WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
MARCH 2019

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
Dunn
Fond du Lac
Milwaukee
Waukesha
Winnebago

MONDAY, MARCH 18, 2019

9:45 a.m.	16AP493	Ann Cattau v. National Insurance Services of Wisconsin, Inc.
10:45 a.m.	17AP1269	John Teske v. Wilson Mutual Insurance Company
1:30 p.m.	17AP1518-CR	State v. Jessica M. Randall

WEDNESDAY, MARCH 20, 2019

9:45 a.m.	18AP1296-CR	State v. Raytrell K. Fitzgerald
10:45 a.m.	18AP1214-W	Raytrell K. Fitzgerald v. Circuit Court for Milwaukee Co.
1:30 p.m.	16AP1837	Rural Mutual Insurance Company v. Lester Buildings, LLC

TUESDAY, MARCH 26, 2019

9:45 a.m.	17AP1206-CR	State v. Emmanuel Earl Trammell
10:45 a.m.	18AP656	L. G. v. Aurora Residential Alternatives, Inc.
1:30 p.m.	16AP2503/	Enbridge Energy Company, Inc. v. Dane County
	17AP13	Enbridge Energy Company, Inc. v. Dane County

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:

16AP1288-D Office of Lawyer Regulation v. Daniel W. Morse

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
March 18, 2019
9:45 a.m.

2016AP493 Ann Cattau v. National Insurance Services of Wisconsin, Inc.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), that reversed and remanded a Winnebago County Circuit Court decision, Judge John A. Jorgensen presiding, that had granted defendants motion to dismiss all claims on the pleadings.

The plaintiffs, Ann Cattau, et alia, are a number of individuals who retired from the Neenah Joint School District from 2006 through 2011. Throughout their employment, the plaintiffs entered into various collective bargaining agreements and contracts with the school district that established a retirement plan. Among other things, the retirement plan promised ten years of payments following retirement. Section 403(b) of the Internal Revenue Code allows this type of retirement plan to have a maximum payout period of sixty-six months. A 2010 IRS audit of the retirement plan revealed this defect. The school district and the IRS reached a settlement agreement; the parties were not part of that settlement. As a result of various tax-related issues, the plaintiffs ended up with federal tax bills they had not anticipated.

The plaintiffs sued the school district and other parties they allege contributed to their financial losses. In an earlier decision, the Court of Appeals reversed the circuit court's conclusion that the plaintiffs' claims were solely federal tax questions that were all preempted. The Court of Appeals held the plaintiffs' allegations did raise cognizable state law claims.

Back in the circuit court, the plaintiffs amended their complaint and alleged that the defendants, MidAmerica and National Insurance Services (NIS), are in the business of marketing, structuring, and administering IRS-qualified plans for employees of public sector organizations, that those entities held themselves out as being experts in structuring retirement plans, and that the plaintiffs relied on MidAmerica's and NIS's expertise to act in accordance with applicable provisions of the Internal Revenue Code when structuring their retirement plan. The plaintiffs alleged that the defendants made representations and distributed to the plaintiffs documentation concerning the MidAmerica program that described the benefits and options available to plan participants. The information described tax benefits that turned out to be faulty. The complaint alleged causes of action for negligence, breach of fiduciary duty, negligent misrepresentation, and strict responsibility misrepresentation.

The circuit court granted the defendants' motion to dismiss all claims based on the pleadings, and the Court of Appeals affirmed. The Court of Appeals said the plaintiffs failed to plead sufficient facts to support any of their claims. However, a dissenting judge found that the plaintiffs had clearly set forth viable claims.

The plaintiffs petitioned the Supreme Court for review, arguing that the case presents important and recurring issues about the standard of pleading in Wisconsin. They argue that the Court of Appeals' decision sets forth the proposition that Wisconsin has adopted a heightened pleading standard consistent with that utilized in federal practice.

The plaintiffs present the following issues for review:

1. Is the pleading standard as stated in Strid v. Converse, 111 Wis. 2d 418, 331 N.W.2d 350 (1983), still the

law in Wisconsin applicable to claims such as negligence and breach of fiduciary duty present in this case?

2. Have Plaintiffs stated a claim upon which relief may be granted against the Defendants for negligence, in particular have Plaintiffs sufficiently pled the existence of a duty of care?

3. Have Plaintiffs stated a claim upon which relief may be granted against the Defendants for breach of fiduciary duty, in particular have Plaintiffs sufficiently alleged the existence of a fiduciary duty?

4. Have Plaintiffs stated a claim upon which relief may be granted against the Defendants for negligent and strict responsibility misrepresentation and, if not, should leave to amend have been granted?

WISCONSIN SUPREME COURT
March 18, 2019
10:45 a.m.

2017AP1269 John Teske v. Wilson Mutual Insurance Company

This is a review of a Court of Appeals, District II (headquartered in Waukesha) decision that reversed a Fond du Lac County Circuit Court decision, Judge Peter L. Grimm presiding, granting summary judgment to Wilson Mutual Insurance Company, thereby dismissing the Teskes' claims as barred by preclusion.

On November 24, 2013, four members of the Teske family were involved in a three-car automobile accident in Fond du Lac County. Sabrina Srock hit the stopped, left-turning Teske vehicle from behind, at a high rate of speed, sending the Teske vehicle into the path of oncoming traffic, where it collided with a third vehicle. Three Teske family members sustained substantial injuries.

At the time of the accident, the Teskes were covered by an automobile policy issued by Wilson Mutual Insurance Company (Wilson). The policy included coverage for underinsured motorists (UIM). The UIM limits in the policy were $500,000 per person and $500,000 per occurrence. There were communications between attorneys for the Teskes and attorneys for Wilson regarding UIM coverage for the accident.

Two lawsuits followed the November 2013 incident. The first began with Julie Teske, who was involved in the accident but was not driving, filing a complaint against Srock and Srock's insurer, State Farm Mutual Automobile Insurance Company (State Farm). Julie was the only named plaintiff. A settlement agreement was reached, under which State Farm paid the Teskes $255,000, and Wilson paid them $245,000 under its UIM policy. The $245,000 was Wilson's UIM policy limit of $500,000, less the $255,000 paid by State Farm. (Wilson took the position that its UIM obligation was reduced by State Farm's payments.) The circuit court issued an order approving the settlement.

As part of the settlement, all of the Teskes signed a Partial Settlement Agreement and Release in favor of Wilson. However, there remained a dispute between the Teskes and Wilson regarding the amount of Wilson's UIM obligation——namely, whether Wilson could reduce its per occurrence $500,000 limit by the $255,000 paid by State Farm.

On July 3, 2014, the Teskes filed an amended complaint, which added Katherine and Elle Teske, passengers in the vehicle at the time of the crash, as plaintiffs and Wilson as a defendant. (The amended complaint dismissed Srock and State Farm.) Both the Teskes and Wilson filed motions for a declaratory judgment as to whether the reducing clause in Wilson's policy applied and reduced its UIM obligation by the amount of State Farm's settlement payment. The circuit court agreed with Wilson that the reducing clause did apply. The Teskes appealed, and the Court of Appeals affirmed the circuit court's decision in August 2015. The Supreme Court denied the Teskes' subsequent petition for review.

In November 2016, John, Julie, Katherine, and Elle Teske filed the second lawsuit against Wilson in Sheboygan County. Their complaint alleged that Emily Teske, who was driving the family vehicle at the time of the crash, had been negligent in the operation of the vehicle and had been a cause of their damages. Therefore, they claimed, Wilson was liable for payment of those damages because Emily was its insured.

Wilson filed a motion for summary judgment on the ground of that the prior judgment barred the Teskes' new claims (claim preclusion). The circuit court granted the motion and dismissed the second lawsuit. The Court of Appeals reversed, on the ground that the two complaints were distinct as to both facts and questions of law. It stated that the first case was a breach of contract case that focused on interpreting the reducing clause in Wilson's policy to determine whether it applied, while the second case was a negligence action focusing on whether Emily had been negligent and had caused the injuries suffered by the other Teske family members. Thus, in the view of the Court of Appeals, "[t]he two actions involve neither a common 'nucleus of facts' nor legal question." The Supreme Court granted Wilson's petition for review.

The following issue is presented for review:

> In the present action, does claim preclusion bar . . . the Teskes['] negligence claims against . . . Wilson Mutual Insurance Company; where the Teskes and Wilson were previously involved in litigation in Milwaukee County and Sheboygan County regarding the Teskes' claims for negligence and underinsured motorist coverage . . . ; and where a court of competent jurisdiction rendered a final judgment?

WISCONSIN SUPREME COURT
March 18, 2019
1:30 p.m.

2017AP1518-CR State v. Jessica M. Randall

This is a review of a Court of Appeals, District IV (headquartered in Madison) decision that affirmed a Dane County Circuit Court decision, Judge Nicholas McNamara presiding, granting Jessica Randall's motion to suppress the results of a blood test after blood had been taken but before the Crime Lab tested it.

On October 29, 2016, Jessica Randall was arrested for operating a vehicle while under the influence of an intoxicant. Randall was read the "Informing the Accused" form and said she would submit to a blood test. She was taken to a hospital and blood was drawn.

On October 31, 2016, Randall's attorney sent a letter to the Wisconsin State Laboratory of Hygiene saying that it was Randall's understanding the blood sample had not yet been analyzed and that Randall "hereby revokes any previous consent that she may have provided to the collection and analysis of her blood, asserts her right to privacy in her blood, and demands that no analysis be run without specific authorization by a neutral and detached magistrate upon a showing of probable cause and specifying the goal of analysis."

The lab acknowledged receipt of the letter. On November 7, 2016, the lab tested Randall's blood and the State charged Randall with operating a motor vehicle while under the influence of an intoxicant and operating with a prohibited alcohol concentration, both third offenses.

Randall moved to suppress the results of the blood test on the ground she withdrew her consent to the search of the blood before the blood had been tested and that the State's testing of the blood after she had withdrawn consent was without a lawful basis. Following a hearing, the circuit court granted Randall's motion, concluding that Randall retained the right to withdraw her consent for a search prior to the blood being tested, that the State's subsequent testing of Randall's blood was without a lawful basis, and that the use of test results would violate Randall's constitutional rights. The State appealed. The Court of Appeals affirmed. The State petitioned the Supreme Court for review.

The issue Randall presented for review is whether Randall was entitled to suppression of the results of a test of a blood sample she voluntarily gave to police under the implied consent law because she informed the lab she was withdrawing her consent before the lab had analyzed the blood to determine the presence and quantity of drugs and alcohol.

WISCONSIN SUPREME COURT
March 20, 2019
9:45 a.m.

2018AP1296-CR State v. Raytrell K. Fitzgerald

This is a review that came to the Supreme Court on a petition to bypass the Court of Appeals. The petition asked the Supreme Court to review a Milwaukee County Circuit Court decision, Judge Dennis R. Cimpl presiding, that ordered Raytrell Fitzgerald's involuntary medication.

In October 2016, Raytrell Fitzgerald was charged with one count of possession of a firearm contrary to a harassment injunction. In May 2018, Dr. Ana Garcia, a psychologist at Mendota Mental Health Institute (Mendota), filed a report concluding that Fitzgerald was not competent to proceed to trial. At that time, Fitzgerald was not yet subject to a medication order, but staff at Mendota had been trying to medicate him, and he was refusing the medication. Dr. Garcia found that Fitzgerald was not competent to refuse medication. She did not opine that he posed a current risk of harm to himself or others, but she stated that Mendota was seeking the ability to administer medication intramuscularly as needed.

At a June 2018 involuntary medication hearing, Dr. Garcia admitted that she had had no contact with Fitzgerald after May 23, 2018; that as a psychologist she cannot prescribe medication but that Fitzgerald had been prescribed the antipsychotic drug Seroquel during his admission; and that she could not say she had ever seen Fitzgerald on medication, nor could she speak with certainty about his history of compliance or noncompliance with taking medication. Fitzgerald testified at the hearing that he had been misdiagnosed, and he said Mendota was trying to give him too much medication.

The State had not requested the administration of involuntary medication based on dangerousness, nor did Dr. Garcia testify that Fitzgerald was dangerous. However, the circuit court noted that Dr. Garcia's report summarized several third-party reports of dangerous behavior by Fitzgerald going back to 2010, 2011, and 2013. The circuit court also noted that staff at Mendota described him as grossly disorganized, laughing to himself, agitated, calling peers names, pushing a staff person, and once flushing large amounts of toilet paper down the toilet.

The circuit court signed an Order of Commitment for Treatment (Incompetency) and an Amended Order of Commitment for Treatment to Competency and authorized the involuntary administration of medication. The circuit court subsequently held multiple hearings relating to the automatic stay of involuntary medication, as mandated by State v. Scott, 2018 WI 74, 382 Wis. 2d 476, 914 N.W.2d 141. Fitzgerald appealed the Order of Commitment for Treatment (Incompetency) and petitioned the Supreme Court for bypass of the Court of Appeals.

Fitzgerald petitioned for bypass on the grounds that the involuntary medication provisions in Wis. Stat. § 971.14 do not comply with Sell v. United States, 539 U.S. 166 (2003). The United States Supreme Court, in Sell, listed four factors a court must consider before ordering the involuntary administration of antipsychotic medication to render a defendant competent for trial, and described the information a court must weigh when applying the factors. The factors are: (1) important governmental interests are at stake; (2) involuntary medication will significantly further those governmental interests; (3) involuntary medication is necessary to

further those interests; and (4) the administration of drugs is medically appropriate, meaning in the patient's best medical interest in light of his medical condition.

Fitzgerald argues that Wis. Stat. § 971.14(4)(b) authorizes circuit courts to order the involuntary administration of antipsychotic medication to render a defendant competent to stand trial based on the inmate's ability to understand, express or apply the advantages, disadvantages and alternatives to treatment, but the statute does not require the circuit court to find either that the defendant is dangerous or that the state has met the Sell factors. As a result, Fitzgerald argues that an order for involuntary medication based on the plain language of Wis. Stat. § 971.14 results in a violation of a defendant's right to substantive due process. Therefore, Fitzgerald asserts, circuit courts in Wisconsin are routinely ordering involuntary medication in violation of Sell.

Fitzgerald presented the following issues for Supreme Court review:

> 1. Whether the involuntary medication provisions of Wis. Stat. § 971.14 are unconstitutional because they do not comport with Sell v. United States, 539 U.S. 166 (2003).
>
> 2. Whether the circuit court's June 18 Order of Commitment for Involuntary Treatment violated Fitzgerald's constitutional right to substantive and procedural due process.
>
> 3. Whether the circuit court erred in ordering that Fitzgerald is entitled to only 45 days of sentence credit for the time he has spent in custody.

WISCONSIN SUPREME COURT
March 20, 2019
10:45 a.m.

2018AP1214-W Raytrell K. Fitzgerald v. Circuit Court of Milwaukee County

This is a review of the decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), that denied, ex parte, a petition for supervisory writ filed by Raytrell K. Fitzgerald.

This case, like case no. 2018AP1296-CR, State v. Raytrell K. Fitzgerald, concerns Fitzgerald's involuntary medication, as ordered by the Milwaukee County Circuit Court. In October 2016, Fitzgerald was charged with one count of possession of a firearm contrary to a harassment injunction. The circuit court set bail, which Fitzgerald paid. He was released and returned to the community.

In May 2018, the circuit court remanded Fitzgerald to the custody of the Department of Human Services for an inpatient competency evaluation. At that time, Fitzgerald was not yet subject to a medication order, but staff at Mendota Mental Health Institute (Mendota) had been trying to medicate him, and he was refusing the medication. Dr. Ana Garcia, a psychologist at Mendota, filed a report stating that she found that Fitzgerald was not competent to refuse medication. She did not opine that he posed a current risk of harm to himself or others, but she stated that Mendota was seeking the ability to administer medication intramuscularly as needed.

On June 18, 2018, the circuit court held an involuntary medication hearing. Dr. Garcia testified that when Fitzgerald stopped taking medication, his psychotic symptoms worsened, and that Fitzgerald did not understand the need for medication, did not cooperate with taking medication, and had hidden medications in his cheek to avoid taking them. Fitzgerald testified that he had been misdiagnosed and he said Mendota was trying to give him too much medication. Ultimately, the circuit court signed an Order of Commitment for Treatment (Incompetency) and an Amended Order of Commitment for Treatment to Competency and authorized the involuntary administration of medication.

On June 20, 2018, the Supreme Court of Wisconsin issued its decision in State v. Scott, 2018 WI 74, 382 Wis. 2d 476, 914 N.W.2d 141, which stated "involuntary medication orders are subject to an automatic stay pending appeal." On June 25, 2018, Fitzgerald filed both a notice of intent to pursue postdisposition relieve from the circuit court's order and a letter notifying the circuit court that, pursuant to the Scott decision, he was entitled to an automatic stay of the involuntary medication order.

On June 27, 2018, the circuit court held a hearing at which it criticized Fitzgerald for not filing a motion to stay the involuntary medication order. Fitzgerald tried to explain that Scott said the stay was automatic. Fitzgerald also noted that the State was not contesting the stay and that, under Scott, the State could file a motion to lift the stay. Fitzgerald also stressed his notice of intent to pursue postdisposition relief.

The circuit court signed Fitzgerald's proposed order imposing the stay, but before the circuit court could sign a written order lifting the stay, Fitzgerald filed a petition for supervisory writ in the Court of Appeals which challenged the circuit court's implementation of Scott's automatic stay procedure.

On June 28, 2018, the circuit court vacated the previous day's proceedings, in light of Scott. The circuit court had a question as to whether the automatic stay comes into play after the appeal is filed or when a notice of intent to appeal is filed or, in the alternative, whether the stay is automatic if there is merely an allegation that the defendant plans to file an appeal. The circuit court said, "[T]hat question is not answered as far as I could find, so I'm going to err on the side of caution and issue the stay today."

Fitzgerald filed a notice of appeal on July 9, 2018. On July 12, 2018, the Court of Appeals issued an order denying Fitzgerald's petition for supervisory writ. The Court of Appeals held that Fitzgerald was not entitled to an automatic stay "until he actually had an appeal pending and that did not happen until he filed the notice of appeal on July 9, 2018. A notice of intent did not suffice." Also, the circuit court, unaware of the Court of Appeals' order, held that because an appeal had been filed, it could not proceed in the case.

Fitzgerald petitioned the Supreme Court for review in light of the need to clarify how the automatic stay discussed in Scott is supposed to work. Fitzgerald notes that Scott imposed an automatic stay "pending an appeal" because without it a defendant's constitutionally-protected liberty interest in avoiding unwanted antipsychotic medications is rendered a nullity.

The following issue is presented for review:

> State v. Scott, 2018 WI 74, ¶43, 382 Wis. 2d 476, 914 N.W.2d 141, held that "involuntary medication orders are subject to an automatic stay pending appeal." Which event triggers the automatic stay——the entry of the involuntary medication order or the filing of a notice of appeal? Either way, must the circuit court enter an "automatic stay" order?

WISCONSIN SUPREME COURT
March 20, 2019
1:30 p.m.

2016AP1837 Rural Mutual Insurance Company v. Lester Buildings, LLC

This is a review of a Court of Appeals, District IV (headquartered in Madison) decision that affirmed a Dane County Circuit Court decision, Judges Maryann Sumi and Valerie Bailey Rihn presiding, granting summary judgment to Lester Buildings, LLC, The Phoenix Insurance Company, Van Wyks, Inc., and West Bend Mutual Insurance Company.

Jim Herman, Inc. (Herman) is a farming operation. In 2009 Herman entered into a contract (the Lester contract) with Lester Building for the design and construction of a large building that would serve both as a milk house and a barn. Under the heading "Insurance" in the "Construction Terms and Conditions" section of the Lester contract was the following paragraph, which Lester and its insurer characterize as a "subrogation waiver":

> *Both parties waive all rights against each other and any of their respective contractors, subcontractors and suppliers of any tier and any design professional engaged with respect to the Project, for recovery of any damages caused by casualty or other perils to the extent covered by property insurance applicable to the Work or the Project, except such rights as they have to the proceeds of such property insurance and to the extent necessary to recover amounts relating to deductibles or self-insured retentions applicable to insured losses. . . . This waiver of subrogation shall be effective notwithstanding allegations of fault, negligence, or indemnity obligation of any party seeking the benefit or protection of such waiver.*

The Lester contract also contained damage limitation provisions. One such provision contained the following language:

> *[Herman] acknowledges that its sole and exclusive remedy against Lester shall be limited to the applicable warranties set forth herein and no other remedy (including but not limited to the recovery of profits, lost sales, incidental or consequential damages, or injury to person or property, or any other loss) shall be available to [Herman] or any other persons or entities, whether by direct action, for contribution or indemnity, or otherwise.*

The second damage limitation provided that "Lester shall not have any liability to [Herman] whatsoever for any consequential, incidental, liquidated or special damages under or in connection with this Contract."

The building required concrete in many parts, including the foundation, side walls, half walls, and piers that supported the roof. The specifications for the concrete were provided by Lester, but Herman entered into a separate contract with Van Wyks to provide the concrete for the building. The Van Wyks contract also contained a waiver of claims similar to that found in

the Lester contract: "Both parties waive all rights against each other and any of their respective contractors, subcontractors and suppliers."

The building constructed by Lester and Van Wyks was covered by Herman's insurance policy with Rural Mutual Insurance Company (Rural). As emphasized by all of the defendants, in that policy Rural explicitly allowed its insureds, including Herman, to waive their rights without interfering with Rural's insurance coverage: "You may waive your right of recovery in writing before a loss occurs without voiding the coverage."

The building was completed in June 2010. Slightly less than three years later, the Herman farm experienced strong winds, which caused one half of the building to collapse. The collapse, in turn, killed or caused catastrophic injuries to a large number of Herman's cattle.

Rural asserts that it is undisputed that the building collapsed due to the improper installation of steel rebar cages in the concrete piers supporting the roof. The cages were installed (by Van Wyks) several inches below where Lester's design had originally called for them to be installed. Rural contends that this fact weakened the tops of the concrete columns, causing them to crack and then fail in the high winds.

Rural paid approximately $607,000 to rebuild the barn and approximately $51,000 for the cattle and certain other miscellaneous damages suffered by Herman. Herman did not bring a civil action on its own behalf regarding the collapse of the barn. In 2014 Rural brought a subrogation action against Lester and its insurer, Phoenix Insurance Company (Phoenix), alleging that Lester had breached its building contract with Herman and that it had been negligent in placing the rebar cages lower than had been specified.

Lester filed third-party cross claims against Van Wyks and its insurer, West Bend, alleging that if it was liable to Rural, then Van Wyks and West Bend were responsible for any damages owed to Rural. Rural subsequently filed an amended complaint that contained a direct action claim against West Bend. Rural alleged that "[i]n the event that [Lester] proves the allegations in it Third-Party Complaint, especially that Van Wyks[] was responsible in whole or in part for the [barn's] collapse, . . . then under Wis. Stat. § 632.24, West Bend [] is directly liable to [Rural].

Herman also became involved in the lawsuit and filed cross claims against Van Wyks and West Bend for consequential, incidental, liquidated or special damages. As Rural did in its claim against West Bend, Herman also phrased its claim in a contingent manner: "In the event that Lester Buildings proves the allegations in its Third-Party Complaint, especially that Van Wyks, Inc. was responsible in whole or in part for the collapse of the [barn], the, in that event, West Bend [] is directly liable to [Herman] for the damage and losses caused by Van Wyks, Inc. . . . ."

Lester, Phoenix, Van Wyks, and West Bend filed separate motions for summary judgment against Rural. They argued that the "subrogation waiver" provision in the Lester contract barred any claim by Rural against them. West Bend also filed a separate motion for summary judgment against Herman.

The circuit court granted summary judgment to all of the defendants. It ruled that Rural's claims against all four defendants were barred by the "subrogation waiver" in the Lester contract. It dismissed most of Herman's claim against West Bend because that claim was contingent on Lester's success on its cross-claim against Van Wyks, which would never be determined because Lester would never need to seek contribution or indemnification from Van Wyks.

Rural appealed the dismissal of its claims against Lester, Van Wyks, and West Bend. The Court of Appeals affirmed the circuit court's judgment in all respects. Rural then petitioned

the Supreme Court for review on the interpretation of Wis. Stat. § 895.447 and its application to subrogation waivers in construction contracts.

The following issues are presented in Rural's petition for review:

1. Can a contractor use a subrogation waiver to force the dismissal of tort claims contrary to Wis. Stat. § 895.447, which voids any provision in a construction contract eliminating or limiting tort liability?
2. Can a contractor use a subrogation waiver to prospectively release it from liability for its own reckless conduct when Wisconsin law prohibits the same release in exculpatory contracts?

WISCONSIN SUPREME COURT
March 26, 2019
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), affirming a Milwaukee County Circuit Court decision, Judge Jeffrey A. Wagner, presiding, that denied Trammell's postconviction motion regarding jury instructions.

2017AP1206-CR State v. Emmanuel Earl Trammell

Emmanuel Earl Trammel was charged with one count of armed robbery and one count of operating a motor vehicle without the owner's consent. A jury trial was held. One of the jury instructions given to the jury was a standard instruction, Wis JI——Criminal 140, regarding the burden of proof and presumption of innocence. At issue are the last two sentences of this instruction, which tell the jury, "While it is your duty to give the defendant the benefit of every reasonable doubt, you are not to search for doubt. You are to search for the truth." These sentences are sometimes referred to as the "dual directives." Trammell did not object to the instruction.

The jury convicted Trammell of both counts, as charged, and he was sentenced to twenty years imprisonment for the armed robbery, with a concurrent thirty month sentence for the motor vehicle conviction.

Trammell filed a postconviction motion claiming the jury instruction violated his constitutional rights because it incorrectly instructed jurors on the State's burden of proof. In support of this argument, Trammell cited two then-recently published law review articles that concluded that use of the "dual directives" may mislead jurors into concluding they may convict a defendant even if they have reasonable doubt about his or her guilt.[1] The court denied the motion.

On appeal, the State asserted that Trammell's failure to object to the jury instruction waived any error in the proposed instructions, citing Wis. Stat. § 805.13(3). The Court of Appeals agreed. The Court of Appeals observed further that the challenge would fail anyway because the Wisconsin Supreme Court has already rejected a similar challenge to the propriety of Instruction 140 in State v. Avila, 192 Wis. 2d 870, 532 N.W.2d 423 (1995).[2]

In Avila, the defendant challenged the same language from Instruction 140. The Supreme Court ruled then that it is "not reasonably likely" that Instruction 140 reduces the State's burden of proof. Trammell petitioned the Supreme Court to review, arguing that the recent law review articles suggest that Avila's holding is no longer sound and should be revisited. Trammell also seeks the Supreme Court's review of the Court of Appeals' application of Wis. Stat. § 805.13(3) regarding waiver/forfeiture of his objection.

The following issues are presented in Trammell's petition for review:

---

[1] Michael D. Cicchini & Lawrence T. White, "Truth or Doubt? An Empirical Test of Criminal Jury Instructions," 50 U. Richmond L. Rev., 1139-1167 (2016); Michael D. Cicchini & Lawrence T. White, "Testing the Impact of Criminal Jury Instructions on Verdicts: A Conceptual Replication," 117 Columbia L. Rev. Online, March 1, 2017, pp. 22-35.

[2] State v. Avila, 192 Wis. 2d 870, 532 N.W.2d 423 (1995), was reversed in part by State v. Gordon, 2003 WI 69, ¶5, 262 Wis. 2d 380, 663 N.W.2d 765, but on unrelated grounds.

1. Is this court's holding in its Avila decision – that it is "not reasonably likely" that the standard JI-140CR reduces the State's burden of proof – good law; or should it be overruled by this court on the ground that it stands rebutted by empirical evidence?

2. Whether Wis. Stat. § 805.13(3) bars defendants from raising, post-trial, objections to jury instructions not raised during an instruction conference, if the objections were not known, and could not have been known or discovered, by the time of the conference?

WISCONSIN SUPREME COURT
March 26, 2019
10:45 a.m.

2018AP656 L.G. v. Aurora Residential Alternatives, Inc.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), that dismissed Aurora Residential Alternatives, Aurora Integrated Management, and Aurora Community Services's (collectively, "Aurora") appeal for lack of jurisdiction on the ground that the appeal concerned a non-final order of the Dunn County Circuit Court, Judge Rod W. Smeltzer presiding.

In October 2012, an Aurora employee sexually assaulted L.G., a mentally disabled woman who resided at an Aurora-operated residential facility. L.G. is subject to a guardianship managed by Chippewa Family Services, Inc., and was also under court-supervised protective placement pursuant to Wis. Stat. Chapter 55. In February 2014, the employee pled guilty to one count of fourth-degree sexual assault.

In September 2017, L.G. filed a lawsuit against Aurora, claiming negligence and a violation of the rights afforded to her under Wis. Stat. §§ 55.23 and 51.61, as a mental health patient in a residential facility. L.G. served Aurora with the complaint in late October 2017.

In December 2017, Aurora moved to compel arbitration and stay the trial court proceedings. Aurora claimed that L.G.'s claim must be submitted to arbitration because, in August 2016, L.G.'s guardian signed an admission agreement with Aurora on L.G.'s behalf, and this admission agreement incorporated an arbitration agreement.

L.G. opposed Aurora's motion, arguing that the arbitration agreement could not possibly govern L.G.'s claims given that they arose four years before the arbitration agreement was signed, and given that the agreement's language cannot be read to cover sexual-assault-based claims known at the time of the agreement's execution.

In February 2018, the trial court entered a written order that: (1) denied Aurora's motion to compel arbitration; (2) bifurcated an insurance coverage question; and (3) set various briefing and discovery deadlines. The order stated at the bottom of the final page: "THIS IS A FINAL ORDER FOR PURPOSES OF APPEAL."

Forty-five days after the trial court order, Aurora filed a standard notice of appeal—— one that assumed that the trial court order was a final order appealable by right, under Wis. Stat. § 808.03(1).

L.G. moved to dismiss the appeal for lack of jurisdiction on the ground that Aurora was seeking review of a non-final order. The Court of Appeals granted L.G.'s motion. Aurora then filed a motion for reconsideration or, in the alternative, a motion for extension of time to file a permissive appeal. The Court of Appeals denied Aurora's reconsideration motion on the ground that, "notwithstanding the erroneously-included finality language" in the trial court's order, "it is plain that the order denying arbitration does not dispose of the matter in litigation among the parties." The Court of Appeals also denied Aurora's alternative motion for extension of time to file a permissive appeal on the ground that, although Aurora may have believed that it could appeal as of right under the Federal Arbitration Act, "it is well established that the FAA does not control state appellate procedures and that, under the Wisconsin Rules of Appellate Procedure, a litigant must seek leave to appeal a nonfinal order denying arbitration."

Aurora petitioned the Supreme Court for review, offering the following issue:

> Whether an order denying a motion to compel arbitration is immediately appealable, as of right, under either Wis. Stat § 808.03(1)'s "final order" rule, or under the Federal Arbitration Act.

WISCONSIN SUPREME COURT
March 26, 2019
1:30 p.m.

2016AP2503 & 2017AP13 Enbridge Energy Company, Inc. v. Dane County

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), that reversed and remanded a Dane County Circuit Court decision, Judge Peter Anderson presiding, that had granted summary judgment in favor of Enbridge Energy Company, Inc.

Enbridge Energy operates an extensive crude oil pipeline that includes a 12-mile line in northeast Dane County. In 2014, Enbridge Energy sought a conditional use permit (CUP) from Dane County to allow it to expand the volume of oil pumped through this line.

The Dane County Zoning and Land Regulation Committee retained an insurance expert, asked Enbridge to "produce documentation regarding proof of insurance," and considered the permit application. The expert report recommended, among other things, that any CUP should require Enbridge to "procure and maintain" two "liability insurance policies over the course of the permit duration," essentially to ensure that Enbridge would have money available to pay for damages and clean-up if there were to be an oil spill. In April 2015, the zoning committee approved a CUP with 12 conditions, including the two insurance requirements.

Effective July 14, 2015, the state legislature passed legislation that precludes a county from requiring an operator of an interstate hazardous pipeline (like Enbridge) to obtain insurance "if the pipeline operating company carries comprehensive general liability insurance coverage that includes coverage for sudden and accidental pollution liability." See 2015 Wis. Act 55, codified in relevant part at Wis. Stat. §§ 59.69(2)(bs) and 59.70(25).

Faced with this change to the law, the zoning committee elected to retain the two insurance conditions, but added language quoting the new law to signal that these conditions were unenforceable. The county board sustained the zoning committee's decision.

In January 2016, Enbridge asked the circuit court to require the zoning committee and the county board to sever the two permit conditions from the CUP.

Meanwhile, in February 2016, several property owners who own land near this pipeline filed a separate lawsuit seeking an injunction to enforce the permit conditions. They asserted, among other things, that Enbridge had never actually demonstrated that it carried comprehensive general liability insurance coverage that includes coverage for sudden and accidental pollution liability.

The circuit court ruled that the two conditions are preempted by the Act 55 insurance limitation and ordered these conditions severed from the CUP. The circuit court also ruled that the landowners were not permitted to challenge whether Enbridge had demonstrated it carried comprehensive general liability insurance coverage. The county and the landowners both appealed. The Court of Appeals consolidated the appeals and reversed.

The Court of Appeals ruled that the landowners may challenge whether Enbridge adequately showed the zoning committee that it carries the insurance specified in the Act 55 insurance limitation. The Court of Appeals ruled that in order to trigger the Act 55 insurance limitation, Enbridge needed to show the zoning committee that it "carries" insurance that "includes" coverage "for sudden and accidental pollution liability."

The Court of Appeals expressed concern that by simply severing these conditions from the CUP, the circuit court had eliminated certain detailed requirements related to insurance that had been incorporated by the county. The appellate court reasoned that that the county may not have issued the CUP without an assurance of insurance coverage. The Court of Appeals concluded that the appropriate remedy was to remand the case to the circuit court with directions to return this matter to the zoning committee for its review.

Enbridge petitioned the Supreme Court for review, presenting the following issues:

> 1. Wisconsin law expressly preempts counties from imposing certain insurance requirements on pipeline operators as conditions in a conditional use permit. Can a county, while conceding that state law prevents it from enforcing a particular insurance requirement, nonetheless include that requirement as a condition in a CUP granted to a pipeline operator?
>
> 2. Wisconsin law permits property owners, under certain circumstances, to enforce county "zoning ordinances." Under this law, (1) can a property owner bring a citizen suit to enforce a particular condition in a CUP issued by a county, and (2) if so, can a property owner bring a citizen suit to enforce that condition when the county concedes that the condition is unenforceable?
>
> 3. If the holder of an approved CUP successfully challenges a particular condition in that permit——but not the permit in its entirety——as unlawful, is striking the unlawful condition a proper remedy? Does this Court's remedy jurisprudence under Adams v. [State] Livestock Facilit[ies] Siting Review Board[, 2012 WI 85, 342 Wis. 2d 444, 820 N.W.2d 404] apply to land-use permitting more generally?