WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
JANUARY 2015

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:

Bayfield
Brown
Eau Claire
Kenosha
Marinette
Milwaukee
Sheboygan
Waukesha

THURSDAY, JANUARY 8, 2015

9:45 a.m.	13AP1531-CR	-	State v. Brian S. Kempainen
10:45 a.m.	13AP558-CR	-	State v. Joel M. Hurley
1:30 p.m.	13AP591	-	Oneida Seven Generations Corporation v. City of Green Bay

FRIDAY, JANUARY 9, 2015

9:45 a.m.	97AP3862-D	-	Office of Lawyer Regulation v. Nancy A. Schlieve
10:45 a.m.	13AP2207	-	Milwaukee City Housing Authority v. Felton Cobb
1:30 p.m.	12AP2692-CR	-	State v. Roddee W. Daniel

WEDNESDAY, JANUARY 14, 2015

9:45 a.m.	13AP1303	-	Acuity v. Chartis Specialty Insurance Company
10:45 a.m.	12AP2552	-	Holman v. Harvey (joint stipulation for voluntary dismissal pending)

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. That office will also have the names of the attorneys who will be arguing the cases.

Media interested in providing camera coverage, must make requests 72 hours in advance by calling media coordinator Rick Blum at (608) 271-4321. Summaries provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
THURSDAY, JANUARY 8, 2015
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which reversed a Sheboygan County Circuit Court decision, Judge Terence T. Bourke, presiding.

2013AP1531-CR State v. Kempainen

This case examines whether a trial court must apply the first three factors of State v. Fawcett, 145 Wis. 2d 244, 426 N.W.2d 91 (Ct. App. 1988) to determine whether a complaint is sufficiently definite in a case involving delayed allegations of sexual assault.

(See also the synopsis for State v. Hurley, 2013AP558-CR, which examines some similar issues.)

The Fawcett court set forth seven factors that courts are to consider in determining whether the dates alleged in a criminal complaint are specific enough to satisfy due process:

> (1) the age and intelligence of the victim and other witnesses; (2) the surrounding circumstances; (3) the nature of the offense, including whether it is likely to occur at a specific time or is likely to have been discovered immediately; (4) the length of the alleged period of time in relation to the number of individual criminal acts alleged; (5) the passage of time between the alleged period for the crime and the defendant's arrest; (6) the duration between the date of the indictment and the alleged offense; and (7) the ability of the victim or complaining witness to particularize the date and time of the alleged transaction or offense.

Some background: In December of 2012, the state charged Brian S. Kempainen with two counts of sexual assault of a child under the age of 13. In October of 2012, the child reported that the defendant had sexual contact with her "on or about Aug. 1, 1997 to Dec. 1, 1997," when she was eight years old, and "on or about March 1, 2001 to June 15, 2001," when she was 11 or 12.

The circuit court granted the defendant's motion to dismiss the charges on the ground they violated his due process rights by failing to provide him with adequate notice. The Court of Appeals disagreed and reversed.

The defendant argued that the circuit court correctly refused to apply the first three Fawcett factors because the defendant did not claim the state could have obtained a more definite date through diligent efforts.

The Court of Appeals concluded courts may consider all of the Fawcett factors in determining whether a charge was sufficiently pled. The Court of Appeals said to the extent State v. R.A.R., 148 Wis. 2d 408, 435 N.W.2d 315 (Ct. App. 1988) suggests that courts may not consider the first three Fawcett factors unless a defendant claims a lack of prosecutorial diligence, such a reading would conflict with its earlier holding in Fawcett and only this court has the power to overrule, modify, or withdraw language from a published opinion of the Court of Appeals. Cook v. Cook, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Accordingly, the Court of Appeals said it must follow Fawcett and must consider all Fawcett factors that relate to this case.

After consideration of all of the Fawcett factors, the Court of Appeals concluded that the charges in this case were sufficiently pled.

Kempainen argues that the Court of Appeals' conclusion that all Fawcett factors must always be considered runs contrary to the holding of R.A.R. The defendant says as it now stands, R.A.R. and Fawcett are in direct conflict. It says as noted in Cook, the Court of Appeals is unable to resolve that conflict.

The state opposes review, saying nothing in the Court of Appeals' decision requires trial courts to apply the first three Fawcett factors. The state says instead, the Court of Appeals simply reiterated that trial courts may apply all seven factors if it deems them helpful. The state argues the Court of Appeals' decision simply reiterates and reinforces its earlier decision in Fawcett.

WISCONSIN SUPREME COURT
THURSDAY, JANUARY 8, 2015
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which reversed in part a Marinette County Circuit Court decision, Judge David G. Miron, presiding.

2013AP558-CR State v. Hurley

This case examines the standards courts should use in evaluating due process notice challenges to complaints that allege the crime of repeated sexual assault of a child.

A decision by the Supreme Court also may resolve a possible conflict between two Court of Appeals' decisions, State v. Fawcett, 145 Wis. 2d 244, 426 N.W.2d 91 (Ct. App. 1988), and State v. R.A.R., 148 Wis. 2d 408, 435 N.W.2d 315 (Ct. App. 1988).

(See also the synopsis for State v. Kempainen, 2013AP1531-CR, which examines some similar issues).

Some background: The Court of Appeals reversed in part a post-conviction order vacating a judgment of conviction against Joel M. Hurley for one count of repeated sexual assault of the same child. The Court of Appeals also granted Hurley a new trial and denied post-conviction motions, including his claim that he was entitled to a new trial based on an improper remark made by the prosecutor during his closing argument. The Court of Appeals remanded for the circuit court to dismiss the charge without prejudice. The Court of Appeals also concluded that the circuit court erred in admitting other acts evidence, and it concluded the error was not harmless so even absent dismissal of the charge, the defendant would be entitled to a new trial.

In July 2011 an amended complaint was filed charging Hurley with one count of repeated sexual assault of the same child, contrary to § 948.025, Stats. The charging section of the amended complaint alleged that the assaults occurred "on and between 2000 and 2005." As probable cause for the charge, the amended complaint alleged that a 15-year-old girl that Hurley had placed his fingers inside her vagina approximately several times when she between the ages of six and 11. She could not say in which months, seasons, or years the assaults occurred, or how much time passed between the individual assaults. The court found probable cause and bound the defendant over for trial.

Before trial, the state filed a motion in limine seeking leave to introduce "other acts" evidence. The state sought to introduce evidence that the defendant had sexually assaulted another girl during the mid-1980s when that girl was 8 to 10 years old and the defendant was 12 to 14 years old. That girl's testimony was admitted as "other acts" evidence.

The jury found Hurley guilty of the charged offenses. The circuit court, following an evidentiary hearing on a post-conviction motion, ordered a new trial. The decision to order a new trial was based on a statement made by the prosecutor during his closing argument to the effect that the defendant did not make a strong denial of the second girl's allegations at trial, and instead testified he did not recall the alleged incidents.

The circuit court rejected Hurley's claim that the complaint violated his right to due process by failing to provide adequate notice to prepare a defense. The Court of Appeals did not address whether the lower court erred in ordering a new trial based on the prosecutor's closing argument remarks. Instead, it concluded that the criminal complaint violated the defendant's

right to due process and that the circuit court erred in admitting the other acts testimony. The Court of Appeals remanded for the circuit court to enter an order dismissing the complaint with prejudice.

Hurley argued that the amended complaint violated his right to due process because the time period in which it alleged the sexual assaults occurred was not specific enough to give him adequate notice of the charge so that he could mount a defense.

The Court of Appeals noted a defendant is entitled to be informed of the charges against him, including the time frame in which the offense allegedly occurred. The court went on to say while the girl's inability to provide specific dates for each of the assaults was understandable, her inability to narrow the five-year charging period was not.

WISCONSIN SUPREME COURT
THURSDAY, JANUARY 8, 2015
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which reversed in part a Brown County Circuit Court decision, Judge Marc A. Hammer, presiding.

2013AP591 Oneida Seven Generations Corp. v. City of Green Bay

This case involves a dispute over the City Council of Green Bay's revocation of a conditional-use permit (CUP) for a subsidiary of the Oneida tribe, Oneida Seven Generations Corp., to operate a waste-to-energy facility that would use "pyrolysis" to vaporize waste with intense heat.

The Supreme Court examines two issues:

- Under precedent establishing certiorari review standards, should the Court of Appeals have remanded the case back to the municipality once it concluded that the municipality failed to articulate the rationale for its decision?
- Did the Court of Appeals' "substantial evidence" review conflict with controlling decisions of this Court addressing the substantial evidence standard to be applied in certiorari actions by equating the substantial evidence standard with the great weight and clear preponderance of the evidence standard and substituting its judgment for that of the municipality?

Some background: The city's plan commission had twice approved issuing the permit – once before and once after opponents objected at a public hearing. However, the council ultimately voted to deny the permit after opponents contended at a city council meeting that the tribe misrepresented the potential for pollution from the facility.

The city notified Seven Generations of its decision by letter on Nov. 1, 2012. The city advised that the CEO of Seven Generations made untruthful statements in response to questions or concerns related to the public safety and health aspect of the project. The city did not identify exactly what information it considered false or how it determined the falsity of the information. The city denied Seven Generations' request for a ch. 68, Stats. administrative appeal.

Seven Generations filed a certiorari action in circuit court. The City filed a brief in opposition in which it identified the alleged misrepresentations for the first time. The City claimed that Seven Generations had misrepresented at the Plan commission's Feb. 21, 2011 hearing that the facility would be a closed system with no emissions, smokestacks, or hazardous material, and that the technology was proven. The circuit court agreed, concluding that the City's revocation of the CUP was not arbitrary and was based on substantial evidence. Seven Generations appealed, and the Court of Appeals reversed.

The Court of Appeals noted that certiorari is a means by which a court may test the validity of a decision rendered by a municipality. It also noted that municipal decisions are entitled to a presumption of correctness and validity, and it said its review is limited.

While the Court of Appeals said the decision to grant or revoke a CUP involves the exercise of a municipality's discretion and it is hesitant to interfere with discretionary determinations, discretion is not synonymous with decision making and a municipality misuses its discretion when it makes a decision that is unreasonable or without a rational basis. It noted

that in Westring v. James, 71 Wis. 2d 462, 476-77, 238 N.W.2d 695 (1976), this court said a flagrant misuse of discretion has been described as capricious, meaning “a whimsical, unreasoning departure from established norms or standards; it describes action which is mercurial, unstable, inconstant, or fickle.”

The Court of Appeals said it was “disappointed” that the City did not mention the Plan commission’s conclusions in rendering its decision to revoke the CUP. The court said even more dismaying was the city’s failure to articulate any rationale for its decision to revoke, and the court said the absence of any identifiable false statements in the city’s decision was “troubling.” The court said to properly review the city’s action, the basis for that action must be known because without a statement of reasoning, it is impossible to meaningfully review a board’s decision and the value of certiorari review becomes worthless. See Lamar Cent. Outdoor, Inc. v. board of Zoning Appeals of Milwaukee, 2005 WI 117, ¶32, 284 Wis. 2d 1, 700 N.W.2d 87

The Court of Appeals said the city did not identify Seven Generations’ allegedly false statements prior to the commencement of the certiorari action. The court said the exercise of discretion must be evident from the municipal record, to which the court’s review is confined. The court went on to say that even if were to allow the city to “fill in” its rationale on certiorari review, none of the allegedly false statements belatedly identified by the city constitute substantial evidence of misrepresentation.

While the City also claimed that Seven Generations misrepresented that the facility would have no smokestacks, the Court of Appeals said none of the statements on which the city relied could be reasonably interpreted as a promise that there would be no stacks or vents. The court said, “again, no reasonable person could believe that a gas-burning engine would not produce exhaust, which must be expelled from the facility.” The court also said Seven Generations informed the Common Council before the CUP was granted that the facility would require exhaust outlets. The court said the final design for the facility was fully consistent with the fact sheet and presentation Seven Generations submitted to the Plan commission, which said there would be “no smokestacks such as those associated with coal-fired power plants.”

While the city argued that Seven Generations misrepresented the technology used in the proposed facility as proven, the Court of Appeals said it perceived no misrepresentations in Seven Generations’ statement with respect to the state of pyrolysis technology.

The city argues that Supreme Court review is needed because rather than remanding the matter back to the city to give it a chance to more explicitly articulate its rationale for the revocation decision, the Court of Appeals proceeded to review the evidence in the record and make its own determination as to whether Seven Generations made any misrepresentations. The city argues the Court of Appeals’ handling of this case is contrary to prior decisions saying that when a decision-maker has not properly explained its decision, remand is the appropriate remedy.

Seven Generations says the unpublished Court of Appeals’ decision rests on the well established legal principle that a municipality may not act arbitrarily or without substantial evidence.

WISCONSIN SUPREME COURT
FRIDAY, JANUARY 9, 2015
9:45 a.m.

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers. Lawyers must follow a code of ethics developed by the Court. When there is an allegation that a lawyer has acted unethically, the Supreme Court's Office of Lawyer Regulation (OLR) investigates, and, if warranted, prosecutes the attorney. A referee - a court-appointed attorney or reserve judge - hears the discipline cases and makes recommendations to the Supreme Court. The lawyer involved in this case is from Eau Claire.

1997AP3862 Office of Lawyer Regulation v. Nancy A. Schlieve

In this case, Atty. Nancy A. Schlieve has appealed the referee's recommendation that her petition for the reinstatement of her license to practice law in Wisconsin be denied because she has failed to prove that she is fit to resume the practice of law.

Schlieve was licensed to practice law in Wisconsin in 1990. In 1997, this court imposed conditions on her license directed toward her rehabilitation from alcoholism. In 1998, this court suspended her license due to her medical incapacity of alcoholism. The suspension was imposed for an indefinite period of time. In 2010 this court denied Schlieve's petition for the reinstatement of her license to practice law on the grounds that she had failed to meet her burden of proving "fitness" as required by SCR 22.36(6). In re Medical Incapacity Proceedings Against Schlieve, 2010 WI 22, 323 Wis. 2d 654, 780 N.W.2d 516.

Schlieve filed a second petition for reinstatement. Although the referee said that he was satisfied that the medical incapacity of alcoholism has been removed, he concluded that Schlieve was still suffering from a medical incapacity. The referee based this conclusion on the fact that, while participating in a lawyers assistance program, Schlieve had two positive drug screens showing codeine in her system and she failed to complete sustained monitoring for a period of at least twelve months. The referee concluded that Schlieve failed to prove that she is currently fit to resume the practice of law.

Schlieve has appealed, arguing that she has in fact met her burden of proving that her medical incapacity has been removed and that she is fit to practice law.

The Supreme Court is expected to decide whether Schlieve has met her burden of proving that she is fit to resume the practice of law and whether her law license should be reinstated.

WISCONSIN SUPREME COURT
FRIDAY, JANUARY 9, 2015
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed a Milwaukee County Circuit Court decision, Judge Pedro M. Colon, presiding.

2013AP2207 Milwaukee City Housing Authority v. Cobb

The issue in this case is whether federal public housing law preempts Wis. Stat. § 704.17(2)(b), which permits landlords to terminate tenancies upon lease breaches if the landlord gives the tenant notice allowing the tenant five days to remedy the default or vacate the premises.

Some background: Felton Cobb lived in an apartment he rented from the Housing Authority of the City of Milwaukee. The Housing Authority is a public body, organized and chartered pursuant to Wis. Stat. § 66.1201, for the purpose of operating a low-income housing program under the U.S. Housing Act of 1937, codified at 42 U.S.C. § 1437, et seq. It is funded by the U.S. Department of Housing and Urban Development (HUD) and regulated by Title 24 of the Code of Federal Regulations.

A Public Safety Officer for the Housing Authority was patrolling the hallways of the building where Cobb lived when he detected the scent of smoked marijuana. The odor was strongest outside the door to the unit occupied by Cobb, who rents from the Housing Authority under the terms of a one-year lease. The officer knocked on the door, and Cobb opened it slightly. The officer noticed that the smell intensified when Cobb opened his door. The officer concluded that Cobb had been smoking marijuana in violation of his lease, although Cobb denied having done so.

The Housing Authority began an eviction action without first giving Cobb the five-day right-to-cure notice required by Wis. Stat. § 704.17(2)(b).

Both Cobb and the public safety officer testified before the trial court, which determined that the officer was more credible and that Cobb had engaged in illegal drug-related activity. Citing certain federal cases, the trial court ruled that, where criminal activity is found by the trial court, there doesn't have to be a cure offered the tenant prior to eviction. The trial court entered judgment evicting Cobb from his apartment.

Cobb appealed, successfully. The specific question for the Court of Appeals was whether the Housing Authority's failure to provide the five-day right-to-cure notice required by Wis. Stat. § 704.17(2)(b) deprived the trial court of competency to adjudicate the eviction action even though the federal public housing law (42 U.S.C. § 1437) does not require a five-day right-to-cure notice. The Court of Appeals answered "yes."

In its filings with the Supreme Court, the Housing Authority argues that § 704.17(2)(b)'s right-to-cure provision runs directly contrary to federal public housing law's objective of preventing crime in federally-assisted housing by permitting the prompt eviction of drug-using tenants.

WISCONSIN SUPREME COURT
FRIDAY, JANUARY 9, 2015
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which reversed a Kenosha County Circuit Court decision, Judge Wilbur W. Warren III, presiding.

2012AP2692-CR State v. Daniel

This case examines the correct burden of proof applicable when a criminal defendant's competency is raised in a post-conviction proceeding.

Some background: The factual background is not in dispute. Roddee W. Daniel was 15 years old when the crimes at issue – including the murder of Capri Walker – were committed. Pretrial, Daniel, a diagnosed schizophrenic, was charged with being a party to the crime of first-degree intentional homicide and of burglary while armed with a dangerous weapon. Daniel was found competent to stand trial. He was convicted and sentenced to life in prison, without extended supervision.

Daniel's lawyer on appeal proceedings contends this case is "replete with potential issues of arguable merit on appeal, including contested motions for reverse waiver, to dismiss the criminal complaint for the unconstitutionality of the statute, to sever defendants for trial, for change of venue, to suppress statements, to determine competency, etc., which were all decided against the Defendant." Appellate counsel states that he has been unable to address those appellate issues because Daniel has inconsistently wanted to terminate representation. He questioned Daniel's ability to understand his § 809.30 appellate rights and also questioned Daniel's ability to effectively communicate with his counsel.

The circuit court conducted an evidentiary hearing and asked Daniel directly if he was competent to make decisions related to his appeal, and Daniel answered, "Yeah." Daniel's counsel then asked Daniel a number of questions seeking to elicit Daniel's understanding (or lack thereof) of the appeal process. The court denied the state's request for a directed verdict on the issue of Daniel's competence after Daniel's counsel stated that he wished to provide further evidence. The court initially placed the burden on Daniel's counsel to prove Daniel's incompetence by the "preponderance of the evidence."

Daniel's counsel called a number of witnesses, including competing experts, whose testimony weighed both for and against Daniel's post-conviction competency.

Following testimony, the court directed the parties to submit closing arguments in writing. Daniel's counsel argued that he had proved Daniel's incompetence "beyond any reasonable doubt" and that the statute established the burden for showing incompetency was by the "clear and convincing" evidence standard.

The State agreed that the standard required of Daniel's counsel was the "clear and convincing evidence" standard. In its oral ruling, the court concluded that Daniel was competent as "the defense had not met their burden to prove that he is incompetent by clear and convincing evidence."

The Court of Appeals granted leave to appeal and reversed. The Court of Appeals ruled that a court may allocate the burden of persuasion to the defendant (or defense counsel) in a post-conviction competency proceeding, but must utilize a "preponderance/greater weight of the evidence" burden of proof when doing so. The Court of Appeals ruled that the circuit court erred by imposing a higher middle "clear and convincing" evidence standard. The Court of Appeals remanded for further proceedings (restoring Daniel's Wis. Stat. § 809.30 time limits).

Daniel presents the following issues to the Supreme Court:

- Should a defendant bear the burden of proving incompetency in a post-conviction proceeding in Wisconsin?

- What procedure should be employed when a defendant and defense counsel disagree as to the defendant's competency?
- What standard of review should be applied to a circuit court's post-conviction competency determination?

WISCONSIN SUPREME COURT
WEDNESDAY, JANUARY 14, 2015
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which reversed a Waukesha County Circuit Court decision, Judge J. Mac Davis, presiding.

2013AP1303 Acuity v. Chartis Specialty Ins. Co.

This is a dispute between two insurance companies, Acuity and Chartis Specialty Ins. Co., about whether or not they shared a duty to defend and indemnify their respective insured, Dorner, Inc., in four consolidated lawsuits.

Some background: The lawsuits were filed as a result of a serious natural gas explosion that occurred when, during excavation, Dorner employees disturbed an underground natural gas line.

The explosion from the ruptured gas line destroyed a church, damaged nearby houses, and seriously injured two Wisconsin Electric employees. Acuity did not contest its duty to defend and indemnify Dorner, pursuant to the commercial general liability policy it issued to Dorner.

However, Acuity asserted that Chartis also had a duty to defend and indemnify Dorner pursuant to a Contractor Pollution Liability (CPL) policy. Chartis disagreed, asserting that it was liable for bodily injury and property damage only if caused by pollution conditions, and maintained that neither the explosion, the bodily injury, nor the property damage was a "pollution condition" under the terms of the policy.

In the circuit court, both Acuity and Chartis moved for summary judgment. On Jan. 28, 2011, the circuit court concluded that Chartis breached its duty under the CPL policy and ordered Chartis to defend Dorner. The court did not allocate the defense and indemnity payments at that time.

Subsequently, the court ordered the insurers to share defense costs and indemnity settlements or judgments on a 50-50 basis. The last of the underlying cases was settled in May 2013. The parties stipulated that: (1) Dorner's defense costs were $283,073.94; (2) Chartis already had paid Acuity $141,486.08, its 50-percent share; (3) the indemnity settlements Acuity had paid on Dorner's behalf amounted to $1,531,761.80; (4) Chartis' 50-percent share of the settlements was $765,880.90; and (5) taxable costs were $905.75.

Accordingly, the circuit court entered an order for judgment against Chartis and in favor of Acuity in the amount of $766,786.65, Chartis' 50-percent share of the indemnity settlements plus taxable costs. Chartis appealed. The Court of Appeals reversed, ruling that Chartis had no duty to defend or indemnify Dorner.

The Court of Appeals noted an insurer's duty to defend its insured is determined by comparing the allegations of the complaint to the terms of the insurance policy. Estate of Sustache v. American Fam. Mutual Ins. Co., 2008 WI 87, ¶20, 311 Wis. 2d 548, 751 N.W.2d 845. The duty to defend "is necessarily broader than the duty to indemnify because the duty to defend is triggered by arguable, as opposed to actual, coverage." Fireman's Fund Ins. Co. of Wis. v. Bradley Corp., 2003 WI 33, ¶20, 261 Wis. 2d 4, 660 N.W.2d 666.

The duty is triggered if the allegations, if proved, "give rise to the possibility of recovery" under the policy. *Id.,* ¶19. The existence of coverage under the facts in the complaint need only be "fairly debatable." *See* Baumann v. Elliott, 2005 WI App 186, ¶118-19, 286 Wis. 2d 667, 704 N.W.2d 361. If even one theory in a complaint appears to fall within the policy's coverage, the insurer is obligated to defend the entire action. State Farm Fire & Cas. Co. v. Acuity, 2005 WI App 77, ¶8, 280 Wis. 2d 624, 695 N.W.2d 883.

Acuity appealed to the Supreme Court, which has been asked to decide if Chartis breached its duty to defend and indemnify its insured.

WISCONSIN SUPREME COURT
WEDNESDAY, JANUARY 14, 2015
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which reversed a Bayfield County Circuit Court decision, Judge Robert E. Eaton, presiding.

2012AP2552 Holman v. Harvey

This case examines the "known and compelling danger" exception to the governmental immunity doctrine under Wis. Stat. § 893.80(4).

Some background: On Jan. 4, 2011, Michael S. Harvey, the highway superintendent for the town of Washburn in Bayfield County, backed a grader into an intersection while scraping ice from the highway. While blocking the intersection, the grader was struck by a mini-van, resulting in injuries to three brothers (the Holmans), including the driver and two passengers.

The Holmans sued Harvey for damages. Harvey moved for summary judgment, arguing he was entitled to governmental immunity under § 893.80(4), Stats. He also asserted that the Holmans' claims were subject to the $50,000 per person damage cap for claims against governmental subdivisions and their employees under § 893.80(3). The Holmans conceded that their claims were capped at $50,000. The Holmans argued Harvey was not entitled to governmental immunity because the ministerial duty and known and compelling danger exceptions to immunity applied.

The circuit court denied Harvey's summary judgment motion, concluding there was a genuine issue of material fact as to whether Harvey was confronted with a known and compelling danger. The circuit court did not address the ministerial duty exception. The parties stipulated to entry of judgment against Harvey in the amount of $50,000 for Brody Holman, $5,000 for Hunter Holman, and $16,500 for Jordan Holman. They also agreed the claims of the Holman brothers' parents could be dismissed with prejudice. The stipulation preserved Harvey's right to appeal the circuit court's denial of his summary judgment motion. The Court of Appeals reversed and concluded that Harvey was entitled to summary judgment on his governmental immunity claim.

The Holmans have asked the Supreme Court to review:

- Did Harvey exercise "legislative, quasi-legislative, judicial or quasi-judicial functions" for purposes of Wis. Stat. § 893.80(4) when he violated Wisconsin's rules of the road, including Wis. Stat. § 346.87, mandating safe backing, and Wis. Stat. § 346.46(1), the Stop Sign Statute, requiring stopping and yielding the right-of-way to vehicles approaching on a through highway?
- Does the known danger exception to governmental immunity apply to the hazard created by blindly backing a motor grader into an intersection in front of an approaching vehicle?