

WISCONSIN SUPREME COURT CALENDAR AND CASE SYNOPSES FEBRUARY 2016

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
Lincoln
Milwaukee
Waukesha

THURSDAY, FEBRUARY 4, 2016

9:45 a.m. 14AP1853 - Albert D. Moustakis v. Wisconsin Department of Justice
10:45 a.m. 13AP1918-D - Office of Lawyer Regulation v. James E. Gatzke

WEDNESDAY, FEBRUARY 24, 2016

9:45 a.m. 14AP1177 - John Doe 56 v. Mayo Clinic Health - Eau Claire Clinic, Inc.
10:45 a.m. 14AP400 - Milwaukee Police Association v. City of Milwaukee
1:30 p.m. 12AP2578 - Sonja Blake v. Debra Jossart

In addition to the cases listed above, the following case is assigned for decision by the court on the last date of oral argument based upon the submission of briefs without oral argument:

15AP1393-BA - Joshua E. Jarrett v. Board of Bar Examiners

Note: 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. If your news organization is interested in providing any camera coverage of Supreme Court argument in Madison, contact media coordinator Rick Blum at (608) 271-4321. Summaries provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
THURSDAY, FEBRUARY 4, 2016
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which affirmed a Lincoln County Circuit Court decision, Judge Jay R. Tlusty presiding.

2014AP1853

[Moustakis v. DOJ](#)

This case examines several issues arising from a public records request submitted by *The Lakeland Times* newspaper to the state Department of Justice (DOJ).

Some background: On July 18, 2013, the newspaper requested records any of “complaints or investigations regarding Vilas County District Attorney Al Moustakis.” The request covered records containing information “regarding any investigation of his conduct or handling of cases while district attorney” as well as records containing “information related to complaints and investigations regarding Mr. Moustakis that were completed or ended without any action taken against him.” *The Lakeland Times* also requested “any communications between Mr. Moustakis and [the DOJ] since he took office in 1995.”

The DOJ prepared a response that consisted of redacted records and a cover letter, a copy of which was sent to Moustakis as a courtesy, not a statutory requirement, according to DOJ. On March 6, 2014, Moustakis notified DOJ he would be filing an action and asked that the DOJ withhold production of the records until resolution of the action. Moustakis filed the action on March 10, 2014. He sought an order under § 19.356(4), Stats., restraining the DOJ from providing access to the requested records. Moustakis asserted the records concerned “the investigation of repeated allegations made by a former political rival,” which allegations did not involve on-duty misconduct. Moustakis also alleged that the DOJ investigation did not lead to any charges against him.

On May 23, 2014, the DOJ filed a motion to dismiss, asserting that the records set for release were not of a type identified by § 19.356(2)(a) as requiring pre-release notice or judicial review. The DOJ reasoned that Moustakis did not qualify as an “employee,” as the term is defined in § 19.32(1bg), and as such the records did not contain “information relating to an employee” under § 19.356(2)(a)1. The DOJ argued that as a result, Moustakis lacked standing to bring his action. Following oral argument on the motion, the circuit court agreed with the state that the term “employee,” as used in § 19.356(2)(a)1., did not include Moustakis because the term specifically excludes “an individual holding local public office or a state public office.”

The circuit court dismissed the suit, determining that various statutes cross-referenced by the Public Records law unambiguously established that district attorney is a “state public office.”

On June 25, 2014, Moustakis had filed an amended complaint alleging two additional causes of action, the first seeking a writ of mandamus and the second asserting an as applied challenge to the constitutionality of § 19.356. There was some dispute at the hearing as to whether the order resulting from the hearing would be final for purposes of appeal. The DOJ moved to dismiss Moustakis’s subsequent appeal from the order. The Court of Appeals affirmed the circuit court’s conclusion that Moustakis lacked standing to bring his suit.

The Court of Appeals concluded that the circuit court properly dismissed Moustakis's claim under Wisconsin's Public Records law because the records requested by *The Lakeland Times* do not "relate" to Moustakis as "an employee" under § 19.356(2)(a)1.

Moustakis argued that he fell within the second category of employees established by § 19.32(1bg), those who are "employed by an employer other than an authority." Moustakis's argument was that although his elected office was an "authority," he was not an employee of that office because his employment derives from the state constitution as well as salary fixing statutes that classify him as a holding a state public office.

WISCONSIN SUPREME COURT
THURSDAY, FEBRUARY 4, 2016
10:45 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 is from New Berlin.

2013AP1918-D Office of Lawyer Regulation v. James E. Gatzke

In this case, Atty. James E. Gatzke has appealed the referee's recommendation that his license to practice law in Wisconsin be revoked as the result of 45 counts of professional misconduct.

Gatzke has been licensed to practice law in Wisconsin since 1994. He has no prior disciplinary history. Gatzke is also a licensed real estate broker, and for a time he served as the mayor of New Berlin.

The majority of the allegations in the OLR's second amended complaint arise out of Gatzke's representation of a woman whose husband was an investment advisor. In June 2005, with criminal investigations and a lawsuit alleging that he had stolen millions of dollars from a business partner pending, the woman's husband committed suicide. Gatzke began representing the woman soon after her husband's death.

Gatzke asserts that the woman told him she wanted to invest money in his real estate ventures because they would provide a higher rate of return than if she were to invest in stocks or mutual funds. He said she told him she did not want to be publicly listed as an owner of the real estate investments because she was concerned that her late husband's creditors might find out what she owned and try to take it. Gatzke invested her money in a number of real estate ventures. He says he kept her apprised of the investments. He says when the economy crashed in 2008 both he and the woman lost a great deal of money. The woman claims that she did not know where Gatzke was investing her money.

The OLR's second amended complaint alleged that Gatzke engaged in conduct involving dishonesty, fraud, deceit or misrepresentation and entered into business transactions with the woman without fully disclosing to her in writing the terms of the transactions, giving her a reasonable opportunity to seek the advice of independent counsel in the transactions, and obtaining her written consent to the transactions. The second amended complaint also alleged that Gatzke violated numerous Supreme Court rules regarding his trust account and record keeping practices.

The referee found that the OLR met its burden of proof as to all 45 counts of misconduct. The referee found that Gatzke converted her funds. The referee recommended that Gatzke's license be revoked and that he be required to pay more than \$500,000 in restitution to the woman and her daughter. Gatzke has appealed, arguing that many of the referee's findings of fact are clearly erroneous. Gatzke admits to poor record keeping but denies converting any client funds. He says both he and the woman lost a great deal of money, but that was the result of the

risk inherent in her choice to invest in real estate deals with Gatzke. He says it was the downturn in the economy that caused them both to suffer losses. Gatzke argues that a suspension of not more than five months is an appropriate sanction for his misconduct and that he should not be required to make restitution.

The Supreme Court is expected to decide whether Gatzke engaged in misconduct and, if so, the appropriate sanction.

WISCONSIN SUPREME COURT
WEDNESDAY, FEBRUARY 24, 2016
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which affirmed an Eau Claire County Circuit Court decision, Judge Michael A. Schumacher presiding.

2014AP1177

[John Doe 56 v. Mayo Clinic Health System-EC](#)

This case examines time limits for filing medical malpractice claims against a pediatrician who allegedly assaulted minor patients who did not realize at the time their genitals were examined that the examinations were not purely medical in nature.

Defendants include the physician, David A. Van de Loo, Mayo Clinic Health System – Eau Claire Clinic, Inc.; its insurer, ProAssurance Casualty Co.; and the Injured Patients and Families Compensation Fund.

Plaintiffs include: John Doe 56, who received medical treatment from Van de Loo at a Mayo Clinic office in Eau Claire between 2003 and 2008, when he was 10 to 15 years old; and John Doe 57, who received medical treatment from Van de Loo at the clinic between 2003 and 2009, when he was eight to 14 years old.

Some background: Van de Loo commonly asked parents to leave the room when he was performing physical examinations on minor male patients. While providing medical treatment to John Does 56 and 57, Van de Loo touched their genitals.

In August 2012, Van de Loo was accused of inappropriately touching a different minor male’s genitals during a medical examination. As a result, in October 2012, the state criminally charged Van de Loo with one count of sexual assault by an employee of an entity and one count of exposing genitals or pubic area. The state ultimately charged Van de Loo with a total of 16 felony counts based on his treatment of male patients at Mayo Clinic. Van de Loo denied his conduct was criminal and argued it served a medical purpose.

A jury acquitted Van de Loo on 14 of the 16 counts, and did not reach a verdict on two of the counts. Van de Loo ultimately agreed to give up his medical license in exchange for the dismissal of these two remaining counts.

John Does 56 and 57 alleged that the first time either of them knew that the treatment they had received from Van de Loo was improper was when they learned in October 2012 that the state had criminally charged him. They alleged that they had suffered profound psychological damage as a result of Van de Loo’s conduct, including depression, anxiety, self-esteem issues, and loss of enjoyment of life.

John Does 56 and 57 each asserted 11 claims against Van de Loo and Mayo Clinic: sexual battery against Van de Loo; vicarious liability for Van de Loo’s conduct against Mayo Clinic; medical malpractice against Van de Loo and Mayo Clinic; negligence, negligent hiring, negligent retention, negligent supervision, and negligent failure to warn against Mayo Clinic; and fraud, fraud—intentional nondisclosure, and fraud—negligent misrepresentation against Mayo Clinic. In addition, the parents of John Does 56 and 57 asserted a claim against Van de Loo and Mayo Clinic for loss of society and companionship.

Mayo Clinic and Van de Loo subsequently moved to dismiss the plaintiffs’ claims, arguing they were barred by the applicable statutes of limitations. Following a hearing, the trial

court granted these motions and entered an order dismissing with prejudice all claims against Mayo Clinic, the Fund, and ProAssurance (as its interests related to those of Mayo Clinic) and dismissing with prejudice the medical malpractice claims against Van de Loo and ProAssurance (as its interests related to those of Van de Loo).

The plaintiffs appealed, and the Court of Appeals held that the accrual of the claims was unaffected by the plaintiffs' allegation that they did not realize the extent of their injuries at the time of the touching. *See John BBB Doe* (citing *Pritzlaff v. Archdiocese of Milwaukee*, 194 Wis. 2d 302, 533 N.W.2d 780 (1995)].

Van de Loo's last alleged touching of the Does' genitals occurred no later than Dec. 31, 2008 for John Doe 56, and Dec. 31, 2009 for John Doe 57. The plaintiffs did not file their complaint until October 2013. The medical malpractice claims therefore fell outside of the three-year statute of limitations, the Court of Appeals found.

In taking their case to the Supreme Court, John Does 56 and 57 argue that their medical malpractice claims did not accrue until the state criminally charged Van de Loo in because the examinations did not immediately cause them any physical injury.

The Supreme Court reviews two issues presented by the plaintiffs:

- Does the statute of limitations begin to run, under the rule set forth in *Estate of Genrich v. OHIC Insurance Company*, 2009 WI 67, 318 Wis. 2d 553, 769 N.W.2d 481, on a minor's claim for emotional distress resulting from medical malpractice in the form of an improper genital examination at the time of the last treatment by the minor's pediatrician even though the minor has not sustained any injury and has no legally cognizable claim until years later when the minor learned that the pediatrician's genital exam had been improper?
- Did the court err in applying the intentional acts rule from *John BBB Doe v. Archdiocese of Milwaukee*, 211 Wis. 2d 312, 565 N.W. 2d 94 (1997) to a claim for medical malpractice that took place in a health clinic during the course of a routine medical examination provided by the health clinic?

A decision by the Supreme Court is expected to clarify when a medical malpractice claim arising from allegedly assaultive behavior accrues under Wisconsin law.

WISCONSIN SUPREME COURT
WEDNESDAY, FEBRUARY 24, 2016
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 Paul V. Van Grunsven presiding.

2014AP400

[Milwaukee Police Association v. City of Milwaukee](#)

In this case, the Supreme Court reviews whether the Home Rule Amendment of the Wisconsin Constitution, Wis. Const. Art. XI, § 3(1), trumps the Wisconsin Legislature's enactment of § 66.0502, which restricts municipalities from imposing residency restrictions on their employees.

Some background: In 2013, the Wisconsin Legislature passed a law that restricts cities, villages, towns, counties and school districts from "requir[ing], as a condition of employment, that any employee or prospective employee reside within any jurisdictional limit." Wis. Stat. § 66.0502(3)(a).

The statute, entitled "Employee Residency Requirements Prohibited," provides, with some exceptions for police and fire personnel to live within 15 miles, no local governmental unit may require, as a condition of employment, that any employee or prospective employee reside within any jurisdictional limit.

After the law took effect, the Milwaukee Common Council promptly enacted a charter ordinance asserting that the new statute violates Milwaukee's constitutional home-rule authority under Wis. Const. art. XI, § 3(1), and ordering the continued enforcement of Milwaukee's local residency rule.

The city of Milwaukee enacted its residency Charter Ordinance more than 75 years ago, predicated on the home rule amendment, which differentiates it from Wisconsin municipalities that derive authority for such ordinances from statutory home rule. The ordinance requires all employees of the city of Milwaukee to establish and maintain their actual bona fide residences within the boundaries of the city or be terminated.

Representatives of the Milwaukee Firefighters and the Milwaukee Police Association brought a declaratory judgment that the state statute preempts the city ordinance. The city responded that the ordinance controls, due to the Home Rule Amendment.

The circuit court ruled that § 66.0502 preempts the city's ordinance. The circuit court ruled that residency requirements are of both state and local concern, but that state interests were paramount based on how the "test of paramountcy" had been applied in previous cases.

The circuit court held that even if the case primarily involved a matter of local affairs, "the City would still be bound by the statute since it satisfies the uniformity requirement." The circuit court reasoned that "[t]he legislature did not enact a statute which could only apply to the City of Milwaukee" but "[r]ather, all cities, villages, and towns are prohibited from requiring their employees to reside within the jurisdictional boundaries."

The Court of Appeals reversed, ruling that the residency ordinance can be enforced. It concluded that: (1) § 66.0502 does *not* involve a matter of statewide concern and does *not* affect all local governmental units uniformly, so it does not trump the Milwaukee ordinance; and (2) § 66.0502 does not create a protectable liberty interest. The court also affirmed the circuit court's

ruling that the city did not violate the constitutional rights of any member of the Police Association.

The Court of Appeals reasoned that “Wis. Stat. § 66.0502 directly affects the city’s economy and tax base, which numerous courts have recognized is a local concern.” The Court of Appeals also held that Wis. Stat. § 66.0502 did not meet the uniformity test because “it will have an outside impact on the City of Milwaukee,” and “undoubtedly interferes with the ability of many municipalities-including the City of Milwaukee to promptly respond to emergencies.”

The Court of Appeals did not strike down § 66.0502, holding instead that it “does not apply to the City of Milwaukee.”

The Wisconsin Supreme Court recently clarified the legal analysis for analyzing a state law under the Home Rule Amendment in Madison Teachers, Inc. v. Walker, 2014 WI 99, 358 Wis. 2d 1, 851 N.W.2d 337. When examining a Home Rule question, the court performs a two-step analysis. First, as a threshold matter, the court determines whether the statute concerns a matter of primarily statewide or primarily local concern. If the statute concerns a matter of primarily statewide interest, the home rule amendment is not implicated and our analysis ends. If, however, the statute concerns a matter of primarily local affairs, the reviewing court then examines whether the statute satisfies the uniformity requirement. If the statute does not, it violates the home rule amendment.

In taking the case to the Supreme Court, the petitioners maintain that § 66.0502 is primarily a matter of statewide, not local, concern. They argue that because § 66.0502 applies, on its face, to every city, village, town and county, uniform application is plain. The petitioners assert that in Van Gilder v. City of Madison, 222 Wis. 58, 267 N.W. 25 (1936), this Court recognized that differences in the way a statute may “*impact*” or “*effect*” municipalities is not determinative; indeed they claim it is irrelevant.

The Wisconsin Institute of Law & Liberty, which filed an amicus brief, observes that other cities and villages could pass a similar charter ordinance exempting themselves from the statute. The state Department of Justice contends in its amicus brief that the Court of Appeals incorrectly focused exclusively on the effects the law would have on Milwaukee, and failed to acknowledge statewide interests recognized by this Court.

The city maintains that the Court of Appeals’ analysis comports with Madison Teachers. Specifically, they argue that the Court of Appeals properly followed the two-part test set forth in Madison Teachers, tracking the language of the Home Rule Amendment: first, a determination whether a local or statewide public concern is involved and, second, a determination as to uniformity.

A decision in this case could determine whether the Home Rule Amendment of the Wisconsin Constitution trumps the Wisconsin Legislature’s enactment of § 66.0502.

**WISCONSIN SUPREME COURT
WEDNESDAY, FEBRUARY 24, 2016
1:30 p.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 Shelley J. Gaylord presiding.

2012AP2578

[Blake v. Jossart](#)

This case involves a challenge to Wisconsin's caregiver law, 2009 Wis. Act 76, as codified in § 48.685(5)(br)5, which permanently bars those who have ever been convicted of specific predicate crimes from holding a child care license. The law has been in effect for approximately six years and has survived various constitutional challenges. See, e.g., *Brown v. State Dep't of Children and Families*, 2012 WI App 61, 341 Wis. 2d 449, 819 N.W.2d 827. See also *Buckner v. Heidke*, No. 2012AP2598 (Ct. App. July 3, 2014).

Some background: Sonja Blake was certified as a child care provider in 2001. Her certification was suspended in 2006, for failure to report that a son who had committed a murder was living in her home. She was recertified in 2008, and she reopened her certified child care business. From the fall of 2009 until Feb. 1, 2010, she also worked part-time as a caregiver in a licensed child care facility.

By letter dated Jan. 25, 2010, the Racine County Human Services Department informed Blake that her certification was being revoked under Act 76. The conviction that triggered revocation of the plaintiff's certification was misdemeanor welfare fraud, to which she pled no contest in 1986. The charge arose out of her failure to report two vehicles, a motorcycle and a car, registered to her as assets in 1985, resulting in overpayment in her public assistance.

Blake challenged revocation of her certification. She also moved for a temporary injunction, which was opposed by both the county and the state defendants. The county agreed to provide the plaintiff with an administrative hearing regarding the revocation of her child care certification. The county department upheld the revocation on administrative appeal. The circuit court affirmed. The Court of Appeals concluded the conviction and uncorroborated criminal complaint, standing alone, were insufficient to show that the plaintiff had engaged in fraudulent activity, as needed to justify the revocation. Accordingly, the appellate court remanded for another hearing at which the county presented additional evidence and live testimony from two people who had been involved in the fraud investigation that led to the plaintiff's 1986 fraud conviction. The hearing examiner upheld the department's decision. The circuit court and Court of Appeals both affirmed. This court denied a petition for review.

The plaintiff filed a declaratory judgment action arguing that her child care certification was unconstitutionally revoked. The circuit court denied the plaintiff's claim for a declaratory judgment. The Court of Appeals affirmed.

The appellate court said that the plaintiff's claim that § 48.685 was facially unconstitutional was previously rejected in *Brown*. The Court of Appeals said while the plaintiff may have also been trying to make an as applied equal-protection argument, she did not specifically use that term, nor did she cite any case law or legal standard that would be relevant to such an analysis.

Blake asks the Supreme Court "to determine whether the most draconian provision of one of the most extreme occupational regulatory schemes in the nation passes constitutional muster."

She says criminal records based disqualifications have increased dramatically over the last decade. She argues that § 48.685 violates equal protection both on its face and as applied to her. She argues that the statute creates classifications that are not rationally related to regulating the profession of child care.

The plaintiff also asserts the new law is not rationally related to the goal of protecting the Wisconsin Shares program from fraud, and she asserts that the classifications are arbitrary. She also contends that the statute violates substantive due process. Despite her past conviction, Blake says she can no more be presumed a threat to defraud the government than a person who has never been convicted of an offense “involving fraudulent activity.”