WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
JANUARY 2017

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:

Jefferson
Milwaukee
Racine
Rock
Trempealeau
Walworth
Waukesha

WEDNESDAY , JANUARY 11, 2017

9:45 a.m.	15AP1877-CR	State v. Lazaro Ozuna
10:45 a.m.	15AP491	AllEnergy Corp. v. Trempealeau Co. Envmt. & Land Use Comm.
1:30 p.m.	15AP463-D	Office of Lawyer Regulation v. Christopher E. Meisel

TUESDAY, JANUARY 17 , 2017

9:45 a.m.	16AP46-FT	Waukesha County v. J.W.J.
10:45 a.m.	15AP643	North Highland Inc. v. Jefferson Machine & Tool Inc.
1:30 p.m.	15AP1016/1119	Margaret Pulera v. Town of Richmond

THURSDAY, JANUARY 19, 2017

9:45 a.m.	14AP1623-CR	State v. Raymond L. Nieves
10:45 a.m.	15AP1523	Vincent Milewski v. Town of Dover
1:30 p.m.	15AP207	Scott Smith v. Greg Kleynerman

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
9:45 a.m.
Wednesday, January 11, 2017

2015AP1877-CR State v. Ozuna

Supreme Court case type: Petition for Review
Court of Appeals: District II
Circuit Court: Walworth County, Judge Kristine E. Drettwan, affirmed
Long caption: State of Wisconsin, Plaintiff-Respondent, v. Lazaro Ozuna, Defendant-Appellant-Petitoner.

Issues presented:
This case examines the expungement statute, due process rights and the requirements for determining whether a defendant has successfully satisfied the conditions of probation for expungement purposes.

The Supreme Court reviews two issues:

- Whether to "satisf[y] the conditions of probation" under Wis. Stat. § 973.015(1m)(b), a probationer must perfectly comply with every probation condition, or whether under State v. Hemp, 2014 WI 129, 359 Wis. 2d 320, 856 N.W.2d 811, it is enough that the probation agent determines that the probationer has "successfully completed . . . probation."
- Whether defendant Lazaro Ozuna's procedural due process rights were violated when the circuit court failed to provide him with notice or a hearing before denying expungement.

Some background: In May 2014, Ozuna pled guilty to two misdemeanors for criminal damage to property and disorderly conduct. The circuit court imposed and stayed jail terms and placed Ozuna on probation for a period of one year. The court imposed a number of conditions of probation, including that Ozuna had to pay the DNA surcharge and court costs, that Ozuna could not possess weapons, and that he could not possess or consume alcohol or illegal drugs.

The judgment of conviction also contains the following provision regarding expungement of the convictions: "IT IS ORDERED, pursuant to Wis. Stat. § 973.015, that upon successful completion of the sentence imposed, as evidenced by receipt by this Court of a Certificate of Discharge from the probationary authority, AND WITH NO VIOLATIONS OF PROBATION OR LAW ENFORCEMENT CONTACTS RISING TO THE LEVEL OF PROBABLE CAUSE, the Clerk of Court shall issue an order expunging the record."

On June 5, 2015, Ozuna's probation agent filed a document entitled "Verification of Satisfaction of Probation Conditions for Expungement," attached to which was a "Balance Inquiry" showing that Ozuna had paid $600 and had a balance due of $1,042.05. The verification form contained check boxes with apparently conflicting indications about whether Ozuna had met all of the requirements of his probation. One box was checked to indicate he successfully completed his probation, while checked boxes on other parts of the form indicated he had not met all the court-ordered conditions of probation.

Walworth County Circuit Court Judge Kristine E. Drettwan denied Ozuna's expungement on June 12, 2015.

Ozuna appealed unsuccessfully, arguing that according to the Department of Corrections' (DOC) verification form, he had successfully completed his sentence (his one-year term of probation) and was therefore entitled to automatic expungement.

The Court of Appeals focused on whether Ozuna had "successfully completed" his sentence, as that phrase is defined in Wis. Stat. § 973.015(1m)(b): "A person has successfully completed the sentence if the person has not been convicted of a subsequent offense and, if on probation, the probation has not been revoked and the probationer has satisfied the conditions of probation."

The Court of Appeals stated that even where a person completes probation without revocation and does not have a new conviction, the person still fails to complete probation successfully if the person does not satisfy all of the conditions of probation.

The Court of Appeals said the DOC verification noted that Ozuna had been cited for underage drinking after giving a preliminary breath test of 0.102 percent. This violated the condition that he not consume alcohol while on probation. Consequently, the Court of Appeals concluded that Ozuna had not been entitled to expungement.

Ozuna argues that the automatic denial of expungement based solely on a blind acceptance of the DOC's representations on the verification form violated his due process rights. Ozuna also asserts that a probationer does not need to comply with 100 percent of the conditions to successfully complete probation and be entitled to expungement.

A decision by the Supreme Court could build on its decision in Hemp by clarifying what is meant by satisfying all conditions of probation in the expungement statute.

Wisconsin Supreme Court
10:45 a.m.
Wednesday, January 11, 2017

2015AP491 AllEnergy Corp. v. Trempealeau Co. Environment & Land Use Comm.

Supreme Court case type: Petition for Review
Court of Appeals: District III
Circuit Court: Trempealeau County, Judge Elliott M. Levine, affirmed
Long caption: AllEnergy Corporation and AllEnergy Silica, Arcadia, LLC, Petitioners-Appellants-Petitioners, v. Trempealeau County Environment & Land Use Committee, Respondent-Respondent-Respondent.

Issues presented: This appeal by AllEnergy Corporation and AllEnergy Silica, Arcadia, LLC (AllEnergy) involves a conditional-use zoning permit that was denied by a five-to-three vote by Trempealeau County Environment & Land Use Committee in October 2013.

The Supreme Court reviews the following issues:

- Do unsubstantiated public comments on the possible negative impacts of a non-metallic mine constitute substantial evidence upon which to base a conditional use permit denial?
- Should the court adopt a new doctrine that where a conditional use permit applicant has shown that all conditions and standards, both by ordinance and as devised by the zoning committee, have been or will be met, the applicant is entitled to the issuance of the permit?
- Did the Trempealeau County Environment & Land Use Committee exceed its jurisdiction by denying a conditional use permit based upon generalized concerns, reflecting the exercise of policy-based, quasi-legislative authority by a committee whose members are appointed, not elected?

Some background: If issued, the permit would have allowed AllEnergy to operate a 265-acre frac sand mine in the town of Arcadia. The committee held a public hearing and approved 37 potential conditions for a permit, before ultimately voting against issuing the permit itself.

Committee members voting against the permit stated four primary reasons for their denial: (1) AllEnergy's application was rushed and incomplete; (2) the proposed mine raised environmental concerns; (3) the proposed mine would have adverse effects on the landscape, wildlife, and recreational opportunities available to residents and tourists; and (4) the proposed mine posed risks to the local population's health, culture, and social conditions.

AllEnergy sought certiorari review of the committee's decision. The trial court denied the certiorari petition, holding that substantial evidence supported the committee's denial of AllEnergy's application, and that AllEnergy's legal arguments were unpersuasive.

AllEnergy appealed. The Court of Appeals affirmed, emphasizing that the court could not substitute its view of the evidence for the committee's when reviewing the sufficiency of the evidence on certiorari.

AllEnergy petitioned this court for review, and this court accepted review of the three issues listed above.

The Court of Appeals further noted, AllEnergy cannot have an intrinsic property right to operate a frac sand mine given that such mining is a *conditional* use subject to local governmental approval – not a use as of right.

AllEnergy argues that the Committee was without authority to adjudge the completeness of the application and the "record shows that the [permit] application was complete as a matter of law under the [o]rdinance."

AllEnergy asserts the committee's "adopti[on] of 37 conditions of approval was a de jure approval of the [permit]" under the zoning ordinance and it "met the conditions of the [o]rdinance and agreed to be bound by the additional 37 conditions of approval adopted by the [Committee]."

Wisconsin Supreme Court
1:30 p.m.
Wednesday, January 11, 2017

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 Milwaukee.

2015AP463-D Office of Lawyer Regulation v. Christopher E. Meisel

In this case, Atty. Christopher E. Meisel has appealed the referee's recommendation that his license to practice law in Wisconsin be suspended for two years as the result of 15 counts of professional misconduct.

Meisel has been licensed to practice law in Wisconsin since 1994. He has no prior disciplinary history.

In October 2006, Meisel was diagnosed with brain cancer and underwent brain surgery. Chemotherapy and radiation treatments continued until 2008. Although his condition is currently stable, Meisel will require constant medical monitoring and is unable to work long hours.

In 2008 Meisel and his wife adopted two children, one of whom was later diagnosed with serious medical issues, including legal blindness and learning disabilities. In order to provide the child with the resources she needed, the family moved to a new school district that they believed had better resources to educate the child. The purchase price of their home in the new district was $125,000 more than the price of the home the family sold.

In addition to his personal health problems and the medical issues of his daughter, Meisel was also under financial distress due to a real estate business called King Park Investment Company, LLC, a real estate venture in the Marquette University area in Milwaukee which he owned with another investor.

The OLR's complaint alleged that beginning in 2009 and for several years thereafter Meisel converted funds totaling approximately $175,000 from two estates and from two guardianship proceedings. Some of the funds were converted for Meisel's own purposes and some funds were converted for the benefit of King Park. The complaint also alleged that Meisel filed annual accountings with the Milwaukee County Probate Court in the two guardianship proceedings that deliberately inflated the account balances in order to conceal the conversions. Meisel subsequently made restitution of all monies converted.

Meisel and the OLR entered into a stipulation whereby Meisel admitted all counts of misconduct alleged in the complaint. The only remaining issue for Referee Hannah Dugan to decide was the appropriate sanction. At a hearing before the referee, Meisel presented a report and telephonic testimony from his attending neuro-oncologist, Dr. Malkin. Malkin's written report opined that Meisel's brain tumor "predisposed him to inappropriate, nonconstructive cognitive responses to stress." In his telephonic testimony, Malkin said it was his opinion, to a reasonable degree of medical probability, that Meisel's brain tumor "conspired to create a perfect storm such that his injured brain, under extreme stress, has reacted to a situation, his judgment

was affected, and he made a financial decision which I'm sure he regrets." On cross-examination by OLR's counsel, Malkin agreed that being predisposed to something is different than causing it to happen.

The referee found that the OLR met its burden of proof as to all 15 counts of misconduct. The referee concluded that a two-year suspension of Meisel's license was an appropriate sanction. She found that Meisel failed to establish a nexus between his medical condition and his misconduct. The referee also pointed to the vulnerability of the victims and the deliberateness with which Meisel undertook the conversions.

Meisel has appealed, arguing that he did in fact establish a causal connection between his medical condition and his misconduct. He argues that a five month suspension is an appropriate sanction.

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

Wisconsin Supreme Court
9:45 p.m.
Tuesday, January 17, 2017

2016AP46-FT Waukesha County v. J.W.J.

Supreme Court case type: Petition for Review
Court of Appeals: District II
Circuit Court: Waukesha County, Judge William Domina, affirmed
Long caption: In the matter of the mental commitment of J.W.J.: Waukesha County, Petitioner-Respondent-Respondent, v. J.W.J., Respondent-Appellant-Petitioner.

Issue presented:
Should the standard adopted in Fond du Lac County v. Helen E.F., 2012 WI 50, 340 Wis. 2d 500, 814 N.W.2d 179 for determining whether an individual is a proper subject for treatment under Chapter 51 be modified?

Some background:
J.W.J. suffers from paranoid schizophrenia. He has been diagnosed with that condition since at least 1990 and has at various times since been subject to Wis. Stat. ch. 51 involuntary commitment orders.

To involuntarily commit a person, a county must show that the person is mentally ill and dangerous. *See Wis. Stat.* § 51.20(1)(a)1.-2., (13)(e). The same standards apply to extensions of the commitment, except the county may satisfy the showing of dangerousness by demonstrating that "there is a substantial likelihood, based on the subject individual's treatment record, that the individual would be a proper subject for commitment if treatment were withdrawn." Sec. 51.20(1)(am). Whether the county has met its burden is a mixed question of law and fact.

J.W.J.'s most recent commitment began in 2009 and has been extended each year since. The Waukesha County Circuit Court held a hearing on the county's extension petition on July 7, 2015. The sole witness called by the county was Dr. Richard Koch, a licensed psychologist, who had been appointed at various times since 1990 to evaluate J.W.J., including in connection with the county's most recent extension petition. Koch was unable to personally examine J.W.J. because J.W.J. refused to meet, but he reviewed J.W.J.'s treatment records and the social worker's report. Koch testified that his record review was sufficient to allow him to reach conclusions to a reasonable degree of certainty. Koch testified that in his opinion J.W.J. was dangerous as that term was defined in the statute.

The circuit court concluded that the county had met its burden of proof that J.W.J. was mentally ill, was a proper subject of treatment, and was dangerous because there was a substantial likelihood that he would be a proper subject for commitment if treatment would be withdrawn. The court ordered that J.W.J.'s commitment be extended for one year and that the maximum level of treatment would be "outpatient with conditions." The court also authorized involuntary medication and treatment. The Court of Appeals affirmed, concluding that Koch's testimony about J.W.J.'s condition and the effect of medication on his symptoms was sufficient to meet the standard adopted in Helen E.F.

In Helen E.F., the Wisconsin Supreme Court adopted the standard to determine whether an individual is a proper subject for treatment under Wis. Stat. ch. 51, ruling in part:

> *If treatment will "maximize the individual functioning and maintenance" of the subject, but not "help in controlling or improving their disorder," then the subject individual does not have rehabilitative potential, and is not a proper subject for treatment. However, if treatment will "go beyond controlling … activity" and will "go to controlling the disorder and its symptoms," then the subject individual has rehabilitative potential, and is a proper subject for treatment.*

J.W.J. argues that Waukesha County failed to prove by clear and convincing evidence that J.W.J. is a proper subject for treatment under Wis. Stat. ch. 51. He contends the Helen E.F. standard is "confusing, difficult to apply, and leads to inconsistent results as it depends on the word choice of the testifying doctors."

J.W.J. contends that the standard developed in Helen E.F. resulted from the type of illness present in that case – Alzheimer's disease. He argues it is well-settled that while some symptoms of that disease can be ameliorated, the vast majority of the symptoms do not respond at all to treatment. Thus, there was little chance that Helen E.F. would improve with treatment.

The county responds that the standard is not intended to direct circuit courts on how to address any particular type of symptom, but is designed to address how to consider symptoms generally. It says that if a particular person's symptoms are behavioral and treatment positively affects those symptoms and the underlying disorder, then the standard for rehabilitation is met and the commitment should be extended.

The county argues that the application of the Helen E.F. standard has not been shown to be problematic or confusing. In the Helen E.F. case itself, the court made clear that while the treatment would have controlled some of Helen E.F.'s symptoms, that was not sufficient because the treatment must "go to controlling [the] disorder and its symptoms." 340 Wis. 2d 500, ¶36. The county says that this reasoning clearly delineated the line between cases appropriate for commitment under Wis. Stat. ch. 51 and those that are not.

Wisconsin Supreme Court
10:45 a.m
Tuesday, January 17, 2017

2015AP643 North Highland, Inc. v. Jefferson Machine & Tool Inc.

Supreme Court case type: Petition for Review
Court of Appeals: District IV
Circuit Court: Jefferson County, Judge William F. Hue, affirmed
Long caption: North Highland Inc., Plaintiff-Appellant-Petitioner, v. Jefferson Machine & Tool Inc. and Steven M. Homann, Defendants, Frederick A. Wells, Defendant-Respondent-Respondent.

Issues presented:
This fairly fact-specific case arises from a dispute over a bidding process. The Supreme Court reviews whether:

- the amount of money that a company bids on a contract is "information" protectable as a trade secret under Wis. Stat. § 134.90(1)(c), when it has value through secrecy meeting the requirements of Wis. Stat. § 134.90(1)(c)(1)-(2)?
- under the circumstances here, may North Highland Inc. maintain suit against other defendants for any of the following when it covenanted not to sue one defendant, Dwain Trewyn, after Trewyn filed for bankruptcy: (a) conspiracy with Trewyn to violate Trewyn's fiduciary duties to North Highland, (b) aiding and abetting Trewyn's breach of fiduciary duties to North Highland, (c) interference with Trewyn's contractual or fiduciary obligations to North Highland, or (d) for interference with North Highland's prospective contract with another person?

Some background: North Highland is a machining and fabrication company that in 2012 began a lawsuit against Frederick Wells; its former employee, Dwain Trewyn; and Jefferson Machine & Tool Inc., a company formed by Wells and Trewyn. North Highland alleged that Trewyn and Wells formed Jefferson Machine to compete with North Highland and that Trewyn formulated a bid for a Tyson Foods Inc. project on behalf of Jefferson Machine while still employed by North Highland. Tyson ultimately awarded Jefferson Machine the contract for its project.

North Highland brought a trade secret misappropriation claim against Trewyn and Wells, alleging that its bid amount for the Tyson project constituted a trade secret; that Trewyn had disclosed North Highland's bid amount to Wells; and that Wells and Trewyn used that information in order for their company to present a more favorable bid to Tyson Foods. North Highland also asserted a claim against Trewyn for breach of fiduciary duty, and a claim against Wells for conspiracy to breach a fiduciary duty.

Trewyn and Wells moved for – and the trial court granted – summary judgment against North Highland's trade secret misappropriation claim. The case therefore proceeded on only North Highland's claims for: (1) breach of fiduciary duty against Trewyn; and (2) conspiracy to breach fiduciary duty against Wells.

Before trial was held on those claims, Trewyn declared Chapter 7 bankruptcy, which resulted in a stay in North Highland's action against Trewyn. North Highland then filed an adversary action against Trewyn in bankruptcy court. North Highland and Trewyn ultimately

reached a settlement agreement that led to the dismissal of the adversary proceeding in bankruptcy court and the dismissal of Trewyn as a party in the instant case.

Following Trewyn's dismissal, Wells moved the trial court for summary judgment on North Highland's conspiracy claim, arguing that as a result of the dismissal of North Highland's claim against Trewyn, North Highland's conspiracy claim against Wells was barred by claim preclusion. The trial court granted Wells' motion.

North Highland unsuccessfully appealed the dismissal of both its conspiracy to breach fiduciary duty claim and its trade secret misappropriation claim against Wells.

The Court of Appeals ruled that the trial court appropriately granted summary judgment against North Highland's conspiracy claim because North Highland failed to set forth sufficient facts in evidence to show that there was a genuine issue as to whether Wells and Trewyn conspired.

As for North Highland's trade secret misappropriation claim, the Court of Appeals ruled that North Highland had failed to adequately explain why its bid amount constituted "information" protected by Wisconsin's trade secret statute.

Among other things, North Highland maintains that this court should consider its bid amount to be "information" protected by Wisconsin's trade secret statute.

Wisconsin Supreme Court
1:30 p.m
Tuesday, January 17, 2017

2015AP1016/2015AP1119 Pulera v. Town of Richmond and Town of Johnstown

Supreme Court case type: Certification
Court of Appeals: District II/IV
Circuit Court: Rock Co., Judge Barbara W. McCrory; Walworth Co., Judge Phillip A. Koss
Long caption: Margaret Pulera, Petitioner-Appellant, v. Town of Richmond and Town of Johnstown, Respondents-Respondents

Issues presented:
This certification of two consolidated cases examines how deadlines are determined for filing objections to town highway projects.

Some background:

Margaret Pulera filed a certiorari petition for judicial review of town highway orders. Because the highway in question is partly on the border of Rock County (Town of Johnstown) and Walworth County (Town of Richmond), she filed a certiorari petition in each county.

She alleged that the towns failed to follow proper procedures for highway redesign and that the redesign creates safety issues. Each circuit court dismissed her petition as untimely, although each court used a different interpretation of the applicable certiorari filing deadline statute.

Because both appeals are based on the same underlying facts and require interpretation and application of the same statute, the Court of Appeals consolidated the cases on its own motion after the briefs were filed.

In both cases Pulera alleged that the Town of Richmond passed a resolution proposing a redesign of an intersection and that the towns had held a joint meeting on Sept. 9, 2014, at which they approved the redesign.

In the Rock County case, the towns provided affidavits averring dates in late September 2014 that Pulera was sent copies of the two highway orders, one by postal mail and one by email.

Pulera did not dispute that she received the copies. Instead, she argued that the certiorari time should not run from her receipt of the highway orders but rather from the recording of the highway orders with the Register of Deeds. The Rock County Circuit Court dismissed the petition as untimely because Pulera failed to file it within 30 days of when she received copies of the highway orders.

In the Walworth County case, the court dismissed the petition as untimely because Pulera failed to file it within 30 days of when the municipalities voted to make the highway change. The Walworth County court expressly rejected the Rock County court's conclusion that the time could be measured from when Pulera received the highway orders because that conclusion would potentially mean different filing dates for different petitioners, depending on when each petitioner received the highway order. The Walworth County court concluded that running the certiorari time from when the town board voted was the most certain answer.

District IV notes that the Wisconsin Supreme Court has previously suggested two possible interpretations of the applicable statute but did not resolve the issue, and the appellant in this case proposes a third interpretation. As District IV puts it:

> *"[T]hese appeals require a court to interpret and apply a certiorari filing deadline statute that seems poorly designed for its intended purpose. Although normally the goal of statutory interpretation is to discern the intent of the legislature, in this case the language of the relevant certiorari statute has so little connection to the highway order process, and is so lacking in language that provides useful guidance, that it is difficult to believe the legislature held any intent on this question at all. Resolution of the issue will likely require the consideration of statutory language and various factors related to policy and judicial administration."*

District IV notes that the Wisconsin Supreme Court acknowledged the problem but did not resolve it in Dawson v. Town of Jackson, 2011 WI 77, 336 Wis. 2d 318, 801 N.W.2d 316. It notes one of the issues decided in Dawson was whether the certiorari process under § 82.15 is the exclusive method of seeking judicial review, to the exclusion of relief by declaratory judgment. The Dawson court held that § 82.15 is indeed the exclusive method for judicial review. The Dawson court observed that certiorari review of highway orders may be sought within 30 days of receipt of the final determination, and then commented that the terminology was not clear.

District IV notes that judicial review of highway orders is provided for in § 82.15, Stats., which provides, " Any person aggrieved by a highway order, or a refusal to issue such an order, may seek judicial review under s. 68.13."

Section 68.13(1) states "Any party to a proceeding resulting in a final determination may seek review thereof by certiorari within 30 days of receipt of the final determination."

District IV goes on to say in the context of the highway order process described in ch. 82, Stats., it is unclear how the certiorari filing deadline of § 68.13(1) ought to be applied. District IV points out the highway order process does not use the term "final determination" or anything similar.

A decision by the Supreme Court could clarify the deadline for filing an objection to a town highway project.

Wisconsin Supreme Court
9:45 a.m.
Thursday, January 19, 2017

2014AP1623-CR State v. Nieves

Supreme Court case type: Petition for Review
Court of Appeals: District I
Circuit Court: Milwaukee County, Judge Jeffrey A. Wagner and Judge Richard J. Sankovitz, reversed and cause remanded for further proceedings
Long caption: State of Wisconsin, Plaintiff-Respondent-Petitioner, v. Raymond L. Nieves, Defendant-Appellant-Respondent.

Issues presented: This homicide case examines issues relating to the Sixth Amendment's confrontation clause in light of several U.S. Supreme Court decisions. More specifically, the state raises the following issues:

- Did the admission of Johnny Maldonado's nontestimonial statement at his and Raymond Nieves's joint trial violate Nieves's Sixth Amendment right to confront the witnesses against him given that, after the change in confrontation law initiated by Crawford v. Washington, 541 U.S. 36 (2004), "only testimonial statements are excluded by the Confrontation Clause?" Giles v. California, 554 U.S. 353, 376 (2008).
- Even if Bruton v. United States, 391 U.S. 123 (1968) prohibits the admission of a non-testifying codefendant's nontestimonial statements, did the admission of Maldonado's statement at trial violate Nieves's confrontation rights when Ramon Trinidad's testimony about the statement did not say that Nieves was involved in the crimes, but instead used "they" to refer to the perpetrators?
- Was any Bruton violation harmless error in light of the strong evidence against Nieves?
- Was the admission of the "Boogie Man" testimony harmless error?

Some background: Nieves and Maldonado were jointly tried and each convicted in 2012 of first-degree intentional homicide and attempted first-degree intentional homicide, both as a party to a crime and with the use of a dangerous weapon.

The convictions stemmed from a 2009 shooting incident in Milwaukee that resulted in the death of Spencer Buckle and in nonfatal injuries to another victim, to whom the Court of Appeals assigned the pseudonym "David," per Wis. Stat. Rule § 809.19(1)(g).

"David" told police officers that before the shootings, he and Buckle had been with Nieves and Maldonado, who had suggested they drive from Kenosha to Milwaukee to hang out with other Maniac Latin Disciple gang members. "David" said that when they arrived in Milwaukee, he, Buckle, Nieves, and Maldonado exited the vehicle and began walking in an alley. "David" told officers that while they were walking in the alley, he heard a gunshot and saw Buckle fall to the ground. "David" said he dropped to the ground and played dead when he heard more gunshots. "David" said that after falling to the ground, he felt a pain in his left hand and he realized he had been shot, and he also felt air pass through his hoodie as bullets went past his head. "David" told the officers that Nieves had shot Buckle and that Maldonado had shot at him.

The trial court denied a motion made by Nieves to sever his case from Maldonado's on grounds that the state's witness, Ramon Trinidad, intended to testify about a confession that Maldonado allegedly made to him concerning Maldonado's involvement in the shootings of Buckle and "David."

Based on written statements of what Trinidad disclosed to the state, portions of Maldonado's alleged confession mentioned, or at least implicitly referenced, Nieves. The state argued that severance was unnecessary because it could couch its questions of Trinidad concerning his conversation with Maldonado in a manner that would preclude any mention of Nieves.

"David" also testified over Nieves's objection, about a conversation he had before the shootings with an individual identified only as "Boogie Man." According to "David," "Boogie Man" had told him that Nieves and Maldonado were planning to kill him.

After trial counsel attempted to point to more specific comments that Maldonado allegedly made about Nieves's involvement, the trial court cut counsel off and stated, without further argument, that it was denying Nieves's motion to sever and that Nieves could later "raise additional reasons why [the court] should sever [the trials] that aren't resolved by the proposal . . . to confine . . . questions to [Trinidad] to conversations that involve the defendant against whom those statements would be admissible as the statements of party opponent."

Nieves argued that severance was required under Bruton because the state planned to introduce – and did introduce – testimony from Trinidad that Nieves's codefendant, Maldonado, confessed to the shootings and implicated Nieves by reference. Specifically, Nieves pointed to Trinidad's frequent use of the pronoun "they" in recounting what Maldonado told him.

The state responded by arguing that, under Richardson v. Marsh, 481 U.S. 200 (1987), it was permissible for it to question Trinidad in a way that would omit any reference to Nieves. The state also argued that Trinidad's multiple uses of "they" referred only to Maldonado and the two victims and in no way implicated Nieves.

The central question examined by the Supreme Court is whether Nieves and Maldonado should have been tried together given that: (1) Maldonado did not testify; and (2) the trial court allowed a witness to testify about an alleged confession by Maldonado that arguably implicated both Maldonado and Nieves.

Wisconsin Supreme Court
10:45 a.m.
Thursday, January 19, 2017

2015AP1523 Milewski v. Town of Dover

Supreme Court case type: Petition for Review
Court of Appeals: District II
Circuit Court: Racine County, Judge Phillip A. Koss (Walworth County), affirmed

Long caption: Vincent Milewski and Morganne MacDonald, Plaintiffs-Appellants-PETITIONERS,v. Town of Dover, Board of Review for the Town of Dover and Gardiner Appraisal Service, LLC, as Assessor for the Town of Dover, Defendants-Respondents-RESPONDENTS.

Issues presented:

- Whether government entry into a citizen's home under Wis. Stat. § 70.47(7)(aa) and § 74.37(4)(a) (which together require property owners to permit interior inspections of homes for tax assessment purposes or forfeit their right to challenge their assessment in any manner) constitute a search for Fourth Amendment purposes.
- Whether warrantless searches under Wis. Stat. § 70.47(7)(aa) and § 74.37(4)(a) are reasonable as a matter of law.
- Whether Wis. Stat. § 70.47(7)(aa) and § 74.37(4)(a) violate the Due Process Clause by depriving a citizen of any right to appeal a tax assessment if the citizen denies consent to an assessor to conduct an interior inspection of the citizen's home.

Some background: Plaintiffs, Vincent Milewski and Morganne MacDonald, own a home in the Town of Dover. In 2013, the town performed a new assessment of all real property. Gardiner Appraisal Service, LLC, was hired to perform property tax assessment services.

Section 70.32(1), Stats., provides that real property shall be valued by the assessor in the manner specified in the Wisconsin Property Assessment Manual. The manual provides that "in the case of real property, actual view requires a detailed viewing of the interior and exterior of all buildings and improvement and recording of complete cost, age, use, and accounting treatments."

Gardiner sent the plaintiffs a notice saying, "We must view the interior of your property for the Town wide revaluation program which is in progress. An assessor will stop by to view your property on Tues, Aug 20 at 6:10 PM." The plaintiffs denied the Gardiner representative entry into the interior of their home.

On Oct. 4, 2013, Gardiner sent the plaintiffs a certified letter seeking to set an appointment and advised Milewski and MacDonald that the property would be assessed according to Wis. Stat. §§ 70.32(1) and 70.47(7)(aa). The plaintiffs wrote the town a letter saying that interior home inspections were not legally required for a revaluation and that the plaintiffs "have not refused a 'reasonable' request to view our property by refusing to allow an unknown stranger entry into our private and secure residence."

Without the benefit of an interior viewing, Gardiner valued the property at $307,100, a 12.12 percent increase from the previous assessment which was made in 2004. Gardiner said it

reached this figure after considering the possibility that the plaintiffs had remodeled over the past nine years, which had not been disclosed or could not be verified; Gardiner's inability to evaluate if the effective age of the home increased or decreased; Gardiner's "reasonable assumption that homes in which no inspection is permitted will have less increase in effective age than average"; that it is not fair to assume that there have been no improvements for any home where access has been denied; that assessed values of many homes had increased in 2013; and a 13 percent increase in value from 2004 to 2013 is not uncommon.

The plaintiffs filed a formal objection to the assessment with the town. They attended the board of review hearing, seeking to object to the property assessment. The board of review rejected the plaintiffs' request because they had refused a reasonable request of the assessor to view the property. After consulting with the Department of Revenue (DOR), the board of review determined the plaintiffs had waived their appeal rights under § 70.47(7)(aa).

Because the plaintiffs could not challenge their assessment before the board of review, they filed a complaint against the town and Gardiner in circuit court, arguing that Wisconsin statutes for property tax assessment and appeals are unconstitutional and that Gardiner over-assessed their property in violation of §§ 70.501 and 70.503.

The court granted motions for summary judgment filed by the town and Gardiner, dismissing all claims against them.

The plaintiffs appealed. The Court of Appeals affirmed.

The Court of Appeals said the plaintiffs' primary argument was that §§ 70.47(7)(aa) and 74.37(4)(a) are unconstitutional as applied because they deprive the plaintiffs of property without due process of law and punish the plaintiffs for exercising their Fourth Amendment right. The Court of Appeals said when a party challenges a law as being unconstitutional on its face, the party "must show that the law cannot be enforced 'under any circumstances.'" League of Women Voters of Wis. Educ. Network, Inc. v. Walker, 2014 WI 97, ¶13, 357 Wis. 2d 360, 851 N.W.2d 302.

The Court of Appeals agreed with the circuit court that the statutory scheme is reasonable because it is based on the government's requirement to comply with the uniformity clause of the Wisconsin constitution: "Between all of the plaintiffs' references to the British and citations to the Bible, there is not a single citation to any case from any jurisdiction supporting their position that the Fourth Amendment is implicated here."

The plaintiffs maintain that an entry into a citizen's home for purposes of tax assessment is a "search" and penalizing those who refuse to consent to such a search is a violation of the Fourth Amendment of the U.S. Constitution and Article I, § 11 of the Wisconsin constitution. They contend that the punishment for withholding consent, which is the elimination of all rights to appeal the assessment, is a denial of due process.

Wisconsin Supreme Court
1:30 p.m.
Thursday, January 19, 2017

2015AP207 Smith v. Kleynerman

Supreme Court case type: Petition for Review
Court of Appeals: District I [Dist. IV judges]
Circuit Court: Milwaukee County, Judge Pedro Colon, affirmed
Long caption: Scott Smith, Plaintiff-Respondent-Cross-Appellant-RESPONDENT, Alpha Cargo Technology, LLC, Plaintiff, v. Greg Kleynerman, Defendant-Appellant-Cross-Respondent-PETITIONER, Red Flag Cargo Security Systems, LLC, Defendant

Issues presented:

- Whether Greg Kleynerman, as a 50-percent member in a Wisconsin limited liability company, owed Scott Smith, the other 50-percent member, a fiduciary duty.
- Whether an LLC member personally has standing to recover lost profits putatively suffered by an LLC.
- What is the proper gatekeeping role of a circuit judge under the statutory Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) admissibility standard with respect to expert's testimony?

Some background: In 2002, Smith and Kleynerman formed Alpha Cargo Technology, LLC (ACT) to distribute cargo security seals in the United States. Kleynerman and Smith each owned a 50 percent interest in ACT. Smith was designated as ACT's president. Kleynerman was the executive vice president. Kleynerman and Smith ran ACT out of their respective homes in Milwaukee and Minneapolis. ACT bought cargo security seals made by Chinese and European manufacturers and resold them to ACT's customers in the Americas. After Kleynerman improved the cargo seal locking mechanism, ACT filed patent applications in the United States on the locking mechanism inventions. Kleynerman was listed as one of the inventors, and the inventors assigned the rights in the patents to ACT.

Kleynerman was responsible for technical aspects of the business, such as receipt of products in the United States, storage, packaging, and shipments of products to customers. Smith was responsible for marketing and sales. The business showed strong sales for several years, which then tapered off, leaving the partners to look for options.

In late 2008 and early 2009, Kleynerman began discussions with Milwaukee attorney and CPA Bruce Glaser, who became interested in investing by forming new companies to buy ACT's assets and retaining ACT as a sales agent. Glaser subsequently entered into business dealings with Kleynerman and his wife and loaned money to Kleynerman.

Glaser set up new and separate limited liability companies – one each to handle production and sales. He owned 75 percent of each company, and another investor, Greg Grinberg, owned 25 percent of each.

Glaser prepared a memorandum of understanding describing an arrangement by which ACT would sell it assets, including patents, to Red Flag and ACT would serve as sales representative for a year. The sale price depended on sales, which fell flat.

Glaser asked Kleynerman to continue to work for Red Flag but did not make a similar offer to Smith. In February 2011, Glaser sold his 75 percent interest in Red Flag to Kleynerman for a nominal value. Kleynerman subsequently made changes to the cargo seal product, which improved cost and performance. Red Flag's gross revenue increased from $98,152 in 2011, to more than $1.5 million in 2012.

In December 2011, Smith sued Kleynerman and Red Flag, claiming that Kleynerman breached his fiduciary duty owed to Smith as it related to Smith's interests in the June 2009 transaction with Red Flag. Smith also alleged that Kleynerman made various misrepresentations to Smith to induce him to agree to the transaction to his detriment. One of Smith's claims was that he suffered from severe depression following the death of his wife in 2007, and this caused Smith to be less involved in running ACT and led to ACT's declining sales.

The case was tried to a jury over the course of six days. The jury found that Kleynerman owed a fiduciary duty to Smith and that Kleynerman had breached that duty, resulting in damages to Smith in the amount of $499,000. While the jury found that Kleynerman had made certain representations to Smith, it found the representations were not untrue. The jury awarded Smith $200,000 in punitive damages.

The parties filed cross-post-verdict motions. The circuit court concluded that the jury's award of punitive damages was legally inconsistent with the jury's verdict that the representations made by Kleynerman were not untrue. Accordingly, the circuit court struck the punitive damages award. The circuit court denied the parties' motions seeking to alter any other portion of the verdict.

The Court of Appeals affirmed.

A decision by the Supreme Court is expected to clarify the law regarding the rights and obligations of Wisconsin LLC members to each other and expand upon the decision in Gottsacker v. Monnier, 2005 WI 69, 281 Wis. 2d 361, 697 N.W.2d 436.