



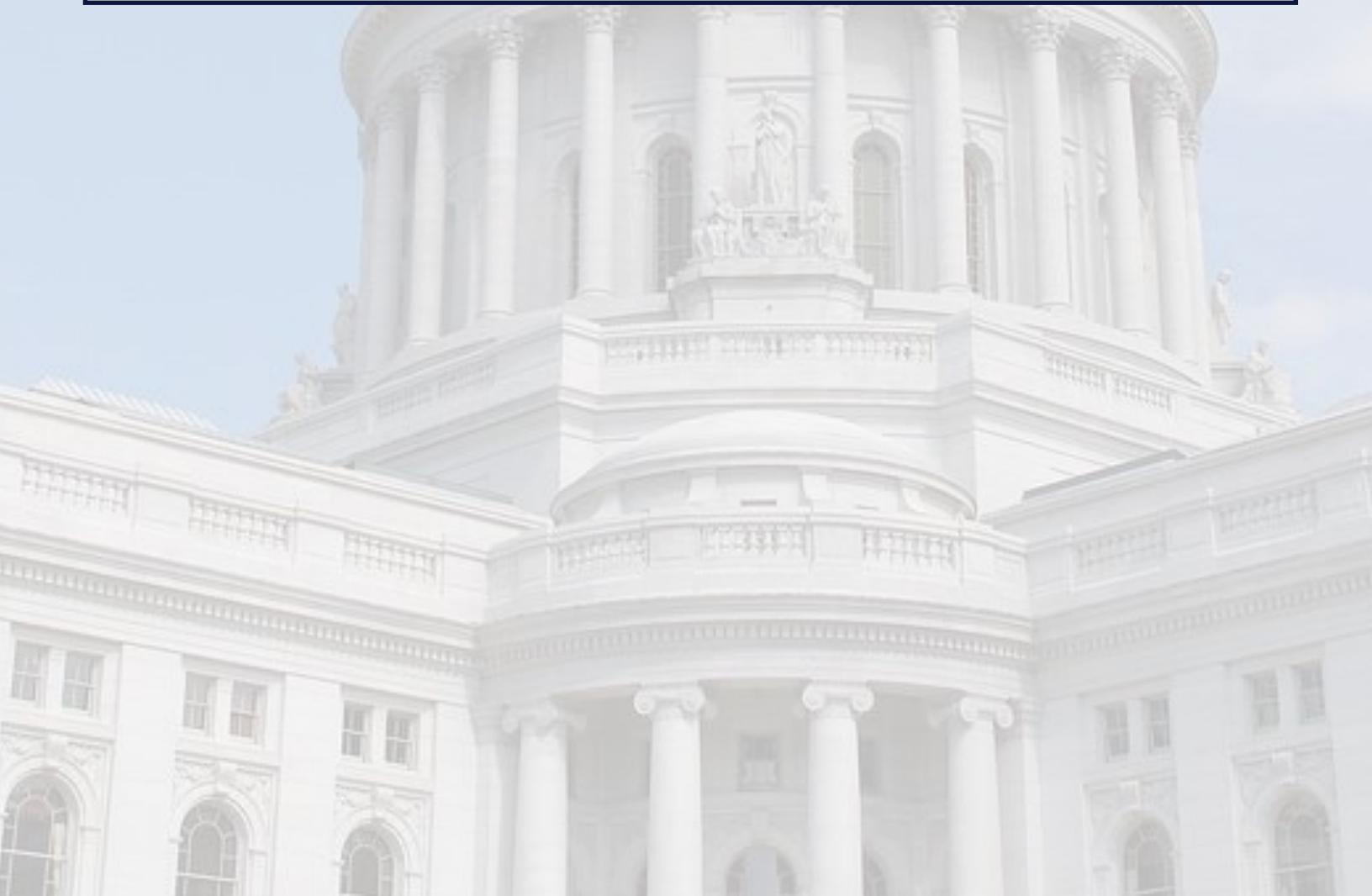
WISCONSIN CIVIL JUSTICE COUNCIL, INC.

Promoting Fairness and Equity in Wisconsin's Civil Justice System

2019 GUIDE TO THE WISCONSIN SUPREME COURT AND JUDICIAL EVALUATION

Fourth Edition: 2018-19 Term

NOVEMBER 2019





WISCONSIN CIVIL JUSTICE COUNCIL, INC.

Promoting Fairness and Equity in Wisconsin's Civil Justice System

2019 GUIDE TO THE WISCONSIN SUPREME COURT AND JUDICIAL EVALUATION

Prepared By:

Paige Scobee, Hamilton Consulting Group, LLC

November 2019

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 fourth *Guide to the Wisconsin Supreme Court and Judicial Evaluation*. The purpose of this publication is to educate WCJC's board members and the public about the role of the Supreme Court in Wisconsin's business climate by providing a summary of the most important decisions issued by the Wisconsin Supreme Court affecting the Wisconsin business community.

BOARD MEMBERS

Bill G. Smith
*National Federation of Independent
Business, Wisconsin Chapter*

Jason Culotta
*Midwest Food Products
Association*

Neal Kedzie
*Wisconsin Motor Carriers
Association*

Scott Manley
*Wisconsin Manufacturers &
Commerce*

William Sepic
*Wisconsin Automobile & Truck
Dealers Association*

Matthew Hauser
*Wisconsin Petroleum Marketers &
Convenience Store Association*

Andrew Franken
Wisconsin Insurance Alliance

John Holevoet
*Wisconsin Dairy Business
Association*

Kristine Hillmer
Wisconsin Restaurant Association

Brad Boycks
Wisconsin Builders Association

Brian Doudna
*Wisconsin Economic Development
Association*

John Mielke
Associated Builders & Contractors

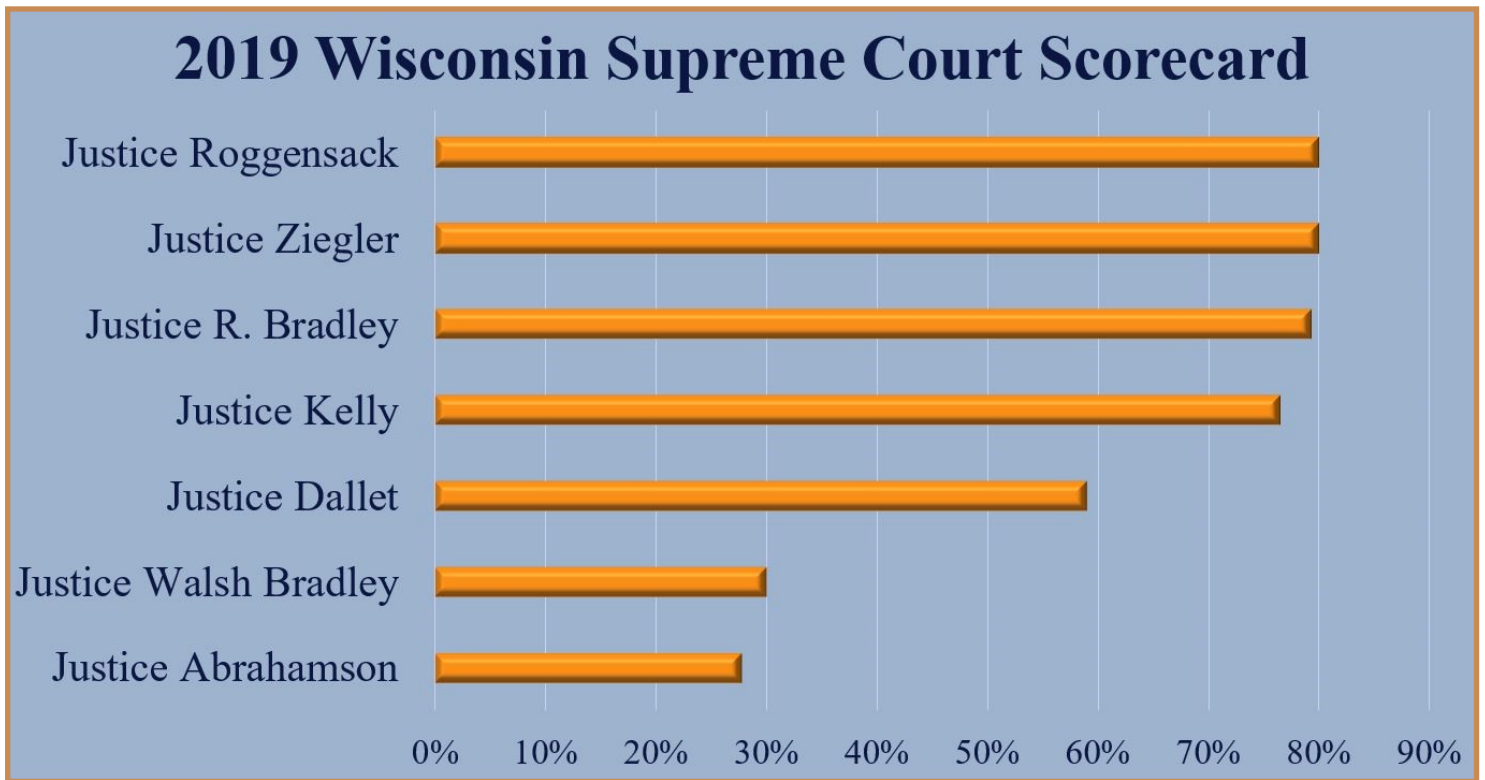
Gary Manke
*Midwest Equipment Dealers
Association*

Eric Borgerding
Wisconsin Hospital Association

EXECUTIVE SUMMARY

The Wisconsin Supreme Court issues decisions that have a direct effect 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 fourth edition of the guide covers the 2018-19 Supreme Court term.

In addition to providing background information about the court, the sitting justices, and the role of the judicial branch in government, the *Guide to the Wisconsin Supreme Court and Judicial Evaluation* tracks how the justices decided each case. Below is the 2019 scorecard, which covers the past eleven terms (2008-09 through 2018-19). The graph indicates how often the individual justices decided cases in favor of the positions taken by WCJC.



INTRODUCTION

WCJC's *Guide to the Wisconsin Supreme Court and Judicial Evaluation* seeks to educate WCJC's members, partners, and the public about the role of the Supreme Court in Wisconsin's business climate. The *Guide* provides summaries of relevant cases and indicates 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. WCJC and its partners often submit these briefs at the circuit court, court of appeals, and Supreme Court.

For each case, the justices meet in private conference to decide the outcome. 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 opinions 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 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 businesses, 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 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 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.



Justice Rebecca Dallet was elected to the court in 2018 and is up for reelection in 2028.



Justice Brian Hagedorn was sworn into the Wisconsin Supreme Court on August 14, 2019, the start of the 2019-20 term. He was elected to the court in spring 2019 to replace Justice Abrahamson. He is up for reelection in 2029.

Former Justices:

Justice Shirley Abrahamson was appointed to the court by Gov. Patrick Lucey in 1976 and won reelection to the court in 1979, 1989, 1999, and 2009. She served as Chief Justice from 1996-2015. 2018-19 was her final term on the court.

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

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

JUDICIAL EVALUATION

Each case selected for the 2019 *Judicial Evaluation* 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: “WCJC agrees with this decision.” or “WCJC disagrees with this decision.” The *Judicial Evaluation* evaluates the justices on how their decisions aligned with WCJC’s positions.

The Lifetime Score incorporates the justices’ decisions on cases beginning from WCJC’s formation in the 2008-09 term. For more information on these cases, see WCJC’s [2018](#), [2013](#), and [2011](#) Guides. The case participation rate indicates how often the justices’ participated in deciding the relevant cases.

Lifetime Score Based on WCJC’s Positions

Justice	2019 Judicial Evaluation <i>Terms: 2018-19</i>	2018 Judicial Evaluation <i>Terms: 2012-13, 2013-14, 2014-15, 2015-16, 2016-17, 2017-18</i>	2013 Judicial Evaluation <i>Terms: 2010-11, 2011-12</i>	2011 Judicial Evaluation <i>Terms: 2008-09, 2009-10</i>	Overall Score
Justice Abrahamson	57%	23%	17%	36%	28%
Justice R. Bradley	76%	81%	n/a	n/a	79%
Justice Walsh Bradley	45%	23%	27%	43%	30%
Justice Dallet	59%	n/a	n/a	n/a	59%
Justice Kelly	76%	77%	n/a	n/a	76%
Chief Justice Roggensack	76%	79%	74%	100%	80%
Justice Ziegler	80%	81%	68%	100%	80%

Case Participation

Justice	2019 Judicial Evaluation <i>Terms: 2018-19</i>	2018 Judicial Evaluation <i>Terms: 2012-13, 2013-14, 2014-15, 2015-16, 2016-17, 2017-18</i>	2013 Judicial Evaluation <i>Terms: 2010-11, 2011-12</i>	2011 Judicial Evaluation <i>Terms: 2008-09, 2009-10</i>
Justice Abrahamson	67%	100%	100%	100%
Justice R. Bradley	100%	95%	n/a	n/a
Justice Walsh Bradley	95%	100%	96%	93%
Justice Dallet	81%	n/a	n/a	n/a
Justice Kelly	100%	91%	n/a	n/a
Chief Justice Roggensack	100%	98%	100%	93%
Justice Ziegler	95%	100%	96%	93%

DISCUSSION OF DECISIONS

2018-19 TERM

[L.G. v. Aurora Residential Services, 2019 WI 79](#) (Compelled Arbitration)

The court held that a circuit court’s order denying a motion to compel arbitration is a final order under Wis. Stat. § 808.03(1), allowing the order to be appealed.

Facts

The plaintiff patient filed the underlying lawsuit in this case against Aurora regarding an incident that occurred in an Aurora residential facility. However, the plaintiff had previously signed an arbitration agreement with Aurora. Aurora filed a motion in circuit court to stay the litigation pending arbitration pursuant to the agreement, following procedures outlined in Wisconsin’s Arbitration Act (Wis. Stat. § 788.02). The circuit court denied the motion to stay and compel arbitration. The instant issue before the Supreme Court was whether that circuit court order on arbitration was a final order that Aurora could appeal.

Decision

In a 5-0 decision (Justice Kelly, joined by Justices R. Bradley, Dallet, Chief Justice Roggensack, and Justice Ziegler), the court determined Aurora’s motion to stay pending arbitration was a “special proceeding,” not an action, under Wis. Stat. § 808.03(1) because it addressed an issue separate from the merits of the underlying action. According to Wis. Stat. § 808.03(1), an appealable final order is one that “disposes of the entire matter in litigation...whether rendered in an action or special proceeding.” Because the circuit court’s decision on the arbitration motion was a separate “special proceeding,” the order need not address the merits of the entire underlying action in order to “dispose of the entire matter” pursuant to § 808.03(1). Therefore, circuit court orders on arbitration motions under Wis. Stat. § 788.02 are final and appealable.

<i>L.G. v. Aurora Residential Services</i> WCJC agrees with this decision.	
Justice Kelly	Wrote opinion
Justice R. Bradley	Concurred
Justice Dallet	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred
<i>Justice Abrahamson</i>	<i>Did not participate</i>
<i>Justice Walsh Bradley</i>	<i>Did not participate</i>

[Enbridge Energy Co., Inc. v. Dane County, 2019 WI 78](#) (Conditional Use Permit)

The court held that counties may not include unenforceable permit conditions on conditional use permits.

Facts

Dane County issued Enbridge Energy a conditional use permit to expand the volume of oil pumped through a local Enbridge pipeline. The permit contained conditions requiring Enbridge to maintain two liability insurance policies. Shortly after Dane County issued the permit, the legislature passed in the 2015-16 state budget (2015 Act 55) a provision precluding counties from requiring pipeline operators to obtain insurance if the operators already carry general liability insurance including coverage for sudden and accidental pollution liability. After the law change, Dane County retained the previous insurance conditions in Enbridge’s permit, but added language indicating that the new state law made the conditions unenforceable.

Enbridge filed the instant lawsuit asking the court to remove the unenforceable insurance conditions. Additionally, several Dane County property owners filed a lawsuit asserting that Enbridge was not in compliance with the new state law insurance requirements, so they could enforce the conditions.

Decision

In a 4-1 decision (Justice R. Bradley, joined by Justice Kelly, Chief Justice Roggensack, and Justice Ziegler), the court determined that Enbridge did have the requisite insurance coverage, both

comprehensive general liability and sudden and accidental pollution liability, to comply with the Act 55 requirements. Therefore, Act 55 applied and precluded Dane County and the landowners from enforcing additional insurance conditions. The Supreme Court then concluded that the circuit court properly struck the unlawful conditions from the permit, as courts can modify conditional use permits under Wis. Stat. § 59.694(10). The decision allows Enbridge to proceed with its pipeline activity without the unlawful permit conditions and without having to start over in the conditional use permit process.

Dissent

In a dissent, Justice Walsh Bradley argued that Enbridge did not carry the statutorily required sudden and accidental pollution liability insurance. Therefore, Act 55 preemption provisions did not apply, and Dane County could enforce the additional insurance conditions. The dissent argued Enbridge did not show it carried the proper insurance. Under a definition of “sudden” used in a previous case, the policy must cover both “abrupt and immediate” and “unexpected and unintended” pollution events. According to the dissent, the policy covered “abrupt and immediate” but not “unexpected and unintended” events. Without the requisite insurance, Dane County could enforce the additional permit conditions without state law preemption under Act 55.

<i>Enbridge Energy Co., Inc. v. Dane County</i> WCJC agrees with this decision.	
Justice R. Bradley	Wrote opinion
Justice Kelly	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred
Justice Walsh Bradley	Wrote dissent
<i>Justice Abrahamson</i>	<i>Did not participate</i>
<i>Justice Dallet</i>	<i>Did not participate</i>

Koschkee v. Taylor, 2019 WI 76 (Agency Rule-making)

The court held that the Department of Public Instruction and Superintendent of Public Instruction must comply with rulemaking requirements in the

2017 Regulations from the Executive In Need of Scrutiny Act (REINS Act) and 2011 Act 21.

Facts

In 2017, the Wisconsin Legislature passed the REINS Act, which mandates that before a state agency may begin to work on drafting an administrative rule, the agency must first submit what is known as a “statement of scope” with the Department of Administration to determine whether the agency has explicit statutory authority to promulgate the rule. The agency must also submit the statement of scope to the governor for approval. The statement of scope provides a summary of the proposed administrative rule as well as the agency’s statutory legal authority to issue the rule.

After Act 57 went into effect, the Department of Public Instruction sent statements of scope to the Legislative Reference Bureau to be published in the Wisconsin Administrative Register without first submitting the statements of scope with the Department of Administration and governor as required by the law. In each statement of scope, the Department of Public Instruction stated that it was not required to submit the statements of scope to the Department of Administration and governor because the REINS Act and other rulemaking requirements are unconstitutional as applied to the Department of Public Instruction and Superintendent of Public Instruction.

The Wisconsin Institute for Law & Liberty filed a lawsuit against the department and superintendent, alleging that they violated Act 57 by failing to submit the statements of scope with the Department of Administration and the governor.

Decision

In a 4-2 decision (Chief Justice Roggensack, joined by Justices R. Bradley, Kelly, and Ziegler), the court held that Act 21 and the REINS Act, specifically, provisions requiring Department of Administration and gubernatorial review of administrative rules, apply to rulemaking by the Department of Public Instruction and Superintendent of Public Instruction. Wis. Const. Art. X § 1 provides the Superintendent constitutional authority to supervise public instruction. However, when the Superintendent promulgates rules via the Department, it is exercising legislative power delegated to it by the legislature, not its constitutional super-

visory power. Therefore, giving the governor and Department of Administration the authority to review the Superintendent and Department of Public Instruction’s rulemaking does not interfere with the Superintendent’s constitutional supervisory authority.

The *Koschkee* decision overturns the 2016 decision *Coyne v. Walker*, which challenged Act 21 as unconstitutional as applied to the Department of Public Instruction and the Superintendent. While a majority agreed Act 21 was unconstitutional, there was no majority opinion written by the Supreme Court in *Coyne*.

Concurring Opinion

In a concurring opinion, Justice R. Bradley criticized a portion of the decision stating that administrative rulemaking is necessary to address the complexity of government. Justice R. Bradley expressed separation of powers concerns with state and federal courts allowing legislatures to defer their authority to a nonelected “fourth branch” of government. The concurring opinion suggested the court take a closer look at delegation of legislative power to agencies if an appropriate case arises.

In a second concurring opinion, Justice Kelly disagreed with the same paragraph of the court’s decision (paragraph 17) related to the administrative state but did not elaborate on his reasoning.

Dissent

In a dissent, Justice Walsh Bradley (joined by Justice Dallet) argued the court should have applied *stare decisis* and kept the *Coyne* decision intact. As Justice Abrahamson argued in *Coyne*, Act 21 unconstitutionally gives the governor superiority over the Superintendent’s constitutional supervisory powers.

<i>Koschkee v. Taylor</i> WCJC agrees with this decision.	
Chief Justice Roggensack	Wrote opinion
Justice R. Bradley	Concurred
Justice Kelly	Concurred
Justice Ziegler	Concurred
Justice Walsh Bradley	Wrote dissent
Justice Dallet	Dissented
Justice Abrahamson	Did not participate

League of Women Voters v. Evers, 2019 WI 75 (Extraordinary Sessions of the Legislature)

The court affirmed that the Wisconsin Legislature’s 2018 extraordinary session was constitutional thus upholding the legislation passed and the 82 appointments confirmed in the extraordinary session.

Facts

The Wisconsin Legislature passed three laws limiting the power of the attorney general and the governor in a “lame duck” extraordinary session in December 2018, after Gov. Tony Evers was elected but before he took office. Additionally, the Senate approved 82 former Gov. Scott Walker appointees in the December extraordinary session.

The League of Women Voters and other plaintiffs subsequently filed a lawsuit seeking to overturn the laws and appointments. The League argued the Legislature does not have the constitutional authority to convene an extraordinary session.

Decision

In a 4-3 decision (Justice R. Bradley, joined by Justice Kelly, Chief Justice Roggensack, and Justice Ziegler), the court ruled in favor of the Legislature, finding the Legislature constitutionally met to vote on the laws and the appointments.

The court said the Wisconsin Constitution authorizes the Legislature to meet only as provided by law or when convened by the governor (Wis. Const. Art. IV § 11). Wis. Stat. § 13.02(3) provides that the Legislature can implement a work schedule. The Legislature provided a work schedule for the 2017-18 session in 2017 Senate Joint Resolution 1, specifically stating that any days not reserved for scheduled floor periods are available for the Legislature to convene an extraordinary session. Furthermore, Art. IV § 8 of the Constitution provides that “Each house may determine the rules of its own proceedings.” Therefore, the court ruled the Legislature met as provided by law under the Constitution and Wis. Stat. § 13.02(3).

The League of Women Voters argued that 13.02(3) only authorizes “regular” sessions, not “extraordinary” sessions. However, the court said the lack of the word “extraordinary” in the statute does not make it unconstitutional.

Regarding separation of powers arguments, the Supreme Court said the circuit court’s decision ruling the extraordinary session unconstitutional improperly encroached on the Legislature’s constitutional powers. While courts can determine whether laws enacted by the Legislature are constitutional, courts do not have jurisdiction over how the Legislature enacts laws.

Dissent

In a dissent, Justice Dallet (joined by Justices Abrahamson and Walsh Bradley) would have affirmed the circuit court’s decision blocking the extraordinary session laws. The dissent said the court’s reading of the constitutional provisions would give the Legislature unlimited authority to convene, which was contrary to the intention of the drafters of Art. IV § 11. Furthermore, the joint resolution allowing the Legislature to meet for extraordinary sessions was not “law” as required by Art. IV § 11.

<i>League of Women Voters v. Evers</i> WCJC agrees with this decision.	
Justice R. Bradley	Wrote opinion
Justice Kelly	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred
Justice Dallet	Wrote dissent
Justice Abrahamson	Dissented
Justice Walsh Bradley	Dissented

Pinter v. Village of Stetsonville, 2019 WI 74
(Governmental Immunity)

The court held that a village’s oral policy related to wastewater processes did not create a ministerial duty exempting it from governmental immunity protections. Furthermore, expert testimony was required for the plaintiff to proceed with a public nuisance claim against the village.

Facts

The underlying claim in the case arose when the Village of Stetsonville failed to abide by its oral policy to bypass typical wastewater treatment processes during heavy rains. As a result, waste and sewage leaked into Alan Pinter’s basement. Pinter filed a lawsuit, claiming negligence and private

nuisance. The village argued it was protected by governmental immunity (Wis. Stat. § 891.80(4)). Pinter argued that by not following the village’s oral policy, the village failed to perform a ministerial duty, exempting it from governmental immunity.

Decision

In a 4-3 decision (Justice Walsh Bradley, joined by Justice Abrahamson, Chief Justice Roggensack, and Justice Ziegler), the court ruled that the oral policy to bypass wastewater treatment processes when excess water reached a certain point did not constitute a ministerial duty. Instead, it was a discretionary “rule of thumb.” Department of Natural Resources rules related to bypassing wastewater treatment underscore the discretionary nature of the decision whether or not to bypass, as they require village employees to determine whether damage would be “unavoidable” and whether there are “feasible alternatives” to bypassing typical processes. Because the decision whether or not to bypass was discretionary, the ministerial duty exception did not apply and governmental immunity blocked Pinter’s negligence claim.

On Pinter’s private nuisance claim, the court determined that expert testimony was required for Pinter to prove that the village’s failure to maintain its wastewater disposal system caused the damages to his basement. In private nuisance cases, the burden is on the plaintiff to prove causation, and without expert testimony on this complex subject, Pinter failed to raise a genuine issue of material fact as to causation. Therefore, the court upheld summary judgment in favor of the village.

Dissent

In a dissent, Justice Dallet (joined by Justices R. Bradley and Kelly) advocated that the court should return to the plain text of the governmental immunity statute and afford governmental immunity only to employees acting “in the exercise of legislative, quasi-legislative, judicial, or quasi-judicial functions” (Wis. Stat. § 891.80(4)). In this case, the village employees reacting to the wastewater emergency were not engaging in these functions, especially since the village had not legislatively formalized the “rule of thumb” bypass policy. Therefore, the dissent would not have afforded governmental immunity to the village. These jus-

tices authored a similar dissent in *Engelhardt v. City of New Berlin* (2019 WI 2).

On the private nuisance claim, the dissent took issue with the court’s decision requiring expert testimony in all cases related to negligent maintenance of wastewater systems. The dissent argued the need for expert testimony should be decided according to the facts on a case-by-case basis. In this case, inferences from the record were sufficient to establish a genuine issue of material fact without expert testimony.

<i>Pinter v. Village of Stetsonville</i> WCJC agrees with this decision.	
Justice Walsh Bradley	Wrote opinion
Justice Abrahamson	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred
Justice Dallet	Wrote dissent
Justice R. Bradley	Dissented
Justice Kelly	Dissented

Rural Mutual Insurance Co. v. Lester Buildings, LLC, 2019 WI 70 (Subrogation Waiver)

The court determined that a subrogation waiver did not violate Wis. Stat. § 895.447, which provides that any provision to limit tort liability in a construction contract is against public policy and void.

Facts

Jim Herman, Inc. and Lester Building entered into a contract to build a barn. The contract contained a subrogation waiver requiring both parties to waive all rights against each other and their subcontractors. Lester then contracted with a concrete provider in the building process. When a storm caused half of the barn to collapse due to improper installation of the concrete, Herman’s insurer Rural Mutual alleged breach of contract and negligence against Lester and its contractors. Lester argued the claims were barred because of the subrogation waiver.

Decision

In a 3-2 decision (Justice Dallet, joined by Chief Justice Roggensack and Justice R. Bradley), the

court found that the subrogation waiver’s provision to “waive all rights against each other...for the recovery of any damages...to the extent covered by property insurance” did not eliminate tort liability in violation of Wis. Stat. § 895.447. Instead, the waiver left the parties to the contract liable beyond whatever damages were covered by property insurance policies like the Rural Mutual policy.

Furthermore, the court determined that the waiver was not an unenforceable exculpatory contract contrary to public policy. An exculpatory contract relieves a party from liability for its own negligence. In this case, the subrogation waiver did not relieve Lester’s liability but instead shifted the payment of damages for Lester’s liability to the insurer. Beyond the insurance policy, Lester would be liable for its own damages. Therefore, Rural Mutual was prevented from recovering from Lester and its contractors.

Dissent

In a dissent, Justice Kelly (joined by Justice Walsh Bradley) argued that the court conflated wholeness in recovery of damages with full tort liability. Rural Mutual was Herman’s casualty insurer and did not contract to cover Herman’s tort liability, so using Rural Mutual’s payments for property damage as a stand-in for some of the tort liability owed by Lester and its contractors did limit their liability in violation of Wis. Stat. § 895.447.

<i>Rural Mutual Insurance Co. v. Lester Buildings, LLC</i> WCJC disagrees with this decision.	
Justice Dallet	Wrote opinion
Chief Justice Roggensack	Concurred
Justice R. Bradley	Concurred
Justice Kelly	Wrote dissent
Justice Walsh Bradley	Dissented
Justice Abrahamson	Did not participate
Justice Ziegler	Did not participate

Paynter v. ProAssurance Wisconsin Insurance Co., 2019 WI 65 (Borrowing Statute in Medical Malpractice)

The court held that in medical malpractice cases where a misdiagnosis causes latent, continuous

injury, the plaintiff's *first* injury determines whether the action is a "foreign cause of action" under Wisconsin's statute applying foreign statutes of limitation (Wis. Stat. § 893.07), also known as the "borrowing statute." The court determines the jurisdiction of the injury based on where it is first felt by the patient.

Facts

The underlying claim in the case arose when Dr. James Hamp, who operates offices in both Wisconsin and Michigan, misdiagnosed a growth on patient David Paynter, a Michigan resident. Paynter first saw Dr. Hamp in his Michigan office, but Dr. Hamp called Paynter with the misdiagnosis from his Wisconsin office. Paynter was residing in Michigan at the time of the call and for the next four years before he found out his growth was cancerous. Paynter sued Dr. Hamp and both his Michigan and Wisconsin malpractice insurance policies, claiming both negligence and violation of the patient's right to informed consent.

The issue before the court was whether Paynter's injury was a "foreign cause of action" under Wis. Stat. § 893.07, thus barring the claim under Michigan's statute of limitations.

Decision

In a 7-0 decision (Justice Abrahamson, joined by Justice Dallet, Chief Justice Roggensack, and Justice Ziegler, with Justices Walsh Bradley, R. Bradley, and Kelly partially dissenting), the court held that in medical malpractice cases like Paynter's where a misdiagnosis causes latent, continuous injury, the plaintiff's *first* injury determines whether the action is a "foreign cause of action" under the borrowing statute. The court based the determination on previous case law holding that an actionable injury in medical malpractice cases occurs when the misdiagnosis causes a greater harm than previously existed.

On Paynter's negligence claim, the court could not identify when and where the Paynter's greater harm first occurred. When the plaintiff's place of injury is unknowable, the borrowing statute does not apply. Therefore, Wisconsin's longer medical malpractice statute of limitations applied

to Paynter's negligence claim, allowing this claim to proceed.

On Paynter's informed consent claim, the court determined that Paynter's injury occurred in Michigan because Paynter was in Michigan when Dr. Hamp called him with the misdiagnosis. Previous case law states that "the injury occurs where it is felt rather than where it originates." Therefore, Paynter's injury was a "foreign cause of action" under the borrowing statute, so Michigan's shorter medical malpractice statute of limitations barred his informed consent claim.

The court declined to adopt Paynter's argument that at least some of his injuries occurred in Wisconsin since he spent time in Wisconsin during the four year period after the misdiagnosis. The court said Paynter's proposed analysis would allow almost any misdiagnosis case to proceed as non-foreign and would encourage venue-shopping in Wisconsin courts.

The court declined to address the issue of insurance coverage related to this case.

Partial Dissent

In a partial dissent, Justice Walsh Bradley disagreed with the court's determination on Paynter's informed consent claim. Instead of finding that the injury occurs where it is felt (i.e. where the patient receives the misdiagnosis call), the court should have used the test from *International Shoe Co. v. Washington*, which requires a defendant to have minimum contacts in Wisconsin in order to apply Wisconsin's statute of limitations. In this case, Dr. Hamp had enough contacts in Wisconsin to pass the *International Shoe* test, so the Wisconsin statute of limitations would have applied, allowing the plaintiff's claims to proceed. The dissent notes complications could occur using the test adopted by the court because patients could be anywhere when they receive a misdiagnosis call.

In a second partial dissent, Justice R. Bradley (joined by Justice Kelly) noted similar concerns regarding the impracticalities of the court's place-of-injury test and "where the injury was felt" test in determining whether the borrowing statute applies in misdiagnosis cases. The dissent would also have remanded the case to lower court to deter-

mine whether Paynter actually stated an informed consent claim for which relief may be granted. Furthermore, the dissent agreed with the court’s decision not to rule on coverage, but rejected the court’s criticism of how Dr. Hamp’s insurer ProAssurance Wisconsin Insurance Co. handled its briefing on the subject.

<i>Paynter v. ProAssurance Wisconsin Insurance Co.</i> WCJC agrees with this decision.	
Justice Abrahamson	Wrote opinion
Justice Dallet	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred
Justice Walsh Bradley	Wrote partial dissent
Justice R. Bradley	Wrote partial dissent
Justice Kelly	Partially dissented

Teske v. Wilson Mutual Insurance Co., 2019 WI 62 (Claim Preclusion)

The court held that previous litigation related to underinsured motorist (UIM) coverage precludes a second tort claim alleging negligence in the same accident.

Facts

The litigation arose from a car accident that injured four members of the Teske family: Julie, Katherine, Elle, and Emily. Emily Teske was driving the vehicle. John Teske was not in the car.

Julie, Katherine, and Elle Teske filed the first action against the other driver and her insurer State Farm. The parties agreed on a settlement wherein State Farm tendered its \$300,000 policy limit to the plaintiffs. The Teskes’ insurer Wilson Mutual paid the Teskes their UIM policy limit minus the amount provided by State Farm in accordance with the Wilson policy’s reducing clause. An appeals court determined the validity of the Wilson payment.

After the conclusion of the first action, John, Julie, Katherine, and Elle Teske filed a claim alleging Emily Teske, who was driving the vehicle, was negligent. The Teskes sued Wilson directly as Emily’s insurer. Wilson argued claim preclusion barred this second action.

Decision

In a 6-0 decision (Justice Walsh Bradley, joined by Justices R. Bradley, Dallet, Kelly, Chief Justice Roggensack, and Justice Ziegler), the court held that claim preclusion did apply to Julie, Katherine, and Elle’s negligence claim, barring the second action against Wilson. The second action satisfied all three required elements of claim preclusion:

1. *Identity of parties.* Julie, Katherine, and Elle Teske and Wilson were named parties in both the first and second lawsuit.
2. *Identity of causes of action.* The lawsuits both arose from a single accident. The decision noted claim preclusion analyses should focus on the identity of the facts, not the identity of the legal arguments. The court held that UIM actions involve both contracts and tort law, so the Teskes’ negligence claim against Emily could have been litigated in the first lawsuit.
3. *Final judgment reached.* The appeals court did reach a final judgment in the Teskes’ first action.

However, the court was evenly divided as to whether John Teske was a party in the first lawsuit. While he was not named in the first lawsuit, he participated in the settlement process and received proceeds. Evenly divided on the issue, the court allowed John Teske’s claims to proceed because the identity of parties element of claim preclusion was not met.

<i>Teske v. Wilson Mutual Insurance Co.</i> WCJC agrees with this decision.	
Justice Walsh Bradley	Wrote opinion
Justice R. Bradley	Concurred
Justice Dallet	Concurred
Justice Kelly	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred
Justice Abrahamson	Did not participate

Daniel v. Armslist, LLC, 2019 WI 47 (Communications Decency Act Liability)

The court held that the federal Communications Decency Act (CDA) prohibited liability claims

against a website for publishing a third-party seller’s advertisement.

Facts

The underlying claim was against Armslist.com, which connects arms buyers and sellers with each other. Radcliffe Haughton, who had been legally prohibited from firearm ownership, obtained a firearm via an ad posted on Armslist by a third-party seller and used the gun to kill four people. Yasmeen Daniel, the daughter of one of the victims, filed several state tort claims against Armslist. Armslist argued the CDA blocks Daniel’s claims.

The CDA states (§ 230(c)(1)) three criteria for a third-party host website like Armslist to be immune from claims against its content:

1. The defendant is an “interactive computer service” that passively displays third-party sellers’ information.
2. The claim is based on content provided by someone other than the defendant. The defendant must have “materially contributed” to the content in order for the claim to proceed.
3. The claim would treat the defendant as a “publisher or speaker of” the content.

It was undisputed that Armslist is an interactive computer service, so the court’s decision was based on the second and third criteria.

Decision

In a 5-1 decision (Chief Justice Roggensack, joined by Justices R. Bradley, Dallet, Kelly, and Ziegler), the court held that the CDA blocked the plaintiff’s claims.

On the second criterion for CDA immunity, Daniel argued the design and operation of Armslist meant it helped develop the content of the advertisement in question. However, the court determined Armslist is a “neutral tool” that can be used both for legal and illegal transactions. The CDA does not hold interactive computer services liable for providing such neutral tools, even if the defendant knows the tools may be used illegally, and does not require services to implement proactive cautionary measures against illegal use. Since Armslist did not create the firearm advertisement at is-

sue here, and instead just provided a neutral tool for third-party user transactions, it did not materially contribute to the content, barring Daniel’s claims.

On the third criterion, Daniel argued Armslist wasn’t a publisher or speaker of the content, but facilitated and encouraged illegal firearm sales. However, the court determined that Daniel’s claims all require the court to treat Armslist as a publisher or speaker. “Facilitating” the illegal sale is just a re-statement of “publishing” the third-party advertisement.

Because Armslist is an interactive computer service that did not develop the content of the firearms advertisement at issue here, and because all the plaintiff’s claims require the court to treat Armslist as a publisher, the CDA blocks the plaintiff’s claims.

Dissent

In a dissent, Justice Walsh Bradley argued that the court misunderstood the complaint. According to the dissent, Daniel’s claim seeks to hold Armslist liable for the overall structure of its website, specifically a search function that allows users to filter out licensed dealers. Whereas Armslist would not be liable for the third-party firearm advertisement under the CDA, the dissent argues Armslist is a liable content provider with respect to the “content” of its site’s general structure.

<i>Daniel v. Armslist, LLC</i> WCJC agrees with this decision.	
Chief Justice Roggensack	Wrote opinion
Justice R. Bradley	Concurred
Justice Dallet	Concurred
Justice Kelly	Concurred
Justice Ziegler	Concurred
Justice Walsh Bradley	Wrote dissent
<i>Justice Abrahamson</i>	<i>Did not participate</i>

Maple Grove Country Club Inc. v. Maple Grove Estates Sanitary District, 2019 WI 43 (Notice of Claim)

The court held that failure to comply with the notice of claim statute is an affirmative defense. If a party fails to set forth the affirmative defense in a responsive pleading, the defense is waived.

Facts

Maple Grove Country Club owned a sewer system, which it leased to the Sanitary District. When the Country Club and Sanitary District failed to come to an agreement on a new lease, the Country Club served the Sanitary District with a notice of claim under Wis. Stat. § 893.80(1d)(a), stating that the Sanitary District was illegally occupying its property in violation of statutory condemnation proceedings. Three years later, the Country Club filed the instant action in circuit court. In the Sanitary District’s response to the Country Club’s complaint, it did not affirmatively plead that the Country Club had failed to comply with the notice of claim statute. Later the Sanitary District attempted to raise the affirmative defense by motion. The Country Club then argued that the Sanitary District had waived the affirmative defense of noncompliance with the notice of claim statute by not including the defense in its initial response.

The issues before the court were 1) whether non-compliance with the notice of claim statute is an affirmative defense, and 2) whether failing to plead the affirmative defense in response to a complaint waives the defense.

Decision

In a 6-0 decision (Justice Walsh Bradley, joined by Justices R. Bradley, Dallet, Kelly, Chief Justice Roggensack, and Justice Ziegler), the court first determined that failure to comply with the notice of claim statute is an affirmative defense. Second, the court determined that such an affirmative defense must be raised in a responsive pleading, not by motion. Wis. Stat. § 802.02(3) states that affirmative defenses “shall” be set forth in responsive pleadings. Furthermore, noncompliance with notice of claim is not included in the list of affirmative defenses that may be brought by motion under Wis. Stat. § 802.06(2). The court overruled previous case law *Lentz v. Young* (1995) that had

ruled defendants may raise affirmative defenses by motion.

Accordingly, the Sanitary District’s affirmative defense that the Country Club did not comply with the notice of claim statute was waived.

<i>Maple Grove Country Club Inc. v. Maple Grove Estates Sanitary District</i> WCJC agrees with this decision.	
Justice Walsh Bradley	Wrote opinion
Justice R. Bradley	Concurred
Justice Dallet	Concurred
Justice Kelly	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred
<i>Justice Abrahamson</i>	<i>Did not participate</i>

Security Finance v. Kirsch, 2019 WI 42 (Wisconsin Consumer Act)

The court held that debtors sued without first receiving a notice of right to cure default may not sue a creditor for damages under the Wisconsin Consumer Act.

Facts

The underlying claim in this case arose when Security Finance sued Brian Kirsch for a default on a loan. Kirsch counterclaimed that Security Finance’s complaint failed to give him proper notice of right to cure the default under Wis. Stat. Ch. 425. Security Finance ultimately voluntarily dismissed the case, but Kirsch wanted to maintain his counterclaims and pursue remedies for violations of Wis. Stat. § 427.104 (1)(g) and (j), which respectively prohibit creditors from harassing and threatening debtors and from attempting to enforce a right that doesn’t exist.

Decision

In a 4-2 decision (Justice Ziegler, joined by Chief Justice Roggensack, with Justices Kelly and R. Bradley concurring), the court held Kirsch cannot sue for damages under Ch. 427 simply because Security Finance failed to give proper notice of right to cure. Because Security violated the notice requirement under Ch. 425, Kirsch was entitled to

the dismissal of the action without prejudice. However, the Ch. 425 violation is simply a procedural error and does not relinquish Security’s right to collect. In contrast, Ch. 427 addresses illegal “egregious behavior” by collectors, and Security’s Ch. 425 procedural violation does not entitle Kirsch to remedies under that chapter, which include damages caused by emotional distress (Wis. Stat. § 427.105(1)).

Concurring Opinion

In a concurring opinion, Justice Kelly (joined by Justice R. Bradley) agreed with the court but also would have overturned *Kett v. Community Credit Plan, Inc.* (1999). While the court distinguished between *Kett* and the instant case, Kelly said both cases address the same issue: whether a procedural mistake by creditors allows debtors to collect remedies under § 427.105. The concurring opinion would overrule *Kett* to say that, in addition to the holding in *Security Finance* that violation of notice requirements does not constitute a Ch. 427 violation, filing in an improper venue is not grounds for damages under § 427.105.

Dissent

In a dissent, Justice Walsh Bradley (joined by Justice Abrahamson) said the court should have followed *Kett* and allowed Kirsch’s § 427.105 claims to stand. Security Finance filing a lawsuit without proper notice of right to cure constituted enforcement of a right it had reason to know did not exist, thus violating § 427.104(1)(j). Furthermore, the dissent argued the court’s ruling contradicts the overall purpose of the Wisconsin Consumer Act to protect consumers against unfair practices.

<i>Security Finance v. Kirsch</i> WCJC agrees with this decision.	
Justice Ziegler	Wrote opinion
Justice R. Bradley	Concurred
Justice Kelly	Concurred
Chief Justice Roggensack	Concurred
Justice Walsh Bradley	Wrote dissent
Justice Abrahamson	Dissented
Justice Dallet	Did not participate

Town of Lincoln v. City of Whitehall, 2019 WI 37 (Annexation of Town)

The court held that a petition for direct annexation not signed by all property owners is not a petition “by unanimous approval,” allowing a town to challenge the petition more broadly.

Facts

Wis. Stat. § 66.0217(2) requires petitions for “direct annexation by unanimous approval” to list signatures of all property owners and electors in the territory to be annexed. Such petitions by unanimous approval may only be challenged in circuit court regarding the contiguity of the annexed territory to the city (Wis. Stat. § 66.0217(11)(c)).

In this case, Whitehall Sand wanted a sand mine site it was purchasing in the Town of Lincoln to be included in the limits of the City of Whitehall. Whitehall Sand submitted a petition to the city for “direct annexation by unanimous approval”; however, the petition was missing a signature from a railroad owner in the territory.

The City of Whitehall approved the annexation petition. Following the approval, the Town of Lincoln sought review from the Department of Administration (DOA), which determined that the annexed territory was not contiguous. The DOA determination allowed the town to challenge the annexation in circuit court pursuant to Wis. Stat. § 66.0217(11)(c) and § 66.0217(6)(d)(2). The town’s challenges included:

- The petition was not “unanimous” because it was missing a signature.
- The annexed territory was not contiguous, as determined by DOA.
- The annexation was arbitrary.
- The city was the “real controlling influence” behind the petition.

In response to the town’s challenges, the City of Whitehall argued that Wis. Stat. § 66.0217(11)(c) prevented the town from bringing any challenges other than contiguity.

Decision

In a unanimous decision, the court agreed with the town that, since the petition was not “unanimous”

as required by § 66.0217(2), the limitation on challenges to petitions by unanimous approval in § 66.0217(11)(c) did not apply. The court remanded the case to circuit court to rule on the substance of the town’s challenges.

<i>Town of Lincoln v. City of Whitehall</i> WCJC disagrees with this decision.	
Justice Walsh Bradley	Wrote opinion
Justice Abrahamson	Concurred
Justice R. Bradley	Concurred
Justice Dallet	Concurred
Justice Kelly	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred

Marx v. Morris, 2019 WI 34 (LLCs)

The court decided that members of a limited liability company (LLC) have standing to assert a claim against another member of the LLC as individuals, not on behalf of the LLC. Furthermore, Wisconsin’s LLC law does not preempt common law claims.

Facts

Plaintiffs Daniel Marx and Michael Murray and defendant Richard Morris all owned LLCs that were members of North Star, LLC. Marx and Murray brought claims against Morris, a manager of North Star, alleging that Morris violated the duty of LLC members and managers to deal fairly in matters in which they have a conflict of interest (Wis. Stat. § 183.0402(1)). Marx and Murray also alleged several common law claims. The plaintiffs brought all the claims as individuals and individual LLCs, not on behalf of North Star.

Decision

In a 4-3 decision (Chief Justice Roggensack, joined by Justices Walsh Bradley, Dallet, and Ziegler), the court allowed the plaintiffs’ claims as individuals to proceed. Defendant Morris argued that the court should treat the LLC similar to a corporation, under which structure individual shareholders must bring claims of injury on behalf of the corporation. However, the court held that, since Wisconsin’s LLC statutes (Wis. Stat. Ch.

183) do not specifically prohibit actions brought by individual members against individual members for injuries to the LLC, LLC members can bring individual claims. The court declined to apply corporate principles of derivative standing to LLCs because the structure of LLCs (and specifically North Star’s structure) results in more individual financial harm than the structure of a corporation would. Because the plaintiffs did suffer individual injuries and Wisconsin law does not specifically prohibit bringing individual actions against LLC members, the court ruled the plaintiffs’ claims do have standing.

Morris also argued that the plaintiffs’ common law claims should be displaced by Wis. Stat. § 183.1302(2), which provides that “unless displaced by particular provisions of this chapter, the principles of law and equity supplement this chapter.” The court rejected Morris’s argument, stating that Ch. 183 does not specifically displace the plaintiffs’ common law claims. The court followed other states that have interpreted these types of provisions broadly to allow common law claims unless statutes unambiguously prevent them.

Partial Dissent

In a partial dissent, Justice Kelly (joined by Justices Abrahamson and R. Bradley) argued that Wis. Stat. § 183.035 does provide that members of an LLC do not have the authority to sue on behalf of the LLC, except in limited circumstances. The dissent states that the cause of action here belongs to North Star, not the individual members. Using the “primary injury rule,” the dissent determined the individual members did not suffer an injury distinct from other members. Therefore, the claims must be brought by North Star as a whole.

Furthermore, the dissent argued the court should not have focused on whether Ch. 183 displaces the common law claims. Instead, the dissent focuses on whether LLC members owe each other a fiduciary duty. The dissent argues that LLC members do not owe each other a fiduciary duty because LLCs do not create a dependence between members in the same way partnerships do – LLCs place obligations and liabilities on the LLC entity. Since there is no fiduciary duty, the plaintiffs’ claims do not stand.

<i>Marx v. Morris</i> WCJC disagrees with this decision.	
Chief Justice Roggensack	Wrote opinion
Justice Walsh Bradley	Concurred
Justice Dallet	Concurred
Justice Ziegler	Concurred
Justice Kelly	Wrote partial dissent
Chief Abrahamson	Partially dissented
Justice R. Bradley	Partially dissented

[Kieninger v. Crown Equipment Corp., 2019 WI 27 \(Wages\)](#)

The court held that employers are not required to compensate employees for time spent commuting using the employer’s vehicle.

Facts

Crown Corp. allows its technicians to commute between work and home either in their personal vehicles or in company vans. Those commuting in personal vehicles meet at an assigned branch to pick up a company van at the beginning of the day, use the company van to travel between work sites throughout the day, then drop the van off again at the end of the work day and travel home in their personal vehicle. Those commuting in company vans may travel straight from home to various work sites, then straight home at the end of the day. Crown Corp. compensates technicians for all travel between work sites but does not compensate technicians commuting using company vans for travel time between home and the first and last work sites of the day.

Crown Corp. technician Christopher Kieninger filed the instant class action lawsuit on behalf of similarly situated Crown Corp. employees who choose to commute using company vans. Kieninger argued that Crown Corp. is legally obligated to compensate technicians for the commuting time in company vans because he is transporting Crown Corp. tools to and from a jobsite. Because those tools are an “integral” (Wis. Admin. Code § DWD 272.12(2)(e)1.c.) part of the “principal activities” (§ DWD 272.12(2)(e)1.) technicians engage in during a “workday” (§ DWD 272.12(1)(a)2.), Kieninger argued Crown Corp. must compensate

for commute time in company vans under Wis. Stat. § 109.03(1) and Department of Workforce Development rules.

Decision

In a unanimous decision, the court ruled that Crown Corp. was not required to compensate employees for commuting in Crown Corp. vans. Wis. Admin. Code. § DWD 272.12(2)(g)2. states plainly that travel between home and work is not work time. Furthermore, since employees commuting in company vans are not “required to report at a meeting place” to pick up tools as exemplified in § DWD 272.12(2)(g)5., this section requiring compensation for carrying tools to a worksite does not apply. The court states that Kieninger’s interpretation would read the statutes and regulations much too broadly, to the point that almost any commuting could be considered compensable. Therefore, Crown Corp. is not obligated to pay employees for commuting time in company vans.

<i>Kieninger v. Crown Equipment Corp.</i> WCJC agrees with this decision.	
Justice Kelly	Wrote opinion
Justice Abrahamson	Concurred
Justice R. Bradley	Concurred
Justice Walsh Bradley	Concurred
Justice Dallet	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred

[Peter Ogden Family Trust v. Board of Review of Town of Delafield, 2019 WI 23 \(Property Tax Assessment\)](#)

The court held that property owners do not need a business purpose in order for their land to be assessed as agricultural.

Facts

The Ogdens owned two lots that were originally assessed as agricultural. The Ogdens grew Christmas trees, apples, and hay on the two lots. In 2016, an assessor reclassified their property as residential, resulting in an over \$800,000 increase in taxes owed by the Ogdens. The Ogdens appealed to the Delafield Board of Review.

The assessor argued that the Ogdens were using a “loophole” in agricultural assessment because they were not harvesting the trees, apples, and hay for commercial purposes. According to the assessor, the Ogdens did not appear to be generating an income from their agricultural activities, and the law prevents property from being assessed as agricultural unless it has a legitimate business purpose.

Decision

In a unanimous decision, the court disagreed with the assessor’s argument, finding that there is no language in statute or rule requiring a business purpose for agricultural assessment. Wis. Stat. § 70.32(2)(c)1g. defines “agricultural land” as land with a primarily “agricultural use” as defined by the Department of Revenue (DOR). The DOR definition of “agricultural use” includes growing Christmas trees, apples, and hay. Neither statute nor DOR rules require any business purpose in growing these crops. Since the assessor had misinterpreted the law, the court ordered the Ogdens’ land reclassified as agricultural.

Concurring Opinion

In a concurring opinion, Justice Dallet (joined by Justice Walsh Bradley) agreed that a business purpose was not required for agricultural assessment, but argued that the court should have remanded to the Delafield Board for further proceedings instead of ordering the reassessment of the land.

<i>Peter Ogden Family Trust v. Board of Review of Town of Delafield</i> WCJC agrees with this decision.	
Justice Abrahamson	Wrote opinion
Justice R. Bradley	Concurred
Justice Walsh Bradley	Concurred
Justice Dallet	Concurred
Justice Kelly	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred

CityDeck Landing, LLC v. Circuit Court for Brown County, 2019 WI 15 (Arbitration)

The court held that circuit courts may not stay private arbitration, even when there is an ongoing

insurance coverage dispute connected to the arbitration parties.

Facts

The underlying issue in this case began when a dispute arose between CityDeck and its contractor. CityDeck and the contractor had contracted to use private arbitration. Several of the subcontractors joined the arbitration, and one subcontractor tendered its defense to its insurer Society Insurance. The main contractor claimed it was an additional insured under the Society policy. In turn, Society filed a lawsuit seeking a determination on coverage in the CityDeck arbitration and asked the circuit court to stay the arbitration until the resolution of the coverage dispute. The circuit court agreed to stay the arbitration. CityDeck asked the Supreme Court to vacate the stay.

Decision

In a 4-2 decision (Justice R. Bradley, joined by Justice Kelly, Chief Justice Roggensack, and Justice Ziegler) the court allowed CityDeck Landing to proceed in private arbitration with its contractors. The decision undertook a historical analysis of the development of the four factors the court uses in issuing supervisory writs like CityDeck requested in this case. Then, the opinion applied the four factors to the *CityDeck* case, finding that it met the criteria for a supervisory writ. The Supreme Court accordingly vacated the circuit court order to stay arbitration.

The court found CityDeck met the criteria for a supervisory writ because:

1. The circuit court had a plain duty to comply with the Wisconsin Arbitration Act (Wis. Stat. § 788.01), which holds arbitration agreements as “valid, irrevocable, and enforceable.” Even though Wisconsin courts typically recommend the bifurcation and stay of liability cases and coverage disputes, circuit courts do not have the authority to stay arbitration.
2. CityDeck could not receive an adequate remedy through the ordinary appeal process because continuing to stay the arbitration on appeal would be a non-reparable and non-compensable damage. Furthermore, an appeal would subject CityDeck to even more litiga-

tion, which the parties intended to contract out of via arbitration.

3. Grave hardship or irreparable harm would have resulted if the Supreme Court did not issue the writ because CityDeck had been denied its right to arbitration and would be forced into public proceedings when it contracted to resolve the matter privately.
4. CityDeck filed for the writ promptly and speedily.

Dissent

In a dissent, Justice Walsh Bradley (joined by Justice Abrahamson) argued that the court too broadly expands the hardships and harms eligible for a supervisory writ under factor number three above. The dissent stated that CityDeck did not meet the grave hardship and irreparable harm criterium because a delay in arbitration is not a grave hardship, and any harm caused could be reparable by a monetary award. According to the dissent, applying the supervisory writ criteria in the broad way the court did here would make the criteria applicable to almost any request for a writ.

The issue in the case was whether Park Bank acted in “bad faith” and was therefore liable for failing to protect Koss Corp. from the executive’s embezzlement. Because the statute does not define “bad faith,” the court grappled with what it means for a bank to act in bad faith.

Decision

In a 5-2 decision (Chief Justice Roggensack, joined by Justice Ziegler, with Justices Walsh Bradley, Abrahamson, and Dallet concurring), the court found Park Bank not liable. The lead opinion said bad faith is determined by acts evidencing dishonesty by the bank; for example, by willfully failing to investigate compelling and obvious known facts suggesting fiduciary misconduct based on a deliberate desire to evade knowledge of fiduciary misconduct.

Concurring Opinion

In a concurring opinion, Justice Walsh Bradley (joined by Justices Abrahamson and Dallet) agreed Park Bank was not liable, but came up with a different definition for bad faith and therefore did not join the lead opinion.

Dissent

In a dissent, Justice Kelly (joined by Justice R. Bradley) would have adopted a much lower standard for bad faith. The dissent also found that the facts in this case could lead a jury to find that Park Bank acted in bad faith when it “remained intentionally ignorant of whether the individuals transacting business on Koss Corp.’s accounts had the authority to do so.”

<i>CityDeck Landing, LLC v. Circuit Court for Brown County</i> WCJC agrees with this decision.	
Justice R. Bradley	Wrote opinion
Justice Kelly	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred
Justice Walsh Bradley	Wrote dissent
Justice Abrahamson	Dissented
<i>Justice Dallet</i>	<i>Did not participate</i>

<i>Koss Corp. v. Park Bank</i> WCJC agrees with this decision.	
Chief Justice Roggensack	Wrote opinion
Justice Abrahamson	Concurred
Justice Walsh Bradley	Concurred
Justice Dallet	Concurred
Justice Ziegler	Concurred
Justice Kelly	Wrote dissent
Justice R. Bradley	Dissented

[Koss Corp. v. Park Bank, 2019 WI 7 \(Liability for Embezzlement\)](#)

The court found that Park Bank was not liable for failing to protect Koss Corp. from its executive’s embezzlement.

Facts

The case involved sophisticated and complicated embezzlement maneuvers by Koss Corp.’s executive vice president of finance. In total, the executive embezzled \$31 million from the company.

Myers v. DNR, 2019 WI 5 (Construction Permits)

The court held that the Department of Natural Resources (DNR) does not have the authority to amend an expired construction permit.

Facts

DNR issued a permit to Philip and Terrie Myers to build a pier on Lake Superior. Over ten years later, DNR issued an amendment to the permit, requiring the Myers to significantly change their pier. The Myers filed a petition for judicial review of DNR’s permit amendment. The issue before the court was whether DNR has the statutory authority to amend the previously issued permit. DNR argued that a condition within the permit stating “the authority herein granted can be amended or rescinded...” provided the agency authority to amend the permit.

Decision

In a 6-1 decision (Justice Dallet, joined by Justices Abrahamson, R. Bradley, Kelly, Chief Justice Roggensack, and Justice Ziegler), the court ruled that without explicit statutory authorization DNR could not amend the permit.

DNR argued its statutory authority came from Wis. Stat. § 30.12(3m)(d)2. and § 30.12(3m)(c), which states that DNR “may establish reasonable conditions” in permits to satisfy certain statutory criteria for building piers. According to DNR, the condition that DNR may amend the permit was such a “reasonable condition.” However, the court read the past tense of the statute to mean that the criteria must be satisfied only when the permit is granted. Once the permit is issued, the statute does not allow DNR ongoing review and authority to enforce whether the criteria are continuously being met.

DNR also argued that Wis. Stat. § 30.2095(2), which states DNR may modify permits for good cause before their expiration, gave it authority to amend the Myers’ permit because the permit never expired. However, the court, rejecting DNR’s reading of § 30.2095(1), determined the permit did expire because the Myers completed construction within the authorized three-year period.

Dissent

In a dissent, Justice Walsh Bradley argued that DNR does have the authority to amend permits. The dissent stated that the statutes necessarily imply that DNR has the authority to continuously enforce the § 30.12(3m)(c) criteria. Furthermore, pier permits apply not only for construction but also for ongoing maintenance, so the Myers’ permit was not expired.

<i>Myers v. DNR</i> WCJC agrees with this decision.	
Justice Dallet	Wrote opinion
Justice Abrahamson	Concurred
Justice R. Bradley	Concurred
Justice Kelly	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred
Justice Walsh Bradley	Dissented

Michael Engelhardt v. City of New Berlin, 2019 WI 2 (Governmental Immunity)

The court held that the City of New Berlin was negligent when a child drowned on a field trip because the known and present danger exception to governmental immunity applied.

Facts

Lily Engelhardt drowned on a field trip with the City of New Berlin Parks and Recreation Department. Lily’s parents had previously informed a New Berlin staff member that Lily could not swim. The Engelhardts sued the city.

Government employees are immune from liability under Wis. Stat. § 893.80(4) unless certain exceptions apply. One exception states that government employees may be held liable if they fail to respond to a known, present, and compelling danger.

Decision

In a 7-0 decision (Justice Abrahamson, joined by Justices Walsh Bradley, Roggensack, and Ziegler, with Justices Dallet, R. Bradley and Kelly concurring), the court held that the known and present danger exception did apply because the danger of a non-swimmer drowning on the field trip was com-

elling and obvious. The park staff failed to properly respond to this danger by taking Lily on the field trip without sufficient supervision, a life jacket, or a swim test.

Concurring Opinion

In a concurring opinion, Justice Dallet (joined by Justices R. Bradley and Kelly) agreed that New Berlin was liable but argued the known and present danger exception did not apply here. Instead, the dissent found the city was not acting in a quasi-legislative or quasi-judicial function when it failed to supervise Lily on the field trip; therefore, governmental immunity did not apply under the language of § 893.80(4).

<i>Michael Engelhardt v. City of New Berlin</i> WCJC disagrees with this decision.	
Justice Abrahamson	Wrote opinion
Justice R. Bradley	Concurred
Justice Walsh Bradley	Concurred
Justice Dallet	Concurred
Justice Kelly	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred

Midwest Neurosciences Associates, LLC v. Great Lakes Neurological Associates, LLC, 2018 WI 112 (Arbitrability)

The court held that circuit courts may decide whether a dispute should be arbitrated when an original contract contains a mandatory arbitration clause but a subsequent contract does not.

Facts

The parties in this case entered into an “Operating Agreement” contract with a noncompete restrictive covenant. The Operating Agreement contained a mandatory arbitration clause, incorporating by reference a rule that the arbitrator has jurisdiction to rule on arbitrability of disputes arising from the contract.

In the process of restructuring, Midwest and Great Lakes drafted a “Redemption Agreement” that contained a merger clause releasing Great Lakes from the terms of the Operating Agreement. Be-

cause Midwest did not officially sign the Redemption Agreement, the parties dispute whether it is enforceable.

The underlying litigation in this case involves whether a doctor violated a noncompete clause in the Operating Agreement by engaging in a competitive practice after he signed the Redemption Agreement. The issue before the Supreme Court was whether the circuit court had authority to determine arbitrability despite the original Operating Agreement mandating arbitrability be determined by an arbitrator.

Decision

In a 5-1 decision (Justice Ziegler, joined by Justices Walsh Bradley, Kelly, and Chief Justice Roggensack, with Justice Abrahamson concurring), the court determined that the circuit court can determine arbitrability when a subsequent contract does not contain an arbitration clause, even if the original contract mandated arbitration. The court stated that freedom of contract principles allow parties who have agreed to arbitrate to subsequently contract out of the arbitration agreement. The court also found that, if valid, the Redemption Agreement would supersede the Operating Agreement’s arbitration clause. However, because there were still issues of material fact as to whether both parties formally agreed to the Redemption Agreement, the Supreme Court remanded the case to circuit court to determine the validity of the Redemption Agreement.

Concurring Opinion

In a concurring opinion, Justice Abrahamson suggested that, because the subject matter of the Redemption Agreement differed from the Operating Agreement, the Redemption Agreement did not entirely supersede all terms of the Operating Agreement. Abrahamson said circuit courts do have the authority to determine whether any part of a subsequent contract (here, the Redemption Agreement) supersede arbitration provisions in a previous contract.

Dissent

In a dissent, Justice R. Bradley argued that the question of whether the Redemption Agreement supersedes the Operating Agreement is an issue of substantive arbitrability governed by the Operating

Agreement. Therefore, an arbitrator – not the courts – should decide whether the Redemption Agreement is valid.

<i>Midwest Neurosciences Associates, LLC v. Great Lakes Neurological Associates, LLC</i>	
Justice Ziegler	Wrote opinion
Justice Abrahamson	Concurred
Justice Walsh Bradley	Concurred
Justice Kelly	Concurred
Chief Justice Roggensack	Concurred
Justice R. Bradley	Wrote dissent
Justice Dallet	Did not participate

<i>Secura Insurance v. Lyme St. Croix Forest Co.</i> WCJC agrees with this decision.	
Justice Walsh Bradley	Wrote opinion
Justice Abrahamson	Concurred
Justice R. Bradley	Concurred
Justice Dallet	Concurred
Justice Kelly	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred

[Secura Insurance v. Lyme St. Croix Forest Co., LLC, 2018 WI 103](#) (Occurrences from a Single Cause)

The court held that multiple occurrences may not arise from a single cause, in this case a fire, for insurance coverage purposes.

Facts

The case involved insurance coverage for property damaged in the Germann Road Fire. SECURA argued that the fire spreading across multiple property lines was a single occurrence and thus coverage arising from the fire would be capped at the per-occurrence limit of \$500,000. Plaintiffs argued that a separate occurrence began each time the fire crossed into another property. Thus, coverage would be capped at \$500,000 per property damaged, up to the policy’s \$2 million aggregate limit.

Decision

In a unanimous decision, the court ultimately sided with SECURA, determining that the fire was a single occurrence and coverage should be capped at the policy’s \$500,000 per-occurrence limit. The court based its decision on the “cause theory” that says damages from a “single, uninterrupted cause” are a single occurrence. The court ruled the fire a single, uninterrupted cause and argued ruling otherwise would have arbitrary and unreasonable consequences.

LIST OF 2018-19 CASES

- L.G. v. Aurora Residential Services, 2019 WI 79* (Compelled Arbitration)
- Enbridge Energy Co., Inc. v. Dane County, 2019 WI 78* (Conditional Use Permit)
- Koschkee v. Taylor, 2019 WI 76* (Agency Rulemaking)
- League of Women Voters v. Evers, 2019 WI 75* (Extraordinary Sessions of the Legislature)
- Pinter v. Village of Stetsonville, 2019 WI 74* (Governmental Immunity)
- Rural Mutual Insurance Co. v. Lester Buildings, LLC, 2019 WI 70* (Subrogation Waiver)
- Paynter v. ProAssurance Wisconsin Insurance Co., 2019 WI 65* (Borrowing Statute in Medical Malpractice)
- Teske v. Wilson Mutual Insurance Co., 2019 WI 62* (Claim Preclusion)
- Daniel v. Armslist, LLC, 2019 WI 47* (Communications Decency Act Liability)
- Maple Grove Country Club Inc. v. Maple Grove Estates Sanitary District, 2019 WI 43*
(Notice of Claim)
- Security Finance v. Kirsch, 2019 WI 42* (Wisconsin Consumer Act)
- Town of Lincoln v. City of Whitehall, 2019 WI 37* (Annexation of Town)
- Marx v. Morris, 2019 WI 34* (LLCs)
- Kieninger v. Crown Equipment Corp., 2019 WI 27* (Wages)
- Peter Ogden Family Trust v. Board of Review of Town of Delafield, 2019 WI 23* (Property Tax Assessment)
- CityDeck Landing, LLC v. Circuit Court for Brown County, 2019 WI 15* (Arbitration)
- Koss Corp. v. Park Bank, 2019 WI 7* (Liability for Embezzlement)
- Myers v. DNR, 2019 WI 5* (Construction Permits)
- Michael Engelhardt v. City of New Berlin, 2019 WI 2* (Governmental Immunity)
- Midwest Neurosciences Associates, LLC v. Great Lakes Neurological Associates, LLC, 2018 WI 112* (Arbitrability)
- Secura Insurance v. Lyme St. Croix Forest Co., LLC, 2018 WI 103* (Occurrences from a Single Cause)