WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
FEBRUARY 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
Manitowoc
Milwaukee
Sawyer
Washington
Waukesha

MONDAY, FEBRUARY 19, 2018

9:45 a.m.	17AP1595-CQ	Winebow, Inc. v. Capitol-Husting Co., Inc.
10:45 a.m.	16AP1496	Federal National Mortgage Association v. Cory Thompson
1:30 p.m.	15AP1799-CR	State v. Anthony R. Pico

WEDNESDAY, FEBRUARY 21, 2018

9:45 a.m.	15AP2665	State v. Anthony Jones
10:45 a.m.	15AP1970/	Donald J. Thoma v. Village of Slinger
	16AP2528	Donald J. Thoma v. Village of Slinger
1:30 p.m.	16AP740-CR	State v. DeAnthony K. Muldrow

FRIDAY, FEBRUARY 23, 2018

9:45 a.m.	16AP897-CR	State v. Lamont Donnell Sholar
10:45 a.m.	16AP1608	Richard Forshee v. Lee Neuschwander
1:30 p.m.	15AP1858	Voters with Facts v. City of Eau Claire

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:

12AP931-D/14AP2086-D	Office of Lawyer Regulation v. Richard W. Voss

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. Synopses provided are not complete analyses of the issues presented.

Wisconsin Supreme Court
Monday, February 19, 2018
9:45 a.m.

2017AP1595-CQ Winebow, Inc. v. Capitol-Husting Co., Inc.

Supreme Court case type: Certified question from the U.S. 7th Circuit Court of Appeals
Long caption: Winebow, Inc., Plaintiff-Appellee, v. Capitol-Husting Co., Inc. and L'Eft Bank Wine Co. Limited, Defendants-Appellants

Issue presented: Does the definition of a dealership contained in Wis. Stat. § 135.02(3)(b) include wine grantor-dealer relationship?

Some background: The Seventh Circuit notes that the Wisconsin Fair Dealership Law (WFDL) restricts the circumstances under which certain sellers may unilaterally stop doing business with their existing distributors. The WFDL is premised on the notion that dealer-grantors have inherently superior economic powers and should not be allowed to behave opportunistically once franchisees or other dealers have invested substantial resources into tailoring their business around, and promoting, a brand. Kenosha Liquor Co. v. Heublein, Inc., 895 F.2d 418, 419 (7th Cir. 1990). If a grantor substantially impairs or terminates an existing relationship with a distributor, the distributor may recover damages, injunctive relief, and attorney's fees. See § 135.06, Stats.

Prior to 1999, the WFDL regulated only those grantor-distributor relationships in which there was a "community of interest," which was defined as a "continuing financial interest between the grantor and grantee in either the operation of the dealership business or the marketing of such goods or services." See § 135.02(1).

In 1999, the Legislature sought to broaden the WFDL to ensure that all "intoxicating liquor" dealerships were protected, and it eliminated the need to prove "community of interest" for those businesses. These changes were included in the budget bill. Large volume distributors of "intoxicating liquor" were brought under the umbrella of the statute's definition of a protected dealership. In addition, the legislature created § 135.066 which expressed the Legislature's desire for a competitive and stable wholesale market and the need for new rules governing a party's acquisition of an entity that has an existing intoxicating liquor dealership.

Then-Gov. Tommy G. Thompson used his partial veto power so that wine dealerships would not be treated the same as other alcohol dealerships. The result, according to the Seventh Circuit, is that § 135.066(2), Stats., is now the "minus wine" provision. In his veto message, Thompson said he was "partially vetoing these provisions so that wine will be excluded from treatment . . . because I object to wine being treated the same as intoxicating liquor." The General Assembly failed to override the partial veto, and the law has been on the books for the past 18 years with no adjustments.

As germane to the instant case, Winebow, Inc. imports and distributes wines to downstream wholesalers. It wants to cut ties with two wholesale distributors, Capitol-Husting and L'Eft Bank wine. Winebow began using Capitol-Husting as a distributor of its wines in 2004. It added L'Eft Bank in 2009. Winebow granted the distributors the exclusive right to sell and distribute Winebow products within specified regions in Wisconsin.

In 2015 Winebow abruptly terminated both dealerships. The distributors agued that the WFDL barred Winebow from doing this without a financial penalty. Winebow brought a declaratory judgment action in U.S. District Court for the Eastern District of Wisconsin, seeking confirmation that the statutory restrictions on dealership terminations do not apply to wine dealerships. Winebow argued that its interpretation of the WFDL was in keeping with Thompson's intent when he partially vetoed the appropriations bill in 1999.

The district court agreed with Winebow and granted Winebow's motion for judgment on the pleadings, finding that wine dealerships do not fall within the "intoxicating liquor" dealerships protected by the WFDL. The distributors appealed.

The Seventh Circuit says the distributors naturally prefer the greater protection of the "good cause" standard and argue that wine dealerships are included in the per se dealership definition contained in § 135.02(3)(b). In the alternative, they argue that the statute is ambiguous but that the term "intoxicating liquor" should be construed as including wine, either as a matter of policy or as a consequence of the supposed plain meaning of the phrase. Winebow counters that the "minus wine" provision removes wine dealerships from the per se definition.

The Seventh Circuit says it is logical to think that the "minus wine" provision would serve no purpose if it didn't set the definition for "intoxicating liquor" throughout the WFDL. On the distributors' side of the equation is the fact that the "minus wine" provision is not expressly limited to § 135.066, nor does it expressly extend to the entirety of ch. 135. In addition, the "minus wine" definition is not contained in the "Definitions" section of the WFDL.

The Seventh Circuit is unable to decide with any confidence if the "minus wine" provision defines "intoxicating liquor" as that term is used throughout the WFDL and, if not, whether an "intoxicating liquor" dealership includes wine dealerships. It says rather than attempt to answer the question itself, it believes the better course is to ask the Wisconsin Supreme Court for guidance.

Wisconsin Supreme Court
February 21, 2018
10:45 a.m.

2016AP1496 Federal National Mortgage Association v. Cory Thompson

Supreme Court case type: Certification
Court of Appeals: District IV
Circuit Court: Dane County, Judge Amy C. Smith
Long caption: Federal National Mortgage Association, Plaintiff-Respondent, v. Cory Thompson, Defendant-Appellant, Unknown Spouse of Cory Thompson, Defendant

Issue presented: The Supreme Court has accepted a certification from the Court of Appeals to resolve the following issue: Where a foreclosure action brought on a borrower's default on a note has been previously dismissed, is the lender barred by the doctrine of claim preclusion from bringing a second foreclosure action on the borrower's continuing default on the same note?

Some background: In 2010 BAC Home Loans Service, LP (BAC) (f/k/a Countrywide Home Loans Servicing, LP) filed a foreclosure action against Cory Thompson based on his default on a 2004 note. The complaint alleged that Thompson had failed to make monthly payments on the note as of April 2009 and that, as a result, BAC had accelerated the debt, making immediately due a principal balance of $153,202.53.

After a bench trial, the circuit court concluded that BAC had failed to present evidence of the original notice of intent to accelerate the debt, had failed to present the original note, and had failed to present evidence that BAC was in possession of the original note. The court dismissed the foreclosure action "with prejudice." The trial court refused to admit into evidence copies of the note and the notice of intent to accelerate the debt.

BAC objected to the dismissal with prejudice in a reconsideration motion in the circuit court. In BAC's subsequent appeal, the Court of Appeals acknowledged that BAC had a meritorious argument that the circuit court had an erroneous reason for making the dismissal with prejudice (that it had confused the concept of prejudice in criminal and civil cases), it refused to consider the argument on the ground that BAC had forfeited the argument by failing to make it in the circuit court. Thus, the Court of Appeals affirmed the dismissal with prejudice. See BAC Home Loans Servicing LP v. Thompson, No. 2013AP210 (Wis. Ct. App. Dec. 19, 2013).

In 2011 Bank of America, N.A. (BANA) took over servicing Thompson's loan. BANA filed a second foreclosure complaint in December 2014. While the complaint in the first action alleged nonpayment and default in April 2009, the complaint in the second action alleged a failure to make payments as of September 2009. The second complaint again alleged that BANA had accelerated the debt, which made the principal balance of $152,355.98 immediately payable in full.

Thompson moved to dismiss the complaint, alleging in part that the second complaint was barred by claim preclusion arising from the dismissal of the first foreclosure action. The circuit court held that the portion of the claimed default alleged to have occurred prior to the trial in the first action was barred, but any default claim relating to a period after the conclusion of the first trial (Aug. 16, 2012) was not barred. BANA therefore filed an amended complaint that

alleged that Thompson had failed to make payments as of September 2012. After the filing of the amended complaint, Federal National Mortgage Association (Fannie Mae) was substituted as plaintiff.

A second bench trial occurred in May 2016. Before calling any witnesses, counsel for Fannie Mae moved to admit several exhibits, including a copy of the note. After Thompson's counsel said that Thompson did not recognize the exhibit as the original note, or even as the note that he had signed, Fannie Mae's counsel produced what he represented to the court was the original note. The circuit court visually inspected and compared the exhibit and the original note, and ultimately admitted the exhibit copy of the note into evidence.

After hearing testimony from foreclosure specialists from both the current loan servicer and BANA about the business records relating to the loan account, the circuit court granted a foreclosure judgment in favor of Fannie Mae and against Thompson.

On appeal, Thompson again argued that the second foreclosure complaint now pursued by Fannie Mae is barred by the doctrine of claim preclusion.

Under the doctrine of claim preclusion, a subsequent claim is barred where: (1) there is an identity between the parties or their privies in the two actions, (2) there is an identity between the causes of action in the two lawsuits, and (3) in the first action there was a final judgment on the merits in a court of competent jurisdiction. Northern States Power Co. v. Bugher, 189 Wis. 2d 541, 551, 525 N.W.2d 732 (1995).

In its certification memorandum, the Court of Appeals stated that the key legal issue here centers on the second element, regarding an identity between the causes of actions in the two lawsuits. It acknowledges that certain rules of law have been developed concerning this element. First, "[u]nder this analysis, all claims arising out of one transaction or factual situation are treated as being part of a single cause of action and they are required to be litigated together." Parks v. City of Madison, 171 Wis. 2d 730, 735, 492 N.W.2d 365 (Ct. App. 1992). Second, the Wisconsin Supreme Court has defined a transaction generally as a "common nucleus of operative facts," which is to be assessed on a pragmatic basis. Kruckenberg v. Harvey, 2005 WI 43, ¶¶26-27, 279 Wis. 2d 520, 694 N.W.2d 879.

The Court of Appeals noted, however, that neither it nor the Supreme Court has answered the question as to whether a default on a note and a subsequent acceleration of the debt constitutes a common nucleus of fact with all subsequent defaults and accelerations. In other words, are all defaults by one borrower to be considered one continuing default when the lender has accelerated the note such that they all constitute one common nucleus of operative fact or are the defaults different transactions or nuclei of operative facts because they occur in different time periods? The Supreme Court has accepted the certification from the Court of Appeals to resolve this legal issue.

Wisconsin Supreme Court
Monday, February 19, 2018
1:30 p.m.

2015AP1799-CR State v. Anthony R. Pico

Supreme Court case type: Petition for Review
Court of Appeals: District II
Circuit Court: Waukesha County, Judge Michael O. Bohren, reversed and judgment reinstated
Long caption: State of Wisconsin, Plaintiff-Appellant, v. Anthony R. Pico, Defendant-Respondent-Petitioner

Issues presented: This case examines how a trial court's findings in ineffective assistance of counsel cases are to be reviewed on appeal. The Supreme Court reviews a Court of Appeals' decision reversing a circuit court order which, after a Machner [State v. Machner, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979)] hearing, vacated a judgment of conviction for first-degree sexual assault and ordered a new trial based on the defendant, Anthony R. Pico, having received ineffective assistance of counsel. Pico presents the following issues:

1. Did the Court of Appeals properly apply the standard of review, which is deference to the trial court unless there is clear error, to the trial court's factual findings in this case?
2. Was the trial court correct that counsel's failure to investigate a serious head injury was deficient performance that caused prejudice to Pico both in pretrial proceedings and at trial, in violation of the Sixth and Fourteenth Amendments and the corresponding Wisconsin Constitutional provisions?
3. Did the sentencing court impermissibly burden the Fifth Amendment privilege against self-incrimination, applied to the states through the Fourteen Amendment, and the corresponding provision of the Wisconsin Constitution?
4. [D]id the Court of Appeals deny Pico due process under the Fourteenth Amendment and the corresponding Wisconsin constitutional provision and err as a matter of law in concluding that he waived issues not raised by cross-appeal?
5. Was it proper for the post-conviction court to admit and rely on testimony from another criminal defense lawyer, who was not involved in Pico's case (i.e. a "Strickland" expert), to opine on Pico's trial counsel's action?

Some background: A jury found Pico guilty of first-degree sexual assault of an eight-year old girl. He was sentenced to six years of initial confinement and 10 years of extended supervision.

The girl claimed that while Pico was a parent volunteer in her second grade class and was listening to her read to him, twice put his hand inside her pants and touched her vagina.

At trial, testimony differed about whether or not Pico made contact with the girl's vagina. During questioning, police led Pico to falsely believe they had much evidence against him. Pico initially told police that he did not make contact with the girl's vagina and later said he didn't know for sure.

The defense did not present any evidence at trial, relying on a reasonable doubt theory. During closing arguments, trial counsel emphasized the girl's unreliability and suggestibility and argued that her mother had suggested that Pico put his hand in her underwear.

Counsel argued Pico was a well-respected member of the community with no history or reason to commit the act and emphasized the unlikelihood that Pico would have touched the girl sexually in a busy classroom with an experienced teacher present.

Pico moved for a new trial based on trial counsel's ineffective assistance. Following a two-day Machner hearing, the post-conviction court vacated the judgment of conviction and ordered a new trial.

In the postconviction proceeding, Pico alleged that as a result of a 1992 motorcycle accident, he sustained a traumatic brain injury, a frontal lobe injury. He argued counsel's failure to obtain the records documenting that injury and failure to consult with an expert on the impact of a frontal lobe injury affected the case in three ways: (1) the injury would have been the basis for an NGI plea; (2) it would have explained his behavior with the girl; and (3) it would have shown that Pico was more susceptible to making false statements during the detective's interview of him, especially through a technique that can trick a suspect into thinking there was more evidence of guilt than the police actually possess. The postconviction court found that trial counsel was deficient and granted Pico's motion for a new trial.

The Court of Appeals, with Judge Paul F. Reilly dissenting, reversed. The Court of Appeals rejected Pico's arguments about alleged failures of counsel and noted that a defendant claiming ineffective assistance of counsel must show both deficient performance and prejudice. Strickland, 466 U.S. at 687; State v. Thiel, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. It also noted that a heavy measure of deference must be given to counsel's judgment. Further, it noted that an ineffective assistance claim is a mixed question of law and fact where a circuit court's findings of fact will be upheld unless they are clearly erroneous but the determination of counsel's effectiveness is a question of law that is reviewed de novo.

The Court of Appeals said counsel testified at the Machner hearing that he considered mental health issues but saw no signs he would have typically seen in someone who had deficits or problems. The Court of Appeals said because counsel made a reasonable investigation, no further investigation was necessary. The Court of Appeals also found counsel was not ineffective in concluding there was no basis for a not guilty by reason of insanity plea.

In his dissent, Reilly said the trial judge here found that trial counsel's decision not to investigate Pico's brain injury was unreasonable and was deficient performance.

Pico argues that review is appropriate because the majority rejected careful factual and legal findings of the circuit court and found that trial counsel had no duty to investigate because he did not know the full extent of Pico's brain damage.

The state says this case presents merely a routine application of the Strickland standard that lower courts regularly make. The state says the Court of Appeals applied the clearly erroneous standard to the factual findings of the post-conviction court, and it says Pico's petition for review, as well as Reilly's dissent, reflect a misunderstanding of the Strickland standard of review.

The state notes that over its objection, Pico was allowed to present testimony at the Machner hearing from an attorney to opine on whether trial counsel conducted the trial in an effective manner. The state says the only published Wisconsin case that counsel is aware of addressing the use of Strickland experts in State v. McDowell, 2003 WI App 168, ¶62 n.20, 266 Wis. 2d 599, 669 N.W.2d 204.

In McDowell, the Court of Appeals said the circuit court should not have admitted Strickland expert testimony because no witness may testify as an expert on issues of domestic law and the only expert on domestic law is the court.

Wisconsin Supreme Court
Wednesday, February 21, 2018
9:45 a.m.

2015AP2665 State v. Anthony Jones

Supreme Court case type: Petition for Review
Court of Appeals: District IV
Circuit Court: Dane County, Judge Rhonda L. Lanford, affirmed
Long caption: In re the commitment of Anthony Jones: State of Wisconsin, Petitioner-Respondent, v. Anthony Jones, Respondent-Appellant-Petitioner

Issue presented: This case involves the involuntary commitment of Anthony Jones as a sexually violent person pursuant to Wis. Stat. § 980.02(1)(a). The Supreme Court reviews whether the circuit court adequately scrutinized two actuarial instruments to determine if they were reliable under the Daubert standard [Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)].

Some background: Prior to 2011, Wis. Stat. § 907.02 made expert testimony admissible if the witness was qualified to testify and the testimony would help the trier of fact understand the evidence or determine a fact at issue. State v. Giese, 2014 WI App 92, ¶17, 356 Wis. 2d 796, 854 N.W.2d 687. In 2011, the Legislature amended § 907.02 to adopt the Daubert reliability standard embodied in Federal Rule of Evidence 702. Section 907.02(1) now states:

> *If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case. (Emphasis added; underlined language added in 2011).*

In 1993, Anthony Jones was convicted of three sexually violent offenses. Prior to his release from prison, the state filed a petition alleging that Jones was a sexually violent person within the meaning of Wis. Stat. § 980.01(7) and, therefore, eligible for commitment under Wis. Stat. § 980.05(5). Prior to trial, Jones filed a motion pursuant to Wis. Stat. § 907.02(1) to bar any and all expert testimony pertaining to the actuarial risk instruments: the Minnesota Sex Offender Screening Tool-Revised (MnSOST-R) and the Rapid Risk Assessment Sex Offender Recidivism (RRASOR).

Jones was committed under Wis. Stat. ch. 980 after a trial at which the state presented expert testimony relying in part on the two actuarial instruments.

Jones had moved pretrial to exclude these instruments as unreliable under Daubert, claiming that they are decades old and were constructed using questionable means. Jones questions whether these actuarial instruments are admissible under Wis. Stat. §907.02(1), which the Legislature revised in 2011 to adopt the test for the admissibility of expert testimony set forth in Daubert.

The circuit court held a Daubert hearing and permitted the introduction of the actuarial instruments.

On appeal, Jones argued that the MnSOST-R instrument is "unreliable" because its design "virtually guarantees a high false positive rate overestimating the probability of recidivism" and "fails to account for the decline in recidivism rates as offenders pass through the middle decades of life." Jones also argued that the norms used in the MnSOST-R instrument are "outdated" and do not account for the "observed decline in recidivism in recent decades."

Jones further argued on appeal that the RRASOR was "unreliable" because it does not account for the decline in recidivism after age 25. Jones also objected to the method used to determine the 10-year risk estimate. Jones also claimed that the studies that have validated the instrument are undated so that it cannot be determined whether the instrument reflects the decline in recidivism.

The Court of Appeals noted that in denying Jones's motion, the trial court considered the Daubert factors. In particular, the trial court found that the state's expert witnesses testified that the instruments "were the product of sufficient facts or data and the product of reliable principals [sic] and methods." *See* Daubert, 509 U.S. at 593 (whether a theory or technique has been tested). The trial court found that the instruments have been the "subject of extensive review." *See* ***id.*** at 593 ("submission to the scrutiny of the scientific community is a component of 'good science'").

A previous decision discussing the 2011 changes to Wis. Stat. § 907.02, Seifert v. Balink, 2017 WI 2, 372 Wis. 2d 525, 888 N.W.2d 816, did not produce a majority opinion. A decision in this case could clarify the Daubert-Wis. Stat. § 907.02 standard.

Wisconsin Supreme Court
Wednesday, February 21, 2018
10:45 a.m.

2015AP1970 & 2016AP2528 Thoma v. Village of Slinger

Supreme Court case type: Petition for Review/Petition for Bypass
Court of Appeals: District II
Circuit Court: Washington County, Judge Andrew T. Gonring, affirmed
Long caption: Donald J. Thoma and Polk Properties LLC, Petitioners-Appellants-Petitoners, v. Village of Slinger, Respondent-Respondent-Respondent

Issues presented: This case involves appeals of property tax assessments by real estate developer Donald J. Thoma and his business, Polk Properties, LLC. Thoma challenges the Village of Slinger's decision to classify one of his development properties as residential property, when he argues it should remain classified as agricultural land – a classification that would result in lower taxes than residential.

The central issue is which competing legal claim has priority: the requirement that classifications are to be based solely on the actual use of the property as stated in the Wisconsin Property Assessment Manual; or an injunction obtained by the village based on a restrictive covenant that prohibited Thoma from using the land for anything other than a residential use. More pointedly, the Supreme Court considers the question: does an injunction trump "use?"

Petition for Review: In Case No. 2015AP1970, the Court of Appeals affirmed the village Board of Review's decision, which in turn, had upheld the village assessor's reassessment of the property as agricultural.

Thoma notes that the Wisconsin Property Assessment Manual, promulgated by the Wisconsin Department of Revenue (DOR), states that classification as agricultural use "is based *solely* on whether *use* of the parcel is agricultural in nature." Thoma also points to DOR guidance on this rule that is published in a frequently-asked-questions section of its website, which says that a municipality may not override the "use trumps" rule by means of ordinance, easement or contract.

Petition to Bypass: Thoma also filed with the Clerk of Supreme Court what he labeled a "Motion for Consolidation" of Case No. 2015AP1970 with Case No. 2016AP2528 on a related issue. This case reaches the Supreme Court as a bypass of the Court of Appeals. Thoma asks here whether an assessor's inaccurate or false testimony regarding DOR guidance constitutes a valid reason for relief under Wis. Stat. § 806.07(1)(h).

Some background: Thoma had purchased vacant land in the town of Polk that had been part of the Melius Farm. He planned to develop the land into a residential subdivision that would be known as Pleasant Farm Estates.

By 2007 Thoma had executed development agreements and restrictive covenants with the village of Slinger. The development agreements called for Pleasant Farm Estates to be developed in three consecutive stages, each with its own set of progress requirements. Following the execution of the development agreements and restrictive covenants, the village annexed the entire parcel that was to become Pleasant Farm Estates and rezoned it as residential.

The village put a provision into the development agreement or the restrictive covenants that Thoma could not use the land for agriculture. Despite the restrictive covenant, Thoma continued to maintain alfalfa and grass on most of the property, which he apparently regularly cut and baled. In a small area of the property, Thoma continued to plant (or allowed someone else to plant) row crops. Initially, the village allowed Thoma's ongoing use of the property, and it continued to classify the property as agricultural land for assessment purposes.

Over the next several years Thoma had very little success in selling residential lots, some of which were partially developed with utilities and other improvements.

In 2011, the Village filed a civil action (Washington County Case No. 2011CR1224) against Thoma seeking an injunction against any agricultural use of the property based on the restrictive covenant. Although Thoma argued that another restrictive covenant allowed him to continue the agricultural use until the lots were sold to residential end users, the circuit court granted summary judgment to the village and entered an injunction prohibiting the land from being used for agricultural purposes.

Following the injunction, Thoma removed the remaining row crops but maintained alfalfa and grass. The village's assessor, Michael Grota, continued to assess the entire property as agricultural for the 2013 tax year.

For the 2014 tax year, Grota changed the classification of the property to residential and reassessed the property, which substantially raised the property's valuation and tax bill. As part of his assessment process, Grota apparently had a telephone conference with the regional supervisor for the DOR.

What the supervisor told Grota and whether the assessor accurately relayed that guidance to the Board of Review is subject to dispute. Indeed, Thoma filed a motion for relief from the summary judgment and injunction under Wis. Stat. § 806.07(h) based on the DOR supervisor's subsequent deposition testimony that contradicted Grota's statements to the Board.

Grota acknowledged that the use of the land (maintaining ground cover that was cut and baled) had met the burdens of establishing an agricultural use in order to be classified as agricultural land. He also acknowledged that ordinarily use trumps all else in classifying land. He concluded, based on what he believed was the DOR's guidance, that the court order directing Thoma not to use the land for agricultural purposes changed the way the land had to be classified for assessment purposes. The Board of Review upheld the classification and the new assessment.

Thoma filed for certiorari review in the circuit court, which upheld the board's decision.

The Court of Appeals also affirmed the board's decision to accept the assessor's classification of the property as residential property. The Court of Appeals said that Thoma made only a conclusory argument that maintaining ground cover on the property was an agricultural use and that he failed to develop that argument either before the board or on appeal. To the extent that Thoma argued that the classification should have remained as in prior years, the Court of Appeals said that its "sole inquiry [was] whether the board erred in accepting the assessor's classification for the 2014 tax year."

Thoma contends that the Court of Appeals' decision violates the state's constitutional requirement of uniformity because other similarly used land continues to be taxed at the agricultural rate. The village argues that this case is really about the factual question of whether Thoma presented evidence at the board hearing that the lots in Pleasant Farm Estates were primarily devoted to agricultural use.

Wisconsin Supreme Court
Wednesday, February 21, 2018
1:30 p.m.

2016AP740-CR State v. DeAnthony K. Muldrow

Supreme Court case type: Petition for Review
Court of Appeals: District II
Circuit Court: Manitowoc County, Judge James L. Fox, affirmed
Long caption: State of Wisconsin, Plaintiff-Respondent, v. DeAnthony K. Muldrow, Defendant-Appellant

Issue presented: This case examines whether lifetime GPS monitoring is a "penalty" that a trial court must cover during a plea colloquy. More specifically, here, whether defendant DeAnthony K. Muldrow was entitled to withdraw his not guilty plea to one count because neither the court nor his attorney advised him that his plea would subject him to lifetime GPS.

Some background: Muldrow pled guilty to third-degree sexual assault and sexual assault of a child under 16 years of age. He has not yet been released on extended supervision, but when that occurs, he will be subject to lifetime GPS monitoring under Wis. Stat. § 301.48.

Postconviction, the trial court concluded that lifetime GPS monitoring was not punishment, and therefore was not a direct consequence of Muldrow's plea. Thus, the trial court denied Muldrow's motion to withdraw his plea.

Muldrow appealed, unsuccessfully. The Court of Appeals noted that due process requires that a court should only accept a guilty plea made knowingly, intelligently, and voluntarily. Brady v. United States, 397 U.S. 742, 748 (1970). This requirement in turn calls for the defendant to be advised of the direct consequences of the plea. State v. Bollig, 2000 WI 6, ¶16, 232 Wis. 2d 561, 605 N.W.2d 199.

A direct consequence is "one that has a definite, immediate, and largely automatic effect on the range of [a] defendant's punishment." Comparatively, a collateral consequence is "indirect" and does "not flow from the conviction." State v. Byrge, 2000 WI 101, ¶61, 237 Wis. 2d 197, 614 N.W.2d 477. "The distinction between direct and collateral consequences essentially recognizes that it would be unreasonable and impractical to require a circuit court to be cognizant of every conceivable consequence before the court accepts a plea."

The Court of Appeals held that, whether one looks to the purpose alone, or at both the intent and effects, lifetime GPS monitoring is not punishment, and therefore, not a direct consequence that Muldrow had to be informed of prior to his plea. Accordingly, the Court of Appeals said Muldrow failed to make a prima facie case that the trial court failed to comply with Wis. Stat. § 971.08 or other court mandated plea colloquy procedures, and he is not entitled to withdraw his plea.

Before this court, Muldrow points out that various courts have come to conflicting conclusions as to whether lifetime GPS statutes are punitive, including the Eastern District of Wisconsin and the Seventh Circuit.

Wisconsin Supreme Court
Friday, February 23, 2018
9:45 a.m.

2016AP897-CR State v. Lamont Donnell Sholar

Supreme Court case type: Petition for Review
Court of Appeals: District I
Circuit Court: Milwaukee County, Judge Rebecca F. Dallet and Judge Thomas J. McAdams, Affirmed.
Long caption: State of Wisconsin, Plaintiff-Respondent, v. Lamont Donnell Sholar, Defendant-Appellant

Issues presented:

- When assessing the prejudice of defense counsel's deficient performance in a multiple-count jury trial, may a court – and if so, when – divide the prejudice analysis on a count-by-count basis, finding prejudice warranting relief on some counts from the single trial but not others?
- If a party fails to file a petition for review following an unfavorable Court of Appeals ruling on a particular argument, may the party re-litigate the same question in a second appeal of the same case?

Some background: In October 2011, Lamont Donnell Sholar was charged with one count of trafficking a child, one count of soliciting a child for prostitution, two counts of pandering/pimping, and one count of human trafficking related to two women, one 17 years old; the other, 21. He was also charged with one count of second-degree sexual assault related to the 21-year-old.

The women independently testified that they met Sholar through his friend, Shawnrell Simmons, and then began working as prostitutes for Sholar. They testified that Sholar uploaded advertisements with pictures of them to a website. They each described in detail how Sholar drove them to and from various hotels for the purpose of engaging in sexual acts with men for payment. Their testimony regarding the prostitution was corroborated by testimony from other witnesses, including another sex worker, one of the women's mothers, the clerk at the hotel where Sholar had rented several rooms and where much of the sex work occurred, and evidence of lingerie and condoms retrieved by hotel staff. The 21-year-old woman also testified that Sholar sexually assaulted her but added that she didn't say no because she was afraid and felt she didn't have a choice.

Sholar's defense was that he was not personally involved in prostitution. He described himself as acting like "a friend" to the 17-year-old and denied having sex with the 21-year-old. He blamed Simmons for engaging them in prostitution. He offered what the trial court would describe as "incredible" and inconsistent stories about where he was living and why he was staying at the Econolodge with a 17-year-old girl.

When Sholar was arrested, he had a cell phone on him and made some statements indicating it was his phone and later claimed it belonged to Simmons. The state introduced as exhibit 79, a 181-page printout, including photos of females in suggestive poses, and text messages referencing drugs, prostitution and threats of violence. Trial counsel did not object.

Later, the jury asked to see a specific text message. All the text messages were part of a single exhibit. Exhibit 79 was provided in its entirety to the jury, without any objection by defense counsel. After a six-day jury trial, Sholar was found guilty of all six charges.

Sholar filed a postconviction motion asserting that his trial counsel was ineffective in allowing exhibit 79 to be sent to the jury in its entirety. The trial court denied the motion without a hearing, ruling that even if the text messages contained improper other acts evidence, Sholar hadn't shown prejudice.

The Court of Appeals concluded that "Sholar's allegations in this regard, if true, are sufficient to entitle Sholar to a Machner hearing." *See* State v. Machner**,** 92 Wis. 797, 285 N.W.2d 905 (Ct. App. 1979).

The judge determined that Sholar's trial counsel was ineffective in allowing exhibit 79 to be sent to the jury, stating, "The messages and the pictures [in the exhibit] are in my opinion so inflammatory that I think a jury then and there might have convicted him of virtually anything."

However, the Machner court said that it was only prejudicial as to the second-degree sexual assault charge. The Machner court believed that Sholar would have been convicted of the five human trafficking counts, regardless of exhibit 79. The Machner court then issued a written order vacating Sholar's conviction and sentence on count five (the sexual assault) and denied the remainder of Sholar's postconviction motion.

Sholar unsuccessfully sought summary reversal and then appealed. The state did not cross appeal and does not challenge the order vacating the sexual assault charge. Sholar argued on his second appeal that the Machner court misunderstood the remand order. He argued that "the only issue to be addressed at the Machner hearing was whether trial counsel's performance was deficient."

The Court of Appeals considering Sholar's second appeal concluded that the Machner court interpreted its order correctly when it conducted a full Machner hearing.

Sholar says that it was incorrect for the Machner court to essentially "parse" whether, as a result of his counsel's ineffective assistance, he was prejudiced as to each individual count. He contends that if counsel was ineffective (which is undisputed) that ineffectiveness taints the entire proceeding. He claims that there is no precedent for the Court of Appeals to determine the prejudice of a trial attorney's deficient performance on a count-by-count basis.

The state says that the Court of Appeals got it right. It points to the court's conclusion that "there is no reasonable probability that the outcome of the trial would have been different if exhibit 79, in its entirely, would not have been given to the jury during deliberations." The state says that "Sholar has not shown that this was improper."

A decision by the Supreme Court may determine whether the prejudice analysis may occur on a count-by-count basis, and if so, under what circumstances.

Wisconsin Supreme Court
Friday, February 23, 2018
10:45 a.m.

2016AP1608 Richard Forshee v. Lee Neuschwander

Supreme Court case type: Petition for Review
Court of Appeals: District III
Circuit Court: Sawyer County, Judge John M. Yackel, reversed and cause remanded with directions
Long caption: Richard Forshee, Judith Timmerman, Verlan E. Edwards, Robert R. Olson, Mary L. Edwards on behalf of Verlan & Mary Edwards LLP and Jean Forshee, Janet A. Olson, Plaintiffs-Respondents-Petitioners, v. Lee Neuschwander and Mary Jo Neuschwander, Defendants-Appellants

Issue presented: This case examines whether operating a home as a vacation rental is: (1) a single family use of real property, permitted by residential zoning ordinances and protected by the public policy preference for the free and unrestricted use of property; or (2) a business enterprise, a form of "commercial activity" appropriately prohibited by residential zoning ordinances.

Some background: Lee and Mary Jo Neuschwander own waterfront property on Sorenson Drive, a private, dead-end road in Hayward. The Neuschwanders acquired the house as part of a tax-deferred "1031 exchange," which means that: (1) they transferred one property in exchange for the Sorenson Drive property; and (2) in order for the exchange to remain tax-deferred, the Neuschwanders are required to hold the Sorenson Drive property "for productive use in a trade or business or for investment." *See* 26 U.S.C. § 1031(a)(1).

Starting in 2014, the Neuschwanders began renting out the house as a short-term vacation rental. They advertised the house both in printed media and online as "Lake Point Lodge." A listing for the property on the vacation rental website vrbo.com specified it was available for minimum stays of two to seven nights, for a maximum of 15 overnight guests.

In 2015, the Neuschwanders rented their property to over 170 people. They received $55,784.93 in rent, including taxes, and they paid the city of Hayward $4,973.81 in room tax.

The Neuschwanders' neighbors (Richard and Jean Forshee, Judith Timmerman, Verlan Edwards, Mary Edwards on behalf of Verlan & Mary Edwards LLP, and Robert and Janet Olson (collectively, the neighbors) filed a lawsuit, which noted that both the Neuschwanders' property and the neighbors' properties are subject to the following restrictive covenants:

- No dwelling can be erected on said property with a living space of less than 1,000 square feet.
- There shall be no subdivision of the existing lots.
- There shall be no commercial activity allowed on any of said lots.

The trial court agreed with the neighbors' argument that the Neuschwanders' short-term rentals violated the restrictive covenant; in particular, its prohibition against "commercial activity." The trial court issued an injunction prohibiting the Neuschwanders from renting their

property on a short-term basis except during the weekend of the American Birkebeiner cross country ski race.

The Neuschwanders appealed. The Court of Appeals, in a published decision, reversed.

The Court of Appeals noted Wisconsin's public policy favors the free and unrestricted use of property. Crowley v. Knapp, 94 Wis. 2d 421, 434, 288 N.W.2d 815 (1980). "Accordingly, restrictions contained in deeds . . . must be strictly construed to favor unencumbered and free use of property." In order to be enforceable, deed restrictions must therefore be expressed "in clear, unambiguous, and peremptory terms." When the meaning of language in a restrictive covenant is doubtful, all doubt should be resolved in favor of the property owner's free use. Zinda v. Krause, 191 Wis. 2d 154, 165, 528 N.W.2d 55 (Ct. App. 1995).

Having concluded that reasonable minds could differ as to whether the restrictive covenant prohibits short-term rentals, the Court of Appeals deemed the covenant to be ambiguous. The Court of Appeals held that the provisions do not clearly indicate any purpose or intent that would allow the court to conclude the prohibition of "commercial activity" on the subject lots was intended to preclude short-term rentals. The Court of Appeals also held that the trial court erred by going beyond the text of the Neuschwanders' restrictive covenant and considering extrinsic evidence to determine the covenant's intent. The Court of Appeals also noted that several other state appellate courts have concluded restrictions similar to the one at issue in this case unambiguously do not prohibit short-term rentals.

Before this court, the neighbors argue that "the short-term rental business is commerce, regardless of how the renters make use of the property." The neighbors question how the Neuschwanders' use of their property differs from a hotel that rents its rooms online; both are undisputedly commercial activities, the neighbors say.

The neighbors also take issue with the Court of Appeals' determination that the fact that no money changes hands on the Neuschwanders' lot is a sign that the Neuschwanders were not engaged in commercial activity. This determination does not square with the reality that many customers rent hotel rooms online, with no money actually changing hands at the hotel itself.

The neighbors also point out that the Neuschwanders acquired the Lake Point Lodge under a "1031 tax exchange," a tax status requires that the property be held for use in a trade or business or for investment.

The neighbors essentially wonder how the Neuschwanders could be viewed as engaging in anything other than commercial activity given that they are holding the Lake Point Lodge for trade or business purposes; they are advertising for its rental online; they collected over $55,000 in rent in 2015; and they paid the city of Hayward a room tax, just as hotels do.

Finally, the neighbors point out that various jurisdictions around the country have held that short-term rentals violate restrictions against commercial use.

Wisconsin Supreme Court
Friday, February 23, 2018
1:30 p.m.

2015AP1858 Voters with Facts v. City of Eau Claire

Supreme Court case type: Petition for Review
Court of Appeals: District III
Circuit Court: Eau Claire County, Paul J. Lenz, affirmed in part; reversed in part and cause remanded with directions
Long caption: Voters with Facts, Pure Savage Enterprises, LLC, Wisconsin Three, LLC, 215 Farwell LLC, Dewloc, LLC, Leah Anderson, J. Peter Bartl, Cynthia Burton, Corinne Charlson, Maryjo Cohen, Jo Ann Hoeppner Cruz, Rachel Mantik, Judy Olson, Janeway Riley, Christine Webster, Dorothy Westermann, Janice Wnukowski, David Wood and Paul Zank, Plaintiffs-Appellants-Petitioners, v. City of Eau Claire and City of Eau Claire Joint Review Board, Defendants-Respondents-Respondents

Issues presented: This case examines Wisconsin's Tax Incremental Financing (TIF) law, Wis. Stat. § 66.1105 (2013-14), as it relates to what has become known as the Confluence Project – a large riverfront development in Eau Claire that is planned to include a new performing arts center and residential construction, among other development.

The Supreme Court reviews issues presented by a group known as Voters with Facts,[1] four limited liability companies, and fourteen individual plaintiffs (collectively, "Voters"):

- Do taxpayers have standing to challenge the legality of a Tax Incremental District ("TID")?
- Must the legal requisites for a formation of TID actually exist, such that their presence or absence can be challenged in a declaratory judgment action?
- Does the payment of a cash subsidy to a property owner for private improvements violate the Uniformity Clause or the Public Purpose Doctrine?
- Did Voters sufficiently plead a claim that Eau Claire is using TID funds to reimburse the owner/developer for the destruction of historic buildings in violation of Wis. Stat. § 66.1105(2)(f)1.a.?

Some background: The statutory TIF process, which involves the creation of specific taxing districts, allows municipalities to finance development in blighted or underdeveloped areas, using the increased tax revenue generated by the resulting increased property value within the TID to repay the costs of the improvements.

In this case, after public hearings, the City of Eau Claire Joint Review Board passed resolutions approving the creation of one new TID ("TID No. 10") and the amendment of another TID ("TID No. 8") for portions of the Confluence Project.

[1] According to the complaint, Voters with Facts is an "unincorporated association of grassroots citizen volunteers and [local] taxpayers who question the propriety" of the developments related to the tax incremental districts at issue in this case.

On Nov. 10, 2014, Voters sent a notice of claim to the city clerk objecting to the amended and created TIDs. The next day, the city council voted to adopt a resolution approving the city's 2015-19 Capital Improvement Plan, which included appropriations of several million dollars to be spent on the TIDs. At the same meeting, the city council also adopted a resolution authorizing the issuance of bonds, the repayment of which was to be funded by the incremental tax revenue generated by the TIDs. The city did not respond to Voters' notice of claim and it was disallowed by inaction pursuant to Wis. Stat. § 893.80(1g).

Voters filed the underlying action here in March 2015. Voters had sought a declaratory judgment invalidating the pertinent resolutions because:

- Eau Claire allegedly failed to follow the statutory requirements when amending TID No. 8 (Count 1);
- Eau Claire allegedly failed to follow the statutory requirements when creating TID No. 10 (Count 2);
- TID funds allegedly could be used unlawfully to reimburse the developer for the cost of demolishing historic structures, contrary to Wis. Stat. § 66.1105(2)(f)1.a. (Count 3); and
- the TIDs allegedly operated in violation of the Wisconsin Constitution's Uniformity Clause, Wis. Const. art. VIII, § 1, because the cash payments to the developer functioned as a tax rebate or credit (Count 4).

Voters' final assertion was that, if declaratory judgment was an improper mechanism for judicial review of Eau Claire's actions related to the TIDs, review was alternatively available by certiorari, and Eau Claire's actions were "arbitrary, capricious, and outside the scope of [its] lawful authority" (Count 5).

The City of Eau Claire and the city's Joint Review Board moved to dismiss Voters' complaint. The trial court granted the motion and dismissed Voters' complaint in its entirety.

The motion advanced nine bases for dismissal, among them: that Voters lacked standing to prosecute its declaratory judgment and certiorari claims; that Voters' constitutional challenge was in fact a facial challenge to legislation that had already been upheld against constitutional attack; and that Voters' historic building allegations in Count 3 failed to state a claim.

The Court of Appeals ruled that Voters lacked standing to challenge the TIDs through a declaratory judgment action, but had standing to challenge the TIDs through certiorari review.

The Court of Appeals remanded the case to the trial court for further proceedings on Voters' claim for certiorari review, which encompasses allegations that Eau Claire lacked substantial evidence to make the determinations necessary to create/amend the TIDs at issue, and that those actions were done arbitrarily.

Voters appealed to the Wisconsin Supreme Court.