WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
JANUARY 2014

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

Dunn
Grant
Milwaukee
Sheboygan
Trempealeau
Waukesha
Wood

THURSDAY, JANUARY 9, 2014

9:45 a.m.	2012AP183	- Randy L. Betz v. Diamond Jim's Auto Sales
10:45 a.m.	2012AP1812	- County of Grant v. Daniel A. Vogt
1:30 p.m.	2012AP150-CR	- State v. Jessica A. Nellessen

TUESDAY, JANUARY 14, 2014

9:45 a.m.	2012AP667	- Brian Casey v. Ronald Smith, et al.
10:45 a.m.	2012AP392	- State Farm v. Hague Quality Water, International

WEDNESDAY, JANUARY 15, 2014

9:45 a.m.	2012AP2402	- Hailey Marie-Joe Force, et al. v. American Family Mut. Ins. Co.
10:45 a.m.	2012AP2085	- Kelli Brandenburg v. Robert Luethi
1:30 p.m.	2011AP2907-CR	- State v. Antonio D. Brown

The Supreme Court calendar may change between the time you receive these synopses and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. That office will also have the names of the attorneys who will be arguing the cases.

Media interested in providing camera coverage, must make requests 72 hours in advance by calling media coordinator Rick Blum at (608) 271-4321. Summaries provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
THURSDAY, JANUARY 9, 2014
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed a Milwaukee County Circuit Court decision, Judge Maxine A. White, presiding.

2012AP183 Betz v. Diamond Jim's Auto Sales

This case arises from a lawsuit over the sale of a defective used car. The parties ultimately reached a settlement agreement that was satisfactory to each without their attorneys' knowledge. This raised questions from the plaintiff's attorney about the enforceability of that agreement and the attorney's ability to recover fees under certain fee-shifting statutes.

The Supreme Court examines several issues, including a potential conflict between the provisions of fee-shifting statutes and the established public policy right of parties to settle disputes. The Court also reviews whether the parties' settlement agreement was a valid, unambiguous, binding contract that released used car dealer Diamond Jim's Auto Sales of any further obligation in connection with plaintiff Randy L. Betz's claims, including responsibility for Atty. Vince Megna's fees.

Some background: Betz spent close to $10,000 on a 1990 Cadillac Escalade sold by Diamond Jim's. Before Betz purchased the vehicle, Diamond Jim's allegedly represented to him that the vehicle was in proper working order.

Betz discovered, among other problems, that the engine needed to be replaced. Diamond Jim's paid $1,800 toward the engine replacement and Betz was to pay $1,000 of the repair cost. Betz allowed Diamond Jim's to put a lien on the vehicle until Betz paid for the repair in full.

Betz then hired Megna to represent him in a lawsuit against Diamond Jim's. On Feb. 12, 2010, Betz executed a retention agreement with Megna that outlined how fees would be handled, depending how the case resolved.

On March 1, 2010, Megna filed on Betz's behalf a complaint against Diamond Jim's for: (1) advertising injury, alleged to violate Wis. Stat. § 100.18; (2) intentional fraudulent misrepresentation; (3) alleged violation of Wis. Stat. § 218.0116, which regulates the licensing of automobile dealers; and (4) punitive damages. Betz's complaint sought damages and, in connection with Diamond Jim's alleged violation of §§ 100.18 and 218.0116, the costs and attorney's fees permitted for a recovery under those sections. See Wis. Stat. §§ 100.18(11) & 218.0163(2).

Diamond Jim's hired a lawyer who answered Betz's complaint and sought dismissal of all of Betz's claims. The attorneys exchanged offers to settle, but none were accepted. Eventually, Diamond Jim's management decided to reach out to Betz directly, without any lawyers involved. On April 4, 2011, and without the knowledge or participation of counsel, Diamond Jim's and Betz entered into a settlement agreement whereby Diamond Jim's agree to pay $15,000 to Betz and Betz agreed to dismiss his claims against the car dealer.

After learning of the agreement, Megna unsuccessfully moved the trial court to award him a significant amount in statutory attorney fees. Megna also moved the trial court to allow his firm to intervene in the lawsuit as a plaintiff and to assert a claim against Diamond Jim's for an intentional interference with the firm's contractual relationship with Betz.

The trial court ruled that the settlement agreement was a valid, unambiguous, binding contract that released Diamond Jim's of any further obligation in connection with Betz's claims. The trial court therefore denied Megna's fee motion and his motion to intervene. The trial court also entered an order dismissing Betz's lawsuit against Diamond Jim's.

Megna, still purporting to represent Betz, appealed. The Court of Appeals reversed the dismissal, holding that the settlement agreement between Betz and Diamond Jim's was void on public policy grounds.

WISCONSIN SUPREME COURT
THURSDAY, JANUARY 9, 2014
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed a Grant County Circuit Court decision, Judge Robert P. VanDeHey, presiding.

2012AP1812 County of Grant v. Vogt

This case examines whether an officer who approaches a vehicle without probable cause or reasonable suspicion that a violation of the law has been committed, and then knocks on the window and motions for the driver to roll down his window, unreasonably seizes the driver.

Some background: At 1 a.m. on Christmas Day 2011, a police officer observed a vehicle pull into a Cassville public boat landing and stop with its lights on. The officer testified at trial that because of the time of year, the time of night, and the fact that the park closes at 11 p.m. (though not necessarily the parking lot itself), he called the vehicle in as suspicious and pulled his squad car into the boat landing where he parked behind the vehicle.

The officer testified that when he parked behind the vehicle, he did not activate his emergency lights. The officer testified that he approached the driver's side window of the vehicle, where he observed Daniel A. Vogt in the driver's seat of the vehicle and an unidentified woman in the passenger seat. The officer testified that he knocked on the driver's side window of the vehicle and motioned for the driver to roll the window down. The officer further testified that once the window was rolled down, he smelled the odor of intoxicants and observed that Vogt's speech was slurred.

Grant County charged Vogt with OWI. Vogt filed a motion to suppress, challenging the lawfulness of his detention. The trial court denied Vogt's motion following an evidentiary hearing at which only the officer testified. The trial court observed that "this is a close case," but found that the officer's initial contact with Vogt did not amount to a seizure.

Following the denial of Vogt's motion to suppress, the case was tried before the court. The officer testified that he had approached Vogt's vehicle, rapped on its window and asked Vogt for his driver's license. The officer testified that while he was talking with Vogt, he noticed that Vogt's speech was slurred and he observed the odor of intoxicants coming from the vehicle.

Vogt testified that he did not believe that he had any alternative to rolling down his window and that his options for voluntarily driving away were limited by obstacles, including the Mississippi River, a vending machine and the location of the officer and the patrol car.

Following the presentation of evidence, Vogt renewed his motion to suppress. The trial court denied Vogt's motion to suppress and found Vogt guilty of OWI.

Vogt appealed, and the Court of Appeals found in Vogt's favor, finding that "here it is not the officer's approach or request to see Vogt's license that represents the seizure. Rather, it is the officer's actions indicating that Vogt should comply with the officer's directive to roll down his window and speak with him."

In appealing to the Supreme Court, the county argues that officers "need to and should be able to approach a motor vehicle and talk to the occupants no differently than an officer would be able to approach a person sitting on a park bench." The county also argues that, especially in wintertime in Wisconsin, an officer ought to be able to knock on a car window and motion for a

driver to roll the window down without transforming the approach and encounter into an unreasonable seizure. The county argues that the Court of Appeals' decision "renders officers unable to approach occupants of vehicles during the winter and to engage in voluntary conversations."

Vogt accuses the county of wanting this court to establish a bright-line rule, whereby an officer may always approach a vehicle and knock on the window without the encounter amounting to an unreasonable seizure. Vogt also argues that, under the circumstances of this case, a reasonable person would not feel free to ignore the officer's directive.

WISCONSIN SUPREME COURT
THURSDAY, JANUARY 9, 2014
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed a Wood County Circuit Court decision, Judge Todd P. Wolf, presiding.

2012AP150-CR State v. Nellessen

This case examines whether a criminal defendant who wants to compel the state to disclose the identity of an informer must make a preliminary showing that the informer could possibly give specifically delineated testimony that could create a reasonable doubt about the defendant's guilt by supporting the asserted theory of defense.

Some background: On June 28, 2011, Jason Punke, a City of Marshfield police officer, stopped a vehicle driven by Jessica A. Nellessen. Nellessen had four passengers. Punke testified that he stopped the vehicle because of an obstructed view violation. Punke testified that while checking the passengers for identification, he smelled a raw odor of marijuana. He then searched the passenger compartment of the car and found a prescription bottle containing a small amount of marijuana. Another Marshfield police officer, James Cramm, testified that in a subsequent search, a larger amount of marijuana, approximately 14 ounces, was found hidden inside a computer located in the trunk of the car.

Nellessen was charged with one count of possession with intent to deliver THC. Nellessen filed a motion to suppress any evidence obtained as a result of the search of her vehicle. She argued that her vehicle was stopped without reasonable suspicion and that her vehicle was searched without a warrant or probable cause.

At the suppression hearing, Cramm testified that prior to the stop, he had received "a tip from another detective that this car would be coming through Marshfield and that it contained approximately a pound of marijuana."

The detective "had received [the information] from a confidential informant." Cramm further testified that Punke was aware of the confidential tip and that the tip was part of the reason that Officer Punke had stopped Nellessen's vehicle. Cramm testified: "My instructions to Punke were to find a violation to stop the vehicle."

Following the hearing on her motion to suppress, Nellessen moved to compel disclosure of the identity of the confidential informant pursuant to Wis. Stat. § 905.10(3)(b). Nellessen "adamantly denied any knowledge of the large quantity of controlled substances in her vehicle." She argued that "whether [she] was aware of the large quantity of marijuana in her vehicle" would "be the critical issue at trial."

Nellessen further alleged that she needed to know the identity of the informant because "[i]f the informant knew the direction of travel [of Nellessen's vehicle] and the existence of controlled substances in the vehicle," it was a "reasonable [inference] that the informant [might] also know whether [Nellessen] was aware that the marijuana [was] in the vehicle."

The circuit court denied Nellessen's motion to compel disclosure. The court found that Nellessen had not sufficiently shown how disclosure of the informant's identity "pertain[ed] particularly to the facts of [her] guilt or innocence."

Nellessen sought leave to appeal. The Court of Appeals granted her request for discretionary appeal and reversed.

On appeal, Nellessen argued that the circuit court erred in refusing to conduct an *in camera* review. She asserted that the court should have determined whether there was reason to believe that the confidential informant may be able to provide testimony "necessary to a fair determination of [Nellessen's] guilt or innocence," pursuant to § 905.10(3)(b).

According to the Court of Appeals, the question before the circuit court was therefore whether the informant might have information that bears on "whether Nellessen was aware that the marijuana was in her trunk," citing State v. Outlaw, 108 Wis. 2d 112, 124-26, 321 N.W.2d 145 (1982).

The court then observed that here, the informer in question provided a considerable amount of detail to the police regarding the transportation of the marijuana: the model of the motor vehicle; the route of travel; the approximate amount of marijuana involved; and that the marijuana was located in the trunk. The court deemed it reasonable to infer from the information provided by the informer to the police that there is a "possibility" that the informer could supply testimony necessary to a fair determination of whether Nellessen was aware that the marijuana was in the trunk of her vehicle at the time the police stopped her in Marshfield.

The state argues that even if the informer says that Nellessen was not present when the marijuana was placed into the trunk, or that she did not take part in any conversation regarding the conspiracy, that this is not sufficient because Nellessen could have learned of the presence of marijuana in her trunk in some manner of which the informer was unaware.

The state further argues that whether Nellessen was present when the marijuana was placed into the trunk or participated in particular conversations about the conspiracy, while relevant, is not sufficient to trigger the *in camera* review because relevancy is not the issue. A decision from the Supreme Court could clarify the threshold to justify an *in camera* review or disclosure of information related to confidential informants.

WISCONSIN SUPREME COURT
TUESDAY, JANUARY 14, 2014
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which affirmed a Dunn County Circuit Court decision, Judge Rod W. Smeltzer, presiding.

2012AP667 Casey v. Smith

This case involves a dispute between two insurers over coverage for an accident that occurred while a semi-truck was being driven to the shop to have the front grille and an oil filler tube replaced. The Supreme Court examines the what is known in insurance circles as a "truckmen's endorsement."

A resolution in this case could depend, at least in part, on a determination of whether the truck was being driven for business purposes on behalf of a freight company at the time of the accident or not.

Some background: Interstate trucking lines often lease equipment, with drivers, in order to avoid the expense of owning their own vehicles and employing their own drivers. Federal regulations govern many aspects of these leasing arrangements, including the procurement of liability insurance coverage. Lessees generally attempt to restrict their potential liability to those times when the vehicle is being put to its business use. Additional insurance coverage is required to protect the lessor during those periods when the truck is not being used for trucking purposes. This additional coverage, or "truckmen's endorsement," customarily exempts the truck and/or trailer from coverage when it is used to carry property in any business or while used in the business of anyone to whom the truck is rented or leased.

In this case, John Zeverino owned and operated a 1993 Freightliner. He leased the vehicle to Taylor Truck Line, Inc. for which he worked as an independent contractor. Acceptance Casualty Insurance Co. issued a non-trucking use automobile policy to Zeverino; Great West Casualty Co. issued a commercial automobile policy to Taylor Truck Line.

The lease agreement stated that Zeverino would use the truck "to transport, load and unload on behalf of [Taylor Truck Line] . . . such traffic as [Taylor Truck Line] may from time to time make available to [Zeverino.]" The agreement further specified that Taylor Truck Line would have "exclusive possession, control and use" of the truck and would "assume complete responsibility to the public for the operation of [the truck]" during the term of the lease. It also provided that Zeverino would be responsible for "[m]aintaining the [truck] in the state of repair required by all regulations" and would bear all repair and maintenance expenses.

Taylor Truck Line agreed "to provide and maintain insurance coverage for the protection of the public from damage to persons and property[.]" However, Taylor Truck Line's insurance would be in effect only when the truck was "being operated in the exclusive service of [Taylor Truck Line] and while actually engaged in transportation for [Taylor Truck Line.]" Zeverino, in turn, agreed to carry insurance for when the truck is not used for business purposes under the contract, or non-trucking insurance.

In accordance with the lease agreement, Taylor Truck Line obtained a commercial automobile policy from Great West, which provided $1 million in liability coverage; Zeverino obtained a non-trucking use policy from Acceptance Casualty, which also had a $1 million

liability limit. Zeverino's non-trucking use policy from Acceptance Casualty had two exclusions that are at issue here.

Zeverino was on the way to a truck dealership to have a damaged grille and oil filler tube replaced when he was involved in an accident with three other vehicles, including one driven by Brian Casey – the plaintiff in this case. Zeverino was not in route for Taylor Truck line at the time of the accident, but had entered in his driver's log that he was "driving," rather than "off duty."

At his deposition, Zeverino testified he "needed to get [the grille] repaired" because it was "already starting to fall apart and fall off on the highway." A State Patrol accident report after the accident noted that no violations were discovered during the inspection, even after the accident.

At the accident scene, Zeverino logged himself as "on duty (not driving)" on his driver's daily log. Following the accident, he drove the truck to FABCO, where the grille and oil filler tube were replaced as planned.

Casey subsequently sued Zeverino and several other defendants, asserting personal injury claims. Great West and Acceptance Casualty disagreed over which of their policies covered Casey's claims. Both insurers agreed that one, but not both, of their policies afforded coverage. They also agreed that resolution of the coverage issue turned on whether Zeverino was operating the truck "in the business of" Taylor Truck Line at the time of the accident. If so, Great West's commercial automobile policy provided coverage; if not, Acceptance Casualty's non-trucking use policy provided coverage.

Both sides moved for summary judgment. The trial court agreed with Great West that Zeverino was not acting "in the business of" Taylor Truck Line at the time of the accident. As a result, the court concluded the Acceptance Casualty policy, not the Great West policy, provided coverage. Acceptance Casualty appealed, unsuccessfully. The Court of Appeals agreed with the trial court's ruling that the truck was not being used "in the business of" Taylor Truck Line at the time of the accident.

WISCONSIN SUPREME COURT
TUESDAY, JANUARY 14, 2014
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which reversed a Sheboygan County Circuit Court decision, Judge James J. Bolgert, presiding.

2012AP392 State Farm v. Hague Quality Water

This case involves a dispute over financial responsibility for property damage caused when a water softener that was installed by a landlord failed at a rental property.

The Supreme Court examines the economic loss doctrine and whether tort claims are precluded because – as determined by the Court of Appeals here – the water softener is not part of an integrated system with the drywall, flooring, and woodwork that was damaged.

Some background: Larry Krueger purchased a water softener from Menards and installed it in a rental house he owned. The water softener was manufactured by Hague Quality Water, International. The limited warranty provided that in the event of a defect, Hague would repair or replace the defective parts but would not be responsible for any "incidental, consequential or secondary damages."

Two years later the water softener failed, causing nearly $45,000 in damage to the drywall, flooring and woodwork in Krueger's home. Krueger's loss was covered by Krueger's homeowners insurance policy issued by State Farm Fire and Casualty Company, and he was reimbursed for the loss. State Farm then filed suit against Hague and its insurer, The Cincinnati Insurance Company, alleging tort claims for the defective water softener.

Hague moved for summary judgment, contending that all of State Farm's damages were economic and, therefore, precluded by the economic loss doctrine. The circuit court agreed and dismissed State Farm's complaint on the grounds that the economic loss doctrine barred recovery. The economic loss doctrine bars the recovery of purely economic losses in consumer transactions through tort remedies where the only damage is to the product purchased by the consumer.

The Court of Appeals reversed in a published decision.

The Court of Appeals stated that "a defective product must be integral to the function of the damaged property before the defective product and the damaged property may be considered part of the same integrated system." The court then concluded that "the damaged property in this action—the drywall, flooring, and woodwork—are not part of an integrated system with the water softener."

Hague and its insurer, the Cincinnati Insurance Company, appealed to the Supreme Court. A decision by the Supreme Court could clarify how the warranty and economic loss doctrine may affect insurance coverage under the circumstances presented here.

WISCONSIN SUPREME COURT
WEDNESDAY, JANUARY 15, 2014
9:45 a.m.

This is a certification from the Wisconsin Court of Appeals, District II (headquartered in Waukesha). The Court of Appeals may certify cases that it believes cannot be resolved by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case originated in Waukesha County Circuit Court, Judge J. Mac Davis, presiding.

2012AP2402 Force v. American Family

In this certification, the Court of Appeals asks the Supreme Court to resolve several questions arising from a lawsuit over a fatal car accident:

- Can the minor children of a man killed in a car accident recover for wrongful death under Wis. Stat. § 895.04 when there is a surviving spouse, but that surviving spouse has been estranged from the decedent for over 10 years, thus precluding any recovery by the spouse from which to set aside the children's share?
- If the statute does not allow the children to recover absent a recovery by the surviving spouse, does the statute violate the Equal Protection Clause of the U.S. Constitution by impermissibly differentiating between minor dependent children by conditioning their recovery on the viability of the surviving spouse's claim?
- Is there a rational basis for providing recovery to minor children whose deceased parent's surviving spouse has a viable claim and denying recovery to those whose deceased parent's surviving spouse does not?

Some background: Billy Joe Force died on Dec. 12, 2008 following a car accident. He was married but had long been estranged from his wife Linda. Billy and Linda separated in 1996, after six months of marriage. The couple had no children with each other, but Billy had three minor daughters from other non-marital relationships.

Billy provided Linda no pecuniary support from 1997 to his death and had no contact at all with Linda in the five years preceding his death. Linda, however, as the surviving spouse, is the special administrator of Billy's estate.

Linda, the estate, and Hailey Marie-Joe Force (Billy's adjudicated daughter born Dec. 3, 2008) sought wrongful death damages. Hailey claimed "an independent, cognizable claim for relief of her own" but also claimed, alternatively, that "the court has a duty and obligation to determine an amount that should be set aside for [her] protection."

In a separate case, Mehgan and Lauren Force, Billy's daughters born Feb. 22, 2002, and Sept. 24, 2000, sought damages for wrongful death, claiming that they were entitled to Billy's "aid, society and companionship." The two cases were consolidated in the circuit court.

The plaintiffs in both cases sued Jeffrey Brown, the driver of the other vehicle in the fatal accident, his insurer, American Family Mutual Insurance Company, and Regent Insurance Company, the insurer of Billy's employer, for whom he was driving at the time of the accident.

Regent, American Family, and Brown (collectively, Regent) moved for summary judgment. The circuit court granted the motion, ruling: (1) that the children did not have an independent cause of action under Wis. Stat. § 895.04; (2) that Linda had no compensable damages; (3) that because Linda could not recover, there was no offset for Hailey (the other girls did not claim an offset in their complaint); and (4) dismissing Linda and all three children's claims.

As the Court of Appeals' certification memo explains, it appears that under controlling law, see Wis. Stat. § 895.04 and Cogger v. Trudell, 35 Wis. 2d 350, 353, 151 N.W.2d 146 (1967), the children do not have an independent cause of action because their share, by the terms of the statute, is "set aside" from the spouse's award. Id. at 358. This decision, however, did not contemplate a non-recovery situation where there is no negligence on the part of the surviving spouse and the children are not dependents of the surviving spouse. The court notes that despite a number of amendments to the statute, the legislature has not changed Cogger's reading of the statute, which carves out the minor children's recovery only if the surviving spouse recovers.

The court explains that although "[a]t first blush, Cogger and its progeny seem to unquestionably preclude the children's recovery in this case" public policy and possibly the statute itself arguably supports a ruling that gives minor children the ability to recover even when the spouse cannot. The Court of Appeals expresses concern that the rule precluding recovery for the children potentially raises an equal protection issue by treating marital and non-marital children differently. The court states that "there are real public policy and equal protection questions posed by this case, and, because answering them in a fair manner would require us to overrule Cogger, they are questions for the Supreme Court, not the Court of Appeals."

WISCONSIN SUPREME COURT
WEDNESDAY, JANUARY 15, 2014
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which reversed a Trempealeau County Circuit Court decision, Judge John A. Damon, presiding.

2012AP2085 Brandenburg v. Luethi

In this case, the Supreme Court examines what constitutes "inherently dangerous" work for purposes of the exception to the general rule that a principal is not liable for an independent contractor's torts.

Some background: Robert Luethi and his insurer, McMillan-Warner Mutual Insurance Company, seek review of the Court of Appeals' authored, unpublished decision reversing a judgment that dismissed claims against them brought by Kelli and Bruce Brandenburg.

The Brandenburgs' complaint alleged that Luethi hired Briarwood Forestry Services, LLC, to apply herbicides to Luethi's property, and that Briarwood's negligent application of the herbicides damaged trees and plants on the Brandenburgs' land.

The central issue is whether Briarwood's application of the herbicides was an "inherently dangerous" activity, such that Luethi could be held liable for injuries to the Brandenburgs even though Briarwood was an independent contractor.

The trial court concluded Luethi could not be held liable for Briarwood's alleged negligence because the application of the herbicides was not an inherently dangerous activity. The Court of Appeals reversed, holding that Briarwood's application of the herbicides was an inherently dangerous activity.

Citing Wagner v. Continental Casualty Co., 143 Wis. 2d 379, 421 N.W.2d 835 (1988) and Wis JI—Civil 1022.6, the Court of Appeals held that two elements are necessary for an activity to be considered inherently dangerous: the activity must pose a naturally expected risk of harm; and it must be possible to reduce the risk to a reasonable level by taking precautions.

Luethi argues that a federal district court in Kansas correctly described the meaning of "inherently dangerous" in Desaire v. Solomon Valley Co-Op, 1995 U.S. Dist. LEXIS 14523 (D. Kan. Sept. 14, 1995), a case with a similar fact pattern involving herbicide damage to a neighboring property. Luethi further argues that if "inherently dangerous" work means merely that "special" safety precautions are required to render the work safe, then it amounts to an almost boundless exception to independent contractor liability.

The Brandenburgs dispute these assertions. They claim that the definition of "inherently dangerous" work in Wagner, 143 Wis. 2d at 392 is sufficient: "A person engaged in an activity . . . that is inherently dangerous without special precautions, can take steps to minimize the risk of injury. Examples include general construction, demolition, and excavation."

That the federal district court in Kansas used a multi-factor test to define "inherently dangerous" work in a drifting herbicide case is, the Brandenburgs say, totally irrelevant. And, the Brandenburgs say, herbicides are inherently dangerous products, and there are known safety precautions that should be taken to reduce the risks inherently present in spraying herbicides. Thus, the Brandenburgs contend that the work at issue here was inherently dangerous, and Luethi should be on the hook for liability.

WISCONSIN SUPREME COURT
WEDNESDAY, JANUARY 15, 2014
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed a Milwaukee County Circuit Court decision, Judge Rebecca F. Dallet, presiding.

2011AP2907-CR State v. Brown

This Fourth Amendment case examines the legality of a traffic stop that started as a possible defective tail light violation, and ultimately resulted in charges of felon in possession of a firearm against Antonio D. Brown.

The Supreme Court reviews whether the Court of Appeals properly concluded that a tail lamp that is 66-percent functional is in "good working order" as required under Wis. Stat. § 347.13(1), and thus cannot serve as a basis for an officer's probable cause to stop the vehicle.

The Supreme Court also may consider this case in light of the U.S. Supreme Court's decision in Arizona v. Gant, 556 U.S. 332 (April 21, 2009). Gant holds that an officer who makes an arrest for a traffic offense can only search the vehicle incident to that arrest if (1) at the time of the search, the arrestee is unsecured and within arms' reach of the passenger compartment, or (2) it is reasonable to believe that evidence related to the crime of arrest is located within the passenger compartment.

Some background: Police stopped Brown's vehicle for a defective tail light. Brown himself was riding as a passenger in the backseat of his own vehicle. He was intoxicated and a friend was driving the car. There was also a woman riding in the front passenger seat.

Police testified they stopped the car on July 3, 2010 at about 9:30 p.m. in an area known for drug deals, just as the car was pulling over to park. Several squad cars were involved. Police officers testified they saw Brown make a movement, like he was kicking something under the car seat. All occupants of the vehicle were removed and handcuffed and sat on the curb. Police then shone a flashlight into the open car door, under the rear passenger seat and saw the gun. Although there was conflicting testimony about whether the butt of the gun was visible or not, this is not a "plain view" case. None of the individuals were cited or ticketed for the equipment violation.

Brown moved to suppress the gun on the grounds that the police lacked probable cause or reasonable suspicion to stop the vehicle. After detailed testimony about the vehicle's rear lights and which particular bulbs may or may not have been lit at a given time, the circuit court denied Brown's motion to suppress.

The circuit court found the driver's testimony that he noticed that all of the lights on the 1977 Buick Electra were fully operational before the stop was not credible. The court found the officers' testimony credible and that they were justified in stopping the vehicle. The court subsequently noted during a plea hearing that due to the operational design of the tail lights, it may have been difficult for officers to determine which bulbs inside the tail light panels were supposed to be lit at any given moment.

Brown pled guilty to possession of a firearm by a felon and was sentenced to five years of imprisonment, composed of three years of initial confinement and two years of extended supervision, concurrently with his extended-supervision-revocation sentence.

The circuit court denied Brown's motion for post-conviction relief, explaining that "[e]ven if the defendant had brought [§ 347.13(1)] to the court's attention [during the suppression hearing], the result would have been the same."

Brown appealed, contending that the officers' stop of the vehicle was predicated on a mistake of law because § 347.13(1) does not require that all of a vehicle's tail lights be lit. The Court of Appeals agreed and reversed.

A decision by the Supreme Court could clarify § 347.13(1) and whether an officer's observation of a partially operating tail lamp on a vehicle supplies probable cause to make a stop.