WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
SEPTEMBER 2016

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:

Columbia
Dane
Grant
Racine
Wood

TUESDAY, SEPTEMBER 6, 2016

9:45 a.m.	14AP304-CR	State v. Richard L. Weber
10:45 a.m.	14AP195	Braylon Seifert v. Kay M. Balink, M.D.
1:30 p.m.	14AP2536-FT	Democratic Party of Wis. v. Wis. Department of Justice

FRIDAY, SEPTEMBER 9, 2016

9:45 a.m.	15AP146	Wisconsin Carry, Inc. v. City of Madison
10:45 a.m.	14AP2947	Regency West Apartments LLC v. City of Racine
1:30 p.m.	15AP366-CR	State v. Stanley J. Maday, Jr.

Note: 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. If your news organization is interested in providing any camera coverage of Supreme Court argument in Madison, contact media coordinator Rick Blum at (608) 271-4321. Summaries provided are not complete analyses of the issues presented.

Wisconsin Supreme Court
9:45 a.m.
Tuesday, Sept. 6, 2016

2014AP304-CR State v. Weber

Supreme Court case type: Petition for Review
Court of Appeals: District IV
Circuit Court: Wood County, Judge Gregory J. Potter, reversed
Long caption: State of Wisconsin, Plaintiff-Respondent-petitioner, v. Richard L. Weber, Defendant-Appellant-respondent.

Issue presented: This drunken driving case examines whether a warrantless entry into the "curtilage" of a home (in this case an attached garage) may be justified by hot pursuit alone, or whether a warrantless entry must also be justified with other circumstances.

Some background: A police officer activated his squad's emergency lights and attempted to pull Richard L. Weber over for having a defective brake light on his vehicle. A few seconds later, Weber turned into his driveway and drove into his garage, which is attached to his house. The officer also turned into Weber's driveway, but stopped short of the garage. The officer got out of his squad car and saw Weber, still in the garage, walking up some steps to his house door. The officer told Weber he needed to speak to him, but Weber continued up the steps.

The officer entered the garage and again told Weber he needed to speak to him, but Weber still continued up the steps. When Weber reached the top of the steps and began opening the house door, the officer secured Weber's arm and prevented him from entering his house. During the encounter, the officer observed signs that Weber had been drinking, which ultimately led to his arrest.

Weber sought suppression of the evidence that was obtained after the officer's entry into the garage. After the trial court denied Weber's suppression motion, he pled no contest to one felony count of operating with a prohibited alcohol concentration.

Weber appealed, successfully arguing that the deputy made a warrantless entry into his home that should lead to suppression of evidence. Weber specifically argued: (1) exigent circumstances allow for warrantless entry when there is danger to life, risk of evidence destruction, or likelihood of escape, see State v. Smith, 131 Wis. 2d 220, 231, 388 N.W.2d 601 (1986); (2) an arrest made in "hot pursuit" is a type of circumstance that may qualify as an exigent circumstance, when measured against the time needed to obtain a warrant, id. at 229; (3) therefore, a hot pursuit does not always qualify as an exigent circumstance, but does so only if there is also present one of the above factors that makes it unsound to wait for a warrant.

In this case, Weber argued, a balancing of the deputy's need to enter quickly against the time needed to obtain a warrant shows that there was no exigent circumstance that justified the warrantless entry. Weber noted that there was no evidence of danger to life; that evidence of the offense he was being pursued for – a defective brake light – was not likely to be destroyed; and that flight was implausible for such a minor offense.

The state argues the warrantless entry was justified. Although there was no testimony that the deputy was actually attempting to arrest Weber for failing to stop his car in response to the officer's emergency lights, the state argued there was probable cause to arrest for that offense

at the time of the deputy's entry into the garage, and therefore the deputy's entry was legal. The state also argued that probable cause existed to arrest Weber for resisting or obstructing an officer.

The state notes Wisconsin Stat. § 346.04(2t) states that "[n]o operator of a vehicle, after having received a visible or audible signal to stop his or her vehicle from a traffic officer or marked police vehicle, shall knowingly resist the traffic officer by failing to stop his or her vehicle as promptly as safety reasonably permits." A person who violates that provision "may be fined not more than $10,000 or imprisoned for not more than 9 months or both." Wis. Stat. § 346.17(2t). In addition, a person commits a Class A misdemeanor when he or she "knowingly resists or obstructs an officer while such officer is doing any act in an official capacity and with lawful authority[.]" Wis. Stat. § 946.41(1).

A decision by the Supreme Court could determine whether the deputy's "hot pursuit" of Weber for one or both of these jailable offenses constitutes a sufficient exigency to justify the deputy's warrantless entry into Weber's garage.

Wisconsin Supreme Court
10:45 a.m.
Tuesday, Sept. 6, 2016

2014AP195 Seifert v. Balink

Supreme Court case type: Petition for Review
Court of Appeals: District IV
Circuit Court: Grant County, Judge Craig R. Day, affirmed
Long caption: Braylon Seifert, by his Guardian ad litem, Paul J. Scoptur, Kimberly Seifert and David Seifert, Plaintiffs-Respondents-Respondents, Dean Health Insurance and BadgerCare Plus, Involuntary-Plaintiffs, v. Kay M. Balink, M.D. and Proassurance Wisconsin Insurance Company, Defendants-Appellants-Petitioners.

Issue presented: This medical malpractice case examines Wis. Stat. § 907.02, which incorporates the Daubert standard for reviewing and admitting expert testimony. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

Some background: Dr. Kay M. Balink provided prenatal care to Kimberly Seifert beginning in December 2008. During her regular prenatal visits, Balink recorded Seifert's weight as well as fundal measurements, which measure fetal growth. Seifert also had five ultrasounds. Kimberly weighed 269 pounds at the start of her pregnancy and she gained approximately 36 pounds during the pregnancy. Using fundal measurements, weight gain, and a physical examination, Balink estimated that the baby would weigh eight pounds eight ounces at birth; his actual birth weight was nine pounds, 12 ounces. Balink also tested Kimberly for gestational diabetes using a one-hour glucose screening test. Kimberly's test result was 131 mg/dL. Balink testified that 131 mg/dL was within the normal range which she stated was below 140. Accordingly, she did not order a follow up three-hour tolerance test.

When the time for delivery approached in May 2009, Balink recommended induced labor. Seifert was induced and ready to deliver. After pushing for one hour, there was no significant progress in birthing the baby but she was exhausted. Based on the fatigue, Balink opted to use a vacuum device to assist in the delivery. After utilizing the vacuum, the baby's head emerged, but then retracted; a phenomenon that occurs when the baby's head and shoulder lodges on the mother's pelvis. Balink quickly diagnosed shoulder dystocia, which is a medical emergency that can result in nerve damage or even death due to total oxygen depletion. Balink then directed a series of obstetrical maneuvers to dislodge the baby's shoulder. The baby was born, without brain injury, but was later diagnosed with a brachial plexus nerve injury, permanently inhibiting the growth and use of his left arm.

On July 29, 2011, Seifert sued Balink for negligent care. At trial Seifert's counsel argued that Balink caused the injury by applying excessive traction while dislodging his shoulder. Balink argued that maternal pushing and contractions caused the injury. The plaintiffs' obstetrical expert, Dr. Jeffrey Wener, rendered four opinions critical of Balink, relating to glucose testing, ultrasounds, the use of vacuum assistance and the use of excessive traction force in an attempt to resolve shoulder dystocia.

Before trial, Balink unsuccessfully sought to exclude Wener's testimony on several points. Balink argued that his opinions were unreliable under § 907.02(1) because Wener provided no support for his opinions other than his own qualifications and personal preferences. She notes that Wener did not rely on any other sources of information which might evidence a reliable methodology, such as medical literature.

The Court of Appeals affirmed, concluding that Wener's qualifications and personal preferences were sufficient to satisfy Daubert's reliability inquiry.

Balink argues that Wener's expert testimony was inadmissible under § 907.02(1), under the newer Daubert standard, because his opinions were not based on any reliable principles or methods. Specifically, she asserts: (1) Wener's testimony was based solely on his personal preferences in practicing medicine; (2) Wener did not support his opinion with reference to medical literature; and (3) Wener did not reliably apply his opinions to the facts of the case.

In Daubert, the U.S. Supreme Court examined Rule 702 and explained that the trial court serves as a gatekeeper to ensure that scientific testimony is both relevant and reliable. In order to meet this gate-keeping responsibility, Daubert ruled that the trial court must determine "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue."

To answer these two questions, the Court provided a list of factors that a trial court *may* utilize in its analysis. These factors include: (1) whether the expert's theory or technique "can be (and has been) tested;" (2) "whether the theory or technique has been subjected to peer review and publication;" (3) "the known or potential rate of error" of a particular scientific technique; and (4) whether the subject of the testimony has been generally accepted. The Court emphasized, however, that these factors did not establish "a definitive checklist or test" and that the test of reliability must be "flexible."

A decision by the Supreme Court is expected to clarify "reliable principles and methods" relating to expert testimony under § 907.02.

Wisconsin Supreme Court
1:30 p.m.
Tuesday, Sept. 6, 2016

2014AP2536-FT Democratic Party of Wisconsin v. Wis. Dept. of Justice

Supreme Court case type: Petition for Review
Court of Appeals: District IV
Circuit Court: Dane County, Judge Richard G. Niess, affirmed
Long caption: Democratic Party of Wisconsin and Cory Liebmann, Petitioners-Respondents-Respondents, v. Wisconsin Department of Justice and Kevin Potter, Respondents-Appellants-Petitioners.

Issue presented: The Supreme Court examines the application of the balancing test that may be used by records custodians to determine if the public interest in not releasing a record may outweigh a presumption of disclosure under the state's public records law, Wis. Stats. §§ 19.31-19.37.

Some background: This case arises from a dispute between the state Department of Justice (DOJ) and the Democratic Party of Wisconsin (DPW) over an open records request. Prior to the 2014 election for Wisconsin attorney general, the DPW made an open records request to the DOJ for materials "made at any training program by (then-attorney general candidate) Brad Schimel." In response, the DOJ identified, but declined to produce, two video recordings of presentations made by Schimel, who is now attorney general, during state prosecutors' education and training conferences: a video recording of a 2013 presentation discussing interacting with victims of sensitive crimes and a video recording of a 2009 presentation discussing prosecution of, and common defenses in, internet sexual predator cases.

The DOJ determined "that any legitimate public interest in disclosure of this information is outweighed by the public policies requiring that crime victims and their families be treated with 'fairness, dignity and respect for their privacy.'" The DOJ also asserted that because the 2013 video recording discusses litigation strategy, the strong public interest in the effective investigation and prosecution of crimes outweighed the public's interest in viewing the video recording. The DOJ declined to produce the 2009 video to preserve victim privacy and the ability to effectively investigate and prosecute crimes.

When the DOJ refused to disclose the video recordings, the DPW filed a § 19.37, Stats., petition for a writ of mandamus seeking to compel their production. The circuit court granted the writ of mandamus but stayed the effect of its order pending appeal.

The Court of Appeals affirmed, finding that the video recordings were records that are subject to Wisconsin's open records law, which it said presumes "complete public access" to public records. See John K. MacIver Inst. for Pub. Policy, Inc. v. Erpenbach, 2014 WI App 49, ¶16, 354 Wis. 2d 61, 848 N.W.2d 862.

With respect to the 2013 video recording, the Court of Appeals agreed with the circuit court's finding that the presentation took place in a large conference room with many people present. In his presentation, Schimel focused on a high-profile case from several years earlier and shared lessons learned in dealing with victims of sensitive crimes, tips for interacting with victims, and changes Schimel intended to make in his own practices. The appellate court said

while Schimel provided a great deal of detail, he did not share any identifying information about the victims and information about the underlying crime was previously widely reported.

With respect to the 2009 video recording, the circuit court found that most, if not all, of the strategies Schimel discussed were already widely discussed in the public sphere.

The Court of Appeals noted that upon receipt of an open records request, a records custodian determines whether any statutory or common law exceptions to disclosure apply. If no exceptions apply, the custodian undertakes a balancing test to "weigh the competing interests involved and determine whether permitting inspection would result in harm to the public interest which outweighs the legislative policy recognizing the public interest in allowing inspection." The custodian must specify reasons for not disclosing the requested records.

The Court of Appeals went on to note that when resolving a challenge to the custodian's decision not to disclose via a writ of mandamus, the circuit court independently undertakes the balancing test and determines if the custodian's reasons for non-disclosure are sufficient. The party advocating for non-disclosure bears the burden to show that public interests favoring secrecy outweigh those favoring disclosure, and access to records may be denied only in an exceptional case.

DOJ asks the Supreme Court to confirm the public interest in nondisclosure to protect the integrity of law enforcement trainings and crime victims' privacy. It says in State ex rel. Richards v. Foust, 165 Wis. 2d 429, 433-37, 477 N.W.2d 608 (1991), the Supreme Court discussed a line of cases dating back to at least 1929, which support the general assertion that investigative files often are not subject to disclosure. The DOJ also says in Linzmeyer v. Forcey, 2002 WI 84, ¶30, 254 Wis. 2d 306, 646 N.W.2d 811, the Supreme Court discussed the "strong public interest in investigating and prosecuting criminal activity."

In addition, the DOJ says that the Linzmeyer court adopted as a framework certain considerations found in the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552, pertaining to law enforcement records. The DOJ says FOIA exempts disclosure where production of the law enforcement records "would disclose techniques and procedures for law enforcement investigations or prosecution."

DOJ also says if a final ruling results in an order for disclosure, it may want the opportunity to redact information.

Wisconsin Supreme Court
9:45 a.m.
Friday, Sept. 9, 2016

2015AP146 Wisconsin Carry, Inc. v. City of Madison

Supreme Court case type: Petition for Review
Court of Appeals: District IV
Circuit Court: Dane County, Judge Ellen K. Berz, affirmed
Long caption: Wisconsin Carry, Inc. and Thomas Waltz, Petitioners-Appellants-Petitioner, v. City of Madison, Respondent-Respondent-respondent.

Issue presented: This case examines provisions of the state's concealed carry law, Wis. Stat. § 66.0409. The Supreme Court reviews whether the statute pre-empts an agency of a local unit of government from regulating the carrying of firearms, and whether a local unit of government may enact an ordinance purporting to bestow such authority on an agency.

Some background: The agency involved here is the city of Madison's Transit and Parking Commission, which is the administrator of Madison Metro, the city's bus service; the local unit of government is the city of Madison.

The commission established the "bus rule" pursuant to a city ordinance that authorizes the commission to establish "rules and procedures" relating to transit. *See* MADISON, WIS., GENERAL ORDINANCES § 3.14(4)(h). The bus rule prohibits a person from traveling in a city bus while armed with a weapon of any kind.

Wisconsin Carry, a gun rights advocacy group, filed a petition for declaratory relief, contending that this rule is preempted by the concealed-carry statute, § 66.0409, which provides:

[With exceptions not relevant here], no political subdivision may enact an ordinance or adopt a resolution that regulates the sale, purchase, purchase delay, transfer, ownership, use, keeping, possession, bearing, transportation, licensing, permitting, registration or taxation of any firearm or part of a firearm, including ammunition and reloader components, unless the ordinance or resolution is the same as or similar to, and no more stringent than, a state statute. Wis. Stat. § 66.0409(2).

The statute defines "political subdivision" as a "city, village, town or county." Wis. Stat. § 66.0409(1)(b).

The city moved to dismiss Wisconsin Carry's petition on the grounds that the commission is not a "political subdivision," and the rule is not an "ordinance" or "resolution," as those terms are used in the statute. The circuit court agreed. The Court of Appeals affirmed, leading to Wisconsin Carry's appeal to the Supreme Court.

The Court of Appeals agreed with the circuit court and with the city that the statute plainly preempts only "ordinances" and "resolutions." The bus rule is not an "ordinance" or "resolution" under case law providing generally accepted meanings for those terms, according to the Court of Appeals.

The Court of Appeals presumed that the Legislature was aware of these generally accepted definitions when it enacted § 66.0409. *See* Tydrich v. Bomkamp, 207 Wis. 2d 632, 638-39, 558 N.W.2d 692 (Ct. App. 1996) (court presumed that Legislature was aware of existing case law on damages definition and concluded that Legislature accepted that definition by not specifying a different definition).

The Court of Appeals determined that "judicial restraint dictates that courts 'assume that the legislature's intent is expressed in the statutory language' chosen by the legislature." *See* State ex rel. Kalal v. Circuit Court for Dane County, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. "It is the enacted *law*, not the unenacted *intent*, that is binding ...." ***Id.*** (emphasis added).

Wisconsin Carry complains that the Court of Appeals focused almost entirely on the statute's reference to ordinances and resolutions. The gist of the Court of Appeals' decision, says Wisconsin Carry, is that the Transit and Parking Commission has powers that the Common Council does not.

Wisconsin Carry maintains that the legislature intended to leave municipalities no role in regulating the carrying of firearms, at least not beyond regulations that are no more restrictive than state law.

A decision by the Supreme Court is expected to clarify whether the commission's rule prohibiting a person from traveling in a city bus with a weapon is preempted or not by the concealed carry statute.

Wisconsin Supreme Court
10:45 a.m.
Friday, Sept. 9, 2016

2014AP2947 Regency West Apartments LLC v. City of Racine

Supreme Court case type: Petition for Review
Court of Appeals: District II
Circuit Court: Racine County, Judge Gerald P. Ptacek, affirmed
Long caption: Regency West Apartments LLC, Plaintiff-Appellant-petitioner, v. City of Racine, Defendant-Respondent-respondent.

Issue presented: This case involves a property tax assessment challenge in the city of Racine. The Supreme Court examines law related to the appropriate methodology for assessing low-income housing developments.

Some background: Regency West is the developer and owner of nine eight-family apartment buildings, each with a community center, manager's office, community room and dedicated garage space.

The apartments were constructed in 2010 and 2011 as Section 42 (Internal Revenue Code) housing. Section 42 refers to that section of the tax code that provides tax credits to investors who build affordable housing. The apartments were fully leased as of Feb. 1, 2012.

The city assessed the property at $4,425,000 in 2012 and at $4,169,000 in 2013. Regency West filed a de novo refund action in the circuit court after the city denied Regency West's claims of excessive assessment.

Regency West's expert testified that under an "income approach," the property should have been appraised at $2,700,000 and $2,730,000 for 2012 and 2013, respectively. The city's experts, who used a "sales comparison approach," an "income approach," and a "cost approach," determined that Regency West had not been excessively appraised.

At trial, both sides presented expert testimony supporting their positons.

Regency West presented expert testimony from Scott McLaughlin, who specialized in appraising properties under Section 42 and Section 8, another low-income housing program. McLaughlin criticized the city's assessments and retrospectively appraised the property using an income approach.

The city presented expert testimony from the assessor who performed the valuation of the property, Janet Scites, and its chief assessor, Ray Anderson, who reviewed and approved her work. The city presented expert testimony from its assessor's office and two outside appraisers, Dan Furdek and Peter Weissenfluh, who had spent most of their careers in the Milwaukee assessor's office. Furdek and Weissenfluh retrospectively appraised the property using several different methods of valuation (sales comparison approach, income approach, and cost approach, which seeks to measure the cost to replace the property). They concluded that the city's 2012 and 2013 assessments were not excessive.

After post-trial briefing, the circuit court rendered a decision acknowledging the subjectivity of the expert witnesses' opinions and the importance of credibility. Ultimately, the circuit court found the city's expert witnesses more credible than Regency West's.

Beyond the question of credibility, the circuit court concluded that the city's assessments complied with the requirements of the Wisconsin Property Assessment Manual and Wisconsin law and were therefore entitled to a presumption of correctness. By contrast, the court found errors in the approach of Regency West's expert witness, McLaughlin. Accordingly, it dismissed Regency West's complaint.

Regency West appealed, unsuccessfully.

Among other things, the Court of Appeals wrote that it would defer to the fact finder's drawing of inferences and weighing of expert witnesses' opinions. The Court of Appeals held that it was satisfied that the circuit court properly concluded that the assessments were not excessive and that the presumption of correctness had not been overcome.

In taking the case to the Supreme Court, Regency West presents the following issues:

- Do sales of HUD (Department of Housing and Urban Development) § 8 rent subsidized properties constitute "reasonably comparable" sales of properties with "similar restrictions" for purposes of applying the comparable sales approach to assess an Internal Revenue Code § 42 low income housing tax credit property?
- Is it appropriate to rely solely upon the income approach in valuing subsidized housing projects for property tax assessment purposes?

Wisconsin Supreme Court
1:30 p.m.
Friday, Sept. 9, 2016

2015AP366-CR State v. Stanley J. Maday, Jr.

Supreme Court case type: Petition for Review
Court of Appeals: District IV
Circuit Court: Columbia County, Judge W. Andrew Voigt, reversed
Long caption: State of Wisconsin, Plaintiff-Respondent-Petitioner, v. Stanley J. Maday, Jr., Defendant-Appellant-Respondent.

Issue presented: In this child sexual assault case, the Supreme Court examines the parameters of permissible testimony and whether defendant Stanley J. Maday's attorney was ineffective for failing to object to testimony from a social worker that the court considered to improperly vouch for the credibility of the alleged victim.

Some background: Maday was convicted on three counts of first-degree sexual assault of a child, in violation of WIS. STAT. § 948.02(1)(b) and (e) (2013-14). He was accused of touching a girl's breasts and vagina on several occasions between approximately June 2011 and November 2011.

At trial, in response to questions from defense counsel, the social worker had testified that she is trained to use a highly structured interview process with children, called the cognitive graphic interview, in order to avoid conducting leading interviews and to make answers more reliable.

On cross-examination, the prosecutor asked, "Was there any indication that [the alleged victim] was not being honest during her interview with you?"

[Social worker]: "No."

On redirect examination, the social worker was asked only briefly to clarify an aspect of the oath given to the victim as part of the interview. She did not directly address coaching or honesty issues. A jury found Maday guilty.

Maday sought postconviction relief alleging his trial counsel was ineffective for failing to object to the social worker's testimony. Following a Machner hearing, [State v. Machner, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979)], the circuit court denied Maday's motion.

Maday successfully appealed, arguing again that his trial counsel was ineffective for failing to object to the social worker's testimony, which he asserts constituted expert opinion testimony that the girl was telling the truth.

In reversing, the Court of Appeals noted that in State v. Krueger, 2008 WI App 162, ¶¶10-13, 314 Wis. 2d 605, 762 N.W.2d 114, the court reviewed case law regarding the admissibility of evidence bearing on the credibility of witnesses. In particular, that case addressed case law regarding expert testimony involving the credibility of alleged child sexual assault victims. *See, e.g.*, State v. Haseltine, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984) (holding "[n]o witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth"); State v. Jensen, 147 Wis. 2d 240, 256, 432 N.W.2d 913 (1988) (holding that although a witness may not testify that a complainant is telling the truth, a witness may testify about the consistency of a complainant's

behavior with the behavior of victims of the same crime); State v. Romero, 147 Wis. 2d 264, 277-78, 432 N.W.2d 899 (1988) (holding that a witness may not give an opinion that a complainant is truthful in his or her accusations).

The state contends that the factual situation is significantly different from those presented in previous cases, thereby making more distinct the "nuanced line between permissible testimony describing objective behavioral manifestations of a child's credibility and impermissible testimony expressing subjective beliefs about the credibility of the child."