WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
MARCH 2023

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

Juneau
Outagamie
Waukesha

MONDAY, MARCH 13, 2023

9:45 a.m.	22AP1233	Wisconsin Property Taxpayers, Inc. v. Town of Buchanan
11 a.m.	21AP1764	Thomas G. Miller v. Zoning Bd. of Appeals, Village of Lyndon Station

WEDNESDAY, MARCH 15, 2023

9:45 a.m.	21AP635	Pepsi-Cola Met. Bottling Co., Inc. v. Employers Ins. Co. of Wausau

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
March 13, 2023
9:45 a.m.

2022AP1233 Wisconsin Property Taxpayers, Inc. v. Town of Buchanan

This case is before the court on a joint petition to bypass the Wisconsin Court of Appeals, District III (headquartered in Wausau), seeking Supreme Court review of an order of the Outagamie County Circuit Court, Judge Mark J. McGinnis, presiding, granting declaratory judgment in favor of Wisconsin Property Taxpayers Inc.

The Town of Buchanan ("Town") is located adjacent to the east side of Appleton, and has a population of about 8,000. The Town has 46 miles of road, 24 miles of which are rated Fair to Very Poor under the State Pavement Surface Evaluation and Rating System. Many of the problems with the Town's road conditions are drainage related.

The Town financed road construction on a "pay as you go" basis, using funds from the general property tax levy along with state aids and grants. Under state law, the Town is only able to increase the general tax levy by annual net new construction. See Wis. Stat. § 66.0602(1) and (2). Over the past five years, annual net construction value had been about 1.11 percent, so the Town has been limited to increasing the tax levy by slightly over one percent.

The Town determined that a "pay as you go" system no longer allowed it to keep up with needed road reconstruction costs, and the Town was at its tax levy limit. The Town prepared a Transportation System Financing Approach report that was completed in 2019. The report considered various alternatives for financing road construction. After a series of public meetings, the Town held a referendum in April of 2019 to determine which financing alternative was favored by Town residents. The majority of voters favored a transportation utility fee (TUF).

In December of 2019, the Town enacted Chapter 482 of the Town's ordinances, establishing a Transportation Utility District—the tax at issue—on property in the district. The Town board also adopted a resolution establishing the amount to be funded, a formula for calculating fees by land use category for all developed property, and a fee schedule for all developed property. The ordinance invoked various statutes for authority, but the Town focused mainly on Wis. Stat. s§ 66.0827. The tax applied to "[e]very developed property within the Town," and imposed a charge based on estimated trips using the Town's roads. The Town billed and collected the tax with and as a part of the annual property tax bill.

Wisconsin Property Taxpayers, Inc. (WPT) filed a lawsuit with the circuit court, seeking declaratory judgment that the district transportation tax/fee was a general property tax subject to the general property tax levy limits, and that the revenue generated by the District exceeded the Town's levy limit. WPT also argued that the district tax violated the constitutional uniformity requirement that all property taxes must be based on property value.

Both parties moved for summary judgment. The circuit court granted summary judgment in favor of WPT. It held that the district transportation tax/fee was a transfer of responsibility for providing a service that the Town itself previously provided; the general property tax levy limit should decrease to reflect the cost that the Town would have otherwise incurred to provide that service; and the Town exceeded its levy limit. The court did not determine if the district transportation utility tax/fee was a general property tax. The circuit court also did not reach WPT's uniformity clause challenge.

The Town appealed to the Court of Appeals. After briefing was completed, the parties filed a joint petition to bypass the Court of Appeals and requested the Wisconsin Supreme Court decide the case. The Supreme Court granted the petition.

The Town argues that road reconstruction is a public improvement and its TUF is authorized under Wis. Stat. § 66.0827. The Town asserts that the TUF is an authorized "taxation of property," not a general property tax. It says the TUF is a special tax which, like special assessments, is not subject to levy limits or the rule of uniformity. WPT argues that the TUF is unlawful because it does not fit as a property tax under § 66.0827, and there is no statutory authority for a tax based on properties' predicted use of the road system. In addition, WPT says even if the TUF could be considered a property tax under § 66.0827, it would then violate both state levy limits and the Uniformity Clause of the Wisconsin Constitution.

This court must decide three issues:

1) Does Wis. Stat. § 66.0827 authorize the Town to impose the tax?
2) Does the tax violate the Town's local levy limit under Wis. Stat. § 66.0602?
3) Does the tax violate the Uniformity Clause under the Wisconsin Constitution?

WISCONSIN SUPREME COURT
March 13, 2023
11:00 a.m.

2021AP1764 Thomas G. Miller v. Zoning Bd. of Appeals Village of Lyndon Station

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison) reversing the Juneau County Circuit Court judgment, Judge William Andrew Sharp presiding, that reversed the Zoning Board of Appeals' decision.

Larry and Kristi Whaley (the Whaleys) purchased a 1.87 acre vacant lot in the Village of Lyndon Station (the "subject property"). The subject property was zoned G1-Residential at the time, which did not permit commercial development. The subject property was surrounded almost entirely by commercial property. The Whaleys contracted to sell the subject property for future commercial development, and the sale was contingent on obtaining the necessary zoning approvals. The Whaleys submitted an application to the Village Board requesting that the subject property be rezoned from residential to commercial. Jan Miller, Kristi Whaley's mother, was chair of the Plan Commission and a trustee of the Village Board. Jan Miller (hereinafter, Trustee Miller) also lived with the Whaleys at all relevant times.

The Village's Plan Commission held a meeting and voted 3-1 in favor of recommending the Village Board adopt a resolution rezoning the subject property commercial. The Village Board held a public hearing on the recommendation. Two residents spoke in favor of the rezoning, while nine residents opposed. Thomas Miller (unrelated to Trustee Miller) spoke against the application. Thomas owns a general store and three rental properties in the vicinity of the subject property. He believed the rezoning would cause his store to go out of business and harm the Village's aesthetics, character, and finances. Participating residents questioned whether Trustee Miller had a conflict of interest. The Village's attorney stated, "Trustee Miller does not have a conflict of interest as she does not receive nor will be receiving any monetary values from the rezoning of the property in question." The attorney explained the relevant statute, Wis. Stat. § 19.59, in detail. The Village Board voted 2-1 to approve the rezoning application. Trustee Miller was with the majority.

Thomas Miller appealed to the Village Zoning Board of Appeals. The Zoning Board of Appeals voted 3-2 to uphold the rezoning decision.

On October 27, 2020, Thomas Miller filed a summons and complaint with the circuit court, seeking certiorari review of the Zoning Board of Appeals' decision. In addition to other arguments, Miller claimed that Wis. Stat. § 19.59(1)(d) was unconstitutional and violated his rights under the due process clause of the United States Constitution and Wisconsin Constitution. Miller also argued that Trustee Miller's participation in the Village Board vote violated his right to due process. The Village Board and the Zoning Board of Appeals moved for judgment on the pleadings, claiming that because rezoning is a legislative act, the Zoning Board of Appeals never should have heard Miller's appeal, and that legislative rezoning decisions cannot be challenged by certiorari review because a circuit court cannot declare a rezoning ordinance void. The

Whaleys intervened in the lawsuit. The circuit court reversed the Zoning Board of Appeals' decision, concluding there was a due process violation based on the appearance of impropriety.

The Whaleys appealed the circuit court's order. Neither the Village nor the Zoning Board of Appeals participated in the appeal. The Court of Appeals reversed the circuit court's decision. Thomas Miller filed a petition with the Wisconsin Supreme Court asking the court to review the Court of Appeals' decision, and the Supreme Court granted the petition.

The issues this court must decide are as follows:

1) Whether there is a Due Process right to impartial decisionmakers in rezoning hearings in Wisconsin and, if so, whether it is commensurate with the recusal requirements of Wis. Stat. § 19.59?
2) Whether rezoning of a single parcel is a quasi-judicial or legislative determination?
3) Whether the Zoning Board of Appeals had jurisdiction to hear Thomas Miller's appeal from the Village Board's rezoning decision, and, if not, whether the Court of Appeals' decision should be vacated?

WISCONSIN SUPREME COURT
March 15, 2023
9:45 a.m.

2021AP635 Pepsi-Cola Metropolitan Bottling Co., Inc. v. Employers Ins. Co. of Wausau

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha) that reversed the Waukesha County Circuit Court order, Judge Ralph M. Ramirez presiding, granting summary judgment in favor of Employers Insurance Co. of Wausau.

This case features a complicated legal issue involving a long history of corporate relationships among a half-dozen entities. At issue is an anti-assignment provision in an insurance policy; i.e., a provision that requires the insurance company's consent to any assignment of policy rights. The insurance policy at issue is an occurrence-based insurance policy; i.e., one that pays for losses that occur during the policy period, even if the policy is no longer active when the claim is filed.

From 1963 to 1968, Waukesha Foundry Company (Old Waukesha) was insured under primary and umbrella insurance policies issued by Employers Insurance Co. of Wausau (Wausau). The policies were occurrence policies that covered, among other things, injurious exposure to conditions. Wausau's policies said it "will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . bodily injury or . . . property damage . . . caused by an occurrence." The policies defined "occurrence" as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured." The policies included an anti-assignment clause that stated: "Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon[.]"

In August 1968, Illinois Central Industries, Inc., acquired substantially all of the assets and liabilities of Old Waukesha through a wholly-owned subsidiary, called Waukesha Foundry Company, Inc. ("New Waukesha"). Wausau issued new policies to New Waukesha that ran from 1968 through 1971. As to the provisions at issue here, the new policies contained the same language as the policies issued to Old Waukesha.

The line of successorship after New Waukesha is as follows:

- In 1974, New Waukesha merged with Abex Corporation (Abex).
- On August 23, 1990, Abex entered into an Assignment and Assumption Agreement whereby it assigned all of its assets and rights to PA Holdings Corporation, its sole stockholder. Abex then dissolved.
- On November 1, 1990, PA Holdings Corporation changed its name to Pneumo Abex Corporation. Pneumo Abex Corporation remained as the surviving corporate entity from 1990 until 2004, when it merged with and into Pneumo Abex, LLC. Pneumo Abex Corporation then ceased to exist. Pneumo Abex, LLC, is the successor in interest to Abex, which in turn is the successor in interest to New Waukesha.

- In 2019, Pneumo Abex, LLC and Pepsi entered into an assignment agreement, whereby Pneumo Abex, LLC stated that it was the successor in interest to the Waukesha foundry companies, that Pepsi is the "net-of-insurance" indemnitor of Pneumo Abex, LLC for numerous asbestos suits relating to the Waukesha entities, and that Pneumo Abex, LLC assigned its rights under the Wausau policies to Pepsi.[1] It is undisputed that Pepsi's indemnification of Pneumo Abex, LLC would not bar recovery.

Over 100 individuals alleged they were injured by exposure to asbestos from a pump manufactured by the Old Waukesha and New Waukesha foundry companies. One of these individuals, Roger Huff, filed a lawsuit against Pneumo Abex, LLC.

Pepsi, as Pneumo Abex, LLC's assignee, tendered defense to Wausau, asserting that Pneumo Abex, LLC was entitled to coverage under the Old Waukesha and New Waukesha polices. Wausau denied coverage, taking the position that Pneumo Abex, LLC was being sued not for any liabilities related to the pump manufactured by Old Waukesha and New Waukesha, but for the historical liabilities of Abex Corporation.

Pepsi then paid defense and settlement costs relating to some of the Waukesha asbestos lawsuits, including Huff's action. In 2019, Pneumo Abex, LLC, assigned to Pepsi the right to pursue and keep insurance proceeds for the Waukesha asbestos lawsuits under the Wausau policies. Pepsi then sued Wausau, seeking a declaration that Wausau had a duty to defend the Huff lawsuit and the other asbestos lawsuits. Pepsi argued that Pneumo Abex, LLC was a successor to insurance rights under the Wausau policies. Wausau refused to defend the suit.

On cross-motions for summary judgment, the circuit court ruled in Wausau's favor. It held that the anti-assignment provisions in the Wausau policies prevented any transfer of insurance rights without Wausau's consent. The trial court also found that Pepsi had failed to demonstrate a transfer of insurance rights from either Old Waukesha to New Waukesha or from Abex to PA Holdings.

Pepsi appealed, arguing that it is the assignee of rights under the insurance policies Wausau issued from 1963 to 1971 to the two Waukesha foundry companies, whose pump products are alleged to have caused asbestos injuries. Therefore, Pepsi argued, Wausau had a duty to indemnify it and to defend against asbestos exposure allegations raised by Huff. Wausau argued (1) that the anti-assignment clause in its policies precludes indemnity coverage for injuries sustained during the coverage period for the insured corporations because the right to insurance was assigned to successor companies without Wausau's consent; (2) even if the anti-assignment provision is unenforceable, two breaks in the assignment during the chain of corporate succession preclude coverage; and (3) the Huff complaint fails to allege facts sufficient to trigger its duty to defend.

The Court of Appeals disagreed with Wausau and concluded that Wausau was required to defend against the asbestos suits brought against Pneumo Abex LLC. Wausau filed a petition

---

[1] "Net of insurance" indemnification means that, with respect to liability for qualifying claims including the Waukesha asbestos lawsuits, Pepsi is entitled to Pneumo Abex, LLC's insurance recoveries applicable to claims for which Pepsi indemnifies Pneumo Abex, LLC.

with the Wisconsin Supreme Court to review the Court of Appeals' decision, and this court granted that petition.

The issues before the Supreme Court are:

1. Should the unambiguous consent-before-assignment provisions in the Wausau policies be applied as written to prevent assignment of policy rights after an occurrence but prior to any third-party claims being brought?
2. Even if the consent-before-assignment provisions are held unenforceable, did Old Waukesha assign its insurance rights under the Wausau policies to New Waukesha as part of the 1968 Reorganization Agreement?
3. Even if the consent-before-assignment provisions are held unenforceable, did Abex assign New Waukesha's insurance rights under the Wausau policies to PA Holdings as part of the 1990 Assignment and Assumption Agreement?
4. Assuming the consent-before-assignment provisions are unenforceable, and the Wausau policies were properly assigned to Pneumo Abex, does Wausau has a duty to defend the Huff Complaint?