WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
NOVEMBER 2022

IMPORTANT NOTICE: Cases listed below will be heard in the Supreme Court Hearing Room, 231 East, State Capitol. Summaries for cases scheduled to be heard Nov. 29 will be provided at a later date. The cases listed below originated in the following counties:

Dane
Kenosha
Milwaukee
Racine

TUESDAY, NOVEMBER 1, 2022

9:45 a.m.	20AP1582	Beatriz Banuelos v. UW Hospitals and Clinics Authority
10:45 a.m.	20AP2146	DEKK Property Development, LLC v. Wis. Dept. of Transportation

MONDAY, NOVEMBER 7, 2022

9:45 a.m.	20AP1078-FT	Secura Supreme Ins. Co. v. The Estate of Daniel Keith Huck

TUESDAY, NOVEMBER 8, 2022

9:45 a.m.	20AP226-CR	State v. Jeffrey L. Hineman
10:45 a.m.	20AP1728-CR	State v. Percy Antione Robinson

TUESDAY, NOVEMBER 29, 2022 (Summaries available at later date)

9:45 a.m.	19AP2383-CR	State v. Daimon Von Jackson, Jr.
10:45 a.m.	20AP1362-CR	State v. Jovan T. Mull

Note: The Supreme Court calendar may change between the time you receive it and when a case is heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at (608) 266-1880. If your news organization is interested in providing any type of camera coverage of Supreme Court oral argument, you must contact media coordinator Logan Rude at WISC-TV, (608) 271-4321. The synopses provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
Tuesday, November 1, 2022
9:45 a.m.

2020AP1582 Beatriz Banuelos v. U.W. Hospital & Clinics Authority

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison) that reversed the Dane County Circuit Court order, Judge Juan B. Colas presiding, that dismissed Banuelos's complaint and remanded to the circuit court for further proceedings.

In February 2020, Banuelos submitted a request to University of Wisconsin Hospital and Clinics (U.W. Health) to transmit electronic copies of her patient health care records to her personal injury lawyers. U.W. Health complied with the request, utilizing its third-party vendor CIOX to furnish Banuelos's attorneys with the requested electronic copies. Federal law required U.W. Health to provide those copies electronically pursuant to the Health Information Technology for Economic and Clinical Health Act (HITECH), which allows patients and their representatives to obtain electronic copies of medical records under certain conditions, and restricts the procurement of fees in some circumstances. At the state level, Wisconsin statutorily outlines its fee restrictions guidelines via Wis. Stat. §146.83(3f).

U.W. Health then sent Banuelos an invoice for the 'per page' fees charged to provide those electronic copies. The fee was based on the maximum per page fees for the provision of 'paper copies' of patient health care records permitted by Wis. Stat. § 146.83(3f)(b)(1). Banuelos asserts that the copies should be free because Wis. Stat. § 146.83(3f), which enumerates six items health care providers can charge fees for, does not permit fee recovery for providing 'electronic copies.' Banuelos does not dispute that these charges would have been proper had paper copies been delivered. U.W. Health alleges that this statute's fee charging structure does not apply to electronic records, and that it is reasonable for them to charge a fee for the services provided.

In September 2020, Banuelos filed an action for declaratory, injunctive, and monetary relief in the Dane County circuit court on a claim that she was unlawfully charged fees to obtain these electronic copies of her patient health care records. U.W. Health moved to dismiss her complaint for failure to state a claim. The circuit court granted U.W. Health's motion to dismiss the complaint. The circuit court said that Wis. Stat. §146.83(3f) was 'merely silent' as to fees allowed for electronic copies and U.W. Health could charge fees. The circuit court determined that U.W. Health did not violate the statute.

Banuelos appealed the decision to the Court of Appeals and the Court of Appeals reversed the circuit court's order and remanded the case to the circuit court. The Court of Appeals held that Wis. Stat. §146.83(3f) 'unambiguously' provided a mandate for health care providers to produce copies of patient health care records – including electronic records – provided that the three statutory requirements are met [i.e., making the request for copies, providing the informed consent, and paying the applicable fees under paragraph (b)]. The court reasoned that since the statute governing the charges for patient health care records had no 'applicable fees' enumerated related to electronic copies of patient health care records, health

care providers like U.W. Health could not charge Banuelos fees for providing her with electronic copies of her patient health care records.

U.W. Health petitioned this court for review of the Court of Appeals' decision. This court must decide the issue of whether Wis. Stat. §146.83(3f) permits a health care provider to charge fees for providing electronic copies of patient health care records. The issue presented to this court is:

> May a health care provider charge a fee for providing an electronic copy of a patient's health care record, where neither Wis. Stat. § 146.83(3f) nor any other provision of state or federal law prohibits such a fee?

WISCONSIN SUPREME COURT
Tuesday, November 1, 2022
10:45 a.m.

2020AP2146 DEKK Property Development LLC v. DOT

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), that reversed the Kenosha County Circuit Court order, Judge Anthony G. Milisauskas presiding, that granted summary judgment to DEKK Property Development, LLC.

DEKK Property Development, LLC (DEKK) owns a lot located at the intersection of State Trunk Highway 50 (STH 50) and County Highway H (CTH H) in Kenosha County. In 2019, as part of a highway improvement project for STH 50, the Wisconsin Department of Transportation (DOT) condemned a portion of DEKK's property along CTH H under its power of eminent domain. The DOT then informed DEKK that, as part of its STH 50 improvement plan, it also planned to close an access point via the single driveway providing direct access from DEKK's property to STH 50, but the DOT did not include the driveway among the property being acquired and compensated under eminent domain. When DEKK inquired about just compensation, it pointed to the 'right of access' reserved in a 1961 indenture the DOT made with DEKK's predecessor-in-interest in eminent domain proceedings in 1961 for a prior improvement project. The DOT said compensation was not required because it was exercising its police power authority to remove the access point, not its power of eminent domain.

On October 11, 2019, DEKK filed this right-to-take action under Wis. Stat. § 32.05(5) challenging DOT's authority to remove its driveway to STH 50 without just compensation. DEKK alleged that the DOT did not acquire all rights of access in 1961 because the indenture expressly reserved a 'right of access' in the driveway that cannot be taken without just compensation. Both the DOT and DEKK moved for summary judgment. On August 13, 2020, the DOT sent a letter to DEKK stating it was removing DEKK's access point via the driveway to STH 50 pursuant to Wis. Admin. Code § Trans 231.03(2), and that if DEKK wished to contest the driveway removal it should submit a letter for review within 30 days. DEKK moved for a temporary restraining order and temporary injunction, presenting the DOT letter in support.

The circuit court granted DEKK a temporary restraining order and temporary injunction prohibiting DOT from closing the driveway. The circuit court entered a final order denying the DOT's motion for summary judgment and granting summary judgment in DEKK's favor. The circuit court held that the removal of the right of access was compensable, could only be accomplished through eminent domain procedures, and is not simply an exercise of police power. The circuit court determined DEKK 'had some sort of right of access to this driveway' and 'there should be just compensation.' DOT appealed from the final order.

The Court of Appeals reversed the circuit court's orders and remanded with instruction to enter summary judgment in DOT's favor. Specifically, the Court of Appeals held the DOT could remove DEKK's STH 50 driveway without compensation. It reasoned that, by the 1961 indenture's plain terms, DEKK's predecessors-in-interest granted to DOT, in exchange for

compensation, all access rights including the authority to revoke DEKK's use of the STH 50 driveway through DOT's police power under Wis. Admin. Code Trans § 231.03(2). DEKK did not have a 'full' right of access under the indenture, but rather a limited driveway connection subject to DOT regulation including its ability to entirely remove all STH 50 driveways and access.

DEKK petitioned the Wisconsin Supreme Court for review of the Court of Appeals decision. This court must decide the following issue:

> Can DOT remove a 'right of access,' contained in a recorded deed made under eminent domain procedures, under the guise of an exercise of the police power without prior due process proceedings and without just compensation?

WISCONSIN SUPREME COURT
Monday, November 7, 2022
9:45 a.m.

2020AP1078-FT Secura Supreme Insurance Co. v. Estate of Daniel Keith Huck

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), that affirmed the Racine County Circuit Court order, Judge Eugene A. Gasiorkiewicz presiding, that denied Secura Supreme Insurance Company's motion for judgment on the pleadings and granted the counterclaim of the Estate of Daniel Keith Huck, concluding that Secura may only reduce its underinsured motorist ("UIM") policy limits under Wis. Stat. § 632.32(5)(i)(2) by the total amount of worker's compensation actually received by the Huck's estate.

Daniel Keith Huck ("Huck") was struck and killed by a motorist while Huck was working for the Village of Mount Pleasant ("Mount Pleasant"). The tortfeasor's insurer paid Huck's estate ("The Estate") its $25,000 policy limit. Because Huck was in the course and scope of his employment with Mount Pleasant when he died, the Estate initially received $35,798.04 in worker's compensation benefits. However, pursuant to Wis. Stat. § 102.29 ("Third party liability" relating to worker's compensation), the Estate was required to refund the worker's compensation carrier $9,718.73 from the $25,000 tortfeasor settlement. Therefore, the Estate netted $26,079.31 from worker's compensation.

The Estate filed a claim for UIM coverage with Huck's personal automobile insurer, Secura Supreme Insurance Co. ("Secura"). Huck's UIM policy with Secura had a $250,000 limit. The policy also contained a reducing clause that mirrored Wis. Stat. § 632.32(5)(i). Wisconsin Stat. § 632.32(5)(i)2 allows insurers to reduce policy limits by "[a]mounts paid or payable under any worker's compensation law."

The parties agree that Huck's damages exceed $250,000. The parties also agree that Secura can reduce Huck's $250,000 UIM limits by the tortfeasor's $25,000 payment, and by the $26,079.31 payment the worker's compensation carrier issued and the Estate retained. However, the parties disagree that Secura can also reduce Huck's $250,000 UIM policy limit by the $9,718.73 that Huck's estate repaid the worker's compensation carrier.

Secura filed this declaratory action against the Estate to determine the parties' rights relative to the UIM coverage. After filing, Secura moved for judgment on the pleadings and asked the circuit court to declare that the UIM reducing clause applied to the disputed amount of $9,718.73, regardless of any recovery under Wis. Stat. § 102.29. The Estate did not file a separate motion for judgment on the pleadings, but in response to Secura's motion, the Estate asked that the circuit court grant judgment in its favor. The circuit court denied Secura's motion and granted the Estate judgment on its counterclaim for the disputed amount. Secura appealed.

The Court of Appeals affirmed the circuit court's decision. Specifically, the Court of Appeals held that Secura could only reduce its coverage limits under Wis. Stat. § 632.32(5)(i)2 and its UIM insurance policy by the total amount of worker's compensation the Estate actually received. The Court of Appeals reasoned that the worker's compensation insurer did not pay the

Estate $9,718.73, because the Estate repaid that initial amount. Secura petitioned the Wisconsin Supreme Court for review. This court granted review.

The court must answer this question:

> Does Wis. Stat. § 632.32(5)(i)2 allow automobile insurers to reduce UIM policy limits by all worker's compensation payments, even worker's compensation payments that an injured party returns pursuant to Wis. Stat. § 102.29?

WISCONSIN SUPREME COURT
Tuesday, November 8, 2022
9:45 a.m.

2020AP226-CR State v. Jeffrey L. Hineman

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha) that reversed the Racine County Circuit Court order, Judge Mark F. Nielsen presiding, that denied post-conviction relief to Jeffrey L. Hineman.

Hineman was romantically involved with SJS's mother up to the boy's birth and remained involved in SJS's life until SJS moved out of state with his mother. About a year later, SJS moved back to Wisconsin to live with his biological father. With his biological father's permission, Hineman reconnected with SJS and would take him places, care for him, and buy him gifts.

On March 12, 2015, when SJS was six years old, his therapist who had been seeing SJS for behavioral problems—including pulling down his pants in class and at home and acting as if he were to defecate on the floor, and ripping his clothes off—reported to Child Protective Services (CPS) her concern that SJS may be the victim of sexual abuse. CPS prepared a report the same day based on the contact from SJS's therapist. In addition to statements SJS had made to his therapist, the report also said that there was no information given by SJS that Hineman had touched him or forced him to touch Hineman, and repeated that "[t]here has been no disclosure of maltreatment by the child." The therapist also reported that SJS's father had stopped Hineman's contact with SJS two or three days before the March 12 report date.

CPS prepared two additional reports, one on April 20, based on contact from a nurse, and the second on May 29, based on contacts from a school teacher and school counselor. Neither of these reports gave any indication that SJS himself reported any inappropriate touching or contact. CPS sent the March 12 CPS report to the Racine County Sheriff's Office on June 5, 2015, and the sheriff's office proceeded to conduct a criminal investigation of possible sexual abuse of SJS by Hineman.

On August 4, 2015, the Child Advocacy Center conducted a forensic interview of SJS, which was videotaped. SJS expressed for the first time during this interview that Hineman had touched his "private parts" over his clothing. Hineman denied these allegations. Thereafter, Hineman was charged with 1st degree sexual assault of a child under the age of 13.

During trial, the forensic investigator testified about the August 4 videotaped interview of SJS and played the tape for the jury. The interviewer further testified about research on child reports of sexual assault and how the reports tend to come in a piecemeal manner and that delayed disclosure is common. The sheriff's deputy who investigated the allegations contained in the CPS reports also testified at trial. She testified that she created her own report after reviewing the CPS report. SJS and Hineman also testified at trial. The CPS reports were never provided to the defense and Hineman's attorney never requested them.

The jury found Hineman guilty, and the circuit court sentenced him to 17 years of initial confinement and 8 years of extended supervision.

Hineman filed a post-conviction motion arguing that he was entitled to a new trial because the State failed to turn over the March 12, 2015 CPS report. The circuit court denied the motion stating that all relevant information in the CPS report that would have been helpful also appeared in the police report. It also found no ineffective assistance by Hineman's trial counsel.

Hineman filed an appeal with the Court of Appeals, and the Court of Appeals reversed and remanded the case to the circuit court for a new trial. The Court of Appeals also ordered production and in-camera review of SJS's private therapy files related to the mandatory report of SJS's therapist on remand.

The State filed a petition for review with the Wisconsin Supreme Court. The issues before this Court are:

1) In cases involving credibility contests between a complaining witness (here, SJS) and the defendant (Hineman), to what extent can a reviewing court reweigh the witnesses' credibility in assessing whether, based on omitted evidence, there was a reasonable likelihood of a different result under Brady[1] materiality or Strickland[2] prejudice standards?
2) Did the Court of Appeals have authority to reach the Shiffra-Green[3] issue, which Hineman did not raise as a direct claim on appeal, and did it have authority to reverse the postconviction court's ruling on a basis that Hineman never advanced?
3) Was the fact that SJS's therapist made a mandatory report, without more, enough to satisfy the Green pleading standard permitting in camera review of SJS's therapy files "related to the report"?
4) Was Hineman denied effective assistance of counsel when trial counsel failed to obtain the CPS report before trial, failed to make an opening statement, failed to object to improper expert testimony, and conceded guilt during closing arguments?

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[1] Brady v. Maryland, 373 U.S. 83 (1963).

[2] Strickland v. Washington, 466 U.S. 668 (1984).

[3] State v. Shiffra, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993); State v. Green, 2002 WI 68, 253 Wis. 2d 365, 646 N.W.2d 298.

WISCONSIN SUPREME COURT
Tuesday, November 8, 2022
10:45 .m.

2020AP1728-CR State v. Percy Antione Robinson

This is a review of a decision of the Circuit Court for Milwaukee County, Judge Lindsay Grady, presiding, denying Percy Antione Robinson's motion for a new trial. Pursuant to Wis. Stat. § 809.61, the Court of Appeals, District I (headquartered in Milwaukee) certified this case to this court.

On December 19, 2017, Robinson was arrested without a warrant on suspicion of bank robbery. On December 21, the police prepared a CR-215[4] probable cause affidavit and presented it to a court commissioner for signature. The court commissioner determined there was probable cause to believe Robinson committed the offense and signed the form at an ex parte hearing where Robinson was neither present for the document's review nor was he provided a copy. On December 22, the State conducted a live lineup where Robinson was identified as the bank robber. As of the time of the lineup, Robinson had not been appointed counsel. The State charged Robinson with one count of robbery of a financial institution.

At trial, the State called the witness who identified Robinson in the lineup. The witness identified Robinson on three separate occasions—from the live lineup, from still photos of the bank robbery, and in court. (The State also called two additional witnesses who spent time with Robinson on the day of the robbery. Both witnesses positively identified Robinson from bank video stills, his clothing, and his appearance.) Robinson denied robbing the bank and testified in his own defense at trial that, on the day of the robbery, he was recovering from the prior day's heroin, marijuana, and cocaine binge. During deliberations, the jury asked to view the robbery photos and footage. The jury found Robinson guilty of the charged offense.

After sentencing, Robinson filed a post-conviction motion with the Milwaukee County circuit court, alleging that he had received ineffective assistance of counsel because his lawyer: (1) failed to move to suppress the identification at the live lineup; (2) failed to present evidence to the jury of two bank employees who witnessed the bank robbery but did not identify Robinson; and (3) failed to present evidence that multiple other people viewed the footage of the bank robbery and confidently identified other people who were not Robinson. The circuit court denied Robinson's postconviction motion without a hearing, concluding that the testimony of other witnesses who did not identify Robinson would not have changed the outcome, evidence

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[4] CR-215 is a standard form developed by the Wisconsin Records Management Committee, a committee of the Director of State Court's office and a mandate of the Wisconsin Judicial Conference. The purpose of the form is to have a written record of the 48 hour court review of an arrested person who is held in custody as required by *County of Riverside v. McLaughlin,* 500 U.S. 44 (1991), and the form is completed by the arresting or other law enforcement officer.

referencing other suspects would be barred, and a recent unpublished Court of Appeals' decision rejected an identical factual claim that the right to counsel is triggered by the CR-215 procedure.

Robinson appealed the circuit court's decision to the Court of Appeals. After briefing was concluded, the Court of Appeals certified this case to the Wisconsin Supreme Court pursuant to Wis. Stat. § 809.61. In its certification to this court, the Court of Appeals identified a difference between Wisconsin state law and federal law on the issue of whether the Sixth Amendment right to counsel is triggered by the CR-215 procedure. Due to the lack of mandatory authority on the issue, the Court of Appeals certified the issue to this court for review.

The issue presented in the Court of Appeals' certification to this court is:

> Whether the CR-215 procedure triggers the attachment of the Sixth Amendment right to counsel, which would then entitle an accused person to have the right to counsel for any subsequent "critical stage" of the legal proceedings.