WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
OCTOBER 2017

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:

Dane
Eau Claire
Jefferson
La Crosse
Milwaukee
Monroe
Racine
St. Croix
Walworth

MONDAY, OCTOBER 2, 2017

9:45 a.m.	15AP829	Penny L. Springer v. Nohl Electric Products Corporation
10:45 a.m.	15AP175	Deutsche Bank National Trust Company v. Thomas P. Wuensch
1:30 p.m.	15AP2429-CR	State v. Shannon Olance Hendricks

TUESDAY, OCTOBER 3, 2017

9:45 a.m.	16AP238-CR	State v. Michael L. Washington
10:45 a.m.	15AP1039	John Y. Westmas v. Selective Ins. Co. of South Carolina
1:30 p.m.	15AP1331	In Re: Partnership Health Plan, Inc. v. Wisconsin OCI

MONDAY, OCTOBER 23, 2017

9:45 a.m.	15AP648-CR	State v. Anton R. Dorsey
10:45 a.m.	15AP1586	Nationstar Mortgage LLC v. Robert R. Stafsholt
1:30 p.m.	15AP2667-CR/	State v. Gerrod R. Bell
	15AP2668-CR	State v. Gerrod R. Bell

In addition to the cases listed above, the following case is assigned for decision by the court on the last date of oral argument based upon the submission of briefs without oral argument:

15AP1350-D Office of Lawyer Regulation v. Steven Cohen

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 Hannah McClung at (608) 271-4321. Summaries provided are not complete analyses of the issues presented.

Wisconsin Supreme Court
9:45 a.m.
Monday, October 2, 2017

2015AP829 Springer v. Nohl Electric Products Corporation

Supreme Court case type: Petition for Review
Court of Appeals: District IV
Circuit Court: Jefferson County, Judge William F. Hue, reversed and cause remanded
Long caption: Penny L. Springer, Plaintiff-Appellant-Respondent, v. Nohl Electric Products Corporation, General Refractories Company, Dana Sealing Products, LLC, John Crane, Inc., Union Carbide Corporation, Rockbestos Surprenant Cable Corporation a/k/a Rockbestos Products Corp and RSCC Wire & Cable, Inc., Garlock Sealing Technologies LLC, Anchor Packing Company, Inc., Gaskets, Inc., Cincinnati Valve Company, Leslie Controls, Inc. and Trac Regulator Company, Inc., Defendants, Powers Holdings, Inc. and Fire Brick Engineers Company, Inc., Defendants-Respondents-Petitioners, Secure Horizons by United Health Care Insurance Company, Subrogated Defendant

Issue presented: Whether the "fraudulent transfer" exception to Wisconsin's general rule against successor liability must be analyzed in the context of Wisconsin's Uniform Fraudulent Transfer Act (WUFTA), Wis. Stat. ch. 242, such that the petitioners, Powers Holdings, Inc. and Fire Brick Engineers Company, Inc., are subjected to successor liability for a former entity's sale of asbestos-containing products.

Some background: Penny L. Springer contends that the petitioners, whose previous corporate entities distributed materials that contained asbestos, are liable for her husband's death under the theory of successor liability because the corporate sales and mergers were fraudulently structured to avoid liability for its distribution of asbestos-related products.

FBE Company was formed by Harry J. Schofield in the 1940s. Before 1983, FBE Company distributed refractory and foundry supplies, some of which contained asbestos. In 1983, a group of investors, including attorneys who had previously provided legal representation to FBE Company, formed FBE Corporation, which purchased the assets of FBE Company. FBE Corporation later changed its name to Fire Brick Engineers Company, Inc., one of the petitioners in this case.

In 1989, FBE Company, Inc. merged with another company to form Powers Holdings, Inc., the other petitioner, and continued to do business as Fire Brick Engineers.

Springer filed her lawsuit in 2010, alleging that the petitioners are liable under theories of negligence and strict liability for damages stemming from the death of her husband. Springer alleged that from approximately 1963 through 1969, her husband was exposed to asbestos-containing products that were manufactured and/or sold by FBE Company and that the exposure to those products contributed to her husband's mesothelioma and subsequent death. Springer sought to hold the petitioners liable, as successors to FBE Company.

The petitioners moved for summary judgment, arguing that there was no evidence that they distributed or sold asbestos-containing products. They argued that, although they acquired the assets of FBE Company, there was no basis upon which to impose liability on them as successors to FBE Company.

Focusing primarily on evidentiary issues relating to the 1983 purchase agreement, the circuit court granted judgment in favor of the petitioners. Springer appealed, and the Court of Appeals reversed.

As the party seeking the benefit of an exception to a general rule, Springer had the burden of proving one of the exceptions to the general rule against successor liability applies. Acuity Mut. Ins. Co. v. Olivas, 2007 WI 12, ¶44, 298 Wis. 2d 640, 726 N.W.2d 258 ("one who relies on an exception to a general rule … has the burden of proving that the case falls within the exception") (quoting State v. Big John, 146 Wis. 2d 741, 756, 432 N.W.2d 576 (1988), which cites Charles T. McCormick, *McCormick's Handbook of the Law of Evidence*, § 337 at 787-89 (2d ed. 1972)).

Ultimately, the Court of Appeals focused on the possible exception provided when a transaction is entered into fraudulently to escape liability for the obligations at issue.

The Court of Appeals stated that it considered it "evident" that the question of whether a transfer transaction was entered into fraudulently should be answered in the context of WUFTA.

The petitioners say this is the first time a Wisconsin appellate court has addressed the question of whether courts should look to the factors listed in § 242.04-where no cause of action is brought under Chapter 242-to determine whether a transfer was "fraudulent" as that term is used in the exceptions to successor non-liability. *See, e.g.*, Fish v. Amsted Indus., Inc., 126 Wis. 2d 293, 298

The petitioners argue that the court should not look to § 242.04(1) as the standard for a fraudulent transfer in the context of this exception to the general rule against successor liability.

The petitioners note that the "very language of the 'fraudulent transfer' exception refers to a situation where the defendant enters into the transaction for the sole purpose of escaping the seller's existing liability," and point out that by contrast, the WUFTA addresses transfers that are fraudulent to both present and future creditors, a distinction they deem relevant. *See* Wis. Stat. §§ 242.05, 242.05.

A decision in this case could determine if the "fraudulent transfer" exception to Wisconsin's general rule against successor liability must be analyzed in the context of WUFTA.

Wisconsin Supreme Court
Monday, October 2, 2017
10:45 a.m.

2015AP175 Deutsche Bank National Trust Company v. Wuensch

Supreme Court case type: Petition for Review
Court of Appeals: District IV
Circuit Court: La Crosse County, Judge Todd W. Bjerke, reversed
Long caption: Deutsche Bank National Trust Company, plaintiff-respondent-petitioner, v. Thomas P. Wuensch, defendant-appellant, Heidi Wuensch, appellant

Issues presented:

- Whether a trial court may accept as proven fact that plaintiff in a residential foreclosure action possesses the original promissory note at issue when counsel presented the originally executed (i.e., "wet-ink") note to the court and Wis. Stat. § 909.02(9) provides that commercial paper, such as promissory notes, are self-authenticating?
- Whether the Court of Appeals, after summarily reversing a judgment of foreclosure under Wis. Stat. § (Rule) 809.21(1), should have remanded the case to the trial court to allow petitioner an opportunity to provide sworn testimony that it possesses the note, thereby preventing, in the words of the Court of Appeals, a "highly inefficient result" that "elevates form over substance?"

A decision by the Wisconsin Supreme Court could resolve apparently conflicting decisions about what a lender needs to do to prove that it is the current owner of a note and also clarify the general evidentiary effect of the self-authentication rule of § 909.02.

Some background: In December 2006, Thomas P. Wuensch signed an adjustable rate note promising to repay HLB Mortgage $301,500. The note was secured by a mortgage on property Wuensch owned. The note contains two endorsements, one from HLB Mortgage to American Home Mortgage and the other from American Home Mortgage in blank.

Wuensch defaulted on the note and mortgage in 2008. Deutsche Bank filed a complaint to foreclose in August 2009. The complaint alleged that the bank was the lawful holder of the note. A copy of the note was attached to the complaint. Wuensch filed a pro se answer and affirmative defenses alleging, in part, that the bank lacked standing to foreclose. Wuensch filed an amended answer and affirmative defenses in February 2011 alleging, among other things, fraud and unclean hands. In April of 2013, Wuensch, through counsel, filed a "third amended pleading" which incorporated the original answer and affirmative defenses.

A bench trial was held during two days in May and June 2014. At the start of the trial but before the first witness was called, the bank's counsel identified to the court, over Wuensch's attorney's objection, two documents. The bank's attorney described one document as being the original note and the other as being a copy of the original note, with the copy having been marked as an exhibit. The bank's counsel, not having been sworn as a witness, said, "Your Honor, I'm handing [Wuensch's attorney] a copy of the original note. I also have the original here today. I'm going to allow [Wuensch's attorney] to inspect the original document and compare it to the copy."

Wuensch's attorney objected "on foundational grounds" and "to the plaintiff's counsel testifying." The circuit court noted that it had not "heard any testimony yet." The court said the purported original and copy appeared to be identical, and the court admitted the purported copy into evidence over Wuensch's attorney's repeated objection that the bank had failed to produce a proper witness to testify about the purported original note.

Based on this record, the circuit court found that the bank possessed the original note at the time of trial and that the bank was the holder of the original note with the right to enforce it.

The only witness called by the bank was a loan analyst for the servicer of the note who testified about the payment history and amounts that Wuensch owed. Wuensch testified about his difficulties in communicating with American Home Servicing, Inc., and in obtaining accurate information about the status of the loan.

The circuit court granted judgment of foreclosure in favor of the bank in the amount of $455,641.85. Wuensch appealed, and the Court of Appeals reversed.

The appellate court said the pleadings placed possession of the original note in dispute, and it said there was no dispute that this was an issue the bank had to prove at trial. See § 401.201(2)(km)1., Stats.

The Court of Appeals agreed with Wuensch that where the bank's counsel did not take an oath and did not lay a foundation to establish personal knowledge about possession of the original note, the bank's counsel was not acting as a witness on whose statements or implied statements the circuit court could rely to prove possession of the note. The appellate court said given Wuensch's unambiguous objections at trial, sworn testimony from someone with personal knowledge was necessary.

The Court of Appeals said the plaintiff was obligated to prove, under the rules of evidence, that the document in the plaintiff's counsel's hands in fact came from his client and not from some other person or entity.

The bank points out that on March 31, 2016 the District IV Court of Appeals issued a decision in another case which appears to come to the opposite result. In Bank of New York Mellon v. Harrop, No. 2014AP2200, District IV held "the fact that . . . counsel is representing the [Bank] in this case, has the note physically in his possession, is enough to establish that the note is in possession of the [Bank]."

The bank goes on to argue that if the Court of Appeals' decision is allowed to stand, it would place an unnecessary and expensive requirement on lenders to produce witnesses at trial regarding the possession of a note when plaintiff's counsel, an agent of the foreclosing party, produces a self-authenticating original "wet-ink" at trial that establishes possession.

In the alternative here, the bank says justice would be served if the case were allowed to be remanded to the circuit court in order to afford the bank an opportunity to provide sworn testimony regarding its possession of the note.

Wisconsin Supreme Court
Monday, October 2, 2017
1:30 p.m.

2015AP2429-CR State v. Hendricks

Supreme Court case type: Petition for Review
Court of Appeals: District I (Dist. IV judges)
Circuit Court: Milwaukee County, Judge M. Joseph Donald and Judge David L. Borowski, affirmed
Long caption: State of Wisconsin, plaintiff-respondent, v. Shannon Olance Hendricks, defendant-appellant-petitioner

Issue presented: Do Wisconsin Stat. § 971.08(1) and State v. Bangert, 131 Wis. 2d 246, 389 N.W.2d 12 (1986) require that a defendant entering a guilty plea to child enticement with intent to have sexual contact understands the meaning of "sexual contact?"

In reviewing this case, the Supreme Court is also expected to consider the Court of Appeals' previous decision in State v. Steele, 2001 WI App 34, 241 Wis. 2d 269, 625 N.W.2d 595. The Court of Appeals itself now questions the validity of its decision in Steele but acknowledges that it is bound by it until the Supreme Court may reconcile the issues presented.

Some background: Shannon Olance Hendricks was convicted of child enticement after initially being charged with second-degree sexual assault. He was sentenced to three years of initial confinement and four years of extended supervision for allegedly enticing a child to a secluded place with the intent to have "sexual contact."

Hendricks filed a post-conviction motion arguing that the plea colloquy was defective because the circuit court did not inquire into his understanding of "sexual contact."

The state conceded at this point that the plea colloquy was defective as alleged by Hendricks but offered to prove at an evidentiary hearing that Hendricks did enter a knowing plea.

The circuit court denied Hendricks' motion without a hearing, concluding there was no plea colloquy defect.

Hendricks appealed, unsuccessfully, with the state arguing that there was no defect in the plea colloquy. In upholding the circuit court's order denying the post-conviction motion, the Court of Appeals noted Steele.

Steele stated that a circuit court inquiring into a defendant's understanding of the nature of a charged crime during a plea colloquy need not inquire into a defendant's understanding of the particular alternative intended underlying the act if the act is not itself an element of the charged crime.

The Steele court observed that in State v. Hammer, 216 Wis. 2d 214, 219, 221, 576 N.W.2d 285 (Ct. App. 1997), it held that "the nature of the particular underlying felony is not an essential element of a burglary charge." Steele, 241 Wis. 2d 269, ¶9. In Hammer, that meant the defendant was not entitled to jury unanimity as to which felony Hammer intended when he entered a dwelling without consent. The Hammer court found it was sufficient if all jurors found that Hammer at least intended one of three felonies: sexual assault, armed robbery, or substantial battery.

The appellate court noted that under State v. Bangert, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), if a defendant makes a prima facie showing of a plea defect and alleges that he did not understand the information that should have been provided during the colloquy, the burden shifts to the state to prove by clear and convincing evidence that the plea was knowing in spite of the defect.

In this case, Hendricks was informed the act the state had to prove was that he intended to have "sexual contact" with the child. See § 948.07(1), Stats. During the plea colloquy, the circuit court did not inquire into whether Hendricks understood the meaning of "sexual contact."

The Court of Appeals concluded that the circuit court's brief exchange with counsel did not satisfy the court's obligation to inquire into Hendricks' understanding of the charged crime.

However, the Court of Appeals said its job under the Steele analysis is to determine if the particular act Hendricks allegedly intended to commit, sexual contact, is an essential element of child enticement. It said whether the "sexual contact" alternative in the child enticement statute is an element of the crime was answered in the negative in State v. Derango, 2000 WI 89, 236 Wis. 2d 721, 613 N.W.2d 833. The court noted that like Hammer, Derango was a jury unanimity case.

The Court of Appeals noted that in Steele, it said, "It follows from our conclusion in Hammer that the nature of the particular underlying felony is not an essential element of a burglary charge and therefore need not be explained during colloquy in order to [satisfy Bangert]." Steele, 241 Wis. 2d 269, ¶9.

The Court of Appeals said Steele compelled the conclusion that the elements analysis in Derango applied with equal force to the plea colloquy context.

The Court of Appeals said, "Although we question some of the law that binds us, we ultimately agree with the circuit court that, under this law, there was no plea colloquy defect."

Hendricks says the Supreme Court should address whether juror unanimity case law should apply to analyses of what a court must explain to ensure that a defendant entering a guilty plea in fact understands the nature of the charge.

The state says it will rely on an alternative ground for sustaining the judgment of conviction, i.e. that Hendricks knew the meaning of sexual contact or intent to have sexual intercourse from the victim's preliminary hearing testimony.

A decision by the Supreme Court discussing Steele is expected to clarify law in this area.

Wisconsin Supreme Court
Tuesday, October 3, 2017
9:45 a.m.

2016AP238-CR State v. Washington

Supreme Court case type: Petition for Review
Court of Appeals: District II
Circuit Court: Racine County, Judges Wayne J. Marik, Allan B. Torhorst, and David W. Paulson, affirmed
Long caption: State of Wisconsin, plaintiff-respondent v. Michael L. Washington, defendant-appellant-petitioner

Issue presented: Whether a defendant, by voluntary absence or other conduct, may waive the statutory right to be present at trial before the trial has begun.

Some background: The state initially charged Michael L. Washington with three crimes: (1) burglary of a building or dwelling, (2) resisting or obstructing an officer, and (3) burglary of a dwelling with a person present. The third count was subsequently dismissed.

The first two lawyers appointed to represent Washington both moved to withdraw from doing so. They cited a breakdown in their relationship with Washington, an inability to prepare a defense, and Washington's "[refusal] to acknowledge the evidence against him."

When Washington's third appointed counsel also sought to withdraw, the circuit court ultimately denied the request due to Washington's speedy trial demand. On the eve of trial, counsel again moved for permission to withdraw. The court again denied the request, repeating concerns made previously that Washington was attempting to manipulate the court process.

After the jury had been chosen, but before the jurors had been sworn, defense counsel advised the court that she had learned of some new, potentially exculpatory information. The court ultimately dismissed the jury before it had been sworn so that counsel could investigate the new information. The third appointed counsel again moved to withdraw from representing Washington, and the court again refused.

On the morning of the day on which the second trial was to commence, defense counsel again explained that Washington had refused to speak to her about the case and had told her that she was not his attorney. The court and Washington discussed Washington's refusal to accept appointed representation and repeated delays in the case. Washington refused to be represented by the appointed counsel and ultimately left the courtroom. The circuit court commented that Washington "semi was removed and semi left on his own."

Based on State v. Divanovic, 200 Wis. 2d 210, 546 N.W.2d 501 (Ct. App. 1996), the court gave Washington some time to cool off and then asked if he wished to come back to the courtroom. Washington refused. The court then proceeded with selecting and swearing a jury and with the trial, having counsel speak with Washington intermittently and giving him several more opportunities to return. Washington continued to refuse and never set foot in the courtroom at any point during the trial, including for the reading of the verdict. Washington did appear at the sentencing hearing, when the circuit court imposed five years of initial confinement and five years of extended supervision.

Because he was not present during any portion of the trial, Washington contends that his conviction was invalid and must be vacated under Wis. Stat. § 971.04. He relied on the Court of Appeals' decision in State v. Dwyer, which held that a defendant must be present at the trial unless he or she voluntarily does not appear 'during the progress of the trial' *provided* that he or she was 'present at the beginning of the trial.' Section 971.04(1)(b) & (3), Stats." State v. Dwyer, 181 Wis. 2d 836, 836, 512 N.W.2d 233 (Ct. App. 1994).

The Court of Appeals rejected Washington's argument that a defendant may not waive his or her statutory right under Wis. Stat. § 971.04 to be present at trial prior to the commencement of the trial.

The Court of Appeals pointed out that in United States v. Benabe, 654 F.3d 753 (7th Cir. 2011), the Seventh Circuit had emphasized that the defendants at issue there had been repeatedly warned that the trial would not go forward unless they promised to behave and that they had made a "knowing and voluntary choice" not to appear in the courtroom for the trial. Citing two Second Circuit decisions (Cuoco v. United States, 208 F.3d 27, 31-31 (2d Cir. 2000); Smith v. Mann, 173 F.3d 73, 76 (2d Cir. 1999)), the Court of Appeals said that the Seventh Circuit had reasoned that "the purpose of Rule 43 certainly was served." Benabe, 654 F.3d at 773.

The Court of Appeals did note that the circuit court had given Washington multiple opportunities to reclaim his right to be present, but he had continued to waive that right. The Court of Appeals asserted that Washington's waiver had been made with knowledge of his rights.

The Court of Appeals rejected Washington's reliance on Dwyer for his argument that Wis. Stat. § 971.04(3) requires a defendant's presence at the beginning of a trial before a waiver of the right to be present can be effective. In Dwyer, the defendant had been present for the first day of jury selection. According to the Court of Appeals, the language of Wis. Stat. 971.04(3) has no application when the defendant waives his or her right to be present. Washington asserts that while the Court of Appeals purported to be distinguishing Dwyer, its decision really results in Dwyer being overruled.

Washington also challenges the Court of Appeals' reliance on a purported distinction between waiver and forfeiture of the statutory right to be present. He contends that several cases cited by the Court of Appeals do not apply to his situation.

Wisconsin Supreme Court
Tuesday, October 3, 2017
10:45 a.m.

2015AP1039 Westmas v. Selective Insurance Company of South Carolina

Supreme Court case type: Petition for Review
Court of Appeals: District II
Circuit Court: Walworth County, Judge Phillip A. Koss, reversed and cause remanded
Long caption: John Y. Westmas, Individually and as Special Administrator of the Estate of Jane L. Westmas and Jason Westmas, plaintiffs-appellants, v. Selective Insurance Company of South Carolina, Creekside Tree Service, Inc. and ABC Insurance Company, defendants-respondent-petitioner

Issues presented: This case examines the terms "agent" and "occupant" under Wis. Stat. § 895.52, the state's recreational immunity statute. The Supreme Court reviews whether Creekside Tree Service, as the entity in charge of trimming trees on recreational land, is entitled to immunity either as an "agent" of the owner of the land or as an "occupant."

Some background: On a May afternoon in 2012, Jane Westmas and her adult son went for a walk on a portion of a shoreline path that wraps around Geneva Lake. She was struck and killed by a tree limb felled by Creekside.

The shoreline path is a public right of way, and property owners are responsible for maintaining the path. Conference Point is one such property owner and had hired Creekside to finish some tree work not completed by another company that had bid on tree work on the property. Creekside had also submitted a bid for the project but was not initially selected.

The proposal, which Creekside submitted to Conference Point months before the accident, stated Creekside would "provide labor, material, equipment and incidentals required for the completion" of the specific tree-trimming services detailed in the proposal.

Creekside's sales/consultant foreman, certified arborist Jonathan Moore, formulated Creekside's proposal for the tree project after meeting with Brian Gaasrud, vice chairperson of Conference Point's board of trustees. Moore apparently thought that Conference Point would be taking some noticeable steps to redirect pedestrians on the path or alert them to danger. Upon his arrival for the first day of work, however, Moore realized Conference Point had not taken any such steps.

Creekside set up cones along the path and utilized its employees as spotters who, verbally or with hand gestures, would either turn back pedestrians, temporarily halt them if tree work was in progress, or halt the tree work until pedestrians had passed. It was Moore's understanding that while Creekside did its tree-trimming, it did not have authority to simply close down the path to all pedestrian traffic or detour pedestrians through other areas of the Conference Point property.

Three Creekside employees, but not Moore, were working at Conference Point on the day of the accident. While Creekside was performing its work at the Conference Point property, Gaasrud had no conversations with Creekside regarding anything Creekside was doing with regard to pedestrian traffic on the path; indeed, Gaasrud was not even aware Creekside would be working on the day of the accident. No one from Conference Point was assigned to check on Creekside's work or provide Creekside with equipment or assistance.

After the accident, Jane's husband (individually and as special administrator of her estate) and her son (collectively "the Westmases") sued Creekside, and its insurer, Selective Insurance Company of South Carolina ("Selective"). (Conference Point and its insurer were previously dismissed from the case, and are not party to this appeal).

Creekside successfully moved for summary judgment on recreational immunity grounds. The Court of Appeals reversed.

The Court of Appeals noted that Wis. Stat. § 895.52(2)(b) provides in relevant part that "no owner and no officer, employee or agent of an owner is liable for the death of, any injury to, or any death or injury caused by, a person engaging in a recreational activity on the owner's property." "Owner" is defined to include "[a] person . . . that owns, leases or occupies property." Sec. 895.52(1)(d)1. The Court of Appeals held that Creekside was not Conference Point's agent for purposes of § 895.52, nor was it an "occupier" of the Conference Point property such that it statutorily was an "owner" of the property.

More specifically, the Court of Appeals ruled that under Showers Appraisals, LLC v. Musson Bros., 2013 WI 79, 350 Wis. 2d 509, 835 N.W.2d 226, Creekside did not qualify as an agent of Conference Point, as there was no evidence that Conference Point either controlled the details of Creekside's work or formulated any "reasonably precise specifications" for that work. Creekside argues that the Showers case, which discussed whether a governmental contractor should be immune from liability as an agent of a governmental entity under Wis. Stat. § 893.80(4), is not helpful precedent to determine whether Creekside was an agent of Conference Point for recreational immunity purposes.

Creekside also argues that it should have been considered an owner for purposes of the recreational immunity statute.

The Westmases say the Court of Appeals' decision is consistent with the purpose and text of the recreational immunity statute. They say the appellate decision declares only that "independent contractors who do not qualify as 'agents' and who are not 'occupying' the property are not entitled to §895.52 immunity. It does not declare that independent contractors can never qualify as 'agents' or 'occupants;' it states only that Creekside does not."

Wisconsin Supreme Court
Tuesday, October 3, 2017
1:30 p.m.

2015AP1331 In Re: Partnership Health Plan v. OCI

Supreme Court case type: Petition for Review
Court of Appeals: District IV
Circuit Court: Dane County, Judge William D. Johnston, affirmed
Long caption: In Re: Partnership Health Plan, Inc., Petitioner, Michael S. Polsky, Esq. as Chapter 128 Receiver of Community Health Partnership, Inc., interested party-appellant-petitioner v. Office of the Commissioner of Insurance, interested party-respondent

Issues presented: This case examines issues related to Wis. Stats. ch. 645, which regulates rehabilitation and liquidation proceedings involving insurers. The Supreme Court reviews lower court decision on how the statute may apply to the facts of this case, including the authority of the Commissioner of Insurance (Commissioner), the subject matter jurisdiction of a circuit court, and actions by taken by a non-profit's board of directors regarding surplus funds remaining after all liabilities have been paid through liquidation proceedings.

Some background: This case concerns the disposition of $4 million to $5 million of surplus funds that will remain after all liabilities of Partnership Health Plan, Inc. (PHP) have been paid in PHP's Wis. Stats. ch. 645 liquidation proceeding. The receiver for Community Health Partnership, Inc. (CHP), Atty. Michael S. Polsky, asserts that CHP is entitled to those surplus funds. Both the circuit court and the Court of Appeals disagreed, leading Polsky to appeal to the Supreme Court.

CHP was incorporated as a nonstock charitable corporation. CHP, in turn, incorporated PHP as a nonstock charitable service insurance corporation. As such, PHP does not have shareholders and CHP is its only member.

PHP was operated as a health maintenance organization, which had no employees or operating assets. All administrative services were provided by CHP. The premises occupied by PHP were leased and occupied by CHP. As of Dec. 31, 2012, CHP and PHP ceased normal operations. CHP entered into an insolvency proceeding under Wis. Stat. ch. 128 in which Polsky was appointed as receiver. PHP entered into liquidation proceedings under Wis. Stat. ch. 645.

On Dec. 17, 2012, before PHP ceased its normal operations and entered into liquidation, the PHP board of directors adopted a consent resolution authorizing the payment of any assets it might have following liquidation to CHP's receivership estate. The validity of this consent resolution is at issue.

In the PHP liquidation proceeding, CHP's receiver (Polsky) filed a claim with the Commissioner for "all surplus funds." The proof of claim states that CHP is "*the sole owner of PHP*" and as such is entitled to all excess funds under Wis. Stat. § 645.68(11).

The Commissioner denied CHP's claim. CHP filed a motion for declaratory relief with the circuit court, seeking an order that CHP is entitled to any surplus funds following PHP's liquidation. The circuit court denied the receiver's motion. The receiver appealed. The Court of Appeals affirmed, concluding, among other things, that CHP, the sole member of PHP, is not an "owner" of PHP in the context of the relevant statutory provisions.

The Court of Appeals determined that policyholders are entitled to make a claim – not because they are members of a nonstock corporation – but because they are owners. The court explains that it does not necessarily follow that because one type of owner (a policyholder in a mutual insurance company) is a member of a nonstock corporation, that all members of a nonstock corporation are therefore owners.

The Court of Appeals also agreed with the Commissioner that CHP is not entitled to the surplus funds because: (1) the resolution is void because it exceeds the authority of PHP's board of directors under PHP's articles of incorporation; and (2) the resolution is invalid under Wis. Stat. § 617.21 and Wis. Admin. Code § Ins. 40.04 because the resolution was not timely disclosed to the Commissioner.

Polsky contends that because the resolution does not take effect until PHP is liquidated, and it concerns only PHP's surplus funds, "the disposition of the surplus funds will have no effect on PHP … [and] cannot be deemed material to PHP." As such, under the circumstances of this case, the reporting requirements of § 617.21 and § Ins. 40.04 do not even apply to the disposition of the surplus funds, according to Polsky.

Polsky also contends that Wis. Stat. § 645.71(2) only gives the court authority to "approve, disapprove or modify any report on claims by the liquidator." The approval of payment of surplus funds to a charitable organization selected by the Commissioner is not a payment of a "claim" and therefore is outside of the authority provided by this statute, according to Polsky.

A decision by the Supreme Court is expected to clarify how provisions of Wis. Stats. ch. 645 apply to circumstances such as those presented here.

Wisconsin Supreme Court
Monday, October 23, 2017
9:45 a.m.

2015AP648-CR State v. Dorsey

Supreme Court case type: Petition for Review
Court of Appeals: District III
Circuit Court: Eau Claire County, Judge Paul J. Lenz, affirmed
Long caption: State of Wisconsin, plaintiff-respondent v. Anton R. Dorsey, defendant-appellant-petitioner

Issues presented: This case examines "other acts" evidence in Wis. Stat. § 904.04(2)(b)1., and how that statute may apply to domestic abuse cases. The Supreme Court reviews:

- Whether evidence of other criminal acts committed against a person other than the victim are admissible in cases of alleged domestic abuse for the purpose of showing a generalized motive or purpose on the part of the defendant to control persons with whom he or she is in a domestic relationship.
- Whether the other acts testimony presented in this case was relevant to the purpose of proving intent on the part of the defendant to cause bodily harm to the victim.

Some background: Anton R. Dorsey was convicted on one count of misdemeanor battery, one count of disorderly conduct, and one count of aggravated battery, with the latter two counts having been charged as acts of domestic abuse against his girlfriend at the time. The jury acquitted Dorsey of a charge of strangulation and suffocation. Dorsey's sole challenge in this case relates to the trial court's admission of certain other acts evidence.

Before trial, the state moved to admit evidence that Dorsey committed acts of domestic violence against a previous girlfriend to establish Dorsey's "intent and motive to cause bodily harm to his victim and to control her within the context of a domestic relationship."

In admitting the other-acts evidence, the trial court applied the "greater latitude rule" in the context of addressing Wis. Stat. § 904.04(2)(b)1. and the Sullivan factors. *See* State v. Sullivan, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30 (1998). The "greater latitude rule," as that phrase is commonly used, refers to a court-created doctrine that applies in sex crimes cases, particularly those involving child victims, to facilitate the admissibility of other acts evidence.

The Court of Appeals initially issued a decision in August 2016, which it withdrew and re-issued in December 2016. In affirming, the Court of Appeals focused on whether the reference to "greater latitude" in § 904.04(2)(b)1. is a codification of the court-created "greater latitude" rule used in sex crime cases.

The Court of Appeals ultimately ruled that § 904.04(2)(b)1. does not make the greater latitude rule applicable to domestic abuses cases, but even without the benefit of the greater latitude rule, the other acts evidence was properly admitted here.

Wis. Stat. § 904.04(2)(b)1. provides:

> "(b) Greater latitude. 1. In a criminal proceeding alleging a violation of s. 940.302(2) or of ch. 948, alleging the commission of a serious sex offense, as defined in s. 939.615(1)(b), or of domestic abuse, as defined in s. 968.075(1)(a), or alleging an offense that, following a conviction, is subject to the surcharge in s.

973.055, evidence of any similar acts by the accused is admissible, and is admissible without regard to whether the victim of the crime that is the subject of the proceeding is the same as the victim of the similar act."

Dorsey claims that the other acts evidence was inadmissible because there was "no specific linkage" between the alleged other acts evidence from a previous case and the crimes alleged here. It was not enough, Dorsey says, for the state to argue that the other acts evidence showed "some generalized motive on the part of [Dorsey] to control the women with whom he is in a domestic relationship."

The state, which also asked the Supreme Court to take the case, says that § 904.04(2)(b)1. is ambiguous because, while that paragraph states that "evidence of any similar acts by the accused is admissible," par. (b)1. is not excepted from the general rule excluding propensity evidence in § 904.04(2)(a). The state says the Court of Appeals did not answer the question of what par. (b)1. means when it says that "evidence of any similar acts by the accused is admissible."

Wisconsin Supreme Court
Monday, October 23
10:45 a.m.

2015AP1586 Nationstar Mortgage v. Stafsholt

Supreme Court case type: Petition for Review
Court of Appeals: District III
Circuit Court: St. Croix County, Judge Scott R. Needham, affirmed in part; reversed in part and cause remanded for further proceedings
Long caption: Nationstar Mortgage LLC n/k/a Bank of America, NA, as successor by merger to BAC Home Loans, plaintiff-appellant-cross-respondent v. Robert R. Stafsholt, defendant-respondent-cross-appellant-petitioner, Colleen Stafsholt f/k/a Coleen McNamara, unknown spouse of Robert R. Stafsholt, unknown spouse of Colleen Stafsholt, f/k/a Colleen McNamara, Richmond Prairie Condominiums Phase I, Association and The First Bank of Baldwin, defendants.

Issues presented: This case involves a dispute over attorney fees arising from a home loan foreclosure. The Supreme Court reviews issues related to the awarding of attorney fees, the method by which attorney fees may be recovered, and the decision-making processes of lower courts in this case.

Some background: Robert R. Stafsholt and his former wife owned property in New Richmond. In October 2002, Colleen Stafsholt executed a note in the amount of $208,000 in favor of RBMG, Inc. The note was secured by a mortgage on the New Richmond property, which both Stafsholts granted to Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for RBMG.

The note came into the possession of Ocwen Loan Servicing, LLC after being serviced at times between 2008 and 2011 by Countrywide Home Loans, BAC Home Loans, and BOA.

BAC Home Loans filed a foreclosure action against the Stafsholts and other parties in February of 2011. The complaint alleged that the Stafsholts had defaulted on the terms of the note and mortgage by failing to pay past due payments as required.

On May 31, 2012, BOA, successor by merger to BAC Home Loans, assigned the mortgage to Homeward Residential, Inc., f/k/a American Home Mortgage Servicing, Inc. Homeward Residential assigned the mortgage to Ocwen. Ocwen was substituted as the plaintiff in the action in December of 2013.

Stafsholt asserted counterclaims for breach of contract, breach of the implied covenant of good faith and fair dealing, equitable estoppel, declaratory judgment, and assignment of mortgage under § 846.02, Stats.

The circuit court issued an order on April 8, 2015, finding that BOA had improperly charged the Stafsholts for lender placed insurance (LPI); that BOA "caused the Stafsholts to default on the Mortgage and Note"; and that Stafsholt "acted in good faith and reliance on the misrepresentations of the BOA agent." The circuit court concluded, among other improper actions, that BOA had breached the implied covenant of good faith and fair dealing and that Stafsholt had established the affirmative defense of equitable estoppel.

The circuit court dismissed the foreclosure action and reinstated the Stafsholts' mortgage. It concluded Ocwen was entitled to be paid the principal balance of the loan, some $172,000. However, the court held that Ocwen could not recover any other "fees or costs, including late fees, mortgage fees, bankruptcy fees or interest."

The circuit court rejected Stafsholt's request for attorney fees, stating there was no basis to award them. The court also declined to award Stafsholt attorney fees and costs as a sanction against Ocwen under § 802.05, Stats.

Stafsholt moved for reconsideration and asked the circuit court to declare that the principal balance of the mortgage was $10,167.38. He arrived at that figure by subtracting from the $172,000 mortgage balance some $71,000 in attorney fees and costs he had incurred during the foreclosure proceedings and a $90,000 payment he made on April 17, 2015.

On June 16, 2015, the circuit court entered a written order granting Stafsholt's motion for reconsideration in part. It concluded Stafsholt was entitled to recover a portion of his claimed attorney fees and costs. Using the "Lodestar Method," the court determined a 10-percent reduction in Stafsholt's claimed attorney fees and costs was warranted. After all of its calculations, the court concluded that the remaining balance on the loan was some $57,000. The court ordered that if Stafsholt paid that amount by Aug. 1, 2015, Ocwen would be required to assign the mortgage to Stafsholt and terminate the underlying note.

Ocwen transferred the servicing of the mortgage to Nationstar as of March 1, 2015. Nationstar was substituted for Ocwen as plaintiff. Nationstar appealed from the portion of the circuit court order dismissing the foreclosure action and from the order granting in part Stafsholt's motion for reconsideration. Stafsholt cross-appealed, arguing that the circuit court erred in reducing his requested attorney fees and costs.

The Court of Appeals' upheld many of the trial court determinations. However, it reversed a circuit court order which granted Stafsholt an offset against the principal balance due on his mortgage with Nationstar Mortgage LLC, n/k/a Bank of American, NA, for his attorney fees and costs. The Court of Appeals concluded that the lower court lacked authority to award Stafsholt attorney fees and costs on that basis.

Nationstar says that the longstanding American Rule that prohibits an award of attorney fees to the prevailing party except where limited exceptions, not present here, apply.

Nationstar goes on to say the Court of Appeals correctly declined to address Stafsholt's claim that the trial court had the inherent authority to grant attorney fees. It says even if the Court of Appeals had reached the merits of that issue, Stafsholt's argument does not support his claim for attorney fees.

Wisconsin Supreme Court
Monday, October 23, 2017
1:30 p.m.

2015AP2667-68-CR State v. Bell

Supreme Court case type: Petition for Review
Court of Appeals: District IV
Circuit Court: Monroe County, Judge Michael J. Rosborough, affirmed
Long caption: State of Wisconsin, plaintiff-respondent, v. Gerrod R. Bell, defendant-appellant-petitioner

Issues presented: This sexual assault case examines whether a prosecutor may argue that, in order to find a defendant not guilty, a jury must believe that certain witnesses lied, and the defendant must provide evidence of their motive to lie.

Some background: Gerrod R. Bell was convicted of three counts of second-degree sexual assault, with the threat or use of force, one count of second-degree sexual assault of a child, and one count of misdemeanor bail jumping. Bell did not testify at trial.

On separate occasions during 2001, Bell allegedly sexually assaulted two girls, who were 14 years old and 17 years old, respectively, at that time. The younger girl told police that in the early morning hours after a birthday party at her mother's house, she went outside and sat down by a bonfire. When she tried to get up from the ground, Bell grabbed her wrist and pulled her back down to the ground. He then engaged in forced sexual intercourse. The girl repeated these statements in her trial testimony.

For this incident, the state charged Bell with second-degree sexual assault, with the threat or use of force, and with second-degree sexual assault of a child.

After the younger girl reported the alleged sexual assault, police spoke with the older girl, who initially told police that she had not been assaulted by Bell. She later told police that on a date near the time of the birthday party Bell had touched her breast, that on another occasion he had attempted to get her to go downstairs with him, and that on the night of the party he had "made a pass" at her. Five months later, the older girl reported that in early July 2001, Bell had raped her in the bathroom of her mother's home.

With respect to the older girl, the state charged Bell with two counts of second-degree sexual assault, with the threat or use of force. One count related to the breast-touching incident and the other related to the alleged forced intercourse.

During voir dire, the prosecutor began to develop his theme by asking prospective jurors whether a teenager would lie about something as important as a sexual assault and whether, if someone had lied, the jurors would expect to hear evidence concerning a reason why the person would lie.

The prosecutor asked whether the jurors would speculate about reasons for lying if no evidence of a motive for lying was presented or whether the jurors would "follow the instructions and not speculate and base your decision based on the evidence or lack of evidence in this case."

Also, throughout his closing argument, the prosecutor repeated time and again that in order to acquit Bell of the charges, the jury "must believe" that the two girls were lying and that they could find the girls were lying only if Bell had provided specific evidence of a motive to lie.

In his closing argument defense counsel did argue that the alleged sexual assaults had never happened and that the two young women were lying. He argued that the girls had lied because they were part of a family where lying had become a way of survival.

In rebuttal, the prosecutor repeated the themes that there was no evidence of any motive for the two young women to have lied. He asserted that defense counsel was engaging in pure speculation and was asking the jurors to do the same.

The jury found Bell guilty on all four of the sexual assault counts.

Bell appealed, unsuccessfully.

The Court of Appeals said that, given the context of the closing argument and the trial as a whole, it would construe the prosecutor's "must believe" statements as simply presenting the jury with a choice between "two starkly contrasting factual alternatives."

Although Bell never testified and presented his alternative, the Court of Appeals concluded that the only alternative to the victims telling the truth was that they were lying. It reasoned that the defense never tried to develop evidence of possible mistaken identity or that Bell's actions were innocent and misinterpreted as sexual assaults. It also pointed to the fact that defense counsel's opening statement indicated that the evidence would either show that the two young women had told the truth about the alleged assaults or that those events had not occurred.

The Court of Appeals acknowledged that other courts, such as the Seventh Circuit, have indeed held as a general rule that it is improper for a prosecutor to argue that a defendant could be found not guilty only if the jurors believed witnesses, such as government agents, to be lying. See, e.g., United States v. Cornett, 232 F.3d 570, 574 (7th Cir. 2000); United States v. Vargas, 583 F.2d 380, 386-87 (7th Cir. 1978).

However, the Court of Appeals said that it believed the circumstances Bell's case were closer to United States v. Amerson, 185 F.3d 676, 680 (7th Cir. 1999) (not improper for prosecutor to comment that jurors simply could not believe both the defendant and the police officers).

The Court of Appeals also rejected Bell's "burden-to-prove-motive" argument and Bell's argument that his trial counsel had been ineffective for failing to seek redaction of certain exhibits before they had been sent back to the jury room.

Bell disagrees, contending that in Amerson, the prosecutor merely told the jury that the testimony of the defendant and the police officers was inconsistent and the jury could not believe both at the same time. Thus, in Amerson, unlike in Vargas, the prosecutor had not told the jury that it had to believe a certain person was lying in order to acquit. The prosecutor merely told the jury it had to weigh the credibility of the witnesses and make a choice. Further, unlike in Amerson, Bell had not testified during the trial.

The state argues that the Court of Appeals was correct. The state also argues that the prosecutor's comments were a proper response to the defense's assertion in closing argument that the assault had not happened and this was essentially a witch trial.