WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
DECEMBER 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:

Jefferson
Portage
Racine

TUESDAY, DECEMBER 11 , 2018

9:45 a.m.	17AP909	West Bend Mutual Ins. Co. v. Ixthus Medical Supply, Inc.
10:45 a.m.	17AP1574	Portage County v. J. W. K.
1:30 p.m.	17AP1337-CR	State v. Zachary S. Friedlander

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

16AP1603-D Office of Lawyer Regulation v. Sonja C. Davig Huesmann

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 oral argument, contact media coordinator Hannah McClung at WISC-TV, (608) 271-4321. The Synopses provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
December 11, 2018
9:45 a.m.

2017AP909 West Bend Mutual Ins. Co. v. Ixthus Medical Supply, Inc.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), that reversed a Racine County Circuit Court decision, Judge David W. Paulson, presiding.

This case presents the question of whether West Bend Mutual Insurance Co. has a "duty to defend" its insured, Ixthus Medical Supply, Inc., in a federal trademark infringement case.

Abbott, a health care company, makes diabetic blood glucose test strips that are sold worldwide. The underlying complaint alleges that test strips intended for international markets were fraudulently diverted, advertised, and passed off as domestic test strips, which are eligible for certain rebates and reimbursement. Test strips intended for international use are not. Abbott thus paid insurers rebates on what it thought were legitimate insurance, Medicaid, or Medicare reimbursement claims. Abbott filed suit against Ixthus and more than 300 other defendants, alleging a number of claims.

Ixthus is alleged to have sold test strips to domestic pharmacies that were wrongfully diverted from international markets. The pharmacies, in turn, allegedly sold the test strips to consumers.

Ixthus tendered defense to its insurer, West Bend. Under the policies, West Bend has a duty to defend for, among other things, claims of "personal and advertising injury." The policies contain an exclusion for coverage for personal and advertising injury under the "Knowing Violation of Rights of Another" provisions, for injury "caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict 'personal and advertising injury.'"

West Bend disputed coverage and filed this declaratory action in Racine County circuit court, seeking a declaration that it had no duty to defend or indemnify Ixthus. West Bend argued that (1) the policies' "knowing violation" exclusion barred coverage, and (2) that the underlying complaint failed to allege a causal connection between Ixthus's advertising activity and Abbott's injury.

The circuit court ruled in favor of West Bend, noting that no reasonable insured would believe it would have liability insurance coverage for repeated and intentional participation in an illegal scheme to defraud.

The Court of Appeals reversed, concluding that there are claims in the complaint that survive the "knowing violation" exclusion, stating "[s]imply because the complaint alleges intent does not necessarily mean each underlying claim requires proof of intent." For example, certain claims arise under the Lanham Act, which is a strict liability statute, so there need not be an allegation of willfulness to succeed on the issue of liability.

West Bend says that the Court of Appeals improperly focused on Abbott's theories of liability, rather than the specific facts alleged in the complaint. West Bend also maintains that there is no coverage because the complaint does not allege a causal connection between an offense covered under the "advertising injury" provisions of the insurance policy and the insured's actual advertising activity.

Ixthus says that the appellate court properly applied controlling precedent and reached the correct result.

The Supreme Court may provide guidance on the proper interpretation of a "knowing rights" exclusion and the scope of a claim for "advertising injury."

The following issues are presented for review:

1. Do allegations of Ixthus' unlawful diversion to U.S. markets of Abbott's diabetic test strips manufactured for foreign markets, and fraudulent rebate scheme with resultant loss to Abbott, constitute injury caused by advertising so as to invoke "advertising injury" liability coverage and invoke West Bend's duty to defend the underlying lawsuit in federal court in New York, Abbott Laboratories, et al. v. Adelphia Supply USA, et al., No. 15 Civ. 05826 (CBA)(MDG)(E.D.N.Y.)(the "Abbott Suit")?
2. Do allegations of Ixthus' unlawful diversion of test strips and fraudulent rebate scheme constitute a knowing violation of rights of another such that the exclusion for Knowing Violation applies?
3. Do allegations of Ixthus' unlawful diversion of test strips and fraudulent rebate scheme preclude coverage pursuant to the Criminal Acts exclusion?
4. Do allegations that Ixthus intentionally caused damage to Abbott by participating in the unlawful diversion of test strips and fraudulent rebate scheme preclude coverage on the basis of the Doctrine of Fortuity?
5. Do allegations of Ixthus' unlawful diversion of test strips and fraudulent rebate scheme preclude coverage on the basis of an insured's reasonable expectations?
6. Do allegations of Ixthus' unlawful diversion of test strips and fraudulent rebate scheme preclude coverage on the basis of public policy considerations?

WISCONSIN SUPREME COURT
December 11, 2018
10:45 a.m.

2017AP1574 Portage County v. J. W. K.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), that dismissed as moot a Portage County Circuit Court decision, Judge Thomas T. Flugaur, presiding.

In 2013, Portage County filed a petition that resulted in the circuit court ordering that J.W.K. be committed under Wis. Stat. Chapter 51. In July 2016, Portage County filed a petition seeking an extension of J.W.K.'s ch. 51 commitment for an additional 12-month period. Based on the county's expert's testimony, the circuit court concluded that the county had met its burden for recommitment and extended J.W.K.'s commitment for an additional 12 months.

J.W.K. did not file a notice of intent to appeal within the required 20 days. The Court of Appeals, however, extended that deadline, and J.W.K. filed a notice of intent in April of 2017. He did not file his notice of appeal until August of 2017.

In the interim, the circuit court held another recommitment hearing in July 2017, and again entered an order extending J.W.K.'s commitment until July or August 2018.

Given the subsequent recommitment order, the Court of Appeals ordered the parties to file memoranda regarding whether the appeal of the 2016 recommitment order had become moot. J.W.K.'s memorandum argued that the appeal was not moot because the appellate issue involved the sufficiency of the evidence to support the 2016 recommitment order, and a successful challenge to the sufficiency of that evidence would require that the 2017 recommitment order also be vacated. The State's memorandum argued that the appeal of the 2016 appeal was moot because the testimony at the July 2017 hearing satisfied the standard for an initial commitment.

The Court of Appeals dismissed the appeal of the 2016 recommitment order as moot because J.W.K. was no longer subject to the order being appealed.

J.W.K. has asked the Supreme Court to reverse that dismissal, arguing that different panels of the Court of Appeals are divided on the question of whether a subsequent recommitment order renders moot an appeal from a prior recommitment order.

J.W.K. also seeks review of whether the standard for obtaining a recommitment order is lower than or the same as the standard for obtaining an initial commitment order.

Finally, J.W.K. asks the Supreme Court to clarify the standard for what a medical expert must include in their testimony to support an order extending a Chapter 51 commitment.

The following issues are presented for review:

1. Is the appeal on sufficiency grounds of an extended mental health commitment moot when a subsequent extension is ordered?
2. Is a doctor's recitation of the recommitment standard, without a factual explanation as to why the individual meets the standard, sufficient to extend an individual's mental health commitment?

WISCONSIN SUPREME COURT
December 11, 2018
1:30 p.m.

2017AP1337-CR State v. Zachary S. Friedlander

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), that reversed a Jefferson County Circuit Court decision, Judge David Wambach, presiding.

This case presents the question of whether Zachary Friedlander is entitled to sixty-five days of sentence credit for time that he should have been in custody in the Jefferson County jail but was not in jail because prison officials who released him from the Oshkosh Correctional Institution failed to transfer him to the jail or order him to report to jail, and his probation agent also never told him to report to jail.

In April 2016, Friedlander pled no contest to felony bail jumping. At the time he was sentenced, he was already serving a prison sentence for an unrelated drug conviction. The plea agreement in the new case contained a joint sentence recommendation that sentence be withheld and Friedlander be sentenced to three years of probation, to run concurrent with the unrelated drug conviction sentence, with eight months in the Jefferson County jail as a condition of probation.

The circuit court followed the joint sentence recommendation. The court and the parties agreed that the eight months of conditional confinement could extend beyond the time left on the prison sentence, and as a result Friedlander would spend some time in jail after he was released from prison, in order to complete the eight months of conditional jail time.

Officials at Oshkosh Correctional Institution released Friedlander from prison without notifying Jefferson County jail personnel of his impending release or arranging to transfer him to the jail. After his release from prison, Friedlander met regularly with his probation agent, who also never told him to report to jail.

The Jefferson County Sheriff's office eventually learned that Friedlander had been released from prison. The sheriff contacted Friedlander's probation agent, who instructed Friedlander to contact a sheriff's department captain. Friedlander promptly did so. The sheriff's department asked the circuit court for direction as to whether Friedlander should report to jail for the remainder of the time until his original release date and what should be done with the days Friedlander should have been in jail but was not. The circuit court concluded that seventy-five days of conditional confinement remained outstanding following Friedlander's release from prison, and it rejected Friedlander's argument that he had earned sentence credit for the sixty-five days he spent at liberty through no fault of his own.

The Court of Appeals reversed. Relying on the decisions in State v. Riske, 152 Wis. 2d 260, 448 N.W.2d 260 (Ct. App. 1989), and State v. Dentici, 2002 WI App 77, 251 Wis. 2d 436, 643 N.W.2d 180, the Court of Appeals held that Friedlander was entitled to sentence credit because he was absent from jail through no fault of his own.

The State presents the following issues for review:

1. To be entitled to sentence credit, an offender must have been "in custody" under Wis. Stat. § 973.155(1) during the time for which credit is sought. Under [State v. Magnuson, 2000 WI 19, ¶¶25, 31, 47,

233 Wis. 2d 40, 606 N.W.2d 536], an offender is "in custody" within the meaning of § 973.155(1) if the offender would be subject to an escape charge for leaving his or her status. When, as here, an offender is mistakenly released from prison or jail, is the offender "in custody" under § 973.155(1) and Magnuson such that sentence credit should be given for this time spent at liberty?

2. Should the Supreme Court overrule the Court of Appeals' decisions in Riske and Dentici?