WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
JANUARY 2018

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
Milwaukee
Racine
Wood

TUESDAY, JANUARY 9, 2018

9:45 a.m.	15AP2356	Archie A. Talley v. Mustafa Mustafa
10:45 a.m.	16AP983	Robert H. Shugarts, II v. Dennis M. Mohr

THURSDAY, JANUARY 11, 2018

9:45 a.m.	15AP1258	Golden Sands Dairy LLC v. Town of Saratoga
10:45 a.m.	15AP2457	Cintas Corp. No. 2 v. Becker Property Services LLC
1:30 p.m.	14AP2561	State v. David McAlister, Sr.

WEDNESDAY, JANUARY 17, 2018

9:45 a.m.	15AP2627	Mark McNally v. Capital Cartage, Inc.
10:45 a.m.	16AP112-D	Office of Lawyer Regulation v. James Toran

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 Hannah McClung at (608) 271-4321. Summaries provided are not complete analyses of the issues presented.

Wisconsin Supreme Court
Tuesday, January 9, 2018
9:45 a.m.

2015AP2356 Talley v. Mustafa

Supreme Court case type: Petition for Review
Court of Appeals: District I (District II judges)
Circuit Court: Milwaukee County, Judge Daniel A. Noonan, reversed and cause remanded
Long caption: Archie A. Talley, Plaintiff-Appellant-Respondent, v. Mustafa Mustafa, d/b/a Burleigh Liquor, a/k/a Burleigh Food Market and Adams Foods, LLC, Defendants, Auto Owners Insurance Company, Defendant-Respondent-Petitioner.

Issues presented:
This dispute over insurance coverage stems from an incident in which a convenience store customer was punched in the face. The Supreme Court reviews the following issues:

- Can negligent supervision alone constitute an occurrence?
- Does a negligent supervision claim extend to wrongful acts committed by people with only a "special relationship" to the employer as opposed to an actual employee?
- When both the insurance company and the policyholder agree that an insurance policy does not provide coverage for allegations in a lawsuit, should that agreement be respected as the intent of the contracting parties?

Some background: Keith Scott regularly helped out in various capacities at a convenience store owned by Mustafa Mustafa. One day in July 2009, Scott allegedly became angry with a customer, Archie Talley, for taking too long to close the door to the convenience store when the air conditioning was on. The two men had words, and then Scott punched Talley twice, fracturing Talley's jaw.

Talley sued Mustafa and his liability insurer, Auto Owners Insurance Company, alleging that Mustafa was negligent with regard to his "duty to properly train and supervise" Scott, and that Mustafa's breach of this duty resulted in Talley's injuries.

Auto Owners moved for summary and declaratory judgment. It claimed that it had no duty to provide coverage to Mustafa because Scott's punching of Talley was an intentional act – not an "accident" – and thus was not an "occurrence" covered under Auto Owners' policy. Auto Owners also argued that it owed no coverage to Mustafa because Mustafa maintains that Scott was not his employee; as such, Mustafa agrees with Auto Owners' position that Scott's actions were not those of an "agent, employee, or representative" of Mustafa that would trigger coverage.

The trial court agreed with Auto Owners' argument that because the injury to Talley was caused by Scott's intentional act, there is no coverage under Mustafa's Auto Owners insurance policy.

The Court of Appeals reversed, ruling that Auto Owners and the trial court incorrectly focused on Scott's conduct, when they should have focused on Mustafa's conduct. While Talley alleged that Scott punched him, he also alleged that Mustafa, the insured, had a duty to properly train and supervise Scott and that Mustafa's negligence was a substantial factor in causing his injuries. The Court of Appeals held that a reasonable business owner in Mustafa's position

would expect that if a customer sued him on the ground that he caused injury to the customer because of his negligence – including negligent supervision—the insurance policy would provide coverage for that claim.

The Court of Appeals held that, rather than granting Auto Owner's motion for summary and declaratory judgment and dismissing it from this action, the trial court should have denied the motion and allowed a jury to determine:

- whether Scott was an employee of Mustafa or otherwise had a special relationship with him that created an obligation for Mustafa to train and/or supervise Scott with due care;
- if so, whether Talley's injuries were caused by wrongful conduct of Scott;
- if so, whether Mustafa was negligent in training or supervising Scott; and
- if so, whether such negligence was a substantial factor in causing Scott's injury-causing conduct.

In a dissent, Court of Appeals Judge Paul F. Reilly agreed with the trial court's reasoning that – regardless of whether Scott was an employee, agent, or customer of Mustafa – Scott's actions could not have qualified as an "occurrence" under Auto Owners' policy because Scott's punching of Talley was an intentional act, not an accident that would trigger coverage.

Wisconsin Supreme Court
Tuesday, January 9, 2018
10:45 a.m.

2016AP983 Robert H. Shugarts, II v. Dennis M. Mohr

Supreme Court case type: Petition for Review
Court of Appeals: District III
Circuit Court: Eau Claire County, Judge Michael A. Schumacher, affirmed
Long caption: Robert H. Shugarts, II and Judith Lynn Shugarts (Shugarts), Plaintiffs-Appellants-Petitioners, v. Dennis M. Mohr, Progressive Casualty Insurance Company/Artisan and Truckers Casualty Company and Wisconsin Municipal Mutual Insurance Company, Defendants, Allstate Property and Casualty Insurance Company, Defendant-Respondent.

Issues presented: This case involves a dispute over underinsured motorist (UIM) coverage. The Supreme Court examines what constitutes proper notice of a claim, and more specifically here, whether the Shugarts properly provided notice to Allstate, their primary insurer, of their underinsured motorist claim. The Court of Appeals found that the Shugarts failed to provide proper notice and denied a motion for reconsideration. The Shugarts raise the following issues:

- Can a Duty to Submit a Proof of Claim Arise before the Claim Exists?
- Under Wis. Stat. § 631.81 can a Party be Required to Submit a "Proof of Loss" with respect to a Claim which has not yet Accrued?
- Can the Court of Appeals Ignore Provisions of an Insurance Contract when Interpreting that Contract?
- Can the Court of Appeals Decide an Appeal based on a Misreading of Decisions Rendered by the Supreme Court?

- Can the Court of Appeals find Prejudice to an Insurer Despite Case Law which is Clearly to the Contrary?
- Can the Court of Appeals Rely on Case Law which it has Raised Sua Sponte without Providing the Parties an Opportunity to Address that Case Law?

Some background: Robert H. Shugarts, II was a deputy sheriff in Eau Claire County, when on Oct. 11, 2010, he was injured while on duty when his county-owned squad car was struck by a vehicle driven by Dennis Mohr. Mohr's vehicle was insured by Progressive Insurance.

Shugarts' squad car was insured under a policy issued by Wisconsin Municipal Mutual Insurance Company (WMMIC), which included UIM coverage. Shugarts and his wife, Judith Shugarts, also a plaintiff here, had a personal automobile insurance policy through Allstate, which also included UIM coverage.

In November 2011, Shugarts retained an attorney and sent a notice of retainer to Progressive. Progressive denied coverage in January 2012, asserting its policy excluded coverage for Shugarts' claim because Mohr intentionally struck Shugarts' vehicle.

In April 2013, through new counsel, Shugarts wrote to Progressive and offered to settle the case for $600,000. In response, Progressive continued to assert that its policy excluded coverage for Shugarts' claim.

In June 2013, Shugarts filed a lawsuit against Mohr and Progressive. Although Progressive continued to deny coverage, in August 2013, it offered Shugarts $10,000 to settle the case. Progressive also provided a declarations page stating that Mohr's policy had a bodily injury liability limit of $50,000 per person.

In July 2014, Shugarts filed a second amended summons and third amended complaint, naming WMMIC as a defendant. Shugarts alleged WMMIC was "liable for . . . underinsured motorist coverage arising out of the operation of" Shugarts' squad car. WMMIC moved to dismiss, and later moved for summary judgment, arguing Shugarts was not an insured under its policy for purposes of UIM coverage. The trial court eventually granted summary judgment in favor of WMMIC, and Shugarts does not challenge that ruling on appeal.

Progressive eventually changed its coverage position, and on Oct. 13, 2014, it offered to settle Shugarts' claim for its full bodily injury liability limit of $50,000.

On October 28, 2014, Shugarts' attorney's firm sent a notice of retainer to Allstate, advising it that Shugarts had retained counsel to represent him "with regard to injuries he sustained in an automobile accident which occurred on October 11, 2010."

During the ensuing months, staff from Shugarts' attorney's firm continued to correspond with Allstate regarding Shugarts' UIM claim. On February 9, 2015, Shugarts' attorney sent Allstate a notice, pursuant to Vogt v. Schroeder, 129 Wis. 2d 3, 383 N.W.2d 876 (1986), that Progressive had offered to settle Shugarts' claim for its $50,000 bodily injury liability limit.

In March 2015, Shugarts filed a third amended summons and fourth amended complaint, naming Allstate as a defendant and asserting it was required to provide him with UIM coverage.

In April 2015, Allstate answered the Shugarts' complaint. Allstate asserted as an affirmative defense that "[t]here is no coverage available to the plaintiffs under the Allstate policy given the failure of the plaintiffs to provide timely notice of their intention to make a claim as a result of the subject accident as required under the Allstate policy." Allstate subsequently and successfully moved for summary judgment on the same ground.

The trial court granted Allstate's motion, concluding that Shugarts failed to provide timely notice to Allstate of the accident and to rebut the presumption that Allstate was prejudiced by the untimely notice.

Shugarts appealed, unsuccessfully. Shugarts insisted that Vogt and Ranes v. American Family Mutual Insurance Co., 219 Wis. 2d 49, 580 N.W.2d 197 (1998) demonstrates that a settlement offer, not the underlying accident, is the trigger for a UIM carrier's subrogation rights. The Court of Appeals held that Shugarts could have provided Allstate with proof of his UIM claim as early as January 2012, when Progressive denied coverage for his claim against Mohr, or when he learned that Progressive's policy limit was only $50,000 – hundreds of thousands of dollars short of his claimed damages and his settlement offer to Progressive.

Wisconsin Supreme Court
Thursday, January 11, 2018
9:45 a.m.

2015AP1258 Golden Sands Dairy LLC v. Town of Saratoga

Supreme Court case type: Petition for Review
Court of Appeals: District IV
Circuit Court: Wood County, Judge Thomas B. Eagon, reversed and cause remanded with directions
Long caption: Golden Sands Dairy LLC, Plaintiff-Respondent-Petitioner, Ellis Industries Saratoga, LLC, Plaintiff, v. Town of Saratoga, Terry A. Rickaby, Douglas Passineau, Patty Heeg, John Frank and Dan Forbes, Defendants-Appellants, Rural Mutual Insurance Company, Intervenor

Issue presented: This case arises out of a dispute between the Town of Saratoga and Golden Sands Dairy LLC, regarding the dairy's efforts to develop and operate an "integrated dairy farm" on approximately 6,388 acres of land in the township. The Supreme Court reviews the issue as presented by Golden Sands: When a permit applicant secures vested rights by filing a valid building permit application for a project (Wisconsin's "Building Permit Rule"), does the law protect the applicant's right to both construct buildings and to use the project land in the lawful manner described in the building permit application?

Some background: This is the second case between these parties to reach the Court of Appeals. In the first case, Golden Sands Dairy, LLC v. Fuehrer, No. 2013AP1468 (Wis. Ct. App. July 24, 2014)(Golden Sands I), the Court of Appeals concluded that Golden Sands had met all requisite criteria to obtain a vested right to a building permit issued for the construction of seven farm buildings. The Court of Appeals ordered the town to issue a building permit to Golden Sands.

In its July 17, 2012 commercial building permit application, Golden Sands identified the "area involved" as "100 acres of site and 6388 acres total." The circuit court issued a writ of mandamus ordering the town to issue the building permit, and the Court of Appeals affirmed. The town did not file a petition for review.

The central issue at this point involves the acreage outside of the area where the buildings are to be constructed. At the time Golden Sands filed its building permit application, the disputed

acres were zoned for unrestricted use. Under that zoning, the land could be used "for any purpose whatsoever, not in conflict with the law."

Accordingly, in July 2012 when Golden Sands submitted its building permit application to construct the farm buildings, the unrestricted use zoning ordinance would have allowed the 6,388 acres to be used for agricultural purposes.

On Nov. 13, 2012, four months after Golden Sands had submitted its building permit application, the town rezoned the area, including the 6,388 acres, in a way that prohibited Golden Sands' planned agricultural use of the land.

While the Golden Sands I litigation was pending in circuit court, Golden Sands filed this lawsuit against the town seeking a declaration that it had a vested right to use the 6,388 acres of land for its dairy operation. The circuit court granted summary judgment on Golden Sands' claim that it had acquired vested rights to agricultural use of the property identified in the building permit application prior to the town enacting its new zoning ordinance.

In its remarks from the bench, the circuit court said, "Golden Sands reasonably and substantially relied on existing zoning regulations when it invested in the development of its proposed farm and filed its building permit application." The circuit court also said, "The use of the acreage that is described [in the building permit application] is integral to the farm operation that was described and, therefore, Golden Sands has a vested use in what was allowed at the time the building was applied for, which was agricultural use."

The Court of Appeals reversed, finding that the use of any land associated with a reference in a building permit application poses additional and different issues than the use of a building site for purposes of constructing a building. It said in order to obtain a building permit an applicant must show that the proposed building comports with then-existing zoning and building code regulations, but land use questions are more complex and do not easily lend themselves to regulation by the mere issuance of a building permit.

While the Court of Appeals said that Golden Sands no doubt needs land to grow crops and spread manure to fully use the multiple large dairy buildings it has acquired the right to construct, the court questioned how many of the 6,388 acres are actually needed. The court queried what would happen if a factual inquiry showed that Golden Sands needs substantially fewer than 6,388 acres to fully utilize its proposed farm buildings. In that event, the court asked why all 6,388 acres should obtain nonconforming use status.

The Court of Appeals said as far as it could tell, Golden Sands was advocating for a rule that turned on whether the land was merely identified in a building application, regardless of the applicant's relationship to the land.

Golden Sands argues that the Court of Appeals' decision, which was issued the day after the Wisconsin Supreme Court released its decision in McKee Family I, 374 Wis. 2d 487, is inconsistent with that decision. McKee Family I reaffirmed the bright-line building permit rule which holds that a valid building permit application triggers vested rights in the use of property under the zoning laws in place at the time of the application.

Golden Sands argues that its farm is an integrated agricultural operation of crop and milk production but despite that fact, the Court of Appeals' analysis divided the farm property into two components: the construction of seven agricultural buildings and the agricultural use of the farm property. Golden Sands says this is an artificial distinction not contemplated in any previous application of Wisconsin's bright-line rule.

The town argues that Golden Sands has not cited any case in which lands apart from a building site have been given vested rights. The town argues that the Court of Appeals' decision

is consistent with this court's decision in McKee Family I, in which this court noted the broad discretion that municipalities have to enact zoning ordinances and the statutory directive that such ordinances are to be liberally construed in favor of the municipality.
The town argues it is Golden Sands' position that would eviscerate the bright-line approach by allowing a building permit to extend vested rights to land outside of the specific building permit parcel without any apparent limitation. The town also argues that Golden Sands ignores the fact that in 2013 the legislature enacted § 66.10015, which it says will govern the application of vested rights in future projects.

Wisconsin Supreme Court
Thursday, January 11, 2018
10:45 a.m.

2015AP2457 Cintas Corp. No. 2 v. Becker Property

Supreme Court case type: Petition for Review
Court of Appeals: District I
Circuit Court: Milwaukee County, Judge John J. DiMotto, reversed and cause remanded for further proceedings
Long caption: American Family Mutual Insurance Company, State Auto Insurance Company of Wisconsin, Property and Casualty Insurance Company of Hartford, Fay Walters and Farmers Insurance Exchange, Plaintiffs, H.O.L.I.E. of Greenfield Avenue, Inc., Dennis Kleinhans, Dorothy Grabowski, Virginia Werner, Mernlyn Goodrich, Theodore Kolodzyk, Judith Gorski, Linda Sutton, as the personal representative of the Estate of Mary Sutton and Alice Carey, Involuntary Plaintiffs, v. Cintas Corporation No. 2, Defendant-Third-Party Plaintiff-Appellant-Cross-Respondent, The Travelers Indemnity Company of Connecticut (Travelers), Defendant-Third-Party Plaintiff-Co-Appellant, v. Becker Property Services LLC, Third-Party Defendant-Respondent-Cross-Appellant-Petitioner.

Issues presented: This indemnification case arose after extensive water damage occurred at the Valentino Square Apartments in West Allis. The issues at trial were whether a contract between Cintas Corporation No. 2 (a fire protection company) and Becker Property Services LLC (the property management company that managed the apartments) obligates Becker to defend and indemnify Cintas for Cintas' alleged negligent acts and breach of implied warranty.

The Supreme Court reviews the enforceability of the contract's choice of law provision, which designates that disputes would be settled under Ohio law, and how that provision may interact with established policy in Wisconsin law.

The trial court ruled by summary judgment in favor of Becker; the Court of Appeals reversed. Becker presents the issues as such:

- Whether an indemnification clause can be interpreted from the perspective of a technocrat or lawyer, as opposed to a reasonable consumer, to provide indemnification for an indemnitee's own negligence when the indemnification clause does not expressly state so; and
- whether the contract's choice of law provision, which designated Ohio law, is enforceable.

Some background: On or about Jan. 6, 2013, a pipe connected to Valentino Square's fire suppression system burst. There was extensive damage. The plaintiffs (owners, tenants, and insurers) sued, alleging that Cintas had failed to properly inspect and maintain the system and that, as a result, the system "catastrophically failed."

Cintas denied liability and filed a third-party complaint against Becker, alleging that Becker breached its contract with Cintas to defend and indemnify Cintas pursuant to the contract. Travelers also filed a third-party complaint against Becker, seeking indemnification for any amount it is required to pay on behalf of its insured, Cintas.

The contract between Becker and Cintas was signed in March 2012. The first page of the contract, entitled "Service Scope of Work and Price," contains the following language in the "Term" provision: "This quotation is subject to the Terms and Conditions of Sale – Fire Equipment Goods and Services."

The following language also appears at the bottom of the first page: "All work performed will be according to NFPA, State and City Fire Department requirements and is guaranteed, insured and done by licensed personnel."

Terms and conditions in the contract address a variety of other subject areas, including an "Acceptance and Modification" provision, which indicates that no other terms or conditions that are not specifically agreed upon by the seller shall be binding upon seller. Among other topics addressed by language in the contract: inspection, limited warranty, claims, indemnity, insurance, governing law and disputes.

The indemnity section included a provision that states, in part, that the *"Purchaser, at its own expense, shall defend, indemnify and hold harmless Seller from any claim, charge, liability, or damage arising out of any goods or services provided by Seller hereunder, including any failure of the goods or services to function as intended[.]…"*

The provision on governing law contained the language: *"The rights and obligations of the parties contained herein shall be governed by the laws of the State of Ohio, excluding any choice of law rules which may direct the application of the laws of another jurisdiction."*

In the trial court, Cintas and Becker filed cross motions for summary judgment. Cintas sought an order requiring Becker to defend and indemnify Cintas in this lawsuit. Becker filed its own motion for summary judgment, seeking an order dismissing Cintas' complaint. The trial court acknowledged the contract provision specified Ohio law, but said that established public policy dictated that Wisconsin law should be applied, and, applying Wisconsin law concluded that "Cintas is not … entitled to defense or coverage."

Cintas appealed, and the Court of Appeals reversed. The Court of Appeals ruled that even under Wisconsin law, the contract language required Becker to defend and indemnify Cintas.

The Court of Appeals concluded that the contract "clearly states that Cintas is to be indemnified by Becker for losses occasioned by Cintas' own negligent acts and that it is clear that the purpose and unmistakable intent of the parties in entering into the contract was for no reason other than to cover losses occasioned by the indemnitee's own negligence."

Becker contends that only an overly technical reading could yield this result.

The Court of Appeals did not decide whether the choice of law provision is applicable (such that Ohio law applies to this case), or whether Wisconsin's practice of strictly interpreting indemnification clauses that indemnify the indemnitee from its own negligence should override the choice of law clause.

The Wisconsin Supreme Court is expected to rule on whether the contract requires Becker to defend and indemnify Cintas and may provide guidance on whether public policy permits the choice of law provision included by the parties.

Wisconsin Supreme Court
Thursday, January 11, 2018
1:30 p.m.

2014AP2561 State v. David McAlister, Sr.

Supreme Court case type: Petition for Review
Court of Appeals: District II
Circuit Court: Racine County, Judge Emily S. Mueller, affirmed
Long caption: State of Wisconsin, Plaintiff-Respondent, v. David McAlister, Sr., Defendant-Appellant-Petitioner.

Issue(s) presented:

- Is newly discovered evidence from three separate witnesses swearing that the state's witnesses admitted prior to trial that they intended to falsely accuse McAlister "cumulative" and "merely tend to impeach the credibility of witnesses" such that it could not support a newly discovered evidence claim?
- Whether the allegations of McAlister's § 974.06 motion were sufficient to require a new trial and therefore an evidentiary hearing on his claim.

Some background: David McAlister, Sr. stands convicted after a jury trial of attempted armed robbery (threat of force), possession of a firearm by a felon, and armed robbery (threat of force). In a September 2009 decision affirming his conviction, the Court of Appeals rejected McAlister's challenges to the trial testimony of his alleged accomplices, Alphonso Waters and Nathan Jefferson.

McAlister argued that Waters perjured himself at trial. McAlister also argued that both Waters and Jefferson were offered concessions for their testimony against him, which were not fully disclosed by the state. The Court of Appeals was unpersuaded by these arguments.

In a 2014 pro se motion, McAlister sought a new trial on the grounds of newly discovered evidence. He offered the affidavits of three individuals: (1) Wendell McPherson; (2) Corey Prince; and (3) Antonio Shannon. Generally speaking, each of these affiants swore that Waters and Jefferson lied when they testified about McAlister's involvement in the charged crimes.

The trial court denied McAlister's post-conviction motion without an evidentiary hearing. The trial court found that the three affiants had "limited credibility"; that there was "no circumstantial guarantee of trustworthiness" in their statements; and that McAlister failed to show a "feasible motive" for the initial false statements. The trial court also found that the credibility of Waters and Jefferson was challenged at trial given that the jury learned about the concessions that they were offered for their testimony against McAlister. Ultimately, the trial court determined that McAlister did not meet his burden to show that there would be a reasonable probability of a different result had the evidence offered in the three affidavits been available to the jury.

Representing himself, McAlister appealed, unsuccessfully, again arguing that the McPherson, Prince, and Shannon affidavits constituted newly discovered evidence that justified a new trial.

The Court of Appeals concluded that the three affidavits McAlister submitted in support of his post-conviction motion were merely an attempt to retry the credibility of Waters and Jefferson, whose credibility was well-aired at trial. The court held that evidence does not warrant a new trial when it would merely tend to impeach the credibility of witnesses.
After receiving this decision, McAlister obtained representation, who filed a motion for reconsideration on McAlister's behalf. The motion was denied, and McAlister, still represented by counsel, appealed to the Supreme Court.

Wisconsin Supreme Court
Wednesday, January 17, 2018
9:45 a.m.

2015AP2627 Mark McNally v. Capital Cartage, Inc.

Supreme Court case type: Petition for Review
Court of Appeals: District IV
Circuit Court: Dane County, Judge Juan B. Colas, affirmed
Long caption: Mark McNally, Plaintiff-Respondent, v. Capital Cartage, Inc. d/b/a Capital Cartage Moving & Storage, Defendant-Appellant-Petitioner, Mary R. Hermanson, Defendant.

Issues presented:

- May the seller of a business and real estate reject an offer, and be relieved of the obligation to pay the listing broker's commission, if the offer matches the listing price but includes additional terms not explicit in the listing contract, such as a requirement that the seller work full time without pay for an undetermined amount of time, among other terms?
- Is this Court's ruling in [Libowitz v. Lake Nursing Home, Inc., 35 Wis. 2d 74, 150 N.W.2d 439 (1967)] (stating that offer terms may constitute a "substantial variance" only if they directly conflict with express terms specified in the listing contract) inconsistent with this Court's interpretation of "substantial variance" in [Kleven v. Cities Serv. Oil Co., 22 Wis. 2d 437, 126 N.W.2d 64 (1964)] and [Peter M. Chalik & Assocs. v. Hermes, 56 Wis. 2d 151, 201 N.W.2d 514 (1972)], which do not limit substantial variances to express terms in the listing contract?
- As a matter of public policy, should state-approved real estate forms intended for use by consumers without attorneys be construed according to their plain meaning?

Some background: Mary and Rolyn Hermanson have owned Capital Cartage, Inc., a moving and storage company for more than 40 years. Mary is the company's president. Mary and Rolyn are the sole shareholders. Mary entered into a listing contract with McNally, a real estate broker, to sell the company. The price in the listing contract was $1.2 million. McNally procured an offer to purchase at the $1.2 million listing price. The prospective buyer's offer included three additional terms:

- Lender charges, including the cost of an appraisal, estimated at $7,500, would be split between the buyer and Capital Cartage, with Capital Cartage recovering its half if the sale went through.
- Mary and Rolyn Hermanson would enter into a covenant not to compete.
- Mary Hermanson would stay on full time without pay for a period "outlined" in a referenced document.

None of these terms conflict with any express terms in the listing contract. The record indicates that these terms were discussed with the Hermansons before the buyer submitted the offer to purchase. After the offer was delivered, Mary and Rolyn met to discuss it. They ended up rejecting the offer by letter, stating "Capital Cartage has decided not to sell its business at this time." The letter provided no other reason for rejecting the offer, and the letter did not mention the three additional terms.

McNally sued Capital Cartage, alleging he was owed a $72,000 commission pursuant to the listing contract. McNally argued he procured an offer in compliance with the conditions in the contract and that the offer he procured was "at the price and on substantially the terms set forth" in this listing.

After filing an answer, Capital Cartage moved for judgment on the pleadings arguing that it did not, as a matter of law, owe McNally the commission because the three terms were substantial variances from the listing contract.

The circuit court denied the motion and the matter proceeded to trial. Over the objection of Capital Cartage, the circuit court concluded as a matter of law that the three terms were not substantial variances from the listing contract because they did not conflict with any demand made by the seller in the contract.

Therefore, the circuit court informed the jury, "The court has determined that as a matter of law that the [three terms] in the offer to purchase . . . are not substantial variances." The jury resolved other disputes in favor of McNally, with the result being that Capital Cartage was required to pay McNally the commission. The Court of Appeals affirmed.

The appellate court noted that Capital Cartage claimed it was unfair to put it in the position of having to either accept the offer with the additional conditions or be penalized by having to pay McNally the $72,000 commission without a sale. The Court of Appeals said those were not Capital Cartage's only options. It said Capital Cartage could have pointed to the three terms when rejecting the offer, thereby preserving its right to rely on those terms as justifiable reasons for rejecting the offer.

McNally says the Court of Appeals properly applied longstanding precedent dictating when a commercial broker is entitled to a commission for the sale of a business. McNally says in refusing to accept the offer, Capital Cartage, a sophisticated business entity represented by counsel, pointed to no specific issues with the terms of the offer but instead simply said it was no longer interested in selling its business. McNally says the three offer terms were discussed in detail between the buyer and Mary Hermanson before the offer was submitted and Hermanson never objected to any of the terms.

Capital Cartage argues that Libowitz is inconsistent with two other Supreme Court cases [Kleven v. Cities Serv. Oil Co., 22 Wis. 2d 437, 126 N.W.2d 64 (1964)] and [Peter M. Chalik & Assocs. v. Hermes, 56 Wis. 2d 151, 201 N.W.2d 514 (1972)], discussing the meaning of 'substantial variance' and the well-established principle that that contract language must be interpreted according to its plain and ordinary meaning. McNally says Capital Cartage is now

arguing for the first time that the Supreme Court ought to ignore the Libowitz decision and instead enforce the listing contract according to its plain language.
Capital Cartage argues that as Libowitz has been interpreted, it stands for the proposition that a prospective buyer can add any term, requirement, or contingency in the universe into an offer to purchase and the added term, as a matter of law, will not constitute a "substantial variance" unless the seller or broker had the forethought to address it explicitly in the listing agreement.

Wisconsin Supreme Court
Wednesday, January 17, 2018
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.

2016AP112-D OLR v. James Toran

Supreme Court case type: Lawyer discipline
Long caption: Office of Lawyer Regulation v. James Toran

Issue presented: The issue presented in this lawyer discipline case is the appropriate discipline for Atty. James Toran's admitted misconduct.

Some background: Toran was admitted to the practice of law in Wisconsin in 1983. He practices criminal law in Milwaukee. Before this proceeding he had been disciplined four times, including three cases that are a matter of public record in 1989, 1991 and 2012. In 2007 he received a private reprimand.

In the case now before the Supreme Court, Toran is alleged to have violated three Supreme Court Rules in connection with his representation of a client who was a criminal defendant.

The client's mother paid Toran $1,000 in advanced fees toward Toran's representation of her son without a written fee agreement in place. She made a series of additional payments to Toran, totaling approximately $1,500.

Although the exact amounts of payment made to Toran, and to which legal services those payments may have applied is in dispute, the parties stipulated:

- By failing to enter into a written fee agreement with regard to his representation of the client when the total cost of the representation exceeded $1,000, Toran violated SCR 20:1.5(b)(l)(Count One).
- By failing to deposit into his trust account the advanced payment of fees made by the mother on her son's behalf, including but not limited to the $1,000 payment made at the outset of the representation and the $500 paid in contemplation of the filing of a writ of certiorari, and absent any evidence Attorney Toran attempted to comply with the

alternative protection for fees available under SCR 20:1.15(b)(4m), Attorney Toran violated SCR 20:1.15(b)(4) (Count Two).

- By failing to return to the client or his mother the $500 advanced payment of fees made in contemplation of Toran's work with regard to filing a writ of certiorari, when no such work was completed and when Toran's representation of subsequently ended, Toran violated SCR 20:1.16(d)(Count Three).

The referee conducted an evidentiary hearing on Sept. 23, 2016 at which time the lawyers informed the referee that they had reached a stipulation whereby Toran opted not to contest the three alleged rules violations in the complaint and agreed that the "facts stated in the Complaint can be used as the factual basis by the Referee to made a determination of misconduct in respect to each misconduct count."

In the stipulation, the parties agreed that Toran could not produce evidence of a written fee agreement, that any received funds should have been placed in trust, and that Attorney Toran could not produce a receipt proving that he repaid the $500 restitution amount as stipulated.

The parties agreed that restitution in the amount of $500 was appropriate and further agreed that the client's mother could seek additional reimbursement at the evidentiary hearing. They further agreed to leave the issue of sanctions to the referee. The stipulation expressly provides that it is not the result of a plea bargain.

At the hearing, the parties agreed that the mother should be permitted to testify because she clearly felt she was entitled to more than $500 in restitution. Both lawyers made brief presentations to the referee as to the appropriate sanction and Attorney Toran testified as well, claiming he thought he repaid the mother but admitting he could not prove it.

In addition to the stipulation, the referee recommended in a brief report that the Court suspend Toran's license to practice law for one year and pay all costs of the proceedings.

Toran appealed, contending a reprimand is sufficient. The OLR says that a suspension is appropriate but agrees with Attorney Toran that one year is too long. The OLR recommends a suspension of less than six months, as this would not require formal reinstatement proceeding under SCRs 22.28(3) and 22.29.

Toran concedes the Supreme Court has long adhered to the practice of progressive discipline. See In re Disciplinary Proceedings Against Nussberger, 2006 WI 111, 296 Wis. 2d 47, 719 N.W.2d 501. In re Disciplinary Proceedings Against Lister, 2010 WI 108, 329 Wis. 2d 289, 787 N.W.2d 820. However, Toran says the "Referee's recommendation is terse in word and analysis," and that progressive discipline does not "in any manner suggest the harsh sanction recommended."

The OLR says that restitution was not made, this is Toran's fifth disciplinary proceeding, and the facts of his most recent public reprimand indicate that this misconduct was not an isolated or unique occurrence. The OLR cited several cases in reaching its recommendation for a 60-day suspension.

A decision in this case is expected to determine is the appropriate discipline for Toran's admitted misconduct, and restitution and/or costs to be paid by Toran, if any.