WISCONSIN SUPREME COURT CALENDAR
AND CASE SYNOPSES
MARCH, 2011

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
Green Lake County
Milwaukee
Oneida
Outagamie
Racine
Waukesha

TUESDAY, MARCH 1, 2011

9:45 a.m.	09AP2845-W	Madison Metro. School District v. Circuit Court for Dane County
10:45 a.m.	09AP1558	John R. Steffens v. BlueCross BlueShield of Illinois
1:30 p.m.	09AP2433-FT	Patrick A. Topolski v. Ellen J. Topolski

WEDNESDAY, MARCH 2, 2011

9:45 a.m.	09AP1422	Jessica L. Siebert v. Wisconsin American Mut. Ins. Co.
10:45 a.m.	09AP1007	BNP Paribas v. Olsen's Mill, Inc.
1:30 p.m.	09AP2315	Joyce Affeldt, et al. v. Green Lake County

TUESDAY, MARCH 8, 2011

9:45 a.m.	08AP2206-CR	State v. Charles Lamar
1:30 p.m.	09AP1249-CR	State v. Esteban M. Gonzalez

WEDNESDAY, MARCH 9, 2011

1:30 p.m.	09AP1209-CR	State v. Brian T. St. Martin

In addition to the cases listed above, the following case will be decided by the court based upon the submission of briefs without oral argument:

09AP2063-D - Office of Lawyer Regulation v. Scott E. Selmer

The Supreme Court calendar may change between the time you receive this synopsis 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. That office will also have the names of the attorneys who will be arguing the cases.

Radio and TV, and print media wanting to take photographs, must make media requests 72 hours in advance by calling Supreme Court Media Coordinator Rick Blum at 608-271-4321. Summaries provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
TUESDAY, MARCH 1, 2011
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which did not uphold a Dane County Circuit Court decision, Judge David T. Flanagan, presiding.

2009AP2845-W Madison Metro School Dist. v. Circuit Court for Dane Co.

This case examines whether a circuit court may order a school district to develop and implement an educational plan for a juvenile who had been found delinquent after being expelled.

Some background: The Madison Metropolitan School District (MMSD) expelled a Madison East High School freshman after he had been caught at school with baggies of marijuana that officials concluded he wanted to sell. This incident followed several years of truancy and other problems.

The school district's expulsion order denied the student any educational services from the school district for the first semester of a three-semester period and set conditions under which the boy could return to school after one semester.

The case landed in circuit court because of the drug-related charges. The court found the boy to be delinquent, and then turned to the question of schooling. The Dane County Department of Human Service had prepared a dispositional report containing, among other things, a recommendation regarding rehabilitative placement and a plan for the juvenile to receive educational services while subject to juvenile court jurisdiction.

After the district declined the court's initial request to provide some services, the court concluded that MMSD had a duty to provide educational programming. The circuit court ordered the district to provide these services at a safe and appropriate location of the district's choice.

MMSD refused and appealed, challenging the circuit court's authority to order the district to provide educational services to an expelled student. The Court of Appeals agreed that the circuit court had overstepped its authority.

The circuit court contends that the school district's refusal to provide any educational services means the court is unable to carry out its statutory duty with regard to the juvenile. In addition, by not providing services, the circuit court contends the school district is contributing to the delinquency of the juvenile.

The district argues that requiring it to provide educational services to an expelled student undermines its statutory authority to make expulsion determinations, while bypassing the proper procedure for appealing expulsion decisions.

WISCONSIN SUPREME COURT
TUESDAY, MARCH 1, 2011
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which reversed an Outagamie County Circuit Court decision, Judge Dee R. Dyer, presiding.

2009AP1558 Steffens v. BlueCross BlueShield of Illinois, et al

This insurance case examines "judicial estoppel," which prevents a party from taking contradictory positions during a court proceeding.

Some background: This case began in June 2005 with an automobile accident. John R. Steffens claimed that he had been injured, and his employer-based BlueCross BlueShield plan paid some of his medical bills.

Steffens also sued the driver and the driver's insurer, AIG National, for compensation. After he received that compensation, Steffens allegedly changed his story, prompting questions about whether his back problems might be traced to a long-term, degenerative disease rather than the car accident. BlueCross requested reimbursement.

In interrogatories filed in the case, Steffens claimed that BlueCross' payments totaled $64,751.40, the bulk of which were for expenses he incurred for lower back surgery that was performed in May 2007. AIG hired Dr. William Monacci to conduct an independent medical examination of Steffens. Dr. Monacci concluded that Steffens' back surgery was necessitated by a longstanding degenerative low back condition, not by the accident. Steffens named his back surgeon on his witness list.

In January 2009, Steffens settled his case with AIG for $100,000, which was the policy limit. He then amended the answers to his interrogatories to omit his previous claim that the back surgery was related to the accident and revised his estimate of what BlueCross had paid in accident-related medical bills from $64,751.40 to $1,741.50.

The circuit court applied the doctrine of judicial estoppel. The court said Steffens had "played it for all it was worth in the settlement of this case" and ordered him to reimburse BlueCross.

Steffens appealed, and the Court of Appeals reversed, finding that the circuit court had incorrectly applied judicial estoppel because Steffens had never taken the position *in court* that the problems that necessitated the back surgery were related to the accident.

The Court of Appeals noted that accepting BlueCross' argument in this regard would require a modification of Wisconsin's current doctrine of judicial estoppel BlueCross argues the Supreme Court should decide whether judicial estoppel applies not only where a court adopts a party's prior inconsistent position but also where a settlement has been based on a prior inconsistent position.

Steffens contends the Court of Appeals applied simple rules of insurance policy interpretation and construction and determined that the specific policy language here requires that BlueCross prove the expenses it paid for Steffens' back surgery were causally related to his motor vehicle accident.

WISCONSIN SUPREME COURT
TUESDAY, MARCH 1, 2011
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which reversed a Outagamie County Circuit Court decision, Judge Dee R. Dyer, presiding.

2009AP2433-FT Topolski v. Topolski

This case examines whether benefits under a pension plan constitute retirement benefits, triggering the property division portion of a divorce judgment, or disability benefits, which do not implicate the property division.

Some background: Ellen and Patrick Topolski were divorced in 1995. Under the terms of their marital settlement agreement, Patrick was awarded his retirement, pension, and deferred benefit accounts, if and when he received them, less $912.88 per month which he was to pay Ellen. Neither party was awarded maintenance. In 1998 and 2000, Patrick suffered a series of strokes that left him unable to work. In 2001 he began receiving $2,348.00 in monthly benefits.

Ellen argued that the $2,348.00 monthly payment constituted retirement benefits. The circuit court agreed and found Patrick in contempt for failing to pay Ellen the $912.88 per month from the benefits. Ellen was awarded a money judgment in the amount of $83,072.08, plus interest and attorney fees. Patrick appealed, and the Court of Appeals reversed.

The Court of Appeals noted that Patrick is receiving benefits from his pension plan because of his total and permanent disability. It also noted there are three types of pensions provided in Patrick's plan: (1) a normal pension for an employee who is at least 65 years old; (2) an early pension; and (3) a disability pension. The court noted that Patrick began receiving his benefits in 2001 when he became totally disabled and the amount he receives is the same amount he would have received if he had retired at age 65.

The Court of Appeals concluded that the terms of the marital settlement agreement show that the parties contemplated that Ellen would not receive any payments from Patrick until he retired at age 65. Because of his strokes, Patrick began receiving payments before age 65 under the disability portion of his pension plan. The Court of Appeals said, "In other words, Patrick 'quit' working because he was disabled, not because he retired. The benefit he receives is, in essence, income replacement. A disability benefit is not an asset acquired through the marital relationship and is not subject to property division." See Leighton v. Leighton, 81 Wis. 2d 620, 636-37, 261 N.W.2d 457 (1978). Having concluded that the benefits Patrick is receiving are disability benefits, the Court of Appeals held they are not subject to the terms of the marital settlement agreement. The court said Ellen is not entitled to receive her portion of the benefits until Patrick reaches age 65, the age at which the parties contemplated he would have retired had he not been injured.

Ellen argues that Patrick's receipt of benefits are in fact retirement benefits, thus triggering the property division portion of the marital settlement agreement. She asks the Supreme Court to distinguish between retirement benefits and disability benefits for purposes of marital settlement agreements. She argues in essence the fund from which Patrick is receiving money is a retirement fund, not a separate disability fund. She says in cases where parties to a divorce action have access to benefits that are, in part, retirement

monies, the other spouse should be entitled to the benefit regardless of the reason why the benefit is being accessed.

The Supreme Court is expected to clarify whether a former spouse is entitled to receive a portion of a benefit payment regardless of the reason why the benefit is accessed.

WISCONSIN SUPREME COURT
WEDNESDAY, MARCH 2, 2011
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which reversed an Oneida County Circuit Court decision, Judge Patrick F. O'Melia, presiding.

2009AP1422 Jessica Siebert et al v. Wis. American Mutual Insurance Co.

This case examines insurance coverage in a situation where a woman lent her father's car to a man who said he was running an errand. Instead, he picked up a woman who was then injured in an accident on the way to a party.

Some background: Jessica Koehler lent her father's car to Jesse Raddatz. Raddatz said he was running an errand, but instead picked up Jessica Siebert and headed for a party. On the way, Raddatz got into an accident that injured Siebert.

Wisconsin American Mutual Insurance Co., which insured the car, declined to cover Siebert's claims. Siebert sued and lost after a jury concluded that Raddatz was not a covered driver because he had exceeded the scope of the permission granted by Koehler.

Siebert appealed and won. The Court of Appeals said there was no dispute that Koehler was an insured person. It ruled that the risk of negligently entrusting the car to Raddatz was an insured risk.

Wisconsin American Mutual Insurance Company asks the Supreme Court to review two issues:

- Does Koehler's alleged negligent entrustment constitute an independent concurrent cause of the plaintiff's injuries sufficient to trigger coverage under Wisconsin American's policy where the jury has already found there is no coverage for Raddatz's negligent operation of the vehicle?

- Is plaintiffs' claim against Wisconsin American for the benefits of coverage based on Koehler's negligent entrustment barred by the doctrine of claim preclusion where it could have been litigated as part of plaintiffs' previous jury trial against Wisconsin American for the benefits of coverage based on Raddatz's negligent operation of the vehicle?

WISCONSIN SUPREME COURT
WEDNESDAY, MARCH 2, 2011
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a Green Lake County Circuit Court decision, Judge William M. McMonigal, presiding.

2009AP1007 BNP Paribas, as Agent v. Olsen's Mill, Inc.

This case examines Wis. Stat. § 128.15(2), relating to a secured creditor's rights in liquidation proceedings.

Some background: Olsen's Mill, Inc. is one of Wisconsin's largest grain mills. BNP Paribas (BNPP) is a bank headquartered in Paris that acted as agent for a group of lenders that loaned Olsen's Mill about $58 million in 2007.

Olsen's Mill defaulted about 18 months after the loan was made. BNPP brought action under Wis. Stat. § 128.08(1)(b) to have the circuit court seize Olsen's Mill's assets and place them in receivership. Olsen's Mill did not contest the action, and consented to the appointment of the Receiver. The parties agreed, with court approval, that the Receiver would manage the assets and have the right to dispose of them pursuant to ch. 128. The agreement required the sale to be commercially reasonable, subject to the consent of creditors holding perfected liens on the assets being sold, and with court approval.

BNPP initially won Olsen's Mill at auction, but the circuit court declined to approve the sale after expressing concerns that BNPP might shut down the mill and liquidate its assets. In subsequent auction proceedings, the circuit court approved the mill's purchase by a group of Oshkosh investors. BNPP appealed the circuit court's decision to the Court of Appeals and lost.

BNPP argued the auction procedures violated provisions of ch. 128, and because the $9 million sale proceeds of the secured inventory was insufficient to satisfy the $58 million debt, and that the order approving the sale unlawfully destroyed BNPP's security interest.

The Court of Appeals found no support for BNPP's contention that the proceeds of the approved sale of BNPP's collateral were substantially less than their liquidated value and, therefore, concluded BNPP's issues were moot.

BNPP asks the Supreme Court to review, among other issues, whether the circuit court's discretion under under ch. 128 allowed it to force a sale of secured collateral without the creditor's consent for substantially less than its secured interest, and whether the actions impermissibly destroyed statutory pre-sale rights and constitutionally protected property interests.

Olsen's Mill contends the Court of Appeals' decision is in accord with prior decisions and core tenets of state receivership law and commercial transactions. Olsen's Mill asserts the record establishes the petitioner's secured claim was $9 million in inventory and the remaining balance of roughly $58 million was unsecured.

WISCONSIN SUPREME COURT
WEDNESDAY, MARCH 2, 2011
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a Green Lake County Circuit Court decision, Judge William M. McMonigal, presiding.

2009AP2315 Joyce Affeldt, et al v. Green Lake County

This case, arising from a county's plans to reconstruct Highway B in Green Lake County (the County), involves the interpretation of sections of Wis. Ch 82, "Town Highways" as it relates to public and private property rights.

Some background: The petitioners, Joyce Affeldt, Walter Alan Affeldt and David Affeldt own two farms along County Highway B that their family homesteaded in the early 1920s. The County's plan to reconstruct the highway along the Affeldts' properties included resurfacing, clearing ditches, preparing for underground utilities, and the removal of all trees, fences, and any other encroachments within the a four rod, or 66-foot right of way.

The Affeldts brought a declaratory judgment action and sought injunctive relief to stop the County from destroying trees or taking any action on their lands in connection with the project. The Affeldts argued the highway is not a "recorded" highway under the law, and therefore the County does not have the authority to widen it in this manner. They also filed an affidavit that if the road would be found to be three, rather than four rods wide, the trees would not have to be removed.

The County sought summary judgment on the ground that Highway B had been in existence for over 20 years and pursuant to § 82.31(1) & (2), was presumed to be 66 ft (4 rods) wide. The County noted that ch. 82, entitled "Town Highway," is interpreted as applying to all highways. The circuit court interpreted ch. 82 to permit the County to accomplish its purpose of having some standardization of the maintenance of the roadways. The court said it was not satisfied that the Affeldts met the legal requisites of overcoming the four rod presumption.

The Affeldts appealed, and the Court of Appeals affirmed on grounds other than those relied upon by circuit court. It explained: "The presumption of a four-rod right-of-way is triggered where the highway has 'not been fully and sufficiently described or recorded or for which the records have been lost or destroyed' or where the road is an unrecorded highway. See Wis. Stat. § 82.31(1) and (2). That is not the case here." The Court of Appeals determined a record exists of a 1939 resolution to create County Highway B, which was officially laid out and recorded, and therefore a four rod right of way under ch. 82.

The Affeldt's ask the Supreme Court to: (1) clarify the distinction between a recorded and an unrecorded highway under ch. 82; (2) determine whether ancient fences, trees, and buildings within the alleged right of way would rebut the four-rod presumption accorded an unrecorded highway under Wis. Stat. § 82.31, thus raising material fact disputes; and (3) decide whether the retroactive application of the four-rod presumption to an unrecorded highway existing before the statute was enacted violates the federal and state constitutional "takings" clauses applying to county highways, as well as town highways.

WISCONSIN SUPREME COURT
TUESDAY, MARCH 8, 2011
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a Milwaukee County Circuit Court decision, Judge Clare L. Fiorenza, presiding.

2008AP2206-CR State v. Charles Lamar

This case asks the Supreme Court to clarify how credit for time served in prison is to be calculated when a defendant is re-sentenced.

Charles Lamar was charged with aggravated battery and two counts of misdemeanor bail jumping, all as a repeat offender. He agreed to plead guilty in exchange for the State dropping one of the bail jumping charges. After conviction, he was given sentences that were to be served concurrently. He then moved to withdraw his plea to the aggravated battery charge, arguing that he hadn't understood the penalties.

The circuit court allowed him to withdraw the plea. It also reinstated the second bail-jumping count. Lamar ultimately pleaded guilty to all three counts – but this time without the repeat-offender penalty enhancement.

Lamar was given a sentence to be served consecutive to the first bail jumping charge, and was given credit for the time he had already served on that charge. He was not, however, given credit for the time he had concurrently served on the original aggravated battery charge. He wants credit for an additional 189 days, to which the circuit court and the Court of Appeals concluded he is not entitled.

Lamar argued he was entitled to additional sentence credit from the time he began serving his sentence on the original aggravated battery as a habitual offender charge to the date he completed the one-year initial confinement portion of his sentence on the misdemeanor bail jumping as a habitual offender charge, which equals an additional 189 days. He claimed if he were not given additional sentence credit, his right against double jeopardy will be violated. He further argued that Wis. Stat. § 973.04 requires the additional sentence credit.

The Court of Appeals assumed, without deciding, that Wis. Stat. § 973.04 (which by its terms is directed to the Department of Corrections, not the trial court), applies to sentencing courts. Wis. Stat. § 973.04 reads: "Credit for imprisonment under earlier sentence for the same crime. When a sentence is vacated and a new sentence is imposed upon the defendant for the same crime, the department shall credit the defendant with confinement previously served."

The Court of Appeals said that if Wis. Stat. § 973.04 in fact applied to sentencing courts, as Lamar contends, it would apply only in the event a defendant was serving one sentence and that particular sentence was vacated.

Lamar argues, among other things, that the constitutional protection against double jeopardy found in state and federal constitutions, as well as the statutory mandate of § 973.04, require the award of additional sentence credit. He claims he is entitled to be credited against his new sentence with the time actually served in prison on the original sentence from the date the sentence was first imposed to the date the sentence was later vacated.

A decision by the Supreme Court is expected to clarify how sentence credits are to be calculated in this circumstance.

WISCONSIN SUPREME COURT
TUESDAY, MARCH 8, 2011
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a Milwaukee County Circuit Court decision, Judge Patricia D. McMahan, presiding.

2009AP1249-CR State v. Gonzalez

In this case, Esteban M. Gonzalez was charged with causing a child to view pornographic material and exposing a child to harmful material. The charges arose from an incident in which Gonzalez allegedly watched a pornographic video and masturbated while his 3½-year-old daughter was present. Gonzalez argued that he had not realized the child was in the room.

A jury convicted the Gonzalez of exposing a child to harmful material but acquitted him of causing a child to view sexually explicit conduct. The trial court imposed and stayed a sentence of 18 months of initial confinement and 24 months of extended supervision. The court imposed a three-year term of probation, with nine months in the House of Correction as a condition. Following denial of his post-conviction motion, the defendant appealed. The Court of Appeals affirmed.

Gonzalez argued that the jury instructions violated his due process rights because they were confusing and misleading. He also argued that he was prejudiced when the trial court refused to give his theory of defense instruction, which would have incorporated definitions of the terms "exhibited" and "face-to-face contact."

Gonzalez contends the trial court made several errors that denied him due process. Among these alleged errors: not answering questions posed by the jury (and not alerting counsel to those questions), declining to give the jury instruction that the defendant requested, and permitting the State to play a pornographic tape with the jury present.

The Court of Appeals noted that it will reverse a judgment of conviction and order a new trial only if the jury instructions, as a whole, misled the jury or communicated an incorrect statement of the law. The Court of Appeals went on to note that whether to give a requested jury instruction is a discretionary decision left to the trial court and agreed with the trial court that the instructions given accurately stated the law.

WISCONSIN SUPREME COURT
WEDNESDAY, MARCH 9, 2011
1:30 p.m.

This is a certification from the Wisconsin Court of Appeals, District II (headquartered in Waukesha). The Court of Appeals may certify cases that it believes cannot be resolved by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case originated in Racine County Circuit Court, Judge Charles Constantine, presiding.

2009AP1209-CR State v. St. Martin

In this certification, the Supreme Court examines the rule regarding consent to search a shared dwelling in Georgia v. Randolph, 547 U.S. 103 (2006), as it would apply to the facts of this case. The rule states that a warrantless search cannot be justified when a physically present resident expressly refuses consent, even if another co-resident gives proper consent.

Some background: This case began when the live-in girlfriend of defendant Brian St. Martin told police that she suspected St. Martin was dealing drugs. The girlfriend accompanied the officers to the apartment and allowed them to open the door of the residence, behind which they found St. Martin. Police removed St. Martin from the apartment to a nearby transport van and conducted a search in spite of his express denial of consent. The search, to which the girlfriend consented, turned up cocaine, currency and an electronic scale. The police then obtained a search warrant and conducted another search of the apartment.

St. Martin ultimately pleaded guilty to one count of possession of cocaine with intent to deliver. He was sentenced to two years initial incarceration and appealed.

The Court of Appeals certified this case to the Supreme Court, which is expected to decide several issues, including whether the initial warrantless search based on the consent of one roommate over the denial of consent by the other roommate was legal.

In addition to the certified issue, St. Martin's brief raises the following issue: "Was the cocaine seized by the police admissible as a result of the search warrant, or did inclusion of information from the warrantless entry and seizure of the cocaine, along with untrue and inaccurate statements in the affidavit, render the warrant invalid?"