2018 Guide to the Wisconsin Supreme Court and Judicial Evaluation

2017-18, 2016-17, 2015-16, 2014-15, 2013-14 & 2012-13 Terms

September 2018

WISCONSIN CIVIL JUSTICE COUNCIL, INC.

Promoting Fairness and Equity in Wisconsin's Civil Justice System

2018 GUIDE TO THE WISCONSIN SUPREME COURT AND JUDICIAL EVALUATION

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The Wisconsin Civil Justice Council, Inc. (WCJC) was formed in 2009 to represent Wisconsin business interests on civil litigation issues before the legislature and courts. WCJC's mission is to promote fairness and equity in Wisconsin's civil justice system, with the ultimate goal of making Wisconsin a better place to work and live.

The WCJC board is proud to present its third Guide to the Wisconsin Supreme Court and Judicial Evaluation. The purpose of this publication is to education WCJC's board members and the public by providing a summary of the most important decisions issued by the Wisconsin Supreme Court impacting Wisconsin business interests.

BOARD MEMBERS

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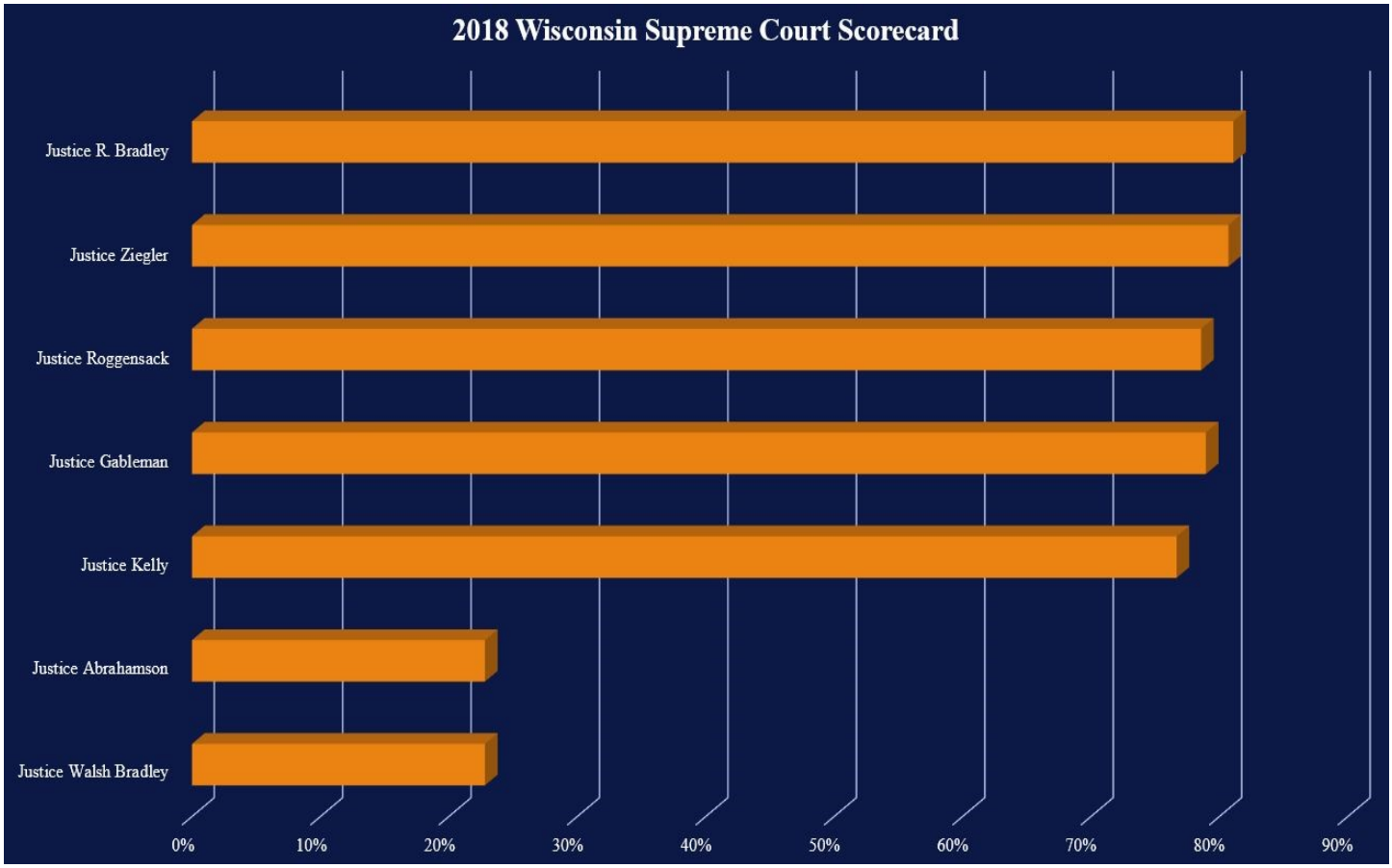
Executive Summary

The Wisconsin Supreme Court issues decisions that have a direct impact on Wisconsin businesses and individuals. WCJC's Guide to the Wisconsin Supreme Court and Judicial Evaluation provides summaries of the most important and relevant cases affecting Wisconsin's business community. This third edition of the guide covers terms 2012-13 through 2017-18.

In addition to providing background information about the court, the sitting justices, and the role of the judicial branch in government, the 2018 Guide to the Wisconsin Supreme Court and Judicial Evaluation tracks how the justices decided each case. Below is the 2018 scorecard for the past six terms. The graph indicates how often the individual justices decided cases in favor of the positions taken by WCJC.



INTRODUCTION

The purpose of this paper is to educate WCJC's members, partners, and the public about the role of the Supreme Court and how it functions with the other two branches of government. In addition, it provides summaries of cases relevant to the business community and notes how each justice voted in the selected cases.

About WCJC
WCJC is a broad coalition of organizations interested in civil liability issues. WCJC's mission is to achieve fairness and equity in Wisconsin's civil justice system, with the ultimate goal of making Wisconsin a better place to work and live. WCJC effectuates this objective through policy development, education, legislative lobbying, and its appellate program.

How the Wisconsin Supreme Court Works
The Supreme Court, consisting of seven justices, has appellate jurisdiction over all Wisconsin state courts and has discretion to determine which appeals it will hear. The court may also hear original actions – cases that have not been heard in a lower court. Review is based on criteria described in Wis. Stat. Ch. 809.

Individuals or organizations who are not actual parties to a case before the court may file an *amicus curiae* (friend of the court) brief presenting their unique interests in the case.

The justices meet in private conference to decide the outcome of a case. Immediately after the court reaches its tentative decision, the case is assigned to a justice for preparation of the court's opinion. Any justice not assigned to author the opinion may choose to write either a concurring or dissenting opinion. Once the decisions are drafted and approved by the justices, the court issues its decision. The Wisconsin Supreme Court's opinions can be found on the court's website (www.wicourts.gov).

Each term begins in September and runs through June, with opinions being issued into July. To read about the court's internal operating procedures, visit www.wicourts.gov/sc/IOPSC.pdf.

Importance of Supreme Court's Decisions to WCJC Members
Many organizations spend considerable resources attempting to influence elected officials in the legislative and executive branches. Although those two branches significantly impact the business community, the court's decisions can equally affect the business community, negatively or positively. The Supreme Court has the ultimate authority to interpret or strike down laws and regulations enacted by the legislature or promulgated by state agencies. Virtually every business, medical provider, and insurer is directly affected by at least some of the court's decisions.

Wisconsin Supreme Court Members

Current Justices:

Chief Justice Patience Roggensack was elected to the court in 2003 and reelected in 2013. In 2015, she became the first justice chosen by members of the court to serve as chief justice and in that capacity serves as the administrative leader of the Wisconsin Court system. She is up for reelection in 2023.

Justice Shirley Abrahamson was appointed to the court by Gov. Patrick Lucey in 1976 and has won reelection to the court in 1979, 1989, 1999, and 2009. She served as Chief Justice from 1996-2015. Her term is up in 2019, and she has stated she will not run for reelection.

Justice Ann Walsh Bradley was elected to the court in 1995 and reelected in 2005 and 2015. She is up for reelection in 2025.

Justice Annette Zielger was elected to the court in 2007 and reelected in 2017. She is up for reelection in 2027.

Justice Michael Gableman was elected to the court in 2008. He is retiring from the court in 2018. Justice Rebecca Dallet has been sworn in to replace him in the upcoming terms.

Justice Rebecca Bradley was elected to the court in 2016 after being appointed by Gov. Scott Walker in 2015. She is up for reelection in 2026.

Justice Daniel Kelly was appointed to the court by Gov. Scott Walker in 2016 and is up for reelection in 2020.

Former Justices:

Justice Patrick Crooks served on the court from 1996-2015.

Justice David Prosser served on the court from 1998-2016.

To read full biographies of the Wisconsin Supreme Court Justices, visit:

https://www.wicourts.gov/courts/supreme/justices/index.htm.

Judicial Evaluation

The cases selected for inclusion in the 2018 Judicial Evaluation were decided over six terms: 2012-13, 2013-14, 2014-15, 2015-16, 2016-17, and 2017-18. Each had a significant impact on one or more of the organizations making up WCJC and Wisconsin's overall business community. Input on case selection was provided by attorney and non-attorney representatives from the business associations that make up WCJC. WCJC's representatives in turn received input from their respective association members. Cases were omitted if they involved issues or parties that created a conflict between any of the organizations or partners making up WCJC.

Each decision is labeled in the following manner: 1) "WCJC agrees with this decision." or 2) "WCJC disagrees with this decision." The ranking given to each justice was based on the impact to WCJC.

Lifetime Score Based on WCJC's Positions

Justice	2018 Judicial Evaluation *Terms: 2012-13, 2013-14, 2014-15, 2015-16, 2016-17, 2017-18*	2013 Judicial Evaluation *Terms: 2010-11, 2011-12*	2011 Judicial Evaluation *Terms: 2008-09, 2009-10*	Overall Score
Justice Abrahamson	23%	17%	36%	23%
Justice R. Bradley	81%	n/a	n/a	81%
Justice Walsh Bradley	23%	27%	43%	27%
Justice Gableman	79%	70%	100%	80%
Justice Kelly	77%	n/a	n/a	77%
Chief Justice Roggensack	79%	74%	100%	80%
Justice Ziegler	81%	68%	100%	80%

Case Participation

Justice	2018 Judicial Evaluation *Terms: 2012-13, 2013-14, 2014-15, 2015-16, 2016-17, 2017-18*	2013 Judicial Evaluation *Terms: 2010-11, 2011-12*	2011 Judicial Evaluation *Terms: 2008-09, 2009-10*
Justice Abrahamson	100%	100%	100%
Justice R. Bradley	95%	n/a	n/a
Justice Walsh Bradley	100%	96%	93%
Justice Gableman	100%	100%	93%
Justice Kelly	91%	n/a	n/a
Chief Justice Roggensack	98%	100%	93%
Justice Ziegler	100%	96%	93%

Discussion of Decisions 2012-13 Term

***Bethke v. Auto-Owners Insurance Co.*, 2013 WI 16 (UIM Coverage)**

The court held that the plaintiff was entitled to underinsured motorist (UIM) coverage because the term "self-insurer" in the insurance policy was ambiguous.

Facts

The driver of a vehicle (Lynn Bethke) was killed, and another person was severely injured when a vehicle traveling in the opposite direction crossed the centerline and struck their vehicle. The driver of the other vehicle did not have insurance. However, he was driving a rental car owned by Avis, which had a Wisconsin safety responsibility self-insurance certificate as required under Wis. Stat. § 344.01(2)(am)1. Under the statute, Avis was liable for damages in the amount of $25,000 per claim and $50,000 per accident and therefore paid $50,000 total to both the driver's estate and the passenger.

Bethke's estate then filed a claim of $450,000 with her insurer, Auto-Owners Insurance Company, for UIM coverage. Auto-Owners denied the coverage, contending that the rental car was a self-insured automobile excluded from coverage under the policy provisions.

Bethke's estate filed a lawsuit against Auto-Owners for a survivor's action, wrongful death, and bad faith.

Decision

In a 4-3 decision (Justice Walsh Bradley, joined by Justices Roggensack, Prosser, and Ziegler), the court held that Bethke was entitled to UIM coverage because the UIM language in the policy explicitly did not include an automobile "owned or operated by a self-insurer under any automobile law."

The court noted Avis was a self-insurer under Wisconsin law and not liable beyond the insurance liability limits for damages caused by the negligent operation of a rented motor vehicle by another person. According to the court, the policy term "self-insurer" was ambiguous as "it is unclear whether a reasonable insured would understand that a car rental company which is statutorily liable under [Wisconsin law] is a 'self-insurer' under the policy." Because the language was ambiguous, the court interpreted the policy in favor of the insured to afford UIM coverage.

Dissent

In her dissent, Chief Justice Abrahamson (joined by Justices Crooks and Gableman) claimed that the "majority opinion struggles mightily, but unsuccessfully…to justify awarding funds to the sympathetic innocent victims of an auto accident." The dissent said that the "exclusion of self-insured vehicles does not function as an impermissible reducing clause and that the policy language excluding a 'self-insurer under any automobile law' is not ambiguous."

Bethke v. Auto-Owners Insurance Co. WCJC disagrees with this decision.	
Justice Walsh Bradley	Wrote opinion
Justice Prosser	Concurred
Justice Roggensack	Concurred
Justice Ziegler	Concurred
Chief Justice Abrahamson	Wrote dissent
Justice Crooks	Dissented
Justice Gableman	Dissented

***Marlowe v. IDS Property Casualty Insurance Co.*, 2013 WI 29 (Arbitration Discovery Provisions)**

The court held that the arbitration panel erred in ordering broad discovery when the insurance policy did not contain specific enough language allowing for such discovery.

Facts

The plaintiff was involved in an automobile accident with an underinsured driver. The plaintiff had an insurance policy with IDS Property Casualty Insurance Co. providing underinsured motorist coverage. Within that section, under the heading "Arbitration," the contract provided that "unless both parties agree otherwise, arbitration will take place in the county which the insured lives. Local rules of law as to procedure and evidence will apply."

Prior to the arbitration hearing, IDS requested various types of discovery materials, including interrogatories, the production of documents, the procurement of medical, employment, and income tax records, depositions, and an independent medical examination. IDS believed that the "local rules" provision in the contract referred to the discovery provisions contained in Wisconsin's discovery rules for civil cases (Wis. Stat. Ch. 804).

The plaintiff objected and argued instead that the "local rules" provision in the contract referred to the more limited discovery provisions under Wisconsin's arbitration statutes (Wis. Stat. § 788.07).

The arbitration panel ruled in IDS's favor, allowing the insurance company to use all of the discovery devices proscribed under civil procedure statutes.

Decision
In a 6-1 decision (Justice Gableman, joined by Chief Justice Abrahamson and Justices Walsh Bradley, Crooks, Roggensack, and Ziegler), the court held that the "arbitration panel erred in ordering broad discovery when the policy contained no explicit, specific, and clearly drafted clause making such discovery available." According to the court, "[f]or a policy to adequately describe the discovery mechanisms to be used at arbitration it must, at the very least, indicate in the policy that the mechanisms are in fact discovery mechanisms, and that they are meant to be available at arbitration. Anything short of that plainly does not qualify as explicit, specific, or clearly drafted."

Dissent
In his dissent, Justice Prosser pointed to other portions of the contract that explicitly provide what is to occur in the event the insured is injured. Specifically, the contract provides that the insured is to "submit…to physical exams" and to "answer questions under oath."

Based on these provisions in the contract, the dissent states that it is "imperative for the majority to explain why the discovery sought by IDS was not explicitly authorized by the insurance contract." According to the dissent, "if an insurer's agreement to participate in arbitration serves to nullify the insurer's contractual rights to obtain information from its insured, insurers will face a powerful disincentive to agree to arbitration, and the arbitration of contractual disputes will suffer a major setback."

Marlowe v. IDS Property Casualty Insurance Co. WCJC disagrees with this decision.	
Justice Gableman	Wrote opinion
Chief Justice Abrahamson	Concurred
Justice Walsh Bradley	Concurred
Justice Crooks	Concurred
Justice Roggensack	Concurred
Justice Ziegler	Concurred
Justice Prosser	Wrote dissent

***Rock-Koshkonong Lake District v. DNR*, 2013 WI 74 (Public Trust Doctrine)**
The court held that the Department of Natural Resources (DNR) improperly relied upon the public trust doctrine for its authority to regulate non-navigable land or non-navigable water above the ordinary high water mark.

Facts
In 2003, Rock-Koshkonong Lake District petitioned DNR to raise the water levels of Lake Koshkonong under Wis. Stat. § 31.02(1) and to eliminate a winter draw down, both established by DNR in 1991. Wisconsin law grants DNR the authority to regulate and control the level of navigable waters "in the interest of public rights in navigable waters or to promote safety and protect life, health and property."

The lake district argued that because Wis. Stat. § 31.02(1) requires DNR to protect "property" when setting water levels, DNR is required to consider the potential economic impact on private property owners residing or doing business on Lake Koshkonong. Many businesses and property owners on Lake Koshkonong argued that the low water levels set by DNR were negatively affecting their property values and businesses.

DNR denied the lake district's petition to raise the water levels on Lake Koshkonong, and therefore the lake district filed a contested case hearing challenging DNR's order.

Decision
In a 4-3 decision (Justice Prosser, joined by Justices Gableman, Roggensack, and Ziegler) the court held that DNR improperly relied upon the public trust doctrine for its authority to regulate non-navigable land or non-navigable water above the ordinary high water mark.

The court explained that if it had accepted DNR's argument that it had the authority to regulate non-navigable wetlands, the "navigability" element of the public trust doctrine would have been eliminated and thus would have "remove[d] one of the prerequisites for the DNR's constitutional basis for regulating" water. According to the court, this "would eliminate the rationale for the doctrine."

The court's decision provided important protections for property owners from arbitrary decisions by DNR where the agency has no authority. As the court explained, "if the public trust doctrine were extended to cover wetlands that are not navigable, it would create significant questions about ownership of and trespass on private land, and it would be difficult to cabin expansion of the state's new constitutionally based jurisdiction over private land."

Dissent

In his dissent, Justice Crooks (joined by Chief Justice Abrahamson and Justice Walsh Bradley) argues that the court "constricted" the public trust doctrine by "transforming the state's affirmative duty to protect the public trust into a legislative choice."

Rock-Koshkonong Lake District v. DNR WCJC agrees with this decision.	
Justice Prosser	Wrote opinion
Justice Gableman	Concurred
Justice Roggensack	Concurred
Justice Ziegler	Concurred
Justice Crooks	Wrote dissent
Chief Justice Abrahamson	Dissented
Justice Walsh Bradley	Dissented

Discussion of Decisions 2013-14 Term

***Belding v. State Farm Mutual Auto Insurance Co.*, 2014 WI 8 (Auto Insurance "Stacking" Limited)**

The court held that the former prohibition on anti-stacking clauses did not allow the insurance company to use the "drive other car" exclusion in the plaintiff's policy to prevent them from stacking the uninsured motorist (UM) coverage of the other vehicles owned and insured by them.

Facts

The plaintiff, Ronald Belding, was injured while driving a Ford Ranger pickup truck he owned. The person who hit him was uninsured. Belding's insurer, State Farm, paid Belding and his wife the UM limit on their policy describing the Ford Ranger pickup truck but contested UM coverage under the policy describing their other vehicle, a Mercury Villager, which was not involved in the accident.

In 2009-10, the legislature enacted a law allowing insureds with multiple cars to "stack," or add together, multiple UM or underinsured motorist (UIM) policies to recover damages. Prior to the 2009-10 law, insurers were allowed to prohibit stacking. In 2011, the legislature repealed the new law, once again allowing insurers to prohibit stacking.

This case occurred when the 2009-10 law was in effect. However, State Farm argued that another existing law (Wis. Stat. § 632.32(5)(j)) authorized "drive other car exclusions" for UM and UIM coverage, under which an insurer may exclude coverage for injuries sustained while an insured family member is driving another family car.

In this case, Belding's State Farm policy for the Mercury Villager included a drive other car exclusion. State Farm paid the Beldings $100,000, the maximum permitted under the Ford Ranger policy. The Beldings then sought to collect excess damages under the UIM coverage in their Mercury Villager policy. Because Belding was not driving the Mercury Villager, State Farm determined that the drive other car exclusion in the Mercury Villager policy applied to his claim and precluded coverage.

Decision

In a unanimous decision, the court held that State Farm could not use the drive other car exclusion in the Mercury Villager policy. The court held that the anti-stacking prohibition trumped the statute that allowed insurers to include drive other car exclusions.

Belding v. State Farm Mutual Auto Insurance Co. WCJC disagrees with this decision.	
Justice Walsh Bradley	Wrote opinion
Chief Justice Abrahamson	Concurred
Justice Crooks	Concurred
Justice Gableman	Concurred
Justice Prosser	Concurred
Justice Roggensack	Concurred
Justice Ziegler	Concurred

***Kimble v. Land Concepts, Inc.*, 2014 WI 21 (Punitive Damages)**

The court held that $1 million in punitive damages against a title insurance company violated constitutional due process rights.

Facts

The case involves a jury verdict awarding the plaintiff-property owners $1 million in punitive damages against First American Title Insurance Co. for bad faith in denying the insureds' requested defense of title and claim.

The plaintiffs purchased property in Door County that was land-locked on three sides and surrounded by water on the other side. The plaintiffs-buyers believed they had an easement over adjoining property allowing access to the nearest road. However, it was determined after the purchase of the property that the plaintiffs did not have an easement. The plaintiffs filed suit against First American when it denied that the policy coverage had been triggered.

The case went to trial and the court awarded the plaintiffs $29,738 in compensatory damages against First American. The jury also awarded the plaintiffs $1 million in punitive damages against First American for its bad faith in denying the claim.

The issue before the court was whether the $1 million was unconstitutional.

Decision
In a 5-2 decision (Justice Ziegler, joined by Justices Crooks, Gableman, Prosser, and Roggensack), the court held that the award of $1 million did "not bear a 'reasonable relationship' to either the compensatory damages award or the potential harm faced by the plaintiff." According to the court, the punitive damages award was excessive and deprived First American of its right to due process under the constitution.

Dissent
In her dissent, Chief Justice Abrahamson (joined by Justice Walsh Bradley) claimed that the court reached a "shocking result" whereby a wrongdoer is enriched by its wrongdoing.

Kimble v. Land Concepts, Inc. WCJC agrees with this decision.	
Justice Ziegler	Wrote opinion
Justice Crooks	Concurred
Justice Gableman	Concurred
Justice Prosser	Concurred
Justice Roggensack	Concurred
Chief Justice Abrahamson	Wrote dissent
Justice Walsh Bradley	Dissented

***Jackson v. Wisconsin County Mutual Insurance Corp.*, 2014 WI 36 (UIM Coverage)**
The court held that a deputy sheriff could not seek underinsured motorist (UIM) coverage under her employer's insurance policy when she was struck by a vehicle in a crosswalk.

Facts
The plaintiff, Rachelle Jackson, was working as a deputy sheriff for Milwaukee County at the Milwaukee airport. While on duty on a sidewalk, a motorist approached Jackson and asked her for directions. After providing the driver with directions, Jackson directed the driver back out into the traffic. As Jackson walked in the crosswalk in front of the vehicle, the driver unexpectedly moved forward and hit Jackson, injuring her.

Jackson sued many parties, including her employer's insurer, Wisconsin County Mutual Insurance Corp., seeking UIM coverage. The insurance company argued that Jackson was not "using an automobile" as required by the insurance policy.

Decision
In a unanimous decision, the court held that Jackson could not recover under the policy. The court noted that Jackson satisfied two out of the three requirements allowing her to obtain UIM coverage under her employer's insurance policy: 1) she was within the scope of her employment, and 2) she was insured under the policy. However, Jackson did not meet the third requirement – she was not "using an automobile," as prescribed under the policy because she was not exercising control over the vehicle at the time of the accident.

Jackson v. Wisconsin County Mutual Insurance Corp. WCJC agrees with this decision.	
Justice Crooks	Wrote opinion
Chief Justice Abrahamson	Concurred
Justice Walsh Bradley	Concurred
Justice Gableman	Concurred
Justice Roggensack	Concurred
Justice Ziegler	Concurred
Justice Prosser	*Did not participate*

***Brandenburg v. Briarwood Forestry Services*, 2014 WI 37 (Independent Contractor Liability)**
The court held that property owners may be held liable for damage caused by an independent contractor hired to perform work on their property.

Facts
The defendant hired an independent contractor to spray herbicide on his property. The spraying drifted to the plaintiffs/neighbors' property, damaging a number of trees. The plaintiffs sued the property owners for the negligence of the independent contractor.

Decision
In a 4-3 decision (Justice Crooks, joined by Justices Gableman, Roggensack, and Ziegler), the court explained that a principal employer is not generally liable for an independent contractor's negligence unless the independent contractor was per-

forming an "inherently dangerous" activity that caused harm to the plaintiff. The employer can still avoid liability depending on whether the employer exercised "ordinary care."

The court therefore remanded the decision back to the lower court to decide: 1) whether the employer failed to use ordinary care with regard to any danger inherent in the herbicide spraying that he knew or had reason to know about, and 2) if so, whether any harm that occurred was caused by the spraying.

Concurring Opinion/Dissent
In her dissent, Chief Justice Abrahamson (joined by Justices Walsh Bradley and Prosser) agreed with the court that the matter was to be remanded to the circuit court to determine whether the independent contractor was negligent in damaging the neighbor's property. However, the dissent disagreed that the lower court was to decide whether the property owner failed to use "ordinary care" with regard to the activity of spraying the herbicide. Instead, the dissent argued that because it was already determined that the spraying of herbicide was inherently dangerous, there was no need to inquire into the property owner's level of care. According to the dissent, the determination that the activity of spraying herbicide was inherently dangerous means that the employer was automatically liable for the independent contractor's negligence.

Brandenburg v. Briarwood Forestry Services WCJC agrees with this decision.	
Justice Crooks	Wrote opinion
Justice Gableman	Concurred
Justice Roggensack	Concurred
Justice Ziegler	Concurred
Chief Justice Abrahamson	Wrote dissent
Justice Walsh Bradley	Dissented
Justice Prosser	Dissented

Betz v. Diamond Jim's Auto Sales, 2014 WI 66
(Attorney Fees Under Lemon Law)
The court handed the self-proclaimed "Lemon Law King" a defeat by refusing to award him attorney fees in a lawsuit.

Facts
The plaintiff, Randy Betz, purchased a used vehicle from Diamond Jim's Auto Sales. Betz experienced problems with the automobile and ultimately sued Diamond Jim's. Betz hired plaintiff attorney Vince Megna, the self-proclaimed "Lemon Law King." Megna sued under Wis. Stat. § 100.18 (11), which allows for attorney fees for the plaintiff (commonly referred to as a "fee shifting" provision).

However, before the case went to trial, Betz and the general manager of Diamond Jim's entered into a settlement agreement without their attorneys' knowledge. The settlement agreement did not include attorney fees for Megna.

Megna intervened in the case as a plaintiff arguing that the right to cover attorney fees under the statute belonged to him as a lawyer, not the client.

Decision
In a 5-1 decision (Justice Ziegler, joined by Justices Walsh Bradley, Crooks, Gableman, and Prosser), the court held that Betz did not assign his right to recover the attorney fees under statute to Megna in the fee agreement between Megna and Betz. Therefore, Megna could not seek the statutory attorney's fees directly from Diamond Jim's.

Dissent
In her dissent, Chief Justice Abrahamson argues that the fee arrangement did assign Betz's right to attorney fees to Megna and that the court failed to apply accurately the rules of contract interpretation. The dissent further stated that although the fee arrangement does not use traditional legal terms in its "Fee Shifting" provisions, the plain-reading of the fee arrangement should be interpreted as having the same intention for the assignment of attorney fees to Megna. The dissent also points to the Wisconsin lemon law fee shifting provision as context in which the fee arrangement was executed.

Betz v. Diamond Jim's Auto Sales WCJC agrees with this decision.	
Justice Ziegler	Wrote opinion
Justice Walsh Bradley	Concurred
Justice Crooks	Concurred
Justice Gableman	Concurred
Justice Prosser	Concurred
Chief Justice Abrahamson	Wrote dissent
Justice Roggensack	*Did not participate*

***Kochanski v. Speedway SuperAmerica*, 2014 WI 72 (Absent Witness Instructions)**

The court held that the absent witness instruction in this safe place statute case was erroneous.

Facts

The case involves a lawsuit brought against Speedway by James Kochanski after he suffered injuries resulting from a fall outside one of Speedway's convenience stores. After filling his vehicle with gas, Kochanski walked into the store to pay. It was snowing that day, and there was approximately two inches of snow on the ground. As Kochanski approached the curb on the walkway leading to the store entrance, which was painted yellow, he noticed snow covering a portion of it. Kochanski did not see any yellow in front of him, so he thought the curb had been cut out or was a wheelchair access point. However, the wheelchair access was four to five feet to the side of the entrance.

Kochanski tripped and fell on the curb, breaking his arm and injuring his wrist. This incident was filmed on Speedway's surveillance video. Kochanski sued Speedway for negligence and for violation of Wisconsin's safe place statute (Wis. Stat. § 101.11).

As the case went to trial, Kochanski's attorney offered into evidence Speedway's interrogatory responses indicating that there were five Speedway employees working when Kochanski fell. Speedway did not call any witnesses at trial, but instead offered into evidence the store video surveillance.

Kochanski then requested the trial court to give a jury instruction (Wis JI—Civil 410), commonly referred to as the "absent-witness" instruction, to the jury. This injury instruction states:

> If a party fails to call a material witness within (his) (her) control, or whom it would be more natural for that party to call than the opposing party, and the party fails to give a satisfactory explanation for not calling the witness, you may infer that the evidence which the witness would give would be unfavorable to the party who failed to call the witness.

During closing argument, Kochanski's attorney commented that Speedway did not call any witnesses and suggested that it was withholding information from the jury.

The jury determined that Speedway was negligent in failing to maintain its premises and found that Kochanski was not negligent. Speedway appealed the decision.

Decision

In a 4-3 decision (Justice Roggensack, joined by Justices Crooks, Gableman, and Ziegler), the court held that the absent witness instruction was erroneous. Specifically, the Supreme Court held:

> [T]here was no evidence in the record that the absent witnesses, former Speedway employees who had been on duty at the time of the accident, were material and within Speedway's control or that it was more natural for Speedway, rather than [the plaintiff] to call them. Furthermore, Speedway's decision not to call the former employees did not reasonably lead to the conclusion that it was unwilling to allow the jury to have "the full truth."

In addition, the court determined that the jury instruction was "prejudicial because without drawing a negative inference about Speedway's snow removal methods and processes from Speedway's decision not to call the former employees, the jury would not have found that [the plaintiff] satisfied the notice element of his safe-place claim that was necessary to liability."

Dissent

In her dissent, Justice Walsh Bradley (joined by Chief Justice Abrahamson) argued absent witness instructions were appropriate because Speedway

could have compelled current employees to testify to their knowledge of salting practices, which would have added otherwise unexposed facts to the record. The dissent said even if the jury instructions were erroneous, the error was harmless because Kochanski presented indisputable video evidence that the unsafe condition was in the Speedway employees' plain view.

In a second dissent, Justice Prosser also argued that absent witness instructions were appropriate because Speedway's decision not to call any witnesses left the jury with incomplete evidence. Furthermore, under Wisconsin's procedural statutes, the court should have deferred to the circuit court's jury instructions decision and the jury's verdict.

Kochanski v. Speedway SuperAmerica WCJC agrees with this decision.	
Justice Roggensack	Wrote opinion
Justice Crooks	Concurred
Justice Gableman	Concurred
Justice Ziegler	Concurred
Justice Walsh Bradley	Wrote dissent
Chief Justice Abrahamson	Dissented
Justice Prosser	Wrote dissent

Blasing v. Zurich American Family, 2014 WI 73

(Permissive Use Coverage)

The court held that the plaintiff's insurance carrier had a duty to defend and indemnify the tortfeasor because the tortfeasor was a "permissive user" of the plaintiff's vehicle.

Facts

The plaintiff, Vicki Blasing, was injured by an employee of Menard, Inc. Blasing drove her pickup truck to a Menards store to purchase lumber. Blasing drove her vehicle into the lumberyard and stood outside of her vehicle. As the boards of lumber were being loaded into her truck, a Menards employee dropped a few boards onto Blasing's foot, injuring her.

Blasing sued Menards and its insurer, Zurich, alleging negligence and a violation of Wisconsin's safe place statute. Blasing's vehicle was covered by American Family Insurance Co. Menards proceeded to tender its defense of Blasing's claims to American Family, asserting that Menards was covered under Blasing's policy because the Menards employee was a "permissive user of Blasing's vehicle."

American Family intervened in the case and argued that Menards was not covered as an additional insured under Blasing's policy because the Menards employee was not "using" Blasing's vehicle within the meaning of the policy or Wisconsin law (Wis. Stat. § 632.32(3)(a)) that requires automobile insurance policies to provide additional vehicle users the same protection as is afforded to the named insured.

Decision

In a 4-3 decision (Chief Justice Abrahamson, joined by Justices Walsh Bradley, Crooks and Prosser), the court held that American Family owed a duty to defend and indemnify the tortfeasor Menards in this case.

The court held that the Menards employee's actions of loading the plaintiff's vehicle constituted a "use" of the pickup under the American Family automobile liability insurance policy. The court further held that the policy required American Family to defend and indemnify the tortfeasor when the injured victim is a named insured under the policy.

Dissent

In her dissent, Justice Roggensack (joined by Justices Gableman and Ziegler) argued that the court failed to address whether the concept of a "permissive user" under Wis. Stat. § 632.32(3)(a)) requires an injured person's own liability insurer to defend and indemnify the tortfeasor who injured the insured and when the tortfeasor has its own liability insurance.

Blasing v. Zurich American Family WCJC disagrees with this decision.	
Chief Justice Abrahamson	Wrote opinion
Justice Walsh Bradley	Concurred
Justice Crooks	Concurred
Justice Prosser	Concurred
Justice Roggensack	Wrote dissent
Justice Gableman	Dissented
Justice Ziegler	Dissented

***Adams v. Northland Equipment Co., Inc.*, 2014 WI 79 (Worker's Compensation Settlements)**
The court held that a circuit court may compel an employee to accept a settlement offer under Wisconsin's Worker's Compensation law (Wis. Stat. § 102.29(1)).

Facts
As Village of Fontana employee Russell Adams was plowing the driveway to the village hall, the blade of his plow struck the lip of a sidewalk. According to Adams, when the plow contacted the sidewalk, the truck stopped suddenly and threw him into the ceiling of the cab of the truck. The force caused injuries to his spine and back. Adams was not wearing a seatbelt.

Adams alleged that the plow was defective. Before the accident, the village had experienced problems with the plow and returned it to Northland Equipment Company to have two springs replaced. Northland did not have the exact brand replacement on hand and could not obtain them before the next snow. Northland and the village decided to replace the springs with another brand. The plow worked well for a year and half before the incident in this case.

The League of Wisconsin Municipalities Mutual Insurance Co. was the worker's compensation insurer for the village and had paid Adams $148,332 in worker's compensation benefits for medical expenses and disability.

Northland and its insurer (Cincinnati Insurance) moved for summary judgment arguing that Adams could not prove negligence or causation. The court denied the motion. Four days later the League of Wisconsin Municipalities Mutual Insurance Co. received a settlement offer of $200,000 from Northland and Cincinnati Insurance. However, Adams refused to accept the offer.

The League then attempted to negotiate a resolution with Adams, to no avail. The League Insurance unilaterally accepted the settlement offer and moved the circuit court to compel Adams to accept it.

Adams argued that a worker's compensation insurer cannot compel an employee to accept settlement of a third-party tort claim. In addition, Adams argued that the worker's compensation law cannot be interpreted to permit the circuit court to compel settlement because such an interpretation would violate his right to a jury trial and due process under the Wisconsin Constitution.

Decision
In a 5-2 decision (Justice Roggensack, joined by Justices Crooks, Gableman, Prosser, and Ziegler), the court held that circuit courts can compel employees to accept settlements under worker's compensation.

The court explained that the statute provides both the employee and the worker's compensation insurer an "equal voice" in the prosecution of the claim. In addition, the court noted that the worker's compensation statute prescribes how recovery from the claim is apportioned and that the circuit court is empowered to resolve any disputes arising between the employee and the worker's compensation insurer during the prosecution of their claim, including disputes involving settlement.

The Supreme Court also dismissed Adams's argument that the circuit court's decision violated his right to a jury trial under the Wisconsin Constitution. The court explained that it has interpreted Art. 1 § 5 to mean that the right to jury trial is preserved for a statutory claim if: 1) the statute codified a cause of action that existed in 1848 when Wisconsin's Constitution was adopted; and 2) the cause of action was an action at law rather than in equity. The court determined that worker's compensation did not fit under these two tests.

Dissent
In her dissent, Justice Walsh Bradley (joined by Chief Justice Abrahamson) argues the worker's

compensation statute maintains employees' rights to a tort action against any party other than their employer, and thus the court cannot compel settlement. The dissent also criticizes the court for not providing clear guidance on procedures for courts in deciding disputes in worker's compensation cases like this one.

Adams v. Northland Equipment Co., Inc. WCJC agrees with this decision.	
Justice Roggensack	Wrote opinion
Justice Crooks	Concurred
Justice Gableman	Concurred
Justice Prosser	Concurred
Justice Ziegler	Concurred
Justice Walsh Bradley	Wrote dissent
Chief Justice Abrahamson	Dissented

***Partenfelder v. Rhode*, 2014 WI 80 (FRSA Preemption)**

The court held that a parade and resultant parade traffic did not qualify as an exception to preemption under the Federal Railroad Safety Act (FRSA).

Facts

This case involved a train colliding with a minivan that became stuck on a set of railroad tracks during a Memorial Day parade in Elm Grove, Wisconsin. Prior to the parade, the Elm Grove Police Department sent a letter to Steve Rhode, a member of Canadian Pacific Rail Police, notifying the company of the Memorial Day parade. The letter stated that the parade-related activities may increase pedestrian traffic. The letter asked Rhode to notify the conductors of potential hazards on the tracks. Rhode sent an email to the railroad dispatcher that Elm Grove was having the parade and asked that the train crews be notified.

On the day of the parade, Scott and Monica Ensley-Partenfelder took their three children to the parade and drove in separate vehicles. Monica followed Scott in their minivan. Monica had the couple's 23-month-old son in her vehicle. When the couple's vehicles approached the track, Monica's minivan became stuck as a train began to approach.

The train crew saw Monica's minivan stuck on the tracks and began to apply the brakes. Meanwhile, police officer John Krahn helped Monica out of the vehicle. Monica informed Krahn that her toddler was strapped in his car seat. Krahn and Scott attempted to extract the toddler from the car seat but were unable to do so before the train collided head on with the minivan. Their son was unharmed, but Krahn and Scott were both injured in the collision.

The plaintiffs, the Partenfelders and Krahn, sued the Soo Line (which is a subsidiary of Canadian Pacific) and their employee, Rhode, alleging that their negligence caused the collision. In addition to their common law negligence claim, their complaint brought a safe place claim (Wis. Stat. § 101.11(1)) against Soo Line. Soo Line asserted various affirmative defenses, one of which was that the FRSA preempted the plaintiffs' claims.

The issue before the court was whether the Memorial Day parade falls under the "specific, individual hazard" exception to preemption under the FRSA.

Decision

In a 5-2 decision (Justice Prosser, joined by Justices Crooks, Gableman, and Roggensack), the court held that the negligence claims were preempted because the Memorial Day parade "was not a 'specific, individual hazard' because the parade created only a generally dangerous traffic condition."

To provide uniformity throughout the country, the FRSA expressly preempts state law in areas covered by the FRSA. The U.S. Supreme Court has stated that the FRSA preemption applies to state common law claims as well as statutory claims. However, the U.S. Supreme Court has also ruled that there is an exception to preemption for state claims alleging that a railroad was negligent for failing to slow or stop a train in response to a "specific, individual hazard."

In this case, the Wisconsin Supreme Court determined that the parade itself was not a "specific, individual hazard," and therefore the state negligence claims brought by the plaintiffs were preempted by the FRSA.

However, the court held that the minivan stuck on the track constituted a "specific, individual haz-

ard." The Supreme Court remanded the case back to circuit court to determine whether the train crew was negligent in responding to the vehicle stuck on the track.

Dissent
In her dissent, Chief Justice Abrahamson (joined by Justice Walsh Bradley) argued that the FRSA "does not fully replace or supersede Wisconsin's tort law, which protects the residents of the state from injury."

Partenfelder v. Rhode WCJC agrees with this decision.	
Justice Prosser	Wrote opinion
Justice Crooks	Concurred
Justice Gableman	Concurred
Justice Roggensack	Concurred
Justice Ziegler	Concurred
Chief Justice Abrahamson	Wrote dissent
Justice Walsh Bradley	Dissented

***Force v. American Family Mutual Insurance. Co.*, 2014 WI 82 (Wrongful Death)**
The court held that minor children can recover for the wrongful death of their father when the deceased father left behind an estranged spouse who is not eligible to recover.

Facts
Billy Joe Force was killed in an automobile accident that was allegedly caused by the negligence of Jeffrey Brown. Brown's vehicle was insured by American Family. At the time of Force's death, he was married to Linda Force. Linda and Billy Joe Force were estranged and had not lived together since 1996. Billy Joe Force also did not provide any pecuniary support to Linda Force.

Linda Force brought a claim for wrongful death and sought damages for pecuniary loss and loss of society and companionship under Wisconsin's wrongful death statute (Wis. Stat. § 895.04). The circuit court determined that Linda Force had no compensable damages and dismissed her claims. Linda Force did not appeal this decision.

Billy Joe Force also had three minor daughters. Linda Force was not the mother of any of the daughters. Each of the daughters attempted to assert claims for pecuniary loss and loss of society and companionship under the wrongful death statute.

The issue presented to the court was whether, under the language of the wrongful death statute, minor children can recover for the wrongful death of their father when the deceased leaves behind an estranged spouse who is precluded from recovering for the wrongful death.

Decision
In a 4-3 decision (Chief Justice Abrahamson, joined by Justices Walsh Bradley, Crooks, and Prosser), the court held that "the phrase 'surviving spouse' in Wis. Stat. § 895.04(2) does not always simply mean any living spouse of the deceased."

In this case, the court veered from a strict literal interpretation of the phrase "surviving spouse" and interpreted the phrase as not including estranged spouse Linda Force, who was barred from recovery. The court opined that if Linda Force is not a "surviving spouse" under the statute, the minor children have a claim as lineal heirs.

The court concluded that the "legislative purpose" of the statute is to "impose liability on the tortfeasor and allow recovery by the deceased's relatives who would have recovered had the deceased lived.

Concurring Opinion
In a concurring opinion, Justice Prosser explained that courts "try to avoid absurd results, but courts are not eager to disregard the seemingly clear language of the statute." Justice Prosser goes on to say that this "reluctance" is "salutary because it reflects the deference and respect of the judiciary for the policy choices of other branches of government."

According to the concurring opinion, "[a]bsurd results are unexpected" and "produce hardship or unfairness that is quickly recognized and cannot be ignored." Recognizing that the statute is clear on its face, Justice Prosser ended his concurrence by "implore[ing] the legislature to rewrite the statute."

Dissent
In her dissent, Justice Roggensack (joined by Justices Gableman and Ziegler) stated that while "the majority opinion reaches an appealing result as it

permits the minor children…to maintain a claim" for their father's death, the majority's opinion "is not based on statutory construction and will create considerable mischief in the future." The dissent further notes that by "[s]aying that § 895.04(2) means whatever the majority wants it to mean will cause confusion and repetitive litigation."

Force v. American Family Mutual Insurance Co. WCJC disagrees with this opinion.	
Chief Justice Abrahamson	Wrote opinion
Justice Walsh Bradley	Concurred
Justice Crooks	Concurred
Justice Prosser	Concurred
Justice Roggensack	Wrote dissent
Justice Gableman	Dissented
Justice Ziegler	Dissented

***Data Key Partners v. Permira Advisers LLC, 2014 WI 86* (Business Judgement Rule)**
The court held that plaintiffs failed to plead facts in the complaint showing that the defendants violated their fiduciary duties to the minority shareholders when selling the company under the business judgement rule.

Facts
The lawsuit arose out of the merger and sale of Renaissance Learning, Inc., a publicly traded corporation. The plaintiff, Data Key Partners, was a partnership involving three partners. The partners owned shares of Renaissance.

The defendants (the Pauls) were the co-founders and majority shareholders of Renaissance. Co-defendants were business organizations involved in the purchase of Renaissance. The founders and directors of Renaissance decided to sell their interest in the company and were approached by Permira, which offered to pay $15 per share to the directors and $16.60 to the minority shareholders. Renaissance's board of directors approved Permira's offer and Renaissance's shareholders accepted it.

After the agreement between Renaissance and Permira, Plato Learning, Inc. began a bidding war. Plato offered $16.90 per share for all of Renaissance's shareholders' interest, which would have netted the directors of Renaissance roughly $38 million more than the sale to Permira.

The plaintiffs sued, alleging that the Renaissance directors breached their fiduciary duty as majority shareholders by choosing to sell their majority interest in Renaissance to Permira. The plaintiffs alleged that the Pauls placed their personal interest in monetizing their holdings ahead of Renaissance and the minority shareholders.

Decision
In a 4-3 decision (Justice Roggensack, joined by Justices Gableman, Prosser, and Ziegler), the court held that the plaintiffs' complaint failed to state a claim upon which relief could be granted in regard to the Pauls and therefore should have been dismissed.

According to the court, the business judgment rule (Wis. Stat. § 180.0828(1)) unequivocally sets forth the terms on which directors may be held liable for their decisions. Therefore, a party challenging the decision of a director must plead facts sufficient to plausibly show that they are entitled to relief. That is, the plaintiff must plead facts that show the director's actions constituted: 1) a willful failure to deal fairly with a shareholder in connection with a matter in which the director has a material conflict of interest; 2) a violation of criminal law; 3) a transaction from which the director derived an improper personal profit; or 4) willful misconduct.

In this case, the court concluded that the plaintiffs' complaint failed to show that the defendants received an improper material benefit or any of the other forms of liability.

Dissent
In her dissent, Chief Justice Abrahamson (joined by Justices Walsh Bradley and Crooks) writes, citing Wisconsin's notice pleading rule, that the parties did set forth sufficient facts for a claim to overcome the business judgement rule, so the motion to dismiss should not have been granted.

Data Key Partners v. Permira Advisers LLC WCJC agrees with this decision.	
Justice Roggensack	Wrote opinion
Justice Gableman	Concurred
Justice Prosser	Concurred
Justice Ziegler	Concurred
Chief Justice Abrahamson	Wrote dissent
Justice Walsh Bradley	Dissented
Justice Crooks	Dissented

Discussion of Decisions
2014-15 Term

Stoker v. Milwaukee County, 2014 WI 130

(Constitutional Home Rule Authority)

The court held that Milwaukee County had home rule authority to reduce the employee pension benefits multiplier with respect to non-vested employee retirement benefits.

Facts

A Milwaukee County employee and the employee's union brought a class action declaratory judgment suit against Milwaukee County seeking to declare invalid a county ordinance that reduced the multiplier of its pension program for employees whose interests in the retirement plan had not yet vested.

The county's retirement formula in 2000 was modified as follows: final average salary at the time of retirement, multiplied by 2 percent (increased from 1.5 percent), with the result then multiplied by the employee's years of service. In 2011, the county enacted an ordinance based upon a collective bargaining agreement, reducing the formula multiplier from 2 percent to 1.6 percent, effective Jan. 1, 2012, for services performed after that date.

County employee Suzanne Stoker argued that she should have a right to the 2 percent multiplier for her post-2011 service because that multiplier was in effect at the time she joined the retirement program. The county argued that she did not have a vested right in that multiplier for her later service, and, even if she had such a right, when her union collectively bargained for the lower multiplier on Stoker's behalf, the union lawfully consented to the lower multiplier.

In 1965, the legislature granted Milwaukee County home rule authority over the Milwaukee County Employee Retirement System (MCERS), empowering the county to make changes to its retirement system. The statute included the caveat that "no such change shall operate to diminish or impair the annuities, benefits or other rights of any person who is a member of [MCERS] prior to the effective date of any such change"(Wis. Stat. § 405.1 (1965)).

Decision

In a 5-2 decision (Justice Ziegler, joined by Justices Crooks, Gableman, Prosser, and Roggensack), the court reasoned that Milwaukee County, based upon its constitutional home rule authority delegated by the legislature, was authorized to make prospective changes to its employee pension retirement system. The county abided by the legislative directive contained in Wis. Stat. Ch. 405, and therefore the county may reduce a benefit for service that has not vested prior to the effective date of the reduction. Stoker had no "vested" right to having the higher multiplier applied to her retirement formula for post-2011 service because those years of service were not in existence at the time the formula change became effective.

Dissent

In her dissent, Justice Walsh Bradley (joined by Chief Justice Abrahamson) argued that the "vesting" of an employee's rights to retirement benefits in MCERS are established at the date the employee joined the workforce and became part of the system based on Wis. Stat. Ch. 148 (1945) because the law defined vesting as a right to "a similar benefit contract and vested right in the annuities" as of that date of hire. Because Stoker joined the Milwaukee County workforce and became part of MCERS when the formula multiplier was 2 percent, she had a vested right in that multiplier for the entirety of her years of service, including those periods of service commencing after the Jan. 1, 2012, reduction in the formula multiplier.

Stoker v. Milwaukee County. WCJC agrees with this decision.	
Justice Ziegler	Wrote opinion
Justice Crooks	Concurred
Justice Gableman	Concurred
Justice Prosser	Concurred
Justice Roggensack	Concurred
Justice Walsh Bradley	Wrote dissent
Chief Justice Abrahamson	Dissented

Aguilar v. Husco International, Inc., 2015 WI 36 (Hours and Wages Compensation)

The court held that the decision of the Department of Workforce Development (DWD) not to seek collection of back pay on behalf of employees was consistent with the purpose of an administrative rule governing pay for certain employee meal breaks.

Facts

Employees of Husco International, Inc. brought a class action against Husco, seeking back pay for 20-minute unpaid meal breaks. The underlying wage claim was initially filed with DWD, based upon Wisconsin Admin. Code § DWD 274.02, requiring that employees' meal times be counted as compensated work time for "on duty meal periods," with such meal periods defined as being "less than 30 minutes free from work."

Husco employees' meal periods were negotiated under a collective bargaining agreement to be an unpaid 20 minutes in length, resulting in employees having a shorter work shift than if the schedule followed the regulation—a shift of 8 hours 20 minutes per the collective bargaining agreement (with the collectively bargained unpaid lunch break), versus 8 hours and 30 minutes (under the administrative rules requirement for an unpaid lunch break).

The DWD regulation has a specific opt-out feature allowing for a union and its employer to negotiate a work schedule other than the one required by regulation. The union and employer must request a waiver from the regulation for shorter unpaid lunch breaks. However, no waiver was requested in this case. When the conflict with the regulation was discovered, the practice was ended, and Husco followed the DWD regulation.

DWD determined it would not seek to collect back pay because the grounds favoring a waiver were present—that the parties had negotiated the unpaid shortened meal break and that there was no evidence that the shortened lunch period jeopardized the life, health or welfare of the employees.

The union then appealed the DWD decision under the wage claim statute (Wis. Stat. § 109.11).

Decision

In a unanimous decision, the court applied a "controlling weight" standard to the underlying DWD decision, in recognition of DWD's expertise in legal matters related to employment disputes. Like the "great weight" standard of deference, "controlling weight" defers to the agency's decision as long as it is "within a range of reasonableness." The court has recently ended the practice of agency deference in *Tetra Tech v. DOR*.

Thus, the court concluded that the DWD decision not to seek back pay for the Husco employees fell within a "range of reasonableness" and upheld DWD's decision under the "controlling weight" standard.

Aguilar v. Husco International, Inc. WCJC agrees with this decision.	
Justice Crooks	Wrote opinion
Chief Justice Abrahamson	Concurred
Justice Walsh Bradley	Concurred
Justice Gableman	Concurred
Justice Prosser	Concurred
Justice Roggensack	Concurred
Justice Ziegler	Concurred

Oneida Seven Generations Corp. v. City of Green Bay, 2015 WI 50 (Conditional Use Permits)

The court held that the City of Green Bay's decision to rescind Oneida Seven Generations Corp.'s conditional use permit was not supported by substantial evidence because Oneida's chief executive officer's statements were not intentional misrepresentations.

Facts

At a series of public meetings, representatives of Oneida discussed three issues with the Green Bay City Council and Plan Commission regarding construction of a biogas fuels plant: 1) plant emissions, 2) the presence of smoke stacks to facilitate emissions, and 3) the presence of "new technology." The council subsequently approved a conditional use permit for the project, including conditions recommended by the commission.

Oneida then proceeded in obtaining various city, state and federal permits needed for the project, in accordance with the conditional use permit. These various permits were approved. As the project progressed, the council directed the commission to hold an additional public hearing to determine if the conditional use permit had been obtained through misrepresentations by Oneida. The same three issues regarding emissions, smokestacks, and new technology were addressed. The commission subsequently determined it had not been misled on these issues in recommending approval of a conditional use permit. A divided council later voted to rescind the Oneida permit.

Decision
In a 6-1 decision (Justice Walsh Bradley, joined by Justices Abrahamson, Crooks, Gableman, Prosser, and Ziegler), the court found there was no substantial evidence to support a finding that Oneida had misled the council when the permit was initially issued. The court determined that, although numerous citizens testified at the commission's subsequent review hearing that they had been misled by Oneida, such allegations were not substantiated by comments Oneida representatives had made on the record.

Dissent
In her dissent, Chief Justice Roggensack said the court did not afford the council's decision the presumption of correctness to which it was entitled under the law. Further, the dissent argued the court was substituting its view of the evidence for the council's. The dissent concluded there was evidence of material misrepresentations in the record regarding the facility's emissions and whether it was experimental. Thus, substantial evidence was present to support the council's decision to rescind the conditional use permit.

Oneida Seven Generations Corp. v. City of Green Bay WCJC agrees with this decision.	
Justice Walsh Bradley	Wrote opinion
Justice Abrahamson	Concurred
Justice Crooks	Concurred
Justice Gableman	Concurred
Justice Prosser	Concurred
Justice Ziegler	Concurred
Chief Justice Roggensack	Wrote dissent

***Dakter v. Cavallino*, 2015 WI 67 (Jury Instructions in Determining Negligence)**
The court concluded that the jury instruction did not misrepresent the law, nor did it mislead the jury on the standard of care to be applied in determining negligence.

Facts
A motor vehicle collision occurred between an automobile driver, Ronald Dakter, and a semi-trailer truck driven by Dale Cavallino. A negligence suit was filed by Dakter against Cavallino, and a jury trial ensued, with the jury concluding that Cavallino was 65 percent at fault for Dakter's injuries.

In post-verdict motions at trial, Cavallino challenged the jury instructions on the basis that the instruction improperly imposed a heightened standard of care on him by focusing on the "special skill and knowledge" that a professional semi-trailer operator should possess. The plaintiff Dakter argued that this instruction simply directed the jury to take into account the semi-trailer driver's knowledge and skills only to determine whether the driver met the ordinary standard of care.

Decision
In a unanimous decision, the court concluded first that because driving a semi-trailer truck constitutes a profession or trade within the legal profession or trade principle, it was appropriate to ask the jury to consider the driver's conduct by reference to the conduct of a reasonable semi-trailer truck driver. Further, the court concluded that the jury instruction was not misleading because it stated clearly that the standard of ordinary care in the operation of motor vehicles applied equally to the defendant and plaintiff.

Concurring Opinions
In a concurring opinion, Chief Justice Roggensack concluded that the jury instruction improperly required the defendant Cavallino to rely on additional skills while operating his vehicle, beyond those skills required of Dakter. The concurring opinion noted further that the special skills and knowledge instruction is venue specific. Motor vehicle operators with various licenses are permitted to operate a range of vehicles on the venue of public roads

and highways, all subject to the same standard of care of a reasonable person operating within that venue. However, the concurring opinion concluded that the error was harmless.

In a second concurring opinion, Justice Ziegler (joined by Justice Gableman) agreed that the jury instruction was not erroneous regarding the semi-trailer operator's skills and abilities. However, she cautioned that the lead opinion's reliance on certain legal treatises was overly broad and could improperly lead to conclusions that are not supported by current Wisconsin law.

Dakter v. Cavallino WCJC disagrees with this decision.	
Justice Abrahamson	Wrote opinion
Justice Walsh Bradley	Concurred
Justice Crooks	Concurred
Justice Gableman	Concurred
Justice Prosser	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred

Full Discussion of Decisions 2015-16 Term

United Food v. Hormel Foods Corp., 2016 WI 13 (Wage and Hour Compliance)

The court held that Hormel must compensate its employees for the 5.7 minutes spent donning and doffing employer-issued clothing and equipment at the beginning and end of each day.

Facts

Hormel produces what are referred to as "shelf ready" and "shelf stable" meat products, which are prepared under high-temperature processing standards to achieve both food safety and shelf life. Federal regulations require Hormel to meet standards of cleanliness, quality, and safety both in its facilities and products. These federal regulations require that persons working with food protect against contamination by maintaining hygienic practices like washing hands and wearing clean outer garments. The federal regulations set forth performance standards but generally do not require these standards be satisfied in a manner such as the specific attire of the workers at issue here.

Decision

In a 4-2 decision (Justice Abrahamson, joined by and Justices Walsh Bradley, Prosser, and Chief Justice Roggensack), the court held that the employees' donning and doffing clothing and equipment at the beginning and end of the day was required to bring Hormel into compliance with federal food and safety regulations and was therefore "integral and indispensable" under Wisconsin Admin. Code § DWD 272.12 to sanitation and safety in the employees' principal work activities, namely food production.

The court held further that donning and doffing claims are not too minor, or *de minimis*, in respect to compensation requirements. The court reached this conclusion by aggregating the 5.7 minutes per day to 24 hours per year.

Dissent

In his dissent, Justice Gableman (joined by Justice Ziegler), reasoned that the court confused the concepts of the employer-issued clothing as being both "required by" and "benefitting" the employer, instead of integral and indispensable to the production.

Further, the dissent pointed out that the court could have resolved the issue of whether the *de minimis* doctrine applies to donning and doffing wage claims, and it could have provided a workable test or approach for how to conduct a *de minimis* analysis. However, the court chose not to by simply concluding that the aggregated time was not a "trifle."

United Food v. Hormel Foods Corp. WCJC disagrees with this decision.	
Justice Abrahamson	Wrote opinion
Justice Walsh Bradley	Concurred
Justice Prosser	Concurred
Chief Justice Roggensack	Concurred
Justice Gableman	Wrote dissent
Justice Ziegler	Dissented
Justice R. Bradley	*Did not participate*

Patti Roberts v. T.H.E. Insurance Co., 2016 WI 20 (Recreational Immunity)

The court held that the operator of a hot air balloon was not an "occupier" of property, nor was the balloon a "structure" under Wisconsin's recreational immunity statute, therefore making the balloon operator ineligible for immunity.

Facts

Patti Roberts attended a charity event where balloon rides were available and was injured while waiting in line to ride the balloon. She subsequently brought a negligence claim against the balloon operator, from which the operator sought immunity under Wisconsin's recreational immunity statute (Wis. Stat. § 895.52).

Decision

In a 4-3 decision (Justice Walsh Bradley, joined by Justices Abrahamson, Gableman, and Ziegler), the court held that the balloon operator was ineligible for immunity under the recreational immunity statute.

Focusing on Wis. Stat. § 895.52(1)(d)1, which defines an "owner" as "[a] person, including a governmental body or nonprofit organization, that owns, leases or occupies property," and Wis. Stat. § 895.52(1)(f) which defines "property" as "real

property and buildings, structures and improvements thereon…," the court concluded the balloon operator could not qualify as an occupier of the property where the injury occurred. The court's conclusion focused on the legislature's intent to limit property owners' liability when they open their property for recreational benefit with limited pecuniary reward.

Concurring Opinion
In a concurring opinion, Justice Ziegler emphasized that recreational immunity did not cover the balloon operator because it was acting as a business in a capacity unrelated to ownership of the land. The concurring opinion said recreational immunity protects property owners but not negligent business owners operating on such property.

Concurring Opinion/Dissent
In a concurring opinion/dissent, Justice Prosser (joined by Chief Justice Roggensack) agreed with the dissent that the balloon operator "occupie[d]" the property, making it an owner, because the court incorrectly ruled that occupants must have some degree of permanence. Even if the balloon operator was not an occupant, it could still be an immune "agent" under the recreational immunity statute. The concurring opinion/dissent disagreed with the concurring opinion's analysis that activity eligible for recreational immunity must be linked to the land.

Dissent
In her dissent, Justice R. Bradley (joined by Justice Prosser) noted the statute does not define the word "occupies," but that a plain reading of the dictionary defines an occupant as one who has actual use of the property. Here, the balloon operator had temporary use of the property at the charity event when tethering the balloon and designating an area with flags and ropes to denote the availability of balloon rides. The dissent observed further that every aspect of this activity was also consistent with the legislature's intent to encourage landowners to open up their property for recreational activity.

Patti Roberts v. T.H.E. Insurance Co. WCJC disagrees with this decision.	
Justice Walsh Bradley	Wrote opinion
Justice Abrahamson	Concurred
Justice Gableman	Concurred
Justice Ziegler	Concurred
Justice Prosser	Concurred/dissented
Chief Justice Roggensack	Concurred/dissented
Justice R. Bradley	Dissented

***Cheryl M. Sorenson v. Richard A. Batchelder,* 2016 WI 34 (Notice of Claims Against State)**
The court held that claims against the state must be filed by certified mail upon the attorney general rather than by service in person under Wis. Stat. § 893.82.

Facts
Motorist Cheryl Sorenson sustained personal injuries and injury to property in an auto accident with state employee Richard Batchelder. Sorenson delivered a notice of claim to the attorney general by personal service, instituting a negligence action against Batchelder.

Wis. Stat. § 893.82(5) requires service of notice of claim on the attorney general by certified mail in claims against state employees. Further, Wis. Stat. § 893.82(2m) mandates strict compliance with all provisions of Wis. Stat § 893.82 to institute an action against a state employee.

Decision
In a 5-2 decision (Chief Justice Roggensack, joined by Justices R. Bradley, Gableman, Prosser, and Ziegler), the court reasoned that Sorenson's argument that she had "substantially complied" with the provisions of Wis. Stat. § 893.82(5) was not the same as the "strict compliance" the legislature mandated in Wis. Stat. 893.82(2m). The court noted that an earlier version of the notice of claim statute mandated a liberal construction of the statute that would have constituted a substantial compliance standard. However, subsequent legislative amendments make clear the legislature expects strict compliance with the service of notice provision.

Dissent
In her dissent, Justice Abrahamson (joined by Justice Walsh Bradley) argued that the attorney general's office no longer receives certified mail. Thus, it is no longer possible to strictly comply with this statute. Because of this change of process, the dissent argued that the court must adjust its reading of the statute to allow for personal service of notice.

Cheryl M. Sorenson v. Richard A. Batchelder WCJC agrees with this opinion.	
Chief Justice Roggensack	Wrote opinion
Justice R. Bradley	Concurred
Justice Gableman	Concurred
Justice Prosser	Concurred
Justice Ziegler	Concurred
Justice Abrahamson	Wrote dissent
Justice Walsh Bradley	Dissented

***Peggy Z. Coye v. Scott Walker*, 2016 WI 38 (Act 21)**
The court held that 2011 Act 21 changes to the administrative rule process were unconstitutional as applied to the Superintendent of Public Instruction (SPI) and Department of Public Instruction (DPI).

Facts
Taxpayers brought a declaratory action against Gov. Scott Walker, seeking a declaration that Act 21, which changed the administrative rulemaking process by requiring governor and DOA secretary approval for an agency to proceed with rulemaking, was unconstitutional as applied to the SPI, a constitutional office, and DPI, administered by the SPI.

Decision
In a 4-3 decision (Justice Gableman, joined by Justices Abrahamson, Walsh Bradley, and Prosser), the court reasoned that administrative rulemaking is a supervisory power of both the SPI and DPI based upon Art. 10 §1 of Wisconsin's Constitution: "[t]he supervision of public instruction shall be vested in a state superintendent and such other officers as the legislature shall direct." Further, under Wis. Stat. § 227.10(2m) the SPI and DPI are required to implement through administrative rule any legally binding action pursuant to statutes they are tasked with administering, unless the statute specifically provides for another course of action. Finally, the court concluded that based upon the history of the Wisconsin Constitution, neither the offices of governor nor DOA secretary were created to "oversee, inspect, or superintend" public instruction in Wisconsin, and therefore the legislature cannot delegate the supervisory authority at issue here to them.

Dissent
In her dissent, Chief Justice Roggensack (joined by Justices R. Bradley and Ziegler) reasoned that when the SPI and DPI engage in rulemaking, they are exercising legislative authority delegated to them by the legislature, and not constitutional authority under Art. 10 § 1. Thus, it is a core constitutional responsibility of the legislature to control its legislative delegation when that delegation is being exercised by the SPI and DPI. Therefore, it is not unconstitutional to apply the administrative rulemaking limitations contained in Act 21 to the SPI.

In a second dissent, Justice Ziegler (joined by Justice R. Bradley) observed that the legislature has the constitutional authority to define or redefine the supervision of public instruction by the SPI and DPI, and that authority includes the manner in which the SPI and DPI undertake rulemaking, including oversight by the governor and DOA secretary.

Peggy Z. Coye v. Scott Walker WCJC disagrees with this decision.	
Justice Gableman	Wrote opinion
Justice Abrahamson	Concurred
Justice Prosser	Concurred
Justice Walsh Bradley	Concurred
Chief Justice Roggensack	Wrote dissent
Justice Ziegler	Wrote dissent
Justice R. Bradley	Dissented

***John Doe 56 v. Mayo Clinic Health System-Eau Claire Clinic Inc.*, 2016 WI 48 (Medical Malpractice Statute of Limitations)**
The court held that the Does' claims for medical malpractice were subject to a three-year statute of

limitations from the last date that the physician inappropriately touched the Does under Wis. Stat. 893.55(1m)(a), based upon the language of the statute denoting a requirement that a "physically injurious change" to the patient occurred in order for a claim to proceed.

Facts
Two juvenile patients and their parents filed medical malpractice claims against a physician and the physician's employer medical clinic, alleging that the physician inappropriately touched the genitals of both patients. The parents did not learn of the alleged touching contemporaneously with the medical exams but learned later in news reports that the state had charged the physician with second-degree sexual assault for the manipulation of a child's penis during a genital exam in a very similar way to the Does' exams.

Decision
In a 5-2 decision (Justice R. Bradley, joined by Justices Gableman, Prosser, Chief Justice Roggensack, and Ziegler), the court reviewed Wisconsin Stat. § 893.55(1m)(a), which provides that actions to recover damages for malpractice must be commenced within three years from the date of injury.

Citing earlier case law, the court noted that the statute has been interpreted to require a "physically injurious change" in the patient as the definition of an injury. Here, the injury occurred to the patients at the time of their physical examinations.

Based upon the legislature's objective of promoting prompt litigation claims to ensure fairness to patients and medical providers through the statute of limitations, the court rejected Does' parents' arguments that the Does were not aware of a physical injury at the time of the touching because they were not aware that the touching was wrongful.

Dissent
In her dissent, Justice Walsh Bradley (joined by Justice Abrahamson) argued that in this case, as in others, an injury can occur sometime after the act of malpractice. The dissent ascribed the injury that occurred here as manifesting later as severe emotional distress to the parents at the time that they learned their children were victims of child sexual assault by the physician. Thus, the statute of limitations should begin to run from that point.

John Doe 56 v. Mayo Clinic Health System-Eau Claire Clinic Inc. WCJC agrees with this decision.	
Justice R. Bradley	Wrote opinion
Justice Gableman	Concurred
Justice Prosser	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred
Justice Walsh Bradley	Wrote dissent
Justice Abrahamson	Dissented

Dennis D. Dufour v. Progressive Classic Insurance Co., 2016 WI 59 **(Made Whole Doctrine)**
The court held that the made whole doctrine did not preclude the insurer of an injured motorcyclist from retaining funds that it recovered in subrogation from the insurer of an underinsured motorist who caused injury to both the cyclist and his motorcycle.

Facts
Dennis Dufour sustained bodily injury and property damage in a motorcycle accident for which an underinsured motorist was at fault. Both Dufour's insurer and the motorists' insurer paid the maximum amount of their coverage to Dufour for bodily harm - $200,000 total. Dufour's insurer also paid for the property damage to his motorcycle, in the amount of $15,559.86. Under the terms of Dufour's insurance policy, the insurer had a subrogation right to collect the amount it paid Dufour for property damage from the motorist's insurance carrier. Dufour then sought, under the made whole doctrine, to collect the subrogated funds that his insurer had collected from the motorists' insurer because he had not yet been fully compensated for his bodily injuries under the combined coverage of $200,000.

Decision
In a 5-2 decision (Chief Justice Roggensack, joined by Justices R. Bradley, Gableman, Prosser, and Ziegler), the court concluded that Dufour's insurer paid him in full up to the limits of the coverage that it had agreed to provide him for bodily injury, as well as 100 percent of the property damage that he had sustained in the accident. Further, Dufour had priority in settling his claim with the motorists' insurer, and if his own insurer had not proceeded on its subrogation claim against the mo-

torists' insurer, Dufour would have had no additional access to the funds of the motorists' insurer that his insurer received through subrogation.

Dissent

In her dissent, Justice Abrahamson (joined by Justice Walsh Bradley) argued that the made whole doctrine exists to avoid the inequitable prospect of an insurer attempting to take funds that should have gone to its insured. She noted further that an insurer's subrogation rights do not typically arise until an insured's losses have been fully paid. Here, the dissent concluded the losses of the insured should include "all elements" of damages sustained, not separate consideration for bodily injury and property damage. Dufour was not fully compensated, and there would have been no double recovery for Dufour were he to receive the subrogated funds held by the insurer.

Dennis D. Dufour v. Progressive Classic Insurance Co. WCJC agrees with this decision.	
Chief Justice Roggensack	Wrote opinion
Justice R. Bradley	Concurred
Justice Gableman	Concurred
Justice Prosser	Concurred
Justice Ziegler	Concurred
Justice Abrahamson	Wrote dissent
Justice Walsh Bradley	Dissented

Discussion of Decisions 2016-17 Term

***Seifert v. Balink*, 2017 WI 2 (Admission of Expert Witness Testimony)**

The court upheld the admission of expert testimony based on a doctor's personal experiences.

Facts

This medical malpractice case is based on the claim that the defendant doctor was negligent in the prenatal care of Braylon Seifert's mother and in Braylon's delivery at birth. Dr. Jeffrey Wener appeared as an expert witness at trial on behalf of Braylon Seifert regarding the medical care provided by Dr. Kay Balink. Because Wener's testimony was based on years of obstetric medical practice, Balink challenged whether the testimony met the new standard defined by the legislature in Wis. Stat. § 907.02(1):

> 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]

Decision

In a 5-2 decision (Justice Abrahamson, joined by Justices Walsh Bradley, Gableman, Chief Justice Roggensack, and Ziegler), the court found that Wener's opinion, based on his personal experiences, could satisfy the reliability standard. He used classic, ordinary medical methods to establish the standard of care of a family practice doctor practicing obstetrics and opined that the defendant doctor breached the standard.

Concurring Opinion

In a concurring opinion, Justices Gableman and Ziegler (joined by Chief Justice Roggensack) found the testimony admissible but concluded the lead opinion did not sufficiently address the legislature's 2011 changes to Wis. Stat. § 907.02(1), which tightened the admissibility standard for expert opinion. The concurring opinion chided the lead opinion for not adequately guiding trial courts in the application of the new standard.

Dissent

In his dissent, Justice Kelly (joined by Justice R. Bradley) noted that the court failed to clarify the standards for the admissibility of evidence and that it affirmed the admission of testimony that does not meet the new standard articulated in Wis. Stat. § 907.02(1).

The dissent observed that Wener should have identified the proper standard of care and then opined as to why Balink's performance fell short of that standard. The dissent noted, "This division between subjective and objective criteria is essential to the rule of law as it relates to negligence, and especially in the context of medical malpractice." The dissent concluded that the court erroneously accepted Wener's own experience as the accepted standard of care to be applied to the facts of the case, which is exactly what the legislature intended to avoid in amending Wis. Stat. § 907.02(1).

Seifert v. Balink WCJC disagrees with this decision.	
Justice Abrahamson	Wrote opinion
Justice Gableman	Concurred
Justice Walsh Bradley	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred
Justice Kelly	Wrote dissent
Justice R. Bradley	Dissented

***Universal Processing Services v. Circuit Court of Milwaukee County*, 2017 WI 26 (Court Referee Authority)**

The court held that a challenged Order of Reference by a Wisconsin circuit court judge enabled the referee to hear and decide all motions filed, subject to review under the standard of erroneous exercise of discretion, and concluded the Order impermissibly delegated constitutional "judicial power" to a referee.

Facts
This case involved various contract claims, as well as violations of restrictive covenants upon termination of the contracts. The issue before the court involved the appointment of a referee by a circuit court judge to both hear and decide any motions in the case brought by the parties. The circuit court's Order of Reference included a provision that the circuit court's review of the referee's "rulings" shall be based only on the referee's "erroneous exercise of discretion."

Decision
In a unanimous decision with two concurring opinions/dissents, the court held that Wisconsin Constitution Art. 7 § 2 vests judicial power in a unified court system that may not be delegated. This case is important in the line of cases clearly defining separation of powers: that courts exercise their core functions unimpeded and that the legislature determine courts' jurisdiction and not improperly delegate that authority.

The court determined that: "The provision that the circuit court's review of the referee's 'rulings' shall be based only on the referee's 'erroneous exercise of discretion' contravenes the constitution and statutes or rules regarding circuit court and appellate court authority and practice. It infringes on the legislature's authority to define a circuit court's appellate jurisdiction."

Concurring Opinions/Dissents
In a concurring opinion/dissent, Justice Ziegler noted that the circuit court's review of the referee's decisions was not adequately presented to the appellate courts, and thus the court should not have addressed the constitutional questions.

In a second concurring opinion/dissent, Justice R. Bradley (joined by Justice Kelly) noted Universal Processing sat on its rights to challenge the Order of Reference. The dissent agreed with the lead opinion's reasoning on the improper delegation of the circuit court's constitutional responsibilities but would have provided Universal Processing only with prospective relief from the Order.

Universal Processing Services v. Circuit Court of Milwaukee County WCJC agrees with this decision.	
Justice Abrahamson	Wrote opinion
Justice R. Bradley	Concurred/dissented
Justice Walsh Bradley	Concurred
Justice Gableman	Concurred
Justice Kelly	Concurred/dissented
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred/dissented

***Dr. Randall Melchert v. Pro Electric Contractors, 2017 WI 30* (Government Contractor Immunity)**
The court held that the governmental immunity statute (Wis. Stat. § 893.80(4)) protects a private contractor from negligence when implementing a construction design chosen by a governmental entity.

Facts
Dr. Randall Melchert sought damages due to flooding of his office building allegedly caused when Pro Electric damaged a sewer lateral while installing a traffic light as part of a contract with the Department of Transportation (DOT). Melchert conceded that Pro Electric was a governmental agent for the specific auger activities that severed the sewer lateral, but Melchert argued certain conduct, such as the alleged failure to identify and repair the severed sewer lateral prior to backfilling, fell outside the shield of immunity and constituted acts of negligence.

Decision
In a 5-2 decision (Justice Gableman, joined by Justices Walsh Bradley, Chief Justice Roggensack, and Ziegler), the court found that Pro Electric Contractors was immune from liability for severing the sewer lateral because it acted in accordance with reasonably precise design specifications adopted by DOT in the exercise of its legislative, quasi-legislative, judicial, or quasi-judicial functions, as specified in Wis. Stat. § 893.80(4).

Concurring Opinion
In a concurring opinion, Justice Abrahamson agreed with the result but expressed reservations over whether the petition for review should have been granted in this case.

Dissent
In her dissent, Justice R. Bradley (joined by Justice Kelly) reasoned that the actions at issue—excavation—cannot reasonably be found to fall under the definition of the exercise of either a legislative or judicial function under Wis. Stat. § 893.80(4).

Dr. Randall Melchert v. Pro Electric Contractors WCJC agrees with this decision.	
Justice Gableman	Wrote opinion
Justice Abrahamson	Concurred
Justice Walsh Bradley	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred
Justice R. Bradley	Wrote dissent
Justice Kelly	Dissented

Ricardo M. Garza v. American Transmission Co., 2017 WI 35 **(Easements)**
The court held that, under a 1969 deed of easement, American Transmission Company (ATC) had the right to enter Ricardo Garza's property to both trim and remove the trees that threaten or endanger the operation of an electric transmission line because the easement was still in effect.

Facts
This case involved a property dispute between a utility, ATC, seeking to maintain power structures on Garza's property based upon a property easement executed with a prior property owner. Garza argued the easement limited ATC's structures on the property to only those constructed of wood and that the current fabricated metal structures were not allowed under the easement, therefore voiding the maintenance easement.

Decision
In a unanimous decision, the court held that the 1969 easement's language "comprising wood pole structures" is language of description, not circumscription, and as such does not limit the transmission line to wood poles. Rather, the 1969 easement grants ATC the right to make the change from wood poles to steel poles.

Further, the court reasoned that easement law allows for advancements in technology, such as the adoption of metal fabricated poles from wooden poles, so long as the advanced technology does not unduly burden the property owner. There was no indication in this instance that the pole upgrades were unduly burdensome.

Ricardo M. Garza v. American Transmission Co. WCJC agrees with this decision.	
Justice Gableman	Wrote opinion
Justice Abrahamson	Concurred
Justice R. Bradley	Concurred
Justice Walsh Bradley	Concurred
Justice Kelly	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred

Taft Parsons v. Associated Banc-Corp., 2017 WI 37 **(Jury Trial Waiver Provisions)**
The court held that a pre-litigation jury waiver provision in a contract was enforceable.

Facts
Both the Wisconsin Constitution and Wisconsin statutes permit waiver of jury trial. The question before the court here was whether the pre-litigation jury waiver provision in a contract was properly agreed to in the manner prescribed by law, including through contractual agreements such as the one at issue here, and independent of statutory authority.

Decision
In a 4-2 decision (Justice Ziegler, joined by Justices R. Bradley, Gableman, and Chief Justice Roggensack), the court held that Wisconsin Constiution Art. 1 § 5 does not require the legislature to codify every instance in which a civil jury trial waiver may be agreed upon. Rather, the right of private citizens to enter into contractual agreements is not affected by this provision.

Dissent
In her dissent, Justice Walsh Bradley (joined by Justice Abrahamson) found that the right to jury trial is such a fundamental right that waiver can only be accomplished through explicit legislative enactment.

Taft Parsons v. Associated Banc-Corp. WCJC agrees with this decision.	
Justice Ziegler	Wrote opinion
Justice R. Bradley	Concurred
Justice Gableman	Concurred
Chief Justice Roggensack	Concurred
Justice Walsh Bradley	Wrote dissent
Justice Abrahamson	Dissented
Justice Kelly	*Did not participate*

Donna Brenner v. Amerisure Mutual Insurance Co., 2017 WI 38 **(Caveat Emptor Doctrine)**

The court held that the caveat emptor doctrine applied so that a former tenant cannot be liable in negligence for an injury on the property after the tenant has vacated the property and a new tenant has moved in.

Facts

Charter was a manufacturer and long-term tenant of real property owned by Garland Brothers. Charter surrendered its lease and vacated the property per the terms and conditions set by Garland Brothers. Subsequently, Garland Brothers sold the property to Milwaukee World Festival Inc. (MFW). During MFW's renovation of the property, contracted construction worker Donna Brenner was severely injured and sought to find Charter negligent for those injuries.

Decision

In a unanimous decision, the court reasoned that Charter should be treated as a vendor for purposes of caveat emptor in this real estate transaction since MFW had ample opportunity to inspect the property at issue before it was purchased from Garland Brother. Because of that opportunity to inspect, MFW was able to negotiate the property's purchase price from Garland based upon any defects in the property that were not concealed by Garland.

The court concluded, for purposes of the sale of property to MFW, Charter stood in the shoes of Garland Brothers, as a vendor of the property. To conclude otherwise would shift risk back to Charter as a former tenant, even though Charter was no longer able to mitigate, negatively impacting settled expectation and settled rights between real estate vendors and vendees.

Donna Brenner v. Amerisure Mutual Insurance Co. WCJC agrees with this decision.	
Judge Kelly	Wrote opinion
Justice Abrahamson	Concurred
Justice Walsh Bradley	Concurred
Justice Gableman	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred
Justice R. Bradley	*Did not participate*

Lela Operton v. LIRC, 2017 WI 46
(Unemployment Insurance)

The court held with no agency deference that a retail employee's poor workplace performance did not rise to the level of "substantial fault" as recognized under the Wisconsin Unemployment Insurance Act.

Facts

Lela Operton, working as a retail cashier, committed a pattern of errors in returning change in customer transactions. The employer terminated Operton's employment and sought to deny her unemployment insurance benefits under a recently created section of the Wisconsin Unemployment Insurance (UI) statute (Wis. Stat. § 108.04(5g)) establishing a standard of "substantial fault" that would deny UI benefit eligibility.

Decision

In a unanimous decision, the court noted that Wis. Stat. § 108.04(5g) provides three exemptions from the definition of substantial fault. Under the statute, substantial fault does not include:

1. One or more minor infractions of rules unless an infraction is repeated after the employer warns the employee about the infraction.
2. One or more inadvertent errors made by the employee.
3. Any failure of the employee to perform work because of insufficient skill, ability, or equipment.

The court concluded that over the course of thousands of retail transactions, the errors on Operton's part amounted to "inadvertent errors" under the statutory exemptions from the substantial fault

standard. Therefore, Operton should be eligible for UI benefits.

In determining that "no deference" should be extended to the Labor and Industry Review commission's interpretation of the statue, this decision initiated a pivotal discussion within the court over the issue of administrative agency deference. The court has recently ended the practice of agency deference in *Tetra Tech v. DOR*.

Concurring Opinions
In a concurring opinion, Justice R. Bradley challenged the concept of agency deference from a constitutional perspective, noting it is the duty of the courts to "say what the law is." The great weight deference construct had developed to the point where courts did not overrule agency interpretations, even where another reading of a statute has a more reasonable interpretation than the agency.

In a second concurring opinion, Justice Zielger suggested that concepts such as "reliance" on agency interpretations may be a consideration. The concurring opinion further alludes to the fact the "regulated community" should be allowed to weigh in on issues before the court reaches any decision that may alter the status quo.

Lela Operton v. LIRC WCJC disagrees with this decision.	
Chief Justice Roggensack	Wrote opinion
Justice Abrahamson	Concurred
Justice R. Bradley	Concurred
Justice Walsh Bradley	Concurred
Justice Gableman	Concurred
Justice Kelly	Concurred
Justice Zielger	Concurred

***Gabler v. Crime Victims Board*, 2017 WI 67**
(Judicial Branch Constitutional Authority)
The court held that the Wisconsin Crime Victims Board's authority to discipline a judge's exercise of core judicial powers violates the Wisconsin Constitution's structural separation of powers.

Facts
Wisconsin Circuit Court Judge William Gabler contended the Wisconsin Crime Victims Board, a legislatively created executive branch agency, violated the separation of powers doctrine under the Wisconsin Constitution by sanctioning him for his discretionary scheduling decision in a matter before his court.

The board argued there was no separation of powers problem because under the state constitution the board and the judiciary share authority to set time limits for judicial decision making, and any decisions by the board are subject to judicial review under Wis. Stat. Ch. 227, the administrative procedures act. The board also argued that the lower court's proposed limitations on the board's remedial powers were untenable because they would deprive crime victims of any remedy in many cases involving judges.

Decision
In a unanimous decision with a concurring opinion/dissent, the court held that, under the separation of powers doctrine in the Wisconsin Constitution, disciplinary powers are given to the Supreme Court alone.

Concurring Opinion/Dissent
In a concurring opinion/dissent, Justice Abrahamson argued that the lead opinion did not follow the doctrine of constitutional avoidance and that the court should not decide an issue on constitutional grounds if there is any interpretation of a statute that will survive constitutional scrutiny. Analyzing the legislative history of the Wisconsin Crime Victims provision of Wisconsin Constitution Art. 9 § 9m, as well as the statutory provisions implementing the constitutional provision, Wis. Stat. Ch. 950, the dissent concluded that the legislative enactment of Wis. Stat. Ch. 950 can be reconciled with the Art. 7 core authority and duties of Wisconsin courts.

Gabler v. Crime Victims Board WCJC agrees with this decision.	
Justice R. Bradley	Wrote opinion
Justice Abrahamson	Concurred/dissented
Justice Walsh Bradley	Concurred
Justice Gableman	Concurred
Justice Kelly	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred

***Account of Ambac Assurance v. Countrywide Home Loans*, 2017 WI 71 (Foreign Corporations Jurisdiction)**

The court held that compliance with the registration requirement for foreign corporations in Wisconsin does not constitute consent to general jurisdiction in Wisconsin.

Facts

Ambac Assurance Corp. is a Wisconsin corporation with its principal place of business in New York. An insurer of financial instruments, Ambac issued polices in 2005 insuring against losses stemming from residential mortgage-backed securities containing Countrywide mortgage loans. Neither the policies nor the contracts were negotiated in Wisconsin, but the underlying securities did include mortgage loans made to Wisconsin residents and secured by property here.

The U.S. Supreme Court recently clarified the limits the U.S. Constitution Amend. 14 due process clause places on the scope of general jurisdiction: "A court may assert general jurisdiction over foreign . . . corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Daimler AG v. Bauman*, 134 S. Ct. at 754 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

Decision

In a 4-2 decision (Justice R. Bradley, joined by Justices Gableman, Chief Justice Roggensack, and Ziegler), the court concluded that treating general jurisdiction as a "duty" of domestic corporations that extends to all registered foreign corporations by default would extend Wisconsin's exercise of general jurisdiction beyond the tapered limits recently described by the U.S. Supreme Court. Because the due process clause controls the circumstances under which a state may exercise personal jurisdiction, the court reasoned that appointing a registered agent under the Wisconsin foreign corporation registration requirement (Wis. Stat. § 180.1507) does not constitute consent to general personal jurisdiction.

Because Wis. Stat. § 180.1507 does not mention jurisdiction, deviation from the text would place the statute's constitutionality into doubt. Foreign corporations principally operating outside of Wisconsin may rightly be subject to suit in Wisconsin courts for claims arising out of their activities in this state, but the U.S. Supreme Court made clear that the due process clause proscribes the exercise of general jurisdiction over foreign corporations beyond exceptional circumstances.

Dissent

In her dissent, Justice Walsh Bradley (joined by Justice Abrahamson) argued Wis. Stat. § 180.1507 should be read in conjunction with Wis. Stat § 180.1510(1), requiring corporations to appoint an agent to receive legal process, which should confer jurisdiction in this instance.

Account of Ambac Assurance v. Countrywide Home Loans WCJC agrees with this decision.	
Justice R. Bradley	Wrote opinion
Justice Gableman	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred
Justice Walsh Bradley	Wrote dissent
Justice Abrahamson	Dissented
Justice Kelly	*Did not participate*

***Tracie Flug v. LIRC*, 2017 WI 72 (Worker's Compensation)**

The court held that the worker's compensation statute extending benefits to workers who undertake a not medically necessary treatment in good faith does not apply to secondary treatments unrelated to the compensable injury.

Facts

Tracie Flug had a work-related soft tissue strain and then undertook surgical treatment for degenerative disc disease in the mistaken belief that the surgery was necessary to treat the soft tissue condition. The soft tissue strain and the degenerative disc disease were unrelated medical conditions. Flug's surgery resulted in a permanent disability, resulting in her claim for permanent partial disability benefits under Wis. Stat § 102.42(2m). The statute laid out five elements for applicability:

1. The employee sustained a compensable injury.

2. The employee undertook invasive medical treatment.
3. The treatment was undertaken in good faith.
4. The treatment was generally medically acceptable, but unnecessary.
5. The employee incurred a disability as a result of the treatment.

Decision
In a 4-3 decision (Justice Kelly, joined by Justices R. Bradley, Gableman, and Ziegler), the court concluded that when the five statutory elements are read as a whole, the legislature's intent was to require that the secondary treatment undertaken (here the claimant's disc surgery) must result from the underlying work injury for any resulting disability to be compensable for the secondary treatment.

Dissent
In her dissent, Chief Justice Roggensack concluded the statute should be read to compensate the disability from the secondary treatment if the injured worker relied in good faith on the recommendation for the secondary treatment, even if the treatment was determined to be unnecessary for treating the compensable injury.

The dissent recommended sending the case back for a factual determination on the injured worker's good faith reliance.

In a second dissent, Justice Walsh Bradley (joined by Justice Abrahamson) argued the case should be remanded back to the Labor and Industry Review Commission to reweigh the competing medical opinions at issue.

Tracie Flug v. LIRC WCJC agrees with this decision.	
Justice Kelly	Wrote opinion
Justice R. Bradley	Concurred
Justice Gableman	Concurred
Justice Ziegler	Concurred
Chief Justice Roggensack	Wrote dissent
Justice Walsh Bradley	Wrote dissent
Justice Abrahamson	Dissented

Milewski v. Town of Dover, 2017 WI 79
(Property Tax Assessments)
The court held that requiring submission to a tax assessor's search as a precondition to challenging the revaluation of their property violated due process.

Facts
After learning of a new property assessment, Vincent Milewski attended open book sessions to review the assessed values of other properties in his subdivision. Based on his research, Milewski learned that of the 43 parcels in the subdivision, only four properties, including the Milewskis', did not have their interiors inspected during the 2013 assessment. Of those four properties, all four saw an increase in their initial assessment. The other 39 properties that did have their interiors inspected saw their assessed value decrease.

After receiving the initial assessments, the owners of two of the four properties that had not had their interiors inspected allowed the inspector to conduct an inspection of their home's interior. The assessments for those properties were then reduced. Thus, the only two properties in the 43-parcel subdivision that saw an increased assessment during the 2013 revaluation were those two properties where the owners did not consent to inspection of their home's interior.

Decision
In a 5-2 decision, Justice Kelly (joined by Justices R. Bradley, Gableman, Chief Justice Roggensack, and Ziegler) held that a procedural due process challenge requires complainants to establish two components: 1) that they have been deprived of a recognized right; and 2) that they have not been afforded process commensurate with the deprivation. The court found that requiring the interior inspection as a precondition to challenging the revaluation in the Milewskis' case met these components.

Concurring Opinions
In a concurring opinion, Justice Ziegler (joined by Justice Gableman) objected to the over breadth of some of the lead opinion analysis based upon the line of "unconstitutional conditions" cases—for example, required entry into the homeowner's premises.

In a second concurring opinion, Chief Justice Roggensack argued that the decision should not have been reached on constitutional grounds.

Dissent
In her dissent, Justice Abrahamson (joined by Justice Walsh Bradley) determined that Milweski had not shown that the statutory provisions at issue were not unconstitutional beyond a reasonable doubt, the applicable standard of review.

Milewski v. Town of Dover WCJC agrees with this decision.	
Justice Kelly	Wrote opinion
Justice R. Bradley	Concurred
Justice Gableman	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred
Justice Abrahamson	Wrote dissent
Justice Walsh Bradley	Dissented

Discussion of Decisions 2017-18 Term

***Metropolitan Associates v. City of Milwaukee*, 2018 WI 4 (Property Tax Assessments)**

The court held that mass appraisals for initial property tax assessments comply with real estate valuation statutes.

Facts

Metropolitan Associates challenged the City of Milwaukee's property tax assessment of several of its properties. The assessor first assessed the property using mass appraisal, which systematically values groups of property altogether. Upon Metropolitan's challenge, the assessor re-assessed the property using a comparable sales analysis and subsequent income analysis.

Metropolitan argued that mass appraisals violate the requirement in Wis. Stat. § 70.32(1) that assessors use the "best information that the assessor can practicably obtain." Metropolitan further challenged the assessor's comparable sales and income analyses.

Decision

In a 5-2 decision (Justice Walsh Bradley, joined by Justices Abrahamson, Gableman, Chief Justice Roggensack, and Ziegler), the court held that mass appraisals do comply with Wis. Stat. § 70.32(1) because:

1. The statute requires assessors to follow the Wisconsin property assessment manual, and the manual allows assessors to use mass appraisal.
2. Individually assessing every property to obtain the "best information" would not be "practicabl[e]" because cities must assess large numbers of properties.

Dissent

In their dissent, Justices R. Bradley and Kelly argued mass appraisal is not a statutorily valid assessment technique because it analyzes supply and demand over a large area instead of the value of the individual property at private sale. Mass appraisal is not included in the three tiers of analyses listed in the statute (recent sales, comparable sales, and income), and statutes override procedures laid out in the manual. Furthermore, the dissent argued both the city's and Metropolitan's assessments were flawed because they did not properly adjust for economic characteristics in their comparable sales analyses.

Metropolitan Associates v. City of Milwaukee WCJC disagrees with this decision.	
Justice Walsh Bradley	Wrote opinion
Justice Abrahamson	Concurred
Justice Gableman	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred
Justice R. Bradley	Wrote dissent
Justice Kelly	Wrote dissent

***Manitowoc Co., Inc. v. Lanning*, 2018 WI 6 (NSE Agreements)**

The court held as an unenforceable restrictive covenant a nonsolicitation of employees (NSE) agreement prohibiting a former employee from raiding any of the company's employees.

Facts

John Lanning signed an NSE agreement while employed by Manitowoc Co. He later accepted a position with a direct competitor and broke the agreement by actively recruiting Manitowoc Co. employees to his new job. He claimed the NSE agreement was void under Wis. Stat. § 103.465, which restricts noncompete clauses in employment contracts.

Decision

In a 5-2 decision (Justice Abrahamson, joined by Justices R. Bradley, Walsh Bradley, Gableman, and Kelly), the court held that the NSE agreement was a restrictive covenant governed by Wis. Stat. § 103.465 because it limited Lanning, his new company, and current Manitowoc Co. employees' opportunities to compete in the labor pool. The court ruled the NSE provision unenforceable because Manitowoc Co. did not establish a protectable interest in restricting the solicitation of *any* of their employees, beyond just those with specialized interest related to Lanning.

Concurring Opinion
In a concurring opinion, Justice R. Bradley (joined by Justices Gableman and Kelly) agreed with the court's decision but said the court should have conducted an analysis of the statutory text instead of relying on case law. The concurring opinion argued that, according to the text, the court should have examined solely the relationship between Lanning and his former employer Manitowoc Co. instead of the competitive relationship between Manitowoc Co. and Lanning's new employer. However, this analysis would have led to the same conclusion that the NSE was an unenforceable restrictive covenant under Wis. Stat. § 103.465.

Dissent
In her dissent, Chief Justice Roggensack (joined by Justice Ziegler) agreed with the concurring opinion that the court should not have focused on the effects of the NSE on parties outside Lanning and his former employer Manitowoc Co. The dissent further reasoned that the court too broadly expanded the scope of Wis. Stat. § 103.465 to include any "restraint of trade," and Lanning's NSE should not be considered an unenforceable restrictive covenant under that section. The NSE was enforceable because Manitowoc Co. had a protectable interest in protecting its key employees from being unfairly raided by competitors.

Manitowoc Co., Inc. v. Lanning WCJC disagrees with this decision.	
Justice Abrahamson	Wrote opinion
Justice R. Bradley	Concurred
Justice Walsh Bradley	Concurred
Justice Gableman	Concurred
Justice Kelly	Concurred
Chief Justice Roggensack	Wrote dissent
Justice Ziegler	Dissented

***Wisconsin Association of State Prosecutors v. Wisconsin Employment Relations Commission*, 2018 WI 17 (Act 10)**
The court upheld Wisconsin Employment Relations Commission (WERC) rules authorized under Act 10 requiring unions to file petitions for certification elections.

Facts
Act 10 requires WERC to hold annual certification elections for representatives of collective bargaining units (Wis. Stat. §§ 111.70(4)(d)3.b. and 111.83(3)(b)). If no representative receives 51 percent of votes in a certification election, the representative will be decertified, and the collective bargaining unit may not be recertified for one year.

WERC promulgated rules for conducting certification elections under these statutes. The rules require labor organizations wishing to represent a collective bargaining unit to file a petition for election by Sept. 15. Those organizations filing timely petitions are included on the ballot. If no organizations file petitions, the current representing organization is decertified, and the collective bargaining unit may not be recertified for one year. The unions in this case each filed petitions after the Sept. 15 deadline.

Decision
In a 5-2 decision (Justice Ziegler, joined by Justices R. Bradley, Gableman, Kelly, and Chief Justice Roggensack), the court held that WERC did not exceed its statutory authority in promulgating the rules requiring a petition for election. The statutes specifically state that ballots shall contain names of organizations "having an interest" in representing a collective bargaining unit and authorize WERC to create rules governing the elections. Thus, it is reasonable for WERC to require those interested in representing to submit their names for the ballot. The court rejected the unions' argument that current representatives have an inherent continuing interest in representing again.

The court also ruled that WERC can decertify representative labor organizations on the Sept. 15 deadline because the statutes direct WERC to hold elections before Dec. 1.

Dissent
In her dissent, Justice Walsh Bradley (joined by Justice Abrahamson) agreed with the unions' argument that the word "shall" in Wis. Stat. §§ 111.70 (4)(d)3.b. and 111.83(3)(b) unconditionally mandates WERC to hold elections. Thus, the WERC rules allowing decertification if no petitions are filed is incompatible with the statute.

Association of State Prosecutors v. Wisconsin Employment Relations Commission WCJC agrees with this decision.	
Justice Ziegler	Wrote opinion
Justice R. Bradley	Concurred
Justice Gableman	Concurred
Justice Kelly	Concurred
Chief Justice Roggensack	Concurred
Justice Walsh Bradley	Wrote dissent
Justice Abrahamson	Dissented

***CED Properties, LLC v. City of Oshkosh*, 2018 WI 24 (Special Assessments)**

The court held that "special benefits" are the same under the eminent domain and special assessment statutes; however, under eminent domain, the statute specifies only special benefits that affect a property's market value.

Facts

The City of Oshkosh used its power of eminent domain to take 6 percent of CED Properties's property to construct a roundabout at a nearby intersection as part of an overall improvement plan. Wis. Stat. § 32.09 provides that the city must offset the price of compensation to property owners in eminent domain takings with the value of any "special benefits" that may affect the market value of the property upon the improvements. The city did not offset the price of compensation to CED for any special benefits that would result from construction of the roundabout.

Two years later, the city levied a special property tax assessment on CED to fund the improvement plan for the nearby intersection. Wis. Stat. § 66.0703(1)(a) requires that the city may only collect special assessments from property owners that incur "special benefits" from the improvements. In this instance, the city claimed the roundabout improvement project would increase accessibility and safety for CED's property, among other special benefits. CED argued the project would not actually provide special benefits to its property, and the city cannot claim special benefits for the purpose of the special assessment since it had not identified special benefits in the previous eminent domain proceedings for the same project.

Decision

In a 5-2 decision (Justice R. Bradley, joined by Justices Gableman, Kelly, Chief Justice Roggensack, and Ziegler), the court agreed with CED that "special benefits" has the same plain meaning in the eminent domain and special assessments statutes. However, the court clarified that the eminent domain statutes require that the city identify only special benefits *affecting the market value of the property* to offset compensation to property owners. In this case, the improvement project may not provide special benefits affecting the market value of CED's property, but the project may provide other special benefits under the more general special assessments statute. The court denied the city's request for summary judgement because CED provided sufficient evidence that there is a genuine dispute over whether the project would actually confer these other special benefits on CED's property for the purpose of the special assessment.

Dissent

In her dissent, Justice Abrahamson (joined by Justice Walsh Bradley) argued that special benefits under eminent domain and special assessments are "distinct and different considerations." The dissent also would have upheld summary judgement for the city because CED did not overcome the presumption of correctness of the city's assessment.

CED Properties, LLC v. City of Oshkosh WCJC agrees with this decision.	
Justice R. Bradley	Wrote opinion
Justice Gableman	Concurred
Justice Kelly	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred
Justice Abrahamson	Wrote dissent
Justice Walsh Bradley	Dissented

DNR v. District IV Court of Appeals, 2018 WI 25

(Appellate Venue Selection)

The court held that the appeal by the Department of Natural Resources (DNR) in this case must be held outside of the District IV Court of Appeals under Wisconsin's venue statute (Wis. Stat. § 752.21(2)) created by 2011 Act 61.

Facts

The underlying litigation in this case involved the reissuance of a DNR Wisconsin Pollutant Discharge Elimination System permit to dairy farm Kinnard Farms, Inc., located in Kewaunee County. DNR initially reissued the permit to Kinnard with two new conditions. Kinnard challenged the imposition of those permit conditions for lack of DNR explicit authority. DNR at first rejected the challenge but subsequently agreed to remove the conditions and reissued the permit to Kinnard.

Clean Wisconsin, Inc., a state-wide environmental advocacy group, and Kinnard's neighbors, the Cocharts, challenged DNR's decision to reissue the permit without conditions. Clean Wisconsin filed a petition for judicial review in Dane County Circuit Court, and the Cocharts filed their petition in Kewaunee County Circuit Court—the home counties of Clean Wisconsin and the Cocharts, respectively. Because the Clean Wisconsin petition was filed first, the venue of both petitions was moved to Dane County Circuit Court, where the two cases were consolidated into one case. The court subsequently ruled in favor of Clean Wisconsin and the Cocharts.

DNR then appealed the Dane County Circuit Court's *Clean Wisconsin* decision, requesting venue in the Wisconsin District II Court of Appeals, instead of District IV. DNR made the request under Wis. Stat. § 752.21(2), which provides in relevant part:

> (2) A judgment or order appealed from an action venued in a county designated by the plaintiff to the action as provided under s. 801.50(3)(a) **shall be heard in a court of appeals district selected by the appellant but the court of appeals district may not be the court of appeals district that contains the court from which the judgment or order is appealed.** [emphasis added]

Contrary to the highlighted language in the statute, the District IV Court of Appeals, whose district includes Dane County Circuit Court, took jurisdiction over the *Clean Wisconsin* case. DNR appealed the District IV decision to claim venue over the *Clean Wisconsin* appeal, arguing the District IV venue violated Wis. Stat. § 752.21(2).

Decision

In a 5-2 opinion (Justice Kelly, joined by Justices R. Bradley, Gableman, Chief Justice Roggensack, and Ziegler), the court agreed with DNR that the case was improperly venued and ordered the case to be moved to the District II Court of Appeals, as initially requested by DNR.

In 2011, Gov. Scott Walker signed into law Act 61, which created Wis. Stat. § 752.21(2), aimed directly at establishing balance in administrative agency review appeals. Act 61 also amended another important venue provision governing Wisconsin courts, Wis. Stat. § 801.50(3)(a):

> Except as provided in this subsection pars. (b) and (c), all actions in which the sole defendant is the state . . . shall be venued in the county designated by the plaintiff unless another venue is specifically authorized by law.

The court held that because the initial petitioner in the underlying case, Clean Wisconsin, designated Dane County Circuit Court as the court in which to file its petition, and because the Cocharts' petition was subsequently filed in Kewaunee County Circuit Court but was removed to Dane County Circuit Court and consolidated with the Clean Wisconsin petition, the combined administrative challenge was properly venued in Dane County Circuit Court under Wis. Stat. § 801.50(3)(a), by designation of the initial petitioner. The decision said that although Clean Wisconsin was required to file in Dane County under Wis. Stat. § 227.53(1)(a), filing in the circuit court of Clean Wisconsin's county of residence still falls under the definition of "designated" in Wis. Stat. § 752.21(2). Therefore, the initial designation of circuit court venue by Clean Wisconsin at the trial court then invoked DNR's choice of appeals court venue under Wis. Stat. § 752.21(2).

Dissent
In her dissent, Justice Abrahamson (joined by Justice Walsh Bradley) argued that the venue statute created by Act 61 does not apply in this case because Clean Wisconsin was required by Wis. Stat. § 227.53(1)(a) to file its petition in Dane County and thus did not "designate" the circuit court venue as required in Wis. Stat. § 752.21(2). The dissent said the term "designated by the plaintiff" indicates a *choice* in venue and cited the Legislative Reference Bureau and Fiscal Estimate Narrative of the original bill as indicating Act 61 "permits" the plaintiff to designate the circuit court venue, implying a necessary choice. Because Clean Wisconsin was *required* by statute to file in its county of residence, the dissent argues this lack of choice prohibits the application of Wis. Stat. § 752.21(2), and DNR should not be permitted to select the appellate court venue.

DNR v. District IV Court of Appeals WCJC agrees with this decision.	
Justice Kelly	Wrote opinion
Justice R. Bradley	Concurred
Justice Gableman	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred
Justice Abrahamson	Wrote dissent
Justice Walsh Bradley	Dissented

***Shugarts v. Allstate Property and Casualty Insurance Co.*, 2018 WI 27 (UIM Coverage)**
The court held that the event triggering the notice requirement in an underinsured motorist (UIM) policy is when the tortfeasor's underlying policy limit is exhausted.

Facts
Robert Shugarts, a deputy sheriff in Eau Claire County, was severely injured in his squad car in a pursuit of defendant Dennis Mohr. The accident occurred in October 2011. Mohr was insured by Progressive. The squad car was insured by Wisconsin Municipal Mutual Insurance Co., and Shugarts had a personal policy with Allstate that included UIM coverage.

Shugarts and Progressive negotiated for several years, and in October 2014 Progressive offered a $50,000 settlement (the Progressive policy's bodily injury liability limit). Believing his injuries in excess of the $50,000 policy limit, Shugarts notified Allstate of the proposed settlement in February 2015.

When Shugarts added Allstate as a defendant to his complaint in March 2015, Allstate argued that UIM coverage was not available to Shugarts because he did not provide timely notice of his intention to make a claim after the accident, pursuant to the Allstate policy and Wis. Stat. § 631.81(1).

Decision
In a unanimous decision, the court held that Shugarts did provide timely notice to Allstate because UIM coverage is not triggered until the tortfeasor's liability limits are met. The decision noted that Allstate's UIM policy did not specifically require Shugarts to provide "proof of loss" at the time of the accident but instead required "proof of claim." Because UIM coverage is excess coverage, the court said Shugarts did not have a claim until Progressive offered the $50,000 settlement. Furthermore, the court said Wis. Stat. § 631.81(1) did not apply because the Allstate UIM policy required "proof of claim," not "notice or proof of loss" as presumed by the statute.

Shugarts v. Allstate Property and Casualty Insurance Co. WCJC disagrees with this decision.	
Justice Walsh Bradley	Wrote opinion
Justice Abrahamson	Concurred
Justice R. Bradley	Concurred
Justice Gableman	Concurred
Justice Kelly	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred

***Deutsche Bank National Trust Co. v. Thomas Wuensch*, 2018 WI 35 (Evidence in Foreclosure Case)**

The court held that attorneys presenting a wet-ink note endorsed in blank sufficiently establish that their clients possess and may enforce the note.

Facts

In a foreclosure action between Thomas Wuensch and Deutsche Bank, a dispute arose regarding whether Deutsche Bank was the legal enforcer of Wuensch's loan. Deutsche Bank was the most recent of several banks to have control of the loan after multiple transfers.

Decision

In a 5-2 decision (Justice R. Bradley, joined by Justices Gableman, Kelly, Chief Justice Roggensack, and Ziegler), the court ruled Deutsche Bank's attorney's presentation of the original, wet-ink, endorsed in blank note is admissible proof that Deutsche bank is the "holder" and enforcer of the note under Wis. Stat. § 403.301, § 401(2)(km)1, and § 401.201(2)(cm). The decision noted the attorney presenting the note need not be sworn in as a witness because he was "presenting self-authenticating evidence…on behalf of his client." The bank only needs to possess the note and does not need to present evidence of possession in order to be the enforcer.

Dissent

In her dissent, Justice Walsh Bradley (joined by Justice Abrahamson) argued that the note should have been formally sworn in as evidence (instead of simply presented by Deutsche Bank's attorney) in order to determine the bank as its possessor.

Deutsche Bank National Trust Co. v. Thomas Wuensch WCJC agrees with this decision.	
Justice R. Bradley	Wrote opinion
Justice Gableman	Concurred
Justice Kelly	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred
Justice Walsh Bradley	Wrote dissent
Justice Abrahamson	Dissented

***Thoma v. Village of Slinger*, 2018 WI 45 (Property Tax Assessments)**

The court held that a property owner did not present enough evidence to overturn a village board decision upholding his property tax assessment change from agricultural to residential, despite the assessor and board attorney presenting incorrect information at hearing.

Facts

In 2004, Donald Thoma purchased farmland to develop into a residential neighborhood. The Village of Slinger rezoned the land for residential use and received an injunction to prevent Thoma from using it agriculturally. However, the property tax assessment remained agricultural until 2014, when the assessment changed from agricultural to residential. Thoma appealed the residential classification to the Village of Slinger Board of Review since the land remained undeveloped. The assessor incorrectly testified to the board (and the board's attorney similarly incorrectly advised them) that the injunction required the land to be taxed residentially. Ultimately, the board upheld the residential assessment. Thoma filed a suit challenging the board's decision.

Decision

In a 4-2 decision (Justice R. Bradley, joined by Justices Abrahamson, Walsh Bradley, and Gableman), the court upheld the board's decision because Thoma did not present enough evidence at the board hearing that he was using the land for agricultural purposes. Though the court agreed that the assessor and board attorney presented incorrect information to the board related to the injunction, Thoma bears the burden of proof in challenging his assessment and failed to present sufficient proof. The court also denied Thoma's motion for a new hearing under Wis. Stat. § 806.07(1)(h), which allows courts to vacate judgements for "reasons justifying relief from the operation of judgement."

Dissent

In her dissent, Chief Justice Roggensack (joined by Justice Ziegler) argued that the board's erroneous reliance on the injunction meant that the court should remand the case for further review since the decision was reached on an incorrect theory of law.

Thoma v. Village of Slinger WCJC disagrees with this decision.	
Justice R. Bradley	Wrote opinion
Justice Abrahamson	Concurred
Justice Walsh Bradley	Concurred
Justice Gableman	Concurred
Chief Justice Roggensack	Wrote dissent
Justice Ziegler	Dissented
Justice Kelly	*Did not participate*

Archie Talley v. Mustafa Mustafa, 2018 WI 47

(Negligent Supervision Claim)

The court held that there was no coverage under a business owner's liability insurance policy for an employee's actions, despite the plaintiff's claim of negligent supervision.

Facts

The case arises from an incident in which Mustafa Mustafa's employee punched customer Archie Talley in Mustafa's store. Talley sued Mustafa and his insurer, Auto-Owners Insurance Company. Talley's complaint alleged that Mustafa was negligent in failing to properly train and supervise his employees.

Decision

In a 4-3 decision (Justice R. Bradley, joined by Justices Gableman, Chief Justice Roggensack, and Ziegler), the court held that Talley had no separate negligence claim against the employer Mustafa, and his claim rested solely on the intentional action of Mustafa's employee. The Auto-Owners policy specifically stated it covers bodily injury only when caused by an "occurrence," defined as "an accident." Punching someone in the face is not an "accident," and the plaintiff failed to show that Mustafa's actions accidentally led to Talley's injuries, so the damages were not covered by the policy.

The decision clarified statements from *Doyle v. Engelke* that said coverage is based on policy as applied to plaintiffs' complaints and courts must stay within the "four corners of the complaint" when determining coverage. The court also clarified that, unlike the court's analysis in *Doyle*, in claims of negligent supervision, "negligence" does not necessarily constitute an "accident" or covered "occurrence."

Despite a request for a bright line rule from Auto-Owners, the court also determined that an agreement between an insured and insurer on whether their contract provides coverage does not control a court's coverage determination.

Dissents

In her dissent, Justice Walsh Bradley (joined by Justices Abrahamson and Kelly) argued that the court did not properly make a decision regarding the coverage phase of this bifurcated case. The dissent argued the court should not have based its decision on the merits of Talley's negligent supervision claim and instead should have decided whether Mustafa would be covered assuming Talley's claims succeed in the liability phase of the case.

In a second dissent, Justice Kelly (joined by Justices Abrahamson and Walsh Bradley) also distinguished the coverage phase of the case and argued the court should have solely addressed whether Auto-Owners would have covered damages if Talley's negligence claim prevailed in the merits phase. The dissent noted that because Wisconsin is a notice pleading state, Talley did not have to prove Mustafa's negligence in his complaint to the extent the court required. The dissent further disagreed with the court's ruling that Talley should have showed a direct link from Mustafa's actions to Talley's injuries.

Archie Talley v. Mustafa Mustafa WCJC agrees with this decision.	
Justice R. Bradley	Wrote opinion
Justice Gableman	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred
Justice Walsh Bradley	Wrote dissent
Justice Kelly	Wrote dissent
Justice Abrahamson	Dissented

***Springer v. Nohl Electric Products Corp.*, 2018 WI 48 (Successor Non-Liability)**

The court held that the Wisconsin Uniform Fraudulent Transfer Act (WUFTA) does not govern the "fraudulent transaction" exception of successor non-liability.

Facts

When a company buys another's assets, it does not incur responsibility for liabilities attached to those assets. This rule exists to protect buyers from unexpected liability. However, certain exceptions apply, including if the transaction took place fraudulently to escape responsibility for the liabilities.

This case arose from an asbestos exposure lawsuit. Penny Springer sued multiple companies for her husband's death from mesothelioma. Powers Holdings moved summary judgment under the successor non-liability law because it was a successor to the previous business that dealt with asbestos-containing products. There was no evidence that Powers Holdings dealt with asbestos-containing products. However, Springer claimed that Powers Holdings was liable under the fraudulent transaction exception of successor non-liability.

Decision

In a 5-2 decision (Justice Kelly, joined by Justices R. Bradley, Gableman, Chief Justice Roggensack, and Ziegler), the court held that WUFTA does not apply because it exists to assist creditors unable to collect because of recent asset transfers. As an asset-focused act, WUFTA does not encompass the fraudulent transaction exception since it fails to address the nuances afforded in successor non-liability. Thus, the court concluded that Powers Holdings was not liable in this case.

Dissent

In her dissent, Justice Abrahamson (joined by Justice Walsh Bradley) argued that courts should be able to consult the examples of fraud listed in WUFTA as indicative of fraudulent transaction in other cases. The dissent also suggested the court should have taken up an amended complaint by Springer and expressed a concern that the court has trended toward deciding issues that are not legally before it.

Springer v. Nohl Electric Products Corp. WCJC agrees with this decision.	
Justice Kelly	Wrote opinion
Justice R. Bradley	Concurred
Chief Gableman	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred
Justice Abrahamson	Wrote dissent
Justice Walsh Bradley	Dissented

***Federal National Mortgage Association v. Cory Thompson*, 2018 WI 57 (Claim Preclusion in Foreclosure Actions)**

The court held that claim preclusion does not bar lenders from subsequent foreclosure action when a previous foreclosure action on the same note has been dismissed with prejudice.

Facts

Cory Thompson executed a promissory note with a lender that also contained an acceleration clause. The lender filed a lawsuit when Thompson defaulted, but the court ruled the lender did not validly fulfill the note's terms for acceleration of payment upon Thompson's default. The court dismissed the lender's claim with prejudice.

After the dismissal of the first lawsuit, Thompson defaulted again, and the lender gave new notice of intent to accelerate payment. The lender filed this instant case, but the circuit court applied claim preclusion, since the case involved the same parties, loan, allegations, and remedy as the first.

Decision

In a unanimous decision, the court ruled that because the lender never validly accelerated payment in the first lawsuit and the action was dismissed with prejudice, the lender could bring a second lawsuit for Thompson's subsequent default. Claim preclusion does not apply because the causes of action between the first case and instant case were not the same. Allowing claim preclusion in this circumstance would prevent the lender from ever suing to collect future defaults after it failed in an earlier action.

Federal National Mortgage Association v. Cory Thompson WCJC agrees with this decision.	
Justice Abrahamson	Wrote opinion
Justice R. Bradley	Concurred
Justice Walsh Bradley	Concurred
Justice Gableman	Concurred
Justice Kelly	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred

***Winebow, Inc. v. Capitol-Husting Co.*, 2018 WI 60 ("Dealership" Definition)**

The court ruled that wine grantor-dealer relationships are not considered "dealerships" under Wisconsin's Fair Dealership Law.

Facts

This case answers a certified question from a U.S. Court of Appeals that will ultimately decide whether Winebow violated the Fair Dealership Law in unilaterally terminating its relationships with distributors Capitol Husting and L'Eft Bank Wine Co.

The Fair Dealership Law defines "dealership" in Wis. Stat. § 135.02(3)(b) as an agreement by which a "wholesaler" is granted the right sell, distribute, or use a commercial symbol related to "intoxicating liquor."

Decision

In a 4-3 decision (Justice Gableman, joined by Justices Walsh Bradley, Chief Justice Roggensack, and Ziegler), the court held that wine grantor-dealer relationships do not fall under the definition of "dealership" because a definition of "intoxicating liquor" later in Ch. 135 explicitly excludes wine. The court backed its position with an examination of the legislative history and intent of the statute, pointing to Gov. Tommy Thompson's partial veto that deleted cross-references to the definition of "intoxicating liquor" that does include wine. Furthermore, the court states that the definition that excludes wine is the only definition of "intoxicating liquor" present in Ch. 135, and courts should aim to use a uniform definition of a single term throughout a chapter.

Dissent

In her dissent, Justice R. Bradley (joined by Justices Abrahamson and Kelly) sided with the distributors in that wine grantor-dealer relationships should be included in the definition of "dealership" under the Fair Dealership Law. The dissent stated that the phrase "In this chapter" in Wis. Stat. § 135.02 is evidence the definition of "dealership" in § 135.02(3)(b) governs the entire chapter. Instead of focusing on the definition of "intoxicating liquor" later in Ch. 135 that excludes wine, the dissent focused on the definition of "wholesaler" in § 135.02(3)(b) that, when cross-referenced, does include wine. The dissent criticized the court for focusing on legislative intent rather than the explicit statutory language.

Winebow, Inc. v. Capitol-Husting Co. WCJC agrees with this decision.	
Justice Gableman	Wrote opinion
Justice Walsh Bradley	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred
Justice R. Bradley	Wrote dissent
Justice Abrahamson	Dissented
Justice Kelly	Dissented

***Golden Sands Dairy v. Town of Saratoga*, 2018 WI 61 (Building Permit Rule)**

The court held that the Building Permit Rule applies not only to building structures but to all land "specifically identified" in a building permit application.

Facts

Wisconsin's Building Permit Rule states that, upon submitting a complete building permit application, owners have a right to build in accordance with the permit and *current* zoning regulations but are not subject to rezoning ordinances enacted after the permit application.

In this case, Golden Sands Dairy filed a permit application with Saratoga to build seven structures on 92 acres of land for a dairy farm. Shortly after the permit was filed, Saratoga implemented a new

zoning ordinance that would have excluded Golden Sands's land for agricultural use. The Building Permit Rule allowed Golden Sands to continue constructing the seven structures.

At issue was whether the Building Permit Rule applied to the 92 acres of land intended for agricultural use. Saratoga argued that the rule does not extend to use of land.

Decision
In a 5-2 decision (Justice Gableman, joined by Justices R. Bradley, Kelly, Chief Justice Roggensack, and Ziegler), the court sided with Golden Sands in extending the Building Permit Rule so that owners have the right to use all land that is specifically identified in a building permit application without being subject to future rezoning.

The court argued that the purpose of the Building Permit Rule is to provide predictability for developers and to avoid lengthy litigation. Separating the structures from the associated land would lead to further litigation regarding how much land is necessary for their construction and how much could be rezoned. Furthermore, the land is necessary for carrying out the agricultural use of the structures, so making the land subject to future rezoning would thereby also make the structures vulnerable to a local ordinance blocking their use. This unpredictability is exactly what the Building Permit Rule aims to avoid, so the rule must extend to the land use, as well as physical structures.

Dissent
In her dissent, Justice Abrahamson (joined by Justice Walsh Bradley) claimed the court's ruling actually increases unpredictability because it fails to require how owners should "specifically identify" land in building permit applications and how detailed they should be in disclosing the intended use of the land.

Golden Sands Dairy v. Town of Saratoga WCJC agrees with this decision.	
Justice Gableman	Wrote opinion
Justice R. Bradley	Concurred
Justice Kelly	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred
Justice Abrahamson	Wrote dissent
Justice Walsh Bradley	Dissented

***Forshee v. Neuschwander*, 2018 WI 62**
(Restrictive Covenants on Short-Term Rentals)
The court ruled that a restriction on "commercial activity" in a restrictive covenant did not preclude short-term and long-term rentals.

Facts
Lee and Mary Jo Neuschwander own property on a subdivision on Hayward Lake. The subdivision is under a restrictive covenant that provides: "There shall be no commercial activity allowed on any of said lots." The Neuschwanders engage in short-term and long-term rentals of the house on their property. Their neighbors complained that these rentals constituted "commercial activity" forbidden by the restrictive covenant.

Decision
In a 6-1 decision (Chief Justice Roggensack, joined by Justices Abrahamson, R. Bradley, Gableman, Kelly and Zielger), the court ruled in favor of the Neuschwanders. The lead opinion stated that "commercial activity" is an ambiguous term that cannot be enforced under the covenant.

Concurring Opinions
In a concurring opinion, Justice Abrahamson argued "commercial activity" is not ambiguous, and short-term rentals do qualify as a commercial activity. However, since the restrictive covenant governs what the occupants do on the property rather than how it is used by the owners, the restrictive covenant does not govern the Neuschwanders' rentals.

In a second concurring opinion, Justice Kelly (joined by Justice R. Bradley) undertook a gram-

matical analysis arguing the covenant is location specific, so the court need not go further than the plain language that says commercial activity cannot take place on the land. The rental transaction takes place off the land, so it is not governed by the restrictive covenant.

Dissent

In her dissent, Justice Walsh Bradley reasoned that the clear definition of "commercial activity" is an activity "having profit as a chief aim." The dissent cited the Neuschwanders' acquisition of property via a tax exchange, records of profits, and room tax paid to Hayward as evidence that the Neuschwanders rent the property with profit as a "chief aim." Additionally, the dissent expressed concerns similar to the lead opinion about the breadth of the covenant but criticized the court's broad ruling in the context of the growing issues surrounding short-term rentals.

Forshee v. Neuschwander WCJC agrees with this decision.	
Chief Justice Roggensack	Wrote opinion
Justice Abrahamson	Concurred
Justice R. Bradley	Concurred
Justice Gableman	Concurred
Justice Kelly	Concurred
Justice Ziegler	Concurred
Justice Walsh Bradley	Dissented

***Voters with Facts v. City of Eau Claire*, 2018 WI 63 (TIDs)**

The court upheld the dismissal of plaintiffs' claims for declaratory judgement in a case protesting the formation of two tax incremental districts (TIDs) in the City of Eau Claire.

Facts

The plaintiffs claimed that:

1. The city did not establish a lawful purpose for the TIDs under Wis. Stat. § 66.1105(4)(gm)4.a because it did not give evidence for its findings of blight in the TID area.
2. The city's joint review board did not reasonably conclude that development would not occur without the TID (Wis. Stat. § 66.1105(4m)(b)2).
3. The city unlawfully allowed developers to use cash grants from the TID to destroy historic properties (Wis. Stat. § 66.1105(2)(f)1.a) because the development agreement did not explicitly prohibit them from using the grants for this purpose.
4. The city violated the Uniformity Clause of the Wisconsin Constitution (Art. 8 § 1) because the cash grants effectively reimbursed developers for their property taxes, thus taxing the developers at a more favorable rate than identically assessed properties.

Decision

In a 5-2 decision (Justice Ziegler, joined by Justices Abrahamson, Walsh Bradley, Gableman, and Chief Justice Roggensack), the court decided the plaintiffs did not present claims upon which relief could be granted because:

1. The statutory language does not require the city to provide evidence for findings of blight. Other closely related sections near the TID statutes explicitly state when there must be itemized evidence for findings of blight, but the TID section does not. Overall, the court held that findings of blight are legislative determinations and not justiciable issues of fact or law.
2. The statutory language does not require the joint review board's assertion that development would not occur without the TIDs to be backed by itemized evidence. Again, the court held that the joint review board's conclusions are legislative determinations and not justiciable issues of fact or law.
3. The historic buildings were already demolished, and the complaint failed to present facts showing the developer used tax incremental financing (TIF) funds to reimburse demolition costs.
4. The list of costs that may be covered by cash grants in Wis. Stat. § 66.1105(2)(f)1.a-n does not include property taxes, and the plaintiffs' complaint did not establish that the grants were used or were intended to be used to reimburse property tax payments. Since constitutional challenges must be demonstrated "beyond a reasonable doubt,"

the plaintiffs did not provide enough facts to present a claim for relief to be granted.

On the first two claims, the Supreme Court remanded the case to the circuit court for *certiorari* review, since there is no statutory appeal process for reviewing TID formation.

Dissent
In their dissent, Justices R. Bradley and Kelly parted with the court on each of the four claims.

On the plaintiffs' first and second claims, the dissent said the court mistakenly characterized the city's finding of blight and joint review board's approval as legislative determinations. The dissent agreed that the city's authority to create TIDs is a legislative determination, but the preconditions of that authority (e.g. finding of blight) are not, and taxpayers must have a judicial avenue to challenge the accuracy of the city's findings.

On the third and fourth claims, the dissent disagreed with the court by arguing that the plaintiffs' complaints are sufficient under Wisconsin's notice pleading law (Wis. Stat. § 802.02(1)(a)). However, the dissent noted that TIF cash grants do not act as tax rebates and thus do not violate the Uniformity Clause.

Voters with Facts v. City of Eau Claire WCJC agrees with this decision.	
Justice Ziegler	Wrote opinion
Justice Abrahamson	Concurred
Justice Walsh Bradley	Concurred
Justice Gableman	Concurred
Chief Justice Roggensack	Concurred
Justice R. Bradley	Wrote dissent
Justice Kelly	Wrote dissent

***Adams Outdoor Advertising v. City of Madison, 2018 WI 70* (Property Rights)**
The court held that an outdoor advertising company is not entitled to compensation from the City of Madison after the city constructed a bridge blocking visibility of a billboard.

Facts
The City of Madison constructed a pedestrian bridge that blocked visibility from the Beltline Highway of the west-facing side of Adams Outdoor Advertising's billboard. The billboard is nonconforming to a Madison ordinance stating that new outdoor advertising signs are prohibited, so Adams may keep but not modify the billboard.

Adams argued it is entitled to just compensation for private property taken for public use, under Amend. 5 of the U.S. Constitution and Art. 1 § 3 of the Wisconsin Constitution. According to Adams, the property interest in this case is the right to the legal nonconforming use of its property, which was taken when the bridge diminished the property's sole use – visibility.

Decision
In a 4-3 decision (Justice Walsh Bradley, joined by Justices Abrahamson, Gableman, and Ziegler), the court said that Adams is not entitled to compensation because it still retains the right to legal nonconforming use of the billboard, despite the bridge placement, because the city did not physically alter Adams's property.

The court agreed with the city that the property interest in this case is Adams's right to visibility of his property from a public road, which is not a recognized property right. Thus, a property interest does not exist for the purpose of just compensation under the U.S. and Wisconsin Constitutions. Since Adams failed to demonstrate a recognized property interest, the court affirmed the summary judgement in favor of the City of Madison.

Dissent
In her dissent, Justice R. Bradley (joined by Justice Kelly and Chief Justice Roggensack) wrote that an unconstitutional taking occurs when government denies all economically viable use of a person's property. In contrast to the court, the dissent defined the property interest as the billboard permit. The dissent determined that the value of the property was in the permit for nonconforming use and the visibility of the billboard for advertisers wishing to rent space. Because the bridge eliminated the entire value of the permit for the west-facing side of the billboard, the bridge construction was a compensable taking.

Adams Outdoor Advertising v. City of Madison WCJC disagrees with this decision.	
Justice Walsh Bradley	Wrote opinion
Justice Abrahamson	Concurred
Justice Gableman	Concurred
Justice Ziegler	Concurred
Justice R. Bradley	Wrote dissent
Justice Kelly	Dissented
Chief Justice Roggensack	Dissented

***Tetra Tech v. DOR*, 2018 WI 75 (Agency Deference)**

The court decided to end the agency deference doctrine that yielded to regulatory agencies when interpreting statutory provisions that ultimately define agencies' own power and reach.

Facts

In 2007, the Environmental Protection Agency required several paper companies to remediate the environmental impact of harmful chemicals into the Fox River. The collective group of paper companies formed Fox River Remediation, which hired Tetra Tech to perform the remediation. Tetra Tech subsequently hired Stuyvesant Dredging, Inc. (SDI) as a subcontractor. The Department of Revenue (DOR) audited the entities and found that Tetra Tech owed sales tax on the portion of its sale for services to Fox River Remediation on SDI's activities, and Fox River Remediation owed use tax on the purchase of remediation services from Tetra Tech on SDI's activities. The entities filed petitions for redetermination with DOR, then with the Tax Appeals Commission. A circuit court, then appeals court upheld the commission's ruling, giving great weight deference to DOR's interpretation of tax statutes. The case was then appealed again at the Supreme Court, with the court asking parties brief the constitutionality of providing deference to agencies on questions of law.

Decision

In a unanimous decision with three concurring opinions, the court again upheld the commission's ruling on the tax issue, stating that the statutory term "processing" includes SDI's activities for taxable purposes. The court also decided to end the practice of agency deference, but the three concurring opinions disagreed on this aspect of the decision. The decision keeps in place "due weight" deference according to the statutes, meaning the court will give consideration to agency views as a matter of persuasion but not automatically yield to them.

The lead opinion (written by Justice Kelly) argued that the agency deference doctrine is unconstitutional because it violates the separation of powers and due process clauses of the Constitution.

Concurring Opinions

In a concurring opinion, Justice Walsh Bradley (joined by Justice Abrahamson) disagreed with the court's decision to end agency deference. The concurring opinion also expressed concerns about unintended consequences for prior cases and said the court should have practiced constitutional avoidance.

In a second concurring opinion, Justice Ziegler agreed with Justice Walsh Bradley's concurrence that, since deference is a court-created doctrine, the court should have restrained from using the constitution to overturn agency deference. (Chief Justice Roggensack joined in this constitutional restraint portion of Justice Ziegler's analysis.) The concurring opinion also agreed with the concurrence by Justice Walsh Bradley in its concerns about the decision's effect on prior cases. Although the concurring opinion by Justice Ziegler agreed with the court's decision to uphold the commission's tax ruling, it disagreed with the lead opinion's definition of "processing."

In a third concurring opinion, Justice Gableman (joined by Chief Justice Roggensack) would choose to eliminate agency deference by withdrawing language from its precedential case *Harnischfeger Corp. v. LIRC*. The concurring opinion again cited constitutional avoidance in its disagreement with the lead opinion.

Tetra Tech v. DOR WCJC agrees with this decision.*	
Justice Kelly	Wrote opinion
Justice R. Bradley	Concurred
Justice Gableman	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred
Justice Abrahamson	Concurred
Justice Walsh Bradley	Concurred

*In this decision, WCJC evaluates justices based on their position regarding agency deference. WCJC agrees with those justices supporting ending agency deference. WCJC remains neutral regarding the tax issue in this case.

***Wisconsin Bell, Inc. v. LIRC*, 2018 WI 76 (Employment Discrimination)**

The court established that employers must *know* an employee's disability caused misconduct in order for the Labor and Industry Review Commission (LIRC) to determine intentional employment discrimination.

Facts

In 2010, Wisconsin Bell suspended employee Charles Carlson for inappropriately hanging up and blocking customer calls. In a hearing related to Carlson's suspension, Carlson's treatment providers wrote letters to Wisconsin Bell describing Carlson's diagnosis of bipolar disorder, but the letters did not detail specifically how the disorder affects Carlson's workplace conduct. As a condition for returning to work after the suspension, Carlson signed a "last chance agreement" stating that he would be terminated for another infraction.

Almost a year later, Carlson broke the last chance agreement, and Wisconsin Bell terminated him. Carlson claimed Wisconsin Bell intentionally discriminated against him because his bipolar disorder caused his misconduct.

Decision

In a 5-2 decision (Justice Kelly, joined by Justices R. Bradley, Gableman, Chief Justice Roggensack, and Ziegler), the court held that Wisconsin Bell did not violate Wisconsin's employment discrimination statute (Wis. Stat. § 111.322(1)) because it was not aware Carlson's bipolar disorder caused his misconduct.

Previously in employment discrimination cases, LIRC used the "inference method," which finds intent to discriminate when employers take action against employees for any misconduct caused by a disability. This decision amended LIRC's "inference method" of determining employment discrimination by requiring that employers *know* an employee's disability caused the misconduct.

The decision further clarifies the court's position on the agency deference doctrine, decided in *Tetra Tech v. DOR*. Here, the court did not defer to LIRC's decision but gave "due weight" to the agency's technical experience.

Dissent

In her dissent, Justice Walsh Bradley (joined by Justice Abrahsmson) argued that tightening LIRC's inference method places an unfair burden on people with disabilities. The dissent said the original application of the inference method protects employees from termination because of symptoms of their disabilities.

Wisconsin Bell, Inc. v. LIRC WCJC agrees with this decision.	
Justice Kelly	Wrote opinion
Justice R. Bradley	Concurred
Justice Gableman	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred
Justice Walsh Bradley	Wrote dissent
Justice Abrahamson	Dissented

***DWD v. LIRC*, 2018 WI 77 (Unemployment Compensation)**

The court held that terminated employees are not eligible for unemployment compensation if they violate their employer's absenteeism policy, even if the policy is stricter than the policy in statute.

Facts
Terminated employee Valerie Beres violated the written attendance policy that she signed with her employer by missing a shift without notifying the employer. The employer's single instance policy was stricter than the two occasions in a 120-day period policy laid out in the unemployment compensation absenteeism statute (Wis. Stat. § 108.04 (5)(e)).

The unemployment compensation statutes state that employees terminated for "misconduct" - including absenteeism - are ineligible for benefits. The Department of Workforce Development (DWD) denied Beres benefits on this basis. Beres appealed to the Labor and Industry Review Commission.

Decision
In a unanimous decision, the court upheld DWD's decision to deny Beres benefits. The court ruled that, according to the "unless clause" in Wis. Stat. § 108.04(5)(e), employers may adopt absenteeism policies stricter than the statute. If employees have violated their employer's stricter policy, they are still ineligible for unemployment compensation.

DWD v. LIRC WCJC agrees with this decision.	
Justice Abrahamson	Wrote opinion
Justice R. Bradley	Concurred
Justice Walsh Bradley	Concurred
Justice Gableman	Concurred
Justice Kelly	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred

***Ascaris Mayo v. Wisconsin Injured Patients and Families Compensation Fund*, 2018 WI 78**
(Medical Malpractice Caps)
The court held that the cap on noneconomic damages arising out of medical malpractice claims (Wis. Stat. § 893.55(4)(d)1) is constitutional.

Facts
The case arose from a septic infection resulting in the amputation of the plaintiff's limbs. The jury awarded the plaintiff $15 million in noneconomic damages, such as pain and suffering, and $1.5 million to the plaintiff's husband for loss of society and companionship. Unaffected is the reported $8.8 million award for economic damages, which has no statutory limitation.

The issues before the court were 1) whether the medical malpractice cap on noneconomic damages is unconstitutional as applied to the plaintiffs and 2) whether the cap is unconstitutional on its face.

The plaintiffs contended that the medical malpractice cap is unconstitutional on its face because it denies catastrophically injured patients equal protection under the law. The plaintiffs argued the cap creates two classifications: 1) catastrophically injured patients who will not be able to collect the entire amount of the award and 2) patients with lesser injuries who will be fully compensated because their award falls under the cap's limits. However, the defendants argued that the plaintiffs did not show the "disparate treatment" required for as-applied equal protection challenges.

Decision
In a 5-2 decision (Chief Justice Roggensack, joined by Justices R. Bradley, Gableman, Kelly, and Ziegler), the court held that the $750,000 cap on noneconomic damages is constitutional both on its face and as applied to the plaintiffs. The court determined that the cap is facially constitutional because the legislature had a rational basis in enacting the cap statute to ensure affordable and accessible health care in Wisconsin. The cap is constitutional as applied because the plaintiffs did not prove beyond a reasonable doubt that the cap treats the two classifications disparately.

The decision also clarified the definition and application of the "rational basis test" for courts considering reversal of legislative enactments. Courts use the rational basis test to determine the constitutionality of a statute based on whether the statute appears to have a rational basis in achieving the legislature's objective in writing it. Since *Ferdon v. Wisconsin Patient Compensation Fund* (holding that the previous $350,000 cap was facially uncon-

stitutional), the courts have been unclear regarding the "rational basis" test as it relates to an equal protection claim. The *Mayo* decision reversed the new scrutiny level created by *Ferdon* called "rational basis with teeth."

Concurring Opinion
In a concurring opinion, Justice R. Bradley (joined by Justice Kelly) agreed that the cap is constitutional but questioned the high burden of proof required to overturn a statute. The concurring opinion argued that "beyond a reasonable doubt" lends unfair and possibly unconstitutional deference to the legislature.

Dissent
In her dissent, Justice Walsh Bradley (joined by Justice Abrahamson) agreed with *Ferdon* that caps on noneconomic damages are unconstitutional because the most severely injured suffer an unequal loss. Furthermore, the dissent argued the legislature did not have a rational basis in enacting the cap because some data show that caps do not increase physician retention or lower health care costs.

Ascaris Mayo v. Wisconsin Injured Patients and Families Compensation Fund WCJC agrees with this decision.	
Chief Justice Roggensack	Wrote opinion
Justice R. Bradley	Concurred
Justice Gableman	Concurred
Justice Kelly	Concurred
Justice Ziegler	Concurred
Justice Walsh Bradley	Wrote dissent
Justice Abrahamson	Dissented

***Cintas Corp. v. Becker Property Services*, 2018 WI 81 (Indemnity Contracts)**
The court enforced a choice-of-law provision and an indemnity clause granting Cintas Corp. damages caused by its own negligence.

Facts
Becker Property Services contracted with Cintas to inspect regularly a fire suppression system at a property Becker managed. The property owner, tenants, and insurers sued Cintas, and Cintas sought to tender the defense to Becker pursuant to an indemnity clause in their contract.

Decision
In a 5-2 decision (Justice Kelly, joined by Justices R. Bradley, Gableman, Chief Justice Roggensack, and Ziegler), the court disagreed with Becker's argument that, despite a choice-of-law provision requiring Ohio as the controlling law, Wisconsin's strict construction rule for indemnity clauses that cover damages for negligence is an important enough public policy to nullify the contract. Instead, the court held that Ohio law controlled, pursuant to the contract, and ruling otherwise would have created uncertainty and "unpredictability in contractual relations."

The court held that the contract's language was clear that Becker must indemnify Cintas for *any* liabilities and damages, including those caused by Cintas's own negligence. The court said that even under Ohio law the indemnity agreement is not "public policy" for the purpose of invalidating the contract.

Dissent
In her dissent, Justice Walsh Bradley (joined by Justice Abrahamson) argued the indemnity agreement cannot be enforced. The dissent said that another provision of the contract stating that Cintas's work would be "insured" created a conflict with the indemnity provision, and this ambiguity would nullify the indemnity clause.

Furthermore, the indemnification clause was too inconspicuous to be enforceable under Wis. Stat. § 401.201(2)(f). The dissent argued the unconscionability of inconspicuous indemnity agreements is important enough public policy in Wisconsin to override the contract's choice-of-law provision.

Cintas Corp. v. Becker Property Services WCJC agrees with this decision.	
Justice Kelly	Wrote opinion
Justice R. Bradley	Concurred
Justice Gableman	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred
Justice Walsh Bradley	Wrote dissent
Justice Abrahamson	Dissented

***Kristi Koschkee v. Tony Evers*, 2018 WI 82 (State Agency Counsel)**

The court held that the Department of Public Instruction (DPI) and the state superintendent may retain separate counsel instead of representation by the Department of Justice (DOJ).

Facts

The petition in this case is about whether DPI must comply with the Regulations from the Executive In Need of Scrutiny (REINS) Act (2017 Act 57). Upon the petition, another dispute arose between DPI and DOJ regarding whether DOJ attorneys should represent DPI. DOJ said DPI is subject to the REINS Act, a position contrary to DPI and DPI Superintendent Tony Evers. DOJ filed a motion that they should be DPI's attorneys. DPI filed a motion to deny substitution of DOJ for their in-house counsel.

Decision

The court used its "superintending and administrative authority over all courts" (Wisconsin Constitution Art. 7 § 3) to allow DPI the counsel of their choice. The court argued that allowing DOJ to represent Evers and DPI would have given the attorney general too much power and would be unethical because of their disagreeing positions on the case.

The court also ruled that Gov. Scott Walker is not a necessary party to the action because he did not fulfill the statutory criteria necessary for a party to be joined in a case (Wis. Stat. § 808.03(1)). The court said the governor's obligation to review scope statements under the REINS Act is not affected by the outcome of the DPI case.

Concurring Opinion/Dissent

In a concurring opinion/dissent, Justice R. Bradley (joined by Justices Gableman and Kelly) agreed that Gov. Walker should not be a party to the action but would have allowed DOJ to represent DPI and Evers. The dissent argued that Wis. Stat. § 165.25(1m) says the governor can request DOJ represent any state department/agency in any matter in which the state has interest. The dissent said the court inappropriately exercised its superintending authority to override the statutes, which give no independent litigation authority to DPI or the state superintendent.

Kristi Koschkee v. Tony Evers WCJC disagrees with this decision.	
Justice Abrahamson	Concurred
Justice Walsh Bradley	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred
Justice Kelly	Concurred/dissented
Justice R. Bradley	Concurred/dissented
Justice Gableman	Concurred/dissented

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