SUPREME COURT OF WISCONSIN

In the matter of the Amendment of the Supreme Court Internal Operating Procedures

FILED

OCT 19, 2007

David R. Schanker
Clerk of Supreme Court
Madison, WI

The Supreme Court, on its own motion, has considered proposed changes to its Internal Operating Procedures in regard to asking for briefing on issues not identified by the parties in orders granting petitions for review, petitions to bypass, certifications, original actions and in post-argument decision conferences.

IT IS ORDERED that, effective the date of this order, Supreme Court Internal Operating Procedures II.B.1, II.B.2, II.B.3., and II.E. are amended to read:

B. Staff Analysis and Reporting

1. *Petition for Review*. Upon filing in the office of the clerk, petitions for review are assigned by clerk staff to the court's commissioners for analysis prior to the court's consideration of the matters presented. Within 50 days of assignment of the petition, the commissioner to whom a petition for review is assigned prepares and circulates to the court a memorandum containing a thorough legal and factual analysis of the petition, including the applicability of the criteria for the granting of a

petition for review set forth in Wis. Stat. § (Rule) 809.62(1), a recommendation for the granting or denial of the petition and, where appropriate, a recommendation for submission of the matter to the court for decision on briefs without oral argument.

In addition to the written memorandum, once each month and at other times as the court may direct, a conference is held at which each commissioner orally reports to the court on the petitions for review. Two weeks prior to the conference at which the commissioners report, each commissioner circulates to the court the petitions for review, the responses to those petitions, and a memorandum on each petition, together with an agenda sheet listing by caption and docket number the cases to be reported on at the conference and the commissioner's recommendation in each case. Prior to the conference, each member of the court reads the materials circulated.

At the conference, the chief justice states the name of each case, and the members of the court are asked whether they have any objection to the commissioner's recommendation. If there is no objection, the commissioner's recommendation is accepted without further discussion.

If any justice objects to or asks to discuss the commissioner's recommendation, a discussion is held in which the commissioner or a justice reports on the case. Following discussion, the court decides whether to grant or deny the petition for review and, if the petition is granted, whether the case will be scheduled for oral argument or for submission on briefs and whether the court will limit the issues in the case.

A petition for review is granted upon the affirmative vote of three or more members of the court. The purpose of requiring less than a majority of the court to grant a petition for review is to accommodate the general public policy that appellate review is desirable. A decision to direct the parties to brief issues other than those raised in the petition for review or response requires the affirmative vote of four or more members of the court.

The commissioner to whom the petition has been assigned prepares an order setting forth the court's

decision on the petition for review and arranges for the issuance of the order by the office of the clerk. If the petition is granted, the order specifies the court's limitation of issues, if any, and the briefing schedule. The order provides that a party may file a brief or may stand on the brief filed in the Court of Appeals. The parties shall not, in any new brief filed, incorporate by reference any portion of their Court of Appeals briefs or their briefs submitted with or in response to the petition for review.

2. *Petition to Bypass, Certification and Direct Review*. A party may request the court to take jurisdiction of an appeal or other proceeding pending in the Court of Appeals by filing a petition to bypass pursuant to Wis. Stat. § (Rule) 809.60. A matter appropriate for bypass is usually one which meets one or more of the criteria for review, Wis. Stat. § (Rule) 809.62(1), and one the court concludes it will ultimately choose to consider regardless of how the Court of Appeals might decide the issues. At times, a petition for bypass will be granted where there is a clear need to hasten the ultimate appellate decision.

The Court of Appeals may request the Supreme Court to exercise its appellate jurisdiction by certifying a pending appeal to the Supreme Court prior to hearing and deciding the matter. Certifications are granted on the basis of the same criteria as petitions to bypass.

Petitions to bypass and certifications are processed according to the procedure set forth above for petitions for review, except that these matters are given priority over petitions for review. Petitions to bypass and certifications are granted upon the affirmative vote of four or more members of the court. A decision to direct the parties to brief issues other than those raised in their court of appeals' briefs requires the affirmative vote of four or more members of the court.

Before the court on its own motion decides to review directly a matter appealed to the Court of Appeals, the chief justice may assign the matter to a commissioner for analysis. If the matter is so assigned, it is processed according to the procedures set forth in this section for petitions to bypass and certifications.

3. *Original Action*. Upon filing in the office of the clerk, a petition requesting the court to take jurisdiction of an original action is assigned to a court commissioner for analysis prior to the court's consideration of the merits of the matter presented. The commissioner orally reports on the matter to the chief justice as soon as practicable, and the chief justice, or in the absence of the chief justice, the most senior justice present, determines a date on which the matter will be considered by the court at conference. The commissioner reports on the matter at that conference. If time permits, the commissioner circulates a memorandum to the court prior to that conference analyzing the legal and factual issues involved and making a recommendation for the denial of the petition ex parte or for a response to be ordered and for the scheduling of oral argument on the question of the court's exercise of its original jurisdiction, if oral argument is deemed necessary. If circumstances warrant, the chief justice, or in the absence of the chief justice, the most senior justice present, may order a response to the petition for original action and may act on nonsubstantive motions concerning the proceeding.

If the petition is denied, the commissioner prepares an order setting forth that decision and arranges for its issuance through the office of the clerk; if a response is ordered, the commissioner prepares an order setting forth that decision, as well as the decision on oral argument. When the order is approved by the court, the commissioner arranges for its issuance by the office of the clerk. Upon the filing of a response, the matter is referred to the commissioner for analysis and reporting. The original action is then processed according to the procedures set forth above for petitions for review.

A petition to commence an original action is granted upon the vote of four or more members of the court. The criteria for the granting of a petition to commence an original action are a matter of case law. *See*, *e.g.*, *Petition of Heil*, 230 Wis. 428 (1939). The Supreme Court is not a fact-finding tribunal, and although it may refer issues of fact to a circuit court or referee for determination, it generally will not exercise its original jurisdiction in matters involving contested issues of fact. Upon granting a

petition to commence an original action, the court may require the parties to file pleadings and stipulations of fact. The court customarily holds oral argument on the merits of the action and expedites the matter to decide it promptly. A decision to direct the parties to brief issues other than those raised in the petition to commence an original action or response requires the affirmative vote of four or more members of the court.

. . .

E. Post-argument Decision Conference

Following each day's oral arguments, the court meets in conference to discuss the cases argued that day. The chief justice presides at the conference, conducts the court's discussion, and calls for the vote on the decision of each case.

For each case, the justice to whom the case was assigned for presentation at the pre-argument conference gives his or her analysis and recommendation, the court discusses the issues in the case, and the vote of each member of the court on the decision is taken, beginning with the justice who has given the recommendation. When possible, the court reaches a decision in each of the cases argued that day, but any decision is tentative until the decision is mandated. Prior to a tentative decision, any justice may have a case held for further consideration and discussion. Following the court's tentative decision, any justice may request reconferencing for further discussion of the case. A decision to direct the parties to brief issues other than those raised in their initial briefs requires the affirmative vote of four or more members of the court. In a week following the oral arguments, the court decides the cases (usually discipline cases) on the month's submission calendar that are not decided at post-argument conference.

IT IS FURTHER ORDERED that notice of this amendment of the Supreme Court Internal Operating Procedures be given by a single publication of a copy of this order in the official state

newspaper and in an official publication of the State Bar of Wisconsin.

ANNETTE KINGSLAND ZIEGLER, J., did not participate.

Dated at Madison, Wisconsin, this 19th day of October, 2007.

BY THE COURT:

David R. Schanker
Clerk of Supreme Court

¶1 ANN WALSH BRADLEY, J. *(concurring).* I write separately to respond to the dissent below. I disagree with its analysis and conclusions for two reasons.

¶2 First. The dissent cites to Wis. Stat. § 809.62(6), but it fails to honor the text of the rule. Section 809.62(6) provides in relevant part:

> (6) The supreme court may grant the petition upon such conditions as it considers appropriate, including the filing of additional briefs. If the petition is granted, the petitioner cannot raise or argue issues not set forth in the petition unless ordered otherwise by the supreme court.

(Emphasis added.)

¶3 Unless otherwise specifically provided, it takes a majority of the court to issue any order of the supreme court. Even though petitions for review can be "granted" by a vote of less than the majority, when an order is issued accepting a petition for review, it is an order on behalf of the entire court. It is not an order issued on behalf of only three justices.

¶4 Second. Although couched in terms of service to the public and fairness to the parties, the essence of the dissent is the desire to more freely frame questions and advance issues rather than letting the parties do so. There is a divergence of opinion as to whether this is the proper role of the court.

¶5 I have on many occasions expressed my view that generally courts should respond to issues presented and not reach out to decide other issues not before the court. In City of Janesville v. CC Midwest, 2007 WI 93, ¶¶67-68, ____

Wis. 2d ____, 734 N.W.2d 438 (Bradley, J., concurring),[1] I recently explained:

> Unlike the legislative or the executive branch of government which have as their regular fare the responsibility to raise and resolve the issues of the day, our role is to respond to the issues presented. . . .
>
> The rule of law is generally best developed when issues are raised by the parties and then tested by the fire of adversarial briefs and oral arguments. Indeed, "[t]he fundamental premise of the adversary process is that these advocates will uncover and present more useful information and arguments to the decision maker than would be developed by a judicial officer acting on his own in an inquisitorial system." Adam A. Milani & Michael R. Smith, Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts, 69 Tenn. L. Rev. 245, 247 (2002), citing United States v. Burke, 504 U.S. 229, 246 (1992) (Scalia, J., concurring).

See also, Beecher v. Labor & Industry Review Comm'n, 2004 WI 88, ¶97, 273 Wis. 2d 136, 682 N.W.2d 29 (Bradley, J., concurring).

¶6 Accordingly, I respectfully concur.

¶7 I am authorized to state that Chief Justice SHIRLEY S. ABRAHAMSON, and Justices N. PATRICK CROOKS and LOUIS B. BUTLER, JR., join this concurrence.

[1] CC Midwest indicated both in its brief and at oral argument that it had abandoned any constitutional issue in this court. Disregarding the fact that the party advancing the issue below affirmatively indicated that it had abandoned the issue here, the lead opinion nevertheless reached out to discuss and decide the constitutional takings issue.

¶8 PATIENCE DRAKE ROGGENSACK, J. *(dissenting).* I write in dissent to the 2007 changes in Supreme Court Internal Operating Procedures (IOP), II.B.1., II.B.2., II.B.3. and II.E., which changes require the affirmative vote of four justices to direct the parties to address an issue not specifically identified in: (1) the petition for review or response; (2) the court of appeals briefs of the parties in bypass and in certification; (3) the request, or response, that the supreme court commence an original action; and (4) after oral argument before the supreme court has occurred. My reasons for dissenting from the changes made to these four parts of the IOP differ.

Part II.B.1.

¶9 IOP II.B.1. applies to petitions for review of court of appeals decisions. It permits the supreme court to take jurisdiction of a case on the affirmative vote of three of the court's seven justices. The stated purpose of this procedure is "to accommodate the general public policy that appellate review is desirable." Stated otherwise, because the taking of more cases by the supreme court is a desirable goal in the court's service of the public, the accepting of cases for review on the affirmative vote of a minority of the court results in supreme court review of more cases.

¶10 Accepting a case on the vote of three justices is a counter-majoritarian action that has other benefits for the public besides increasing the number of cases that the supreme court will review. For example, the three-vote rule also

prevents the majority of the court from completely controlling the court's docket of cases and issues. That is, without this opportunity for a minority of the court to require the court to review cases in which three justices have identified legal issues of state-wide concern, the court's majority would prevent the exploration of any case or the development of the law on any issue the majority decided it did not want the court to address. Therefore, the 2007 change in II.B.1. is an impediment to the ability of a minority of the court to have the court address issues it deems to be of state-wide concern.

¶11 The 2007 change in IOP II.B.1. is extremely significant when read in concert with Wis. Stat. § 809.62(6), which directs that a petitioner is not to brief or to argue an issue not set forth in the petition for review unless ordered to do so by the court. The concurring opinion to the IOP changes asserts that Wis. Stat. § 809.62(6) requires the vote of four justices because "when an order is issued accepting a petition for review, it is an order on behalf of the entire court. It is not an order issued on behalf of only three justices."[1] I agree with the concurrence that any order made by this court is made on behalf of the entire court, unless, of course, a justice dissents, concurs or does not participate. However, an order based on the vote of three justices requesting the parties to address an issue not listed in the petition for review could just as easily be an "order on behalf of the entire court," as is an order granting a petition for review. This is so because

[1] Bradley, J., concurring in the changes to the IOP.

the sole basis for permitting an order of the court that grants a petition for review to be based on the vote of only three justices is because our IOP provides for granting a petition for review on the vote of three. Therefore, if our IOP provided that the vote of three justices would result in an order requesting the parties to address issues in addition to those set out in the petition for review, that order would be "an order on behalf of the entire court," as well. Section 809.62(6) is a creation of this court; therefore, our interpretation of it to permit certain orders to be issued on the vote of three justices pursuant to the IOP is not restricted by any goal of the legislature.

¶12 It is also important to note that the directive of Wis. Stat. § 809.62(6) does not prevent a majority of the court from addressing issues that were not set out in the petition for review, when the majority chooses to do so. City of La Crosse Police and Fire Comm'n v. LIRC, 139 Wis. 2d 740, 766-67 n.7, 407 N.W.2d 510 (1987) (concluding that even though the petition for review of neither party had addressed "hiring standard[s]" or "Rusch's ability to perform the duties of a police officer" in their petitions for review, a "complete review" required that those issues be addressed).

¶13 The concurrence also cites a recent concurrence in which Justice Bradley argued that the court should not address whether there was a constitutional underpinning to the eminent domain issue being addressed because the constitutional issue

was not raised by the parties.[2] The concurrence is incorrect in this assertion, as it was in the published decision. The lack of constitutional underpinnings to CC Midwest's claim was briefed for this court by a party, the City of Janesville,[3] and it also was the subject of a lengthy dissent by Justice Prosser.

¶14 Furthermore, once the court accepts jurisdiction of a case, it may "review any substantial and compelling issue which the case presents." Univest Corp. v. General Split Corp., 148 Wis. 2d 29, 32, 435 N.W.2d 234 (1989). In addition, justices routinely address issues in their opinions that the parties have not briefed or argued. See e.g., State v. Leitner, 2002 WI 77, ¶12, 253 Wis. 2d 449, 646 N.W.2d 341 (addressing mootness, sua sponte); Burks v. St. Joseph's Hospital, 227 Wis. 2d 811, 835, 596 N.W.2d 391 (1999) (Abrahamson, C.J., concurring) (noting that the parties did not brief or argue the distinction employed by the majority opinion).

¶15 However, my greatest concern is the occasion when the failure to list an issue in a petition for review will prevent a petitioner from having any opportunity for reversal of the previous court decision. This occurs when the supreme court accepts review and then enforces Wis. Stat. § 809.62(6), thereby refusing to consider an issue that was not listed in the petition for review but is an issue on which the petitioner must prevail in order to obtain reversal of the earlier decision.

---

[2] Id., citing her concurrence in City of Janesville v. CC Midwest, 2007 WI 93, ___ Wis. 2d ___, 734 N.W.2d 438 (Bradley, J., concurring).

[3] CC Midwest, 2007 WI 93, ___ Wis. 2d ____, ¶15 n.13.

Estate of Szleszinski v. LIRC, 2007 WI 106, ¶4 n.5 and ¶13 n.8, __ Wis. 2d __, 736 N.W.2d 111 (concluding that because the court of appeals reversed LIRC's decision that Szleszinski's medical evaluation was "individualized" and the employer did not seek review of the court of appeals' decision on that issue, it was conclusively decided for purposes of supreme court review that the medical evaluation did not qualify as an "individualized" evaluation under Wis. Stat. § 111.34(2)(c); therefore, the employer could not prevail on its defense that Szleszinski's handicap was reasonably related to performing his job duties).

¶16 Nevertheless, as most would acknowledge, one of the purposes of appellate review is "justice for the parties." See Allan D. Vestal, Sua Sponte Consideration In Appellate Review, 27 Ford. L. Rev. 477, 509 (1958-59). Preventing the parties from participating in the discussion of all the legal issues that the three justices who have voted to accept jurisdiction seek to have decided does not promote justice for the parties, because the parties are prevented from addressing all of the questions that those voting to grant the petition for review deem necessary to a complete analysis of the case.

¶17 Furthermore, there is an unfairness to the parties to the litigation that is inherent in the 2007 change in IOP II.B.1. This is so because the IOP change will permit the supreme court to limit the parties' briefing and argument more frequently, when the court does not limit the amici curiae. This unfairness among participants occurs because frequently an amicus will file its brief with the court in completed form, together with a request that the court accept it. The court's

routine practice is to do so. The brief of an amicus addresses any issue that the amicus believes the court should consider. Neither Wis. Stat. § 809.62(6) nor any IOP limits the issues that an amicus curiae can address.[4] The practice of adding a new issue at the pleasure of an amicus permits an amicus to shape the nature of the controversies before the supreme court in ways that the court prevents the parties from doing.

¶18 In addition, after accepting an amicus brief, it is not uncommon for members of the court to cite to and address an issue raised therein that may not have been in the petition for review. See Wagner v. Milwaukee County Election Comm'n, 2003 WI 103, ¶6, 263 Wis. 2d 709, 666 N.W.2d 816 (addressing the justicibility of the controversy raised by an amicus); In re Guardianship of Jane E.P., 2005 WI 106, ¶¶76, 77, 283 Wis. 2d 258, 700 N.W.2d 863 (referencing venue under Wis. Stat. § 55.06(3)(c) at the request of an amicus). Therefore, under the 2007 change to IOP II.B.1., at times, the parties who brought the case before the court will be given a more limited scope of issues that they can frame and participate in than non-parties. This does not promote justice for the parties.

¶19 Accordingly, I conclude that when it is apparent at the petition conference to three of the justices who voted to grant the petition for review that an issue should be addressed in order to accord a full and fair hearing of the case but that the petitioner has not identified that issue in the petition for

[4] At times, the court permits the parties to respond to an issue raised by the amicus. See e.g., State v. Piddington, 2001 WI 24, ¶11, 241 Wis. 2d 754, 623 N.W.2d 528.

review, the court should direct the parties to address the issue. Otherwise, the major effects of the change in II.B.1. are: (1) to increase the majority's control of the issues the court will consider, and (2) to reduce the opportunity for fairness to the parties on appeal.

Parts II.B.2., II.B.3. and II.E.

¶20 IOP II.B.2. and B.3. address bypass, certification and petition for an original action. In those other procedures by which the supreme court commonly accepts cases, the affirmative vote of a majority of the court is required. Therefore, the majority of the court controls the supreme court's docket of the cases and issues that develop by those procedures. The 2007 changes in these parts of the IOP do not restrict the right of a party to address an issue by a greater number of votes than does the acceptance of a case in the first instance.

¶21 Part II.E. addresses the procedure in a post-argument decision conference on all cases for which we have held oral argument: petitions for review, petitions for bypass, certifications and original actions. Although Part II.E. requires the vote of only one justice to re-conference or to adjourn and continue the discussion of a case on a later date, the 2007 change in IOP creates a blanket rule that the vote of four justices is required before the court will order the parties to address an issue that was not briefed, regardless of the procedure used to accept jurisdiction of the case.

¶22 Accordingly, with the exception of the effect of II.E. on a case that is before the court for decision because a petition for review was accepted upon the affirmative vote of

three justices, these changes to the IOP do not prevent a minority of the court from having an issue reviewed by the court that the minority believes is of state-wide concern. Nevertheless, the changes may reduce the fairness to all parties on appeal. Unfairness will occur when a party has not addressed an issue in its brief, but the resolution of the issue is a necessary component of the decision the supreme court must make. See Estate of Szleszinski, 2007 WI 106, ___ Wis. 2d ___, ¶4 n.4, and ¶13 n.8 (concluding that the court of appeals' determination that the medical exam of Szleszinski was not individualized will not be reviewed because the issue was not raised in the petition for review). Therefore, in fairness to the parties, when it becomes apparent after oral argument that an issue that was not listed in the petition for review or reply thereto is necessary to the court's decision on the merits of the case, I would permit the affirmative vote of three justices to result in an order directing the parties to address that issue. This is consistent with the three-vote rule of IOP II.B.1. and will promote fairness for the parties in all appeals.

¶23 For the reasons set forth above, I respectfully dissent from the 2007 changes to IOP II.B.1., II.B.2., II.B.3. and II.E.

¶24 I am authorized to state that Justice DAVID T. PROSSER joins this dissent.