. v. Wis. Dep't of Taxation, 243 Wis. 198, 10 N.W.2d 169 (1943) (on appeal).
37. In re Razall's Will, 245 Wis. 416, 14 N.W.2d 764 (1944) (on appeal).
38. Fed. Refrigerator Mfg. Co. v. Crowley, 252 Wis. 532, 32 N.W.2d 351 (1948) (on appeal).

39. In re Klofanda's Will, 252 Wis. 541, 32 N.W.2d 220 (1948) (on appeal).
40. Carley v. Jewett, 253 Wis. 630, 34 N.W.2d 779 (1948) (on appeal).
41. Halvorson v. Connors, 253 Wis. 629, 34 N.W.2d 778 (1948) (on appeal).
42. City of Lake Geneva v. Walworth Cty., 258 Wis. 495, 46 N.W.2d 767 (1951) (on appeal).
43. Wis. Elec. Power Co. v. City of Milwaukee, 263 Wis. 111, 56 N.W.2d 784 (1953) (on appeal).
44. Mahringer v. Knoeller, 9 Wis. 2d 7, 100 N.W.2d 371 (1960) (on appeal).
45. Barker v. Retail Credit Co., 8 Wis. 2d 664, 100 N.W.2d 391 (1960) (on appeal).
46. Village of Brown Deer v. City of Milwaukee, 16 Wis. 2d 206, 114 N.W.2d 493 (1962) (on appeal).
47. State v. Roggensack, 20 Wis. 2d 468, 122 N.W.2d 408 (1963) (on appeal).
48. Coffee-Rich, Inc. v. McDowell, 25 Wis. 2d 99, 130 N.W.2d 203 (1964) (on appeal).
49. Graebner v. Wis. Indus. Comm'n, 27 Wis. 2d 142, 133 N.W.2d 810 (1965) (on appeal).
50. Foregger v. Foregger, 28 Wis. 2d 505, 137 N.W.2d 409 (1965) (on appeal).
51. Smith v. State, 41 Wis. 2d 145, 163 N.W.2d 8 (1968) (on appeal).

52. State v. White, 59 Wis. 2d 354, 208 N.W.2d 321 (1973) (on appeal).
53. State v. Kline, 73 Wis. 2d 337, 243 N.W.2d 519 (1976) (on appeal).
54. Brown v. State, 73 Wis. 2d 351, 243 N.W.2d 519 (1976) (on appeal).
55. Punches v. Schmidt, 73 Wis. 2d 206, 243 N.W.2d 518 (1976) (on appeal).
56. State v. Balistrieri, 96 Wis. 2d 361, 291 N.W.2d 579 (1980) (on petition for review).
57. Herwig v. Enerson & Eggen, 101 Wis. 2d 170, 303 N.W.2d 669 (1981) (on petition for review).
58. Frito-Lay v. LIRC, 101 Wis. 2d 169, 303 N.W.2d 668 (1981) (on petition for review).
59. State ex rel. Badger Produce Co., Inc. v. Equal Opportunities Comm'n, 1982 WL 11213 (unpublished per curiam).
60. Local 507 v. Wilson Street E. Dinner Playhouse, Inc., 126 Wis. 2d 284, 375 N.W.2d 664 (1985) (on certification).
61. In Interest of R.H., 150 Wis. 2d 432, 441 N.W.2d 233 (1989) (on petition for review).
62. Wis. Public Serv. Corp. v. Public Serv. Comm'n of Wis., 174 Wis. 2d 705, 497 N.W.2d 723 (1993) (on bypass).
63. State v. Young, 191 Wis. 2d 393, 528 N.W.2d 417 (1995) (on petition for review).
64. State v. Richard Knutson, Inc., 191 Wis. 2d 395, 528 N.W.2d 430 (1995) (on certification).

- 65. State v. Ameritech Corp., 193 Wis. 2d 150, 532 N.W.2d 449 (1995) (on petition for review).
- 66. State v. Wills, 193 Wis. 2d 273, 533 N.W.2d 165 (1995) (on petition for review).
- 67. State v. Elam 195 Wis. 2d 683, 538 N.W.2d 249 (1995) (on bypass).
- 68. Ware v. Schoone, 199 Wis. 2d 712, 546 N.W.2d 142 (1996) (on petition for review).
- 69. State ex rel. Thompson v. Jackson, 199 Wis. 2d 714, 546 N.W.2d 140 (1996) (original action).
- 70. Ives v. Coopertools, 208 Wis. 2d 55, 559 N.W.2d 571 (1997) (on petition for review).
- 71. State v. Wis. Cent. Transp. Corp., 209 Wis. 2d 278, 562 N.W.2d 152 (1997) (on petition for review).
- 72. State v. Watson, 209 Wis. 2d 281, 562 N.W.2d 151 (1997) (on certification).
- 73. DeRuyter v. Wis. Elec. Power Co., 211 Wis. 2d 169, 565 N.W.2d 118 (1997) (on petition for review).
- 74. Moulas v. PBC Productions, Inc., 217 Wis. 2d 449, 576 N.W.2d 929 (1998) (on petition for review).
- 75. Eneman v. Richter, 224 Wis. 2d 258, 589 N.W.2d 414 (1999) (on petition for review).
- 76. State v. Deborah J.Z., 225 Wis. 2d 33, 590 N.W.2d 711 (1999) (on certification).
- 77. State ex rel. Luedtke v. Bertrand, 226 Wis. 2d 271, 594 N.W.2d 370 (1999) (on petition for review).

78. In re Commitment of Thomas, 231 Wis. 2d 241, 603 N.W.2d 84 (1999) (on petition for review).
79. Douglas-Hanson Co., Inc. v. BF Goodrich Co., 2000 WI 22, 233 Wis. 2d 276, 607 N.W.2d 621 (on petition for review).
80. State v. Longcore, 2000 WI 23, 233 Wis. 2d 278, 607 N.W.2d 620 (on petition for review).
81. Guzman v. St. Francis Hosp., Inc. 2000 WI 34, 234 Wis. 2d 170, 609 N.W.2d 166 (on bypass).
82. State v. Strong, 2000 WI 50, 235 Wis. 2d 379, 611 N.W.2d 457 (on petition for review).
83. Powell v. Cooper, 2001 WI 10, 241 Wis. 2d 153, 622 N.W.2d 265 (on petition for review).
84. State ex rel. Marberry v. Macht, 2001 WI 19, 241 Wis. 2d 695, 623 N.W.2d 135 (on certification).
85. State v. Bond, 2001 WI 56, 243 Wis. 2d 476, 627 N.W.2d 484 (on petition for review).
86. In re Commitment of Schulpus, 2001 WI 69, 244 Wis. 2d 401, 628 N.W.2d 349 (on bypass).
87. S.J.A.J. v. First Things First, Ltd., 2001 WI 118, 247 Wis. 2d 1029, 635 N.W.2d 292 (on petition for review).
88. Servais v. Kraft Foods, Inc., 2002 WI 42, 252 Wis. 2d 145, 643 N.W.2d 92 (on petition for review).
89. State v. Greer, 2003 WI 20, 260 Wis. 2d 43, 658 N.W.2d 795 (on certification).
90. State v. Agnello, 2003 WI 44, 261 Wis. 2d 331, 664 N.W.2d 55 (on certification).

91. Wenke v. Gehl Co., 2003 WI 96, 263 Wis. 2d 675, 665 N.W.2d 211 (on certification).
92. Hoyme v. Brakken, 2004 WI 26, 270 Wis. 2d 55, 677 N.W.2d 233 (on petition for review).
93. Dairyland Greyhound Park, Inc. v. Doyle, 2004 WI 34, 270 Wis. 2d 267, 677 N.W.2d 275 (on certification).
94. State v. Thornton, 2004 WI 35, 270 Wis. 2d 265, 677 N.W.2d 274 (on petition for review).
95. St. Paul Fire & Marine Ins. Co. v. Keltgen, 2004 WI 37, 270 Wis. 2d 315, 677 N.W.2d 297 (on petition for review).
96. Lynch v. Carriage Ridge, LLC, 2004 WI 53, 271 Wis. 2d 608, 679 N.W.2d 514 (on petition for review).
97. GPS, Inc. v. Town of St. Germain, 2004 WI 81, 273 Wis. 2d 103, 681 N.W.2d 533 (on petition for review).
98. Wis. Bell, Inc. v. Public Serv. Comm'n of Wis., 2005 WI 23, 279 Wis. 2d 1, 693 N.W.2d 301 (on petition for review).
99. Strenke v. Hogner, 2005 WI 25, 279 Wis. 2d 52, 694 N.W.2d 296 (on certification).
100. State v. Jensen, 2005 WI 31, 279 Wis. 2d 220, 694 N.W.2d 56 (on petition for review).
101. State v. Chvala, 2005 WI 30, 279 Wis. 2d 216, 693 N.W.2d 747 (on petition for review).
102. Heikkinen v. United Servs. Auto. Ass'n, 2007 WI 124, 305 Wis. 2d 68, 739 N.W.2d 489 (on petition for review).
103. Wis. Realtors Ass'n v. Town of West Point, 2007 WI 139, 306 Wis. 2d 42, 743 N.W.2d 441 (on certification).

104. Hornback v. Archdiocese of Milwaukee, 2008 WI 98, 313 Wis. 2d 294, 752 N.W.2d 862 (on petition for review).
105. Polsky v. Virnich, 2009 WI 66, 318 Wis. 2d 599, 769 N.W.2d 52 (on certification).
106. Metro. Milwaukee Ass'n of Commerce, Inc. v. City of Milwaukee, 2010 WI 122, 329 Wis. 2d 537, 789 N.W.2d 734 (on certification).
107. Phillips v. U.S. Bank Nat. Ass'n, 2010 WI 131, 329 Wis. 2d 639, 791 N.W.2d 190 (on petition for review).
108. Polsky v. Virnich, 2011 WI 13, 332 Wis. 2d 1, 800 N.W.2d 742 (on petition for review).
109. State v. Henley, 2011 WI 68, 335 Wis. 2d 559, 800 N.W.2d 418 (on motion to file amicus brief).
110. Polsky v. Virnich, 2011 WI 69, 335 Wis. 2d 555, 804 N.W.2d 80 (on motion to disqualify Justice Roggensack).
111. Wis. Prosperity Network v. Myse, 2012 WI 27, 339 Wis. 2d 243, 810 N.W.2d 356 (original action).
112. State Farm Fire & Cas. Co. v. Hague Quality Water, Intern., 2014 WI 5, 352 Wis. 2d 308, 841 N.W.2d 819 (on petition for review).
113. Sohn Mfg., Inc. v. LIRC, 2014 WI 112, 358 Wis. 2d 308, 854 N.W.2d 371 (on petition for review).
114. New Richmond News v. City of New Richmond, 2015 WI 106, 365 Wis. 2d 610, 875 N.W.2d 107 (on bypass).
115. Clark ex rel. Gramling v. Am. Cyanamid Co., 2016 WI 24, 367 Wis. 2d 540, 877 N.W.2d 117 (on certification).

ATTACHMENT B

Equally Divided Court:

Cases Not Naming Justices

1. State ex rel. Dunning v. Giles, 2 Pin. 166 (1849) (on writ of mandamus).
2. Oshoga v. State, 3 Pin. 56 (1850) (on appeal).
3. Selleck v. Griswold, 49 Wis. 39 (1880) (on appeal).
4. State ex rel. Dietrich v. Patterson 119 Wis. 52, 96 N.W. 1135 (1903) (on appeal).
5. Francisco v. Hatch, 124 Wis. 220, 101 N.W. 1135 (1905) (on appeal).
6. Swenson v. Flint, 123 Wis. 613, 101 N.W. 1135 (1905) (on appeal).
7. Montayne v. N. Electrical Mfg. Co., 127 Wis. 22, 105 N.W. 1043 (1905) (on appeal).
8. Stark v. Huber Mfg. Co., 130 Wis. 432, 100 N.W. 231 (1907) (on appeal).
9. State ex rel. McGovern v. Williams, 130 Wis. 588, 110 N.W. 1135 (1907) (on writ of mandamus).
10. Pfister v. McGovern, 132 Wis. 533, 111 N.W. 1135 (1907) (on appeal).
11. Hagenah v. Milwaukee Elec. Ry. & Light Co., 136 Wis. 300, 116 N.W. 843 (1908) (on appeal).
12. Hahn v. Eells, 177 Wis. 378, 187 N.W. 686 (1922) (on appeal).
13. Kieckhefer Box Co. v. John Strange Paper Co., 180 Wis. 367, 189 N.W. 145 (1922) (on appeal).
14. Cunneen v. Kalscheuer, 203 N.W. 737 (1925) (on appeal).

15. City of Barron v. Indus. Comm'n, 188 Wis. 653, 206 N.W. 978 (1926) (on appeal).
16. Luebke v. Danaher, 195 Wis. 660, 219 N.W. 270 (1928) (on appeal).
17. State ex rel. Dammann v. Ballard, 198 Wis. 23, 223 N.W.2d 93 (1929) (on appeal).
18. Halamka v. Schneider, 197 Wis. 538, 222 N.W. 821 (1929) (on appeal).
19. Gooder v. State, 198 Wis. 42, 223 N.W. 408 (1929) (on appeal).
20. In re Relocation of Cty. Hwy. J, 199 Wis. 75, 225 N.W. 750 (1929) (on appeal).
21. Aylward v. Indus. Comm'n, 202 Wis. 171, 228 N.W. 133 (1929) (on appeal).
22. Seifert v. Milwaukee & Suburban Transport Corp., 4 Wis. 2d 623, 91 N.W.2d 236 (1958) (on appeal).
23. Joint School Dist. No. 1 v. Thuss, 4 Wis. 2d 207, 89 N.W.2d 797 (1958) (on appeal).
24. In re Todd's Estate, 16 Wis. 2d 635, 115 N.W.2d 551 (1962) (on appeal).
25. Godard v. State, 55 Wis. 2d 189, 197 N.W.2d 811 (1972) (on appeal).
26. Beckley v. Seidita, 87 Wis. 2d 911, 276 N.W.2d 301 (1979) (unpublished per curiam—cites are to tables).

