WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
FEBRUARY 2015

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

Dane
Eau Claire
La Crosse
Milwaukee
Ozaukee
Winnebago

TUESDAY, FEBRUARY 3, 2015

9:45 a.m.	13AP197-CR	-	State v. Jesse L. Herrmann
10:45 a.m.	13AP265	-	Mauricio Aguilar v. Husco International, Inc.
1:30 p.m.	{13AP1737-CR	-	State v. Michael R. Luedtke
	{13AP218-CR	-	State v. Jessica M. Weissinger

WEDNESDAY, FEBRUARY 4, 2015

9:45 a.m.	13AP2107-CR	-	State v. Dean M. Blatterman
10:45 a.m.	13AP1205	-	First Weber Group, Inc. v. Synergy Real Estate Group, LLC
1:30 p.m.	12AP1493	-	Donald Christ, et al. v. Exxon Mobil Corporation, et al.

THURSDAY, FEBRUARY 5, 2015

9:45 a.m.	12AP1845-D	-	Office of Lawyer Regulation v. David J. Winkel
10:45 a.m.	13AP1407	-	Wisconsin Realtors Assoc. v. PSC of Wisconsin

The Supreme Court calendar may change between the time you receive these synopses and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. That office will also have the names of the attorneys who will be arguing the cases.

Media interested in providing camera coverage, must make requests 72 hours in advance by calling media coordinator Rick Blum at (608) 271-4321. Summaries provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
TUESDAY, FEBRUARY 3, 2015
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed a La Crosse County Circuit Court decision, Judge Romona A. Gonzalez, presiding.

2013AP197-CR State v. Herrmann

The issue raised in this case is whether the sentencing court erroneously exercised its discretion and violated the defendant's due process rights when it allegedly exhibited bias in sentencing him.

Some background: The Supreme Court is reviewing a Court of Appeals' decision affirming Jesse Herrmann's conviction for one count of homicide by intoxicated use of a vehicle, two counts of injury by intoxicated use of a vehicle, two counts of operating while intoxicated causing injury, and one count of hit-and-run involving death and an order denying a motion seeking resentencing.

Specifically, the question posed is whether, when sentencing the defendant for homicide and injury by intoxicated use of a vehicle, the sentencing court's remarks, which spoke of losing a sister to a drunk driver in 1976, demonstrated an appearance of bias.

Herrmann pled guilty to the charges and was found to be a repeat offender on all counts and all but the hit-and-run count were charged with him already having one or more prior OWI offenses. The court sentenced the defendant to consecutive sentences totaling 31 years of initial confinement and 40 years of extended supervision, with an additional consecutive probation term.

Herrmann says the judge in this case made statements that indicated the emotional pain she suffered when her sister was killed by a drunk driver, and she suggested that she felt a certain sense of mission to make the defendant pay that would not likely be felt by a judge who was less emotionally involved. Herrmann says the judge made it clear that she wanted him to remain on supervision for the rest of his life, and when the prosecutor expressed concern that the defendant would not start his probation term until he was nearly 100 years old, the judge said, "I want to make sure that he's under supervision until he dies."

The court denied Herrmann's post-conviction motion, saying it properly exercised its discretion by ensuring that the sentencing record identified the objectives of the sentence and demonstrated how the relevant facts and factors furthered those objectives. The court said the defendant "took the court's comments out of context in an attempt to suggest judicial bias." The defendant appealed, and the Court of Appeals affirmed.

The Court of Appeals noted that there are two types of judicial bias: subjective and objective. It noted that subjective bias refers to the judge's own determination of his or her bias and objective bias occurs in two forms: when there is an appearance of bias and when there are objective facts showing that the judge in fact treated the defendant unfairly. State v. Goodson, 2009 WI App 107, ¶9, 320 Wis. 2d 166, 771 N.W.2d 385. The court said the defendant did not claim subjective bias.

The state asserts that the judge's remarks about her personal experience as a crime victim did not create an appearance of bias because the judge's remarks were not tied to the length of

the defendant's sentence, which was substantially shorter than the sentence recommended by the Pre-sentence Investigation (PSI) report's author. Rather, the state argues that the judge's remarks were merely an effort to show sympathy for the victims in the case. The state says the Court of Appeals correctly noted that it is not uncommon for judges or their family members to have been victims of the types of crime for which they pass sentence, and a rule mandating recusal in such cases disregards the strong presumption that judges are impartial.

WISCONSIN SUPREME COURT
TUESDAY, FEBRUARY 3, 2015
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed a Milwaukee County Circuit Court decision, Judge Dominic S. Amato, presiding.

2013AP265 Aguilar v. Husco Int'l, Inc.

This labor law case has a lengthy and somewhat complicated legal history, including consideration at the administrative level and in the state courts.

The Supreme Court reviews a series of questions arising from a dispute between Husco International, Inc. and a labor union over how break times are to be treated under the terms of a faulty contract provision and in context of state and federal labor laws. The union in this case is District No. 10 of the International Association of Machinists and Aerospace Workers.

Some background: Since 1981, District 10 has been the collective bargaining representative for a bargaining unit of production and maintenance employees at Husco. In 1983, Husco and District 10 agreed to implement some changes into the employees' collective bargaining agreement. The agreement provided for a paid 10 minute break, an unpaid 20-minute break, and paid wash-up periods totaling five minutes per eight-hour and 20-minute shift. This meant employees would work a total of seven hours and 45 minutes for every eight hours of pay.

At the time, neither party was aware that the unpaid 20-minute breaks were unlawful under Wis. Admin. Code § DWD § 274.02(3), which provides that all breaks under 30 minutes must be paid.

The parties worked to resolve issues that arose from the situation on their own and with the help of arbitrators and administrators before the case worked its way into the state courts, ultimately now landing before the Supreme Court.

Husco has asked the Supreme Court to review the Court of Appeals' decision, which reversed a circuit court order denying cross motions for summary judgment filed by Husco, its employees, and the union. The Court of Appeals remanded for entry of summary judgment in favor of the employees and District 10.

The questions before the Supreme Court include:

- Did plaintiff employees "earn" wages for their 20-minute meal breaks, where it is undisputed that their union negotiated collective bargaining agreements that call for the breaks to be unpaid and the employees ratified those agreements?
- Has there been substantial compliance by Husco with DWD § 274.02, the regulation adopted by the state Department of Workforce Development (DWD) to protect workers from unhealthy and unsafe work hours where DWD interprets DWD § 274.02 as permitting employees to agree to $0.00/hour as the rate of pay for 20-minute meal breaks; where DWD has expressly found that the 20-minute meal breaks – agreed to by District 10 and the employees – have not endangered the health or safety of the employees; and where DWD § 274.05 expressly permits employers and unions to agree to such meal breaks and where DWD would formally approve these meal breaks if District 10 would simply join with Husco in seeking such formal approval?

- Are Husco's defenses of waiver, unjust enrichment, equitable estoppel and failure to mitigate damages barred by Wisconsin law?
- Are Husco's state law defenses to plaintiff employees' state law claims barred by federal law?
- Do the state law defenses of unjust enrichment, equitable estoppel, waiver and failure to mitigate damages bar plaintiff employees from pursuing state law claims for the 20-minute breaks, where it is undisputed that District 10 negotiated contracts that call for the breaks to be unpaid, the employees ratified the contracts, the employees receive additional monetary benefits and a shorter workday in exchange for the 20-minute breaks, and where it is undisputed that employees' union refused to seek formal DWD approvals of the 20-minute unpaid breaks, which approvals it is undisputed the DWD would grant?
- Is Husco's third-party claim under § 301 of the Labor Management Relations Act against District 10 for breach of the federally recognized contractual duty of good faith and fair dealing barred by that same federal law?
- Are Husco's state law third-party claims against District 10 for promissory estoppel and unjust enrichment barred by federal law?
- Is Husco entitled to summary judgment on its third-party claims against District 10 for breach of the federally recognized contractual duty of good faith and fair dealing, for unjust enrichment and for promissory estoppel where it is undisputed that District 10, over a span of 15 years, negotiated a series of contracts that all unequivocally provide for 20-minute unpaid meal breaks, but then refused to seek waivers from DWD formally approving those breaks, which waivers DWD would grant, and instead tried to extract other financial concessions from Husco and then orchestrated this class action lawsuit?

WISCONSIN SUPREME COURT
TUESDAY, FEBRUARY 3, 2015
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 Winnebago County Circuit Court decision, Judge Karen L. Seifert, presiding.

2013AP1737-CR State v. Luedtke

Although the factual background is different, this case raises the same destruction of evidence issue presented in State v. Weissinger, 2013AP281-CR.

Some background: The Court of Appeals affirmed Michael R. Luedtke's conviction of operating a motor vehicle with a detectable amount of a restricted controlled substance in his blood and an order denying his post-conviction motion for dismissal or a new trial.

Luedtke was driving someone else's vehicle when he rear-ended the car in front of him. A witness told police that after the accident, Luedtke got out of the car and stuffed items down the sewer; the items turned out to be syringes and a metal spoon. A search of the car upon Luedtke's consent revealed more drug paraphernalia.

Luedtke claimed that he had no idea that drug paraphernalia was in the car; that he only noticed syringes on the floorboard after the accident; that he stuffed the syringes down the sewer in a panic because he thought their mere presence in the car was illegal; and that although he had recently injected morphine, it was prescribed for back pain. Luedtke failed field sobriety tests; was placed under arrest; had his blood drawn at a local hospital; and was advised that he could take an alternative test free of charge or have a test conducted by a qualified person at his own expense.

A drug recognition expert at the hospital administered tests to Luedtke and concluded that he was impaired. Luedtke's blood later tested positive for cocaine, valium, and other substances. The state charged Luedtke with operating a motor vehicle with a detectable amount of a restricted controlled substance in his blood and operating a motor vehicle while under the influence of an intoxicant. Due to delays in testing the blood sample and in charging Luedtke, and due to Luedtke's incarceration in another county on another case, the state crime lab destroyed his blood sample before he received notice of the results and before he could have it independently tested.

In the trial court and in the Court of Appeals, Luedtke argued that the blood test results should be suppressed because the destruction of the blood sample before he was able to test it violated his constitutional rights. Luedtke lost at both levels.

Luedtke's petition lists two issues for review by the Supreme Court:

- Consistent with State v. Griffin, 220 Wis. 2d 371, 584 N.W.2d 127 (Ct. App. 1998), which recognized that a blood or urine test, standing alone, is insufficient to prove knowing possession of cocaine because cocaine can be unwittingly ingested, must Wis. Stat. § 346.63(1)(am), which prohibits operating a motor vehicle with a detectable amount of a restricted controlled substance in the blood, be construed to include a scienter element rather than authorizing punishment even when an otherwise unimpaired driver unknowingly ingests the restricted substance?

- Consistent with this court's conclusion in State v. Dubose, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, that the Wisconsin Constitution provides greater due process protection than the federal constitution, was Luedtke denied due process when, following the filing of charges, his blood sample was destroyed before he received actual notice of the restricted substance charge?

WISCONSIN SUPREME COURT
TUESDAY, FEBRUARY 3, 2015
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed an Ozaukee County Circuit Court decision, Judge Sandy A. Williams, presiding.

2013AP218-CR State v. Weissinger

This case examines whether it is a due process violation for the state to discard a blood sample that shows the unlawful presence of intoxicants before the defendant receives notice of the results of the blood testing.

Some background: The Court of Appeals' affirmed Jessica Weissinger's conviction for: (1) causing great bodily harm by intoxicated use of a motor vehicle while having a detectable amount of a restricted controlled substance in the blood; and (2) operating a motor vehicle while having a detectable amount of a restricted controlled substance in the blood, second offense.

In July 2009, Weissinger was driving a car that struck and severely injured a motorcyclist. Police did not suspect Weissinger was under the influence of an intoxicant, but they asked her to provide a blood sample, and she agreed. Because she wasn't arrested, Weissinger was never advised of her rights to an additional blood test. *See* Wis. Stat. § 343.305(2)-(4).

A July 2009 blood test showed no alcohol. An August 2009 blood test – this time looking for drugs – detected THC. A February 2010 confirmatory test also detected THC. In March 2010, the results were reported to prosecutors. In April 2010, the crime lab discarded the sample because the lab's six-month retention period had expired. In May 2010, Weissinger was charged with offenses based on the detectable amount of THC in her blood. In August 2010, Weissinger received the results of the tests. After getting the results, Weissinger sought retesting, but her blood sample had already been destroyed.

The Supreme Court reviews whether it should interpret the Wisconsin Constitution to provide greater due process protection than the federal constitution, such that Weissinger was denied due process under the Wisconsin Constitution when her blood sample was destroyed before she was charged with offenses based on a detectable amount of a controlled substance in her blood.

WISCONSIN SUPREME COURT
WEDNESDAY, FEBRUARY 4, 2015
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed a Dane County Circuit Court decision, Judge William E. Hanrahan, presiding.

2013AP2107-CR State v. Blatterman

This case examines the community care doctrine and the probable cause necessary to arrest a person for a prohibited blood-alcohol concentration violation when the threshold level is the 0.02-percent standard.

Some background: Dane County Sheriff's Deputy James Nisius was on duty at approximately 8:47 a.m. on March 19, 2013, when he was dispatched to a home in response to a call from the defendant, Dean Blatterman's wife, that he was "putting gas in [a] house . . . through a stove or a fireplace." The defendant's wife said she thought the defendant was trying to blow up the house or light the house on fire by pulling gas or monoxide into the house.

While Nisius was en route to the home, dispatch informed him that the defendant was leaving the house in a white minivan and that he was possibly intoxicated. Dispatch provided the license plate number of the minivan. Soon thereafter, a vehicle matching that description passed Nisius's squad car, and Nisius followed it. Nisius testified that he did not immediately stop the minivan because dispatch had informed him the driver had historically mentioned "suicide by cop."

When backup officers arrived, Nisius stopped the defendant's vehicle, opened his door, drew his duty weapon, pointed it at the minivan, and told the defendant "to stick his hands up out the window." Nisius testified that the defendant "opened up the door right away and started walking back with his hands in the air." Nisius noticed the defendant had something in his hand. (The object was later identified as a cell phone.)

Nisius told the defendant to "turn away" and "stop walking" because it is not procedure to have someone get out of a car and walk back on a high-risk stop. In spite of these directives, and a warning that he may be "tased," the defendant kept walking toward the officers. One of the backup officers told the defendant to "get down" and "turn away." The defendant knelt down but did not turn away, so backup officers put him on the ground and placed him in handcuffs.

Nisius testified that when he got close to the defendant he detected an odor of intoxicants and noticed the defendant's eyes were watery. Nisius testified that he believed the defendant may have been operating while intoxicated because of the defendant's strange behavior of not responding to the officers, the odor of intoxicants, the watery eyes, and the fact that the person who had called dispatch said the defendant was intoxicated. Nisius did not ask the defendant to perform field sobriety tests at the scene of the stop.

Blatterman refused medical treatment from EMS. Nisius testified he thought the defendant "should get checked out at the hospital" because there was potentially an issue with carbon monoxide poisoning, the defendant was potentially suicidal, and he claimed that his chest hurt. Before leaving the scene of the stop, Nisius reviewed the defendant's driving record. He

found that Blatterman had three prior convictions for operating while intoxicated, meaning he was unable to legally drive with a blood-alcohol content of 0.02 percent or more.

Nisius asked the defendant what hospital he would go to, and he replied St. Mary's. The defendant was transported to St. Mary's Hospital, approximately 10 miles away. Nisius informed the hospital staff that he had transported the defendant to the hospital for three reasons: (1) because he may have had carbon monoxide poisoning; (2) because he was potentially suicidal; and (3) because he said that his chest hurt. Nisius also told hospital staff that there was "potentially a need for a phlebotomist to do a legal blood draw."

The defendant was transferred to an exam room. A nurse checked his vitals and monoxide levels, which were within normal limits. Hospital staff questioned the defendant about whether he was suicidal, and he said he was not. The defendant was handcuffed during the examinations. After the exams were completed, Nisius removed the handcuffs and had the defendant perform field sobriety tests. A blood sample was drawn, which showed a blood alcohol content of 0.118-percent. The defendant was charged with operating a motor vehicle while intoxicated and operating with a prohibited alcohol concentration.

The defendant filed a motion to suppress, arguing that he was arrested without probable cause and seeking suppression of all evidence gathered subsequent to the illegal arrest. Following a hearing, the circuit court denied the motion.

The defendant subsequently pled guilty to fourth offense drunk driving. He appealed, and the Court of Appeals reversed, rejecting the trial court's explicit finding that the hospital to which the defendant was transported was within the vicinity of the stop.

The state says previous cases set precedent that the police can legitimately pursue a community caretaker agenda while at the same time also pursuing investigatory objectives.

The defendant says the community caretaker exception argument was not specifically developed by the state either in the trial court or the Court of Appeals such that the issue should be deemed waived.

WISCONSIN SUPREME COURT
WEDNESDAY, FEBRUARY 4, 2015
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed a Dane County Circuit Court decision, Judge Juan B. Colas, presiding.

2013AP1205 First Weber Group, Inc. v. Synergy Real Estate Group LLC

This real estate case examines procedures to compel arbitration under Wis. Stat. § 788.03.

Some background: First Weber Group, Inc. and James Imhoff, Jr. (hereafter "First Weber"), seek review of a Court of Appeals' decision that affirmed a circuit court order denying First Weber's petition to compel arbitration of a dispute with Synergy Real Estate Group, LLC and James Graham (hereafter "Graham").

This case stems from a 2012 circuit court decision denying First Weber's request to compel arbitration. The same parties were involved in arbitration in 2009 that is also relevant to this case.

In the 2009 case, the parties had a dispute over a commission. An arbitration panel issued an award in favor of First Weber in the amount of $5,440, which Graham paid only after First Weber sought enforcement of the award in circuit court.

In the second arbitration at issue, on June 5, 2012, First Weber filed a new Request and Agreement to Arbitrate and/or Attend Mediation Proceedings form, seeking to initiate an arbitration regarding the costs and fees it claimed from the underlying confirmation proceeding.

First Weber asserts that this request to arbitrate was filed on May 8, 2012. The Court of Appeals noted that a dated document, which was plainly created after the request to arbitrate was filed, appears to establish that the request was filed sometime in the weeks before June 5, 2012.

This form request included the same italicized language reciting the 180-day time limit on arbitration requests as had been included on First Weber's initial request for arbitration.

This time, Graham simply e-mailed in response that he would not be participating and declined to attend the scheduled arbitration. The Wisconsin Realtor's Association took the position that this second arbitration could not occur without Graham's signed agreement to arbitrate or his appearance, absent court action.

Accordingly, on Nov. 2, 2012, First Weber filed in the circuit court a petition to compel arbitration pursuant to § 788.03. The circuit court concluded that First Weber should have sought arbitration within 180 days of March 10, 2011 (the date Graham wrote a letter indicating disagreement with fees and costs sought), "rather than continuing to pursue fees in litigation," and that the time limit expired [180 days later] on Sept. 6, 2011. Under the agreement to arbitrate, the court concluded, "[a]fter Sept. 6, 2011 the dispute was no longer arbitrable."

First Weber appealed. It argued that the arbitration process, and not the court, should have been responsible for determining whether the dispute between First Weber and Graham regarding fees and costs was arbitrable.

The Court of Appeals ruled that the circuit court properly took up the time limitation issue, ruling that "First Weber has failed to carry its burden of demonstrating, by pointing to clear and unmistakable language in the agreement to arbitrate, an intent that the time limitation

issue be decided as part of the arbitration process. Therefore, as a matter of law, the fees and costs dispute does not belong in arbitration."

First Weber presents the following issues to the Supreme Court:

1. Was there an agreement to arbitrate and a dispute subject to that agreement (elements under sec. 788.03, Wis. Stats.)?
    a. Did the two courts err in failing to compel arbitration under sec. 788.03, Wis. Stats., given the above findings?
    b. Did the two courts err in refusing to handle an arbitration-forum time limitation rule as a *"procedural"* arbitrability issue instead of as a *"substantive"* arbitrability issue?
2. May a court *"re-decide"* an arbitration-forum time limitation rule (during a proceeding under sec. 788.03, Wis. Stats.) that had already been decided in arbitration?
3. If a court may "re-decide" an arbitration-forum time limitation rule already decided in arbitration, did the Courts here select the "correct" date?

An *amicus* brief filed by the Wisconsin Realtors Association contends the Court of Appeals' decision "allows a court to refuse to compel arbitration and substitute its own decision, contrary to the stricture of the statute, misapplying the case law on 'arbitrability,' reversing the presumption of arbitration, and otherwise misapplying federal and state law precedents."

Graham concedes that arbitration is a favored process in Wisconsin, but emphasizes that this does not imply that parties must arbitrate disputes already raised in litigation, or that parties must arbitrate disputes brought outside of the time parameters set by the arbitration agreement. To the contrary, he contends that it would frustrate the arbitration process to force parties to litigate the same disputes endlessly, first in court, then in arbitration. He contends that it also would frustrate the arbitration process to force parties to litigate claims outside of the agreed upon parameters for dispute resolution.

WISCONSIN SUPREME COURT
WEDNESDAY, FEBRUARY 4, 2015
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 Eau Claire County Circuit Court decision, Judge Lisa K. Stark, presiding.

2012AP1493 Christ v. Exxon Mobil

This case examines several issues arising from wrongful death and survival claims filed against Exxon Mobile Corp. and other companies for allegedly contributing to the presence of benzene-containing petroleum products at a Uniroyal tire factory in Eau Claire. The plaintiffs, including Donald Christ, are former Uniroyal employees and special administrators of deceased employees' estates who allege injuries from benzene exposure.

Some background: A three-year statute of limitations applies to wrongful death and survival claims. See § 893.54(2), Stats. It is undisputed that these plaintiffs filed their claims more than three years after the death of the former employees.

Exxon sought dismissal of the plaintiffs' suit on the ground that the plaintiffs' claims were time barred, and the circuit court agreed with Exxon. The plaintiffs alleged that the discovery rule applied to their claims and that, accordingly, the claims were timely brought.

The plaintiffs appealed. Exxon cross-appealed. The Court of Appeals found the Christs' arguments persuasive, and it reversed in part and remanded for further proceedings on the question of whether the plaintiffs' claims were time barred after application of the discovery rule.

The Court of Appeals, consistent with its decision in Beaver v. Exxon Mobile Corp., No. 2012AP542 (WI App May 9, 2013), concluded that the discovery rule applied to the plaintiffs' claims.

The appellate court noted that in Beaver it held that wrongful death and survival claims alleging the same basis for liability as set forth here were subject to the discovery rule, which provides that the statute of limitations begins to run when the plaintiff discovers or should have discovered the injury and that the injury may have been caused by the defendant. See Doe v. Archdiocese of Milwaukee, 211 Wis. 2d 312, 335, 565 N.W.2d 94 (1997).

Exxon argues that the Court of Appeals' decision here is contrary to its decision in Beaver because, unlike the circuit court in Beaver, the circuit court here agreed that the discovery rule applied but went on to conclude that the discovery rule failed to save the plaintiffs' claims. Exxon argues that by failing to acknowledge that the trial court already applied the discovery rule, the Court of Appeals violated Exxon's vested property right in its statute of limitations defense.

Christ says contrary to Exxon's representations, the circuit court here never applied the discovery rule to the plaintiffs' claims. The plaintiffs argue that the issue presented in Beaver is identical to that presented here and there is no more reason to review the issue here than there was last year when the Beaver petition for review was filed.

WISCONSIN SUPREME COURT
THURSDAY, FEBRUARY 5, 2015
9:45 a.m.

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers. Lawyers must follow a code of ethics developed by the Court. When there is an allegation that a lawyer has acted unethically, the Supreme Court's Office of Lawyer Regulation (OLR) investigates, and, if warranted, prosecutes the attorney. A referee - a court-appointed attorney or reserve judge - hears the discipline cases and makes recommendations to the Supreme Court. The lawyer involved in this case has a practice in Neenah.

2012AP1845-D OLR v. David J. Winkel

In this case, Atty. David J. Winkel has appealed a referee's report and recommendation for a four-month suspension of Winkel's law license and the imposition of full costs of $37,002.13.

Some background: Winkel was admitted to practice law in Wisconsin in 1984. His prior disciplinary history includes public reprimands in 1998 and 2005.

The referee's report in this case arises out of an August 2012 Office of Lawyer Regulation (OLR) complaint charging Winkel with six counts of professional misconduct, five of which remain at issue at this point in the proceedings.

The OLR's complaint stems from Winkel's representation of Peter Long, an inmate in the Wisconsin Prison System. Long hurt his leg during recreational activities in the prison yard. A methicillin – resistant staphylococcus aureus (MRSA) infection later developed in the leg.

Initially representing himself, Long filed an Eighth Amendment civil rights case in federal court, seeking monetary damages. Long claimed that by delaying his treatment several hours, prison officials had been deliberately indifferent to his serious medical need.

Long then hired Winkle, entered a written fee agreement and paid an advance fee to Winkel for expert witness fees and discovery costs.

After having summary judgment entered against him, Long complained to OLR that Winkel made little progress on the case, missed several deadlines and failed to keep Long informed about the status of his case. OLR investigated, and in turn, filed a complaint with the Supreme Court.

The referee found Winkel failed to competently represent Long and violated several provisions of Supreme Court Rules relating to the professional conduct of lawyers.

Winkel does not contest the factual findings made by the referee, nor does he oppose the imposition of full costs. Instead, Winkel asks the Supreme Court to review whether the referee's recommendation of a four-month suspension and payment of costs is appropriate discipline in light of the facts in this case. Winkel maintains that his conduct warrants only a public reprimand.

The Supreme Court is expected to decide the appropriate sanction for Winkel's misconduct.

WISCONSIN SUPREME COURT
THURSDAY, FEBRUARY 5, 2015
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed a Dane County Circuit Court decision, Judge Juan B. Colas, presiding.

2013AP1407 Wis. Realtors Assoc. (WRA) v. Public Service Comm. (PSC) of Wis.

This case examines whether Wis. Stat. § 227.115(2) required the PSC to obtain a housing impact report from the Department of Commerce (the Department of Administration under the current statute) before it submitted a proposed rule regarding the siting of wind energy systems to the Legislature for review before that rule went into effect.

The Supreme Court reviews the statutory subsection, which provides as follows:

> (2) REPORT ON RULES AFFECTING HOUSING. If a proposed rule directly or substantially affects the development, construction, cost, or availability of housing in this state, the department shall prepare a report on the proposed rule before it is submitted to the legislative council staff under s. 227.15. The department may request any information from other state agencies, local governments or individuals or organizations that is reasonably necessary for the department to prepare the report. The department shall prepare the report within 30 days after the rule is submitted to the department.

The WRA asserts that the intent of this statute was to provide the Legislature with a second opinion regarding the impact of a proposed rule on housing in this state so that the Legislature would have that report available to it when it reviewed a proposed rule before the rule became law.

Some background about the specifics of this case: In 2009 the legislature passed a law, codified at Wis. Stat. § 196.378(4g)(b), directing the PSC to create an advisory wind siting council and then to "promulgate rules that specify the restrictions a political subdivision may impose on the installation of a wind energy system."

According to the statute, the proposed rule was to include limits on setback requirements that would still provide reasonable protection from any health effects flowing from wind energy systems. The proposed rule also was to address a host of regulations on other subjects, such as sound levels and shadow flicker.

The wind siting council held a number of hearings in the spring and summer of 2010. Three of those meetings were devoted primarily to the effect of wind energy systems on property values. The council received conflicting testimony and evidence regarding whether the placement of wind energy systems affected the property values of neighboring parcels.

The PSC ultimately concluded, based on the work of the wind siting council and its own hearings, that there was insufficient data to prove that wind turbines had a negative effect on property values within a one-half mile and that there was no real evidence to suggest any impact on the value of properties located more than one-half mile from one or more wind turbines.

The PSC submitted a proposed rule to the legislature which precluded a local unit of government from establishing a setback requirement around wind turbines that was greater than 1,250 feet, among other regulations on other topics that local government units could not exceed.

The Legislature required some modifications to the proposed rule, but ultimately allowed the modified version of the rule to take effect. It was codified as Wis. Admin. Code PSC 128 and took effect on March 16, 2012.

On June 6, 2012, the WRA (and the other plaintiffs-appellants) filed this civil action in the Brown County circuit court. The WRA's complaint alleged that PSC 128 was invalid because it had not been promulgated in compliance with certain statutorily required procedures, including that the PSC had failed to request and obtain a housing impact report from the Department of Commerce under Wis. Stat. § 227.115(2).

The WRA and the PSC filed opposing motions for summary judgment. The circuit court concluded that no housing impact report was required, and it granted summary judgment to the PSC.

On appeal, the WRA argued that a housing impact report is required under Wis. Stat. § 227.115(2) whenever the subject matter of the proposed rule relates to housing.

The Court of Appeals found this interpretation to be too broad, given what it characterized as the unambiguous language in the statute that the proposed rule must "directly and substantially" affect housing. The Court of Appeals applied this to the specific facts in this case as follows: "To demonstrate that a housing impact report was required, WRA must show that the setback, noise, and shadow flicker restrictions imposed by PSC 128 are so inadequate that the rules will directly or substantially affect the development, construction, cost, or availability of housing in Wisconsin." Because it concluded that the WRA had not done so, it determined that the rule had been validly promulgated.

The supreme court is being asked to provide a definitive interpretation of the statute and to determine whether the rule on the siting of wind energy systems was properly promulgated.